STARTING OVER: LETTING STATES REGULATE ADHESION ARBITRATION AGREEMENTS

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ABSTRACT

The explosive growth of adhesion arbitration—mandatory arbitration clauses in adhesion contracts—throughout today's economy compromises access to justice for millions of Americans. This

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widespread use of adhesion arbitration stems from a series of U.S. Supreme Court decisions interpreting the Federal Arbitration Act (FAA) as establishing an expansive pro-arbitration policy. These decisions have upheld arbitration clauses in adhesion contracts written by large businesses forcing employees, consumers, and others with unequal bargaining power to waive their rights to a public jury trial, a class action, or a judge deciding whether the clause is even valid. They also hold that the FAA preempts state law that would regulate the impact of adhesion arbitration. Adhesion arbitration clauses are controversial. Some view these clauses as beneficial to the economy and efficient for disputants. Others find them problematic and have offered a range of possible reforms. This article agrees that reforms are needed and contends that the Court's FAA decisions must be overturned legislatively as to adhesion arbitration. It proposes a solution that is less extreme than outlawing pre-dispute arbitration agreements, broader than discrete procedural reforms, and potentially more attractive to stakeholders. This article proposes that Congress amend the FAA to exclude adhesion arbitration agreements from the scope of the statute. This proposal would immediately untether adhesion arbitration from the Court's FAA jurisprudence. It would also create a regulatory vacuum that the states would fill. Freed from FAA preemption, states could prohibit adhesion arbitration or serve as regulatory laboratories for procedural reforms designed to realize the efficiencies and meaningful access to justice that an arbitration process grounded in fairness can offer.

INTRODUCTION

This article addresses an issue that affects millions of Americans, impacts much of the national economy, and implicates core dispute resolution values. Chances are that it is an issue that affects you, the reader of this article, if you have ever purchased a cell phone, opened a bank account, had a credit card, or signed an employment contract. The issue is "adhesion arbitration"—arbitration clauses inserted by large businesses into adhesion contracts that are presented to employees, consumers, and others with lesser bargaining power on a "take-it-or-leave-it" basis.[1] Adhesion arbitration often is referred to as "forced arbitration" or "mandatory arbitration."[2] If you want the job, cell phone,

1. *See, e.g.*, *Adhesion Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining adhesion contract as "[a] standard-form contract prepared by one party, to be signed by another party in a weaker position, [usually] a consumer, who adheres to the contract with little choice about the terms").

2. Other scholars also have referred to forced or mandatory arbitration as adhesion arbitration. *See, e.g.*, Jennifer W. Reynolds, *Games, Dystopia and ADR*, 27 OHIO ST. J. ON

or credit card, you must sign the contract as written. By doing so, under the contract's arbitration clause you give up your right to go to court if you later have a claim against the business relating to the contract. You may also be barred from joining with others to bring your claim or even from discussing it with anyone. Your claim may only be adjudicated in binding, private (and perhaps secret) arbitration with almost no meaningful judicial review to determine whether the arbitrator made an error of law or fact about your claim. This typically is so whether or not you actually saw, read, or understood the arbitration clause before you signed the adhesion contract.

How is this possible? It is because the cumulative effect of U.S. Supreme Court decisions interpreting the Federal Arbitration Act (FAA)[3] has resulted in an expansive FAA "pro-arbitration policy" that can preempt state law and make adhesion arbitration agreements enforceable even when doing so denies employees, consumers, and others meaningful access to justice and a fair opportunity to vindicate their public law rights. The Court has upheld adhesion arbitration clauses that, *inter alia*, force employees, consumers, and others to: (1) waive their right to a jury trial; (2) waive their right to prosecute their claims on a class or collective basis; (3) waive their right to public adjudication of their public law claims; and (4) waive their right to have a judge decide whether an adhesion arbitration clause is even valid.[4]

Many commentators, including this author, believe that the Court's FAA adhesion arbitration jurisprudence is problematic and does not reflect sound public policy.[5] Because all of these decisions are based on the Court's interpretation of a statute (the FAA) a natural solution to the adhesion arbitration problem is to overturn the Court's FAA adhesion arbitration decisions through legislation. This article offers a proposal for doing so. It recommends that Congress amend the FAA to exclude adhesion arbitration agreements from the scope of the statute. Doing so would immediately untether adhesion arbitration clauses from the Court's FAA jurisprudence. It would also create a regulatory vacuum that would be filled by the states. Pushing a "restart" button would allow states—freed from FAA preemption—to decide whether to prohibit adhesion arbitration or regulate it to promote procedural reforms and realize the efficiencies and meaningful access to justice that an arbitration process grounded in fairness can offer.

DISP. RESOL. 477, 522 (2012); Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 69 (2002).

3. Federal Arbitration Act, 9 U.S.C. §§ 1–307 (2021).

4. *See infra* notes 46–55 and accompanying discussion.

5. *See infra* notes 73–76 and accompanying discussion.

Part I of this article provides background on the FAA by reviewing the historical context in which it was adopted and the statutory structure that has provided the basis for the Supreme Court's FAA jurisprudence. Part II describes the adhesion arbitration problems caused by the Court's FAA pro-arbitration policy decisions. Part III shows that the Supreme Court's FAA decisions have led to calls for reform. Part IV contains this article's proposal, explaining how the proposal would allow our society to reconsider the use of adhesion arbitration clauses in a twenty-first century economy in which adhesion contracts are widely used and adhesive arbitration and class waiver clauses are common. Part IV also explains why the proposed solution is a balanced one, discusses the impact of the proposal on the Supreme Court's FAA precedents, and offers specific language that Congress could adopt to implement the proposal. Finally, this article ends with some concluding observations about adhesion arbitration.

I. BACKGROUND REGARDING THE FEDERAL ARBITRATION ACT

The adhesion arbitration problem is largely a creation of a series of Supreme Court decisions interpreting the FAA to aggressively enforce arbitration clauses in adhesion contracts. In order to offer context for this article's proposal, this Part provides background information about the FAA and the ways in which the Supreme Court's adhesion arbitration decisions are disconnected from the circumstances giving rise to the FAA in the first place.

A. The Historical Context of the FAA

Arbitration between parties who meaningfully consent to it (either before or after a dispute arises) can be an excellent alternative to court adjudication, offering an efficient, customized process producing practical outcomes rendered by expert decision-makers.[6] Congress

6. *See* Jill I. Gross, *Achieving Access to Justice Through ADR: Fact or Fiction?: Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2325–27 (2020) (describing common arbitration process characteristics); *see also* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data From Four Providers*, 107 CAL. L. REV. 1, 9 (2019) (analyzing data from 40,775 employment, consumer, and medical malpractice arbitrations administered by four major arbitration service provider institutions and concluding, *inter alia*, that arbitration "has the capacity to facilitate access to justice" but "is not currently living up to its potential"); Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1962–63 (2014) (noting that customizing arbitration allows the arbitrator to be an expert in the industry or area of law in dispute); Christopher R. Drahozal, *Arbitration Law in the Wake of AT&T Mobility v. Concepcion: Arbitration Innumeracy*, 4 Y.B. ON ARB. & MEDIATION 89, 102 (2012) (emphasizing that restricting the availability of arbitration will deprive consumers of the opportunity to present their claim to a neutral decision-maker because most court cases are resolved by dispositive motions or settlement).

understood this in 1925 when it enacted the FAA[7] to make arbitration agreements "valid, irrevocable and enforceable."[8]

Congress passed the FAA in order to overcome long-standing judicial hostility toward ordering specific performance of arbitration agreements[9] between businesses.[10] Prior to the adoption of the FAA, courts had invalidated arbitration agreements that were negotiated by merchants at arms' length.[11] Just as there is broad agreement that the FAA was primarily designed to ensure the enforceability of arbitration agreements among merchants, many scholars agree that the FAA's legislative history does not suggest that Congress enacted the statute to

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7. The history of the FAA has been well-chronicled. *See, e.g.*, Katherine Van Wetzel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969–94 (1999) (reviewing the history of the FAA and FAA jurisprudence); *see also* Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 245–66 (2008) (describing the history of the FAA).

8. 9 U.S.C. § 2 (2021).

9. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 14 (1984) (observing that Congress adopted the FAA in 1925 to overcome rules of equity prohibiting specific enforcement of arbitration agreements). *See also* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265, 283 (1926) (observing that the FAA "reversed the hoary doctrine that agreements for arbitration are revocable at will" and noting that "[f]or many centuries there has been established a rule, rooted originally in the jealousy of courts for their jurisdiction, that parties might not, by their agreement, oust the jurisdiction of the courts. This rule was so firmly established that our American courts did not feel themselves free to change the rule, but declared it to be the duty of the legislature to make this change").

10. *See, e.g.*, Margaret L. Moses, *How the Supreme Court's Misconstruction of the FAA Has Affected Consumers*, 30 LOY. CONSUMER L. REV. 1, 1 (2017) (observing that "[t]he FAA was simply intended to provide a means for resolving disputes among commercial entities that might voluntarily choose to forego their rights to have their disputes settled in court, in favor of what they deemed to be a simpler and more efficient means of dispute resolution"); *see also* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 308 (2015) (observing that Congress "intended the FAA to allow enforcement only of arbitration agreements between merchants"); Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 729–30 (2001) (observing that "the Federal Arbitration Act was never intended to permit companies to impose arbitration on unknowing consumers and employees, but rather was merely intended to allow two sophisticated businesses to enter into pre-dispute arbitration agreements").

11. *See, e.g.*, Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 118 (2016) (stating that the FAA "was enacted to cover privately-negotiated arbitration agreements between merchants in order to facilitate the resolution of contractual disputes, through minimal procedures applicable solely in federal court"); *see also* Carbonneau, *supra* note 7, at 245 (commenting that the "FAA was enacted . . . to rehabilitate arbitration for groups within the commercial community" and was not intended to be a "comprehensive statute on arbitration"); Cohen & Dayton, *supra* note 9, at 265, 281 (discussing how the newly-enacted FAA would serve the interests of the business community by making arbitration agreements specifically enforceable and irrevocable, and describing arbitration as "a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like").

facilitate the expansive use of pre-dispute arbitration clauses in contracts between businesses and consumers or other persons with lesser bargaining power.[12] On the other hand, some scholars contend that the FAA fairly may be interpreted to encompass arbitration clauses in agreements (adhesive or otherwise) between businesses and consumers or other individuals.[13] Such an interpretation, of course, is not the same thing as concluding that Congress anticipated the widespread adoption of adhesion contracts throughout the national economy and chose to embrace adhesion arbitration as part of an aggressive pro-arbitration policy.

Regardless of whether (or the degree to which) Congress thought about arbitration involving individual consumers or adhesive arbitration clauses in 1925, it is beyond doubt that Congress passed the FAA in a commercial environment that was radically different than the commercial environment today. During this time, the U.S. economy has been transformed by the development of the Internet and the dramatic rise in

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12. *See, e.g.*, Leslie, *supra* note 10, at 308 (observing that "Congress did not intend the FAA to apply to consumer contracts"); *see also* Szalai, *supra* note 11, at 118 (arguing that "[b]ased on the history of the FAA's enactment, it is clear that the statute was never intended to apply in state courts or cover employment disputes"); Moses, *supra* note 10, at 1 (noting that "[n]either the drafters of the Federal Arbitration Act nor the Congress that adopted it intended it to cover consumers or workers, or to displace state jurisdiction or state substantive law.").

13. Professor Stephen Ware has observed that:

> [w]hile the FAA's legislative history reflects concerns about non-employment adhesion contracts, such as insurance policies, these concerns did not find their way into the statute's text. So, under mainstream approaches to statutory interpretation that, for good reasons, prioritize statutory text far above legislative history, it is enough to say Congress knew how to except types of parties from FAA section 2 and chose to except some employees but not any consumers. Consequently, if consumers make arbitration agreements 'involving commerce,' then those agreements are covered by the FAA.

Stephen J. Ware, *A Short Defense of Southland, Casarotto, and Other Long-Controversial Arbitration Decisions*, 30 LOY. CONSUMER L. REV. 303, 318 (2018).

The Court has held that the FAA section 1 employment exclusion (providing that FAA section 2 did not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce") exempted "only contracts of employment of transportation workers." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112, 119 (2001) (quoting 9 U.S.C. § 1 (2021)). Professor Christopher Drahozal has pointed out that:

> [a]t the time the FAA was enacted, most consumer contracts would not have had a sufficient nexus to interstate commerce for the Act to apply. Thus, the support for the proposed Act was from merchants (and lawyers) who wanted to make arbitration agreements among merchants enforceable. As the Supreme Court has construed the commerce power more broadly and consumer transactions have become more national in scope, the FAA has come to cover increasing numbers of consumer transactions.

Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 129 n.190 (2002).

the number of companies that provide services and goods to consumers on a national and international scale.[14]

These economic changes have been accompanied by an explosion in the use of adhesion contracts.[15] Today, agreements between corporations and consumers, employers and employees, credit card companies and customers, ride-share companies and passengers, and franchisors and franchisees almost invariably are standard form contracts of adhesion.[16] These contracts increasingly are e-commerce agreements entered into digitally.[17] These adhesion contracts, in turn, now commonly include arbitration clauses and many of those clauses include class proceeding waivers barring the party with lesser bargaining power from bringing a class action lawsuit or class action arbitration against the adhesion contract drafter.[18] For example, a 2015 report by the federal Consumer Financial Protection Bureau found that "tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses" and that "[n]early all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis."[19] Professor Alexander Colvin reported the results of a 2017 study

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14. *See* Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 134 (2012) (observing that "[a]dhesion contracting was old news by the time the Internet rolled into homes across America") (footnote omitted).

15. This article will not go in depth into this history which other scholars have explored. *See, e.g.*, *id.* at 146–62 (reviewing the evolution of, the use of, and the law related to, adhesion contracts). Although contracts of adhesion existed one hundred years ago in business-to-consumer transactions, such as transportation tickets and movie tickets, the validity of these contracts was a state law issue and many state courts were skeptical of adhesion or "notice" contracts and often declined to enforce them or restricted enforcement of their provisions. *Id.*

16. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346–47 (2011) (recognizing that "the times in which consumer contracts were anything other than adhesive are long past"); *see also* Preston & McCann, *supra* note 15, at 133–34 (footnotes omitted) (observing that "[a]dhesive, preprinted contracts supplied by repeat players in the market are extremely convenient, time-efficient, and cost-effective for the parties who have the power to choose. For this reason, '[s]tandard form contracts probably account for more than ninety-nine percent of all the contracts now made.' Standard form contracts are the norm across industries").

17. *See, e.g.*, Press Release, U.S. Census Bureau, *Quarterly Retail E-Commerce Sales 1st Quarter 2020* (May 19, 2020), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. (reporting that "[t]he first quarter 2020 e-commerce estimate increased 14.8 percent (±1.8%) from the first quarter of 2019 while total retail sales increased 2.1 percent (±0.4%) in the same period. E-commerce sales in the first quarter of 2020 accounted for 11.8 percent of total sales").

18. *See infra* notes 19–22 and accompanying discussion.

19. *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 9–10 (2015) [hereinafter CFPB REPORT], https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (concluding that "tens of millions of consumers use consumer financial products or

finding that "[a]mong private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures. Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration."[20] According to Professor Jill Gross in 2019, "[v]irtually all broker-dealers require their customers to arbitrate disputes arising out of their investment accounts. And all major ride-sharing apps in the U.S. now include a PDAA [pre-dispute arbitration agreement] in their agreements with both drivers and passengers."[21] Professor Jean Sternlight earlier found that "[m]any whole industries, as well as individual employers, are now requiring employees to give up their right to litigate claims against their employer as a condition of getting the job."[22] As these examples show, the FAA was enacted in an economic environment that is quite different than the modern economy that provides the context for today's far-flung use of adhesion arbitration.[23] The sections that follow describe the structure of the FAA and review the Supreme Court's interpretation of the FAA that has given rise to the adhesion arbitration problem.

B. The Role of Section 2 of the FAA

The current version of FAA Chapter 1 (FAA §sections 1 through 16) is substantially similar to the statute as originally adopted in 1925.[24]

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services that are subject to pre-dispute arbitration clauses" and that "[n]early all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis").

20. ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2017).

21. Jill I. Gross, *Bargaining in the (Murky) Shadow of Arbitration*, 24 HARV. NEGOT. L. REV. 185, 197 (2019); *accord* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 233–34, 236 (2019) (observing that "the use of arbitration clauses in non-negotiable, adhesionary contracts is widespread in American society," including by most Fortune 100 companies, and that "more than sixty percent of U.S. retail e-commerce sales are covered by broad consumer arbitration agreements"); *see* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 323 (2013) (stating that "powerful economic entities can impose no-class-action-arbitration clauses on people with little or no bargaining position—through adhesion contracts involving securities accounts, credit cards, mobile phones, car rentals, and many other social amenities and necessities").

22. Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 7 (1997).

23. DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 70 (2015) (Ginsburg, J., dissenting) (stating that "Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place").

24. *See* Drahozal, *supra* note 13, at 123, n.147 (2002) (observing in connection with reviewing the FAA and its legislative history that "[t]he FAA as enacted in 1925 is virtually

Sections 3 through 16 address rules governing arbitration agreement enforcement procedure in federal court, such as motions to a federal district court to stay litigation pending arbitration (section 3),[25] compel arbitration (section 4),[26] appoint arbitrators (section 5),[27] issue subpoenas (section 7),[28] and to confirm, vacate or modify arbitration awards (sections 9 through 11)[29] as well as appeals from certain district court arbitration rulings (section 16).[30] Nothing in the FAA expressly addresses class arbitration, consolidated arbitration proceedings, arbitration confidentiality, pre-hearing discovery, pre-hearing pleading or motion practice, or the form of arbitration awards.

Sections 1 and 2 shape the scope of the FAA. Section 1 defines "maritime transactions" and "commerce" as used in section 2.[31] Section 1 also provides that the FAA does not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[32] In 2001, the Supreme Court in *Circuit City Stores, Inc. v. Adams* held that the section 1 employment exclusion exempted "only contracts of employment of transportation workers,"[33] leaving subject to the FAA arbitration agreements (adhesive or otherwise) in employment contracts for workers "engaged in commerce" in other economic sectors.

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identical to Chapter 1 of the FAA as in force today" and noting that "Sections 15 and 16 of the FAA, as well as Chapters 2 and 3, have been added since 1925. The rest remains almost identical to the FAA as originally enacted, except as changed to reflect the adoption of the Federal Rules of Civil Procedure"). Chapter 1 of the FAA provides general provisions applicable to domestic arbitration. 9 U.S.C. §§ 1–16 (2021). Chapter 2 addresses the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 3 addresses the Inter-American Convention on International Commercial Arbitration. 9 U.S.C. §§ 201–307 (2021). Issues relating to international commercial arbitration are beyond the scope of this article.

25. *See* 9 U.S.C. § 3.

26. *Id.* § 4.

27. *Id.* § 5.

28. *Id.* § 7.

29. *Id.* §§ 9–11.

30. 9 U.S.C. § 16 (2021). Chapter 1 also addresses: treating FAA district court applications as motions (section 6); proceedings begun by libel in admiralty or seizure of property (section 8); notice of motions to vacate or modify awards (section 12); types of papers filed in connection with motions to confirm, correct or modify an award (section 13); the January 1, 1926 effective date of the FAA (section 14); and the inapplicability of the Act of State doctrine (section 15). 9 U.S.C. §§ 6, 8, 12–15 (2021).

31. 9 U.S.C. § 1 (2021). In Citizens' Bank v. Alafabco, 539 U.S. 52, 56 (2003), the Court observed that "[w]e have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'–words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."

32. 9 U.S.C. § 1.

33. 532 U.S. 105, 119 (2001).

Much of the Court's adhesion arbitration jurisprudence is based on the Court's interpretation of section 2 as creating an expansive, substantive pro-arbitration policy.[34] Section 2 states that:

> 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.[35]

State law plays an important role when applying section 2. First, the Court has interpreted the contract defense "savings clause" appearing at the end of section 2 to allow generally applicable state law contract defenses to defeat enforcement of arbitration agreements. Generally applicable state law contract law defenses typically include concepts such as unconscionability, fraud in the inducement, or other defenses that do not single out arbitration agreements for disfavored treatment.[36] Second, state law also is supposed to apply when analyzing contract formation issues under the FAA. When applying the section 2 mandate that FAA-covered arbitration agreements are "valid, irrevocable and enforceable," the Court has generally held that state law determines questions of arbitration agreement formation and interpretation.[37] Section 2, resting at the heart of the FAA, thus reflects Congress' interest that federalism serve an essential function in shaping national arbitration policy.

II. THE PROBLEM: THE SUPREME COURT'S INTERPRETATION OF THE FAA

34. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (holding that Congress adopted the FAA in 1925 pursuant to its power to regulate interstate commerce); *see also* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (stating that "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"). *See also infra* notes 46–55 and accompanying discussion (describing Supreme Court FAA adhesion arbitration cases and the way in which the Court has expansively interpreted section 2's pro-arbitration policy).

35. 9 U.S.C. § 2 (2021).

36. *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (observing that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2") (emphasis in original).

37. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 54 (2015) (noting in connection with interpreting an arbitration clause that "the interpretation of a contract is ordinarily a matter of state law to which we defer" so long as it is consistent with the FAA). But *see infra* notes 51, 55 and accompanying discussion.

HAS ENCOURAGED BUSINESSES TO INCLUDE MANDATORY ARBITRATION CLAUSES IN ADHESION CONTRACTS

The twenty-first century American economy bears little resemblance to the American economy of 1925 when Congress enacted the FAA, including today's widespread use of adhesion contracts. Many large U.S. corporations use adhesive arbitration agreements. For example, a study by Professor Imre Szalai (published in 2019) of consumer arbitration agreements used by Fortune 100 companies (including subsidiaries and related affiliates) and their customers, found that large U.S. corporations such as Wal-Mart, Exxon-Mobil, Apple, Amazon, AT&T, General Motors, Home Depot, Wells Fargo, Microsoft, Dell Technologies, Disney, Proctor & Gamble, Best Buy, Time-Warner, and others all included arbitration clauses in customer agreements and that many of those agreements also included class waivers.[38]

Large businesses find adhesive pre-dispute arbitration clauses attractive for a variety of reasons, including the efficiency, reduced transaction costs, expert decision-making, and increased speed advantages of arbitration as compared with court litigation.[39] But adhesive arbitration clauses could also be appealing to businesses for other reasons, such as to avoid jury trials and public accountability for alleged wrongdoing, secure arbitrators with whom repeat player businesses are familiar, and enjoy the potentially exculpatory effect of depriving others of the opportunity to bring class proceedings necessary to make pursuit of small dollar value public law claims economically feasible.[40]

Why are adhesive arbitration clauses so prevalent across the U.S. economy? The reason is because the U.S. Supreme Court has interpreted the FAA to establish a preemptive "pro-arbitration policy" that makes adhesive arbitration clauses enforceable. The Court's FAA adhesion arbitration jurisprudence has evolved iteratively through a series of decisions interpreting the FAA over the course of four decades.[41] While the Court's FAA decisions assert that this aggressive arbitration

38. *See* Szalai, *supra* note 21, at 248–59.

39. *See, e.g.*, Gross, *supra* note 6, at 2325–27 (describing common arbitration process attributes, including potential for reduced costs and faster decisions); *see also* Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 59–63 (2017) (highlighting the informality of adhesive arbitration agreements as reducing discovery and the use of evidentiary rules); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (stating that arbitration can be "considerably less expensive than litigation").

40. *See infra* notes 56, 63–67, 72–73 and accompanying discussion.

41. *See infra* notes 46–55 and accompanying discussion.

enforcement policy arises from the sparse language of the FAA itself, in reality this policy is, as Justice O'Conner once observed, "an edifice of [the Court's] own creation."[42] Indeed, many of the Court's pro-arbitration policy decisions address issues that are not explicitly addressed in the FAA.[43] Justice O'Conner's observation aptly captured the arc of the Court's FAA jurisprudence when she made it in 1995.[44] Evidence proving her point has only grown since then.[45]

The Court created this "edifice" in a series of decisions holding that:

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42. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (observing that "[y]et, over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation" and discussing Southland Corp. v. Keating, 465 U.S. 1 (1984) and Perry v. Thomas, 482 U.S. 483 (1987)); *see also* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 331 (1996) (observing in 1996 that "[o]ver the last dozen years, the Supreme Court has rewritten the law governing commercial and employment arbitration in the United States. So bold has the Court been that its work in this field could be said to exemplify the indeterminacy of American law, confirming the hypothesis of Critical Legal scholars that our judges (or at least our Justices) are uncontrolled by legal texts or precedents and free to decide cases according to their own political predilections."); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (1997) (observing that "[t]he Supreme Court has created a monster" in that through a series of cases in the 1980s and early 1990s "the Supreme Court has broadly endorsed the enforcement of adhesive pre-dispute arbitration agreements").

43. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (establishing the FAA separability doctrine); *see also Southland*, 465 U.S. at 16 (holding that the FAA can preempt state law); *Perry*, 482 U.S. at 491 (holding that the FAA preempts the primary jurisdiction of state administrative agencies as to disputes within the scope of an arbitration agreement); Buckeye Check Cashing v. Cardegna, 546 U.S. 440, 449 (2006) (holding that the FAA separability doctrine applies in state court); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69, 69 n. 1 (2010) (recognizing the enforceability of adhesive delegation clauses); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (creating a federal rule for interpreting arbitration contracts regarding availability of class arbitration); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (creating an extra-statutory preemptive "streamlined" proceeding definition of FAA arbitration and applying it to enforce an adhesive class arbitration waiver); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236–39 (2013) (enforcing an adhesive arbitration clause containing a class waiver, consolidated proceeding ban and confidentiality clause that prevented a small business plaintiff from effectively vindicating its federal statutory rights); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417–18 (2019) (preempting generally applicable state contract law to create and enforce federal rule for requiring an unambiguous contractual basis consenting to class arbitration).

44. *See Dobson*, 513 U.S. 265 at 283; *see also supra notes* 42–43; *see also infra notes* 46–48 and accompanying discussion.

45. *See infra* notes 49–55. *See also* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 70–71 (2015) (Ginsburg, J., dissenting) (stating that "[a]s Justice O'Connor observed when the Court was just beginning to transform the FAA into what it has become, 'the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.'").

- The FAA preempts state laws that would otherwise prohibit or regulate adhesion arbitration (*Southland Corp. v. Keating*,[46] 1984);[47]
- Adhesive arbitration clauses in employment contracts are enforceable under the FAA, even with regard to claims under federal workplace anti-discrimination statutes (*Gilmer v. Interstate/Johnson Lane*, 1991);[48]

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46. 465 U.S. at 16. Building on its holding in *Prima Paint*, 388 U.S. at 405, that Congress adopted the FAA in 1925 pursuant to its power to regulate interstate commerce, the Court in *Southland* held that the FAA section 2 pro-arbitration policy constituted substantive federal law that (a) applied in state courts as well as federal courts and (b) preempted a California state law ban on arbitrating certain franchisee claims against franchisors. *Southland*, 465 U.S. at 16. Justice Stevens dissented in part, rejecting the conclusion that the FAA preempted the California Legislature's policy choice to assure a judicial forum for franchisee claims. *Id.* at 19–20. Justice O'Conner also dissented from the conclusion that FAA section 2 applies in state court and rejected extending *Prima Paint* to transform the FAA from an essentially procedural statute to a substantive one with preemptive effect. *Id.* at 22–24 (lamenting that "[t]he Court's decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements").

47. Over the years, the Court has relied on *Southland* to preempt state laws addressing a wide range of issues, such as: (1) regulating arbitration agreement formatting so parties understood that they were waiving their rights to court adjudication (Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (holding that the FAA preempted a Montana statute imposing special notice requirements on arbitration agreements because so singling out arbitration contracts disfavored arbitration in contravention of FAA section 2); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1425 (2017) (holding that the Kentucky Supreme Court's "clear-statement" rule requiring express authority in powers of attorney for the execution of an arbitration agreement was preempted by section 2 because it disfavored arbitration)); (2) directing certain disputes to specialized state administrative tribunals (Preston v. Ferrer, 552 U.S. 346, 349–50 (2008) (holding that FAA section 2 preempted a California Talent Agencies Act provision lodging primary jurisdiction over talent agency compensation disputes in a California state administrative tribunal when the dispute was covered by a private arbitration agreement)); and (3) prohibiting enforcement of pre-dispute arbitration agreements involving wage collection, nursing home contracts or other matters of state legislative or common law concern (*Perry*, 482 U.S. at 491 (holding that FAA section 2 preempted a California Labor Code provision requiring a judicial forum for wage collection claims regardless of the existence of an arbitration agreement); Marmet Health Care Ctr., Inc., v. Brown, 565 U.S. 530, 531 (2012) (per curiam) (holding that the FAA preempted a West Virginia Supreme Court decision finding enforcement of pre-dispute arbitration clauses in nursing home contracts unenforceable as a matter of West Virginia state public policy)).

48. 500 U.S. 20, 23 (1991). In *Gilmer*, the Court held that an employee was required to arbitrate a federal Age Discrimination in Employment Act (ADEA) claim pursuant to an adhesive pre-dispute arbitration agreement. The Court determined that under the FAA the employee had the burden of showing that Congress intended to preclude arbitration of his ADEA claim, *id.* at 26, further observing that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id*. at 32–33. The Court concluded that Gilmer failed to meet this burden, noting that the proposed arbitration permitted the appointment of neutral arbitrators, allowed Gilmer adequate discovery to prove his claim, provided for a written

- The FAA requires states to compel arbitration despite objections that the adhesion contract containing the arbitration clause is void or voidable (*Buckeye Check Cashing v. Cardegna*, 2006);[49]
- An adhesive clause delegating to potentially self-interested arbitrators the power to decide the scope of their own jurisdiction is enforceable under the FAA (*Rent-A-Center West, Inc. v. Jackson*, 2010);[50]
- Unlike class action court litigation, the FAA bars class arbitration unless the defendant who drafted the arbitration clause (adhesive

award, and did not deprive Gilmer of remedies available to him in court. *Id.* at 30–32. *Gilmer* did not involve a claim by a union employee. The distinction is significant, as "[m]andatory employment arbitration is very different from the labor arbitration system used to resolve disputes between unions and management in unionized workplaces. Labor arbitration is a bilateral system jointly run by unions and management, while mandatory employment arbitration procedures are unilaterally developed and forced on employees by employers. Whereas labor arbitration deals with the enforcement of a contract privately negotiated between a union and an employer, mandatory employment arbitration concerns employment laws established in statutes." COLVIN, *supra* note 20, at 2–3.

49. 546 U.S. 440, 449 (2006). The Court in *Prima Paint*, 388 U.S. 395, had interpreted FAA section 3 (governing motions to stay federal court lawsuits regarding claims subject to an arbitration agreement) and section 4 (governing federal court motions to compel arbitration) to require application of the "separability doctrine" (referred to by some courts as the "severability" doctrine) requiring that for a generally applicable contract defense raised under FAA section 2 to prevent enforcement of an arbitration clause, the defense must be directed at the arbitration clause itself and not to the overall agreement containing the arbitration clause (the "container contract"). *Id.* at 404–06. In *Buckeye Check Cashing*, the Court concluded that the separability doctrine ultimately was derived from section 2. 546 U.S. at 447. As a result, because section 2 (according to *Southland*) constituted substantive law enacted pursuant to the Commerce Clause, it applied in state courts. *Id.* The Court held that section 2 preempted a Florida state court from relying on a Florida state rule that barred application of the separability doctrine with regard to arbitration clauses contained in a void contract (here, an allegedly illegal usurious payday loan agreement). *Id.* at 447–48.

50. 561 U.S. 63, 65 (2010). In *First Options of Chicago, Inc. v. Kaplan*, the Court held that under the FAA, issues of substantive arbitrability (e.g., the validity or scope of an arbitration agreement) must be decided by a court rather than an arbitrator unless the parties clearly and unmistakably delegated decision of the issue to an arbitrator. 514 U.S. 938, 944–45 (1995). In *Rent-A-Center*, the Court determined that an adhesive arbitration clause that clearly and unmistakably recited that an arbitrability issue must be decided by an arbitrator was enforceable. 561 U.S. at 68–69, 69 n. 1. The Court also extended the separability doctrine to delegation clauses contained within an adhesive arbitration agreement, holding that a contract defense specifically directed at the overall arbitration agreement would not prevent enforcement of the delegation clause (viewed as a fictional, separate arbitration agreement) unless the defense also was directed specifically at the delegation clause. *Id.* at 71–72. Justice Stevens in dissent questioned the applicability of the *Prima Paint* separability doctrine to a delegation clause within a free-standing arbitration agreement, likening this additional layer of separability as "something akin to Russian nesting dolls." *Id.* at 85; *see also* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 429 (2018) (observing that the *Rent-A-Center* "super-separability" regime "elevates form over substance").

or otherwise) consents to being sued on a class-wide basis (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 2010);[51]

- Adhesive waivers of the right to bring a class arbitration claim are generally enforceable under the FAA (*AT&T Mobility LLC v. Concepcion*, 2011);[52]
- An adhesive agreement with class waiver and confidentiality clauses that chill pursuit of statutory claims against the contract drafter is enforceable under the FAA (*American Express Corp. v. Italian Colors Restaurant*, 2013);[53]

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51. 559 U.S. 662, 687 (2010). The Court in *Stolt-Nielsen* stated that the FAA "imposes certain rules of fundamental importance, including the basic precept that arbitration is a matter of consent, not coercion." *Id.* at 681. The Court held that class arbitration could not be ordered under the FAA absent an affirmative contractual basis in the arbitration agreement showing that parties actually consented to class-wide arbitration. *Id*. at 684. The Court based this conclusion on the differences between bilateral and class arbitration including increased risk to defendants, added formality, and diminished privacy. *Id.* at 685–87. The Court vacated the arbitrators' determination that the arbitration agreement permitted class arbitration because the parties had stipulated that their agreement was "silent" on the class arbitration issue and thus could not have contained the requisite consent. *Id.* at 677, 684. *See also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417–18 (2019) (relying on *Stolt-Nielsen* and *Concepcion* to preempt the use of the generally applicable California *contra proferentem* canon of contractual interpretation (construing contractual ambiguity against the drafter, particularly in the context of adhesive contracts) that would have found the consent to class arbitration required by *Stolt-Nielsen* and holding that under the FAA an ambiguous clause cannot satisfy the *Stolt-Nielsen* contractual basis requirement).

52. 563 U.S. 333, 344 (2011) (upholding enforceability of adhesive class waiver). In *Concepcion*, the Court held that FAA section 2 preempted application of a California Supreme Court rule (the "*Discover Bank* rule") that barred, as an unconscionable exculpatory clause: (1) any provision in a consumer adhesion contract that waived class adjudication (whether in court or arbitration); (2) in connection with predictably small dollar value claims; and (3) alleging a scheme to cheat large numbers of consumers. *Id.* Central to the *Concepcion* Court's reasoning was its conclusion that "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3 and 4, is to ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*. Requiring the availability of class wide arbitration *interferes with fundamental attributes of arbitration* and thus creates a scheme inconsistent with the FAA." *Id*. (emphasis added). The Court concluded that while contracting parties could agree to aggregated arbitration proceedings and their attendant procedural complications, what such parties "would have agreed to *is not arbitration as envisioned by the FAA*, lacks its benefits, and therefore may not be required by state law." *Id.* at 351 (emphasis added). *See* Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 727 (2012) (observing that "[s]tate legislatures have quite limited power to combat the effects of Concepcion given prior Supreme Court decisions. In particular, state legislatures can neither prohibit mandatory arbitration nor prohibit use of arbitral class action waivers. Such actions would be held preempted by the FAA, just as the Court in Concepcion preempted state courts' finding that arbitral class action waivers are unconscionable."). *See also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013) (enforcing a class waiver despite the chilling effect on the plaintiff's ability to assert a federal antitrust claim).

53. *Italian Colors*, 570 U.S. at 238–39. In *Italian Colors*, the Court enforced an adhesion arbitration agreement containing a class waiver, consolidated arbitration ban and

- An adhesive arbitration clause that prohibits employees from joining together to assert workplace claims in a class-wide arbitration is permissible under the FAA. (*Epic Systems Corporation v. Lewis*, 2018);[54] and

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confidentiality clause that prevented a restaurant owner from joining with similarly situated merchants to bring a federal antitrust claim (seeking individual damages of $38,549 after trebling) against American Express. *Id.* at 231. The adhesion arbitration clause prevented the restaurant owner from sharing the costs of pursuing the antitrust claim (including expert fees that could have reached $1 million), which would have been possible in court litigation. *Id.* The Court's decision effectively required the restaurant to either spend up to $1 million or more to pursue the federal antitrust claim in bilateral arbitration (which sought only $38,549 in individual damages) or to abandon the claim because the adhesion arbitration clause made it economically irrational to pursue. *Id.* The restaurant abandoned the claim in light of the Court's decision. *See Arbitration in America: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Alan S. Carlson, Owner, Italian Colors Restaurant) (describing circumstances relating to the *Italian Colors* decision). The Court noted that "the FAA's command to enforce arbitration agreements *trumps any interest in ensuring the prosecution of low-value claims*. The latter interest, we said, is 'unrelated' to the FAA. Accordingly, the FAA does, contrary to the dissent's assertion, *favor the absence of litigation when that is the consequence of a class-action waiver, since its 'principal purpose' is the enforcement of arbitration agreements according to their terms*." *Italian Colors*, 570 U.S. at 238 n.5 (emphasis added); *see also* Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 608 (2018) (observing that "[a]nother major infusion of lawyering resources comes from class actions. Aggregation responds to the problem that some claims have what economists call 'negative value,' meaning that the expenses of recovery are larger than the direct loss incurred."); *see generally*, Okezie Chukwumerije *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375 (2014) (discussing the vindication of federal statutory rights doctrine).

54. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018). In *Epic Systems*, the Court held that the National Labor Relations Act (NLRA) did not prohibit class waivers in adhesion employment agreements, concluding that employees' right under NLRA section 7, 29 U.S.C. § 157 (2021), to engage in "concerted activity" meant labor organizing but did not extend to collective litigation. *Id.* at 1624. As a result, the Court held that adhesive class waivers were not an illegal "unfair labor practice" under NLRA section 8(a)(1), 29 U.S.C. §158 (a)(1) (2021). *Id.* Moreover, the Court held that a contract defense (like illegality or unconscionability) that would find an arbitration clause provision unenforceable because it required bilateral arbitration (like the adhesive clause at issue in *Epic Systems*) would impermissibly disfavor arbitration (understood under *Concepcion* as a "streamlined" dispute resolution process). *Id.*; *see Concepcion*, 563 U.S. at 344. The Court concluded that under *Concepcion*, such a defense would not be preserved under the FAA Section 2 savings clause. *Epic Systems*, 138 S. Ct. at 1623. Previously, in *Circuit City Stores, Inc.*, the Court held that the FAA Section 1 employment exclusion (providing that the FAA did not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. §1), exempted "only contracts of employment of transportation workers." 532 U.S. 105, 119 (2001). The Court concluded that "[t]he wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at 114–15. In his dissenting opinion, Justice Souter disagreed with the majority's application of a "cramped" interpretation of "commerce" under section 1

- The FAA preempts generally applicable state contract law when the application of state law to an ambiguous adhesion clause would find consent to class arbitration (*Lamps Plus, Inc. v. Varela*, 2019).[55]

Collectively, these decisions have enabled the aggressive, widespread use of arbitration clauses by adhesive contract drafters with the implicit assurance that these clauses generally will be enforced.[56] Millions of Americans who have entered into adhesive employment, consumer, and other contracts have waived important rights as a condition of getting a job or purchasing a product because the Court's FAA adhesion arbitration decisions have allowed this to happen.

The core problem with "forced" or "mandatory" arbitration today is the Court's application of its expansive interpretation of the FAA "pro-arbitration policy" to adhesion contracts. The Court has repeatedly

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while finding section 2 reached to the furthest extent of the Commerce Clause. *Id.* at 128–29. Justice Stevens also dissented, concluding that the legislative history of section 1 "amply supports the proposition that it was an uncontroversial provision that merely confirmed the fact that no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts." *Id*. at 128. The Court's decision in *Circuit City Stores, Inc.*, meant that the FAA applied to arbitration clauses in employment contracts throughout most of the national economy, and the Court's decision in *Southland* meant that the FAA preempted states from regulating workplace arbitration agreements (adhesive or otherwise). *See* COLVIN, *supra* note 20, at 2 (reporting that according to a 2017 study, 56.2% of private-sector nonunion employees were subject to mandatory arbitration provisions and extrapolating that data to conclude that over sixty million American workers were subject to mandatory arbitration).

55. *Lamps Plus*, 139 S. Ct. at 1415. In *Lamps Plus*, the Court held that California's generally applicable *contra proferentem* canon of contractual interpretation (construing ambiguous contract language against the drafter, particularly in the context of adhesion contracts) was preempted by the FAA when applied by the lower courts to find that an ambiguous adhesive arbitration clause provided consent to class arbitration. *Id.* at 1417–19; *see also* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 54 (2015) (rejecting a California state court's application of California law interpreting an arbitration agreement and substituting the U.S. Supreme Court's own prediction of how California law would apply to uphold an adhesive class arbitration waiver).

56. *See, e.g.*, Gross, *supra* note 21, at 196–97 (footnotes omitted) (observing that "[w]ith such strong court support for the enforceability of arbitration agreements, parties to private commercial transactions included arbitration clauses in their contracts with increasing frequency in the late twentieth and early twenty-first centuries. In particular, pre-dispute arbitration clauses now appear with some regularity in consumer, franchise, employment, and financial services contracts . . . These agreements typically are non-negotiable, take-it-or-leave-it clauses in a broader contract of adhesion governing the relationship between an individual and an institution with far greater legal resources and bargaining power."); *see also* Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Li, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 11 (2015) (describing empirical studies and commenting that "[t]he business community has responded to the Supreme Court's expansive arbitration jurisprudence by adding arbitration clauses to many common consumer contracts").

characterized as a rule of "fundamental importance" that arbitration under the FAA is a matter of "consent, rather than coercion."[57] As an abstraction, this is not a controversial proposition. But in application, the Court has enforced this FAA rule of "fundamental importance" asymmetrically. The Court has vigorously enforced it, for example, when blocking class arbitration, such as by preempting generally applicable state contract law to require express consent to class arbitration (or to enforce adhesive class waivers) because of the Court's concern about the effect of class proceedings on defendants.[58] But the Court has not engaged in a comparable search for genuine consent before enforcing the waiver of a public jury trial or meaningful judicial review against an employee or consumer required to sign an adhesion arbitration clause (which she likely has not seen, read, or understood[59]) as a condition of getting a job, buying a product, or receiving a service. The end result of the Court's arbitration decisions has been to turn the FAA rule of "fundamental importance" on its head by making arbitration pursuant to an adhesive clause more a matter of coercion than of true consent.[60] Enabling the abuse of economic power inherent through the broad enforcement of adhesion arbitration clauses is not what Congress was focusing on when it passed the FAA in 1925,[61] but it is the reality that now exists as a result of the Court's FAA jurisprudence.

III. THE SUPREME COURT'S FAA ADHESION ARBITRATION DECISIONS

57. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. 662, 681 (2010); *Lamps Plus*, 139 S. Ct. at 1415.

58. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 684, 686–87 (creating an extra-textual FAA rule requiring additional affirmative contractual basis consenting to class arbitration); *see also Lamps Plus*, 139 S. Ct. at 1415 (preempting generally applicable California state contract law *contra proferentem* canon that would have established the contractual basis for consent to class arbitration called for in *Stolt-Nielsen*); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (preempting application of California's generally applicable *Discover Bank* unconscionability rule in the course of enforcing an adhesive class arbitration waiver).

59. *See, e.g.*, CFPB REPORT, *supra* note 19, at 11 (reporting that "[c]onsumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either did not know whether they can sue in court or wrongly believe that they can do so."); *see also* Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 13 J. LEGAL STUD. 1, 2 (2014) (observing after conducting a large-scale study of consumers that "a majority of buyers do not read the fine print").

60. *See Lamps Plus*, 139 S. Ct. at 1420 (Ginsburg, J., dissenting) (stating that "I write separately to emphasize once again how treacherously the Court has strayed from the principle that "arbitration is a matter of consent, not coercion.") (internal citation omitted).

61. *See supra* notes 7–23 and accompanying discussion.

HAVE LED TO CALLS FOR REFORM

This article is premised on the belief that the Court's FAA adhesion arbitration decisions need to be overturned. Broad enforcement of adhesion arbitration clauses particularly benefits repeat arbitration players (large businesses who regularly participate in arbitration and employ arbitration service providers),[62] such as by enforcing adhesive delegation clauses, i.e., arbitration agreement clauses that delegate to arbitrators the power to decide the scope of their own jurisdiction.[63] Moreover, by enforcing adhesive clauses containing class arbitration waivers and confidentiality provisions,[64] the Court's FAA decisions (1) promote the privatization of public law applicable to relationships commonly governed by adhesion contracts,[65] (2) chill the vindication of

62. *See, e.g.*, Gross, *supra* note 6, at 2333 (noting that "commentators have raised concern regarding the advantage of 'repeat players'– those parties who regularly arbitrate disputes in connection with their business and thus are very familiar with the process and regularly compensate arbitrators for their time"); *see also* Chandrasekher & Horton, *supra* note 6, at 9 (analyzing data from 40,775 employment, consumer and medical malpractice arbitrations and concluding that "[a]rbitration favors repeat players on *both sides*. In a variety of different settings, serially arbitrating *plaintiffs' law firms* also fare particularly well") (emphasis in original); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L. J. 57, 124 (2015) (reporting analysis of "four-and-a-half years' worth of records to assess consumer arbitration after *Rent-A-Center*, *Concepcion*, and *Italian Colors*" and finding that "few plaintiffs pursue low-value claims and that high-level and super repeat-playing companies perform particularly well"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650–51 (2005) (discussing issues associated with "repeat providers" and "repeat players"); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 239 (1998) (observing that "[t]he repeat player effect is a cause for concern because in dispute resolution, sometimes the perception of fairness is as important as the reality. There is undeniably a repeat player effect in employment arbitration . . .").

63. *See, e.g.*, Horton, *supra* note 50, at 394–405 (criticizing the use of adhesion delegation clauses).

64. Confidentiality provisions in adhesion arbitration agreements can prevent claimants from discussing their claims with third parties. They also prevent individual claimants from coordinating with other individual claimants with similar claims, depriving them (as would a class arbitration waiver) of the opportunity that otherwise would be available to them in court litigation to share expert witness and other transaction costs related to pursuing their claims. *See generally* Judith Resnik, Stephanie Garlock, & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611 (2020) (analyzing claim chilling and law privatization effects of confidentiality provisions and informational asymmetry). In *Italian Colors*, the Court enforced an adhesive arbitration clause with both a class waiver and confidentiality clause that had the effect of preventing a small business owner from pursing a federal antitrust claim that could only be brought cost-effectively on a class or coordinated basis. 570 U.S. 228, 238 (2013)*; see generally supra* note 53 and accompanying discussion.

65. *See, e.g.*, Benjamin P. Edwards, *Arbitration's Dark Shadow*, 18 NEV. L. J. 427, 430 (2018) (observing that "[i]ndustry-wide adoption of pre-dispute arbitration agreements now plunges entire fields of law into shadow. As arbitrators resolve these disputes in the shadow

federal statutory rights (particularly with regard to small dollar value claims that, but for an adhesion arbitration clause and class waiver, could have been brought as part of a class action in court),[66] and thus (3) can effectively shield adhesive contract drafters from meaningful public accountability.[67] In addition, the Court's FAA arbitration decisions have become increasingly anti-federalist. On the one hand, for decades the Court has stated that under the FAA, state law provides the rule of decision for interpreting and determining the validity of arbitration agreements.[68] Yet in a series of FAA decisions denying the availability of class arbitration, the Court has ignored this general principle and

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of the law, the public loses sight of critical information and arbitrators gradually lose sight of the law.") (internal footnote omitted); *see also* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL L. REV. 371, 376–77 (2016) (commenting that mandatory, confidential, bilateral arbitration will stop the common law doctrinal development of "entire categories of cases, including consumer law, employment law, and much of antitrust law"); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704 (1999) (observing that "under Supreme Court cases and other current legal doctrine, vast areas of law are privatizable and that this degree of privatization is possible only through arbitration").

66. *See generally supra* note 53 and accompanying discussion; *see also* COLVIN, *supra* note 20, at 5 (describing study of mandatory employment arbitration and finding that "[m]andatory arbitration has a tendency to suppress claims."); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1332 (2015) (arguing that "it is not true that mandatory employment arbitration affords employees increased access to justice. Rather, it seems that the imposition of mandatory arbitration is actually suppressing the claims of employees."); Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT'L ARB. 163, 177 (2011) (internal footnote omitted) (noting that "parties may agree to arbitrate (or a business may draft a form contract providing for arbitration) to avoid class relief – both class actions in court and class arbitrations. The absence of class relief might make some claims uneconomical to litigate, such that the claims are never brought").

67. *See Italian Colors*, 570 U.S. at 242 (Kagan, J., dissenting) (observing that "the rule against prospective waivers of federal rights can work only if it applies not just to a contract clause explicitly barring a claim, but to others that operate to do so"); *see also* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 576, 584 (2020) (describing the use by large corporations of standardized arbitration clauses to prevent collective action by individuals and small businesses as "a legally facilitated practice that is calculatedly designed to insulate corporations from legal liability by preventing claimants from coming together – which is by and large their only viable path to redress"); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 683–84 (2018) (arguing that mandatory arbitration "effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies"); Sternlight, *supra* note 66, at 1310 (analyzing use of adhesion arbitration by employers to restrict employee access to justice); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 (1997) (observing that "enforcement of adhesive arbitration clauses allows firms to lessen the regulatory impact of statutory claims—in short, to deregulate themselves").

68. *See supra* notes 36–37 and accompanying discussion.

instead conjured and then enforced "fundamental" FAA rules (of indeterminate extra-textual origin) to preempt the application of generally applicable state contract law.[69]

The current state of the law governing adhesion arbitration is problematic. The Court's decisions have provided a roadmap for how adhesion contract drafters may craft clauses to avoid class actions, jury trials, and public accountability.[70] The Court's adhesion arbitration decisions are often untethered to either the FAA's language or its original objective of overcoming judicial hostility to specifically enforcing arbitration agreements between merchants. Instead, the Court's FAA jurisprudence is largely the product, in the words of Justice Stevens, of the Court "standing on its own shoulders."[71] These decisions have incrementally fashioned a substantive pro-arbitration policy that enables the widespread use of adhesion arbitration, which, in turn, has begun to undermine public confidence in arbitration as a legitimate and fair dispute resolution process.[72] The question, then, is what to do about it.

Many commentators object to the current state of adhesion arbitration law.[73] Scholars and legislators have offered a variety of

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69. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) (holding that the FAA requires a contractual basis showing party consent to class arbitration); *see also* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 51 (2015) (rejecting as preempted the state court's application of state contract law to interpret an arbitration agreement regarding a class waiver); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (holding that an ambiguous agreement did not permit class arbitration because the FAA preempted the generally applicable state contract law *contra proferentem* canon of interpretation).

70. *See supra* notes 51–53 and accompanying discussion.

71. *Circuit City Stores, Inc.*, 532 U.S. at 132 (Stevens, J., dissenting) (objecting to the Court's reliance on its pro-arbitration policy decisions to support a narrow interpretation of the FAA section 1 employment contract exclusion and concluding that "[i]n a sense, therefore, the Court is standing on its own shoulders when it points to those cases as the basis for its narrow construction of the exclusion in § 1").

72. *See, e.g.*, Gross, *supra* note 21, at 212 (footnotes omitted) observing that:

> the Supreme Court continues to enforce adhesive arbitration agreements rigidly and refers to Congress litigants who challenge the enforceability of an arbitration clause if they want relief. However, as a practical matter, arbitration is under assault. The public's perception that arbitration is unfair undermines the legitimacy of the process and promotes a 'flight from arbitration.' In turn, weakening the legitimacy of arbitration contradicts values of 'process pluralism,' which promotes utilizing the most appropriate dispute resolution process to enhance the delivery of substantive and procedural justice."

See also Arbitration in America: Hearing Before the S. Comm. on the Judiciary, 116th Cong. (2019) (statement of Professor Myriam Gilles, Professor of Law, Benjamin N. Cardozo School of Law) (noting that "the percentage of Americans against forced arbitration has risen steadily in the past few years."); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (discussing U.S. Supreme Court arbitration decisions and the growing use of mandatory arbitration clauses).

73. *See generally, e.g.*, Estlund, *supra* note 67; Gilles, *supra* note 65; Alexander J.S.

proposals to address problems with adhesion arbitration.[74] For example, some have suggested pre-dispute arbitration procedural reforms, such as banning the separability doctrine, regulating adhesive clause limitations on arbitration discovery, or requiring de novo judicial review of public law claim awards.[75] Other proposals would ban class or collective

Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014); Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985 (2012); Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637 (1996); Carrington & Haagen, *supra* note 42.

74. For bills relating to pre-dispute arbitration agreements introduced in the 116th Congress, *see infra* note 78. Scholars have offered a variety of legislative proposals addressing adhesion arbitration issues. *See, e.g.*, Deborah Zalesne, *The Consentability of Mandatory Employment Arbitration Clauses*, 66 LOY. L. REV. 115, 119 (2020) (proposing a "rebuttable presumption against the validity of a mandatory arbitration clause in employment contracts, with the presumption rebutted only by the employer showing that the term was agreed to through negotiation by parties with roughly equal bargaining power"); *see also* Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus*, 56 AM. BUS. L.J. 815, 874 (2019) (proposing an amendment to FAA section 1 excluding arbitration agreements for all workers, not just transportation workers); Carbonneau, *supra* note 7, at 267 (proposing that employment contracts containing arbitration clauses should be accompanied by a special notice explaining the significance of arbitration and its impact on statutory rights); Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L. J. 271, 309–10 (2007) (proposing an amendment to the FAA requiring voluntary, clear, and unmistakable assent to arbitrate); Sternlight, *supra* note 73 at 705 (proposing that Congress amend the FAA to relax its preemptive effect and allow states to regulate arbitration process in a way that assures procedural fairness). The author of this article previously recommended removing just adhesive employment and consumer arbitration agreements from the scope of the FAA. Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration*, 42 SW. L. REV. 131, 181–84 (2012). Since then, the adhesion arbitration problem has only worsened. The Court has embraced an increasingly aggressive approach to enforcing adhesive arbitration agreements against individuals and small businesses, and to preempting state contract law as applied to adhesion arbitration agreements. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); *see also* DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019). Congress should—as this article proposes—exclude all adhesion arbitration agreements from the FAA in order to comprehensively overturn the Court's growing body of problematic FAA jurisprudence as to all forms of adhesion arbitration, allowing the states to fill the resulting regulatory vacuum and look afresh at the propriety and efficacy of adhesion arbitration. *See* Part IV *infra*.

75. Procedural reform suggestions have involved proposals for either legislative or administrative agency action. *See, e.g.*, Szalai, *supra* note 21, at 246 (arguing that "Congress should consider enacting a law guaranteeing procedural protections in consumer arbitration proceedings, such as basic discovery, a fair location for the hearings for consumers to enable meaningful participation, a prohibition against abbreviated statutes of limitations, a

arbitration waivers in pre-dispute arbitration agreements (PDAAs).[76] A federal statutory class waiver ban would eliminate one of the primary exculpatory effects of adhesion arbitration (such as the combination of class waiver ban and confidentiality clause upheld in *Italian Colors*[77]) by preventing corporations from crafting arbitration clauses that effectively shield them from liability for relatively small dollar value claims brought by similarly situated employees or consumers. Other suggestions for reform have been far broader in scope, seeking the prohibition of PDAAs as a matter of federal law. For example, some federal legislative proposals have sought to ban PDAAs covering specified types of

prohibition against damage limitations, class procedures in limited circumstances, a requirement that the arbitration proceedings and filings should be public, and heightened judicial review of arbitral awards for certain types of claims"); *see also* Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 750–53 (2014) (proposing a Consumer Financial Protection Bureau rule reflecting a centrist interpretation of the FAA that would enforce adhesive arbitration agreements subject to application of FAA section 2 savings clause defense, but also would abolish the separability doctrine, increase judicial review of arbitrators' public law claim decisions and enforce class arbitration waivers only under circumstances where non-arbitration class action waivers are enforced). Some procedural reform suggestions have focused on state regulatory efforts. *See, e.g.*, Aylssa S. King, *Arbitration and the Federal Balance*, 94 IND. L. J. 1447, 1449–50, 1470–71, 1481–82 (2019) (recommending state legislative arbitration reforms, such as state laws addressing arbitrator conflicts of interest, procedural due process, public information about arbitration awards, and heightened standards for judicial review of awards); *see also* Chandrasekher & Horton, *supra* note 6, at 10, 65 (proposing, "[t]o compensate for the elimination of the class device and level the playing field between individuals and arbitration-savvy corporations," that state legislatures enact laws providing for a non-waivable "arbitration multiplier" that would allow an arbitrator to augment a statutory or contractual attorney's fee award to a prevailing employee or consumer claimant); Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 511–12 (2009) (proposing a series of state arbitration procedure regulatory reforms); Sternlight, *supra* note 73, at 705 (proposing an amendment to the FAA allowing state arbitration regulations promoting procedural fairness).

76. *See, e.g.*, Cole, *supra* note 73, at 498–05 (proposing an FAA amendment invaliding consumer arbitration agreements to the extent that they preclude consumer access to class action litigation or arbitration); *see also* Ware, *supra* note 75, at 750–53 (proposing a Consumer Financial Protection Bureau (CFPB) rule that arbitration class waivers be enforceable to the same extent as non-arbitration class waivers). In 2017, the CFPB adopted a rule that banned certain providers of consumer financial products and services from including class waivers in pre-dispute arbitration agreements, and required the providers to submit arbitration records to the CFPB. Arbitration Agreements, 82 Fed. Reg. 33210, 33210 (July 19, 2017) (codified at 12 C.F.R. pt.1040). On November 1, 2017, President Trump signed a congressional Joint Resolution adopted pursuant to the Congressional Review Act, 5 U.S.C. § 801, nullifying the CFPB rule. Joint Resolution, Pub. L. No. 115-74, 131 Stat. 1243.

77. *See supra* note 53 and accompanying discussion.

disputes, such as employment, civil rights, antitrust, or consumer claims ("PDAA ban proposals").[78]

78. For example, bills addressing adhesion arbitration issues introduced in the 116th Congress (2019–20) included the following: COVID Justice and Accountability Act, H.R. 7020, 116th Cong. (2020) (suspending pre-dispute arbitration agreements (PDAA) and joint-action waivers during the COVID-19 public health emergency regarding employment, consumer, antitrust, or civil rights disputes); Financial Protections and Assistance for America's Consumers, States, Businesses, and Vulnerable Populations Act, H.R. 6321, 116th Cong. (2019) (prohibiting PDAAs and class action waivers from being valid or enforceable regarding consumer loan payment disputes under Federal law during the COVID-19 emergency); Ending Passenger Rail Forced Arbitration Act, H.R. 6101, 116th Cong. (2020) (identical to S. 3400, 116th Cong. (2020)) (prohibiting PDAAs regarding consumer and civil rights disputes between Amtrak and its customers); Online Privacy Act of 2019, H.R. 4978, 116th Cong. (2019) (prohibiting PDAAs regarding online privacy and prohibiting waiver of online privacy protections); Student Borrower Protections Act of 2019, H.R. 5294, 116th Cong. (2019) (prohibiting PDAAs and class action waivers from being valid or enforceable by covered lender, servicer, or assignee); Investor Choice Act of 2019, H.R. 5336, 116th Cong. (2019) (related bill S. 2992, 116th Cong. (2019)) (prohibiting broker-dealers and investment advisors from including mandatory arbitration in customer or client agreements); Ensuring Fair Legal Recourse for Private Student Loan Borrowers Act, H.R. 4544, 116th Cong. (2019) (invalidating PDAAs requiring arbitration related to private education loan disputes); Justice for Student Borrowers Act, H.R. 3764, 116th Cong. (2019) (prohibiting PDAAs from being valid or enforceable if requiring arbitration of private education loan disputes); Airline Passengers' Bill of Rights, S. 2341, 116th Cong. (2019) (invalidating PDAAs and class action waiver clauses in certain contracts relating to passenger air transportation); Restoring Justice for Workers Act, H.R. 2749, 116th Cong. (2019) (related bill S. 1491, 116th Cong. (2019)) (prohibiting PDAAs that require arbitration of employment disputes); Justice for Servicemembers Act, H.R. 2750, 116th Cong. (2019) (identical bill S. 2459, 116th Cong. (2019)) (prohibiting PDAAs from being valid or enforceable if requiring arbitration of employment rights disputes of a uniformed service member); Protections and Regulation for Our Students Act, H.R. 3487, 116th Cong. (2019) (amending the Higher Education Act of 1965 to add provision prohibiting PDAAs clauses in student loans); Student Loan Borrower Bill of Rights, S. 1354, 116th Cong. (2019) (prohibiting PDAAs and class action waivers from being valid or enforceable by an educational lender or servicer); Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2019) (amending the Labor-Management Reporting and Disclosure Act of 1959 to protect rights from waiver in PDAA regarding employment conditions); BE HEARD in the Workplace Act, S. 1082, 116th Cong. (2019) (identical bill H.R. 2148, 116th Cong. (2019)) (establishing that no PDAA is valid or unenforceable unless the agreement is not required, nor made a condition of employment, work, or related privilege or benefit); Ending Forced Arbitration of Sexual Harassment Act of 2019, H.R. 1443, 116th Cong. (2019) (prohibiting a PDAA from being valid or enforceable if it requires arbitration of a sex discrimination dispute); Consumers First Act, H.R. 1500, 116th Cong. (2019) (as passed by House, May 22, 2019) (prohibiting PDAAs that prevent consumers from filing or participating in certain class action suits); Forced Arbitration Injustice Repeal Act (the "FAIR Act"), S. 610, 116th Cong. (2019) (related bill H.R. 1423, 116th Cong. (as passed by House, Sept. 20, 2019)) (prohibiting PDAAs from being valid or enforceable for employment, consumer, antitrust, and civil rights disputes); Restoring Statutory Rights and Interests of the States Act of 2019, S. 635, 116th Cong. (2019) (rendering written arbitration agreements in certain commercial contracts unenforceable where an individual or small business alleges a violation of federal or state statute or constitution); Arbitration Fairness for Consumers Act, S. 630, 116th Cong. (2019) (amending the Consumer Financial Protection Act of 2010 by prohibiting PDAAs that force arbitration of future

This article adds to this rich body of literature with a legislative proposal that takes a different approach from other suggested reforms. It is broader than discrete procedural changes to FAA adhesion arbitration, yet narrower than a PDAA ban. This article recommends that the time has come to think afresh about the relative costs and benefits of adhesion arbitration in our modern economy as well as the level of government best suited to regulate the use of arbitration clauses in adhesion contracts. This cannot be accomplished while adhesion arbitration remains subject to the Court's current FAA jurisprudence. The next Part of this article describes and analyzes a proposal for addressing the problem of adhesion arbitration.

IV. STARTING OVER: LETTING STATES REGULATE ADHESION ARBITRATION AGREEMENTS

Because the Supreme Court's adhesion arbitration jurisprudence is based on a federal statute, change can occur if Congress amends the FAA or if the Court decides to overrule one or more of its FAA decisions. In the author's view, a solution to the adhesion arbitration problem requires federal legislation. The U.S. Supreme Court is unlikely to meaningfully revisit its adhesion arbitration jurisprudence in the foreseeable future. Indeed, in its recent *Epic Systems*[79] and *Lamps Plus*[80] decisions, the Court enforced adhesion arbitration agreements with added vigor. Even with changed Court membership over time, the doctrine of stare decisis could prevent the wholesale reversal of nearly forty years of FAA decisions necessary to cure the adhesion arbitration problem created by the Court's

consumer financial product or service disputes); Ending Forced Arbitration for Victims of Data Breaches Act of 2019, H.R. 327, 116th Cong. (2019) (prohibiting customer or similar agreements from requiring an individual to submit to arbitration for security breach related disputes). The most successful of these bills was the FAIR Act, which passed the House of Representatives on September 20, 2019. The FAIR Act would have rendered unenforceable all PDAAs requiring arbitration of employment, consumer, antitrust, or civil rights disputes. It would also have made joint, class, or collective action waivers in any such agreement unenforceable. After passage in the House the FAIR Act was referred to the Senate Judiciary Committee, which did not take any action on the bill. The Restoring Statutory Rights and the Interests of the States Act (S. 635) took a different approach than the FAIR Act by seeking to exclude from the scope of FAA Section 2 pre-dispute agreements to arbitrate federal or state statutory or constitutional claims by individuals or small businesses. S.635 did not address private claims (i.e., non-statutory or constitutional claims) nor did it directly focus its regulatory exclusion on the adhesive nature of a pre-dispute arbitration agreement; however, like the FAIR Act it would have represented a substantial improvement over the current state of adhesion arbitration law under the FAA.

79. *See supra* note 54 and accompanying discussion.

80. *See supra* note 55 and accompanying discussion.

FAA jurisprudence.[81] As the Court itself has effectively recognized, changing adhesion arbitration policy must be brought about legislatively.[82]

A. A Proposal: Exclude Pre-Dispute Adhesion Arbitration Agreements from FAA Regulation & Let States Regulate Them Instead

This article recommends a proposal to address the adhesion arbitration problem. The proposal is based on several principles. First, the heart of the adhesion arbitration problem is the abuse of economic power resulting in the imposition of adhesive arbitration agreements.[83] Second, because adhesion arbitration expanded throughout the economy as a result of the Court's FAA pro-arbitration policy jurisprudence,[84] those decisions (at least as applied to adhesive agreements) need to be overturned legislatively. Third, the problems fostered by the Court's FAA decisions arise almost exclusively in the context of adhesion arbitration, not arbitration agreements between parties of relatively equal bargaining power who are capable of protecting their own interests through negotiation.[85] Fourth, PDAAs under appropriate circumstances can offer efficient, practical, and meaningful access to justice.[86] Fifth, the role of state contract law should be respected, allowing generally applicable state contract law principles to provide the rules of decision for PDAA formation and interpretation.[87]

In order to address the adhesion arbitration problem, Congress needs to start over and overturn the Court's FAA adhesion arbitration

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81. *See* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 53 (2015) (admonishing lower courts to follow the U.S. Supreme Court's precedent, including *Concepcion*, notwithstanding the fact that it was decided by a closely divided court); *see also* Marmet Health Care Ctr., Inc., v. Brown, 565 U.S. 530, 531 (2012) (per curium) (admonishing the lower court for "misreading and disregarding the precedents of this Court interpreting the FAA").

82. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (finding no employee right to class or coordinated adjudication under NLRA and noting that "[t]he policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act"); *Id.* at 1633 (Ginsburg, J., dissenting) (observing that "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."). *See also* Gross, *supra* note 21, at 212 (noting that "the Supreme Court continues to enforce adhesive arbitration agreements rigidly and refers to Congress litigants who challenge the enforceability of an arbitration clause if they want relief").

83. *See generally* Part II *supra.*

84. *See supra* notes 56, 65–67 and accompanying discussion.

85. *See supra* notes 46–55 and accompanying discussion.

86. *See supra* notes 6, 39 and accompanying discussion.

87. *See supra* notes 36–37 and accompanying discussion. This principle is consistent with the federalism values that Congress embedded in section 2. *Id.*

jurisprudence. Congress can accomplish this goal with an amendment to the FAA explicitly excluding adhesion arbitration agreements from regulation under the statute. If the FAA no longer applied to adhesion arbitration agreements, the Court's problematic FAA decisions (e.g., *Southland, Concepcion, Italian Colors, Rent-A-Center, Lamps Plus*)[88] would not apply to them either. Under this proposal, the FAA would still govern ad hoc arbitration agreements and PDAAs other than those constituting or contained in adhesion contracts. Part IV(B) offers specific language that Congress could use if it chooses to adopt this proposal.

This proposal would not outlaw PDAAs (adhesive or otherwise). Instead, it would create a regulatory vacuum by removing adhesion arbitration agreements from FAA jurisdiction and thus the reach of the Court's FAA caselaw. This regulatory vacuum, in turn, would be filled by the states. Without the specter of federal preemption (*Southland* would no longer apply to adhesion agreements), the states would be free to regulate adhesion arbitration. The states could do so in accordance with general state contract law applicable to other types of adhesion agreements or they could craft laws addressing public policy issues uniquely presented by adhesion arbitration. In other words, the proposal does the equivalent of hitting a "restart" button, allowing policymakers to consider the impact and wisdom of enforcing adhesion arbitration provisions given the realities of the twenty-first century U.S. economy.

B. Sample Legislative Language to Implement the Proposal

This proposal would require amending the FAA. In the interest of fleshing out what such an amendment might look like, this portion of the article provides an example of potential statutory language effecting the proposal and discusses the reasoning underlying the sample language. The proposal could be codified as an amendment to FAA section 1 (by offering a second exclusion in addition to the employment exclusion) or section 2 (by adding a subsection excluding adhesion arbitration). Alternatively, it could constitute a new FAA section by itself (similar to the role currently played by the section 1 employment exclusion). The following provides an example of legislative language embracing the proposal.

Proposal: The FAA Adhesion Arbitration Restart Amendment

(A) The phrase "[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" as used in section 2 of this title [the

88. *See supra* notes 46–55 and accompanying discussion.

FAA] shall not include any adhesion pre-dispute arbitration agreement.

(B) For purposes of this section, (1) the phrase "pre-dispute arbitration agreement" means an agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement;[89] (2) the term "adhesion" when applied to the term "contract" or the phrase "pre-dispute arbitration agreement" means a standardized form contract imposed and drafted by a party with superior bargaining power that relegates to the party with lesser bargaining power only the choice to either adhere to the proposed contract or reject it; and (3) the phrase "adhesion pre-dispute arbitration agreement" includes a pre-dispute arbitration agreement that constitutes a contract of adhesion or a pre-dispute arbitration agreement clause that is contained within a contract of adhesion.

(C) In any proceeding to enforce a pre-dispute arbitration agreement, including but not limited to a proceeding in a United States district court brought under sections 3 [to stay federal court litigation because a claim was subject to a valid arbitration agreement] or 4 [to compel arbitration] of this title, the court and not an arbitrator shall decide all questions regarding the applicability of [section (A)] to the arbitration agreement at issue.

(D) The applicability of [section (A)] to a pre-dispute arbitration agreement is a question of federal law.

(E) The party seeking a stay under section 3 of this title or moving to compel arbitration under section 4 of this title shall have the burden of proving that the pre-dispute arbitration agreement at issue is not an adhesion pre-dispute arbitration agreement within the meaning of [section (A)].

(F) In an action over which a United States district court has subject matter jurisdiction, the court shall decide under applicable state law regarding contract formation or interpretation any motion under section 4 to compel arbitration properly before the court pursuant to a pre-dispute arbitration agreement covered by [section 2]. Nothing in this sub-section [section (F)] shall be interpreted to address whether this Act [the FAA] preempts state

89. Section (B) uses a definition of "pre-dispute arbitration agreement" similar to that used in some pre-dispute arbitration reform proposals. *See, e.g.*, Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 401(5) (as passed by House, Sept. 20, 2019) (stating that "the term 'predispute arbitration agreement' means an agreement to arbitrate a dispute that has not yet arisen at the time of the making of the agreement . . .").

> law with regard to any arbitration agreement governed by [section 2.]

Section (A) reflects the heart of the proposal. It would remove adhesion PDAAs from the scope of FAA regulation by excluding them from the types of arbitration agreements covered by section 2. Doing so would place them beyond the scope of the FAA's preemptive "pro-arbitration policy."

Section (B) is definitional. It would make clear that all adhesion PDAAs would be beyond FAA jurisdiction. Section (B) adopts a definition of "adhesion" agreement that tracks how the concept is commonly understood as a matter of general contract law.[90] Section (B) also makes clear that the proposal (section (A)) applies to a free-standing adhesion PDAA and to a PDAA that is contained within a larger contract of adhesion, such as a PDAA clause within a "container" employment or consumer contract.

Section (C) would overrule *Rent-A-Center* and *First Options* as applied to adhesive agreements. It would require that a court rather than an arbitrator determine whether the proposal (i.e., section (A)) applied to an arbitration agreement that was the subject of a motion under section 3 (to stay a federal court action pending arbitration), or section 4 (federal court motion to compel arbitration). It would similarly require that a court, rather than an arbitrator, make this decision in any other proceeding. In the event that the party seeking to enforce a PDAA contended in state court that the agreement was covered by the FAA (and thus outside the scope of section (A)), a court and not an arbitrator would decide this issue. Under section (C), a court would make this decision notwithstanding the existence of a delegation clause purporting to submit all arbitrability disputes to an arbitrator. Section (C) is limited to determining the applicability of section (A), so that if a court determined that the arbitration agreement in question was not an adhesion PDAA within the meaning of section (A), any remaining arbitrability issues (if subject to an otherwise valid delegation clause) would then be decided by an arbitrator.[91]

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90. *See* BLACK'S LAW DICTIONARY, *supra* note 1.

91. Section (C) thus would be philosophically consistent with the Court's holding in New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019), that notwithstanding the otherwise applicable terms of a delegation clause, a court and not an arbitrator should decide whether an arbitration agreement is within the scope of the FAA or instead falls within the FAA section 1 employment exclusion. Some might object to this aspect of the proposal because it would add a layer of litigation to what should be a streamlined arbitration process. The FAA, however, already contemplates threshold judicial proceedings relating to arbitrability issues. *See, e.g.*, 9 U.S.C. § 3 (2021) (motions for stay pending arbitration); 9 U.S.C. § 4 (2021) (motions to compel arbitration if the making of the arbitration agreement is not at issue). *See*

Section (D) is intended to promote uniform application of the proposal by making the issue of whether section (A) applies (i.e., whether the agreement in question is an "adhesion pre-dispute arbitration agreement") a question of federal law. Under section (D), the jurisdictional reach of the FAA thus would be a uniform question of federal law rather than a determination dependent on how a particular state defined "adhesion" contracts. Legislative findings about the intended breadth of the adhesion agreement exclusion could further assure uniform application of the proposal by the courts.

Section (E) places the burden of proving that a PDAA is not an adhesive contract on the party seeking to enforce the agreement. Just as the moving party under sections 3 or 4 would have the burden of showing the existence of a valid agreement to arbitrate, this party would also have the burden of showing that a pre-dispute agreement was not adhesive and thus properly was subject to enforcement under the FAA. Placing the burden of proof on the party seeking to compel arbitration should reduce the volume of actions invoking the FAA to compel arbitration under clearly adhesive standard form contracts. Moreover, requiring the party seeking to enforce a PDAA to show that it was indeed the product of meaningful "consent" would be consistent with the rule of "fundamental importance" underlying the FAA (as articulated by the Supreme Court) that arbitration should be the product of "consent, rather than coercion."[92]

Section (F) is intended to make clear that while the application of section (A) (the adhesion arbitration exclusion) is a question of federal law, contract formation and interpretation issues raised by a motion to compel arbitration under a PDAA that is within the scope of the FAA (i.e., not excluded by section (A)) should be decided pursuant to applicable state law. This, in turn, would confirm the traditional role played by state law under the FAA while leaving undisturbed the preemptive effect of the FAA with regard to ad hoc arbitration agreements and non-adhesive pre-dispute agreements.[93]

This sample statutory language demonstrates one approach to how this article's proposal could be achieved through legislation. There might be alternative language that would also achieve the goals of this article. Despite the fact that it is intended to be illustrative rather than exclusive,

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also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (holding that under the FAA issues of substantive arbitrability must be decided by a court rather than an arbitrator unless the parties clearly and unmistakably delegated decision of the issue to an arbitrator).

92. *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019).

93. Whether FAA preemption of state arbitration law regarding non-adhesive arbitration agreements reflects sound public policy is beyond the scope of this article.

this sample language hopefully will prove useful in connection with consideration and evaluation of the proposal.

C. The Proposal's Impact on Adhesion Arbitration Law

Adopting this proposal would have a profound impact on the law governing adhesion arbitration. Rendering the Court's FAA jurisprudence inapplicable to adhesion arbitration would affect state arbitration law in many ways.

Because *Southland*[94] would no longer apply, the FAA would no longer have preemptive effect on state regulation of adhesion arbitration.[95] As a result, states could regulate adhesion arbitration availability, agreement formation, agreement interpretation, arbitration process, and award enforcement consistent with the state's public policy objectives. For instance, states could prohibit enforcement of adhesive PDAAs altogether, or they could choose to ban them in specific settings (e.g., nursing home contracts or franchise agreements).[96]

Because this proposal would not ban PDAAs as a matter of federal law, states instead could regulate their enforceability to promote the adjudicative efficiency and access to justice policy goals potentially served by pre-dispute arbitration clauses.[97] The Court's assertion in *Concepcion* that Congress adopted the FAA to "facilitate streamlined

94. Southland Corp. v. Keating, 465 U.S. 1, 1 (1984); *see supra* notes 46–47 and accompanying discussion.

95. Similarly, under the proposal the FAA would no longer apply to state court proceedings involving adhesive PDAAs.

96. *See, e.g.*, Marmet Health Care Ctr., Inc., v. Brown, 565 U.S. 530, 533 (2012) (per curium) (holding that the FAA preempted a West Virginia rule barring enforcement of pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes).

97. *See, e.g.*, Gross, *supra* note 6, at 2326–34 (describing generic arbitration features that enhance access to justice, including equal or reduced cost and greater speed compared to court litigation, published and explained awards, the absence of remedy or right-stripping procedural rules, and the right to representation); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements - With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 292 (2006) (favoring the general enforcement of adhesion arbitration agreements and addressing advantages to "the majority of consumers and employees who benefit from their enforcement, that is, those who never have a dispute (but benefit from the better price or wage generated by arbitration's lower costs to businesses) and those who have the sort of small-yet-meritorious case that does not attract a lawyer to take the case to court"); *but see* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 815–16 (2008) (observing that "for employees and consumers with small and mid-sized claims, the availability of low-cost arbitration makes arbitration an accessible forum, and possibly a more accessible forum than litigation. But for consumers with large claims, and for employees not able to use low-cost arbitration, the evidence is less clear").

proceedings"[98] could no longer be used to preempt state law regulating adhesion arbitration process because the FAA would no longer apply to those agreements. Under the proposal, states could adopt a variety of reform measures, including the following possible policy choices:

- Arbitrator Fees and Arbitration Costs: States could require that adhesion contract drafters absorb all arbitration costs and arbitrator fees. Doing so would eliminate some economic barriers preventing employees and consumers from asserting claims against adhesive contract drafters.
- Discovery: States could establish minimum, meaningful discovery rights for adhesion arbitration. Under the proposal, *Concepcion*'s interpretation of arbitration under the FAA as requiring "streamlined" proceedings would not preempt state law from mandating expanded discovery rights for public law (or other) adhesion arbitration claims.[99]
- Adhesive Delegation Clauses: States could require that courts, rather than arbitrators, decide substantive arbitrability issues.[100] Under the proposal, because *Rent-A-Center* no longer would apply to adhesive arbitration, states could ban enforcement of adhesive delegation clauses.[101]
- Class Arbitration and Class Waivers: States could prohibit class waivers in adhesion arbitration agreements. States could also permit class arbitration without requiring that the adhesive contract drafter affirmatively consent to class proceedings against it. Under the proposal, *Concepcion*, *Stolt-Nielsen*, and *Lamps Plus* would no longer preempt states from making these policy choices.[102]

98. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); *see* Aronovsky, *supra* note 74, at 167 (discussing how *Concepcion* arguably created "a new, preemptive FAA 'streamlined proceeding' paradigm"). The Court relied on this "streamlined proceeding" reasoning in *Italian Colors* to permit the use of an adhesion arbitration clause to restrict application of the vindication of federal statutory rights doctrine. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 239 (2013) (observing that a judicial hearing to determine the chilling effect of an adhesive class waiver and confidentiality clause on a claimant's ability to effectively vindicate its statutory rights "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure").

99. *See supra* note 52 and accompanying discussion.

100. *See supra* notes 49–50, 75 and accompanying discussion.

101. *See supra* note 50 and accompanying discussion.

102. *See supra* notes 51–52, 55 and accompanying discussion.

- Separability Doctrine: By overturning *Buckeye Check Cashing*[103] as to adhesion arbitration the proposal would let states refuse to enforce adhesion arbitration clauses contained within void or voidable contracts without resorting to the fiction mandated by the Court's FAA separability doctrine caselaw that an arbitration clause contained within a larger contract must be treated as a separate contract to which a generally applicable contract defense must directly apply.
- Confidentiality Clauses: States could forbid confidentiality clauses in adhesion arbitration agreements. Doing so would prohibit secret adhesive arbitration that prevents accountability for adhesive contract drafters (as reflected in *Italian Colors*[104]), would discourage unlawful behavior that could generate adverse publicity for the contract drafters, and would help chill the privatization of public law otherwise enabled by mandatory private, confidential arbitration proceedings.[105]
- Judicial Review: States could require de novo judicial review of awards for questions of law presented in public law claims. The proposal would eliminate the threat that the FAA would preempt expanded judicial review as inconsistent with "streamlined" dispute resolution.[106] States could also require

103. *See supra* note 49 and accompanying discussion. *Buckeye Check Cashing* held that the separability doctrine applied to the states because it was ultimately derived from FAA section 2. 546 U.S. 440, 447 (2006). If the FAA no longer applied to adhesion PDAAs, neither would the separability doctrine.

104. *See supra* note 53 and accompanying discussion.

105. Arbitration is a private process, i.e., unlike court proceedings, members of the public and the press generally do not have a right of access to attend arbitration hearings or review arbitration records. Arbitration parties, however, are free to disclose arbitration information to third parties unless they are subject to enforceable confidentiality agreements or arbitration service provider confidentiality rules. *See* Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration,* 7 Y.B. ON ARB. & MEDIATION 28, 30–31 (2015) (discussing the difference between arbitration privacy and confidentiality and noting the split among courts about whether adhesion arbitration agreement confidentiality clauses are unconscionable); *see also* Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping the Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 422 (2018) (observing that "as a result of confidentiality provisions, employment and consumer arbitration continue to offer powerful individuals and corporations the ability to hide egregious behavior from public view.") (original emphasis); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1218–22 (2006) (discussing how arbitrating parties may contract for confidentiality and how arbitration is generally more private than court proceedings).

106. FAA section 10(a) provides narrow grounds for vacating arbitration awards which do not include errors of law or fact by the arbitrator. 9 U.S.C. § 10(a) (2021). In Hall Street Associates LLC v. Mattel, Inc., 542 U.S. 576, 582, 590 (2008), the Supreme Court held that section 10(a) provided the sole grounds for vacating an award under the FAA but left open the question of whether state law could permit more searching review of an arbitration award

that adhesion arbitration result in a "reasoned award" explaining the factual and legal bases for an arbitrator's decision.

- Vindicating Statutory Rights: States could ensure that claimants could effectively vindicate their federal (and state) statutory rights under an otherwise enforceable adhesion arbitration agreement.[107] Along with placing all arbitration costs and arbitrator fees on adhesion contract drafters, states could prohibit adhesive clauses like the one in *Italian Colors* (combining a class waiver, consolidated proceeding ban, and confidentiality provision) that chill public law claims to the point that they operate as de facto exculpatory clauses.[108] Because *Gilmer* would no longer apply to adhesion arbitration, states could also place the burden on the adhesive contract drafter to show that the proposed arbitration would provide a reasonable substitute for a judicial forum for the vindication of public law rights.[109]

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on grounds other than those specified in section 10(a). Under this article's proposal, the issue of whether the FAA would preempt de novo review of public law awards issued under adhesive arbitration agreements would be moot because the FAA would no longer apply to adhesive arbitration. *See* Ware, *supra* note 75, at 750 (proposing a Consumer Financial Protection Bureau rule that would, among other things, increase judicial review of arbitrators' public law claim decisions).

107. At one time, the Court refused to enforce PDAAs as to federal statutory claims. For example, the Court held in Wilko v. Swan, 346 U.S. 427, 435–36 (1953) that arbitration of a federal Securities Act of 1934 claim could not be compelled pursuant to a PDAA and catalogued reasons why arbitration was not an adequate substitute for court adjudication of such a public law claim. But in the 1980s, the Court began to enforce PDAAs with regard to federal statutory claims, ultimately overruling *Wilko* in 1989. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989) (overruling *Wilko*). In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 637, 637 n.19 (1985), the Court held that arbitration of a federal antitrust claim by an automobile distributer against an automobile manufacturer could be compelled pursuant to the arbitration clause contained in the parties' distribution agreement and observed that a PDAA could be enforced as to a federal statutory claim so long as: (1) Congress did not prohibit waiver of a judicial remedy for the statutory rights at issue; (2) the arbitration agreement did not operate as a prospective waiver of federal statutory rights; and (3) "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." Subsequent decisions by the Court, including *Gilmer*, 500 U.S. 20, 26 (1991), and Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233–39 (2013), however, have called into question the vigor with which the Court will enforce the standards identified in *Mitsubishi* for assuring that a pre-dispute arbitration agreement will provide a reasonable substitute for a judicial forum for the vindication of federal statutory rights. *See*, *e.g.*, Chukwumerije, *supra* note 53, at 394–427 (discussing the evolution of the Supreme Court's expansive interpretation of the FAA).

108. *See supra* note 53 and accompanying discussion.

109. In *Gilmer*, the Court held that an employee was required to arbitrate a federal Age Discrimination in Employment Act (ADEA) claim pursuant to an adhesive PDAA. 500 U.S.

- Workplace Arbitration: States could regulate the availability of adhesion arbitration in the workplace.[110] Similarly, under the proposal the Court's decision in *Epic Systems*[111]—that class waivers were not illegal as an unfair labor practice under the National Labor Relations Act and not a contract defense preserved under the FAA section 2 savings clause[112]—could be overcome by state law prohibiting class waivers in adhesion employment contracts.

It is also important to note what this proposal would not affect. Under the proposal, adhesive PDAAs would be excluded from the scope of FAA regulation. FAA jurisdiction over all other arbitration agreements already covered by the statute would be left unchanged, i.e., pre-dispute agreements between parties of relatively equal bargaining power and ad hoc arbitration agreements executed in the context of an existing dispute. As a general matter, the parties to these agreements have the ability to protect themselves through arm's length negotiation from the problematic effects of the Court's FAA decisions described above.[113] By removing adhesion arbitration agreements from the FAA, this proposal would redirect federal arbitration law to what Congress focused on when it passed the FAA in 1925: assuring the specific performance of freely negotiated arbitration agreements. The next Part of this article looks at policy advantages that would result from adopting the proposal and addresses potential questions that the proposal might generate.

D. Advantages & Disadvantages of this Article's "Restart Button"

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at 23. The Court determined that under the FAA the employee had the burden of showing that Congress intended to preclude arbitration of his ADEA claim. *Id*. at 26.

110. In Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001), the Court held that the FAA section 1 employment exclusion (providing that the FAA did not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (2021)), exempted "only contracts of employment of transportation workers." Under this article's proposal, *Adams* would no longer apply to adhesion arbitration agreements so states would be free to prohibit or regulate adhesion arbitration in the workplace outside of the narrow limitations of the FAA section 1 transportation worker exclusion. For an alternative approach that would let states regulate workplace arbitration, *see* Greene & O'Brien, *supra* note 74, at 874–75 (proposing an amendment to FAA section 1 excluding arbitration agreements for all workers, not just transportation workers, from the FAA and leaving regulation of employment arbitration to the states).

111. *See supra* note 54 and accompanying discussion.

112. 9 U.S.C. § 2 (2021); *see supra* note 36 and accompanying discussion.

113. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) (observing that "[p]arties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations" but such a process "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law").

Proposal

This article's proposal, by removing adhesion arbitration from the "edifice"[114] created by the Supreme Court through its FAA decisions, will allow policymakers to consider afresh the actual costs and benefits of adhesion arbitration and then craft an appropriate legal framework to regulate it. The proposal recognizes that context matters. Times have changed. Adhesion contracts are far more prevalent in the national economy than they were when Congress passed the FAA in 1925.[115] Moreover, because the Internet did not exist in 1925, Congress could not possibly have conceived of adhesion arbitration clauses entered into through "clickwrap" and other forms of digital agreements now commonplace through e-commerce.[116] The proposal creates a "restart button" that allows policymakers to rethink the role of adhesion arbitration in a twenty-first century economy.

By allowing states to regulate adhesion arbitration, the proposal would serve important federalism interests. Some might contend that the proposal does not assure that state regulation will solve the problems created by the Court's FAA jurisprudence because a state might simply adopt the adhesion arbitration enforcement approach reflected in the Court's FAA decisions. Perhaps. But with growing public awareness and disapproval of "forced arbitration,"[117] it would seem likely that more politically accountable state governments would embrace the opportunity to reform (if not eliminate) adhesion arbitration.

If states choose to regulate rather than prohibit adhesion arbitration, the proposal could generate best practice protocols for PDAAs that could inform model laws such as a revisited Revised Uniform Arbitration Act,[118] which would no longer be inhibited by the specter of FAA preemption on adhesion arbitration agreement enforcement and other regulatory issues.[119] As a result, although some might consider it a downside of the proposal, the fact that states might arrive at different

114. *See supra* notes 46–47 and accompanying discussion.

115. *See supra* notes 15–16 and accompanying discussion.

116. *See* Jeffrey H. Dasteel, *Consumer Click Arbitration: A Review of Online Consumer Arbitration Agreements*, 9 Y.B. on ARB. & MEDIATION. 1, 2–3 (2017) (discussing clickwrap and other forms of digital agreements and reporting that a survey of 200 consumer websites found roughly forty-eight percent of the websites reviewed included binding arbitration in their terms and conditions).

117. *See supra* note 72 and accompanying discussion.

118. REVISED UNIFORM ARBITRATION ACT 2 (UNIF. LAW COMM'N. 2000).

119. In the Prefatory Note to the 2000 revision of the Uniform Arbitration Act, the National Conference of Commissioners on Uniform State Law advised that the U.S. Supreme Court's FAA jurisprudence "establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA." *Id.*

policy choices regarding adhesion arbitration would have a beneficial effect on the development of arbitration law. States would serve as laboratories for PDAA reform ideas, with the resulting data informing the nation (and, perhaps, Congress) about the efficacy and fairness of meaningfully regulated PDAAs.

The proposal thus would reinvigorate the role of state law applicable to adhesion arbitration. States are not—and should not be—strangers to arbitration regulation. Arguably, Congress never intended the FAA to regulate adhesion arbitration in the first place.[120] Regardless, state law already plays an important role in arbitration regulation because under the FAA, state law is supposed to provide the rules of decision on issues of arbitration agreement formation and interpretation as well as the basis for section 2 savings clause contract law defenses.[121] The Court's decisions in *Stolt-Nielsen*,[122] *Concepcion*[123], and *Lamps Plus*,[124] however, have undermined some of the core federalism values Congress embedded in the FAA by preempting generally applicable state law defenses and rules of contract interpretation.[125] The proposal would allow a state either to regulate adhesion arbitration agreements in a manner consistent with how it regulates other adhesion contracts or to craft a regulatory scheme tailored to the unique issues presented by adhesion arbitration.

Conflict of laws problems would arise with state-by-state regulation of adhesion arbitration, but that would be nothing new. Under the FAA, courts now must decide which state law applies to the interpretation or formation of arbitration agreements as well as the state law governing an asserted section 2 savings clause defense. Conflict of laws issue affecting adhesion contracts, of course, may be addressed by a choice of law

120. *See supra* notes 10–12 and accompanying discussion.

121. *See supra* notes 36–37 and accompanying discussion; *see also* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1333–34 (1985).

122. 559 U.S. 662, 688 (2010); *see supra* note 51 and accompanying discussion.

123. 563 U.S. 333, 352 (2011); *see supra* note 52 and accompanying discussion.

124. 139 S. Ct. 1407, 1415 (2019); *see supra* note 55 and accompanying discussion.

125. *See* Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L. J. 326, 340 (2007) (referencing "the lack of any sensitivity toward state laws or candid discussion of federalism in Supreme Court arbitration decisions"); *see also* S. I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 228 n.134 (2012) (stating that the *Concepcion* majority's use of the phrase "facilitate streamlined proceedings" is "problematic, since, as Justice Breyer noted, there is nothing in the FAA or in nearly a century's worth of Supreme Court precedent to support that reading of the statute"); Imre S. Szalai, *Reconciling Fault Lines in Arbitration and Redefining Arbitration Through the Broader Lens of Procedure*, 18 NEV. L. J. 511, 520–24 (2018) (contending that states should be free to regulate arbitration because *Southland* was "wrongly decided" and arguing that "[w]hen arbitration is properly understood and treated as procedural law, such acknowledgment of the procedural nature of arbitration should free states to experiment with regulating arbitration in different ways").

clause. Some might object that under the proposal an adhesion contract drafter could impose an onerous choice of law clause that disadvantages the party with lesser bargaining power. But this, too, would not be a problem that the proposal would have created. Currently, adhesion arbitration contracts often include choice of law provisions. Under the proposal, states would be free to regulate the enforceability of adhesive arbitration choice of law clauses. Traditional conflict of laws principles otherwise should prevent enforcement of an adhesive choice of law clause that would compromise a fundamental policy of the state that would otherwise provide the applicable law absent the clause.[126]

This article's proposed "restart button" reform has advantages not present in some other proposed reforms.[127] For example, some PDAA ban proposals could represent a significant improvement over the current law by preventing abusive consequences of adhesion arbitration through prohibition of certain PDAAs. These proposals, however, also present several potential issues with regard to comprehensively addressing the FAA adhesion arbitration problem.[128] First, PDAA ban proposals would prohibit enforcement of all PDAAs, not just adhesive ("forced") agreements. Such proposals would needlessly ban freely negotiated pre-dispute agreements seeking the potential benefits of arbitration. The problems created by PDAAs are presented by adhesive clauses, not negotiated ones. Second, PDAA ban proposals foreclose PDAA procedural fairness reforms that would allow employees, consumers and others the opportunity to realize the potential access to justice and efficiency benefits that arbitration might provide.[129] Third, a PDAA ban

126. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187–88, 218–19 (1971) (addressing conflict of law rules relating to choice of law clauses in general and arbitration agreements in particular).

127. *See supra* notes 74–78 and accompanying discussion.

128. Scholars have differing perspectives on PDAA ban proposals. Some have expressed skepticism regarding certain PDAA ban proposals. *See, e.g.*, Cole, *supra* note 73, at 491–97 (reviewing objections to the Arbitration Fairness Act of 2011 (a PDAA ban proposal), including over-breadth, potential disenfranchisement of one-shot players, and the availability of due process procedural requirements that could address many concerns with adhesion arbitration contracts); *see also* Amy J. Schmitz, *Regulation Rash? Questioning the AFA's Approach for Protecting Arbitration Fairness*, 28 No. 10 BANKING & FIN. SERVICES POL'Y REP. 16, 21, 23–29 (2009) (reviewing concerns with the Arbitration Fairness Act of 2011 (a PDAA ban proposal), noting, *inter alia*, that arbitration may offer consumers potential access to justice benefits as compared with litigation and suggesting arbitration procedural reforms). Other scholars have commented favorably about PDAA ban proposals. *See, e.g.*, *Arbitration in America: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Professor Myriam Gilles, Professor of Law, Benjamin N. Cardozo School of Law) (supporting passage of the FAIR Act); *see also* Sternlight, *supra* note 52, at 726 (commenting that the Arbitration Fairness Act of 2011 would counteract some of the effects of *Concepcion*).

129. *See supra* notes 6, 39 and accompanying discussion; *see also* Schmitz, *supra* note 128, at 21 (cautioning against abandoning "underappreciated benefits" of pre-dispute arbitration

proposal bill may face difficulty securing congressional approval (particularly in the Senate with its current sixty vote supermajority requirement to win a cloture vote in the event of a filibuster). The federalism values underlying this article's proposal shifting regulation of adhesion arbitration to the states, on the other hand, could generate sufficient bi-partisan support to become law.[130]

This article's proposed reform offers a more comprehensive approach to the adhesion arbitration problem than calls for discrete pre-dispute arbitration procedural reforms.[131] Many of these reforms would represent important improvements over current law. For example, some reform proposals have called for bans on class or collective arbitration waivers in PDAAs.[132] This kind of class waiver ban could prevent corporations from enforcing waiver clauses if faced with a putative class or collective action claim, or could deter them from including arbitration clauses in adhesion contracts in the first place. Indeed, as much as adhesion contract drafters may want to avoid a public jury trial by including an arbitration clause in adhesion contracts, it appears that some find that risk far more palatable than the prospect of an adverse class arbitration award subject only to deferential judicial review.[133] But a class waiver ban alone would not address the broader abuse of economic power flowing from enforcement of adhesion arbitration agreements as to individual claims.[134] Focusing reform efforts on the unequal bargaining power underlying adhesion agreements may become increasingly important in light of the Court's recent questioning in *Lamps Plus* (albeit

agreements that would result from adoption of the Arbitration Fairness Act of 2009, a PDAA ban proposal).

130. *See* Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 719–25 (2014) (discussing the "political divide" over the law governing adhesive arbitration); *see also supra* note 78 and accompanying discussion.

131. *See supra* notes 75–76 and accompanying discussion.

132. *See supra* note 76 and accompanying discussion.

133. *See* Richard Frankel, *Hostility on Display: Why and When Corporations Aren't Really Big Fans of Arbitration*, 38 ALTERNATIVES TO HIGH COST. LITIG. 133, 138 (2020) (observing that "[a]nti-severability clauses are common and often used in conjunction with a class action ban."); *see also* Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update: Green Tree Financial Corp. v. Bazzle—Dazzle for Green Tree, Fizzle for Practitioners*, 59 BUS. LAW. 1265, 1272–73 (2004) (commenting that "[b]ecause courts on the whole are vastly more experienced than arbitrators in administering class action procedures, most companies faced with the prospect of class arbitration would likely prefer to remain in court rather than navigate through the uncharted waters of class-wide arbitration"). *See also* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 50 (2015) (addressing an adhesive consumer arbitration clause that contained a class waiver but also provided that "if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision 'is unenforceable'").

134. *See supra* notes 46–50 and accompanying discussion.

in dicta) as to whether class arbitration is constitutional.[135] Unlike this article's proposal, discrete procedural reforms—while potentially beneficial—would not address the full effect of the Court's FAA jurisprudence on arbitration agreement formation and enforcement issues, would leave adhesion arbitration agreements regulated by the FAA and subject to the Court's otherwise applicable FAA jurisprudence, and thus would not go far enough in regulating adhesive arbitration clauses.

Overall, this article's proposal would liberate adhesion arbitration from the Court's FAA caselaw and let states serve as laboratories of democracy to explore best practices for regulating adhesion arbitration. Any perceived downsides to the proposal are outweighed by the benefits that would flow from allowing society to push the "restart button" on adhesive arbitration regulation.

CONCLUSION: THE COURT'S FAA ADHESION ARBITRATION JURISPRUDENCE MUST BE OVERTURNED

The FAA as interpreted by the U.S. Supreme Court now allows powerful economic actors to shield themselves from a wide range of claims through the use of adhesive pre-dispute arbitration clauses. The current state of FAA adhesion arbitration law is doctrinally incoherent and untenable as a matter of sound public policy. It must be changed. The question is how to do it.

The Court will not likely revisit its FAA adhesion arbitration jurisprudence anytime soon. The solution, then, rests with Congress. Potential legislative solutions require reconsideration of the role that arbitration should and should not play as a dispute resolution process and the level of government best suited to regulate it. A variety of legislative solutions have been suggested in recent years, many of which have considerable merit and would represent material improvements over the status quo.

Reform of adhesion arbitration should focus on the potential misuse of economic power at its core. The proposal offered in this article attempts to do just that by excluding adhesive PDAAs from the scope of the FAA and thus from the reach of the Court's FAA pro-arbitration policy jurisprudence. This would let states regulate adhesion arbitration agreements in a manner reflecting state contract law and dispute resolution public policy choices. Without the protective shield offered by the Court's FAA adhesion arbitration precedents, adhesion contract

135. *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (observing in dicta that class arbitration "raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class—again, with only limited judicial review").

drafters would have incentives to craft fair arbitration agreements and eschew imposing procedurally greedy clauses that could inspire states to ban pre-dispute agreements altogether.

Starting over would restore the FAA to what Congress meant to accomplish—legislation assuring specific performance of freely negotiated arbitration agreements. It also would restore states to their originally contemplated role as providing the rules of decision for arbitration agreement formation, interpretation, and defenses, and allow states to fill the adhesion arbitration regulatory space that Congress may well have believed it was entrusting to the states when it passed the FAA in 1925. This proposal hopefully will provide a vehicle for serving these policy goals and for encouraging a thoughtful conversation about pre-dispute arbitration agreements that embraces the principle that arbitration should truly be a matter of consent rather than coercion.