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Abstract

In 1925, Congress, to provide for the enforcement of certain arbitration agreements, enacted the Federal Arbitration Act ("FAA") as a procedural law to be applicable only in federal courts. However, the United States Supreme Court, seemingly for the purpose of reducing federal courts' caseloads, co-opted the FAA by disregarding Congress's intent that the FAA be applicable only in federal courts. And in furtherance of its own Court-created "federal policy in favor of arbitration," the Court created precedents that limit state regulation of arbitration agreements, including that states cannot exempt disputes from forced or mandatory arbitration agreements or otherwise regulate the enforcement of arbitration agreements in a manner that is inconsistent with the FAA. The Court's precedents have left a regulatory gap where states cannot prevent some of the dangers that arbitration poses to litigants in many areas of the law, including in consumer and employment contracts. Recently, however, Congress has reentered the arbitration field to reassert its authority over arbitration. In 2022, it enacted the Ending Forced Arbitration of Sexual Abuse and Sexual Harassment Act to exclude these types of claims from forced or mandatory

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arbitration. This Article asserts that Congress, having reentered the field, should continue its reforms of the FAA to recalibrate the balance of power between the Court and Congress. This would include Congress clearly stating whether Section 2 of the FAA should be applicable only in federal courts; should not be applicable to adhesion arbitration agreements; and should not be applicable to federal statutory claims, as well as whether the lack of diversity in arbitrators should be one of the justifications for not enforcing predispute arbitration agreements. This Articles discusses these topics and offers suggestions on how Congress should resolve these issues.

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INTRODUCTION

On March 3, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021[1] ("Ending Forced Arbitration Act") that excludes sexual abuse and sexual harassment cases from forced or mandatory arbitration.[2] It took the #MeToo movement, and the horrific sexual abuses it highlighted,[3] to get Congress to take major action to amend the Federal Arbitration Act ("FAA"),[4] which is the primary federal law providing for the broad enforcement of arbitration agreements.[5] Having taken a first step toward reforming the FAA, Congress should continue the reform by making other changes to this Act.

Arbitration, as a form of alternative dispute resolution, has been in existence for a long time.[6] It is a system where arbitrators decide civil disputes in a less formal process than a

1. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.).

2. *See* 9 U.S.C. § 402 (stating that no predispute arbitration agreement or joint-action waiver, at the election of the person alleging sexual harassment, shall be valid).

3. Will Manuel and Anne Yuengert, *Closing the Gate to Arbitrate: New Law Bans Pre-Dispute Arbitration Agreements on Sex Harassment and Abuse Claims*, 2022 PRINDBRF 0157, 2022 WL 996668.

4. 9 U.S.C. §§ 1–14.

5. *See id.*

6. Cindy Fazzi, *Mediation and Arbitration in the Middle Ages: England 1154 to 1558*, 68 DISP. RESOL. J. 95, 95 (2013) (reviewing DEREK ROEBUCK, MEDIATION AND ARBITRATION IN THE MIDDLE AGES: ENGLAND 1154 TO 1558 (2013)) ("During the Middle Ages, the common practice was to turn to mediation and arbitration after a dispute has arisen."); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 793–96 (2002).

normal civil trial.[7] Today, many contracts regarding consumer goods and services, employment, medical care, and other contractual relationships are subject to arbitration agreements.[8]

Many of these arbitration agreements are forced or mandatory agreements where the consumers or employees do not have a choice because they must accept the arbitration agreements if they want to purchase the product or accept the job.[9] There are major concerns regarding the impact of these mandatory agreements on women, African Americans, and other people of color—primarily because most arbitrators are conservative white males[10] and because other process dangers exist in arbitration.[11]

Some states have partially addressed these dangers by passing laws that exclude certain disputes involving consumer

7. *See* Pittman, *supra* note 6, at 790.

8. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 233 (2019) [hereinafter Szalai, *The Prevalence of Consumer Arbitration Agreements*] ("This study examines the use of arbitration agreements in connection with consumer transactions by the top 100 largest domestic United States companies, as ranked by *Fortune* magazine."); Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 6 (2014) ("However, the survey indicates a dramatic fall-off in the use of arbitration in most types of disputes: commercial, employment, environmental, intellectual property, real estate, and construction, among other categories, with notable exceptions of consumer disputes and products liability cases.").

9. Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, BLOOMBERG L. (Oct. 28, 2021, 12:01 PM), https://perma.cc/JX8K-9PXE ("The number of employment disputes resolved in arbitration climbed by roughly 66% between 2018 and 2020, according to new data, despite pressure from the #MeToo movement and efforts by Fortune 500 companies and lawmakers to curb agreements that keep claims out of court.").

10. *See* Kathryn Meyer, *Arbitration: An Old (White) Boys' Club*, ARB. L. REV. BLOG (Apr. 22, 2019), https://perma.cc/CT25-ZXSB (discussing the lack of racial and gender diversity in arbitration).

11. *See* Larry J. Pittman, *Mandatory Arbitration and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 855–65 (2011) (discussing "repeat player bias" and racial and gender discrimination in arbitration).

contracts[12] and employment contracts,[13] and by imposing other requirements to ameliorate some of the concerns about forced or mandatory arbitration agreements.[14] Despite these states' reform efforts, the Court has created legal precedents that mostly preempt state law regulation of mandatory arbitration agreements.[15] And there were only a few federal laws that offered some protection from the negative effects of mandatory arbitration and the Court's precedent before Congress enacted the above-referenced Ending Forced Arbitration Act.[16] Clearly, the Ending Forced Arbitration Act is a major achievement against forced arbitration clauses, at least clauses involving sexual abuse and sexual harassment claims.[17]

Although this new law does not resolve all issues involving sexual abuse and sexual harassment disputes, it does achieve one thing: it can start a recalibration of the power imbalance between the U.S. Supreme Court and Congress regarding arbitration, which is well overdue.

Part I discusses the FAA and some of the problems with arbitration as a dispute resolution process. Part II discusses the

12. *See* David Seligman, *Three June State Law Actions Helping Consumers Fight Arbitration Requirements*, NCLC DIGIT. LIBR. (July 31, 2019), https://perma.cc/8V5H-EM4Q (discussing state legal reforms to soften the impact of mandatory arbitration).

13. *See Does FAA Prevent States from Barring Mandatory Arbitration?,* CORP. COUNS. BUS. J. (Mar. 17, 2020), https://perma.cc/H3EN-G74U.

14. For a discussion of a model act that offers provisions that might allow states to enact a law that possibly escapes Section 2 of the FAA's preemption, see David Seligman, *Model State Consumer & Employment Justice Enforcement Act*, NAT'L CONSUMER L. CTR., (Nov. 2, 2015), https://perma.cc/W437-7RDX. *See also* Victor D. Lopez, *Mandatory Arbitration Clauses in Consumer Contracts: A Legally Permissible Means of Denying Consumers the Constitutional Right to Litigate Contract Disputes in Court and The Right to Trial by Jury*, 40 N.E. J. LEGAL STUD. 1, 12–15 (2020) (discussing state law efforts to reduce some of the disadvantages of mandatory arbitration, including adoption of some of the provisions of the above-referenced model act).

15. *See* Southland v. Keating, 465 U.S. 1, 16 (1984) (holding that Section 2 of the FAA preempts any state law that imposes requirements that Section 2 itself does not impose); Doctors Assocs. v. Casarotto, 517 U.S. 681, 688–89 (1996).

16. *See infra* notes 181–187–and accompanying text.

17. But, even when regular litigation is now available to those who have suffered sexual abuse and sexual harassment, these litigants might still encounter substantial challenges when they pursue regular court litigation. *See infra* note notes 72–80 and accompanying text.

new Ending Forced Arbitration Act and some of the benefits and detriments of this statute. It also emphasizes that the statute is incomplete because it does not exclude other types of Title VII claims from forced arbitration. Lastly, this Part discusses a bill that the House passed in the 117th Congress, the FAIR Act of 2022,[18] and shows how it would have filled, if Congress had enacted it, some of the gaps that the Ending Forced Arbitration Act leaves open.

Part III examines other reforms that Congress should consider enacting, including establishing that the FAA is a procedural law that should not be applicable to the states and state court proceedings and that Section 2 of the FAA should not enforce adhesion arbitration agreements; should not be applicable to federal statutory claims—and if applicable, Congress should impose certain discovery and motion practice requirements for the arbitration of such claims; and that Congress should consider the lack of diversity of arbitrators as one justification for establishing that Section 2 should not be applicable to predispute, adhesion arbitration agreements.

I. THE FEDERAL ARBITRATION ACT

Much of the criticism of the enforcement of mandatory arbitration agreements can be traced back to the FAA and the Supreme Court's enforcement of the FAA.[19] The substantial growth in the use of arbitration is due in large part to the enactment of the FAA in 1925, which, in Section 2, makes written agreements to arbitrate disputes binding and irrevocable in contracts involving interstate commerce.[20] In

18. H.R. 963, 117th Cong. (2022).

19. *See* Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1185–86 (2021)

> While scholars and dissenting Justices have insisted that § 2 was designed to apply only in federal court, the Court has imbued the statute with a broad-reaching substantive commitment to enforcing arbitration agreements in both state and federal courts. In doing so, the Court has effectively nullified any wisdom that state legislatures or courts might bring to bear on the increasing prevalence of arbitration clauses in contracts.

(citing *Southland*, 465 U.S. at 10, 15, 22, 23).

20. *See* 9 U.S.C. § 2

Southland v. Keating,[21] the Court held that the FAA is substantive law and is therefore enforceable in both state courts and in federal courts.[22]

This enforceability in state courts means that these courts must enforce arbitration agreements that are valid under Section 2, and that states cannot enact laws that are inconsistent with Section 2.[23] In other words, states cannot impose conditions on arbitration agreements that Section 2 does not impose.[24] For example, states cannot enact laws that prevent the enforcement of arbitration agreements involving consumer, employment, and civil rights disputes, although some states have tried to do so.[25]

The FAA, however, does give state law an important role in the enforcement of arbitration agreements in that Section 2 of the FAA has a savings clause that allows for the invalidation of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract."[26] This clause mostly

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> 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 or as otherwise provided in chapter.

21. 465 U.S. 1 (1984).

22. *Id*. at 11–16.

23. *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 47 (1999) (citing *Southland* for the proposition that the "FAA created a substantive rule of law enacted under the commerce power, the majority held that it preempted state law and applied to state courts").

24. *See Doctor's Ass'n v. Casarotto*, 517 U.S. 681, 687 (1996) ("Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act.").

25. *See generally* William G. Phelps, Annotation, *Pre-emption by Federal Arbitration Act (9 U.S.C.A. §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. FED. 179 (1992).

26. 9 U.S.C. § 2.

refers to generally applicable defenses that would invalidate any contract and not just arbitration agreements.[27]

A big limitation on the savings clause defenses is the Court's decision in *AT&T v. Concepcion*[28] which holds that, even when a contract defense is generally applicable, it cannot stand as an obstacle to the enforcement of an arbitration agreement that is governed by the FAA.[29]

Considering the above-discussed legal framework for arbitration, if a state wants to protect its citizens by excluding certain disputes from forced or mandatory arbitration, Section 2 of the FAA would preempt and prevent the exclusion. It would also prevent states from imposing any requirements on arbitration that it does not impose.

A. *The Problem with Arbitration as a Dispute Resolution Process*

Most disputes are settled by various types of dispute resolution processes.[30] Arbitration is one such process, where a neutral party, normally an attorney or a retired judge, will hear the evidence and the law that disputants present and then

27. *See* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1917 (2022) ("A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" (citing Kindred Nursing Ctrs. L.P. v. Clark, 581 U.S. 246, 251 (2017))).

28. 563 U.S. 333 (2011).

29. In *Concepcion*, the Court held the FAA preempted California common law which prohibited all adhesion contract from having a class action waiver under certain conditions because, in the Court's opinion, (1) class actions are more complex than normal bilateral arbitration and this complexity "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"; (2) "class action required certain procedure formality" (like notice, opt-out, and class representation requirement) that is incompatible to arbitration proceedings; and (3) "class arbitration greatly increases risks to defendants." *See id.* at 348–50.

30. *See* Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 120 (2020).

render a decision on the merits, deciding who wins and who loses.[31]

Arbitration has several benefits and disadvantages depending on whether one is a plaintiff or defendant in a dispute.[32] For some defendants, the benefits are that it is a private process that excludes the public from observing the proceedings;[33] it has limited judicial review of arbitrators' awards,[34] and it is a system where arbitrators tend to be more conservative than juries and therefore award less money to a prevailing plaintiff.[35] Additionally, arbitrators' awards do not establish legal precedents,[36] and the arbitral process is supposed to be speedier and less costly than regular court litigation.[37]

Some of the disadvantages for plaintiffs are that one does not get as diverse of a panel of decisionmakers as one might get in a jury trial;[38] there is less chance of winning a large verdict

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31. *Arbitration Defined: What Is Arbitration?*, JAMS, https://perma.cc/6V64-SVPW

> In general, the arbitrator is an impartial person chosen by the parties. The arbitrator reads briefs and documentary evidence, hears testimony, examines evidence and renders an opinion on liability and damages in the form of an 'award of the arbitrator' after the hearing. Once confirmed by a court of appropriate jurisdiction, the award can be subsequently entered as a judgment.

32. *See generally* Cameron A. Roark, *Arbitration or Litigation: The Battle Continues*, THE MO. BAR (Mar.–Apr. 2022), https://perma.cc/7GJL-QGUA; 21 *Williston on Contracts* § 57.11 (4th ed.).

33. *See* Roark, *supra* note 32.

34. *See id*.

35. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS, ECONOMIC POLICY INSTITUTE 1, 3 (2015), https://perma.cc/86SW-6N7N (PDF) ("On average, employees and consumers win less often and receive much lower damages in arbitration than they do in court.").

36. *Arbitration vs. Litigation in the US*, Practical Law Practice Note w-006-5897, WESTLAW ("An arbitration award does not give rise to any binding precedent or bind other parties in similar actions.").

37. Jason Krause, *100 Innovations in the Law*, ABA J., Apr. 2015, at 34, 43 ("As the jury trial disappears, arbitration has emerged as a faster, less adversarial and cheaper dispute-resolution mechanism.").

38. *See Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and Minorities*, AM. ASS'N JUST. (June 2021), https://perma.cc/UX3E-CR2V ("Few people realize that forced arbitration provisions eliminate their constitutional right to a trial before a jury of their peers." (citations omitted)).

because of many arbitrators' conservatism;[39] and there is a "repeat player bias" that works in favor of defendants who are repeat players because they are involved in multiple arbitrations.[40]

There might be other dangers when arbitration is forced or mandatory. First, many persons who are bound by mandatory arbitration agreements might not have knowledge of them because they either do not read their contracts or they are otherwise not aware of their presence.[41] Another criticism is that, even if one knows of the presence of a mandatory arbitration agreement, there may be no freedom of choice in deciding whether to accept the agreement—given the pervasiveness of mandatory agreements in many consumer, employment, and other contracts[42] which may limit one's ability to shop around for contracts that do not have arbitration agreements.[43]

Regarding the use of mandatory arbitration agreements in consumer contracts, it has been reported that eighty-one of the Fortune 100 corporations included mandatory arbitration agreement in their consumer contracts.[44]

For employment contracts, "[m]ore than half—53.9 percent—of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more

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39. *See* STONE & COLVIN, *supra* note 35, at 3.

40. Liz Kramer, *Studies Conclude Arbitration Is a Black Hole With Repeat Player Bias (But Also Faster & Cheaper Than Court)*, ARB. NATION (Nov. 21, 2018), https://perma.cc/3Q2J-MC7Y.

41. *See* Michael J. Hanby II, *The Future of Forced Arbitration*, IDAHO STATE BAR (June 2022), https://perma.cc/57EP-M65M

> Most people have no idea that by simply downloading an app, or by checking a box agreeing to a company's terms of service, they are sacrificing their right to sue that company in court regardless of its misconduct. Such agreements are couched in hard to understand legalize [sic] and are often buried in the fine print.

see also Jeff Sovern et. al., *'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1 (2015).

42. *See* STONE & COLVIN, *supra* note 35, at 3.

43. *See* Jessica Silver-Greenberg & Robert Cebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://perma.cc/4Y77-X3CJ.

44. *See* Hanby, *supra* note 41. *See generally* Szalai, *The Prevalence of Consumer Arbitration Agreements*, *supra* note 8.

employees, 65.1 percent have mandatory arbitration procedures."[45] And, these mandatory agreements cover many types of employment disputes, including civil rights claims.[46] The pervasive use of arbitration agreements in employment contracts means that almost any dispute between an employer and an employee can end up in arbitration.[47]

Some do not believe, however, that employment disputes should be subject to forced or mandatory arbitration agreements.[48] And, some, enhanced by the #MeToo movement, have been especially opposed to the forced arbitration of sexual abuse and sexual harassment disputes between employers and employees.[49] This opposition led to the recently enacted Ending Forced Arbitration Act that excludes such disputes from forced or mandatory arbitration.

II. FEDERAL RESPONSE

A. *Ending Forced Arbitration of Sexual Abuse and Sexual Harassment Claims*

Sexual harassment is prevalent in the work force. In a report, the Equal Employment Opportunity Commission (EEOC) stated:

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45. *See* ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS (Sep. 27, 2017), https://perma.cc/ZX2D-MZ4Q.

46. *See id.* (outlining the increasing trend of arbitration agreements barring employment-related civil rights claims, "including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act").

47. *See generally* Genie Harrison, *INSIGHT: Forced Arbitration Is Bad News for Employees, California Stats Show*, BLOOMBERG L. (Aug. 15, 2019, 4:01 AM), https://perma.cc/2RJ7-JYHY.

48. *See The Problem with the Craze for Mandatory Arbitration: Millions of American Employees Have No Recourse to the Courts*, THE ECONOMIST (Jan. 27, 2018), https://perma.cc/TVT6-LV37 ("And whereas the judicial system is designed, at least in theory, to treat people equally before the law, mandatory arbitration puts employees at a further disadvantage.").

49. Emille Shumway, *After the #MeToo Bill, Is the Future of Mandatory Arbitration in Question?*, HRDIVE (Feb. 22, 2022), https://perma.cc/TPF4-FLMX ("But the process has also drawn scrutiny and criticism from worker advocacy groups and other political organizations, and not only in cases of sexual harassment and sexual assault.").

> Women also continue to file a disproportionate number of the charges filed with the EEOC alleging sexual harassment. Women filed 78.2% of the 27,291 sexual harassment charges received between FY 2018 and FY 2021 . . . . Additionally, women filed 62.2% of the 98,411 total harassment charges alleging any bases (e.g., race, national origin) received between FY 2018 and FY 2021.[50]

It also asserted that approximately ninety percent of workplace sexual harassment goes unreported.[51]

A letter by the attorneys general from all fifty states discussed some of dangers from the mandatory arbitration of sexual harassment claims: (1) lack of transparency because of "fine print" language; (2) lack of choice because arbitration is presented as a "take-it-or-leave it" option; (3) lack of arbitrators' qualification in resolving sexual harassment claims and (4) a culture of silence where arbitration proceedings and awards are kept secret which prevents others from learning of sexual harassment.[52]

Because Section 2 of the FAA preempts any state law that seeks to exclude certain claims from arbitration, including claims involving sexual abuse and sexual harassment, the only possibility of relief from the forced arbitration of these claims was a federal law amending Section 2's scope. In response to the #MeToo movement,[53] on March 3, 2022, President Biden signed into law the Ending Forced Arbitration Act.[54] This law has several important provisions regarding sexual abuse and sexual harassment claims, in that it:

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50. *See* EEOC, DATA HIGHLIGHT, SEXUAL HARASSMENT IN OUR NATION'S WORKPLACES 2 (Apr. 2022), https://perma.cc/N5JU-8UHZ (PDF).

51. *Id*. at 1.

52. *See* Letter from Nat'l Ass'n of Attorneys Gen. to Congress 1 (Feb. 12, 2018), https://perma.cc/U975-4UP7 ("Specifically, we seek to ensure these victims' access to the courts, so that they may pursue justice and obtain appropriate relief free from the impediment of arbitration requirements.").

53. For a general overview of the #MeToo movement, see Shumway, *supra* note 49.

54. *See* Dareh Gregorian, *Biden Signs Bill Ending Forced Arbitration in Sexual Misconduct Cases*, NBC NEWS (Mar. 3, 2022, 7:56 PM), https://perma.cc/GW4J-PKAD.

1. Prevents the enforcement of predispute arbitration agreements unless the party alleging the claims wants to arbitrate them;

2. Prevents arbitration and other agreements from including class action waivers or other joinder-of-parties waivers;

3. Assigns to courts, and not arbitrators, the responsibility of determining whether a claim falls within the scope of the law's exclusion, even when the parties' agreements might leave such determination to an arbitrator; and

4. Establishes that federal law shall determine whether this new statute applies to a dispute. [55]

The House Judiciary Committee submitted a report detailing a variety of dangers from the use of forced arbitration agreements for sexual abuse and sexual harassment claims, including a lack of transparency that prevents the discovery of such claims (and, therefore, allows the abuse and harassment to continue) and the secrecy of records which allows retaliation against victims.[56]

This new law addresses many of the concerns about the mandatory arbitration of sexual assault and sexual harassment disputes. First, a person alleging sexual abuse or sexual harassment can take their claims to court where they are more likely to get a jury that includes their peers, including women, people of color, and perhaps people of their same social and economic backgrounds, instead of having to present their disputes to an arbitration panel composed primarily of white men who may not understand either sexual abuse or sexual

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55. 9 U.S.C. § 402. Congress stated in the Committee Report:

> Over the past several decades, forced arbitration clauses have become virtually ubiquitous in everyday contracts. Often buried deep within the fine print of employment and consumer contracts, forced arbitration deprives millions of Americans of their day in court to enforce state and federal rights. Because arbitration lacks the transparency and precedential guidance of the justice system, there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process. Furthermore, due to the secretive nature of this system, these disputes are often shielded from public scrutiny.

H.R. Rep. No. 117-234, at 3 (2022).

56. H.R. Rep. No. 117-234, at 4–6 (2022).

harassment claims or the laws applicable to such claims.[57] Further, during the civil litigation of their sexual abuse and harassment claims, plaintiffs should reap the benefits of the procedural and evidentiary rules that govern their federal and state lawsuits.[58]

Second, those parties who have either small or large monetary claims can join together in a class action even if the claim is one that the parties keep in arbitration.[59] The Ending Forced Arbitration Act's anti-waiver provision makes *Concepcion*'s conclusion—that class actions are incompatible with arbitration—inapplicable to sexual abuse and sexual harassment claims.[60]

Third, the new law displaces prior arbitration law that the parties' mandatory agreements can assign arbitrability issues to an arbitrator.[61] Now, courts must decide arbitrability, which

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57. *See infra* notes 298–322 and accompanying text; *see also* Letter from Nat'l Ass'n of Attorneys Gen. to Congress, *supra* note 52. To the extent that a potential juror's experiences are important—and not just race and gender—this is even more reason to have a diverse pool of potential jurors, instead of having a more insular roster of arbitrators who are mostly middle-aged white men. *See generally*, John D. Winer, *Trial of a Sexual Harassment Case*, WINER, BURRITT & SCOTT, LLP, https://perma.cc/A63S-XKLZ (discussing the many factors that one should consider when selecting a jury for a sexual harassment lawsuit).

58. Both the Federal Rules of Civil Procedure and of Evidence, and similar state court rules, will be applicable during civil litigation, but not during arbitration proceedings—unless the parties agree to make them applicable. *See* FED. R. CIV. P. 81 (stating that the FAA's procedures supersede the respective Federal Rules); *see also* William C. Turner, *A Brief Overview of the Use of Evidence in Arbitration*, NEV. LAW. 21 (Oct. 2010), https://perma.cc/BFH2-WMBV (stating that a party's use of the Federal Rules of Evidence within an arbitration hearing is "unnecessary" and may result in worse outcomes).

59. 9 U.S.C. § 402(a).

> Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.

60. AT&T v. Concepcion, 563 U.S. 333, 348–50 (2011).

61. 9 U.S.C. § 402(b).

involves deciding whether a dispute falls within the scope of an arbitration agreement and is thereby subject to arbitration.[62]

1. Benefits of the Ending Forced Arbitration Act

Given the prevalence of sexual abuse and sexual harassment claims, one would expect the Ending Forced Arbitration Act to result in more sexual abuse and sexual harassment lawsuits because there will be more transparency about these types of claims in a particular place of employment, which may cause others at the job to file similar claims.[63]

Further, the mere fact that plaintiffs who have such claims do not have to submit to arbitration should lead to more of them seeking court litigation instead of arbitration, thereby increasing the number of sexual abuse and sexual harassment

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> An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator.

62. Before the enactment of the Ending Forced Arbitration Act, an arbitrator decided arbitrability issues when an arbitration agreement assigned that issue to the arbitrator. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 530 (2019) ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.").

63. The lack of transparency and its concealing of sexual harassment is one of the points that the attorneys general from the fifty states raised in their letter of support in favor of the passage of the Act. *See* Letter from Nat'l Ass'n of Attorneys Gen. to Congress, *supra* note 52; *see also* Nicolette Sullivan, Note, *The Price Is (Not) Right: Mandatory Arbitration of Claims Arising Out of Sexual Violence Should Not Be the Price of Earning a Living*, 21 VAND. J. ENT. & TECH L. 339, 343 ("Further, when combined with confidentiality agreements, mandatory arbitration clauses provide a shield for harassers and offenders to escape liability. This shield particularly damages efforts to address sexual harassment in the public sphere, because the secretive nature of mandatory arbitration safeguards harassers from accountability, perpetuates predatory behavior, and silences victims.").

lawsuits.[64] The Ending Forced Arbitration Act should also empower women to some extent because they will no longer have mostly men deciding their sexual abuse and sexual harassment claims.[65] Therefore, the court litigation system should be less disconcerting for them because they are not subjected to male arbitrators who are of the same gender as the ones who committed the abuse or harassment.[66]

Along these lines, one should also think about implicit bias. According to EEOC statistics, approximately 78% of those who file sexual harassment charges with the EEOC are women, while, according to one source, approximately 77% of arbitrators are men.[67] In short, arbitrators are more likely to be male while the plaintiffs or claimants are more likely to be female. This presents the probability that the male arbitrators are likely to have implicit bias against female plaintiffs during the arbitrations of sexual abuse and sexual harassment claims.[68]

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64. *See* Charles Toutant, *Expect More Sexual Harassment Lawsuits After New Federal Law Bars Arbitration of Such Disputes*, N.J. L.J. (Mar. 9, 2022, 3:52 PM), https://perma.cc/9AXR-QJ6H.

65. *See* Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 FORDHAM L. REV. 2255, 2265 (2020) ("The reality is that the arbitrators selected for these cases may tend to look more like the managers or supervisors that the claimants have accused of statutory employment discrimination.").

66. *Id*. at 2263–64 ("[W]ith more parties choosing to resolve their disputes through arbitration and mediation, ADR service providers need to ensure that such parties are given the option to select from panels of arbitrators and mediators who[m] they believe come from backgrounds and experiences similar to their own." (citations omitted)).

67. EEOC statistics show that women, from 2018 to 2021, filed 78.2% of sexual harassment claims. EEOC DATA HIGHLIGHT, *supra* note 50. A report by the American Association of Justice shows that 77% of arbitrators at AAA and JAMS are male and only 23% are female, and 88% are white. *Where White Men Rule: How the Secretive System of Forced Arbitration Hurts Women and Minorities*, AM. ASS'N JUST. (June 2021), https://perma.cc/59JN-WA2Y.

68. *See generally* Joan Stearns Johnsen, *Why Your Arbitrator Is Biased*, ABA, (Mar. 18, 2015), https://perma.cc/X64L-TBDH ("We are also subject to implicit or unconscious bias. These biases are more insidious because they may be irrational and outside of our knowledge and control. We do not choose or even want these implicit biases and would be unlikely to list them on an arbitrator disclosure form.").

In addition, when the female is also an African American, Hispanic, or other person of color, she might also be subject to racial implicit bias.[69]

The Ending Forced Arbitration Act has the potential to avoid some of the unfairness discussed above because more women can bring their sexual abuse and sexual harassment claims in court and have trials before more diverse juries, which they have participated in selecting from a more diverse pool of potential jurors.[70]

2. Possible Detriments

Most lawsuits are settled before they reach the jury trial stage. Moreover, sexual abuse and sexual harassment victims and their attorneys might face challenges even when they are involved in trial court litigation.[71] This is so because trial courts dismiss a substantial number of sexual harassment claims by applying very difficult standards that litigants must meet to avoid dismissal.[72]

One scholar noted that:

> [O]ne factor that's often left out of this conversation is the role the courts have played in shielding companies from legal liability. When a case does manage to reach the legal system,

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69. *See, e.g.*, Jocelyn Frye, *Racism and Sexism Combine to Shortchange Working Black Women*, CTR. FOR AM. PROGRESS (Aug. 22, 2019), https://perma.cc/US2E-4ZS8 ("The fight for Black women's equal pay must address race and gender biases that erode Black women's wages and undermine their ability to thrive."). For a discussion of different types of implicit bias, see Sidney A. Shapiro et al., *Private Courts, Biased Outcomes: The Adverse Impact of Forced Arbitration on People of Color, Women, Low-Income Americans, and Nursing Home Residents*, CTR. FOR PROGRESSIVE REFORM (Feb. 2022), https://perma.cc/2MFC-J443.

70. The Ending Forced Arbitration Act gives litigants a choice of filing their claims in a trial court or seeking an arbitration of their claims. *See* 9 U.S.C. § 402. Their attorneys should still have to review each venue to determine which one has more of the types of diversity that they seek.

71. *See* Lauren B. Edelman, *How HR and Judges Made it Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), https://perma.cc/ZVL3-9ATG ("[A]nalyses of a half-century of judicial opinions tell a story of judges who increasingly view the presence of anti-harassment policies and complaint procedures as sufficient for employers to avoid liability, even where there is substantial evidence that harassment occurred.").

72. *See id.*

> courts will often side with a company due to the mere presence of an official policy, regardless of whether the policy is actually effective in addressing harassment or abuse. I call these policies "symbolic structures," and they often do more to protect employers from lawsuits than they do to protect employees from harassment.[73]

This scholar chronicles how the Court's decisions in *Faragher v. City of Boca Raton*[74] and *Burlington v. Ellerth*,[75] and the creation of the *Faragher-Ellerth* affirmative defense,[76] may lead to courts giving too much deference to employers' having anti-sexual harassment policies and other structural procedures in place than concentrating on whether harassment actually existed despite the presence of policies and structures.[77] This scholar asserts that: "By 2014, judges were deferring to symbolic structures in about 70% of district court cases and nearly 50% of circuit court cases."[78] The scholar concludes: "Given that judges often rely on the mere presence of anti-harassment policies and complaint procedures, we cannot look to the courts for a solution to the problem that the #MeToo movement has exposed."[79] Additionally, some estimate that only approximately three to six percent of sexual harassment cases make it to trial.[80]

Therefore, the litigation of sexual abuse and harassment cases (instead of arbitration) may not be a panacea given the

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73. *Id.*

74. 524 U.S. 775 (1998).

75. 524 U.S. 742 (1998).

76. *See* Edelman, supra note 71.

77. *See id.* (analyzing 1,888 judicial opinions since 1965, which demonstrate that "even the mere presence of an official policy is enough for a U.S. judge to rule in a company's favor").

78. *Id.*

79. *Id.*

80. Yuki Noguchi, *Sexual Harassment Cases Often Rejected By Courts*, NPR (Nov. 28, 2017, 7:28 AM), https://perma.cc/TT52-ACWM. This statistic is similar to the small number of other types of lawsuits actually making it to trial, given that many cases are either dismissed by judges during motions for summary judgment (or other motions to dismiss) or settled during settlement negotiations. Shari S. Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives for Attorneys and Judges*, 81 LA. L. REV. 120, 122 (2020). However, regarding sexual abuse and sexual harassment lawsuits, it appears that a greater percentage of cases are dismissed because the litigants did not meet the rigorous standards for establishing a sexual harassment case. *See* Edelman, *supra* note 71.

substantially high standards that a litigant may have to satisfy to avoid a trial court's dismissal.[81] But, at least with the passage of the Ending Forced Arbitration Act,[82] a litigant with a sexual abuse or sexual harassment claim now has the freedom of choice to decide whether they want to run either the litigation and trial court gauntlet or the arbitration gauntlet.[83] Further, this new law should alleviate some of the lack of transparency and secrecy regarding sexual abuse and sexual harassment claims because victims can now go public and seek redress in a public trial court.[84]

3. Incompleteness of the Ending Forced Arbitration Act

The Ending Forced Arbitration Act applies only to sexual abuse and sexual harassment claims.[85] It does not exclude other Title VII claims or other discrimination claims from forced arbitration, including racial discrimination, age discrimination, and sexual orientation discrimination.[86] Despite that the #MeToo movement appears to be the impetus for the passage of this law, there does not appear to be a good reason to exclude other types of Title VII claims from the law's protection.[87]

For example, one could make an argument that racial discrimination claims are just as entitled to an exclusion from

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81. *See generally* Edelman, *supra* note 71.

82. 9 U.S.C. § 402.

83. *See id.*

84. *See Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 82 (2021)

> Litigation in the public court system, it has power. The powers it has is the power of signaling, not only to the defendant that I've sued, but to all similarly situated defendants that this is a wrong . . . . None of that happens in arbitration. From the beginning, it is private throughout the entire proceeding, which is held in a secret location, no public, and no press.

85. *See* 9 U.S.C. § 402(a) ("[A]t the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute . . . no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable.").

86. *See id.*

87. *See* Heidi M. Sandomir, *The End of Forced Arbitration of Sexual Violence and the Uncertain Future*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 111, 151 (2022).

mandatory arbitration as sexual abuse and sexual harassment claims. According to the EEOC's 2022 statistics, 20,908 persons filed racial discrimination claims, 34% of total claims, compared to 18,762 persons who filed sex discrimination claims, or 30.6% of total claims.[88] So, it appears that racial discrimination is just as prevalent as sex discrimination—at least for the charges that employees filed with the EEOC.[89] This is probably true, even though it is widely believed that many sexual abuse and sexual harassment cases go unreported,[90] given that underreporting probably also occurs for racial discrimination claims.[91]

It is important to note that those who have racial discrimination claims are likely to suffer similar process dangers from arbitration that women face when they have sexual abuse and sexual harassment claims resolved in arbitration.[92] For example, the lack of diversity in the pool of arbitrators and the explicit and implicit bias that might occur in arbitration proceedings are just as likely to affect those who have racial discrimination claims as they affect those who have sexual abuse and sexual harassment claims.[93] At least scholar

88. Katie Bay, *EEOC Roundup: Top 5 Takeaways for Employers on the 2021 Enforcement and Litigation Statistics*, JDSUPRA (Apr. 7, 2022), https://perma.cc/AS2M-9R2D.

89. *See id.*

90. *See Sexual Harassment in Our Nation's Workplaces*, *supra* note 50 ("In June 2016, the EEOC released a report on the study of harassment in the workplace which noted that workplace harassment often goes unreported.").

91. *See* Lily Zheng, *Do Your Employees Feel Safe Reporting Abuse and Discrimination?*, HARV. BUS. REV. (Oct. 8, 2020), https://perma.cc/PT7U-6RPX ("One of the alarming symptoms of these challenges is the low rate at which employees report incidents of assault, harassment, and discrimination.").

92. *See* Pittman, *supra* note 11, at 855–65 (explaining that arbitrators have financial incentives to harbor bias in favor of corporations and other businesses that are "repeat players"); Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 859 (2020) (arguing that other forms of discrimination should be examined when considering the process dangers of mandatory arbitration).

93. *See* Pittman, *supra* note 11, at 862–65 ("[T]he fear of racism against minorities who are forced into arbitration is a real and legitimate fear. It is too late in the day for one to categorically dismiss the idea that some arbitrators will harbor negative racial feelings against minority claimants during arbitrations."); *see also* Heidi M.S. Sandomir, *End of Forced Arbitration of Sexual Violence and the Uncertain Future*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 111, 120 (2022) ("Racial diversity remains a critically important and under-represented area of arbitration that cannot be replaced by an emphasis on another area of diversity in arbitration."); Joan Stearns, *ABA Practice*

has discussed unconscious bias and stereotypes that some white Americans have against women, African Americans, Hispanics, and other people of color.[94] Other scholars have discussed the implicit biases that arbitration poses in general[95] and the negative message that is sent when there is a lack of diversity in the pool of arbitrators for employment disputes.[96]

And it is reasonable to believe that the implicit bias and other disadvantages that women, African Americans, and people of color face in arbitration are similarly suffered by those with disabilities and by those who are members of the LGBTQ community.[97]

Point: Why Your Arbitrator Is Biased, (March 18, 2015), https://perma.cc/RW7B-MC5K (discussing implicit bias generally, including racial implicit bias, and stating, "Whether presenting arguments to a jury, seeking to persuade a mediator, or eliciting testimony before an arbitration panel, a litigator should recognize the relationship between form and substance. In fact, implicit bias explains why we tend to conflate the messenger with the message").

94. *See* Pittman, *supra* note 11, at 862–64

> These negative images might include a false belief that African Americans (and perhaps non-white Hispanics) as a group are lazy, violent, angry, dishonest, overly sexed, and want something for nothing. There are other stereotypes regarding women and other minorities. Experts believe that unconscious racism and its negative images of "the others" is pervasive and exists in almost every person, including Caucasians, Asians, non-white Hispanics, African Americans, and other minorities. Because of the pervasiveness of unconscious racism, arbitrators are not exempted from its negative influences, which might appear during arbitration hearings.

95. *See* Paul B. Marrow et al., *Artificial Intelligence and Arbitration: The Computer as an Arbitrator—Are We There Yet?*, 74 DISP. RESOL. J. 35, 58 (2020) ("Empirical studies have shown that arbitrators, judges, and juries bring to their roles hidden biases that often they themselves are unaware of. These biases, some call them blinders, result from the human tendency to use heuristics—mental shortcuts—when making decisions.").

96. Green, *supra* note 64, at 2264 ("Failing to diversify the pool of arbitrators sends a 'detrimental and hostile' message to all black workers that based on history the process 'is comparable to what all-white juries have done.'" (citations omitted)).

97. *See* IMPLICIT BIASES & PEOPLE WITH DISABILITIES, ABA IMPLICIT BIAS GUIDE, https://perma.cc/E4WT-HNMN; THE STATE OF THE LGBTQ COMMUNITY IN 2020 CAP REPORT (October 6, 2020), https://perma.cc/6595-7ZFH (discussing survey showing that those in the LBGTQ community suffer pervasive discrimination in "their personal lives, in the workplace and the public sphere, and in their access to critical health care."). It is reasonable to believe that the implicit bias and explicit bias that persons with disabilities

Given the above discussion, it is unreasonable for the Ending Forced Arbitration Act to not also exclude other Title VII claims from forced arbitration.[98] Perhaps it was the strength of the #MeToo movement—and the spotlight that it shined on pervasive sexual abuse and sexual harassment—that was the primary motivation for Congress being galvanized to enact the Act.[99] In Congress, the Senate passed the Act by unanimous consent and the House passed it by a 335 to 97 margin[100]—despite that Congress is a political institution that is normally motived by lobbying,[101] money,[102] and not enacting laws that would be beneficial to the opposing political party.[103] One can expect, however, that some in Congress who believe in slippery-slope arguments would not want to extend an exclusion from forced arbitration to other

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and persons in the LGBTQ community endure in general society will also exist in arbitration proceedings because arbitrators have the same types of implicit bias and explicit bias that exist in the general population. Further, at least one scholar believes that implicit bias will impact whether persons with a disability and persons in the LGBTQ community will be selected as arbitrators. *See* Homer C. La Rue & Alan A. Symonette, *The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection*, 63 HOW. L.J. 215, 217 (2020) ("The unconscious bias that is at play in the selection of arbitrators of color and woman are equally at play in the selection of persons with disabilities and for those persons in the LGBTQ+ community.").

98. *See generally* Terri Gerstein, *End Forced Arbitration for Sexual Harassment. Then Do More*, N.Y. TIMES (Nov. 14, 2018), https://perma.cc/FUJ3-WKXQ ("The same employers that permit or perpetrate sexual harassment also commit a host of other violations—underpaying workers, discriminating in other ways or preventing workers from organizing.").

99. *See* Sarah R. Cole, *The End of 'Forced' Arbitration Isn't the Beginning of Corporate Transparency*, THE HILL (Feb. 17, 2022, 11:01 AM), https://perma.cc/KS8C-3ZCG; Erin Webb, *Analysis: #MeToo Law May Keep Entire 'Case' in Court*, BLOOMBERG L. (Mar. 21, 2022, 11:20 AM), https://perma.cc/9MDK-XNAH.

100. *See Biden Ends Forced Arbitration for Sexual Assault, Harassment*, HRWORLD (Mar. 4, 2022, 5:28 PM), https://perma.cc/6Z5S-6MRM.

101. *See generally* Michael Weingartner, *The Right to Petition as Access and Information*, 169 U. PA. L. REV. 1235 (2021).

102. *See generally How Campaign Donations Influence the Congressional Economic Agenda*, RUSSELL SAGE FOUND. (Mar. 23, 2018), https://perma.cc/2G2K-2ZJ6.

103. *See* Philip Elliott, *Congress Isn't Stuck in Political Gridlock. But That Doesn't Mean It's Working*, TIME (Mar. 18, 2022, 12:01 PM), https://perma.cc/YXT8-KXGK.

types of litigants in addition to the new law's exclusion of sexual abuse and sexual harassment claims.[104] But slippery slopes are not necessarily bad if they lead to needed legislation.[105]

In other words, if the Ending Forced Arbitration Act excludes women with sexual abuse and sexual harassment claims from forced arbitration, there is no good reason, other than Congressional politics, that it should not also exclude African Americans, Hispanics, and other people of color from forced arbitration when they bring other types of Title VII claims.

As a matter of fact, in 2022, there was another bill that sought an exclusion of civil rights cases from forced arbitration, which the House passed and the Senate submitted to one of its committees.[106] Some estimated that the bill had a 36% chance of passing the Senate—which was not a good chance given the strong unanimous consent vote in the Senate and the 335 to 97 vote in the House to pass the Ending Forced Arbitration Act.[107]

B. *H.R. 963: The FAIR Act of 2022*

The House passed H.R. 963[108] in March 2022. Representative Hank Johnson, Jr. was its principal sponsor.[109] The bill did not become law because the Senate did not pass it during the 117th Congress before the Republicans won control of the House for the 118th Congress in 2023. Presently, the bill has not been reintroduced in the House. However, it is still important for the issues discussed in this Article.

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104. *See generally* Eugene Volokh & David Newman, *In Defense of the Slippery Slope*, LEGAL AFFS. (Mar. & Apr. 2003), https://perma.cc/AG7N-5AEL ("Most of us have made some slippery slope arguments and ridiculed others. They are a staple of debates about topics from free speech and privacy to church-state relations, gun control, and euthanasia.").

105. *See id.* ("[A]rguments such as 'Oppose this law, because it starts us down the slippery slope' have earned a deservedly bad reputation, because they're too abstract to be helpful. One can always shout, 'Slippery Slope!' but without more details this is hardly an argument at all.").

106. *See* H.R. 963, 117th Cong. (2022).

107. *See* Mark Kantor, *Congress Passes Anti-Arbitration Act for Sexual Harassment Cases*, ABA (Feb. 16, 2022), https://perma.cc/LF2M-RUVK/.

108. H.R. 963, 117th Cong. (2022).

109. *See U.S. HR963; FAIR Act of 2022, Forced Arbitration Injustice Repeal Act of 2022*, BILL TRACK, https://perma.cc/L287-F6HW (last updated Jan. 3, 2022).

Its substantive provisions:

1. Exclude claims involving employment, consumer, antitrust, and civil rights disputes from forced arbitration, and it has a detailed definition of each type of claim;

2. Define Civil Rights claims very broadly to include claims actionable under Title VII;[110]

3. Prevent class action waivers and other types of joint-action waivers;[111]

4. Assign to courts, and not arbitrators, the responsibility of determining whether a claim falls within the scope of the bill's exclusion, even when the parties' agreement might leave such determination to an arbitrator;[112] and

5. Establish that federal law will determine when the bill applies to a dispute.[113]

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110. *See* H.R. 963, 117th Cong. (2022)

> (2) the term civil rights dispute means a dispute—
>
> (A) arising from an alleged violation of—
>
> (i) the Constitution of the United States or the constitution of a State;
>
> (ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and
>
> (B) in which at least one party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law.

111. *See id*. ("Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.").

112. *See id.* ("The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator").

113. *See id.* ("An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law.").

H.R. 963 would have patched up many of the holes that the Ending Forced Arbitration Act left open, as discussed above, including giving other civil rights claimants the right to exclude themselves from forced or mandatory arbitration agreements. It would have also extended such freedom of choice to employment, antitrust, and consumer disputes.[114]

To some extent, H.R. 963, if it had been enacted, would have been a substantial limitation on Section 2 of the FAA—by extending the Ending Forced Arbitration Act's exclusion of sexual abuse and sexual harassment claims to other types of claims—and on the Court's broad interpretation of Section 2. These two laws together would have ended: *Concepcion*'s anti-class action waiver rule for a larger class of disputes and not just for sexual abuse and sexual harassment claims as the Ending Force Arbitration Act provides; many states' frustration with not being able to prevent the arbitration of consumer and employment disputes; and the unfair advantage that many corporations have over weaker litigants who really have no choice but to enter into forced or mandatory arbitration agreements.

In any event, in the wake of Congress's successful exclusion of sexual abuse and sexual harassment claims from forced arbitration, and the House's passage of H.R. 963 which did not ultimately become law during the 117th Congress, there are other reforms to the FAA that Congress should consider, including a reintroduction and enactment of H.R. 963.

III. OTHER POSSIBLE REFORMS

A. *Is the FAA Applicable Only in Federal Courts?*

Further reform by Congress to restore the separation of powers balance between the Supreme Court and Congress is warranted. As discussed earlier, *Southland*'s interpretation of Section 2 of the FAA is one of the major reasons for the growth of arbitration because the interpretation—that the FAA is applicable in both federal and state courts as a matter of

114. *See id.* ("Notwithstanding any other provision of this title, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.").

substantive law, instead of being a procedural law applicable only in federal courts—prevents states from excluding certain claims from arbitration and from imposing other requirements on the enforcement of arbitration agreements.[115] However, it is reasonably clear that Congress intended that the FAA be a procedural law applicable only to lawsuits filed in federal courts.[116] Substantial legislative history from House Report No. 96 and other references; statements and an article from the American Bar Association committee that drafted the FAA; and dissenting opinions by Justice O'Connor and other Justices provide persuasive support that Congress intended for the FAA to be a federal procedural law applicable only to federal court proceedings.[117] In opposition is Justice Berger's majority opinion's textual analysis in *Southland,* which, in part, asserts that Congress's use of its Commerce Clause powers to enact the FAA means that the FAA is substantive law to be enforced in both federal and state courts.[118] However, such thinking is just Justice Berger's self-interested speculation, which Congress should address in future legislation.

Congress should specifically define what its original intent was regarding the FAA's applicability to state court lawsuits and other proceedings, including whether the FAA was meant to be a procedural or substantive law, and the legal implications stemming therefrom. As a part of that analysis, Congress should also consider the Tenth Amendment implications of the FAA. Just as important, Congress should decide whether the FAA in the future should be deemed a procedural law or substantive law. There are at least two factors that Congress should consider: (1) whether federalism is important enough for states to be allowed to decide both their procedural law and substantive law regarding arbitration and (2) whether there are some efficiency arguments that warrant the continuation of the

115. *See* Southland v. Keating, 465 U.S. 1, 16–17 (1984); *see also* Doctor's Ass'n v. Casarotto, 517 U.S. 681, 687 (1996).

116. *See* Pittman, *supra* note 6, 873–74 (2002).

117. *See id.* at 863–74 (explaining that Justice O'Connor's conclusion—that even if Section 2 of the FAA was intended to be a new federal substantive right, states should be allowed to use their own procedures when evaluating arbitration agreements—was supported by extrinsic evidence such as the House Report No. 96).

118. *See id.* at 863.

FAA's broad substantive law application and the Court's current broad interpretation of the FAA.

1. Factors to Consider in Reevaluating the FAA's Scope

a. *Federalism and Alleged State Judicial Hostility Against Arbitration?*

Whether states should have more control over the arbitration process may depend on whether there is still a state law "hostility" against arbitration agreements. Judicial hostility against the enforcement of arbitration agreements appears to be the primary reason Congress enacted the FAA.[119] Therefore, after the FAA has been in existence for ninety-seven years, Congress should determine whether there is still a judicial hostility to the enforcement of arbitration agreements. Perhaps Congress should redefine the meaning of "hostility" to include a recognition that some of the alleged hostility may be just a disagreement over whether states should have the authority to exclude certain disputes from arbitration and not a general dislike by states of arbitration as a dispute resolution process.

There appears to be less general dislike of arbitration as a dispute resolution process because many states, through their own arbitration statutes, have policies in favor of some types of arbitrations.[120] According to statistics from the Uniform Law Commission, twenty-two states have adopted the Revised Uniform Arbitration Act (RUAA) (revised in 2000), which updated an earlier version of the Uniform Arbitration Act (UAA) (enacted in 1955).[121] And, some states like New York, Florida, and Texas have reputations for being pro-arbitration states.[122]

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119. *See* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 93 (2012) ("As reflected in both the House Report and the Senate Report, the purpose of the FAA was to place arbitration agreements on the 'same footing as other contracts' and thereby overcome judicial hostility to arbitration.").

120. *See* UNIF. L. COMM'N, *Revised Uniform Arbitration Act Enactment History*, https://perma.cc/DJ7F-ZRU5 (2000).

121. *Id.*

122. *See* Claudia Salomon & Irina Sivachenko, *Choosing an Arbitral Seat in the United States*, LEXISNEXIS, https://perma.cc/6933-8ZXS ("Despite the proliferation of places around the world promoting themselves as favourable arbitral seats, the United States remains one of the most popular seats of

Section 6 of the RUAA provides for the enforcement of arbitration agreements involving both existing disputes and disputes that arise after the parties' agreement.[123] Under the RUAA, and in the twenty-two states that have adopted it, an arbitration agreement is binding and irrevocable just like under Section 2 of the FAA.[124] Therefore, under the laws in twenty-two states, parties can enter into predispute, forced arbitration agreements that are binding and enforceable.

States' adoption of either the RUAA or the UAA is evidence that there is less general hostility against arbitration on the state level. It also may mean that some of the currently perceived state law hostility against the enforcement of arbitration agreements may not be a general hostility against arbitration agreements, but an effort by states and state courts to promote legitimate public policy concerns by excluding certain disputes from predispute, mandatory arbitration agreements while leaving other disputes subject to that type of arbitration. For example, several states, including New York, Maryland, and New Jersey, sought to amend their state arbitration statutes to exclude the forced or mandatory arbitration of sexual harassment claims, probably in response to the #MeToo movement.[125] There is no reason to believe that these states were motivated by a general hostility against arbitration.[126] As a matter of fact, New York is deemed by some to be a pro-arbitration state.[127] Instead of a general hostility, it appears that the above-referenced states were motivated by the

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arbitration. . . .Within the United States, New York, Miami and Houston have emerged as the most popular arbitral seats.").

123. NAT'L CONF. COMM'RS UNIF. STATE L., UNIFORM ARBITRATION ACT 18 (2000 draft), https://perma.cc/9J74-LDA4 (PDF).

124. *See id.*

125. *See* Keith J. Frank, *State Legislation Precluding Compelled Arbitration in Sexual Harassment Claims and the FAA*, ABA (Feb. 24, 2020), https://perma.cc/L5HR-66VS ("For instance, in New York, the state passed legislation in 2018, N.Y. C.P.L.R. § 7515, prohibiting the use of arbitration agreements for claims of sexual harassment regardless of the FAA.").

126. *See* Mitchell L. Marinello, *New York Law Prohibiting Arbitration of Sexual Harassment Claims Is Preempted*, ABA (Sept. 12, 2019), https://perma.cc/RD8A-MMPU ("Several states, propelled by recent political currents, have passed or proposed passing legislation that nullifies agreements that require the arbitration of certain kinds of claims, such as those involving sexual harassment or discrimination.").

127. *Id.*

issue of whether sexual harassment claims should be subject to forced or mandatory arbitration because of some of the perceived process dangers that arbitration poses to the resolution of sexual harassment claims.[128]

There is little doubt that the Court would have held that Section 2 of the FAA preempted New York's, Maryland's, and New Jersey's attempted exclusions of sexual harassment claims from forced arbitration. For example, in *Latif v. Morgan Stanley*,[129] a federal district court held that Section 2 of the FAA preempted the above-referenced New York statute because the law sought to exempt a claim from arbitration that Section 2 of the FAA does not exempt.[130] The Supreme Court likely would have come to the same conclusion. The preemption of such policy-driven state laws, however, like New York's attempt to exclude sexual harassment claims from arbitration, will frequently leave states without a means of doing what they are supposed to do—protect their citizens from perceived harm, including any dangers presented by the arbitration of certain civil disputes.[131]

Additionally, the courts—that would find a Section 2 preemption of states' sexual abuse and sexual harassment exclusions from forced arbitration, or any other type of exclusion—will not provide any needed protection because they are interested in only one thing: does the dispute fall within the scope of the parties' arbitration agreements?[132] These courts do

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128. *See* Newton v. LVMH Moet Hennessy Louis Vuitton Inc., 192 A.D.3d 540, 541 (N.Y. 2021) ("Although there are strong public policy interests in preventing sexual harassment in the workplace, there is no showing here that the arbitration agreement is unconscionable to the extent that it requires arbitration of such claims.").

129. No. 18-cv-11528 (DLC), 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019).

130. *See id.* at *9 ("[T]he FAA's saving clause does not render the parties' Arbitration Agreement unenforceable here. Section 7515(b) applies only to contract provisions that require 'mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment.'").

131. The court in *Latif* did not offer any suggestions regarding possible alternative protections to replace New York's attempted exclusion of sexual harassment claims from forced arbitration. *See generally id.*

132. *See, e.g.*, *id.* at *9 (reasoning that the New York Statute was "not a 'ground as exists at law or in equity for the revocation of any contract,' but

not give any deference or importance to a state's desire to resolve pressing public policy concerns by excluding certain claims and disputes from mandatory arbitration.[133]

Fortunately for sexual abuse and sexual harassment disputes, Congress enacted the Ending Forced Arbitration Act to exclude these claims from forced or mandatory arbitration.[134] But it is unreasonable to expect that Congress will always step in to enact additional laws to exclude other claims and disputes from arbitration or to enact other laws to regulate arbitration agreements.

If sexual assault and sexual harassment cases warrant exclusion from forced arbitration, there is a good chance that other claims are just as worthy of exclusion. For example, some states have sought to exclude employment disputes from mandatory arbitration when allegations of discrimination are involved.[135] Others have attempted to exclude the arbitration of consumer disputes.[136] And even the House of Representatives, in the FAIR Act of 2022, sought to exclude employment, consumer, antitrust, and civil rights claims from forced arbitration.[137]

Additionally, West Virginia has attempted to exclude mandatory arbitration agreements regarding nursing home

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rather a 'state law prohibit[ing] outright the arbitration of a particular type of claim,' which, as described by the Supreme Court, is 'displaced by the FAA'").

133. *See id.* at *10 (explaining that the argument that the sexual harassment provisions passed in the same bill as § 7515 reflected a general intent to protect victims was unavailing because this did not alter the plain language of the law).

134. *See* 9 U.S.C. § 402. One could say that New York, Maryland, and New Jersey were leaders in this area because they acted to exclude such claims before Congress enacted the Ending Forced Arbitration Act. *See* Laura Lawless, *President Biden Signs Into Law Ban on Mandatory Arbitration of Sexual Harassment Claims (US)*, SQUIRE PATTON BOGGS (Mar. 4, 2022), https://perma.cc/U9CZ-ZDQW.

135. *See* Ruth Rauls & Erik Pramschufer, *Can Employers Still Require Arbitration in New York and New Jersey?*, BLOOMBERG L. (Nov. 5, 2020, 4:00 AM), https://perma.cc/JBA6-GGL4.

136. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 65 (2015) ("In the decades after Congress passed the statute, state legislatures sometimes declared that certain causes of action—often those designed to protect consumers, franchisees, or employees—were not arbitrable.").

137. *See, e.g.*, H.R 963, 117th Cong. (2022).

residents[138] by enacting a law that provided: "Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy."[139] However, in *Marmet v. Brown*,[140] the Supreme Court held that Section 2 of the FAA preempted that law because the law sought to exclude a specific claim from arbitration.[141]

In a similar case, *Kindred Nursing Centers Limited Partnership v. Clark*,[142] the Court held that Section 2 of the FAA preempted a state power of attorney law requiring that a holder of the power of attorney obtain specific instructions before he or she waives the principal's right to a jury trial. Because the law required specific instructions for the signing of only arbitration agreements, it was therefore not generally applicable to other types of contracts that did not involve arbitration agreements, which is a pre-condition for a valid contract defense under Section 2's savings clause.[143]

Unlike for sexual abuse and sexual harassment disputes, Congress has not stepped in to exclude the forced arbitration of disputes involving nursing home contracts, despite an initial effort by one of its agencies, the Center for Medicare & Medicaid Services ("CMS"), to do so.[144] In 2016, during the Obama Administration, the CMS initially adopted a federal rule that predispute, forced arbitration agreements are not valid in contracts between nursing homes and their residents.[145] In 2017, however, the CMS altered the rule to allow predispute mandatory arbitration.[146] And, in 2019, it continued that

138. W. VA. CODE § 16-5C-15(c) (2022); *see, e.g.*, *Forced Arbitration Agreements in Long-Term Care Facility Admission Contracts*, THE NAT'L CONSUMER VOICE, https://perma.cc/3DQ4-9UPQ.

139. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W.V. 2011), *rev'd*, Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012).

140. 565 U.S. 530 (2012).

141. *See id*. at 533–34.

142. 581 US 246 (2017).

143. *Id*. at 1427–29.

144. *See* H.R. 963, 17th Cong. (2022).

145. *See* Charlie Sabatino, *Our New Nursing Home Arbitration Mandate: Educate, Educate, Educate*, 40 ABA L. & AGING, July–Aug. 2019, https://perma.cc/WXJ4-UJ5A.

146. *See id.*

allowance but established that nursing homes cannot use a resident's failure to sign a predispute mandatory arbitration agreement as a condition for admission to a nursing home and that nursing home residents have a thirty-day grace period to rescind an arbitration agreement.[147]

The above discussion shows that some states, and at least one federal agency, had concerns about the use of predispute, forced arbitration agreements in nursing home contracts. It is reasonable to believe that such concern was, in part, due to the stress and anxiety surrounding residents' being admitted to nursing homes.[148] Given that stress, it seems only reasonable that these states, and perhaps other states, would be concerned that some nursing home residents might have involuntarily entered into predispute arbitration agreements, and that there was a need for a law to protect these vulnerable citizens by excluding their disputes from forced arbitrations.[149]

But the reality is that the Court's decisions in *Marmet* and in *Kindred Nursing* would lead to FAA preemption of any state law to exclude nursing home contractual or torts claims from forced arbitration. That said, in these opinions the Court expressed no concern about the conditions and needs of nursing home patients, nor about the best way to protect them during a stressful nursing home admission process.[150]

In other words, the Court's preemption of state laws, that exclude nursing home disputes from arbitration leaves a regulatory vacuum where certain arbitration-process dangers

147. *See id.*

148. *See id.*

> Like many groups, we do not believe that the time of admission to a nursing home is appropriate for informed decision-making about such agreements. Nursing home admission is usually a time of crisis for individuals and their families; the resident is in an impaired condition, the choice of nursing homes may be severely limited, and the resident and family have no idea of the kind of dispute that might be bound by an arbitration clause in the future. There are advantages and disadvantages to arbitration, but it is only after a dispute arises that those pros and cons can be fully weighed, and an informed and voluntary decision can be made.

149. *See id.*

150. *See* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); *Kindred*, 137 S. Ct. 1421, 1429.

may thrive.[151] Therefore, instead of the Court and lower courts complaining about a hostility against arbitration agreements, they should recognize that states' efforts to regulate in this area, where a vacuum of regulations exists, is not the type of general hostility against arbitration that Congress wanted to eradicate when it enacted the FAA in 1925. Nor does that type of general hostility exist when a state has a general arbitration statue for the enforcement of arbitration agreements regarding other disputes but excludes only nursing home disputes (or other problematic disputes) from forced arbitration because of legitimate public policy concerns. This fact should be relevant and mostly outcome determinantive when analyzing whether an alleged general hostility against arbitration exists when a state tries to exclude a forced arbitration of nursing home disputes (or other problematic disputes).

Instructive are examples of alleged state courts' hostility against arbitration that appear in some of the legal literature.[152] To the extent state court judges have narrowly construed or misapplied Supreme Court precedent regarding the enforcement of arbitration agreements, the degree of impropriety probably hinges on how clear the controlling precedent was and on whether there was enough ambiguity in the interpretation of the precedent that allowed the judges to not apply an interpretation that they did not believe was accurate. In other words, if the precedent is a clear "on-all-fours" decision or interpretation, state courts should apply that interpretation. However, there is no good reason state court

151. Even if a federal court were to uphold the legality of a CMS final rule—either the prior version that prohibited a nursing home's mandatory arbitration agreements or the current version that allows such agreements but prevents nursing homes from refusing residency if a customer refuses to sign such an agreement—there is still some potential for nursing homes to force their residents into a mandatory arbitration process that they may not fully understand, or not appreciate all of the process dangers that arbitration presents. *See generally* Amy Stulick, *Nursing Home Operators Could Face Fines, Citations Tied to Arbitration Agreements as Part of New CMS Requirements,* SKILLED NURSING NEWS (July 19, 2022), https://perma.cc/AWB5-JCW5 (discussing elaborate measures that CMS will use to ensure that nursing homes do not force or coerce nursing home residents into signing mandatory arbitration agreements).

152. *See* Note, *State Courts and The Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1194–98 (2021); Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1156–72 (2015).

judges should not be allowed to do what attorneys do—interpret any ambiguity in the Court's precedent in the light most favorable to their clients' interests. Likewise, where state court judges are making interpretative decisions, they should interpret ambiguity in the light most favorable to the relevant state law interests—by using the judges' best interpretations of the ambiguous precedent.[153]

An example of possible improper state court hostility is the West Virginia Supreme Court's decision in *Schumacher Homes of Circleville, Inc. v. Spencer*,[154] where the court considered a delegation provision that provided: "The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute."[155] This provision allowed the arbitrator to determine all issues regarding the validity and enforceability of the arbitration agreement, including whether the arbitration agreement was unconscionable.[156] The U.S Supreme Court precedent was that a delegation provision should be deemed valid unless the party opposing it specifically challenged the provision, in which case a court would determine whether the provision was enforceable.[157] Despite the plaintiff not challenging the provision, the Virginia Supreme Court held that the provision was not enforceable because the word "arbitrability" was ambiguous, and therefore the trial court, instead of the arbitrator, could determine whether the arbitration agreement was unconscionable.[158] In rendering its decision, that court stated:

> In recent years, the United States Supreme Court has doled out several complicated decisions construing the Federal

153. *See* Richard M. Re, *Legal Scholarship Highlight: When Lower Courts Don't Follow Supreme Court Precedent*, SCOTUSBLOG (Oct. 18, 2016, 10:02 AM), https://perma.cc/ZWD8-ZZYE ("But when Supreme Court precedent is relevantly ambiguous, then narrowing is often legitimate, even though it means not adhering to the best available reading of precedent.").

154. *See* Schumacher Homes of Circleville, Inc. v. Spencer, 774 S.E.2d 1, 6 (W. Va. 2015)

155. *Id.* at 6.

156. *See id*.

157. *See* Schumacher Homes of Circleville, Inc. v. Spencer, 787 S.E.2d 650, 661 (W. Va. 2016) (acknowledging that the party resisting delegation must successfully challenge that provision).

158. *See Schumacher*, 774 S.E.2d at 13 (describing arbitrability as a "nebulous" term).

> Arbitration Act . . . .Read together, these decisions create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses that is politely described as "a tad oversubtle for sensible application." The Supreme Court sees its arbitration decisions as a series of "clear instruction[s]." But experience suggests that the rules derived from these decisions are difficult for lawyers and judges—and nearly impossible for people of ordinary knowledge—to comprehend. Still, no matter how confounding the Supreme Court's arbitration decisions may seem, we are constitutionally bound to apply them to arbitration clauses that involve interstate transactions.[159] (citations omitted).

The U.S. Supreme Court vacated and remanded the decision with instruction that the West Virginia Supreme Court should consider the impact of one of the Court's cited opinions.[160]

On remand, the West Virginia Supreme Court decided to follow the U.S. Supreme Court's precedent and held that, because the plaintiff did not challenge the validity of the delegation provision, the provision was valid and the arbitrator, instead of the trial court, should decide whether the arbitration agreement was enforceable.[161]

The state court's opinion in *Schumacher* is deemed by some to be an example of a state judge's hostility against arbitration.[162] First, the state judge apparently decided not to follow Supreme Court precedent that a delegation provision should be enforced if a party does not raise a specific challenge to the provision.[163] Second, the above-quoted language from the

159. *Id*. at 1.

160. *See* Schumacher Homes of Circleville, Inc. v. Spencer, 577 U.S. 1129 (2016).

161. *See Schumacher*, 787 S.E.2d at 663 ("We now turn to the subject delegation language. It provides, 'The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute.' After considering *DIRECTV*, we believe that this language controls the outcome of this case for one reason: the doctrine of severability.").

162. *See State Courts and the Federalization of Arbitration*, *supra* note 152, at 1197–98 (stating that the Western Virginia decision was an "egregious misapplication of law" and was summarily vacated by the Supreme Court).

163. *See Schumacher*, 787 S.E.2d at 663.

state court's opinion is offered as an example of a state court's hostility.[164]

Even if this were an example of a state court's hostility against arbitration, the state supreme court justice cited to one of Justice Stevens's opinions for this portion of the above-referenced quotation: "But experience suggests that the rules derived from these [U.S. Supreme Court decisions] are difficult for lawyers and judges—and nearly impossible for people of ordinary knowledge—to comprehend."[165] And, for the first part of the quotation—"a tad oversubtle for sensible application"—the state court cited a law review article.[166] Therefore, the West Virginia Supreme Court had support for its stated conclusions.

On the other hand, *Casarotto v. Lambardi*,[167] is an example of a state court grappling with how to properly reconcile state law with the FAA. The focus of that opinion was on whether Section 2 of the FAA preempts a Montana statutory provision that "notice that [the] contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract."[168]

The Montana Supreme Court held that Section 2 did not preempt the notice provision because it "would not undermine the goals and polices of the FAA."[169] That court cited the U.S. Supreme Court's decision in *Volt Information Sciences v. Board of Trustees*,[170] that Congress did "not intend that the FAA occupy the entire field of arbitration law."[171]

The Supreme Court, however, held that Section 2 preempted the notice requirement as it "directly conflicts with

164. *See State Courts and the Federalization of Arbitration*, *supra* note 152, at 1197–98.

165. *See Schumacher*, 774 S.E.2d at 5 n.2 (citing Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 87 (2010) (Stevens, J., dissenting)).

166. *See id.* at 5 (citing Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 519 (2011)).

167. 901 P.2d 596 (Mont. 1995).

168. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

169. *See* Casarotto v. Lombardi, 886 P.2d 931, 938–39 (1994), *cert. granted*, *judgment vacated sub nom. by* Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995), *and opinion reinstated by* 901 P.2d 596 (Mont. 1995).

170. 489 U.S. 468 (1989).

171. *Casarotto*, 886 P.2d at 938.

§ 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally."[172]

One of the Montana Supreme Court Justices, Justice Terry Trieweiler, made the following comment about the Court's FAA case law:

> What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.[173]

Justice Trieweiler continued:

> I am particularly offended by the attitude of federal judges, typified by the remarks of Judge Selya in the First Circuit, which were articulated in *Securities Industry Ass'n v. Connolly*, [883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990)].
>
> Judge Selya refers to the preference in the various state jurisdictions to resolve disputes according to traditional notions of fairness, and then suggests that "[t]he FAA was enacted to overcome this 'anachronism'." *Connolly,* 883 F.2d at 1119 (citation omitted). He considers it the role of federal courts to be "on guard for artifices in which the ancient suspicion of arbitration might reappear." *Connolly,* 883 F.2d at 1119.
>
> This type of arrogance not only reflects an intellectual detachment from reality, but a self-serving disregard for the purposes for which courts exist.[174]

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172. *Casarotto*, 517 U.S. at 687.

173. *Casarotto*, 886 P.2d at 939–40 (Trieweiler, J., concurring).

174. *See id*. at 940.

Although some would consider Justice Trieweiler's comments as judicial hostility, one could reasonably conclude that the comments are a rational display of the frustration that some state court judges have with the FAA's preemption of state public policy through an expansive interpretation of Section 2 of the FAA under a Court-created "liberal national policy favoring arbitration"[175] that Congress did not create during its enactment of the FAA, and which the Court, in *Morgan v. Sundance Inc.*,[176] finally recognized does not exist.

At the end of the day, Justice Trieweiler had some support for his conclusion that the Court misinterpreted the FAA; indeed, at one time, three of the Court's Justices opined that *Southland* was a misinterpretation of the FAA.[177] Some will conclude that some state courts' decisions are hostile to the Court's FAA precedent, while others may find that they are a rational effort to support state law policies, in cases of first impression, by giving a narrow interpretation to the FAA and the Court's precedent.

Some of the problem might not be caused by state court judges, but by the Supreme Court due to: (1) its misinterpretation of *Southland* to make Section 2 apply in state courts (as well as in federal courts), and (2) its creation of a "national policy in favor of arbitration"[178] which causes the Court and lower courts to construe ambiguities about the scope of Section 2 in favor of the enforcement of arbitration

175. Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713–14 (2022)

> Over the years, both that rule and its reasoning spread. Circuit after circuit (with just a couple of holdouts) justified adopting a prejudice requirement based on the "liberal national policy favoring arbitration." . . . If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.

For those considering Justice Trieweiler's comments as a judicial hostility, see *supra* note 165 and accompanying text.

176. 142 S. Ct. 1708 (2022).

177. This is shown by Justice O'Connor's concurrence, Justice Scalia's dissent, and Justice Thomas's dissent in Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

178. *Morgan*, 142 S. Ct. at 1713–14.

agreements.[179] As stated above, the Court has only recently acknowledged that there is no federal or national policy in favor of arbitration, but only one in favor of enforcing valid arbitration agreements—an acknowledgement that should lead to fewer instances of the FAA's preemption of state laws.[180]

b. *Alleged Federal Hostility Against Arbitration?*

There are several federal laws that exempt persons from forced arbitration if they choose such exemptions, including prohibitions against forced arbitration agreements regarding residential mortgages,[181] certain disputes involving military personnel,[182] certain bankruptcy proceedings,[183] disputes between manufacturers and dealership franchisees,[184] disputes involving commodity whistleblowers,[185] disputes involving

179. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

180. *See Morgan*, 142 S. Ct. at 1713–14.

181. *See* 15 U.S.C § 1639c(e)(3) ("No residential mortgage loan . . . may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction."); *see also* Lyons v. PNC Bank, 26 F.4th 180, 191 (4th Cir. 2022) (holding that the statute prevents the enforcement of a predispute arbitration agreement in a residential mortgage).

182. *See* 38 U.S.C § 4302(b) (securing the rights and benefits provided to veterans from "any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates" such benefits).

183. *See* 11 U.S.C. § 362(a). Under § 362(a), a bankruptcy judge can stay an arbitration when the arbitration would involve a "core proceeding" of the bankruptcy court. *See also* In re Bethlehem Steel Corp., 390 B.R. 784, 793 (S.D.N.Y. 2008) ("[T]he Court nevertheless has discretion to deny arbitration of these core proceedings and would exercise that discretion to deny the motions to compel arbitration in these cases."); Shana A. Elberg & Jennifer Permesly, *When Arbitration Meets Bankruptcy: Considering Arbitration Options in Wake of a Growing Rise in Corporate Insolvencies*, SKADDEN (Sept. 30, 2020), https://perma.cc/J5K9-9Q2P **(**weighing the effects of *In re Bethlehem* and the bankruptcy code on insolvent companies in the wake of the COVID-19 pandemic).

184. *See* 15 U.S.C. § 1226(a)(2) ("[A]rbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.").

185. *See* 7 U.S.C. § 26(n)(2) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.").

consumers financial products and services,[186] and disputes involving the extension of consumer credit.[187] Additionally, as discussed above, the newly enacted Ending Forced Arbitration Act provides for an exclusion of sexual abuse and sexual harassment claims from forced arbitration.[188] Are these examples of a federal hostility against arbitration?

In these excluded areas, either Congress or a federal agency provided for the exclusion of certain claims from forced arbitration. Certainly, the Court and lower courts would not deem Congress to be hostile against arbitration in these situations—especially given that it is Congress that enacted, and has not abrogated, Section 2 of the FAA. If Congress and federal agencies can find sound public policy reasons to exclude certain disputes from forced arbitration, there is no legitimate reason why states should not be able to do the same in the areas where they deem such exclusions necessary to protect their citizens.

It is time for Congress to reconsider the scope of Section 2 of the FAA, including whether it should either be abrogated or amended to give states more authority to regulate the types of clams that can and cannot be subject to forced arbitration agreements. The initial fear of a hostility against arbitration, if it currently exists, is a hostility of both the federal government and state governments. On the federal level, one could allege that it exists by Congress's and federal agencies' exclusion of certain claims from arbitration; and, on the state level, one could allege that it exists because of some states' attempts to exclude certain claims from arbitration and some state courts' narrow interpretation of the FAA to do the same.

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186. *See* 12 U.S.C. § 5567(d)(1) ("[T]he rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement.").

187. *See* 10 U.S.C. § 987(e)(3) ("[N]o agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.").

188. *See* 9 U.S.C. § 402(a) ("[N]o predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute.").

Instead of labeling such exclusions as hostilities against arbitration, however, it is best to call them a federal and state recognition that some claims are not appropriate for arbitration.

c. *Tenth Amendment vs. Reduction of Courts' Caseloads*

As stated above, in considering whether to abrogate Section 2 or to amend it to give states more authority to determine which claims should be excluded from forced arbitration, Congress should, in addition to the above-discussed federalism issue, consider whether some type of efficiency argument overrides any federalism concerns. One possible efficiency argument is that forced arbitration reduces federal courts' caseloads and thereby creates a more efficient and workable federal judicial system—a theme that is consistent with a belief that the Court's, and perhaps Congress's, objective in vigorously enforcing Section 2 of the FAA is to reduce the number of lawsuits in federal courts[189] and the overall cost of operating federal courts.[190]

However, if a reduction in the number of federal lawsuits is the primary motivation for Section 2, and the Supreme Court's broad interpretation of it—as indicated by Justice Berger, the drafter of the Court's *Southland* opinion[191]—then it presents a substantial issue regarding federalism and the Tenth Amendment's prohibition against an impermissible federal intrusion on states' sovereignty. The Court has never specifically addressed the Tenth Amendment's impact on the FAA. Instead, the Court's precedent presents the issue as a Supremacy Clause and Commerce Clause issue.[192] For example,

189. *See, e.g.*, Paul R. Verkuil, Opinion, *The Supreme Court's Doublethink on Arbitration and Administration*, THE REGUL. REV., (Apr. 27, 2020), https://perma.cc/4CVY-KEAA ("The *Southland* and *Chevron* doctrines have one thing in common: a desire to reduce the judicial workload by resolving cases in alternative venues.").

190. *See id.* ("Favoring arbitration because of its effect on judicial workload has long been appealing to overcrowded courts. Unlike with administrative actions, judicial dockets are permanently reduced once putative cases are sent to arbitrators or, as happens more now, simply disappear.").

191. *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

192. *See id.* at 10–14 (striking down the California statute as a violation of the Supremacy Clause, which conflicted with the FAA passed under Congress' Commerce Clause powers).

the Court in *Southland* held that Congress enacted the FAA under its Commerce Clause authority and that it is therefore substantive law that is applicable in both state courts and federal courts; and that state courts must, under the Supremacy Clause, apply Section 2 in state court proceedings.[193] It is now time, though, for the Court and Congress to specifically evaluate whether the FAA is unconstitutional under the Tenth Amendment. And there are some controlling Tenth Amendment principles that should govern this analysis.

First, under the Court's precedent in *Printz v. United States*,[194] Congress, even when exercising it Commerce Clause authority, cannot impermissibly intrude on a state's sovereignty. Therefore, the *Printz* Court held that Congress could not impose a requirement that states enforce the federal Brady background-check law because "the Federal Government may not compel the States to enact or administer a federal regulatory program. . . . The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule."[195] The Court based *Printz* on the fact that states are separate sovereign entities.[196]

To resolve the Tenth Amendment's impact on the FAA, there are several important issues that Congress (and the Court) must decide. First, under *Printz,* states have sovereign authority to operate independent judicial systems.[197] Congress probably does not have the authority to establish the procedural rules that state courts must apply when resolving civil lawsuits and disputes, especially those based on state law, such as

193. *See id.* at 16.

194. 521 U.S. 898 (1997).

195. *Id*. at 933.

196. *See id*. at 935.

197. A judicial system is an indispensable part of a state being a state. *See* Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: Warning Not Heeded*, 64 TENN. L. REV. 665, 679 (1977)

> Rather, the constitutional failings of the current legislation derive from a scheme that imposes upon sovereign state judicial systems "legislative regulation" of court procedures and processes. This was the very notion that so troubled Hamilton when he argued against the federal imposition of a uniform guarantee of the right to trial by jury in all civil cases.

whether the parties are entitled to a jury trial.[198] Therefore, if the FAA is a procedural rule, it is probably an unconstitutional intrusion on state sovereignty because it establishes the procedures that states must use when interpreting arbitration agreements, and it also mandates that states must enforce predispute arbitration agreements.[199]

Second, even if the FAA is a substantive rule, as the Court in *Southland* improperly held, there are limits to how far Congress can go in using its Commerce Clause power to impose a federal policy that states must enforce mandatory or forced arbitration agreements. Just like in *Printz*, where Congress could not use its Commerce Clause authority to require background checks for firearm purchases by mandating that state law enforcement officers conduct the background checks, Congress should not have the authority to use its Commerce Clause power to enforce mandatory or forced arbitration agreements for the purpose of reducing federal courts' caseloads by mandating state courts' enforcement of forced arbitration agreements when such agreements are contrary to state laws that regulate states' judicial systems.

But it is doubtful that the Supreme Court will find that the FAA violates the Tenth Amendment because the Court tends to

198. Only in very limited situation has the Court allowed federal law to supplant state procedural rules. *See, e.g.*, Dice v. Akron, 342 U.S. 359, 363 (1952) (holding that a state had to give an employee a jury trial for a Federal Employers' Liability Act claim involving negligence and fraud issues); Jinks v. Richland Cnty., 538 U.S. 456, 464–65 (2003) (holding that a federal supplemental jurisdiction rule preempted a state's statute of limitations despite a *Printz* Tenth Amendment argument). However, it appears that the Court has not established the limits to which Congress can regulate a state court's civil procedures and still be constitutional under the Tenth Amendment. *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1, 46 (1999)

> If the Framers felt that a judiciary was critical to the sovereignty of the federal government, it is not surprising that they also assumed that courts would be critical to the sovereignty of the states. As was noted before, the Framers assumed that the states would keep their courts and that those courts would retain all of their preexisting jurisdiction, except to the extent that such jurisdiction had been exclusively delegated to the federal government.

As a part of her Tenth Amendment argument, Parmet also discussed Justice O'Connor's comments in *Southland* regarding the FAA being a procedural law and that it was not supposed to apply to state court proceeding. *See id*. at 47.

199. *See supra* note 194–196 and accompanying text.

apply a rational-basis-like, permissive analysis when considering such issues. Several of its opinions are relevant to this analysis. In *Jinks v. Richard County*,[200] the Court held that the federal district court's supplemental jurisdiction statute, 28 U.S.C. § 1367(d), preempted South Carolina's two-year statute of limitations for state law claims.[201] The district court had dismissed some state law claims that the plaintiff filed along with other claims over which the court had independent federal jurisdiction, which then required that the plaintiff file the claims in state court, after which the state court judge dismissed the claims because plaintiff filed them after the two-year state statute of limitations period had passed.[202] On appeal, however, the U.S. Supreme Court held that Section 1367(d), which is basically a federal rule of civil procedure, preempted the state's statute of limitations.[203] Preemption occurred because Section 1367(d) was needed for the orderly operation of federal courts, including their supplemental jurisdiction.[204] The Court therefore deemed Section 1367(d) to be a substantive rule which mandated the preemption of the state's statute of limitations,[205] despite the defendant's alleging that the Tenth Amendment and *Printz* prevented the application of Section 1367(d).[206]

Jinks established two rules that are arguably applicable to whether the Tenth Amendment preempts the application of Section 2 to a state law: (1) is the state law a procedural law or a substantive law—with the implication that, if the state law is a procedural law, then the federal law will not preempted it; but, if it is a substantive law, it is more likely that the relevant federal law will preempt it; and (2) is the disputed federal law provision necessary and proper for the operation of the federal

200. 538 U.S. 456 (2003).

201. *Id*. at 463–65.

202. *Id*. at 460.

203. *Id*. at 463–65.

204. *See id*. (concluding that Section 1367(d) promoted the fair and efficient operation of the courts by creating a clear tolling rule but not tolling state-law claims pending in federal courts).

205. *See id*. at 465 ("[I]f the substance-procedure dichotomy posited by respondent is valid—the tolling of limitations periods falls on the 'substantive' side of the line.").

206. *See id*. at 464 (assessing and rejecting respondent's argument that the tolling rule was not "proper" under Congress's Article I powers).

statutory scheme?[207] Additionally, it appears that the substantive and procedural distinction is flexible, and that a state law is deemed procedural or substantive based on the impact that it has on the operation of the relevant federal law.[208] Hence, the Court in *Jinks* deemed the state statute of limitations to be a substantive law because it would have prevented the operation of the federal supplemental jurisdiction statute and the statute's efforts to allow plaintiffs to initially join state claims with federal claims and to subsequently refile them in state court if the federal district judge decides to dismiss the state law claims by refusing to exercise supplemental jurisdiction over them.[209] It seems that the Court can therefore deem almost any state law to be substantive, even one that has only a *de minimis* impact on the relevant federal law or rule, and then find that the federal law or rule preempts the state law.

Applying *Jinks* to the FAA, the Court would probably find that Section 2 establishes the validity of predispute mandatory arbitration agreements, and that any state law that would prevent the enforcement of such agreements would be a "substantive" state law (labeled as such solely because of the state law's impact on Section 2's allowing of predispute forced arbitration agreements).[210] The Court would also find that Section 2, which is an alleged "substantive" provision, would preempt the state law either because of a direct conflict with the state law or because the state law frustrates the operation of the federal law which seeks to enforce predispute, forced arbitration agreements—when the state law seeks to not enforce such agreements.[211] It also appears that the level of frustration can be *de minimis* and still warrant preemption.[212] The above-stated analysis would probably be consistent with a *Printz* Tenth Amendment analysis, especially given that the Court specifically addressed the Tenth Amendment issue as a part of

207. *See id*. at 463–65.
208. *Id*. at 464–65.
209. *Id.* at 463–65.
210. *See id*. 464–65.
211. *Id.*
212. *Id*. at 463–65.

its finding that Section 1367(d) preempted the state's statute of limitations.[213]

The second important Court precedent for the Tenth Amendment analysis is *Dice v. Akron, C & Y. Co.*,[214] where the Court held that, in the pending Federal Employers' Liability Act's ("FELA") claim, a state judge had to provide for a jury trial on the issues of negligence and of fraud in the execution of a release because such was the federal preference.[215]

Despite a Tenth Amendment argument, a federal rule regarding the right to a jury trial preempted a conflicting state law whether it was called a "substantive rule" or a "procedural rule" because the state law conflicted with, or frustrated, the operation of the federal law or rule.[216] This appears to be the rule that the Court will apply to future analysis, including an analysis involving the Tenth Amendment's impact on the FAA.

Therefore, one cannot expect any relief if the Court were to perform a Tenth Amendment analysis of the FAA because it has a very permissive analysis where only a *de minimis* impact of the state law on the federal law will suffice to establish a preemption of the state law. Furthermore, the Court appears to disregard the distinction between a procedural law and a substantive law and instead resolve the issue by determining whether the state law conflicts with or frustrates the enforcement of a federal law.

This is the reason Congress must reassert itself in this analysis by determining whether its initial intent was, and present intent is, that the FAA be applicable in state courts.[217]

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213. *See id*. at 464.

214. 342 U.S. 359 (1952).

215. *Id*. at 361.

216. Other courts have applied this rule to preempt a state rule that would have awarded double costs to the winner when the federal rules did not provide for such. *See* Boyd v. BNSF, 874 N.W.2d 234, 241–42 (Minn. 2016). Courts also applied this rule when state law provided for prejudgment interest when FELA did not. *See, e.g.*, Monessen v. Morgan, 486 U.S. 330, 336–39 (1988).

217. Even if Congress determines that the FAA is a procedural law that is applicable only in federal courts, Congress should still be vigilant that the Court does not use the *Jinks* opinion to reclassify both the FAA, and the relevant state law provision, as substantive laws for the limited and flexible purpose of determining the Tenth Amendment issue. This is because the Court will mostly use a *de minimis* test to resolve the Tenth Amendment issue and because it will find a "procedural preemption" of a state law or rule of

d. *Economic Efficiency*

This Author is not aware of any study that shows the overall economic impact that would occur if Congress were to abrogate or amend Section 2 of the FAA to allow more state law control over arbitration, including the authority to exclude certain state law claims from forced arbitration. However, the Congressional Budget Office's (CBO) score of the FAIR Act of 2022 recognized that there is substantial uncertainty about the number of additional lawsuits that litigants might file in federal courts if the Act's exclusion of employment, consumer, antitrust, and civil rights disputes occurs.[218] It nonetheless estimated that from 2022 to 2031, there would be an increase in court revenue—from an increase in filing fees from additional lawsuits—of $2 million and that there would be a $2 million increase in "direct spending" for the same time period.[219] Therefore, as far as estimated cost is concerned, there appears to be a wash.[220]

It is important to note, however, that the CBO score of the FAIR Act does not disclose an estimate of how much individual judges' dockets would increase, nor does it discuss the amount of delay time that would occur to each litigant's lawsuit if there is any delay from an increased number of cases that judges might experience if Congress had passed the FAIR Act.[221]

Some have relied on a recent economic study by Micronomics that compares the time to resolution of lawsuits in federal courts in ten states to the time to resolution of cases that

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procedure if it frustrates a federal procedural or jurisdictional rule, as it did for Section 1367(d) in *Jinks*.

218. CBO'S ESTIMATE OF THE STATUTORY PAY-AS-YOU-GO EFFECTS OF H.R. 963, THE FAIR ACT OF 2022, AS POSTED ON THE WEBSITE OF THE CLERK OF THE HOUSE ON MARCH 14, 2022 (2022), https://perma.cc/Y9AC-YXFF (PDF).

219. *Id*.

220. Research did not disclose a similar CBO score estimate of the Ending Forced Arbitration Act that excludes sexual assault and sexual abuse claims from forced arbitration. *See H.R. 4445—Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, CONGRESS.GOV (2021), https://perma.cc/R295-2FU6 (indicating no CBO cost estimate).

221. *See supra* note 218 and accompanying text.

use arbitration.[222] The researchers concluded that it took cases in federal courts "12 months longer to get to trial than cases adjudicated by arbitration (24.2 months vs 11.6 months)."[223] And, given that some defendants must hold money in reserve pending the conclusion of a lawsuit, the researchers concluded that "direct losses associated with *additional time to trial* required for district court cases as compared with AAA arbitration were approximately $10.9–$13.6 billion between 2011 and 2015 (i.e., more than $180 million per month)."[224]

However, in a recent empirical analysis of 40,775 arbitration cases from the AAA, JAMS, ADR Services, and Kaiser, other scholars—despite finding that arbitration was faster than court litigation[225]—cautioned that this might "reflect differences in the nature or quality of claims that are subject to forced arbitration clauses" and that "it would be unwise to use arbitration-to-litigation comparisons as the springboard for bold policy prescriptions."[226]

The Micronomics study warrants several observations. Any delay in resolution of lawsuits pending in federal district courts is not inevitable because those who want to speed up the litigation of their lawsuits are not helpless.[227] They can use other dispute resolution processes to resolve their cases in a more expeditious manner and thereby reap the cost savings associated with using those processes.[228] Those processes include negotiation, mediation, early neutral evaluation, and

222. *See* ROY WEINSTEIN ET AL., EFFICIENCY AND ECONOMIC BENEFITS OF DISPUTE RESOLUTION THROUGH ARBITRATION COMPARED WITH U.S. DISTRICT COURT PROCEEDING 2–4 (2017), https://perma.cc/C79S-F64G (PDF).

223. *Id.* at 2.

224. *Id*. at 4 (emphasis in original); *see also* AMERICAN ARBITRATION ASSOCIATION, AMERICAN ARBITRATION ASSOCIATION RELEASES STUDY MEASURING THE COST TO BUSINESS OF DELAYS IN DISPUTE RESOLUTION (2017), https://perma.cc/M6B3-6QH2 (PDF).

225. *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 51 (2019).

226. *Id*. at 56–57.

227. *See* WEINSTEIN ET AL.*, supra* note 222, at 3–4.

228. *See generally, e.g.*, John Lande, *Charting a Middle Course for Court-Connected Mediation*, 2022 J. DISP. RESOL. 63 (2022); SARAH VANDER VEEN, A CASE FOR MEDIATION: THE COST-EFFECTIVENESS OF CIVIL, FAMILY, AND WORKPLACE MEDIATION (2014), https://perma.cc/D5Q7-JHMR (PDF).

perhaps even nonbinding or court-annexed arbitration.[229] Therefore, corporations and other entities—who are allegedly suffering billions of dollars of direct and indirect cost—probably should prod their attorneys to be more efficient and effective in conducting discovery and motion practice, and in using other ADR or litigation-related processes to more timely resolve the lawsuits in which they are involved.[230]

Despite the Micronomics study's cost estimates, some believe that arbitration does not offer the cost savings and efficiencies that proponents contend it once provided in individual cases because it has become more like regular litigation and trial.[231] And, at least one scholar opines that, for defendants, arbitration might not reduce the overall cost of resolving disputes because—despite that in consumer and employment disputes it appears that plaintiffs obtain less money in arbitration disputes—plaintiffs win more frequently in these types of arbitrations.[232] Therefore, the defendants' total payout might be more for arbitration than in trial court litigation.

In any event, Congress—with the aid of the CBO, other experts, and researchers—should conduct a study of the cost impact of moving more cases to the litigation/trial court system. Such research will be important to any argument that Congress should or should not abrogate both Section 2 of the FAA and, implicitly, the Court's broad interpretation of the FAA.

Even if Section 2 offers some cost savings and efficiencies for the federal judicial system, this Article still asserts the position that Congress should return issues involving the enforcement of forced or mandatory arbitration agreements to the states, which can then exclude or not exclude mandatory arbitration agreements based on each state's public policy

229. *See* JUDITH S. OGDEN & NIKKI M. FINLAY, STRATEGIES FOR CHOOSING A DISPUTE RESOLUTION METHOD 3–5, https://perma.cc/52KU-9TE2 (PDF).

230. *See generally* Bart J. Eagle, *Win the Battle, Win the War: Cost-Effective Dispute Resolution for Small and Midsize Companies*, 32 WESTLAW J. EMP. 1 (2018).

231. Judy Greenwald, *Arbitration Ban Expected to Increase Harassment of Dispute Costs*, BUS. INS. (Mar. 2022), https://perma.cc/MS2A-KNWE.

232. *See* Karl Fisher, *Changing Mandatory Arbitration to Optional Arbitration: A Better Business Decision*, 54 CREIGHTON L. REV. 497, 516–17 (2021) (discussing empirical studies regarding the effectiveness of arbitration for businesses that employ mandatory arbitration mechanisms).

concerns.[233] Those states that want to enforce mandatory or forced arbitration agreements can do so if such agreements fit their public policy needs, while other states might not enforce such agreements, but instead may develop new and different ways to encourage or incentivize the voluntary use of arbitration.[234]

Despite any cost savings and efficiencies that the FAA might cause, there are other factors that should be considered. For example, giving citizens a freedom of choice between a jury trial, arbitration, or another ADR process; having a fairer resolution of claims without "repeat player" bias and other types of bias that exist in arbitration; allowing transparency by having more public trials of lawsuits (which was one of the motivations for Congress's enactment of the Ending Forced Arbitration Act);[235] and giving states the authority to determine their own public policy concerns regarding which claims should be subject to forced or mandatory arbitration are important considerations that might outweigh any alleged cost savings and efficiencies.[236] Congress apparently found some of these factors important and outcome determinant when it enacted the Ending Forced Arbitration Act to exclude sexual assault and sexual harassment claims from forced arbitration; when the House passed the FAIR Act of 2022 that would further exclude disputes involving employment, consumer, antitrust, and civil rights; and when Congress passed several other, above-discussed laws that exclude certain types of disputes from

233. *See* Chandrasekher & Horton, *supra* note 225, at 10 ("Accordingly, rather than trying to exempt claims from the extrajudicial forum, the Article suggests that state lawmakers create rewards for plaintiffs' lawyers *to arbitrate*. Specifically, jurisdictions should create a statutory 'arbitration multiplier': an extra bounty for winning a case in arbitration." (emphasis in original)).

234. *See id*. It may be that a continuation of the current broad application and interpretation of Section 2 of the FAA leads to a stifling of innovation and creativity regarding the use of arbitration. In the absence of forced or mandatory arbitration under a broad interpretation of Section 2, states, providers of arbitrators, corporations, defense attorneys, and plaintiffs' attorneys may develop new and better ways to use voluntary arbitration.

235. *See supra* note 52 and accompanying text.

236. Despite any supposed cost effectiveness of arbitration and other ADR processes, there is still a need for court litigation. *See* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities*, 96 N.C. L. REV. 605, 678 (2018).

forced or mandatory arbitration.[237] Out of respect for states' sovereignty, there is no good reason why states should not be allowed to use their own public policy concerns—just as the federal government has used its concerns—to determine the types of claims that they believe should be excluded from forced arbitration.[238]

Finally, it is doubtful that Congress's abrogating the forced or mandatory arbitration aspect of Section 2 will mean that parties will stop using arbitration. The AAA, JAMS, CPR, and other providers of arbitration services make a great deal of money providing such services,[239] and they will probably engage in any necessary innovations to continue providing their services—hopefully by addressing some of the shortcomings of arbitration, as they have tried to do by offering more diversity in their pools of arbitrators.[240]

B. *Did Congress Intend for the FAA to Apply to Adhesion Contracts?*

Adhesion contracts generally offer some benefits to both sellers and buyers because it may be impracticable to individualize the negotiation of standard, boiler-plate contract terms for each commercial transaction.[241]

However, there is a current discussion as to whether Congress intended the FAA to apply to adhesion arbitration contracts.[242] There is relevant legislative history, including a

237. *See supra* notes 181–188 accompanying text.

238. *See* Chandrasekher & Horton, *supra* note 225, at 61–64 (noting that state legislatures are in the best position to incentivize arbitration without encouraging "shakedown lawsuits").

239. For example, in 2021, AAA earned $127,375,000 in administration fees for arbitrations and, after operating expenses, it achieved a $15,381,000 net operating income. AM. ARB. ASS'N, AAA ANNUAL REPORT AND CONSOLIDATED FINANCIAL STATEMENTS AND INDEPENDENT AUDITOR'S REPORT DECEMBER 31, 2021 AND 2020, 35–36 (2021), https://perma.cc/U7HB-AH2H (PDF). It also had $432,148,000 in total assets. *Id.*

240. *See* Sarah Rudolph Cole, *Picking Arbitrators, and the "Pipeline Problem' in Achieving Conflict Resolution Diversity*, 39 ALTS. TO HIGH COST LITIG. 155, 155–56 (2021).

241. *See* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 (2002).

242. *See* Pittman, *supra* note 11, at 830 ("The Court's textualist plain meaning interpretation of section 2 leaves open the legitimate challenge that

colloquy between Senators Walsh and Pratt, that Congress might have intended that the FAA apply only to contracts between merchants who enter into voluntary arbitration agreements, and that it not be applicable to forced adhesion contracts that the weaker party must accept on a take-it-or-leave-it basis.[243]

Interestingly, the Judiciary Committee's Report in support of the Ending Force Arbitration Act cited portions of the FAA's legislative history and concluded that "by imposing arbitration on a 'take-it-or-leave-it' basis, large companies have largely eviscerated the congressional intent of arbitration as a voluntary process agreed to between parties of equal bargaining powers."[244]

In another portion of the Report, the Judiciary Committee cited a Supreme Court opinion for the conclusion that "it was clear from congressional debate on the [FAA] that Congress did not intend for parties with unequal bargaining power to be forced to arbitrate claims on a 'take-it-or-leave-it basis.'"[245]

This debate is still relevant. Even if Congress had enacted the FAIR Act—and its exclusion of claims from forced arbitration joined the Ending Forced Arbitration Act's exclusion of sexual abuse and sexual harassment claims from forced arbitration—only sexual abuse and sexual harassment, employment, consumer, antitrust, and civil rights disputes would have been excluded from forced arbitration, and a few other types of disputes as referenced above.[246] In other dispute subject areas there are and will continue to be adhesion arbitration agreements that will prevent litigants from having their day in court.[247]

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it has progressively expanded its interpretation of the FAA's coverage to further the Court's own self-interested goal of reducing the number of cases pending in the federal courts.").

243. *See Id*. ("[W]hen called upon to do so, the Court—which has only implicitly held that the FAA is applicable to all contracts—should reconsider whether the FAA is applicable only to 'commercial contracts' between merchants and only to voluntary non-adhesion contracts.").

244. H.R. REP. NO. 117-234, at 8 (2022).

245. *Id*. at 7 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967)).

246. *See supra* notes 181–188 and accompanying text.

247. Section 2 of the FAA will still be applicable to other types of disputes that are subject to forced or mandatory arbitration agreements, as it currently

Therefore, to rebalance its authority against the Court's broad enforcement of adhesion arbitration agreements, Congress should reexamine whether the FAA should apply to adhesion arbitration agreements. Agreements that bind persons to forced arbitration, when they may not want to be bound, are now inconsistent with the new Ending Forced Arbitration Act, which gives a freedom of choice to litigants whose disputes fall within the scope of that law.[248] Litigants with such claims have a choice of whether they submit to forced arbitration or seek another means of resolving their disputes.[249] If these covered litigants are entitled to a freedom of choice, there is no legitimate reason why other litigants should not be given that same freedom.

In other words, Congress should recognize that many persons sign arbitration agreements without reading them.[250] And even if they do read them, they may not understand that they are waiving their right to a jury trial.[251] Obviously, in many of these situations, there would have been no meeting of the parties' minds as to whether the weaker party actually agreed to the terms and conditions of the arbitration agreement.[252] Further, even if the weaker party did understand the legal implications of an arbitration agreement, that party (mostly consumers/plaintiffs) would not have had a freedom of choice

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is. *See generally* 9 U.S.C. §§ 1–14; Southland Corp. v. Keating, 465 U.S. 1 (1984).

248. *See* 9 U.S.C. § 402; Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. § 2 (2022).

249. *See EEOC Chair Applauds Passage of Ending Forced Arbitration Act*, EEOC (Mar. 3, 2022), https://perma.cc/PJS3-N2EY (commending the Ending Forced Arbitration Act for "allow[ing] workers to choose how to pursue their cases after sexual assault or harassment has occurred"); Galen Sherwin & Vania Leveilli, *It's Time to End Forced Arbitration*, ACLU (Sept. 20, 2019), https://perma.cc/W7JB-8XJ4 ("[T]he FAIR Act could finally allow workers, consumers, and others to choose how they wanted to pursue their disputes.").

250. *See Mandatory Arbitration Clauses Are Everywhere but Aren't Really That Good for the Consumer*, N.C. CONSUMER COUNCIL (May 29, 2021), https://perma.cc/K9AE-GGNA.

251. *See* Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), https://perma.cc/S48B-XF4X (providing an example of a wronged consumer who unknowingly forfeited their right to bring a claim before the court by signing a website's terms of use).

252. *See id.*

because she, he, or they accepted the adhesion arbitration agreement on a take-it-or-leave-it basis.[253]

Perhaps adhesion terms and conditions in an agreement are good for some contractual relationships.[254] However, Congress should treat an adhesion contractual waiver of one's right to a jury trial differently[255] because, in the federal judicial system, the right to a civil jury trial is rooted in the Seventh Amendment of the U.S. Constitution.[256] As a matter of fact, Congress should consider the importance of the right to a jury trial in the civil context more in line with the importance of the right to a jury trial in the criminal context.[257] In the criminal context, under the Sixth Amendment, a waiver of the right to a jury trial must be "voluntary, knowing, intelligent, and intentional."[258] Congress should at least consider this standard when deciding whether Section 2 of the FAA should bind parties to adhesion predispute, forced arbitration agreements.[259]

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253. *See id.*

254. *See* Allison E. McClure, *The Professional Presumption: Do Professional Employees Really Have Equal Bargaining Power When They Enter into Employment-Related Adhesion Contracts?*, 74 U. CIN. L. REV. 1497, 1500–01 (2006)

> While finding that society benefits from the economic efficiency of adhesion contracts, Professor Kessler argued that these contracts are generally used by parties with "strong bargaining power" and that the "weaker party" cannot "shop around for better terms, either because the author of the standard contract ha[s] a monopoly" or because all of its competitors use similar terms.

255. Under the Court's current FAA jurisprudence, Section 2 would probably preempt any effort by litigants to treat the waiver of an arbitration agreement differently. *See* Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

256. *See* U.S. CONST. amend. VII ("In suits at common law . . . the right of trial by jury shall be preserved.").

257. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and the district wherein the crime shall have been committed.").

258. *See* Wayne Klomp, Note, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L.J. 545, 550 (2006) ("Courts are hesitant to enforce contractual waivers of fundamental rights unless they are voluntary, knowing, intelligent and intentional or some derivation thereof.").

259. *See id.* at 550 n.45 ("Although the Supreme Court has never expressly extended the criminal waiver standard of knowing, voluntary, and intelligent to civil matters, lower courts have done so consistently based on dicta in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185–86 (1972)."). *See generally*

Additionally, Congress should recognize that jury trials are an important aspect of democracy,[260] and it should promote that democracy and not try to walk away from it by allowing Section 2 of the FAA to be used to force adhesion arbitration agreements on weaker persons when they do not want arbitration. This argument is timely because of discussions regarding the future of this country's democracy.[261] The attack on the Capitol on January 6, 2021, and the current divisions in this country, have caused substantial concerns about democracy and the degree to which it will exist in the future.[262] Therefore, anything that Congress can do to promote democracy in all of its various aspects should be done, including promoting one's right to a jury trial.

Because of the importance of the right to a jury trial, Congress would be justified in excluding adhesion arbitration agreements from enforcement under Section 2 of the FAA. The only way that a corporation or other party should be able to enforce an arbitration agreement is to show that it was not an adhesion contract. This would mean that both parties had bargaining power and there was a possibility that the weaker party could have purchased the consumer good, accepted the job, or entered into the contractual arrangement without having to accept the arbitration agreement.[263]

It is encouraging and important that the Judiciary Committee's *Report for the Ending Forced Arbitration Act* concluded that Congress's intent was that the FAA not apply to

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Amanda R. Szuch, *Reconsidering Contractual Waivers of the Right to a Jury Trial in Federal Courts*, 79 U. CIN. L. REV. 435 (2010) (discussing the validity of contractual waivers of the right to jury trials at both the state and federal levels).

260. *Cf.* Daniel S. Harawa, *The False Promise of Peña-Rodriguez*, 109 CALIF. L. REV. 2121, 2151 (2021) ("And, for the past few decades, the Court has claimed to be steadfast in its commitment to guard against race-based discrimination in the jury system because the jury is central to our democracy.").

261. *See* David Leonhardt, *'A Crisis Coming': The Twin Threats to American Democracy*, N.Y. TIMES (Sept. 17, 2022), https://perma.cc/KH2U-RBLK (last updated Sept. 21, 2022).

262. *See* Joan E. Greve, *Historians Mark 6 January with Urgent Warning on Threats to US Democracy*, THE GUARDIAN (Jan. 6, 2022, 4:43 PM), https://perma.cc/CT9C-PYX5.

263. *See* Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. REGUL. 313, 346 (2011).

adhesion contracts. Now, Congress should apply that conclusion by extending the exclusion of sexual abuse and sexual harassment claims to the exclusion of all types of adhesion arbitration agreements.[264]

C. *Did Congress Intend for the FAA to Apply to Federal Statutory Claims?*

It seems that some members of Congress recognize that federal statutory claims are different. The Judicial Committee *Report for the Ending Forced Arbitration Act* states:

> As a result of the decline of enforcement of state and federal statutory protections, forced arbitration makes it more likely that corporate harms and abuse will go unchallenged. As Professor Myriam Gilles testified last Congress, many companies' arbitration clauses specifically identify federal protections that arbitration makes unenforceable in court, such as rights under the Civil Rights Act of 1964 and the Family Medical Leave Act. In this respect, as Professor Gilles observes, "forced arbitration is not an alternative regime for resolving claims, it is a means of suppressing legal claims altogether." Judge William G. Young, who was appointed by President Ronald Reagan, likewise stated that the proliferation of forced arbitration clauses means that "business has a good chance of opting out of the legal system altogether and misbehaving without reproach." Deepak Gupta, a leading public interest attorney, similarly testified

264. Consistent with the above argument is that Congress should also exclude the enforcement of adhesion waivers of class action and other waivers that prevent plaintiffs from joining their claims—including class actions in regular lawsuits and in arbitrations. Both the Ending Forced Arbitration Act and the FAIR Act of 2022 exclude waivers of class actions, *see* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 § 2(a) (codified at 9 U.S.C. § 402); Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. § 2 (2022), and that exclusion should apply to other plaintiffs whether their claims are in trial court litigation or in arbitration. It is reasonably clear that class action waivers prevent plaintiffs with small claims from effectively vindicating their claims because it is too costly to bring such small claims individually and attorneys are unwilling to represent such small claims unless aggregated into a class action. *See* Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 IND. L.J. 1315, 1324–25 (2022).

> that forced arbitration has undermined the enforcement of statutory rights.[265]

It is encouraging that Congress relied on this testimony in the Judiciary Committee's Report, which shows that there is something different about federal statutory rights and claims. The FAA's applicability to such rights and claims is still an issue because the Ending Forced Arbitration Act and the FAIR Act do not exclude all statutory claims from arbitration.[266] This Article asserts that Congress should be concerned about the arbitration of statutory claims because: (1) federal statutes create public policies in areas that Congress believes are important enough to enact statutes; (2) these statutes tend to be complex and require substantial interpretation of the statutory language and the statutes' applicability to existing and future situations; (3) the statutes give notice to similarly situated persons of what is and is not permissible; (4) and the statutes frequently offer protections in important areas such as federal securities laws, environmental protection laws, antitrust laws, and a host of other important areas.[267] Additionally, many of these federal statutes normally require some type of agency action and the creation of federal regulations that need interpretation, as the governing statutes may need interpretation.[268] Normally it takes a long time to develop the law governing a federal statute, requiring years of judicial interpretation of the statute and the underlying federal regulations.[269] It is very important that the interpretation of the statutes and the regulations be as accurate as possible as these interpretations will provide guidance to

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265. H.R. REP. NO. 117-234, at 5–6 (2022).

266. *See supra* note 237 and accompanying text.

267. *See generally* Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173 (1998).

268. *See generally* JARED P. COLE, CONG. RSCH. SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION (2016).

269. One needs to look no further than the history of the Court's and lower courts' interpretation of the FAA, from 1925 to now—and the ink that courts and scholars have spent discussing the FAA—to see how long it takes to interpret and understand the full implications and applications that the FAA has on modern disputes. *See generally* Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History Symposium*, 2016 J. DISP. RESOL. 115 (2016).

affected persons and industries that may either save or endanger lives and property.[270]

Given the importance of accurate statutory interpretation as a statute is applied to new and different situations, it is vital that the decisionmakers—judges, juries, or arbitrators—do a credible job interpreting and applying the statute and its regulations. Initially, the Court in *Wilko v. Swan*,[271] believed that arbitrators were not competent to interpret important federal statutes, such as the Securities and Exchange Act, because they had no expertise in interpreting the statute and because of limited procedural protections, including limited opportunities for discovery.[272] However, as the use of arbitration increased and courts became more comfortable with its usage in the resolution of many different types of disputes, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*[273] established a new standard for the arbitration of a federal statutory claim. The statutory claim would be subject to arbitration unless the opponent of arbitration showed a congressional intent against arbitration that appeared in the statute's text, legislative history, or the facts showed an "inherent conflict" exists between arbitration and the statute's "underlying purposes."[274]

Subsequently, the Court, in *Epic Systems Corp. v. Lewis*,[275] held that the National Labor Relations Act,[276] which provides for certain "concerted activities for the purpose of collective bargaining or other mutual aid or protection,"[277] did not exclude or prevent the arbitration of employees' Fair Labor Standards Act claims because "it does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand."[278]

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270. *See generally* Brian G. Slocum, *Big Data and Accuracy in Statutory Interpretation*, 86 BROOK. L. REV. 357 (2021).

271. 346 U.S. 427 (1953).

272. *See id.* at 435–38.

273. 500 U.S. 20 (1991).

274. *Id.* at 26.

275. 138 S. Ct. 1612 (2018).

276. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended in scattered sections of 29 U.S.C.).

277. *Id.*

278. *Epic Sys. Corp.*, 138 S. Ct. at 1624.

The Court also established that it would try to reconcile a statute with the FAA so that both can be enforced, and it created a presumption that disfavors the exclusion of statutory claims by implication.[279] The Court, as examples of the proper way for Congress to exclude a statutory claim from arbitration, cited to several federal statutes where Congress excluded forced arbitration, which seems to indicate that an exclusion must contain specific statutory language that Congress intended to exclude arbitration.[280]

Congress previously excluded some statutory claims from arbitration on a case-by-case basis.[281] But perhaps there are reasons why Congress may want to either exclude all federal statutory claims from forced arbitration or impose specific rules for the arbitration of such claims.

Because federal statutory claims are frequently more complex than run-of-the-mill tort or breach of contract claims, Congress should be concerned about whether arbitration will provide the type of discovery opportunities and other procedures that are available when a party litigates a statutory claim in either a federal or a state court. It is significant that the Judiciary Committee's *Report for the Ending Forced Arbitration Act* cited "limit[ed] discovery" as one of arbitration's detriments.[282] Therefore, if Congress decides not to exclude all statutory claims from arbitration, despite the substantial grounds for such exclusion that this Article discusses, it should codify, as a precondition for the arbitration of statutory claims, that the procedures in arbitration shall be substantially the same as they would be if the parties were litigating the claims in a federal or state court so that plaintiffs "effectively may vindicate [their] statutory cause[s] of action in the arbitral forum"—which is the approach that the D.C. Circuit Court of

279. *See id.*

280. *See id.*

281. *See supra* notes 181–187 and accompanying text. If Congress has excluded some statutory claims from arbitration, there is no reason it cannot exclude others. Of course, it is conceivable that some congressional votes may be lost when an exclusion from arbitration is included in a bill.

282. *See* H.R. REP. NO. 117-234, at 5 (2022) (finding that higher cost, limited discovery, lack of formal procedural rules, and limited access to counsel are several attributes of forced arbitration that go against the fundamental principles of fairness and equality in the justice system).

Appeals took in *Cole v. Burns International Security Services*.[283] Congress should specifically impose this "substantially the same procedure" requirement on the arbitration of federal statutory claims because these claims are frequently more complex and they further important public policy interests. Therefore, Congress, courts, and litigants should treat the claims differently than the run-of-the-mill tort, breach of contract, or other state law cases.[284]

Cole is really an adherence to the Court's "effective vindication of rights" rationale that it created in several of its opinions affirming *Gilmer* and the arbitration of statutory claims.[285] But *Cole* does not go far enough to ensure an "effective vindication" of one's rights given the importance of discovery to an effective resolution of civil lawsuits.[286] This is true because, in the civil lawsuit context, most cases settle before trial;[287]

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283. 105 F.3d 1465 (D.C. Cir. 1997). *Id.* at 1482–83 The court in *Cole* stated:

> We believe that all of the factors addressed in *Gilmer* are satisfied here. In particular, we note that the arbitration arrangement (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs *or* any arbitrators' fees or expenses as a condition of access to the arbitration forum. Thus, an employee who is made to use arbitration as a condition of employment *"effectively may vindicate [his or her] statutory cause of action in the arbitral forum*."

Id. at 1482 (quoting *Gilmer*, 500 U.S. at 28) (emphasis added).

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

285. *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., EPI BRIEFING PAPER #414, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 11 (2015) ("The U.S. Supreme Court has long maintained that arbitration is only appropriate when it entails no loss of substantive statutory right.").

286. *See Changing the Rules: Will Limiting the Scope of Civil Discovery Diminish Accountability and Leave Americans Without Access to Justice?: Hearing Before the S. Subcomm. on Bankr. & the Cts.*, 113th Cong. 3 (2013) (statement of Sen. Christopher A. Coons, Chairman, S. Subcomm. on Bankr. & the Cts.) ("Discovery is a critical stage in litigation that allows parties to marshal evidence in support of their claims or defenses and evaluate the claims and defenses of their counterparty.").

287. *See, e.g.*, Theodore Eisenburg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111,

therefore, an "effective vindication" really means that a plaintiff will be effectively vindicated mostly by obtaining the largest monetary or other settlement possible, and the defendant will be effectively vindicated by obtaining the smallest monetary or other settlement possible.[288] This frequently means that attorneys will have to engage in aggressive litigation, including substantial discovery, protracted motion practice, and other delay or aggressive actions in the hopes of obtaining a more advantageous settlement.[289] Many of these actions may be contrary to arbitration's alleged goals of a speedy and cost-effective resolution of the disputes.[290] Therefore, in its traditional form, arbitration may not be capable of giving many, if not most, litigants an "effective vindication" of their rights because of its restrictions on discovery and motion practice.[291] This inadequacy is further enhanced by arbitration's process danger of having arbitrators who are more conservative and who therefore award less money, which further reduces some litigant's possibility of obtaining an "effective vindication" of their rights.[292]

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111 (2009) (finding settlement rates from 2001 through 2002 in the Eastern District of Pennsylvania and the Northern District of Georgia were approximately 66.9%).

288. *See id.* at 113 ("Although objective success in litigation can be difficult to define, if a plaintiff is to recover something in a case seeking monetary relief, and therefore to succeed at least in part by an objective measure, recovery is far more likely to be via settlement than via trial.").

289. *See generally* Hayes Hunt & Thomas M. O'Rourke, *Coercive Litigation Tactics—Playing Hardball in* The Board of Trustees of the University of Illinois v. Micron Technology Inc., FROM THE SIDEBAR (May 6, 2013), https://perma.cc/9AB8-F53R.

290. *See* Hannah N. Myslik, *Attempting—and Failing—to Balance Fairness and Efficiency in the Arbitral System: How Arbitration Institutions Are Defeating the Purpose of Arbitration*, 8 TEX. A&M L. REV. 583, 604 (2021) ("If the AAA continues to promulgate more rules in the name of ensuring fairness or the validity of arbitration agreements, it follows that arbitration proceedings could become—and in many cases often are—just as long and costly as litigation.").

291. *See generally* Janice L. Sperow, *Discovery in Arbitration: Agreement, Plans, and Fairness*, A.B.A. (Apr. 10, 2019), https://perma.cc/5W8X-DYZD.

292. *See* Benjamin K. Riley & Robert H. Bunzel, *Sometimes It Pays to Opt for a Jury in Business Disputes*, A.B.A. (Aug. 28, 2019), https://perma.cc/S4W3-MS23

> Most arbitrators reasonably believe that companies select arbitration to avoid the perceived excesses of juries and see

What this ultimately means is that arbitration, to provide an "effective vindication," must become more like trial court litigation,[293] which may reduce the benefits of arbitration being speedier and more cost effective, thereby making forced or mandatory arbitration even less justified.

And, in the final analysis, if given the nature of litigation—with its motion practice, sustained discovery, procedural, and evidentiary rules—arbitration is a system that does not allow an "effective vindication" of federal statutory rights, then Congress would be justified in totally excluding federal statutory claims from predispute, forced arbitration agreements, especially when it considers other arbitration-process dangers, including a lack of diversity in the pool of arbitrators and in the arbitrators who actually arbitrate disputes.[294] However, if Congress does not exclude federal statutory claims from predispute arbitration agreements, it should give teeth to the "effective vindication" principles by extending one of *Cole*'s "effective vindication" factors ("more than minimal discovery")[295] to include a requirement that, for federal statutory claims, arbitration procedures must allow the full range of discovery and motion practice that exist in trial court litigation.[296]

> arbitration as a more conservative venue for deciding potential disputes. Realistically, sophisticated commercial contracting parties have sought in advance to limit exposure in the event of a business rupture to losses best measured by their contract. The Uniform Commercial Code is replete with such limitations. Arbitrators in contractual business disputes are thus less susceptible to emotive arguments designed to capture big dollars or to find intentional misconduct. Instead, they decide cases from the risk-averse perspective that the parties before them contracted for.

293. This may be the reason why some complain that arbitration is becoming more protracted and similar to regular court litigation.

294. *See infra* notes 297–329 and accompanying text.

295. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997).

296. Perhaps in a truly voluntary arbitration agreement, with parties negotiating in an arm-length transaction, the argument—that one who enters into an arbitration agreement has voluntarily exchanged their right to a jury trial for a speedier and cost-effective process—would have merit. But in the current environment, where forced arbitration agreements are adhesion contracts without negotiation over the terms, Congress should be more concerned about whether the weaker parties to arbitration agreements have voluntarily exchanged a jury trial, discovery, and motion practice for arbitration's alleged efficiencies. They frequently have not. Regarding the

D. *Should Congress Consider the Lack of Diversity of Arbitrators?*

When determining whether to abrogate or amend Section 2 of the FAA, Congress should consider the lack of diversity in the pools of arbitrators and in those arbitrators whom the litigants choose to arbitrate their disputes. The goal should be to create the same quality of dispute resolution in arbitration as in trial court litigation. And the diversity percentages of practicing attorneys are relevant to that analysis.

For example, ABA statistics show that all minority groups are underrepresented in the practice of law, with only 5% being African Americans (who are 13.4% of the population); 5% Hispanics (18.5% of population); 2% Asian (5.9% of population); and 0.4% Native Americans (1.3% of population).[297] Additionally, in 2020, women were 37.4% of lawyers, while men were 63.6%.[298]

Minority groups are similarly underrepresented in the ranks of arbitrators, although it is sometimes difficult to determine the degree of underrepresentation. For example, for its 2021 statistics, the AAA provides that 29% of its full panel are "women and racially and ethnically diverse."[299] It further provides that 50% of new arbitrators were "women and racially and ethnically minorities"; that 95% of the rosters of arbitrators that it provided to litigants contained 20% of arbitrators who were diverse ("women and racially and ethnically minorities"); and that 32% of chosen arbitration panels contain "diverse appointments" of arbitrators.[300]

However, reference to "women and racially and ethnically minorities" is not sufficient for several reasons. First, regarding women, it does not disclose the women's race or ethnicity, which

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arbitration of statutory claims, Congress would be justified in excluding such claims (preferably) or imposing substantially the same discovery and motion practice requirements for forced arbitration as exist for court litigation.

297. *See Lawyers by Race & Ethnicity*, ABA, https://perma.cc/RE6W-PQ8K.

298. *See ABA Profile of the Legal Profession*, ABA (2020) 1, 32 https://perma.cc/B7BC-MDKT (PDF).

299. *Diversity & Inclusion*, AM. ARB. ASS'N, https://perma.cc/BWW2-UPPE; *see also Arbitrator Demographic Data*, AM. ARB. ASS'N, https://perma.cc/2VK2-CL6Q (PDF).

300. *See Arbitrator Demographic Data*, *supra* note 299.

would be important to a litigant because all women do not have the same beliefs and attitudes regarding racial issues; nor do they have the same levels of implicit bias.[301] For example, a Black litigant may legitimately believe that the racial history of this country is such that some white women, just like some white men, have shown racial hostility against Black Americans and African Americans and that some white women may still harbor intentional racism or implicit bias against Black Americans and African Americans.[302] Therefore, these persons of color may prefer a Black female arbitrator and therefore would want to know how many Black female arbitrators will be on the panel of arbitrators.[303]

This same lack of specificity applies to the phrase "racially and ethnically minorities." Different racial and ethnic minorities may have different sensibilities and potentials for racism against other minorities.[304] As a matter of fact, there is a racism hierarchy in this country wherein some white people and some racial and ethnic minorities intentionally discriminate against, or have implicit bias against, other allegedly inferior minorities who are not in their favored groups.[305] Therefore, it is important for providers of arbitrators (such as AAA) to disclose—to the public and to disputants—the specific race and ethnicity of the women and people of color who both comprise their rosters of arbitrators and who actually arbitrate cases.

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301. *See* Shannon Keating, *The Racism of White Women*, BUZZFEEDNEWS (May 28, 2020, 2:28 PM), https://perma.cc/UM5D-58N8 (discussing some white women's racism against black Americans).

302. *See id.* (discussing historical racism involving white women).

303. This same argument would apply to other people of color, including Hispanics, Asians, and Native Americans, to name only a few.

304. *See* Tom Jacobs, *The Idea of Racial Hierarchy Remains Entrenched in Americans' Psyches*, PAC. STANDARD (Aug. 1, 2014), https://perma.cc/HXF5-NGGR (last updated Jan. 22, 2015) (detailing a study finding that ethnic and religious groups exhibit the least implicit bias toward people that share their own ethnic identity and even exhibit less bias toward whites than other ethnic groups).

305. *See* Kat Chow, *'Model Minority' Myth Again Used as a Racial Wedge Between Asians and Blacks*, NPR (Apr. 19, 2017, 8:32 AM), https://perma.cc/TE2K-HWYL; *see also* Jacobs, *supra* note 304 (describing how some white people have praised and still praise the work ethic and economic success of Asian Americans as opposed to African Americans).

At least one chart from the AAA shows some of this demographic information:[306] and the information in the chart, with any necessary demographic modifications, should become the norm and not the exception. This chart apparently shows the racial composition of arbitrators who arbitrated in California during the stated time period: American Indian or Alaska Native, 1.5%; Black or African American, 3.9%; Hispanic or Latino, 3.7%; Pacific Islander, 0.1%; White, 88.0%; More Than One Race, 1.9%; and, the statistics on gender identity/sexual orientation show: Heterosexual, 98.0%; Lesbian, 0.5%; Gay, 0.8%; Bisexual, 0.6%; Transgender, 0.0%; and the statistics on disability show: No Disability, 95.1%; Yes Disability, 4.9%.[307] The AAA apparently filed this chart to comply with a California disclosure rule.[308] This more specific demographic breakdown of AAA's arbitrators shows the degree of underrepresentation of arbitrators who are people of color, women, persons with disabilities, and persons in the LGBTQ community.[309]

Additionally, despite that the AAA, JAMS, and CPR (the three leading arbitration providers in this country) might have taken efforts to increase the diversity of the arbitrators on their rosters, there is still concern about the small number of women and people of color who actually arbitrate disputes.[310] There are probably multiple reasons why litigants do not choose more

306. *See Arbitrator Demographic Data*, *supra* note 299. The chart does not clearly identify the date or time period for which the demographic statistics apply.

307. *See id*. The chart also shows that women comprised 22% of the arbitrators and men comprised 78%. *Id.* The chart, however, does not contain a breakdown of the race or ethnicity of the 22% of women arbitrators, so we do not know how many of them were Black women, or other women of color. *Id.*

308. *See id.*

309. Providers of arbitrators should also consider disclosing how arbitrators of different races, ethnicities, genders, or sexual orientations vote in favor of or against plaintiffs or defendants who are members of the same groups in which the arbitrators are members and who are members of other groups in which the arbitrators are not members. *See generally* Megan Leonhardt, *The Huge Diversity Issue Hiding in Companies' Forced Arbitration Agreements*, CNBC (Jun. 7, 2021, 1:54 PM), https://perma.cc/2BKV-T8WU (asserting that "the gender and race of an arbitrator can have an impact on the outcome of a case. Female arbitrators, for example, rule in favor of employees more often than male arbitrators, and typically award higher settlement amounts, according to AAJ's report.").

310. *See* Sarah Rudolph Cole, *Arbitrator Diversity: Can It Be Achieved?* 98 WASH. U. L. REV. 965, 970 (2021).

women and people of color arbitrators.[311] For example, it is reasonable to believe that some litigants and attorneys make a cost-benefit analysis to identify the types of arbitrators who might be more likely to return an award in their or their clients' favor.[312] Obviously, litigants and their attorneys should not use racism and implicit bias when choosing arbitrators; but, it is reasonable to believe that they will try to choose an arbitrator who will issue an award in their favor.[313] Such occurs in every-day civil litigation before trial judges when the litigants try to pick the best juries for their sides of the lawsuits.[314]

However, it is also possible that some of those who select arbitrators use intentional racism, implicit bias, impermissible stereotypes, and other questionable criteria[315]—which may contribute to a smaller number of women and people of color serving as arbitrators (despite being listed on rosters of arbitrators). This underrepresentation of people of color and women, especially women of color,[316] calls into question the

311. *See* La Rue & Symonette, *supra* note 97, at 220 (discussing factors that cause fewer minorities and women to be selected as arbitrators in arbitrations of labor and employment disputes).

312. Green, *supra* note 65, at 2259

> However, the arbitrator must decide who wins and who loses the dispute. If parties (especially businesses) have their advocates push for a specific arbitrator as a means to promote diversity, then those parties and their advocates will face backlash from corporate investors and higher-level executives for financial and reputational losses incurred if the arbitrator rules against them.

313. It may be a part of the duty to zealously represent one's client. MODEL RULES OF PROF. CONDUCT r. 1.3 (AM. BAR ASS'N 2023).

314. This is probably why many litigants will use jury consultants to pick the best jury. *See generally* Sanford Marks & Cintia Calevoso, *The Benefits of Trial Consulting Services: Improving Your Chances of Success at Trial,* FED. LAW., Jan./Feb. 2012, at 39, https://perma.cc/77HB-VL9V (PDF).

315. *See* James Carstensen, *Legal Experts Say Bias in Arbitration Is a Growing Problem*, ALMLAW.COM INT'L (Sept. 23, 2021, 3:46 PM), https://perma.cc/6BG4-PEN9 ("It seems more and more as if there is a tendency, when choosing an arbitrator, to look for strategic arbitral appointments to get some kind of unfair advantage or take advantage of bias.").

316. Research did not disclose statistics on the number of Black female arbitrators when compared to the number of white women arbitrators, or the number of other race or ethnicity of women arbitrators; however, such numbers are believed to be smaller than white women arbitrators, given the historical racial hierarchy in this country. For a discussion of one Black woman's efforts to increase the number of Black and Black female arbitrators,

legitimacy of arbitration as a dispute resolution process, regardless of the reasons for the exclusion of these underrepresented persons.[317]

This Article therefore supports the proposals that some legal scholars have offered to increase the number of women and people of color who actually arbitrate cases—and who are not just listed on rosters of arbitrators—including allowing AAA and other providers (and not the litigants) to choose the presiding arbitrators;[318] creating a system where arbitrators are randomly selected in the same manner as federal judges;[319] and devising a system, similar to that which the National Football League has for coaches, which ensures litigants consider diverse persons to serve as arbitrators.[320] Disputants (mostly corporate defendants) who do not want to comply with such limitations can opt out of enforcing their mandatory arbitration agreements, or do a better job of convincing their opponents to enter into postdispute arbitration agreements that do not have the limitations.[321]

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see Vivia Chen, *Is the White, Male World of Arbitration Ready for Diversity?*, BLOOMBERG L. (Aug. 21, 2021, 11:52 AM), https://perma.cc/H2WU-CPCM.

317. *See* Jann Johnson & Michael Koss, *Time for More Women Mediators and Arbitrators: A Perspective from ADR Systems*, ADR SYS. (June 20, 2022), https://perma.cc/SVB9-D9ND ("And just as judicial diversification can help propagate public trust in the legitimacy of the courts, increased diversity among mediators and arbitrators can contribute to perceptions of alternative dispute resolution proceedings as legitimate and procedurally just alternatives to the courts in 'the shadow of the rule of law.'"); Green, *supra* note 65, at 2265

> The report described the "diversity of the arbitrators who decide the cases" as "[v]ery important to the legitimacy of the process" and opined that "[w]omen and minorities need to be among the arbitrators who actually serve on cases as well as be represented in the pools of expert arbitrators an organization can offer the parties."

318. *See* Cole, *supra* note 310, at 985–94 (suggesting alternative appointment approaches, increased implementation of permanent panels, consolidated information about diverse arbitrators, and published arbitrator evaluations).

319. *See* Green, *supra* note 65, at 2281–85.

320. *See* La Rue & Symonette, *supra* note 97, 236–47 (describing how the NFL's "Rooney Rule," which requires teams to interview a certain number of minority candidates for a head-coach position, can be used as a model to increase diversity in arbitrators).

321. Opting out may be especially possible if it is the defendant corporation that wants to opt out—given that the plaintiff in the case will probably agree to an opt out, especially if it is a significant case and a plaintiff's attorney is

However, it will probably take a long time to obtain a substantial increase in the number of women and people of color arbitrators who actually arbitrate disputes, despite any reforms for the purpose of achieving that outcome.[322] In the meantime, litigants who are subject to forced or mandatory arbitration agreements will have to endure arbitration with less diverse arbitrators and with other process dangers and limitations that arbitration imposes.

It is reasonable to believe that providers of arbitrators and those who support the use of arbitration will, at some point, allege that they have worked hard enough to increase the diversity of the arbitrators that they provide. They will therefore throw up their hands in frustration and assert that the real cause of a lack of diversity in arbitrators is that there are not enough qualified women and people of color arbitrators to have either more diverse rosters of arbitrators or more diverse arbitrators who actually arbitrate disputes.[323]

But even if such arguments were true—in that the lack of diversity in the rosters of arbitrators and in the arbitrators who actually arbitrate disputes is in part caused by a lack of diversity in the composition of the legal profession in general—the arguments would still not support the use of forced or mandatory arbitration. As a matter of fact, such contentions would be more supportive of arguments against the use of forced

present—given that a plaintiff's attorney and a plaintiff are less likely to want to be bound by a mandatory arbitration agreement.

322. That it will take a long time is shown by how long it has taken to arrive where we currently are and by recognizing that any future change will, in part, require the changing of the hearts and minds of defendants' attorneys and defendants themselves who choose arbitrators and who may be less inclined to choose people of color and women arbitrators. *See generally Diversity on Arbitral Tribunals: What's the Prognosis?*, WHITE & CASE (May 6, 2021), https://perma.cc/HA4C-66CM ("Despite the increased amount of focus on, and awareness of, diversity issues and initiatives since then, respondents clearly feel that this has not as yet translated into actual or sufficient positive change."); *see also* Rachel A. Gupta, *DEI & ADR: 5 Practical Ways to Increase Diversity in the Selection of Neutrals*, ACCDOCKET (May 23, 2022), https://perma.cc/BAA6-B3WE ("Even so, the majority of neutrals on ADR rosters are still white men.").

323. *See generally* G. Michael Glover II, *Reconsidering the LSAT to Improve Diversity in Arbitration*, 9 RESOLVED: J. ALT. DISP. RESOL. 1 (2021) (discussing how law schools' admission standards have an impact on the lack of diversity regarding practicing arbitrators).

or mandatory arbitration because a lack of diversity in the pools of arbitrators—even in the face of any arguments that providers of arbitrators have used good faith efforts to improve the diversity of arbitrators, but still cannot provide diverse pools of arbitrators—would only emphasize the protracted nature of the lack of diversity in the pools of arbitrators and that any increase in diversity is probably not going to achieve an optimal level of diversity in the near future. The potential permanency of a lack of diversity in the various rosters of arbitrators should further support and establish that unwilling parties should not be forced to give up their right to a jury trial and thereby be subjected to the dangers of the arbitration process, including the implicit bias, overwhelming conservatism, and possible intentional racism of middle-aged arbitrators who are predominantly white men. Instead, Congress should allow parties' freedom of choice—to select a jury trial instead of arbitration to resolve their disputes.

Therefore, in addition to any possible present and future benefits from reforms by providers of arbitrators, other entities, or persons, Congress should consider the lack of diversity in the use of women and people of color arbitrators and the impact that this has on the type of justice it wants to promote in this country. If Congress were to amend the FAA to exclude all predispute arbitration agreements from Section 2's protection, so that such agreements would be unenforceable, litigants would then have a post-dispute choice of submitting their claims to arbitration or submitting them to litigation in a trial court.

Excluding all predispute arbitration agreements would not necessarily lead to a destruction of arbitration. Instead, the exclusion would invite the types of reforms—by those who support the use of arbitration—that are necessary to provide for: more diverse panels of arbitrators comprised of different types of women and different types of people of color; awards that are more in line with what a prevailing party would get in regular litigation in a trial court; less advantage to repeat players; and the possibility of some judicial review of arbitrators' awards.[324] It is reasonable to believe that the AAA, JAMS, and CPR can be leaders in these and other necessary reforms because they

324. Pittman, *supra* note 11, at 872–74. (discussing additional judicial review).

should have more information about the specifics of arbitration and about what it takes to provide the types of reforms that would make arbitration more appealing to plaintiffs, their attorneys, and to other persons who presently do not want to submit to either mandatory arbitrations or voluntary arbitration. As a matter of fact, at least one provider of arbitration services is touting its efforts and plans to increase the diversity of arbitrators that it provides.[325] Similarly, the AAA, JAMS, and CPR have taken some efforts to promote more diverse pools of arbitrators.[326]

Corporate defendants also have a role to play because they are the ones who are forcing consumers, employees, and others to sign forced arbitration agreements. Some of them, such as Google, Uber, Wells Fargo, Lyft, Microsoft, and Facebook have already stopped using forced or mandatory arbitration agreements.[327] Others should do the same. And the first question for them is why, when litigating against each other, they prefer jury trials, but when litigating against weaker consumers and employees, they prefer arbitration?[328]

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325. *See* Susan L. Stewart, *On the National Academy of Arbitrators' 75th Anniversary, A Former President Looks at ADR History for A Future Path*, 40 ALT. HIGH COST LITIG. 155, 157 (2022) (referencing that the National Academy of Arbitrators recently adopted a seventy-page strategic plan to increase the diversity of labor arbitrators and asserting that "[t]aking the important step of enhancing diversity among arbitrators is consistent with our principled actions in defense of and promotion of arbitration over our history"). For a discussion of some of the efforts that the major providers of arbitrators have taken to increase diversity in their rosters of arbitrators, see Cole, *supra* note 240, 155–56

> Finally, most critical to improving diversity in those who hear cases, is increasing the selection of arbitrators who provide greater diversity. It is at this point that efforts to diversify the arbitrator corps tend to break down, because arbitrator providers typically do not control who is ultimately selected as an arbitrator.

326. *See* Stewart, *supra* note 325, at 156–58 (detailing measures taken by some arbitration provides to improve diversity).

327. *See Forced Arbitration in a Pandemic: Corporations Double Down*, AM. ASS'N FOR JUST. (Oct. 27, 2021), https://perma.cc/DG3E-CJKC (discussing the use of arbitration during the COVID-19 pandemic).

328. *See* Theodore Eisenberg et al., *Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 92 JUDICATURE 118, 118–23 (2008) (examining that companies are far less likely to choose arbitration for conflict resolution between companies, "suggesting that the firms' faith in arbitration is considerably weaker than they have claimed").

Lastly, plaintiffs and their attorneys may be more inclined to choose arbitration after necessary reforms are made. This is because these litigants—even if Congress were to exclude predispute, mandatory arbitration agreements from enforcement under the FAA—would still face challenges in obtaining more diversity among state and federal judges, and in the composition of juries, depending on the states and cities in which their trials are occurring.[329] This is so even though trial court litigation may offer the potential of larger verdicts, more fairness, and more due process protections.[330]

However, despite the above arguments about what reformers, corporate defendants, and plaintiffs' attorneys can do—and despite the uncertainty of whether such reforms would increase or decrease the yearly number of arbitrations—Congress should still reevaluate the FAA and Section 2's coverage. It would be justified in using a lack of diversity of arbitrators as one of the reasons for excluding all predispute, adhesion arbitration agreements from enforcement under Section 2, in conjunction with the other reasons this Article offers for excluding predispute arbitration agreements and certain types of disputes, such as federal statutory claims, from Section 2's enforcement, as discussed in this Article.

CONCLUSION

Congress is not powerless in the face of a zealous Supreme Court. The newly enacted Ending Forced Arbitration Act is an exhibit of that proposition. Having started its recalibration of the power imbalance that the Court holds in the arbitration arena, Congress should continue its review and amendment of the FAA. Clearly, the Court has misinterpreted Congress's intent that the FAA be only a procedural law applicable in federal courts and not in state courts. Despite the Court's arguably laudable goal of wanting to reduce federal courts' caseloads, it should be held accountable for its misapplication of Congress's intent regarding the FAA's scope and applicability. It is therefore time for Congress to definitively determine

329. *See* CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 3 (Feb. 2020), https://perma.cc/4UE7-UUZG (PDF).

330. Fisher, *supra* note 232, at 516–17.

whether the FAA is applicable to state court proceedings, adhesion arbitration agreements, federal statutory claims, and to an arbitration system that lacks a diversity of arbitrators. This Article discusses these issues and is supportive of Congress answering the above-stated questions in the negative, thereby returning much of arbitration law back to the states, including issues involving the exclusion of disputes from predispute arbitration agreements.[331]

331. This would not mean that Congress would not have the authority, on a case-by-case basis under the Supremacy Clause, to exclude certain disputes from arbitration—even when a state law would allow such arbitration—if Congress decides that an exclusion is desirable for federal public policy reasons.