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## Delegating the Administration of Justice: The Need to Update the Federal Arbitration Act

*“I think everybody [today] feels strongly that the right of freedom of contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion.”*<sup>1</sup>

### I. INTRODUCTION

In 1925, the 68th Congress passed the Federal Arbitration Act (FAA), solidifying arbitration as a valid form of alternative dispute resolution.<sup>2</sup> The need for efficient dispute resolution manifested into the FAA’s statutory framework, which favors enforcing arbitration clauses and limits judicial review of arbitration awards.<sup>3</sup> Since the FAA’s enactment, arbitration has expanded, and modern arbitration clauses are often buried in the fine print of contracts relating to cell phones, cable television, and employment.<sup>4</sup> The Supreme Court responded by liberally interpreting the FAA, maintaining a policy favoring arbitration despite significant social and economic differences between society

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1. See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 14 (1924) (statement of Julius Henry Cohen) [hereinafter *FAA Hearings*] (indicating agreements to arbitrate protected by Constitution). But see Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1120 (2009) (highlighting limits on freedom to contract).

2. See United States (Federal) Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2018)); see also Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 532 (2014) (stating FAA’s purpose to make arbitration clauses enforceable contract provisions). Julius Henry Cohen played a role in framing the FAA, his testimony before the subcommittees pointed to business principles, agreements, and freedoms as the underlying reasons for enforcing arbitration clauses. See *FAA Hearings*, *supra* note 1, at 14, 17 (statement of Julius Henry Cohen). The FAA was clearly intended to place arbitration clauses on equal footing with other contract provisions. See Frankel, *supra*, at 537; Asa Lopatin, *What Constitutes Arbitration for Federal Arbitration Act Purposes?*, AM. B. ASS’N (June 16, 2014), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/articles/2014/what-constitutes-arbitration-for-federal-arbitration-act-purposes/> [https://perma.cc/C9MB-K75R] (explaining FAA’s purpose).

3. See, e.g., 9 U.S.C. § 10 (2018) (outlining courts’ authority to vacate arbitration awards); *id.* § 11 (outlining courts’ authority to modify arbitration awards); Frankel, *supra* note 2, at 539 (explaining FAA considered remedy to nonenforcement).

4. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2813 (2015) (noting common contracts with arbitration clauses); 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?mcubz=3> [https://perma.cc/8T5J-YTBD] (exposing common contracts containing arbitration clauses).

in 1925 and society today.<sup>5</sup> As a result, the arbitration clauses present in myriad contracts have produced a supplemental judiciary guided by private agreements.<sup>6</sup>

While privatizing dispute resolution can be beneficial, arbitration rarely resembles the judicial proceedings citizens expect when a dispute arises.<sup>7</sup> Consequently, arbitration has faced increased scrutiny with pundits arguing for the abolishment of mandatory arbitration clauses and/or a regulatory framework by which arbiters must abide.<sup>8</sup> This disdain culminated in the legislature reintroducing the Arbitration Fairness Act (AFA) that, if passed, will make pre-dispute arbitration agreements relating to employment, civil rights, consumer, and antitrust disputes unenforceable.<sup>9</sup> Although several politicians and scholars support the AFA, it is not a viable solution.<sup>10</sup> Rather than diluting the FAA by

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5. See, e.g., *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (upholding arbitration clause in consumer contracts); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (stating courts should liberally construe scope of arbitration agreements); *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984) (upholding arbitration clause in contracts relating to 7-Eleven franchises). Arbitration clauses are routinely upheld in contracts regardless of the contract's subject matter, illustrating the Supreme Court's liberal approach in interpreting the FAA. See Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1361 (2009) (describing Court's support of arbitration). The Supreme Court's reasoning notes the need to "respect and protect the contractual privilege to arbitrate." *Id.*

6. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3061-62 (2015) (describing Supreme Court's endorsement of arbitration); Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. SOC. POL'Y & L. 195, 210-12 (2017) (criticizing arbitration's current role in resolving disputes); Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 983 (2005) (highlighting arbitration's growth and Supreme Court's endorsement of arbitration). Arbitration's expansion is fueled by the idea that arbitration is a cost-effective alternative to the court system and an effective form of dispute resolution. See Glover, *supra*, at 3062-63.

7. See Judge Craig Smith & Judge Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 297 (2012) (describing why arbitration inadequate in certain circumstances). Arbitration is not the court system's functional equivalent; while "private dispute resolution provides an important alternative to th[e] open-court system, it comes with many hidden costs." See *id.* Some opine that arbitration's private nature restricts the "accessible development of the common law as it pertains to commercial, consumer, and employment disputes." *Id.*

8. See Jean R. Sternlight, *Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009*, 16 DISP. RESOL. MAG., no. 1, 2009, at 5, 6 (describing unfairness of mandatory arbitration). But see Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery With a Hatchet Instead of a Scalpel?*, 74 ALB. L. REV. 769, 784 (2011) (pointing out AFA's shortcomings). A major component of the case against arbitration is that people rarely understand what it entails when they agree to it, thus "prohibition would protect persons who, realistically, will not read or understand the meaning of an arbitration provision prior to when a dispute has even arisen." Sternlight, *supra*, at 6.

9. See Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 157 (2009) (arguing against allowing mandatory pre-dispute arbitration clauses); Megan Leonhardt, *Democrats Are Trying to Make It Easier for People to Take Their Employers to Court*, TIME (Mar. 7, 2017), <http://time.com/money/4694256/democrats-employers-court-mandatory-arbitration/> [<https://perma.cc/3JJG-8YDK>] (discussing AFA in employment context). "This is not the first time lawmakers have attempted to curb companies' use of arbitration. [Senator Al] Franken, as well as others, have introduced bills in previous Congresses that have not gone anywhere." Leonhardt, *supra*.

10. See Igor M. Brin, Recent Development, *The Arbitration Fairness Act of 2009*, 25 OHIO ST. J. ON DISP. RESOL. 821, 839 (2010) (listing arguments against AFA). "The AFA eliminates the potential for developing a fast, efficient, fair, and low-cost dispute resolution process. The AFA creates uncertainty for judicial arbitration

banning pre-dispute arbitration agreements, Congress should take the least restrictive approach and amend the FAA to provide a clear, predictable standard under which arbitration awards can be analyzed.<sup>11</sup>

The judicial process is considered fair because a neutral party detached from the dispute is administering a final decision without regard to persons.<sup>12</sup> The legislature should recognize that arbitration is grounded in similar principles and, despite its imperfections, can be a viable means to resolve a dispute.<sup>13</sup>

This Note outlines two major dispute resolution methods: litigation and arbitration.<sup>14</sup> Next, this Note analyzes the FAA's formation, emphasizing the drafters' influential testimonies before the 68th Congress.<sup>15</sup> Then, this Note addresses the constitutional and contractual principles the Supreme Court has utilized in applying the FAA.<sup>16</sup> Next, this Note considers the Supreme Court's liberal application of the FAA and the criticism the Court has faced for its role in facilitating private dispute resolution.<sup>17</sup> This Note then argues existing solutions fail to adequately preserve the FAA and that they will eliminate the benefits arbitration offers.<sup>18</sup> Finally, this Note proposes an amendment to the FAA that implements a standard for limited, predictable review, arguing such an amendment is supported by the FAA's legislative history.<sup>19</sup>

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doctrines, more than thirty years of bicameral deferral to such doctrines, and business practices dependent on this certainty." *Id.*

11. See Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 464-65 (2007) (illustrating possible benefits of statutory reform). Legislatures should be careful when reforming alternative dispute resolution to ensure "they don't undermine the very flexibility and autonomy they seek to facilitate." *Id.* at 464. The legislature could facilitate alternative dispute resolution's purpose by providing a more grounded, systematic legislative structure to such practices. See *id.*

12. See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=Marginalia&pgtype=article> [https://perma.cc/4U97-TZT7] [hereinafter Silver-Greenberg & Corkery, *Privatization of the Justice System*] (stating arbitration bears little resemblance to court); see also Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> [https://perma.cc/49WF-PV2L] [hereinafter Corkery & Silver-Greenberg, *Scripture Is the Rule of Law*] (describing application of religious text in arbitration proceeding).

13. See Gilda R. Turitz, *Court Intervention When the Parties' Arbitrator Appointment Process Fails*, AM. B. ASS'N (Mar. 27, 2013), <http://apps.americanbar.org/litigation/committees/adr/articles/winter2013-032713-court-intervention.html> [https://perma.cc/846E-7YLR] (describing how arbitrator selection can hinder arbitration's purpose); see also Stipanowich, *supra* note 11, at 462 (calling for simpler approach to alternative dispute resolution). Arbitration's structure is inherently flawed, and "where judicial facilitation is most likely to be needed, court involvement [is] nevertheless severely confined." See Stipanowich, *supra* note 11, at 464.

14. See *infra* Sections II.A-B.

15. See *infra* Sections II.B.1-2.

16. See *infra* Section II.C.

17. See *infra* Section II.D.

18. See *infra* Sections III.A-C.

19. See *infra* Section III.D.

## II. HISTORY

### A. *The Courts*

Arbitration is a form of alternative dispute resolution; to understand its utility, one must first look at what it is an alternative to.<sup>20</sup> The court system is the traditional forum for resolving disputes, and within that forum there are constitutional and procedural safeguards in place to ensure a fair and just outcome is reached and that the parties rights are preserved.<sup>21</sup> In general terms, the Seventh Amendment to the United States Constitution bestows an inalienable right on the people to have their disputes settled by a jury.<sup>22</sup> A jury's main function is deciding what occurred between the parties—the facts of the case—with the given law dictating which party is entitled to a verdict in their favor.<sup>23</sup> This right limits judicial amendment, revocation, or influence of what a jury finds to be fact, intrinsically protecting litigants from an overpowering judiciary by allowing their fellow citizens to determine what facts apply to the law.<sup>24</sup>

Despite the Seventh Amendment codifying the right to a jury trial, the Federal Rules of Civil Procedure presume that a bench trial will be used to settle disputes, so parties must invoke their right to a jury trial if they desire one.<sup>25</sup> In addition, not all cases are eligible for a jury trial, but the courts have broad discretion in submitting a case to a jury.<sup>26</sup> Although judges and juries seek the same

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20. See *Alternative Dispute Resolution*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "alternative dispute resolution"). Alternative dispute resolution is "[a]ny procedure for settling a dispute by means other than litigation, as by arbitration or mediation." *Id.*

21. See *Court Role and Structure*, U.S. CTS, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> [https://perma.cc/7YT4-57ES] (summarizing role of courts). "Courts decide what really happened and what should be done about it." *See id.*

22. See U.S. CONST. amend. VII (establishing right of trial by jury in civil suits); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966) (highlighting arguments for right to jury trial); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 725 (1973) (describing why Seventh Amendment passed). "In response to the pressures for a guarantee of the right of jury trial in civil cases that had been generated during the ratification process, Congress included the [S]eventh [A]mendment in what became the first ten amendments to the Constitution." Wolfram, *supra*, at 725.

23. See Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 874 (2013) (outlining right to jury trial); see also *Jury*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "jury" and "jury functions"). A jury is "[a] group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them." *Jury, supra*. A jury does not decide questions of law, but rather, questions of fact. *Id.*

24. See Wolfram, *supra* note 22, at 646 n.21 (describing protections afforded by Seventh Amendment); see also Deborah J. Matties, Note, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 439-40 (1997) (outlining rights stemming from Seventh Amendment).

25. See FED. R. CIV. P. 38 (stating procedure for demanding jury trial). Under Rule 38, "[o]n any issue triable of right by a jury, a party may demand a jury trial." *See id.* Although the burden is lenient for the party seeking a jury trial, the rule requires that there be a specific demand for a jury trial. *See Matties, supra* note 24, at 442-43 (describing procedure for demanding jury trial).

26. See generally FED. R. CIV. P. 39 (outlining procedure once jury trial demand entered). Rule 39 makes it clear that if the claim is eligible for a jury trial, the party will get a jury. *See id.* The rule also outlines that

outcome—a final resolution grounded in justice—the two are invariably distinct from one another; thus, litigants are forced to consider which entity will best serve their interests with the facts of the case, cause of action, and societal views typically playing a role in that decision.<sup>27</sup> Whether before a judge or jury, litigating a dispute in the court system requires parties to comport with a specific set of rules, deal with logistical challenges, open their dispute to public scrutiny, subject themselves to the applicable law, and potentially deal with an appeal.<sup>28</sup>

The run-of-the-mill civil action begins with pleadings, which encompass the initial allegations.<sup>29</sup> From there, lawsuits must survive responsive pleadings and motion practice, which can derail cases for issues such as procedural defects or lack of merit.<sup>30</sup> Common issues arise with jurisdiction, service, and the statute of limitations.<sup>31</sup> In addition to motion practice, settlements can end a lawsuit as settlement opportunities can arise at every stage and litigants are constantly weighing the cost of further pursuing the action against the potential of recovery at trial.<sup>32</sup>

If the suit is still pending after pleadings, responsive pleadings, and early motion practice, each party is entitled to discovery that exposes a multitude of materials and enables litigants to depose each other and their respective witnesses.<sup>33</sup> The discovery rules initially favored a broad scope of discoverable

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even if an action is not triable by a jury the court may, “with the parties’ consent, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right.” *See id.*

27. *See* Samuel R. Gross, *Settling for a Judge: A Comment on Clermont and Eisenberg*, 77 CORNELL L. REV. 1178, 1180-83 (1992) (highlighting differences between bench trials and jury trials).

28. *See* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 368-69 (2009) (illustrating litigation risks); *see also* FED. R. CIV. P. 1 (delivering purpose of Federal Rules). “These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . . They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1.

29. *See* JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 20 (2d ed. 2014) (describing timeline of typical civil action). Cases rarely proceed through the entire litigation process; although numerous complaints are filed, few are actually tried. *See id.*

30. *See, e.g.*, FED. R. CIV. P. 12(b) (listing defenses responsive pleadings raise); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (holding complaints must plausibly suggest pleader entitled to relief); GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 29, at 22 (highlighting different motions which occur after complaint filed).

31. *See, e.g.*, FED. R. CIV. P. 12(b) (listing defects capable of thwarting lawsuit); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (holding federal courts need jurisdiction to decide cases); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (holding due process requires court establish personal jurisdiction over defendant). Rule 12(b) states that a party may assert defenses for lack of subject-matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim upon which relief can be granted, and failure to join a party under Rule 19. FED. R. CIV. P. 12(b).

32. *See* J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 68-71 (2016) (describing reasons to settle dispute). In theory, settlements are accepted if their benefit is superior to that of the alternatives; making this determination requires an analysis of future costs and potential gains. *See id.*

33. *See* GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 29, at 23 (explaining discovery phase). Discovery is a major aspect of civil litigation; the judge “decides when a party or witness will be required to

materials, but have since been amended to reflect proportionality, which generally requires that the burden of production is worth the potential value of the materials.<sup>34</sup> Even with the proportionality requirement, discovery is an arduous process that requires meticulous review of each item sent to an opposing party because of a potential “smoking gun” lurking in any document, witness testimony, or the like.<sup>35</sup>

If there is no issue of material fact after discovery, a party will likely move for summary judgment claiming there is no need for a jury because, based on the established facts, he or she is entitled to a judgment as a matter of law (JMOL).<sup>36</sup> If this fails, and the case is still pending, eventually the trial ensues: the parties make their opening statements; evidence is introduced, subject to the Federal Rules of Evidence; and closing arguments are made.<sup>37</sup> Furthermore, at the conclusion of the opponent’s evidence, a litigant can move for a JMOL.<sup>38</sup> The court can grant the motion, holding the law requires an outcome in the movant’s favor, or deny the motion, leaving the movant free to renew it if the jury returns a verdict against him or her.<sup>39</sup>

At the conclusion of all the evidence, the case is deliberated upon by a judge or jury who will choose the theoretical “winner.”<sup>40</sup> Contrary to expectation, the verdict or judgment is rarely the case’s end; the aggrieved party may seek a new trial or pursue an appeal, and even if the aggrieved party accepts defeat,

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testify or produce documents.” *See id.* The process is also subject to the Federal Rules of Civil Procedure, which outline the methods of requesting and producing discoverable evidence. *See, e.g.*, FED. R. CIV. P. 26 (outlining general discovery provisions); FED. R. CIV. P. 29 (stipulating discovery procedure); FED. R. CIV. P. 33 (explaining interrogatory procedure).

34. *See* FED. R. CIV. P. 26(b)(1) (explaining parties may discover matters proportional to case’s needs); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1779 (2015) (highlighting initial purpose of discovery rules and proposed amendments). Scholars have argued the amendments to the rules are geared towards promoting efficiency, measuring the costs of discovery against the value of the case. *See* Coleman, *supra*.

35. *See* Coleman, *supra* note 34, at 1787-91 (illustrating pecuniary factors involved in discovery practices). It is difficult to quantify the value of a lawsuit; as a result, cost is not the only factor in evaluating the importance of discoverable information. *See* Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 896-98 (2015) (explaining why benefits of litigation not always reflected in pecuniary value).

36. *See* FED. R. CIV. P. 56 (explaining standard movant must meet to succeed on motion for summary judgment).

37. *See* GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 29, at 27-28 (highlighting stages of trial). The process varies between bench trials and jury trials; if it is a jury trial there is an in-depth process of choosing jurors through voir dire, which attempts to ensure an impartial jury is empaneled. *See id.*

38. *See* FED. R. CIV. P. 50 (defining standard for JMOL in jury trials). Rule 50(a) governs motions for a JMOL. *See id.* “In general, . . . court[s] may not resolve issues or enter [JMOL] against a party until that party has been fully heard on those issues and given a fair chance to cure alleged deficiencies in the evidence that would support a finding for the party on those issues.” 2 STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY § VI, Rule 50 (2018), Westlaw FRCP-RC Rule 50.

39. *See* FED. R. CIV. P. 50 (outlining motion for JMOL and renewing motion for JMOL after jury verdict). “The rule creates two distinct but related motions: (1) a ‘preverdict’ motion made before the case is submitted to the jury; and (2) a ‘postverdict’ renewal of that motion (assuming it was denied or the court reserved ruling) after entry of judgment on an adverse jury verdict.” GENSLER, *supra* note 38, § VI, Rule 50.

40. *See* GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 29, at 27-28 (describing conclusion of trial).

collecting damages may result in further proceedings.<sup>41</sup> In summary, if a case survives motion practice and is not dismissed or settled, the dispute is resolved for all intents and purposes when a judgment is entered and appeals are exhausted.<sup>42</sup>

In 2016, the Federal Judiciary reported that 291,851 civil actions were filed in the district courts, equating to 431 filings per judgeship.<sup>43</sup> The Judiciary also reported a completion of 2,814 nonjury trials, and 1,758 jury trials, with an average time—from filing to disposition—of roughly nine months.<sup>44</sup> Moreover, there were a reported 271,649 case terminations in 2016; in general terms, this is the number of cases filed but resolved before an argument on the merits, often because of settlement or dismissal.<sup>45</sup> In addition, litigation costs can be unpredictable in the current system because unexpected motions typically require responses; attorneys conduct discovery subject to their hourly rates; and—although potential damages are enticing—there are no guarantees at trial, so litigation costs are a risky expenditure.<sup>46</sup> While many citizens flock to the courts to pursue justice, it is easy to see why alternatives exist—not the least of which is arbitration.<sup>47</sup>

### B. Arbitration

Arbitration is a “process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the[ir] dispute.”<sup>48</sup> As an alternative to formal litigation, arbitration derives its utility

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41. See *id.* (illustrating difficulties with reaching and enforcing judgments).

42. See *id.* at 20 (explaining few cases survive through every stage of litigation).

43. See *U.S. District Courts-Judicial Business 2016*, U.S. CTS, <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2016> [<https://perma.cc/VA5W-ZBPN>] (listing court statistics).

44. See *id.* (describing disposition of civil lawsuits in federal court system). In 2016, a total of 4,572 civil trials were completed in the U.S. district courts, a three percent decrease from 2015. *Id.*

45. See *id.* (highlighting number of civil case terminations). “Civil case terminations . . . declin[ed] [one] percent . . . to 271,649.” *Id.* An action can be terminated because of compromise, settlement, or dismissal, at which point the case is no longer pending in court. See Michael C. Wilhelm, *The Four Ways to End a Lawsuit*, LEXOLOGY (Dec. 5, 2011), <https://www.lexology.com/library/detail.aspx?g=975ed0ef-c75e-4227-93c3-34816a433555> [<https://perma.cc/G74C-STBS>] (explaining different ways lawsuits end).

46. See Tidmarsh, *supra* note 35, at 862-66 (explaining subjective nature of analyzing litigation costs). Often litigants do not consider the total cost of a lawsuit and whether suing is financially feasible. See *id.* Typically, the analysis begins and ends with the litigant’s cost incurred and potential reward, ignoring the opposing party’s costs incurred and the court fees. See *id.*

47. See Stipanowich, *supra* note 11, at 432 (describing arbitration forum for alternative dispute resolution).

48. *Arbitration*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “arbitration”); see *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (describing flexibility of arbitration agreements); Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2257 (2002) (highlighting Court’s view of arbitration in *Volt*). “Arbitration . . . is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate.” *Volt*, 489 U.S. at 479.

from privacy, expedience, and flexibility.<sup>49</sup> In arbitration, the parties are free to craft procedures that resolve their dispute on their own terms, in a timely manner, without the formalities and traditions of litigation.<sup>50</sup> Furthermore, the parties get to choose their arbiters, a process that usually involves each party choosing one arbiter and a third being chosen by the two elected arbiters to form a panel.<sup>51</sup> Arbitration's simplicity has led to a high demand for competent arbitration, with organizations such as the American Arbitration Association (AAA) emerging to facilitate the process.<sup>52</sup>

Although arbitration may be perceived as a twenty-first century business practice, it is not a modern concept; in a 1908 speech, William Howard Taft recognized arbitration as a viable alternative to the courts' "elaborate" framework.<sup>53</sup> He opined that arbitration's growth had relieved the courts because "merchants and commercial men" were drawn towards private dispute resolution rather than public litigation.<sup>54</sup> As Chief Justice of the Supreme Court, Taft

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49. See Bruce H. Mann, *The Formalization of Informal Law Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 454 (1984) (describing early forms of arbitration); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 707-08 (1993) (comparing public and private dispute resolution). "It was expeditious and inexpensive. It was also less public and less adversarial than litigation. More importantly, notions of compromise and reconciliation permeated arbitration, from the initial decision to submit to a voluntary process to the common law requirement that an arbitration award must be 'mutual' to be valid." Mann, *supra*, at 454.

50. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 965-67 (2000) (explaining arbitration process).

While arbitrations are far less formal than trials, they still have a very clear adjudicative structure. Each side typically has an opportunity to present witnesses and evidence and to engage in cross-examination—subject to the arbitrator's discretion or, significantly in contractual arbitration, the rules agreed upon by the parties themselves prior to the arbitration. Discovery may be available, but to a much lesser extent than in traditional litigation. As a result, the arbitrator's award generally may be rendered quickly on the basis of the arbitrator's professional judgment under the circumstances rather than on the basis of traditional legal norms.

*Id.* at 965.

51. See Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 39-40 (summarizing typical arbitration proceeding); Reuben, *supra* note 50, at 965 (describing arbitration process); see also ALAN S. GUTTERMAN, *BUSINESS TRANSACTIONS SOLUTIONS* § 101:162 (2018), Westlaw BUSTRANSOL § 101:162 (describing methods of selecting an arbitrator or arbitrators). Each party is typically involved in the selection process which allows them to choose an expert on the subject matter of the dispute. See Cole, *supra*, at 39.

52. See generally *AAA-ICDR Clause Drafting*, AM. ARB. ASS'N, <https://www.adr.org/Clauses> [<https://perm.a.cc/83Z5-T28L>] (explaining how to name AAA as arbitration forum in drafting stage). But see Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 OHIO ST. J. ON DISP. RESOL. 103, 104 (1997) (opining lawyers lack confidence in AAA). The AAA website even provides a pre-drafted contract clause for those who wish to utilize their arbitration services. See *AAA-ICDR Clause Drafting, supra*.

53. See Imre S. Szalai, *An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 396-97 (describing Taft's speech on court systems). At the time of Taft's speech the FAA had not yet been enacted, but Taft spoke highly of arbitration and criticized the court system as a burdensome course for any dispute. See *id.*

54. See *id.* (explaining Taft's dismay that arbitration reserved for commercial parties). The speech's central message was the inadequate procedural framework of the courts. See *id.* In addition, his quasi-endorsement of arbitration illustrated that, in his view, arbitration was a feasible alternative to the courts. See *id.*

expressed similar views in 1922 when he highlighted that the district courts' overcrowded dockets and procedural defects could not accommodate growing markets.<sup>55</sup> Taft's words did not go unnoticed, and Congress enacted the FAA shortly after his 1922 speech; now, almost 100 years later, the statute serves as the foundation for modern arbitration and the issues that come with it.<sup>56</sup>

### 1. *The New York Model*

The FAA finds its roots in New York, where the state legislature was one of the first to address judicial hostility towards arbitration agreements.<sup>57</sup> In 1914, the New York Bar Association created the Committee on the Prevention of Unnecessary Litigation, which eventually manifested into the Committee on Arbitration.<sup>58</sup> The New York Bar Association sought to remove the judicial encumbrance on arbitration by convincing the legislature to enact a statute precluding judges from ignoring arbitration clauses.<sup>59</sup> In passing the New York Arbitration Law, the state legislature accomplished that goal; and shortly thereafter, the framers of New York law convinced the federal legislature to follow their lead.<sup>60</sup>

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55. *Id.* at 397-99 (highlighting Taft's 1922 speech). In Taft's speech at the American Bar Association's annual meeting, he pointed to the increase in business and federal regulations as a major cause of the overburdened federal dockets. *See id.* Some scholars have argued the issue of overcrowded dockets ushered in the vast array of procedural reforms, such as the Judiciary Act of 1925 and the FAA. *See id.* at 398-99.

56. *Id.* at 398 (describing legislation attempted to alleviate overburdened federal courts). The Judiciary Act of 1925 was considered a major restructuring of the Supreme Court, allowing them to adequately respond to the needs of a growing nation. *See id.* at 398-99.

57. *See* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 119 (2002) (noting FAA based on New York's arbitration law); *see also* Matthew J. Brown, "Final" Awards Reconceptualized: A Proposal to Resolve the Hall Street Circuit Split, 13 PEPP. DISP. RESOL. L.J. 325, 334 (2013) (highlighting New York Chamber of Commerce's role in shaping FAA); Julius Henry Cohen, *The Law of Commercial Arbitration and The New York Statute*, 31 YALE L.J. 147, 148 (1921) (highlighting goals of New York arbitration law). The "demands of international commerce" fueled New York's facilitation of arbitration. *See* Cohen, *supra*, at 148.

58. *See* Cohen, *supra* note 57, at 147-48 (describing Committee on Arbitration's evolution).

59. *See id.* at 148 (recognizing international commerce demands). The New York Bar Association advocates for judicial enforcement of arbitration clauses; in their view, no public good was served by nullifying the clauses. *See id.*

60. *See id.* at 157 (describing how statute ensures judicial enforcement). Cohen highlighted Section 2 of the New York Arbitration Law, that states: "A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract . . . shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* He justified this mandate with the following contention:

[T]he rights of both parties are reasonably safeguarded, and no common-law or constitutional right to a jury trial or to the protection of the courts is taken from them, except so far as by their express agreement they themselves have provided that the arbitrators, instead of court and jury or court without jury, shall pass upon certain questions of fact better suited for decision by them than by strangers to the customs and practices of the trade.

*Id.* at 149-50.

## 2. *The FAA*

In 1925, the FAA's enactment solidified arbitration as a legally binding form of alternative dispute resolution.<sup>61</sup> Working off the New York model, Congress codified the growing trend favoring arbitration by declaring arbitration clauses "valid, irrevocable, and enforceable."<sup>62</sup> The hearings on the FAA illustrate that businesses loathed litigation, as Charles Bernheimer, the Chairman of New York's Committee on Arbitration, described "lawyer's work" as an "economic wastage in the everyday commercial transaction[]." <sup>63</sup> Bernheimer noted the four methods for resolving a business dispute, in descending order of favorability: settlement between the parties; settlement by negotiation with the assistance of a third party; agreed upon arbitration; and as the last resort, litigation.<sup>64</sup> In Bernheimer's view, arbitration was appealing to businesses because it saved time and money, preserved professional relationships, and maintained the honor between entities.<sup>65</sup>

Bernheimer opined the FAA was necessary to alleviate the judiciary's resistance to arbitration because, absent a statutory mandate, the district courts rarely ousted their jurisdiction over a dispute.<sup>66</sup> Julius Henry Cohen, a driving force behind the New York arbitration law, endorsed Bernheimer's testimony by stating that the FAA's mandate—the enforcement of arbitration clauses—provided businesses with flexibility because litigation could be avoided, thereby decreasing the risks in business transactions.<sup>67</sup> Moreover, Cohen argued that

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61. See Drahozal, *supra* note 57, at 123 (acknowledging FAA's primary purpose to make arbitration clauses valid). "The language of section 2 broadly makes 'valid, irrevocable, and enforceable' both pre-dispute and post-dispute arbitration agreements." *See id.*

62. See Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 115 (summarizing important provision of FAA); *see also* 9 U.S.C. § 2 (2018) (stating validity of arbitration agreements). Pursuant to the FAA, the Supreme Court has held, "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *See Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (explaining need to enforce arbitration clauses).

63. *See FAA Hearings, supra* note 1, at 7 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y.). Representing the New York State Chamber of Commerce, Bernheimer explained that the cost of litigation influences businesses' selling prices, thus arbitration saves the businesses time, trouble, and money. *See id.*

64. *See id.* (listing four methods of dispute resolution). Bernheimer based these four methods, and the level of favorability attributed to each, from his experiences resolving trade disputes. *Id.*

65. *See id.* (indicating benefits of arbitrating disputes). Bernheimer also called upon his years of experience to substantiate his claim, on behalf of all those engaged in business, that arbitration preserves business relationships. *See id.* Furthermore, he argued that litigation expenses affect prices because merchants factor potential lawyer fees into their overhead; therefore, the higher the risk of litigation, the higher the price. *See id.*

66. *Id.* at 6 (arguing arbitration prevents unnecessary litigation). Bernheimer emphasized that litigation is "[t]he most unprofitable thing" confronting businesses. *See id.* He further stated that not only does the business suffer from unnecessary litigation, the state does as well. *See id.*

67. *See FAA Hearings, supra* note 1, at 16 (statement of Julius Henry Cohen) (explaining why merchants favor arbitration). Cohen stated that merchants who do not have to worry about litigating a dispute out of state are more likely to engage in interstate business relationships. *See id.* He emphasized the growth of "interstate business" as a driving force between the FAA's support. *See id.*

arbitration alleviated the courts' dockets by providing a judicially-recognized avenue for businesses to avoid litigation, which reserves the courts for "important litigation."<sup>68</sup> Bernheimer's and Cohen's testimony persuaded the legislature that the FAA would serve two distinct functions: facilitating businesses by allowing them to avoid litigation, and aiding the judiciary by reducing its docket.<sup>69</sup> Relying on its power to regulate procedure and interstate commerce, Congress passed the United States Arbitration Act (now referred to as the FAA), intrinsically endorsing the principles set forth by the draftsmen.<sup>70</sup>

Just one day after signing the FAA into law, President Coolidge signed the Judiciary Act of 1925, which limited access to the Supreme Court and gave the Court broad discretion in deciding the cases it hears.<sup>71</sup> The timing of these bills illustrates the legislature's attempt to mitigate the judiciary's caseload, with the FAA cutting off a major source of disputes that flooded the district courts, and the Judiciary Act of 1925 restricting appeals to the Supreme Court.<sup>72</sup> However,

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68. See *id.* at 18 (opining arbitration removes unnecessary litigation from court dockets). Cohen stated: "[I]f you could get rid of the litigation that these business concerns can prevent by their arbitration committees—you and I would be able to get along with our important litigation without waiting for a year or two for it to be reached." *Id.*

69. See, e.g., David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 *BUS. LAW.* 55, 58-59 (2007) (highlighting Bernheimer's testimony before Judiciary Committee); *supra* notes 63-65 and accompanying text (arguing arbitration beneficial for businesses); *supra* note 68 and accompanying text (explaining how arbitration lessens court burden). At a hearing before a subcommittee of the Senate Judiciary Committee, Bernheimer opined that businesses prefer arbitration over litigation because it expedites the settlement process. See Clancy & Stein, *supra*, at 59 (highlighting Bernheimer's 1923 testimony).

70. See United States (Federal) Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2018)); S. REP. NO. 68-536, at 3 (1924) (stating arbitration efficient form of dispute resolution); H.R. REP. NO. 68-96, at 2 (1924) (explaining arbitration's simplistic nature). The House of Representatives described arbitration as a simple procedure with less technicality, which limited the delays and costs of litigation. See H.R. REP. NO. 68-96, at 2. Moreover, they relied upon their power to regulate procedure for authority, stating whether to enforce arbitration agreements was a "question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made." *Id.* at 1. The House Report also detailed that "[t]he remedy is founded also upon the Federal control over interstate commerce and . . . admiralty." *Id.* The Senate noted the "desire to avoid the delay and expense of litigation persists," and arbitration has proven to be effective in mitigating those costs in New York. See S. REP. NO. 68-536, at 3. Also, it is evident Congress relied upon the descriptions Cohen and Bernheimer offered, as each report emphasized arbitration's expedience. See Clancy & Stein, *supra* note 69, at 61 (describing House and Senate reports).

71. See Szalai, *supra* note 53, at 400-01 (explaining close proximity of FAA and Judiciary Act); see also John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 *N.Y.U. L. REV.* 1, 10-11 (1983) (stating Judiciary Act's purpose). The Supreme Court had a vast docket, but by enacting the Judiciary Act—commonly referred to as the "Judges' Bill"—the legislature gave the Court broad discretion to choose which cases it heard. See Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 *HARV. L. REV.* 1711, 1712 (1978) (explaining how Judiciary Act changes business of Supreme Court).

72. See Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation?*, 4 *HARV. NEGOT. L. REV.* 231, 246-47 (1999) (explaining FAA passed to alleviate court burden); Szalai, *supra* note 53, at 400-01 (describing relationship between Judiciary Act and FAA); see also Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 *HARV. NEGOT. L. REV.* 319, 369 (2007) [hereinafter Szalai, *FAA*] (illustrating legislature's two-pronged approach to alleviating court burden). While the primary purpose of the

the FAA's main purpose—the facilitation of arbitration through judicial enforcement—has proved controversial.<sup>73</sup>

### C. The Supreme Court's Role

In the 1950s, the Supreme Court was hesitant to subject litigants to arbitration.<sup>74</sup> In *Wilko v. Swan*,<sup>75</sup> the Court held a misrepresentation claim brought under the Securities Act of 1933 was not subject to arbitration.<sup>76</sup> The Court reasoned that, although the FAA requires courts to enforce arbitration agreements, the Securities Act clearly sought to aid investors by protecting their rights; therefore, agreeing to arbitrate issues that fell under the Securities Act was an invalid waiver of the investor's legal rights because it restricted the investor's ability to choose a forum.<sup>77</sup> In *Bernhardt v. Polygraphic Company of America*,<sup>78</sup> the Supreme Court held that the enforceability of arbitration clauses depends on state law in diversity cases not involving interstate commerce.<sup>79</sup> In so holding,

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FAA was to protect arbitration clauses, the hearings indicate an added benefit of curtailing a significant portion of the lower courts' caseload. See *FAA Hearings*, *supra* note 1, at 7, 18 (highlighting reductions in judiciary's caseload resulting from FAA). Furthermore, Herbert Hoover, the Secretary of Commerce at the time, described "the clogging of [the] courts" as a "virtual denial of justice," creating an "urgent need" for the FAA. See Letter from Herbert Hoover, Sec'y of Commerce, to Senator Thomas Sterling, U.S. Senate (Jan. 31, 1923) (depicting Hoover's concern with clogged courts), reprinted in *FAA Hearings*, *supra* note 1, at 21; Szalai, *FAA*, *supra*, at 371-72 (highlighting Hoover's concerns).

73. See, e.g., Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 123-24 (2015) (articulating challenges associated with arbitration and Supreme Court's tendency to hear arbitration cases); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 114-16, 120-22 (2006) (criticizing Supreme Court's application of FAA); Preston D. Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1499-1500 (1995) (explaining confusion and difficulty when interpreting FAA). It has been argued that the FAA allows corporations to limit their liability by using arbitration clauses, therefore uprooting the judiciary's role as a forum for dispute resolution. See 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, 53-55 (detailing arbitrations displacement of courts).

74. See *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (describing parties who agree to arbitrate accept "less certainty of legally correct adjustment"); see also *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956) (highlighting lack of judicial instruction, records, and review of arbitration awards).

75. 346 U.S. 427 (1953).

76. See *id.* at 437-38 (holding claims under Securities Act of 1933 not arbitrable). The Court held that Congress's intent regarding the sales of securities is better carried out by invalidating the agreement to arbitrate issues arising under the Act. *Id.* at 438.

77. See *id.* at 435 (highlighting protections afforded by Securities Act of 1933). The Court reasoned the Securities Act was drafted to protect investors, and arbitration serves to undercut the Act's function by causing a waiver of certain rights which fall under it. See *id.*

78. 350 U.S. 198 (1956).

79. See *id.* at 204-05 (declaring FAA does not apply in diversity cases not involving interstate commerce); see also Moses, *supra* note 73, at 115 (explaining *Bernhardt* holding). The Court determined that an employment contract, not involving interstate commerce, does not fall within the scope of the FAA. See Moses, *supra* note 73, at 115.

the Court offered its view of arbitration, describing it as an inferior process that did not have the benefits of the judicial forum.<sup>80</sup>

Despite its initial hesitation, the Court eventually endorsed the arbitration process in a series of cases that shaped the FAA's current state.<sup>81</sup> In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>82</sup> an action to rescind a contract involving interstate commerce was granted certiorari and the Court addressed whether an arbitrator or the courts should decide if the contract was induced by fraud.<sup>83</sup> The Court held that the FAA applied because the contract involved interstate commerce, which serves as the FAA's constitutional basis.<sup>84</sup> In its reasoning, the Court distinguished contracts from agreements to arbitrate, holding that a claim that the contract itself was procured by fraud is subject to arbitration, whereas a claim the arbitration agreement was procured by fraud should be determined by the courts.<sup>85</sup> Though this case did not necessarily expand the FAA, it shows the Court furthering the FAA's legislative intent by allowing an arbiter to decide a critical element of the parties' dispute: whether the contract was induced by fraud.<sup>86</sup>

After *Prima Paint*, the appellate courts began deciding arbitration issues with a "healthy regard for the federal policy favoring arbitration," and the Supreme Court endorsed this trend in *Moses H. Cone Memorial Hospital v. Mercury*

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80. See *Bernhardt*, 350 U.S. at 203 (stating differences between arbitration and judicial forum). Justice Douglas wrote:

The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury . . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . . .

*Id.*

81. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-06 (1967) (holding arbitrators should decide whether contract induced by fraud); see also *Moses*, *supra* note 73, at 120 (stating *Prima Paint*'s effect).

82. 388 U.S. 395 (1967).

83. See *id.* at 406 (addressing whether arbitrator should decide validity of entire contract). The language in the arbitration clause was broad enough to justify referring the issue to an arbitrator because it encompassed all claims relating to the "agreement." See *id.*

84. See *id.* at 405 (stating Congress relied on Commerce Clause authority to enact FAA). The Court grappled with whether the FAA creates substantive rules for diversity cases. *Id.* Justice Fortas explained this was not an issue because the FAA guides federal courts in how they should handle issues relating to interstate commerce, which the contract at issue involved. See *id.*

85. See *id.* at 406 (considering whether agreement to arbitrate invalid); see also *Moses*, *supra* note 73, at 118-20 (explaining Court's distinction between contract itself and agreement to arbitrate).

86. See *Prima Paint*, 388 U.S. at 404-06 (declaring FAA valid exercise of Congress's power to regulate interstate commerce). The Court stated the issue was "whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate" and decided "[t]he answer to that can only be in the affirmative." *Id.* at 405.

*Construction Corp.*,<sup>87</sup> stating the FAA was a “congressional declaration of a liberal federal policy favoring arbitration agreements.”<sup>88</sup> The Court’s view on arbitration was evolving, and shortly after its holding in *Moses H. Cone*, the Court would administer arguably its most controversial decision regarding the FAA.<sup>89</sup>

In *Southland Corp. v. Keating*,<sup>90</sup> a group of 7-Eleven franchisees sued the franchisor for violating the California Franchise Investment Law (CFIL).<sup>91</sup> The CFIL prohibited contracts that waive CFIL compliance, and the California Supreme Court ruled the claims brought under the CFIL were not arbitrable.<sup>92</sup> The Supreme Court granted certiorari to decide whether the FAA overrides conflicting state laws.<sup>93</sup> Relying on the FAA’s legislative history, the Court reasoned that Congress intended arbitration clauses to be enforceable regardless of which court they end up in, and held the CFIL violated the Supremacy Clause by “undercut[ting] the enforceability of arbitration agreements.”<sup>94</sup> Though it is highly debatable whether *Southland* accurately reflects the 68th Congress’s goal, the Court has routinely held that the FAA preempts conflicting state laws.<sup>95</sup>

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87. 460 U.S. 1 (1983).

88. *See id.* at 24 (highlighting interpretation of *Prima Paint*); *Dickinson v. Heinold Secs., Inc.*, 661 F.2d 638, 642-43 (7th Cir. 1981) (stating federal policy to resolve doubts in favor of arbitration); *Galt v. Libbey-Owens-Ford Glass Co.*, 376 F.2d 711, 714 (7th Cir. 1967) (highlighting FAA’s purpose to promote arbitration to ease court congestion).

89. *See infra* notes 90-94 and accompanying text (describing controversial decision).

90. 465 U.S. 1 (1984).

91. *See id.* at 4 (identifying allegations against franchisor).

92. *See id.* at 5, 10 (outlining procedural history and detailing CFIL’s relevant provision); *see also* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1227 (2013) (highlighting California Supreme Court’s decision).

93. *See Southland*, 465 U.S. at 3 (identifying issues); Horton, *supra* note 92, at 1227-28 (explaining Supreme Court’s decision regarding conflicting state law).

94. *See Southland*, 465 U.S. at 10-12, 16 (explaining legislative intent behind FAA and holding CFIL violates Supremacy Clause). The Court stated that in enacting the FAA, Congress “mandated the enforcement of arbitration agreements” pursuant to its authority “to enact substantive rules under the Commerce Clause.” *Id.* at 10-11.

95. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting) (criticizing *Southland* decision); *Moses*, *supra* note 73, at 125-26 (highlighting disputes regarding *Southland* decision); Schwartz, *supra* note 73, at 86-88 (criticizing *Southland*’s reasoning). *But see* Drahozal, *supra* note 57, at 105-09 (arguing *Southland* decided correctly). Justice Scalia argued that “[a]dhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.” *See Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting).

## D. Recent History

### 1. Class Actions

Recent cases illustrate that the Supreme Court still maintains a liberal policy favoring arbitration.<sup>96</sup> In *AT&T Mobility LLC v. Concepcion*,<sup>97</sup> the Court applied its liberal policy and held the FAA preempted a California statute that prohibited class action waivers in consumer contracts.<sup>98</sup> The decision is widely criticized for allegedly enabling corporations to prevent class action lawsuits by forcing consumers to arbitrate disputes individually.<sup>99</sup> Some even argue the Court's liberal policy favoring arbitration has gone so far as to incentivize class action waivers.<sup>100</sup>

### 2. Constitutional Arguments

Due to the *AT&T Mobility* decision and arbitration's popularity among large corporations, skepticism over arbitration has grown and pundits routinely criticize arbitration's role in modern society.<sup>101</sup> Many are troubled by the fact that a third party, who may not be schooled in the law, can administer a legally binding decision, and some commentators argue it directly conflicts with several constitutional principles.<sup>102</sup> A popular constitutional critique of arbitration clauses is that the waiver of such an important right—the right to a jury trial—is often buried in a contract's fine print, and people rarely understand they are waiving that right.<sup>103</sup> In recent years, the FAA's most controversial aspect has

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96. See Glover, *supra* note 6, at 3054 (explaining recent jurisprudence shows movement towards privatization).

97. 563 U.S. 333 (2011).

98. See *id.* at 351-52 (striking down statute which restricts FAA's function).

99. See Horton, *supra* note 92, at 1242-45 (explaining impact of *AT&T Mobility* in consumer and employment contracts).

100. See Gross, *supra* note 73, at 127 (arguing Court incentivized class action waivers in *AT&T Mobility*); Resnik, *supra* note 4, at 2891-92 (highlighting issues with *AT&T Mobility* opinion).

101. See, e.g., Corkery & Silver-Greenberg, *Scripture Is the Rule of Law*, *supra* note 12 (explaining how arbitration can pervert rules governing disputes); Silver-Greenberg & Corkery, *Privatization of the Justice System*, *supra* note 12 (highlighting disparities between arbitration process and court system); Silver-Greenberg & Gebeloff, *supra* note 4 (describing arbitration used to circumvent court system). This three-part series in the New York Times provided the public with a vivid illustration of the pitfalls of arbitration. See Daniel Fisher, *Arbitration vs. Litigation: It's Not an Either-Or Proposition*, FORBES (Nov. 8, 2015), <https://www.forbes.com/sites/danielfisher/2015/11/08/arbitration-vs-litigation-its-not-an-either-or-proposition/#1831f5615782> [<https://perma.cc/GGA9-PJFW>] (criticizing New York Times articles on arbitration).

102. See, e.g., Cole, *supra* note 51, at 41-43 (explaining why enforcement of arbitration clauses not state action); S.I. Strong, *Constitutional Conundrums in Arbitration*, 15 CARDOZO J. CONFLICT RESOL. 41, 47-49 (2013) (reviewing PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* (Cambridge Univ. Press, 2013)) (highlighting Rutledge's argument arbitration ousts jurisdiction of Article III judges); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS., nos. 1 & 2, 2004, at 5, 5, 11-14 (explaining FAA's preemption curtails states' law-making abilities).

103. See Schwartz, *supra* note 73, at 41-43 (highlighting situation where importance of arbitration clause went unappreciated); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh*

been the courts' reservations in reviewing arbitration awards, resulting in a major circuit split over when and how an arbitration award can be struck down by the courts.<sup>104</sup>

### 3. *The Circuit Split*

In *Hall Street Associates LLC v. Mattel, Inc.*,<sup>105</sup> a landlord and tenant stipulated to an arbitration agreement that expanded the grounds on which the court could modify or vacate the arbitrator's award.<sup>106</sup> The parties wanted the court to modify or vacate an award if "the arbitrator's findings of facts [were] not supported by substantial evidence, or . . . [if] the arbitrator's conclusions of law [were] erroneous."<sup>107</sup> Mattel prevailed in arbitration and Hall Street sought judicial review, arguing the conclusions of law were inaccurate.<sup>108</sup> The district court agreed, vacated the award, and remanded it to the arbitrator who modified the award in favor of Hall Street.<sup>109</sup> Each party appealed the reformed arbitration award, and the district court upheld the award, yet modified the arbitrator's calculation of interest.<sup>110</sup> After a complex series of appeals, reversals, and remands, the Supreme Court granted certiorari.<sup>111</sup> The Court ultimately held the FAA's grounds to vacate or modify an arbitration award cannot be supplemented by contract, interpreting the FAA's grounds for judicial modification of arbitration awards as exclusive.<sup>112</sup> Nevertheless, in dicta, the Court stated "[t]he

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*Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 674 (2001) (illustrating importance of arbitration clauses despite their appearance); see also Matthew J. Stanford, Note, *Odd Man Out: A Comparative Critique of the Federal Arbitration Act's Article III Shortcomings*, 105 CAL. L. REV. 929, 956 (2017) (explaining common opposition to arbitration).

104. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (holding arbitration awards only vacated or modified according to exclusive grounds in FAA); Stanley A. Leasure, *Arbitration Law in Tension After Hall Street: Accuracy or Finality?*, 39 U. ARK. LITTLE ROCK L. REV. 75, 75 (2016) (arguing limited review major source of controversy in FAA).

105. 552 U.S. 576 (2008).

106. See *id.* at 579 (explaining arbitration agreement between parties to lawsuit).

107. See *id.* (explaining extended grounds for court to modify arbitration awards).

108. See *id.* at 580 (highlighting procedural history).

109. See *Hall St.*, 552 U.S. at 580 (explaining district court's interaction with arbitrator). In vacating the award, the district court "expressly invoked the standard of review chosen by the parties in the arbitration agreement." *Id.*

110. *Id.* (describing second modification of arbitration award). In so reversing, the district court again relied on the parties' stipulated legal standard. *Id.*

111. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 580-81 (2008) (illustrating complex nature of procedural history). Each party appealed the district courts' modification of the award to the Ninth Circuit, who reversed for Mattel holding the FAA was the exclusive grounds to vacate or modify an arbitration award. See *id.* The Ninth Circuit instructed the District Court to confirm the original award; however, the district court again ruled for Hall Street. See *id.* at 581. Each party appealed yet again, and the Ninth Circuit reversed yet again. *Id.* At which time, the Supreme Court granted certiorari. *Id.*

112. See *id.* at 584 (holding FAA's grounds for vacatur or modification of arbitration awards exclusive).

FAA is not the only way into court for parties wanting review of arbitration awards,” leading to immense confusion among the circuits.<sup>113</sup>

Prior to *Hall Street*, the dicta in *Wilko* alluded to the fact that an arbitration award may be vacated because of manifest disregard; lower courts later relied on this dicta as a common law ground to vacate or modify an arbitration award.<sup>114</sup> With *Hall Street* explicitly stating grounds for vacatur or modification cannot be extended by agreement, the circuits were split as to whether manifest disregard was a basis for judicial amendment or vacatur of arbitration awards.<sup>115</sup>

The Supreme Court addressed manifest disregard in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>116</sup> stating “[i]t is not enough . . . to show that the panel committed an error—or even a serious error,” it is only when an arbitrator “‘dispense[d] his own brand of industrial justice’ that his decision may be unenforceable.”<sup>117</sup> The Court reasoned such a situation would equate to an arbitrator exceeding his powers, which is a valid ground for vacatur under § 10(a)(4) of the FAA.<sup>118</sup> Although the Court did not rest its decision on that issue, the opinion seems to imply that expanded judicial review of arbitration awards may be appropriate in some cases.<sup>119</sup> Despite leaving that door open, one year

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113. See *id.* at 590 (highlighting Court’s stance on potential avenues not listed in the FAA); see also Leasure, *supra* note 104, at 82 (highlighting confusion resulting from *Hall Street*’s dicta).

114. See *Wilko v. Swan*, 346 U.S. 427, 436 (1953) (explaining grounds to vacate or modify arbitration award). The Court stated, “the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error.” *Id.*; see Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 222-23 (2007) (highlighting FAA’s judicial review provisions and potential interpretations); Leasure, *supra* note 104, at 83-84 (describing circuit split pre-*Hall Street*); Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, DISP. RESOL. J., Oct. 2006, at 16, 16, 21-22 (describing difficulty in applying manifest disregard standard).

115. See *Dewan v. Walia*, 544 F. App’x 240, 245 (4th Cir. 2013) (holding manifest disregard valid ground for vacatur); *Med. Shoppe Int’l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010) (holding FAA provides exclusive grounds for vacatur); *Citigroup Glob. Mkts, Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) (holding manifest disregard not ground for vacatur); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009) (holding manifest disregard valid ground for vacatur under § 10(a)(4) of FAA); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 941 (10th Cir. 2001) (highlighting difficulties when parties agree to expanded review). In *Citigroup*, the court framed the question as “whether, under the FAA, manifest disregard of the law remains valid, as an independent ground for vacatur, after *Hall Street*.” *Citigroup*, 562 F.3d at 355. In answering the question, the court stated: “The answer seems clear. *Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a *nonstatutory* ground for vacatur.” See *id.*

116. 559 U.S. 662 (2010).

117. See *id.* at 671-72 (explaining reasons why court would vacate arbitration award); *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam) (describing standard for manifest disregard).

118. See *Stolt-Nielsen*, 559 U.S. at 671-72 (elaborating on ground for vacatur when arbitrator applies erroneous rules). The Court described the standard for vacating an arbitration award as a “high hurdle.” *Id.* at 671. Furthermore, the Court stated that showing a serious error is not enough to vacate an arbitral award; it is only when the arbitrator ignores the parties’ intentions that an award is eligible for vacatur. *Id.*

119. See Nicholas Goodrich, Note, *Dispensing Injustice: Stolt-Nielsen and Its Implications*, 2011 J. DISP. RESOL. 197, 204 (illustrating *Stolt-Nielsen*’s answer to manifest disregard issue); Jason P. Steed, *Appealing Arbitration Awards and the Circuit Split over “Manifest Disregard of the Law”*, AM. B. ASS’N (May 10, 2016), <https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2016/spring2016-0516->

later in *AT&T Mobility*, the Court stated the FAA provides the exclusive grounds for review of arbitration awards; but, it remains unclear whether certain common law grounds for vacatur are analogous to the FAA's exclusive grounds for review.<sup>120</sup>

#### 4. *The AFA*

Despite immense criticism, the Court's FAA holdings have promoted one goal, enforcing arbitration agreements; consequently, Congress has tried and failed numerous times in amending the FAA to insulate certain classes of dispute.<sup>121</sup> The AFA, which has been routinely introduced to Congress, seeks to prohibit the application of pre-dispute arbitration agreements relating to employment, consumer, antitrust, or civil rights issues.<sup>122</sup> The proposed bill perpetuates the ideas that arbitration is unjust, and that requiring parties to waive their access to the judicial forum prior to a dispute infringes upon their legal rights.<sup>123</sup> Although the bill garners support, Congress has yet to enact its provisions and the FAA remains a polarizing statute.<sup>124</sup>

### III. ANALYSIS

#### A. *Arbitration's Pitfalls*

The FAA implicates both the freedom to contract and due process.<sup>125</sup> By facilitating arbitration, the legislature and judiciary enable private parties to choose what, if any, process applies when a dispute arises.<sup>126</sup> The obvious issue is: What if the chosen process fails to adequately preserve one's rights?<sup>127</sup> Resolving the issue is a topic of fierce debate, with some scholars arguing arbitration can serve as a vehicle to avoid constitutional and statutory

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appealing-arbitration-awards-circuit-split-manifest-disregard-law/ [https://perma.cc/M3H6-K5NP] (describing circuit split surrounding manifest disregard).

120. See Kenneth R. Davis, *The End of An Error: Replacing "Manifest Disregard" with a New Framework for Reviewing Arbitration Awards*, 60 CLEV. ST. L. REV. 87, 124-25 (2012) (arguing *AT&T Mobility* forecloses potential review for manifest disregard). But see Margaret Moses, *Can Parties Tell Courts What to do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 442-43 (2004) (addressing general notion FAA provides strict avenues for review); Steed, *supra* note 119 (acknowledging question still remains whether manifest disregard equals ground for review under FAA).

121. See Brin, *supra* note 10, at 836-38 (explaining proposed AFA).

122. See Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (proposing amendment to FAA).

123. See Brin, *supra* note 10, at 838 (illustrating support for AFA).

124. See 9 U.S.C. §§ 1-16 (2018) (showing FAA remained true to its original form); *H.R.1374-Arbitration Fairness Act of 2017*, CONGRESS, <https://www.congress.gov/bill/115th-congress/house-bill/1374> [https://perma.cc/ACT7-6R3S] (detailing AFA status); see also Glover, *supra* note 6, at 3054 (explaining expansion of arbitration).

125. See Reuben, *supra* note 50, at 1017 (describing struggle between freedom to contract and "ordered liberty").

126. See *id.* at 1018 (explaining how freedom to contract allows one to waive access to public forum).

127. See Glover, *supra* note 6, at 3077 (describing how arbitration curtails substantive law).

compliance.<sup>128</sup> In theory, this contention appears to be true because the FAA fails to define “arbitration”; thus, the procedure is calibrated by the parties, and the superior party will likely safeguard its interests by crafting the arbitration clause and procedure to suit its needs.<sup>129</sup> In addition, the judiciary maintains a passive role in the arbitration process and its review of arbitration awards is restricted.<sup>130</sup> Despite these valid concerns, arbitration is still a viable forum for dispute resolution if conducted in a fair and neutral manner.<sup>131</sup>

### B. The Proposed Solutions

The three main areas of concern with arbitration are the arbitration agreement’s formation, the arbitration’s procedure, and the arbitration award’s finality.<sup>132</sup> Naturally, the question remains whether these issues can be remedied without destroying arbitration altogether.<sup>133</sup> Many legal scholars offer solutions; but, as each concern is addressed, arbitration’s privacy and expedience deteriorates, and the resulting process looks more like the traditional litigation process.<sup>134</sup>

#### 1. Formation of Arbitration Agreements

Some commentators take a front-end approach, arguing the issue lies at the contract’s formation and, to preserve parties’ rights, pre-dispute arbitration agreements should not be enforced.<sup>135</sup> This argument parallels the language in the proposed AFA, and scholars opine that such clauses implicate constitutional rights because of the inherent jury trial waiver.<sup>136</sup> Some scholars propose a

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128. See *id.* at 3077-78 (highlighting how arbitration accomplishes legal reform outside democratic process).

129. See Lopatin, *supra* note 2 (stating FAA does not define or describe arbitration); see also Reuben, *supra* note 50, at 965 (comparing arbitration to informal dispute resolution).

130. See Gross, *supra* note 73, at 145 (criticizing courts’ limited ability to review arbitration awards).

131. See Fisher, *supra* note 101 (opining arbitration upholds individual’s right to transact freely and issue actually lies in lack of oversight).

132. See Brown, *supra* note 57, at 348-49 (addressing finality of arbitration awards); Reuben, *supra* note 50, at 1054-55 (opining arbitration should have minimal constitutional standards); Sternlight, *supra* note 103, at 675-76 (highlighting mandatory arbitration issues).

133. See Reuben, *supra* note 50, at 1054-55 (stating any solution to arbitration issues must account for arbitration’s goals); Stipanowich, *supra* note 11, at 473 (highlighting complexities of regulating arbitration); Helm, *supra* note 114, at 24 (explaining arguments showing arbitration awards final).

134. See Horton, *supra* note 92, at 1265-67 (arguing Supreme Court should interpret FAA to only preempt state laws which “unjustifiably disfavor” arbitration); Moses, *supra* note 73, at 158 (highlighting Court’s failure to consider individual rights when interpreting FAA); Stipanowich, *supra* note 11, at 464-65 (setting forth potential benefits of statutes creating uniform arbitration procedures); Matties, *supra* note 24, at 458-59 (opining jury trial waivers should not conflict with Seventh Amendment’s purpose).

135. See *supra* note 9 and accompanying text (arguing AFA will remedy issues surrounding mandatory arbitration agreements formed before dispute arises); see also Schwartz, *supra* note 73, at 125 (opining enforceable pre-dispute arbitration agreements not desirable); Brin, *supra* note 10, at 838-39 (pointing out arguments raised in favor and against AFA).

136. See Alderman, *supra* note 9, at 157 (highlighting AFA); Matties, *supra* note 24, at 459 (arguing for increased scrutiny of jury trial waivers); Sternlight, *supra* note 8, at 6 (explaining AFA).

narrower solution, requiring the party with superior bargaining power (employers and companies) to fully disclose the applicable arbitration procedures and rules, and the inferior party (employees and consumers) to expressly consent to resolving future disputes in the manner specified by the arbitration clause.<sup>137</sup> Other scholars' proposals suggest precluding superior parties from conditioning contracts on agreements to arbitrate, thereby ensuring each party is on a level playing field.<sup>138</sup>

## 2. Arbitration Procedure

Some commentators address the arbitration process, arguing that arbitration should have litigation-type procedural safeguards.<sup>139</sup> For example, one scholar suggests due process requirements—a neutral forum, the right to counsel, and evidentiary procedures—can be implemented in arbitration to safeguard parties' rights, and that these requirements will not overly burden the arbitration.<sup>140</sup>

## 3. Finality of Arbitration Awards

In like manner, many commentators challenge arbitration's finality, arguing that courts should review arbitration awards to make sure there is a legal basis for the award and that the process was fair.<sup>141</sup> This back-end approach would force arbiters to be well reasoned and diligent because of the potential scrutiny their decision could face.<sup>142</sup>

### C. The Proposals' Inadequacies

The aforementioned solutions are viable; however, arbitration should be given greater deference because the courts do not, and should not, have a monopoly on dispute resolution.<sup>143</sup> First, merchants seeking to avoid litigation advocated for the FAA, so the remedy should not hamper arbitration between business entities

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137. See Szalai, *supra* note 6, at 222-24 (proffering amendment to FAA requiring disclosure and consent).

138. See *id.* (contending FAA needs amendment prohibiting companies from refusing customers who do not agree to arbitrate).

139. See Reuben, *supra* note 50, at 1055 (arguing constitutional standards should apply to arbitration); Verkuil, *supra* note 6, at 985-86 (noting private parties instituting due process in arbitration procedures).

140. See Reuben, *supra* note 50, at 1054-55, 1073, 1079 (opining minimum constitutional standards would mitigate arbitration abuse and maintain its function).

141. See Cole, *supra* note 114, at 231-33 (arguing judicial review feasible pursuant to FAA amendment); Davis, *supra* note 120, at 130-31 (arguing arbitration law needs review process for awards). *But see* Helm, *supra* note 114, at 24-25 (criticizing argument for increased judicial participation in arbitration).

142. See Brown, *supra* note 57, at 354 (proposing new concept of final in arbitration which requires arbitration awards meet judgment standards); Cole, *supra* note 114, at 232-33 (arguing Congress should revise FAA so parties can expand judicial review through contract); Ware, *supra* note 49, at 737-39 (opining for imposition of courts' de novo review of arbitration awards).

143. See Helm, *supra* note 114, at 18 (explaining limited review of awards gives arbitration efficacy); Silver-Greenberg & Gebeloff, *supra* note 4 (highlighting situation where one party to arbitration is superior to other party).

because they are evenly situated and share a common interest in limiting litigation costs.<sup>144</sup> Second, the major concerns relate to the burden on inferior parties—consumers and employees—so the remedy should be tailored to the needs of such persons.<sup>145</sup> Finally, the Supreme Court routinely encounters the FAA, so constitutional arguments against the Act, albeit well supported, are diluted by the Court’s jurisprudence pertaining to the FAA and the liberal policy it has continuously recognized.<sup>146</sup>

### 1. Formation of Arbitration Agreements

An all-out ban on pre-dispute arbitration agreements is impractical because it improperly undermines the FAA and ignores the freedom to contract.<sup>147</sup> The FAA places arbitration agreements “upon the same footing as other contracts, where it belongs.”<sup>148</sup> This language unambiguously indicates that arbitration agreements are contracts and should be treated as such.<sup>149</sup> Naturally, agreeing to arbitrate waives the right to a jury; however, forwarding an invalid waiver argument would call for a heightened jury waiver analysis instead of a contractual analysis, effectively asking the court to ignore the FAA.<sup>150</sup> Therefore, the appropriate question for the court is whether the parties agreed to disposing of future disputes through arbitration—a necessary factor to uphold the FAA’s legislative intent and endorse the contractual freedom that allows parties to craft agreements without government involvement.<sup>151</sup>

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144. See *FAA Hearings*, *supra* note 1, at 16 (statement of Julius Henry Cohen) (illustrating underlying rational for FAA); Schwartz, *supra* note 73, at 71-73 (explaining arbitration was designed for and by merchants). *But see* Glover, *supra* note 6, at 3075-76 (arguing arbitration can undermine legal system).

145. See Schwartz, *supra* note 73, at 71-73 (explaining why merchants’ views of arbitration different from consumers); Sternlight, *supra* note 8, at 5-7 (stressing issues with mandatory arbitration agreements in consumer and employment context).

146. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding FAA preempts state laws conflicting with its objectives); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008) (endorsing national policy in favor of arbitration).

147. See *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (highlighting FAA based on parties’ agreement); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630-32 (1985) (stating parties resisting arbitration free to pursue contract defenses); *supra* note 1 and accompanying text (explaining freedom of contract). In *Volt*, the Court stated that enforcing arbitration agreements according to their terms “give[s] effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.” *Volt*, 489 U.S. at 479.

148. H.R. REP. NO. 68-96, at 1 (1924) (stating FAA’s purpose); see 9 U.S.C. § 2 (2018) (declaring arbitration clauses valid save upon such grounds existing for revocation of contracts); Reuben, *supra* note 1, at 1107 (explaining standard for valid arbitration clauses based on contract law). *But see Hall St.*, 552 U.S. at 585-86 (holding limits exist on parties’ ability to tailor arbitration).

149. See *supra* note 148 and accompanying text.

150. Compare *Waiver*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “waiver” in legal context), with *Arbitration*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “arbitration”).

151. Compare *Contract*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “contract”), with *Contractual Right*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “contractual right”), and *Mandatory Arbitration*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “mandatory arbitration”). A contractual right is “[a]n entitlement arising out of a legally enforceable agreement, whether express, implied, or imposed by law or

## 2. Arbitration Procedure

Regulations would undermine the FAA because implementing litigation-type procedures would turn the streamlined process into a glorified mini-trial.<sup>152</sup> Undoubtedly, arbitration's informal nature is both a strength and weakness, but regulating arbitration procedure toes the line between fixing the issue and destroying the concept.<sup>153</sup> The proposals suggesting uniform standards and privatized due process are inadequate because disputes over regulatory compliance would produce litigation, increase the judiciary's role, and dilute arbitration's expedience.<sup>154</sup> These inevitable regulatory byproducts would transform arbitration into an augmented court system, which is not what the FAA is designed to facilitate.<sup>155</sup> Moreover, the 68th Congress passed the FAA with the intent to alleviate the federal courts' dockets, and instituting regulations that will likely increase the courts' dockets undermines that intent.<sup>156</sup>

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equity." *Contractual Right*, BLACK'S LAW DICTIONARY (10th ed. 2014); see *Freedom of Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "freedom of contract").

152. See *FAA Hearings*, *supra* note 1, at 14 (statement of Julius Henry Cohen) (explaining arbitration's essence and underlying rationale). See generally H.R. REP. NO. 68-96 (illustrating House's understanding of arbitration); S. REP. NO. 68-536 (1924) (illustrating Senate's understanding of arbitration).

153. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (highlighting arbitration trades procedure for informality and expedition); Reuben, *supra* note 50, at 1055 (opining arbitration's informality creates potential for mischief).

[T]he very informality that is arbitration's strength also creates arbitration's greatest potential for mischief. The central concerns are for the impartiality of the neutral, equality of treatment of the parties, the ability of the parties to participate in a meaningful way, the potential for arbitration to exacerbate power imbalances, and the transparency and rationality of the process itself.

Reuben, *supra* note 50, at 1055; see Brin, *supra* note 10, at 840-41 (pointing out previous failure in regulating arbitration).

154. See Gross, *supra* note 73, at 118-19 (describing what makes arbitration appealing); *supra* notes 63-66 and accompanying text (outlining arbitration's benefits). But see Gross, *supra* note 73, at 147-48 (arguing Supreme Court failed to address changes in arbitration procedures).

155. See *Volt Info. Scis., Inc. v. Board of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989) (explaining parties free to structure arbitration to fit their needs); *Mitsubishi Motors Corp.*, 473 U.S. at 628 (explaining how arbitration trades procedure and review for simplicity and speed); *Wilko v. Swan*, 346 U.S. 427, 431-32 (1953) (stating FAA illustrates arbitration desirable over complicated litigation); see also H.R. REP. NO. 68-96, at 2 (highlighting arbitration avoids delay and expense of litigation); S. REP. NO. 68-536, at 3 (recognizing arbitration enables parties to avoid litigation). The Court reasons that because the FAA seeks to preserve the arbitration agreement, parties have the ability to layout the applicable rules of the arbitration and limit its scope pursuant to the agreement. See *Volt*, 489 U.S. at 479.

156. See *supra* notes 68, 70-72 and accompanying text (explaining arbitration serves to alleviate courts' burden, justifying the FAA).

### 3. Finality of Arbitration Awards

The current circuit split shows that expanded judicial review beyond what the FAA provides is an open issue.<sup>157</sup> It is possible the Court determines certain common law grounds for vacatur parallel the FAA's exclusive grounds.<sup>158</sup> But, if history is any indicator, the Court will avoid setting such precedent because promoting appellate practice and litigation pursuant to the FAA would run contrary to its purpose.<sup>159</sup>

#### D. The Fix

The FAA's framers were not worried about the outcomes produced by the courts, but rather the means of reaching those outcomes.<sup>160</sup> The FAA's legislative history characterizes arbitration as a vehicle to reach a just outcome without costly litigation procedures and formalities.<sup>161</sup> In like manner, the statutory grounds to challenge an arbitration award—fraud, bias, corruption, and

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157. See Steed, *supra* note 119 (explaining current circuit split regarding grounds for vacatur including manifest disregard); *supra* note 115 and accompanying text (highlighting circuit split regarding judicial review of arbitration awards).

158. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 671-72 (2010) (explaining how arbitrator's shortcomings could lead to vacatur of award); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001) (stating expanded judicial review undermines FAA's purpose).

159. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (highlighting arbitration awards vacated because of corruption, fraud, or undue means); *Stolt-Nielsen*, 559 U.S. at 671 (showing vacatur of arbitration award difficult to justify); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (interpreting FAA's grounds for review narrowly). *But see AT&T Mobility*, 563 U.S. at 344-45 (describing arbitration more streamlined and informal than traditional litigation); *Hall St.*, 552 U.S. at 590 (stating "FAA . . . not . . . only way into court for parties wanting review of arbitration awards"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (explaining arbitration trades review procedures for speedy resolution).

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

*Mitsubishi*, 473 U.S. at 628.

160. See *FAA Hearings*, *supra* note 1, at 7 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y.) (describing lawyers' work often economic wastage in transactions); H.R. REP. NO. 68-96, at 2 (highlighting parties can challenge arbitration procedures for bias and corruption); S. REP. NO. 68-536, at 3 (characterizing arbitration used to avoid litigation expenses and delays); see also Cohen, *supra* note 57, at 149 (explaining ways to challenge arbitration award under New York statute). Cohen helped develop both the New York Arbitration Law and the FAA, and emphasized that under New York law an award may be challenged for imperfections, misconduct, and mistake. See Cohen, *supra* note 57, at 149.

161. See *FAA Hearings*, *supra* note 1, at 14 (statement of Julius Henry Cohen) (characterizing arbitration similar vehicle for compromise without formalities). Cohen highlighted that often times parties are fully capable of reaching a resolution on their own. See *id.* He emphasized that parties have the right to agree to settle a dispute in their own fashion, and there is no need to involve the courts when they reach such an agreement. See *id.*

the like—focus more on the arbiters’ conduct than the award produced.<sup>162</sup> To compliment these safeguards, Congress should amend the FAA to ensure the awards arbiters produce are reasonably justifiable.<sup>163</sup> The amendment should permit judges to ask a simple question: Could the public forum produce an outcome comparable to the one reached in the arbitration? If that is possible, then the award should be enforced; if it is impossible, then the award should not be enforced.<sup>164</sup>

### 1. *The Amendment*

Section 9 of the FAA provides that any party to the administration of an arbitration award may apply for a court order confirming the award within one year of its administration.<sup>165</sup> From there, the FAA states that the court “must grant such an order” so long as it is not altered in any way under the FAA’s vacation and modification provisions—§ 10 and § 11.<sup>166</sup> Congress should add language after the aforementioned clause of § 9, and the additional language should open the door—ever so slightly—for substantive judicial review by allowing judges to refuse confirming an arbitration award when no reasonable jury could render a comparable verdict.<sup>167</sup> For example, the following addition to § 9 could allow judges to refuse confirming an award in limited circumstances:

[A]t any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [or the

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162. 9 U.S.C. § 10 (2018) (listing grounds for challenging arbitration award). Section 10 focuses on the arbiter’s conduct, allowing vacatur where there is “evident partiality” or “misconduct,” and when the “award was procured by corruption, fraud, or undue means.” *See id.* Furthermore, § 10 allows the court to vacate an award if the arbiter “refus[ed] to hear evidence pertinent and material to the controversy,” bestowing an obligation on the arbiter to give each party an opportunity to present their respective evidence. *See id.*

163. *Compare* Stipanowich, *supra* note 11, at 462 (opining current landscape of arbitration law led to confusion regarding legal consequences), *with* Hochman, *supra* note 52, at 106 (highlighting efforts to ensure correct result traditionally accomplished through appellate practice). Arbitration awards should be somewhat analogous to the outcomes reached in court because the FAA was designed to facilitate the path to an outcome, not give free reign on policy decisions. *See Stolt-Nielsen*, 559 U.S. at 672 (stating arbiters do not make public policy).

164. *See* Hochman, *supra* note 52, at 107 (opining modification of judicial review will need to balance finality and competent arbiters); Moses, *supra* note 120, at 443-44 (comparing reasons to expand judicial review and reasons to restrict it).

165. 9 U.S.C. § 9 (outlining procedure for confirming arbitration award in court).

166. *Id.* (mandating granting of order confirming arbitration award unless altered under § 10 and § 11).

167. *Compare* FED. R. CIV. P. 50(b) (allowing courts to set aside jury verdict and direct JMOL), *with* Hochman, *supra* note 52, at 106 (noting parties seek correct result by arbiters deciding disputes based on applicable law), *and* Reuben, *supra* note 50, at 965 (explaining arbiters rendering award may rely on professional judgment).

court finds that no reasonable jury could find the facts necessary to administer the arbitration award].<sup>168</sup>

The added language stems from Rule 50 of the Federal Rules of Civil Procedure.<sup>169</sup> Rule 50(a)(1) provides, “if a party has been fully heard on an issue . . . and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue,” the court can decide the issue against said party, or grant a motion for JMOL if that issue controls the case’s outcome.<sup>170</sup> Similarly, a court can forego ruling on a Rule 50(a) motion until the jury returns a verdict, or reconsider a party’s motion if it is renewed after the verdict is rendered, pursuant to Rule 50(b).<sup>171</sup> In fact, a Rule 50(b) motion is commonly referred to as a “motion for judgment notwithstanding the verdict” because it is asking the court to supplant the jury’s decision, effectively overruling the jury and entering a different judgment.<sup>172</sup>

## 2. *The Amendment’s Goals*

The proposed amendment to the FAA borrows Rule 50’s principles by allowing courts to consider what a jury would be permitted to do if the arbitrated dispute came before them.<sup>173</sup> Put simply, the amendment seeks to allow courts to set aside an arbiters award the same way it may set aside a jury verdict under Rule 50.<sup>174</sup> By granting this authority, Congress could account for any egregious arbitration outcomes because judges would strike down awards that could not possibly be reached in the public forum.<sup>175</sup> Furthermore, incorporating the proposed standard is reasonable because it is a high standard giving arbiters considerable leeway in resolving disputes, namely because the only requirement for arbiters is that their award would be reached by a reasonable jury.<sup>176</sup>

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168. Compare 9 U.S.C. § 9 (mandating granting of orders seeking to confirm arbitration awards), with FED. R. CIV. P. 50(b) (allowing judges to enter judgment contrary to jury verdict), and GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 29, at 1070-71 (explaining Rule 50(b)’s function in civil litigation).

169. Compare FED. R. CIV. P. 50(a)(1) (providing standard for JMOL), with *supra* text accompanying note 168 (proposing language for amendment to FAA).

170. See FED. R. CIV. P. 50(a)(1)(A)-(B) (providing standard applicable to motion for JMOL).

171. See *id.* at 50(b) (explaining procedure for renewing and ruling on renewed motion for JMOL).

172. See *id.* (allowing courts to grant renewed motion for JMOL following jury verdict); GLANNON, PERLMAN & RAVEN-HANSEN, *supra* note 29, at 1071 (laying out Rule 50(b)’s implications on case’s outcome).

173. Cf. *supra* note 168 and accompanying text (proposing addition to FAA and explaining proposed language).

174. See FED. R. CIV. P. 50(b) (permitting judges to render judgment contrary to jury’s verdict); *supra* note 168 and accompanying text (explaining proposed amendment).

175. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671-72 (2010) (explaining high standard to overturn arbitration award). The Court stated, an award may be overturned when an arbitrator dispenses their “own brand” of justice. *Id.* The Court applied this to an arbitrator’s role in enforcing a contract; however, this language should also be used to vacate unsupported arbitration awards. Cf. *id.*

176. See FED. R. CIV. P. 50(a) (allowing judge to prevent jury from deciding certain issues); see also Hochman, *supra* note 52, at 107 (stating judicial review provides safety net). “[E]ven if the parties could be confident that every arbitrator would be at least as competent as the average trial judge to correctly decide the

*a. The Amendment's Flaws*

The proposed amendment is not perfect by any means, and will burden arbitration in some respects.<sup>177</sup> For one, the amendment will produce litigation for parties in arbitration because it creates a new avenue for judicial review.<sup>178</sup> In addition, arbitration's expedience would diminish because arbiters will be conscious of the potential judicial review, likely producing a more scrupulous arbitral process.<sup>179</sup> Also, arbitration's private nature will be diminished because the underlying dispute will be placed in the public eye when the review procedure is invoked.<sup>180</sup>

*b. The Amendment's Benefits*

*i. Protecting Parties' Rights*

Although the proposed amendment is an added burden, it can indirectly preserve the parties' Seventh Amendment rights by ensuring the courts consider what a jury could have done in similar circumstances, and allowing judges to refuse enforcing any outcome a reasonable jury could not produce.<sup>181</sup> An ancillary benefit is that the demand for competent arbitration will increase because of the potential waste of time and money an arbiter could cause by administering an unenforceable award.<sup>182</sup> As such, arbiters will have an incentive to document their findings and explain their reasoning, and if a court were to review the award, there will be some precedent established as to what is

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dispute, some parties will not buy into arbitration without the safety net of some degree of substantive judicial review." Hochman, *supra* note 52, at 107.

177. See *infra* notes 178-180 and accompanying text (highlighting flaws in proposed amendment).

178. See Hochman, *supra* note 52, at 110 (showing how judicial review produces litigation). Even under FAA's limited grounds for review, litigation is common as parties can argue the process was unfair and or bias. See *id.*

179. Cf. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (noting differences between judicial process and arbitral process). The Court recognizes that when a party agrees to arbitrate, he or she "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* This illustrates that the potential for review slows down the process because there is a greater incentive to get it right. Cf. Hochman, *supra* note 52, at 104 (explaining why lack of review contributes to arbitration's expedience).

180. See Stipanowich, *supra* note 11, at 428 (highlighting alternative dispute resolution does not require complete disclosure); see also *FAA Hearings*, *supra* note 1, at 14 (statement of Julius Henry Cohen) (opining no need to go to court after agreeing to arbitrate).

181. See FED. R. CIV. P. 50(a)(1)(A) (forcing court to consider whether jury could administer similar award). Ensuring arbitration awards could be produced by a jury is desirable because it forecloses an arbiter's ability to craft their own laws and apply them in whatever manner they wish. See *supra* text accompanying note 181. Furthermore, the *Stolt-Nielsen* Court highlighted that an arbiter's job is "to interpret and enforce a contract, not to make public policy." See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 (2010).

182. See, e.g., Hochman, *supra* note 52, at 104-05 (arguing reasoned awards with legal basis produce solid outcomes); Jiang-Schuerger, *supra* note 72, at 245-46 (opining expanded judicial review would encourage parties to use arbitration when they otherwise would not); Stipanowich, *supra* note 11, at 462-63 (explaining logic in giving arbitration room to operate but difficulty in not having clear rules).

tolerable in arbitration and what is not.<sup>183</sup> This will indirectly preserve the parties' expectations of a fair resolution and mitigate concerns over pre-dispute agreements because the court is determining whether the public forum could have produced a similar outcome, thereby imposing objectivity and accounting for those who manipulate the arbitration process to obtain an award in their favor.<sup>184</sup> Coupled with § 10 of the FAA—which seeks to prevent bias, motive, or corruption in arbitration—the amendment better ensures arbitration is conducted in a fair and competent manner and that the result is justifiable because judges would have a basis to render certain inconceivable awards unenforceable.<sup>185</sup>

*ii. Preserving Arbitration's Utility*

Furthermore, the standard limits the courts' powers and prevents judges from vacating an award merely because they disagree with it.<sup>186</sup> This upholds arbitration's utility because the procedures and rules are still in the parties' discretion, and the awards will be enforced so long as such procedures and rules produce a legally logical result.<sup>187</sup> In like manner, the FAA's function of enforcing arbitration agreements is maintained because the amendment is not concerned with the agreement to arbitrate or arbitration itself, it is only concerned with the outcome: Who won and why?<sup>188</sup> And, although parties will litigate whether the award complies with the amendment's standard, this litigation is a small price to pay for the preservation of arbitration.<sup>189</sup> Lastly, by using a well-known civil procedure rule, arbiters will be on notice of what the legislature is willing to tolerate, and arbitration will be given deference as the parties

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183. Compare Glover, *supra* note 6, at 3074-75 (explaining dangers in nonpublication of dispute resolution), with Hochman, *supra* note 52 at 104-05 (arguing reasoned awards with legal basis produce solid outcomes).

184. Cf. Hochman, *supra* note 52, at 103-05 (highlighting danger in allowing arbiter to administer decision based on subjective notions of fairness).

185. See 9 U.S.C. § 10 (2018) (outlining basis to challenge arbiters bias, corruption, etc.); see also *infra* Section III.D.1.b.ii (opining amendment would enable courts to determine when arbitral award justified).

186. See Hochman, *supra* note 52, at 113 (highlighting judicial review beneficial, however if too broad can dilute function of arbitration).

187. See *supra* note 175 and accompanying text (focusing on review of outcome arbitration produced, not procedures implemented).

188. See *supra* note 164 and accompanying text (explaining amendment would only allow courts to look to outcome, not procedures used in arbitration).

189. See Hochman, *supra* note 52, at 120 (stating parties to arbitration often seek same result court would produce); *supra* note 164 and accompanying text (arguing for judicial review of arbitration awards).

Limiting judicial review of the arbitrator's conclusions of law by such a vague standard would create an additional level of uncertainty and would require a more subjective determination than is required where the usual judicial standard of legal error is applied. Moreover, if the goal of the parties is to obtain the same result that they would hope to obtain in court, it is not likely they would want to accept a legally incorrect award merely because the legal error is not gross or substantial.

Hochman, *supra* note 52, at 120.

challenging an award will have to meet a high standard—that no reasonable jury could administer a similar verdict.<sup>190</sup>

#### IV. CONCLUSION

The FAA's framers envisioned an expedited system for dispute resolution. However, present-day arbitration appears to allow statutory and constitutional avoidance, and Congress must act. Despite the breadth of valid critiques, the FAA was drafted—in large part—so parties could avoid costly litigation by agreeing to arbitrate. The issues that have resulted will likely persist, and alleviating those issues should be done in accordance with the FAA's intent. The FAA's framers were not particularly concerned with whether they won or lost in litigation—their concern was with the litigation process itself. As a result, the solution should avoid directly altering the arbitration process and instead narrow in on the results that process produces.

The proposed amendment is not perfect; it definitely burdens arbitration and does not account for every issue stemming from arbitration. But the amendment could improve arbitration because it will disincentivize manipulation of the arbitration forum. Arbiters will not have unbridled authority to favor residual clients because the ultimate award could be attacked on the ground that no reasonable jury could produce a similar verdict. While this does not directly regulate arbitration procedure, it should result in a process that considers each side—as a jury does—and produces a legally justifiable result. Furthermore, the high standard for preventing enforcement would bestow a burden on the aggrieved party to show that the outcome could not be produced by a jury. This burden would give arbitration room to breathe and prevent courts from needlessly striking down arbitration awards that could have been produced through litigation.

Although modern arbitration clauses cover a wide array of disputes, arbitration can still serve its purpose regardless of the dispute's subject matter if the ultimate outcome is justifiable under the circumstances. The amendment this Note proposes, attempts to accomplish this by setting the standard for what is a justifiable outcome—that which a reasonable jury could produce. In conjunction with § 10 of the FAA—review of awards based on corruption, fraud, and the like—the amendment would produce a more complete statute by allowing for a simple check on arbitration awards, a fair compromise because it does not demand perfect results, only logical ones.

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190. *See supra* note 175 (opining minimum standard should require factual basis for award and award possible in court). The two distinct rules impose a predictable standard that does no more than require the award is legally feasible. *See supra* note 175.