

A Modest Proposal: Review of the  
National Consumer Law Center’s  
Model State Consumer and Employee  
Justice Enforcement Act

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## INTRODUCTION

Arbitration has a deep history in the United States, but in the last forty years, it has become an exceptionally prevalent form of dispute resolution. Agreements to arbitrate have become increasingly common—so much so that almost anyone with a cellular phone could be a party to one. When parties agree to arbitration, it is most often through a predispute arbitration agreement that presents as a clause in standard form contracts for services or employment.<sup>1</sup> Often unnoticed, predispute arbitration agreements exist in contracts for many common goods and services.<sup>2</sup> Examples include cellphone contracts, credit agreements, auto loans, school enrollment forms, nursing home contracts, and employment contracts.<sup>3</sup> In many of these situations, arbitration is not consented to by way of a bargained for exchange but is rather a condition of sale.

The foremost law controlling arbitration is the Federal Arbitration Act (FAA), which has been in effect for nearly a century.<sup>4</sup> Though originally intended to ensure judicial recognition of arbitration,<sup>5</sup> the FAA has since become a particularly contentious topic, splitting the opinions of pundits, legal scholars, and the Supreme Court. A series of Supreme Court decisions have served not only to guarantee judicial recognition of arbitration but to safeguard a “national policy favoring arbitration.”<sup>6</sup> Preserving the national policy favoring arbitration, the Supreme Court has given the FAA significant preemptive force over

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<sup>1</sup> ZACHARY GIMA ET AL., PUB. CITIZEN, FORCED ARBITRATION: UNFAIR AND EVERYWHERE 1–2 (Sept. 14, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (noting that seventy-five percent of the consumer industry companies that took part in the survey included mandatory arbitration clauses in contracts).

<sup>2</sup> EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 129–30 (2006) (discussing the expansion of arbitration agreements into everyday consumer transactions with financial institutions, service providers, and sellers of goods).

<sup>3</sup> *Id.*

<sup>4</sup> 9 U.S.C. §§ 1–307 (2015).

<sup>5</sup> See Ashley M. Sergeant, *The Corporation’s New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 153 (2012).

<sup>6</sup> Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 400 (2004).

state-made legislation that seeks even the slightest control over arbitration. With states consistently losing ground to the FAA in the Supreme Court, the National Consumer Law Center (NCLC) has recently published the Model State Consumer and Employee Justice Enforcement Act (Model Act), which offers model statutory language the states can adopt whole, or in part, to both control arbitration and avoid FAA preemption.

This Comment summarizes the FAA's long and divisive jurisprudence, culminating in a critical review of the NCLC's Model Act. This Comment intends to illustrate the tension in arbitration law between the prominent FAA and the states which have tried to maintain some control over arbitration. Part I outlines the state and processes of arbitration today, beginning with the context in which the FAA was enacted and its stated purpose. Part II considers how the Supreme Court has interpreted the FAA and the decisions that gave rise to the astonishing scope the FAA now enjoys. After discussing the breadth of FAA jurisprudence, Part III examines problems the FAA has created for employees, consumers, and the plaintiff's bar generally, as well as state legislatures and judiciaries. This part is not intended to weigh the merits of arbitration (in fact, the advantages of arbitration are almost entirely ignored), instead the purpose is to highlight the difficulties faced by aggrieved parties essentially forced to arbitrate their disputes and why states feel compelled to protect those parties. Part IV then analyzes why many scholars argue Congress or the Supreme Court should restore the states with some control over arbitration and how and why neither has made meaningful strides to do so. Lastly, Part V turns to the NCLC's Model Act, assessing its potential as a legislative resource for states to gain some control over arbitration, absent action by Congress or the Supreme Court.

## I ARBITRATION'S LONG HISTORY

### *A. Overview*

Arbitration is an industrious invention of common law and has become the dominant form of alternative dispute resolution in the American legal system.<sup>7</sup> Arbitration is a “method of dispute

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<sup>7</sup> JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION 108 (3d ed. 2005).

resolution in which the parties submit a dispute to an impartial (person or) persons who have been selected by the parties for a final and binding decision.”<sup>8</sup> A hallmark of arbitration, and an attribute contributing to its popularity, is the significant amount of control maintained by the parties in creating their own arbitration agreement and, thus, in resolving their dispute. Arbitration has been summarized by the United States Department of Labor as a form of dispute resolution that “rests upon the voluntary agreement of the parties to submit their dispute to an outsider.”<sup>9</sup> Using common law arbitration as a base, most states have altered and codified common law rules by implementing various arbitration statutes.<sup>10</sup>

Despite the rising popularity of arbitration as an alternative form of dispute resolution, a perceived “judicial hostility” was harbored towards arbitration prior to 1925 and the modern arbitration statutes.<sup>11</sup> This hostility stemmed from the thought that any procedure which deprived courts of their jurisdiction to hear cases was contrary to public policy.<sup>12</sup> However, it is difficult to reconcile this rationale with the fact that courts routinely and voluntarily relinquish their jurisdiction where a valid settlement agreement, release, or covenant not to sue exists.<sup>13</sup> Moreover, under the common law, executory arbitration agreements were effectively unenforceable due to a lack of procedural safeguards.<sup>14</sup> Despite mounting procedural concerns over arbitration, the business community, which lobbied for the passage of the FAA, convinced Congress that the hostility towards arbitration

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<sup>8</sup> *Id.*

<sup>9</sup> MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, *REMEDIES IN ARBITRATION* 11 (2d ed. 1991); *see also* Sergeant, *supra* note 5 (“Arbitration is a very unique system of industrial jurisprudence as it is virtually created and limited by the participants themselves.”).

<sup>10</sup> GREINIG, *supra* note 7, at 113; *see* OR. REV. STAT. §§ 36.600–36.740; WASH. REV. CODE §§ 7.04A.010–7.04A.903; CAL. CIV. PROC. CODE §§ 1281–1284.3 (West 2016).

<sup>11</sup> Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1250 (2011); *see also* Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

<sup>12</sup> Aragaki, *supra* note 11, at 1251–52.

<sup>13</sup> *Id.* at 1252.

<sup>14</sup> *Id.* at 1250–51 (outlining three reasons executor arbitration agreements were practically unenforceable: (1) under the common law “revocability doctrine,” parties were entitled to revoke their promise to arbitrate at any time prior to the arbitrators issuing an award; (2) there was no legal mechanism for pleading an executory arbitration agreement as a complete bar to an action at law; and (3) courts refused to stay a legal action pending a determination of arbitrability, giving plaintiffs intent on evading arbitration a tactical advantage).

was both without merit and built purely on anti-arbitration bias.<sup>15</sup> Consequently, Congress passed the FAA in 1925 in an attempt to end the perceived judicial hostility to arbitration.<sup>16</sup>

### *B. The Federal Arbitration Act (FAA)*

The FAA was enacted in an effort to bring reason and modernity to “what the business community increasingly viewed as the law’s ‘unjust,’ irrational, and ‘anachronistic’ treatment of arbitration.”<sup>17</sup> The legislative history of the FAA shows that the law was originally intended to allow the enforcement of arbitration agreements between merchants.<sup>18</sup> Congress therefore created the FAA with two purposes in mind. The first, unsurprisingly, was to “reverse the longstanding judicial hostility to arbitration agreements . . . that had been adopted by American courts.”<sup>19</sup> The Second purpose was to put arbitration on equal footing with other contractual provisions.<sup>20</sup> Unencumbered by concerns over the rudimentary (or in some instances, entirely absent) procedural rules of arbitration, Congress passed the FAA to cure hostility towards arbitration that “prevented parties who ‘[stood] upon equal footing . . . [from] intelligently and deliberately’ choosing to arbitrate their disputes.”<sup>21</sup>

For parties choosing to arbitrate disputes, the FAA, in the most general sense, prescribes the enforcement of agreements to arbitrate.<sup>22</sup> Section 2, the foremost substantive provision of the FAA, provides in relevant part:

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<sup>15</sup> See *id.* at 1253.

<sup>16</sup> Lawrence A. Cunningham, *Rhetoric v. Reality in Arbitration Jurisprudence*, 75 L. & CONTEMP. PROBS. 129, 130 (2012).

<sup>17</sup> Aragaki, *supra* note 11, at 1253.

<sup>18</sup> See *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16 (1924) (statement of Julius Cohen, Gen. Counsel, N.Y. State Chamber of Commerce).

<sup>19</sup> Sergeant, *supra* note 5; see also H.R. Rep. No. 96 (1924) (“The need for the law arises from . . . the jealousy of the English courts for their own jurisdiction . . . . The principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . .”).

<sup>20</sup> Sergeant, *supra* note 5, at 153.

<sup>21</sup> Aragaki, *supra* note 11 at 1254.

<sup>22</sup> See William G. Phelps, Annotation, *Pre-emption by Federal Arbitration Act (9 U.S.C.A. §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements*, 108 A.L.R. Fed. 179, § 4[a] (1992).

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>23</sup>

The language of the FAA is plainly obvious insofar as it applies to “any” contract (involving commerce) that contains an arbitration provision.<sup>24</sup> However, from the plain language of the statute itself, it is less obvious where exactly the FAA derives its power to preempt state law. Under many federal statutes, the extent to which the federal law preempts a state law is expressly stated through a preemption clause in the federal statute.<sup>25</sup> The FAA contains no such preemption clause, and grounds for preemption are not otherwise apparent in the language of the FAA.<sup>26</sup> On this point, Justice Stevens remarked, “[e]ven though the [Federal] Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the [Supreme] Court nor the litigants even considered the possibility that the [Federal Arbitration] Act had preempted state-created rights.”<sup>27</sup> Though the FAA’s power to preempt state law remained largely unnoticed for some time, the Court interpreted that power as congressional intention for a “federal policy favoring arbitration agreements.”<sup>28</sup> To that end, the Supreme Court has afforded the FAA a remarkably wide breadth, and, through a series of decisions, the Court has made the FAA a formidable obstacle for state-made laws attempting to exercise control over arbitration.<sup>29</sup>

### *C. Supreme Court Jurisprudence on the FAA*

The FAA has been in effect for nearly a century, and, as Justice Stevens observed, its preemptive power went entirely unnoticed for decades.<sup>30</sup> However, more recently, the FAA’s scope has become so

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<sup>23</sup> 9 U.S.C. § 2 (2015).

<sup>24</sup> *Id.*

<sup>25</sup> *See, e.g.*, 49 U.S.C. § 41713(b) (2015); 21 U.S.C. § 343-1(a) (2015).

<sup>26</sup> *See* 9 U.S.C. §§ 1–307.

<sup>27</sup> *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting).

<sup>28</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>29</sup> *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem’l Hosp.*, 460 U.S. 1; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

<sup>30</sup> *Perry*, 482 U.S. at 493 (Stevens, J., dissenting).

broad it is now used to preempt state laws with no obvious connection to arbitration.<sup>31</sup> Despite that the FAA contains no preemption clause, several Supreme Court cases can be credited with granting the FAA the broad scope and tremendous preemptive force it has today.

The first of these cases is *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*<sup>32</sup> The controversy persistent at the time, prompting the Supreme Court to hear the case, was whether a federal court, exercising diversity jurisdiction, should apply state law or the FAA in deciding the enforceability of an arbitration agreement.<sup>33</sup> Until *Prima Paint*, federal courts had often resolved the issue under the *Erie* doctrine,<sup>34</sup> which prescribes that in diversity cases, federal courts should apply state substantive law and federal procedural law.<sup>35</sup> Courts that chose to apply the *Erie* doctrine would therefore have interpreted the FAA to be a source of federal procedural law only.<sup>36</sup> However, in *Prima Paint*, the Court held that, in federal court, the FAA is a source of federal substantive law under the Commerce Clause of the Constitution, irrespective of the *Erie* doctrine.<sup>37</sup> *Prima Paint* thus established that the FAA would henceforth be interpreted and applied as substantive law, albeit only in federal courts. However, despite *Prima Paint*, lower courts were reluctant to hold that the FAA preempted state law for almost two decades longer.<sup>38</sup>

In what is arguably the single most important decision in FAA jurisprudence, the Supreme Court made a landmark ruling in *Southland Corp. v. Keating*.<sup>39</sup> In *Southland*, the Court extended the reach of the FAA far beyond that in *Prima Paint*.<sup>40</sup> Whereas *Prima Paint* declared that the FAA is substantive law in federal court,<sup>41</sup> the *Southland* Court held that the substantive law created by the FAA is

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<sup>31</sup> See *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603 (S.D. W. Va. 2004).

<sup>32</sup> 388 U.S. 395 (1967).

<sup>33</sup> See Phelps, *supra* note 22, at § 2.

<sup>34</sup> *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938).

<sup>35</sup> Phelps, *supra* note 22, at § 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 400, 405 (1967).

<sup>38</sup> See Phelps, *supra* note 22, at § 2.

<sup>39</sup> 465 U.S. 1 (1984).

<sup>40</sup> *Id.* at 16.

<sup>41</sup> *Id.*

applicable in state court as well.<sup>42</sup> The implications of this holding with respect to preemption are hard to overstate: The FAA, a federal law that the Court deemed to be both substantive and applicable in state court, would from then on preempt any state law that “stands as an obstacle to the accomplishment and execution of [the FAA’s] full purpose and objectives.”<sup>43</sup> As future cases would demonstrate, state-made laws only tenuously related to arbitration were struck down, construed as obstacles to the FAA’s purpose and objectives.<sup>44</sup>

The *Southland* holding remained undisturbed for eleven years, until the Court’s decision in *Allied-Bruce Terminix Cos. v. Dobson* resolved challenges to not only the preemptive effect of the FAA but also its scope.<sup>45</sup> Addressing the preemption question first, the Court neither overruled *Southland* nor reviewed its merits, as it would have been “inappropriate to reconsider what is by now well-established law.”<sup>46</sup> Moving to the scope of the FAA, the Court studied the legislative history and decades-old precedent to reach its decision.<sup>47</sup> The Court decided that Congress, to enact the FAA, had relied on its power to regulate interstate commerce.<sup>48</sup> The Court consequently construed the scope of the FAA to extend to the full reach of congressional power under the Commerce Clause.<sup>49</sup> As a result of *Allied Bruce Terminix Cos.*, the FAA now applies to any transaction within the scope of the commerce power of the Constitution.<sup>50</sup>

One of the most contentious developments in FAA jurisprudence has been the Supreme Court’s effective ban on class-wide arbitration. Though the Court has repeatedly and enthusiastically acknowledged a national policy in favor of arbitration,<sup>51</sup> it has, in recent years, displayed an anti-class arbitration sentiment with equal enthusiasm.

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<sup>42</sup> *Southland*, 465 U.S. at 16.

<sup>43</sup> Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1195 (2011) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000)).

<sup>44</sup> See *Doctor’s Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 612 (S.D. W. Va. 2004).

<sup>45</sup> 513 U.S. 265, 268 (1995); see also *Drahozal*, *supra* note 6, at 402.

<sup>46</sup> *Allied-Bruce*, 513 U.S. at 272.

<sup>47</sup> *Id.* at 270–72; see also *Drahozal*, *supra* note 6, at 402.

<sup>48</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (quoting H.R. Rep. No. 68-96, at 1 (1924)).

<sup>49</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–77 (1995). Justices Thomas and Scalia dissented from the majority in the case, arguing that *Southland* should have been overruled. *Id.* at 295–96 (Thomas, J., dissenting).

<sup>50</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>51</sup> See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

One of the Court's more recent arbitration decisions, *AT&T Mobility LLC v. Concepcion*, precluded class-wide arbitration entirely.<sup>52</sup>

*AT&T Mobility LLC v. Concepcion* put an end to class arbitration<sup>53</sup> and, in doing so, prompted a flood of literature on FAA jurisprudence and the role of arbitration in the U.S. legal system. At issue in *Concepcion* was California's *Discover Bank* rule,<sup>54</sup> under which a consumer arbitration agreement containing a waiver of class-wide arbitration in an adhesion contract was unconscionable and therefore unenforceable.<sup>55</sup> In a split decision, a 5–4 Supreme Court held that the *Discover Bank* rule was preempted by the FAA because requiring class-wide arbitration “interferes with fundamental attributes of arbitration . . . .”<sup>56</sup> The Court reasoned that bilateral dispute resolution is the fundamental attribute of arbitration with which the *Discover Bank* rule would interfere.<sup>57</sup> In so holding, the Court was unequivocal in resolving any doubt left by an earlier case, *Stolt-Nielsen*,<sup>58</sup> as to whether a class waiver in a predispute arbitration clause was unconscionable. Most commenters attribute the holding in *Concepcion* as the death knell for the class arbitration process.<sup>59</sup> Moreover, *Concepcion* is touted by FAA opponents as an egregious example of how the court has construed the FAA to preempt a law governing an area traditionally occupied by the states.<sup>60</sup>

#### *D. The FAA in the Context of Preemption Doctrine*

The FAA's original purpose was simply to ensure the enforcement of arbitration agreements.<sup>61</sup> However, the FAA adopted by Congress bears little resemblance to the Supreme Court's current interpretation

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<sup>52</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

<sup>53</sup> *Concepcion*, 563 U.S. at 344.

<sup>54</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

<sup>55</sup> *Concepcion*, 563 U.S. at 333–34.

<sup>56</sup> *Id.* at 343.

<sup>57</sup> *Id.*

<sup>58</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

<sup>59</sup> Sara Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 467 (2011).

<sup>60</sup> Drahozal, *supra* note 6, at 398 (“[I]n subject matter areas ‘traditionally occupied’ by the states, the Court applies a presumption against preemption: it presumes ‘that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’”) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>61</sup> Sergeant, *supra* note 5, at 153.

of the Act, which now preempts an array of state laws with legitimate interest in areas like consumer protection.<sup>62</sup> The Supreme Court has significantly widened the scope and bolstered the preemptive force of the FAA over the last three decades.<sup>63</sup> The FAA has, as a result, become a major impediment for states seeking to pass and enforce their own laws on arbitration. The scope of FAA preemption has been surprising because a preemption clause, which would provide evidence of Congress's manifest intent that the FAA should preempt state law, is conspicuously absent from the Act.<sup>64</sup> The FAA has therefore become a formidable presence in state courts due to both the Supreme Court's preference for arbitrability and the fact that FAA preemption cases have been decided in the context of broader preemption doctrine.<sup>65</sup>

Preemption doctrine is derived from the Supremacy Clause of the Constitution.<sup>66</sup> The Supremacy Clause mandates that federal law is the "supreme law of the Land."<sup>67</sup> Whether a particular federal statute preempts a particular state statute (thereby displacing the state law) is a matter of congressional intent.<sup>68</sup> To determine congressional intent, the Supreme Court has employed what has been called a "categorical" approach to preemption issues.<sup>69</sup> Within this framework, scholars largely agree that FAA Section 2 preemption is a brand of "implied obstacle preemption."<sup>70</sup> The term "implied preemption" refers to preemption that occurs even where Congress has not expressly included a preemption clause in the federal statute.<sup>71</sup> "Obstacle preemption," a subcategory of implied preemption, refers to situations in which state law is preempted when it "stands as an obstacle to the

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<sup>62</sup> See, e.g., *Concepcion*, 563 U.S. at 333–34.

<sup>63</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

<sup>64</sup> See 9 U.S.C. § 2 (2015).

<sup>65</sup> Drahozal, *supra* note 6, at 396.

<sup>66</sup> *Id.* at 397.

<sup>67</sup> U.S. CONST. art. VI, cl. 2.

<sup>68</sup> *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963) ("The purpose of Congress is the ultimate touchstone.").

<sup>69</sup> Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretative Issues*, 51 VAND. L. REV. 1149, 1151 (1998); see also Drahozal, *supra* note 6, at 396.

<sup>70</sup> Aragaki, *supra* note 43, at 1195; see also Drahozal, *supra* note 6, at 398.

<sup>71</sup> *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); see also Drahozal, *supra* note 6, at 396 (contrasting implied preemption with express preemption, in which congress indicates the extent that state law is preempted in the language of the statute).

accomplishment and execution of the full purposes and objectives of Congress.”<sup>72</sup>

In its FAA preemption cases, the Court has determined that the FAA’s objective, as specified by Congress in the language of Section 2 of the statute, is that arbitration agreements “shall be valid, irrevocable, and enforceable.”<sup>73</sup> Under this characterization of the FAA, Professor Hiro N. Aragaki has observed that the FAA’s ability to preempt state law turns on two factors.<sup>74</sup> The first factor examines whether or not the given state law is *enforcement impeding*, or stated differently, whether the state law, even partially, impairs a “provision . . . to settle a controversy by arbitration thereafter arising.”<sup>75</sup> The second factor considers whether the state law in question “singles out” arbitration for disfavor, as opposed to being “generally applicable” to principles of contract law.<sup>76</sup> Though “singles out” is somewhat ambiguous, Professor Aragaki has contended that the term applies to state laws that facially apply only to arbitration or seek specifically to regulate arbitration.<sup>77</sup> State laws that both impede enforcement and single out arbitration will always be preempted.<sup>78</sup> Conversely, a state law that is merely generally applicable to principles of contract law will not be preempted.<sup>79</sup>

## II

### THE FAA’S WAKE OF ADVERSARIES

The Supreme Court has expanded the applicability of the FAA to cover almost all employment and consumer contracts and to render arbitration agreements enforceable regardless of whether parties have actually bargained over them.<sup>80</sup> As a result, the increasingly pervasive use of predispute arbitration agreements has left a number of parties

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<sup>72</sup> Drahozal, *supra* note 6, at 397–98 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>73</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333–34 (2011).

<sup>74</sup> Aragaki, *supra* note 43, at 1195.

<sup>75</sup> *Id.* at 1196 (quoting 9 U.S.C. § 2 (2015)) (impairing an arbitration provision includes impairing agreements on time, place, or manner of arbitration, as well as the agreement to arbitrate).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See generally IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (Carolina Academic Press 2013).

aggrieved in its wake. This Part names some of the parties adversely affected by the “national policy in favor of arbitration” and sets out some of the more prevalent arguments in opposition of the FAA and applicable jurisprudence. This Comment ignores the arguments of the proponents of arbitration. The intent is not to condemn the use of arbitration entirely. Instead, this Comment aims to show that the prominence of the FAA in state courts has handcuffed both state judiciaries and unassuming parties to arbitration.

Growing concern abounds in scholarship over the perceived inequity in arbitration that has prompted broad critical review of FAA jurisprudence.<sup>81</sup> Those who oppose the current FAA jurisprudence include the American Association of Retired Persons (AARP), the National Employment Lawyers Association, the Equal Employment Advisory Council, the National Consumer Law Center (NCLC), at least twenty state attorneys general, the plaintiff’s bar, and other consumer advocacy groups.<sup>82</sup> Those who oppose arbitration make the broad contention that it can “unjustly deny American citizens their day in court.”<sup>83</sup> The many opponents diverge, however, in their opinions on how arbitration can be unjust. Some of the more prevalent arguments are addressed below.

#### *A. Forced Arbitration*

As Supreme Court FAA jurisprudence currently stands, state courts are obligated to enforce what are commonly referred to as forced arbitration agreements.<sup>84</sup> Forced arbitration agreements are the result of an arbitration provision in a contract of adhesion.<sup>85</sup> An adhesion contract is one “in which one of the parties has enough bargaining power to be able to dictate the terms of the contract to the other on a take-it-or-leave-it basis, and the weaker party has no choice but to ‘adhere’ to the terms”<sup>86</sup> or forgo the good or service. The Supreme Court has based its decision to uphold forced arbitration agreements

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<sup>81</sup> *Id.*; see also Cole, *supra* note 59, at 482; Aragaki, *supra* note 43, at 1191–92.

<sup>82</sup> See DAVID SELIGMAN, NAT’L CONSUMER LAW CENTER, THE MODEL STATE CONSUMER AND EMPLOYEE JUSTICE ENFORCEMENT ACT (2015) [hereinafter MODEL ACT]; Sergeant, *supra* note 5, at 162–63.

<sup>83</sup> Sergeant, *supra* note 5, at 164 (referring specifically to forced arbitration).

<sup>84</sup> Mara Kent, *Forced vs. Compulsory Arbitration of Civil Rights Claims*, 23 L. & INEQ. 95 (2005).

<sup>85</sup> *Id.*

<sup>86</sup> BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS 483 (3d ed. 2012).

largely on parties' freedom to contract.<sup>87</sup> The Court reasons that since the parties agree to arbitration in their contract, they should be held to their bargain.<sup>88</sup> Indeed, a fundamental principle in contract law is the manifestation of consent to contractual terms.<sup>89</sup> The Supreme Court has reiterated that mantra, stating that arbitration "is a matter of consent, not coercion."<sup>90</sup> However, critics of arbitration find the Court's distinction between consent and coercion in forced arbitration to be disingenuous.<sup>91</sup> Under circumstances in which an adhesion contract is involved, arbitration critics view the agreement as forced because the signee is presented with an ultimatum—sign the contract and agree to arbitrate, or don't sign and forgo the use of the good or service.<sup>92</sup> Such an ultimatum is, the critics contend, a form of coercion that should not be enforced.<sup>93</sup>

Much of the criticism aimed at arbitration is exacerbated by forced arbitration. However, even where parties have equal bargaining power, it can be argued that a party agreeing to arbitration may not realize she has agreed to arbitrate in lieu of her constitutional right to assert a legal claim against the other party.<sup>94</sup> Some have argued that if arbitration were better understood, the agreeing parties would structure their agreements more favorably, or not at all.<sup>95</sup> However, in the context of forced arbitration, the non-drafting party has no bargaining power and therefore no opportunity to negotiate for terms more advantageous to themselves. As a result, the drafting party is in a better position to impose the terms of an arbitration upon the non-drafting party with less bargaining power.

### *B. Class Arbitration Waivers*

In many situations, large businesses or employers who typically include arbitration clauses in their standard form contracts prefer

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<sup>87</sup> Kent, *supra* note 84, at 95; *see also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

<sup>88</sup> *Gilmer*, 500 U.S. at 23.

<sup>89</sup> *BLUM & BUSHAW*, *supra* note 86, at 59.

<sup>90</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

<sup>91</sup> Cunningham, *supra* note 16, at 141–42.

<sup>92</sup> Kent, *supra* note 84.

<sup>93</sup> *Id.* at 95–96.

<sup>94</sup> Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *STAN. L. REV.* 1631, 1631–32 (2005).

<sup>95</sup> *Id.*

arbitration to litigation because it gives the companies a strategic advantage.<sup>96</sup> By resolving a dispute through arbitration, companies can preclude the possibility of a class action claim against them in the future.<sup>97</sup> Class arbitration affords plaintiffs many of the same benefits found in class action litigation.<sup>98</sup> Class actions benefit plaintiffs with small value claims that might otherwise be too expensive or difficult to bring individually by allowing members of the class to aggregate their claims.<sup>99</sup> Similarly, class actions place members of a consolidated class with aggregated claims on footing more equal to large businesses, as opposed to an individual plaintiff with a low value claim.<sup>100</sup> The potential of an adverse judgment under which the corporation has to pay large sums in damages to the entire class is a strong deterrent for legally actionable conduct.<sup>101</sup>

Since *Concepcion*,<sup>102</sup> the group most vehemently opposed to class arbitration waivers is consumer advocates. The National Consumer Law Center (NCLC) has found that, because class action waivers prevent the aggregation of low value claims, such “waivers have effectively squelched hundreds of viable consumer and employment class actions – often in cases that are impossible or very difficult to bring on an individual basis.”<sup>103</sup> Moreover, since large payouts to a class serves as a deterrent to violating consumer rights, consumer advocates argue that without the class action remedy, “companies [are] able to violate consumer rights in small ways with impunity.”<sup>104</sup> Critics of arbitration feel class arbitration waivers stand in the way of the vindication of low value claims—a major problem associated with consumer arbitration.<sup>105</sup>

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<sup>96</sup> Cole, *supra* note 59, at 478–79.

<sup>97</sup> *Id.* at 478.

<sup>98</sup> Lisa Pomerantz, *Consumer Arbitration: Pre-Dispute Resolution Clauses and Class Action Waivers*, 71 CONSUMER ARBITRATION 17, 18 (2016) (“Class Actions allow plaintiffs in cases where there are common issues of law and fact to represent all similarly situated plaintiffs, provided certain other conditions are met.”).

<sup>99</sup> Cole, *supra* note 59, at 477–78.

<sup>100</sup> See Pomerantz, *supra* note 98, at 17.

<sup>101</sup> See *id.*

<sup>102</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333–34 (2011) (holding bilateral dispute resolution to be a fundamental attribute of arbitration, thereby precluding the use of class arbitration).

<sup>103</sup> MODEL ACT, *supra* note 82, at 7.

<sup>104</sup> Pomerantz, *supra* note 98, at 17.

<sup>105</sup> *Id.*

### *C. Repeat Player Bias and Inefficiency in Arbitration*

One of the most hotly contested debates in arbitration literature centers on what has been called repeat player bias. The repeat player bias argument contends that arbitrators are partial, and that a party drafting an arbitration clause will choose from arbitrators who frequently rule in the party's favor.<sup>106</sup> To understand the basic premise at play with repeat player bias, one must view arbitration as an industry and arbitration providers as businesses. As such, arbitrators are robustly criticized for not delivering the efficient and impartial form of dispute resolution that arbitration is intended to provide. The drafter of an arbitration agreement has the opportunity to specify where, when, and which arbitrator(s) will administer the arbitration hearing.<sup>107</sup> The drafter therefore has the opportunity to select an arbitrator more likely to rule in the drafter's favor or one who has done so in the past.<sup>108</sup> Since arbitrators and arbitration providers like the American Arbitration Association (AAA) are in the business of administering arbitration hearings, they have a strong incentive to rule in favor of the drafting party to attract future business.<sup>109</sup> This phenomenon explains why parties that frequently arbitrate are termed "repeat players," and whether arbitrators are biased toward or against them is a contentious topic amongst arbitration proponents and opponents.<sup>110</sup> The merits of the repeat player bias argument aside, even the perception of a partial adjudicator is intolerable in our legal system, a system that has made a deliberate effort to "prevent even the probability of unfairness."<sup>111</sup>

Consistent with the idea that forced arbitration agreements favor the drafting party is the contention that arbitration can in fact be more expensive, more time consuming, and less efficient than litigation.<sup>112</sup> The drafting party can specify the time and place the arbitration hearing is to take place, thereby potentially imposing large travel costs on the other party.<sup>113</sup> The arbitration provision could also allocate arbitration initiation fees to the non-drafting party and require

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<sup>106</sup> Sergeant, *supra* note 5, at 164.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Cole, *supra* note 59, at 475.

<sup>110</sup> *Id.*

<sup>111</sup> *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

<sup>112</sup> Sergeant, *supra* note 5, at 165.

<sup>113</sup> *Id.*

attorney's fees from the losing party.<sup>114</sup> Arbitration proponents rebut these contentions, stating that arguments portraying arbitration as inefficient are simply untrue.<sup>115</sup>

Compounded with the potentially large costs imposed on those who arbitrate is the fact that financial awards granted by arbitrators are typically smaller than those granted by judges and juries.<sup>116</sup> Moreover, binding arbitration agreements frequently prohibit punitive damages and injunctive relief, thus limiting a potential award.<sup>117</sup> According to one study, “[c]omparisons of average awards by arbitrators and courts in employment cases and medical malpractice cases show that arbitration claimants receive only about twenty percent of the damages that they would have received in court.”<sup>118</sup>

#### *D. Confidentiality and Disclosure*

A common concern often raised by arbitration opponents is the privacy and lack of disclosure throughout the proceeding.<sup>119</sup> The confidentiality of the proceeding means that only the involved parties know of the outcome, so there is no legal precedent created or doctrine of *stare decisis* to assist arbitrators in adjudicating future disputes.<sup>120</sup> An arbitrator is not required to offer a written decision, consider legal precedent, or even follow state or federal law in issuing his or her decision.<sup>121</sup> The only real requirement of an arbitrator is that he or she must not act in blatant disregard of the law.<sup>122</sup> Arbitration critics contend that overzealous efforts to keep arbitration proceedings confidential have made resulting arbitration decisions less legally sound, less uniform, and less predictable than their judicial counterparts.<sup>123</sup>

In sum, the primary argument against arbitration is that the drafting party has the opportunity to “stack the deck” against a non-drafting party. Still, proponents of arbitration consider this argument to be

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<sup>114</sup> Cole, *supra* note 59, at 475 (noting that if there is any merit to the repeat player theory, the losing party will often be the non-drafting party).

<sup>115</sup> Sergeant, *supra* note 5, at 163.

<sup>116</sup> *Id.* at 165.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

overstated and, at times, entirely inaccurate.<sup>124</sup> Setting the merits of the arguments aside, however, it is undisputed that states have been active in trying establish their own arbitration laws but have been largely unsuccessful in doing so.<sup>125</sup> With state law losing ground to federal law in the Supreme Court, commenters have called for an intervention, either by act of Congress or for the Supreme Court to break from its current jurisprudence.<sup>126</sup>

### III

#### ANY SUBSTANTIAL CHANGE IN ARBITRATION LAW MUST COME FROM EITHER CONGRESS OR THE SUPREME COURT

In the decades since Congress enacted the FAA to end the judicial hostility toward arbitration,<sup>127</sup> the Supreme Court has given almost unwavering support to arbitration.<sup>128</sup> As a result of the steadfast support the FAA has received from the Court, the Act now presents an almost insurmountable obstacle for the states seeking to regulate arbitration. Therefore, state laws traditionally authorized under states' "historic police powers" and only tenuously related to arbitration have been found to be in conflict with, and displaced by, the FAA.<sup>129</sup> So long as the Court is willing to brush aside state law addressing areas like consumer fraud and labor rights to instead rigorously enforce private choices to arbitrate, there will be little room for any state law on arbitration. Any meaningful judicial change in FAA jurisprudence would require *Southland* to be overruled, and that is a path the Court has already refused to take.<sup>130</sup> Another source of possible change is Congress, but legislative intervention has so far been ineffective.<sup>131</sup>

#### A. *The Supreme Court*

With state law on arbitration losing ground to the FAA in the Supreme Court, some scholars believe meaningful change in FAA

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<sup>124</sup> Cole, *supra* note 59, at 475 ("Claims that consumer arbitration is inherently unfair were overstated.").

<sup>125</sup> Aragaki, *supra* note 43, at 1190.

<sup>126</sup> See, e.g., Cunningham, *supra* note 16, at 159.

<sup>127</sup> AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

<sup>128</sup> *Id.*

<sup>129</sup> Drahozal, *supra* note 6, at 398 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

<sup>130</sup> Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995).

<sup>131</sup> See *infra* Part III.B.

jurisprudence can occur only by overruling *Southland*.<sup>132</sup> However, such a contention seems like wishful thinking when the Supreme Court has shown no inclination to do away with, or even weaken, *Southland* and its progeny.<sup>133</sup>

There was, for a short time, a choice of law loophole in the *Southland* holding established by *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,<sup>134</sup> but it was promptly closed by *Mastrobuono v. Shearson Lehman Hutton, Inc.*<sup>135</sup> The contract disputed in *Volt* contained both an arbitration provision and a choice of law provision. The issue before the Court was what effect the choice of law clause had on FAA preemption.<sup>136</sup> This issue presented an interesting dilemma for the Court, which had developed a precedent of taking the hardline approach of rigorously enforcing arbitration agreements according to their terms.<sup>137</sup> According to the terms of the contract in *Volt*, the parties had expressly chosen to use not only an arbitration clause but also a choice of law provision specifying the use of California arbitration law.<sup>138</sup> The Court therefore had to decide between two bargained-for provisions in the contract: just as the arbitration agreement was evidence of the parties' agreement to arbitrate, the choice of law provision evidenced an agreement for the application of California law.<sup>139</sup> Somewhat surprisingly, the Supreme Court followed the California Supreme Court's interpretation of the choice of law provision, giving effect to that clause.<sup>140</sup> Although upholding the choice of law provision led to a different outcome than if the Court had decided the FAA governed, the Court reasoned that the state law in question "simply d[id] not offend the rule of liberal construction" of the FAA.<sup>141</sup> The Court elaborated that the FAA does not preempt the entire field of arbitration law,<sup>142</sup> lending validity to the contention that FAA preemption is a form of obstacle preemption. The holding in *Volt*

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<sup>132</sup> See Aragaki, *supra* note 43, at 1237.

<sup>133</sup> *Allied-Bruce*, 513 U.S. at 272.

<sup>134</sup> 489 U.S. 468, 478–79 (1989).

<sup>135</sup> 514 U.S. 52, 64 (1995).

<sup>136</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Jr. Univ.*, 489 U.S. 468, 472 (1989).

<sup>137</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003).

<sup>138</sup> *Volt*, 489 U.S. at 472.

<sup>139</sup> *Id.* at 475–76.

<sup>140</sup> *Id.* at 476.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 477.

therefore opened up a loophole in the *Southland* decision, in that a state court “could construe the choice of law clause as an agreement to follow the state arbitration law and continue to enforce at least some state laws that would otherwise be preempted under *Southland*.”<sup>143</sup>

However, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Supreme Court quickly closed the loophole opened in *Volt*.<sup>144</sup> Similar to that in *Volt*, the contract in *Mastrobuono* too contained a general choice of law provision, but the *Mastrobuono* Court arrived at a different outcome, holding that the choice of law clause was preempted.<sup>145</sup> In *Volt*, the Court had construed the choice of law clause as an agreement to apply state arbitration law, whereas in *Mastrobuono* the Court construed the choice of law clause as an agreement that “New York’s substantive rights and obligations, and not the State’s allocation of power between alternative tribunals” governed the relationship.<sup>146</sup> To reconcile the two seemingly contradictory decisions, the Court narrowed its former holding, stating that *Volt* was a case where the Court deferred to the California Supreme Court’s interpretation of contract law,<sup>147</sup> while in *Mastrobuono*, the Court was reviewing a lower federal court interpretation to which it owed no deference.<sup>148</sup>

Although there was little remarkable about *Mastrobuono* or a similar case, *Allied Bruce Terminix*, in terms of their precedential effect, these cases were indicative of the Supreme Court’s intention to fully support the national policy in favor of arbitration. Decided only three months apart, *Allied-Bruce Terminix* bluntly refused to overrule *Southland*, and *Mastrobuono* closed the loophole in the *Southland* holding which had allowed for the enforcement of some state made laws on arbitration. These decisions solidified the Court’s sentiment expressed in *Southland* a decade earlier—that “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”<sup>149</sup> Writing in dissent from the majority

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<sup>143</sup> Drahozal, *supra* note 6, at 406.

<sup>144</sup> 514 U.S. 52, 64 (1995).

<sup>145</sup> *Id.*

<sup>146</sup> Compare *Volt*, 489 U.S. at 478–79 with *Mastrobuono*, 514 U.S. at 64; see also Drahozal, *supra* note 6, at 405–06.

<sup>147</sup> Recall that contract law is an area of law “traditionally occupied by the states.” Drahozal, *supra* note 6, at 398.

<sup>148</sup> *Mastrobuono*, 514 U.S. at 60 n.4.

<sup>149</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

opinion in *Allied-Bruce Terminix*, Justice O'Connor eloquently summed up *Southland* and its progeny: "Today's decision caps this Court's effort to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in *Southland* laid a faulty foundation."<sup>150</sup> Recognizing that the Supreme Court was unwilling to deviate from the path it started down with *Southland*, Justice O'Connor stated, "[i]t remains now for Congress to correct this interpretation if it wishes to preserve state autonomy in state courts."<sup>151</sup>

### B. Congress

In addition to Justice O'Connor, many legal scholars believe the FAA is due for legislative reform.<sup>152</sup> Recognizing the harms caused by the rigorous enforcement of arbitration agreements, the federal government has taken several positive, albeit small, steps to address the issue.<sup>153</sup>

One example is the Military Lending Act, which prohibits lenders from including arbitration clauses in credit contracts with military personnel and their dependents.<sup>154</sup> Similarly, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) prohibits lenders from using forced arbitration clauses in mortgage agreements.<sup>155</sup> Further, the Dodd-Frank Act created the Consumer Financial Protection Bureau (CFPB), which "promulgate[s] regulations prohibiting or limiting arbitration agreements involving consumer financial products."<sup>156</sup> Another notable intervention by the federal government is the Fair Pay and Safe Workplaces Executive Order.<sup>157</sup> This order "prohibits pre-dispute, binding arbitration agreements covering discrimination, assault, and sexual harassment claims in contracts between federal contractors and their employees."<sup>158</sup> While these examples indicate that the federal

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<sup>150</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

<sup>151</sup> *Id.*

<sup>152</sup> MODEL ACT, *supra* note 82, at 2 ("Forced arbitration of consumer and employment disputes is the scourge of the American justice system that calls for action at every level of government.").

<sup>153</sup> *See id.* at 3–4.

<sup>154</sup> *Id.*; *see also* 10 U.S.C. § 987(e)(3) (2015).

<sup>155</sup> MODEL ACT, *supra* note 82, at 2; *see also* 15 U.S.C. § 1639c(e) (2015).

<sup>156</sup> MODEL ACT, *supra* note 82, at 2; *see also* 12 U.S.C. § 5518 (2015).

<sup>157</sup> MODEL ACT, *supra* note 82, at 2; *see also* Exec. Order No. 13,673, 81 Fed. Reg. 58,653 (July 31, 2014).

<sup>158</sup> MODEL ACT, *supra* note 82, at 2.

government is at least aware of the harms caused by forced arbitration and has shown some effort to fix it, this legislation is limited to the extent that it applies only to very specific parties in a narrow set of circumstances. As a result, federal involvement has been largely ineffective at preventing forced arbitration in most situations.

Although the modest intervention by the federal government shows that federal lawmakers are aware of the problem, many proposed amendments to the FAA have failed to gain traction.<sup>159</sup> Few of these bills made it out of the committee stage of the legislative process and those that did were never voted on by the House or Senate.<sup>160</sup> The legislation with the most potential to shift the legal landscape created by the FAA was the Arbitration Fairness Act (AFA), introduced first in 2009 and again in 2011.<sup>161</sup> The aim of the AFA was to “restrict forced arbitration and allow consumers and employees to choose arbitration after a dispute occurs.”<sup>162</sup> To achieve its purpose, the AFA would have prohibited any predispute arbitration agreement that required the arbitration of an employment, consumer, or civil rights dispute.<sup>163</sup> Had the AFA passed, it would have eliminated many of the problems the FAA currently presents, but with those problems it also would have occasionally eliminated arbitration agreements between parties with equal bargaining power.<sup>164</sup> Professor Sarah Rudolph Cole speculates that the AFA overstated the case against arbitration, and its overzealous approach made it unpalatable to corporate interests and many consumer and employee advocates alike.<sup>165</sup> When the AFA was last proposed in 2011, the political climate was ripe for its passing, with a Democratic President, Democratic legislators, and a series of adverse Supreme Court decisions.<sup>166</sup> The AFA failed nonetheless.<sup>167</sup> Considering the lack of

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<sup>159</sup> See, e.g., H.R. 815, 107th Cong. (2001); H.R. 2282, 107th Cong. (2001); S. 2435, 107th Cong. (2002); H.R. 3809, 108th Cong. H.R. 1887, 108th Cong. (2003); H.R. 2969, 109th Cong. (2005); H.R. 3010, 110th Cong. (2007); H.R. 5129, 110th Cong. (2008); S. 931, 111th Cong. (2009); H.R. 1873, 112th Cong. (2011).

<sup>160</sup> Cole, *supra* note 59, at 458.

<sup>161</sup> *Id.*; see also H.R. 1873, S. 987, 112th Cong. (2011); S. 931, 111th Cong. (2009).

<sup>162</sup> Cole, *supra* note 59, at 458; see also H.R. 1873, S. 987, 112th Cong. (2011).

<sup>163</sup> Cole, *supra* note 59, at 458; see also H.R. 1873, S. 987, 112th Cong. (2011).

<sup>164</sup> Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 477 (1996).

<sup>165</sup> Cole, *supra* note 59, at 458.

<sup>166</sup> *Id.* at 459–60.

<sup>167</sup> *Id.* at 458.

support garnered by the AFA, the likelihood of significant legislative intervention by the federal government in the near future appears suspect.

#### IV

##### THE NATIONAL CONSUMER LAW CENTER'S MODEL STATE CONSUMER AND EMPLOYEE JUSTICE REFORM ACT

Consumers and consumer advocates have been particularly affected by the national policy in favor of arbitration. The National Consumer Law Center (NCLC), close observer and vocal advocate for overhauling the FAA, has recently published model statutory language that states can adopt to protect themselves from the harms of forced arbitration without interfering with private parties' right, embodied in the FAA, to enter into arbitration agreements.<sup>168</sup> The NCLC's Model State Consumer and Employee Justice Enforcement Act (Model Act) articulates the need for further action by the federal government in the area of arbitration and proposes statutory language intended to be effective even absent legislative or judicial reform.<sup>169</sup>

The Model Act is, however, a modest proposal, and it seems the Model Act would do little to prevent or even mitigate the most serious harms imposed by the FAA in the majority of instances. The NCLC's approach is reserved and the statutory language of the Model Act does not provide the states with that necessary to reclaim the ground lost to the FAA in the Supreme Court. Rather, the language provided by the Model Act will only help the states to dig their proverbial heels in the ground and prevent the FAA from gaining any *more* territory of arbitration law from the states. Although this Comment is critical of the Model Act, the Model Act may strike the best balance in a nearly impossible dilemma. To its credit, the NCLC has proffered some enlightened prospective solutions to what many scholars see as a hopeless situation. In that regard, the Model Act is commendable in its pragmatism. Instead of recounting the litany of reasons FAA jurisprudence is harmful to the states and arguing the need for legislative or judicial intervention, the Model Act operates under the pretext that there will likely be no legislative or judicial intervention and, nevertheless, offers statutory language that is intended to work under the current FAA.

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<sup>168</sup> MODEL ACT, *supra* note 82, at 12.

<sup>169</sup> *Id.* at 2.

The Model Act is organized into eight titles—some are specific to FAA preemption, others relate to states’ powers more generally.<sup>170</sup> The titles seeking to protect state interests,<sup>171</sup> Titles I and II, exceed the scope of this Comment and are excluded. Titles III through VI, which seek to protect consumers’ and employees’ access to justice, are the focus of the remainder of this part. The following subsections contain a summary of the Model Act’s Titles III through VII and what the NCLC intends each title to accomplish. This part also provides some analysis on what each title might accomplish if in fact enacted by a state legislature.

#### *A. Clear Notice and Single Document Rule*

Title III of the Model Act sets out the “Clear Notice and Single Document Rule.”<sup>172</sup> This title aims to add clarity to the “obscure and overly complex” language typical to consumer and employment contracts.<sup>173</sup> The intent behind Title III is “to ensure that private parties comprehend the material terms of the consumer and employment contracts into which they enter,” and it requires adequate disclosure of terms and conditions.<sup>174</sup> Title III specifies that any non-conforming contract may be reformed by a court to reflect the agreement of the parties.<sup>175</sup> In reforming the contract, a court may exclude any provision that does not adhere to the specification of Title III.<sup>176</sup>

Though the NCLC is adamant that Title III escapes FAA preemption,<sup>177</sup> this Author is less confident. The title proposes a state law strikingly similar to a Montana statute preempted in *Doctor’s Associates, Inc. v. Casarotto*.<sup>178</sup> In *Casarotto*, the Supreme Court had no trouble preempting the Montana statute that “directly conflict[ed] with §2 of the FAA because the state’s law condition[ed] the

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<sup>170</sup> *Id.* at 12.

<sup>171</sup> *Id.* at 1.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 39.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 41–42.

<sup>178</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996). The Montana statute in question required conspicuous notice on the front page of a contract that the contract included an arbitration clause. *Id.*

enforceability of arbitration agreements . . . .”<sup>179</sup> It appears likely that Title III could be displaced by a preemption challenge because, similar to *Casarotto*, Title III likewise allows for the exclusion of any provision that does not conform with the requirements of Title III. By placing qualifications on what terms may be given effect by a court, Title III conditions enforceability of the arbitration agreement, even if it stops short of singling out arbitration specifically. Thus, the Court could hold that Title III frustrates the intentions of Congress as specified in section 2 of the FAA. Given the parallels between the statute in *Casarotto* and the NCLC’s single document rule, it is entirely possible that the single document rule could and would be preempted.

Title III’s single document rule may be preempted under the reasoning articulated in *Concepcion*. *Concepcion* decided that a state law routinely applied to arbitration stands as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and will therefore be preempted.<sup>180</sup> Such language suggests that if Title III is used to routinely thwart arbitration agreements, it may also be considered an obstacle to the execution of the full purposes of the FAA.

Moreover, contrary to what the NCLC contends, it is doubtful that Title III can achieve its stated purpose. Title III is meant to “ensure that private parties comprehend the material terms of the consumer and employment contracts into which they enter.”<sup>181</sup> However, to comprehend an arbitration provision, one would have to not only know what arbitration is, but also understand that it is an alternative to litigation. The reasons why litigation may be more favorable to a consumer than arbitration are complex, and the average consumer or employee may not be adequately informed of his or her choice to make the informed decision the NCLC attempts to make available. Even if an arbitration clause is accompanied by a thorough explanation of what exactly it is, can a consumer be expected to appreciate the gravity of a class action waiver, the difference in damages available through arbitration instead of litigation, or the merits of the repeat player bias argument? Can anyone not steeped in arbitration literature fully appreciate what agreeing to arbitration in

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<sup>179</sup> *Id.* at 687.

<sup>180</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336–37 (2011).

<sup>181</sup> *Id.*

lieu of litigation truly entails, especially at the predispute stage of the transaction? At the risk of being cynical, it seems unlikely.

Finally, in the context of forced arbitration, even if the arbitration provision were presented to the most knowledgeable of consumers and in bold technicolor typeface with a detailed description, comprehension of the arbitration agreement alone does not necessarily benefit the consumer or solve the problems inherent in an unequal bargain. Even if the consumer is aware of the arbitration provision, she is still presented with the same ultimatum that adhesion contracts ubiquitously present—the contract is still offered on a take-it-or-leave-it basis, and completing the transaction will require consent to arbitration. In the context of forced arbitration, finding and comprehending the arbitration provision is not the problem. The larger issue for the consumer is her inability to negotiate for the removal of an arbitration provision if she would prefer litigation.

### *B. Unconscionable Terms*

Title IV is entitled “Unconscionable Terms in Standard form Contracts” and seeks to define unconscionable terms pertaining to dispute resolution and end the common practice of including them in predispute arbitration agreements.<sup>182</sup> Title IV identifies five provisions for which it establishes a rebuttable presumption that they are substantively unconscionable.<sup>183</sup> Title IV thus shifts the burden of persuasion to the party seeking to enforce the contract to show that the inclusion of any of these terms is *not* unconscionable. As the authors acknowledge, these provisions reflect common law principles that are already used in many state courts, and as such, they are comfortably beyond the reach of FAA preemption.<sup>184</sup> However, by this some token, Title IV provides very little new protection for individual consumers or employees and does not noticeably change the inherently one-sided dynamic between consumer or employee, and business or employer.

By defining certain terms as unconscionable, Title IV aims to enhance consumer protection in two ways. First, on an individual level, the consumer is saved from later having to resolve her dispute

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<sup>182</sup> MODEL ACT, *supra* note 82, at 47; *see also* Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 L. & CONTEMP. PROBS. 55, 72–73 (2004).

<sup>183</sup> MODEL ACT, *supra* note 82, at 47.

<sup>184</sup> *Id.*

pursuant to the unconscionable terms to which she agreed predispute.<sup>185</sup> Moreover, by codifying a list of terms that are presumptively unconscionable, the Model Act seeks to cure the chilling effect unconscionable terms have on otherwise valid claims.<sup>186</sup> Although having a list of terms that are statutorily presumptively unconscionable may help an individual who is already willing to arbitrate his or her dispute, empirical evidence suggests that the provisions of Title IV may not cure, at least not significantly, the chilling effect unconscionable terms have on putative claims.<sup>187</sup>

Empirical evidence suggests that Title IV will be less successful in mitigating the chilling effect predispute arbitration agreements have on potential claimants in two ways. First, research suggests that predispute arbitration agreements, at least facially, put both parties on equal footing.<sup>188</sup> The facial appearance of equality is a key feature in defending claims of unconscionability.<sup>189</sup> Since Title IV simply codifies the principles of unconscionability as they are found at common law, it does not follow that mere codification will provide claimants with any additional protection.

Moreover, evidence indicates that most predispute arbitration provisions will survive unconscionability challenges when rebutting a presumption of unconscionability requires an inquiry deeper than a mere facial appearance of fairness analysis.<sup>190</sup> Empirical evidence shows several things: (1) arbitration proceedings are almost always held at a location convenient to the consumer and the business; (2) the vast majority of clauses place no limits on substantive remedies; (3) either party may be represented by counsel; that either party may specify means of provisional relief; (4) when small claims are exempted from arbitration, they are exempt for both parties; (5) the rules of evidence are relaxed for both parties; (6) discovery is limited for both parties; and (7) expenses are often split equally between consumers and businesses.<sup>191</sup>

Section 2, subsections (a) through (e) of Title IV, provide the terms that the Model Act deems presumptively unconscionable.<sup>192</sup> Of these

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See Demaine & Hensler, *supra* note 182, at 72.

<sup>188</sup> *Id.*

<sup>189</sup> See *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 748–49 (Cal. 2015).

<sup>190</sup> Demaine & Hensler, *supra* note 182, at 72.

<sup>191</sup> *Id.*

<sup>192</sup> MODEL ACT, *supra* note 82, at 43.

subsections, (a), (d), and (e) label presumptively unconscionable certain conditions a drafting party may impose on a claimant in order for that claimant to engage in an arbitration proceeding.<sup>193</sup> Alternatively, subsections (b) and (c) render presumptively unconscionable terms that limit the potential awards, including punitive damages, that may be awarded to the claimant.<sup>194</sup> Although a larger potential reward can offset a claimant's reservations about pursuing costly arbitration, insufficient resources to initiate arbitration at the outset can preclude a claim from ever going forward. Therefore, subsections (a), (d), and (e), the provisions that seek to provide access to arbitration, stand to potentially be more effective at curing the chilling effect unconscionable predispute agreements have on future claims.

Whereas subsections (a), (d), and (e) are intended to provide potential claimants with enhanced access to arbitration, evidence suggests Title IV may not be as helpful in this regard as intended.<sup>195</sup> For instance, Title IV section 2(a) states it is unconscionable for the agreement to require the claimant to arbitrate her claim in an inconvenient venue.<sup>196</sup> However, it has been shown that arbitration is held, almost always, at a location convenient to the consumer and business.<sup>197</sup> Moreover, Title IV section 2(d) seeks to reduce the costs of filing for arbitration in the hopes that reduced costs improve access to arbitration and will thus mitigate the chilling of claims.<sup>198</sup> However, evidence indicates that even when fees are split equally, the burden will fall disproportionately on the ordinarily less-financially able consumer.<sup>199</sup>

Although Title IV section 2 does little to expand the doctrine of unconscionability as applicable to arbitration, sections 4 and 5 provide statutory language potentially strong enough to dissuade businesses from including unconscionable terms in predispute arbitration agreements.<sup>200</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See Demaine & Hensler, *supra* note 182, at 72.

<sup>196</sup> MODEL ACT, *supra* note 83, at 43.

<sup>197</sup> Pomerantz, *supra* note 98, at 18.

<sup>198</sup> *Id.* at 47; Demaine & Hensler, *supra* note 182, at 72.

<sup>199</sup> Demaine & Hensler, *supra* note 182, at 73.

<sup>200</sup> MODEL ACT, *supra* note 82, at 44.

Section 4 establishes a “rebuttable presumption that a term in a standard form contract that is found to be unconscionable is not severable from the agreement in which it is situated.”<sup>201</sup> A presumption against severing the unenforceable term is in contrast to the rule in a majority of jurisdictions.<sup>202</sup> Under the majority rule, the unconscionable term is severed from the rest of the agreement, and the rest of the arbitration agreement remains enforceable.<sup>203</sup> Even if the arbitration agreement becomes more equal after a court has stricken the unconscionable terms, it would be at the claimant’s legal expense.<sup>204</sup> Under the majority rule regarding severability, if businesses become aware that the most severe consequence of including unconscionable provisions in their agreements is the removal of those provisions, businesses may continue to offer illegal contract provisions with impunity.<sup>205</sup> However, under the language of section 4, including a term found to be unconscionable would result in a court deciding that the entire agreement is unenforceable.<sup>206</sup> A business forced to concede its ability to arbitrate a dispute would subject itself to all the expenses and public scrutiny of litigation that it was hoping to avoid by arbitration. The presumption against severability, therefore, provides strong incentive for a business to not include unconscionable contractual provisions in its arbitration agreements.

Section 5 provides that including any one of these presumptively unconscionable terms in a standard form contract will be a violation of unfair and deceptive trade practice statutes under state law.<sup>207</sup> Invoking state unfair and deceptive trade practice laws provides claimants an avenue to different remedies than are available through arbitration.<sup>208</sup> Under deceptive trade practice laws, presumptively unconscionable terms in an agreement can result in a court holding the contract unenforceable and also provide for a cause of action under state law.<sup>209</sup> Similar to section 4, considering the inclusion of a presumptively unconscionable provision in an agreement a violation

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 45.

<sup>205</sup> See NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS § 6.8.3. (7th ed. 2015).

<sup>206</sup> See *id.* at 44.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 45.

<sup>209</sup> *Id.*

of state deceptive trade practice laws will discourage businesses from using unconscionable terms as a means to chill putative claims.

Although Title IV does not expand the doctrine of unconscionability to deny the enforceability of a larger range of arbitration provisions than the common law currently does, sections 4 and 5 provide statutory language that may be strong enough to dissuade businesses from including terms that are unconscionable. Dissuading businesses from including unconscionable terms in arbitration agreements may serve to counter the chilling effect that arbitration generally has on claims. Under Title IV, potential claimants can be sure that the terms of their arbitration will meet standards sufficient to pass common law unconscionability challenges and will not have to waste any time or money disputing the terms of the arbitration agreement. If potential claimants don't have to expend resources disputing the terms of the agreement, their potential reward is bigger, and they therefore have more incentive to assert a claim.

### *C. Prohibition of Forced Arbitration Clauses Under State Law*

Title V of the Model Act essentially reserves to the states the express authority to govern the enforceability of arbitration agreements when the agreement is not already subject to the FAA.<sup>210</sup> Since the expansion of the FAA's scope, Title V is helpful in the sense that it outlines the circumstances under which the FAA does not apply. Recall that the FAA does not preempt the "entire field of arbitration,"<sup>211</sup> and the federal government, through various actions, has carved out limited exceptions to which the FAA does not apply.<sup>212</sup> Title V asserts that when state law governs the enforceability of a contract, forced arbitration clauses will be void as a matter of law.<sup>213</sup>

By adopting section 1 of Title V, a state would be unequivocally declaring that forced arbitration agreements contravene its public policy.<sup>214</sup> Section 1, therefore, provides constructive notice that the state will prohibit the formation and enforcement of forced arbitration

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<sup>210</sup> MODEL ACT, *supra* note 82, at 48–49.

<sup>211</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

<sup>212</sup> MODEL ACT, *supra* note 82, at 5–6.

<sup>213</sup> *Id.* at 50.

<sup>214</sup> *Id.* at 48.

agreements, except when doing so would be inconsistent with federal law.<sup>215</sup>

Sections 2 through 4 of Title V prohibit arbitration agreements in contracts that various federal actions have already put beyond the scope of the FAA.<sup>216</sup> Section 2 of Title V prohibits arbitration clauses in insurance contracts pursuant to the McCarran-Ferguson Act, which allows states to regulate arbitration clauses in insurance contracts.<sup>217</sup> Similarly, section 3 prohibits arbitration clauses in employment contracts for workers known to be exempt from the FAA.<sup>218</sup> The FAA expressly excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,”<sup>219</sup> and the Supreme Court has removed “transportation workers” from the reach of the FAA.<sup>220</sup> In a state that has not adopted section 3, there would be the open question of whether that state’s laws would follow the FAA and permit the enforceability of a forced arbitration agreement. In a state that has adopted section 3, however, there is no question that a forced arbitration agreement will not be enforced. Section 4 is referred to by the NCLC as the catchall provision to Title V, and provides that any forced arbitration agreement not covered by federal law will be held invalid, unenforceable, and void under state law.<sup>221</sup>

Noticeably, Title V does not carve out any room for states to regulate arbitration; instead, it restates where the FAA has no effect to begin with. In the same way that the FAA is widely regarded as evidence of the “national policy in favor of arbitration,”<sup>222</sup> a state that adopts Title V is a declaration of the state’s policy in opposition to certain aspects of arbitration, specifically forced arbitration. At minimum, Title V clearly informs parties who wish to include an arbitration clause in their contract that a state court generally prohibits forced arbitration agreements. Moreover, similar to the way that the FAA has received its preemptive force through Supreme Court decisions, a state, through enacting the unequivocal language of Title V, may embolden its courts to find more unconventional ways to

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 48–50.

<sup>217</sup> *Id.* at 49; *see also* 15 U.S.C. § 1012(b) (2015).

<sup>218</sup> MODEL ACT, *supra* note 82, at 45.

<sup>219</sup> 9 U.S.C. § 1 (2015).

<sup>220</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001).

<sup>221</sup> MODEL ACT, *supra* note 82, at 45.

<sup>222</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

strike forced arbitration agreements and bolster the states' opposition to forced arbitration.

#### *D. Data Disclosure Requirements for Arbitration Providers*

Title VI targets arbitration providers rather than arbitration agreements and mandates the disclosure of certain data for each proceeding.<sup>223</sup> Placing the emphasis on arbitration administrators is a clever method of reserving at least one aspect of arbitration for states while avoiding preemption by the FAA, a law that specifically targets the enforcement of arbitration agreements.<sup>224</sup> Title VI requires the disclosure of certain information in an arbitration proceeding for the purpose of exposing any bias or corruption of arbitrators.<sup>225</sup> By emphasizing disclosure, Title VI closely resembles California's regulations pertaining to arbitration.<sup>226</sup> Although the Model Act and the California rules share a common purpose, the California rules require arbitration administrators to disclose more data of arbitration proceedings than the Model Act, and, as a result, the California rules are better suited to exposing any bias or corruption in arbitration proceedings.

Title VI is composed of five sections, and section 2 lists the information that arbitration administrators are required to disclose.<sup>227</sup> At the outset, subsection (a) indicates that only private companies administering five or more arbitration proceedings in a year are required to collect and publish the specified information.<sup>228</sup> Subsection (a) outlines various pieces of information that the arbitration administrator is required to collect and publish.<sup>229</sup> Moreover, section 2(b) provides that arbitration administrators must update their records quarterly, and that the information should be available from administrator websites or made available in hard copies upon request.<sup>230</sup> If an arbitration provider fails to comply with

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<sup>223</sup> See MODEL ACT, *supra* note 82, at 47.

<sup>224</sup> 9 U.S.C. § 1 (2015).

<sup>225</sup> MODEL ACT, *supra* note 82, at 51.

<sup>226</sup> CAL. CIV. PROC. CODE §§ 1281–1284.3 (West 2015).

<sup>227</sup> MODEL ACT, *supra* note 82, at 51.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

those requirements, injunctive relief is the only relief available to a winning party.<sup>231</sup>

Again, the California rules have very similar disclosure requirements, but require arbitration administrators to collect and record more information than is required under the Model Act.<sup>232</sup> The substantive disclosure requirements in the California rules are contained in section 1281.96 of the California Code of Civil Procedure. Section 1281.96(a) differs from the Model Act in that it applies to private arbitration companies that administer or are otherwise involved in arbitration proceedings.<sup>233</sup> The California rules have a wider scope than the Model Act because they apply to private arbitration companies which not only administer the proceeding, but also those which otherwise participate in the proceeding.<sup>234</sup> Moreover, the California rules apply to arbitration companies regardless of the number of arbitrations they administer, whereas the Model Act requires only arbitration administrators who administer five or more arbitration proceedings in a year to disclose information.<sup>235</sup>

The information that must be collected and published is set out in section 1281.96(a)(1)-(11) of the California rules.<sup>236</sup> A prevalent distinction made in the California rules that has no analog in the Model Act is that between the consumer and non-consumer party.<sup>237</sup> The California rules are specific to consumer arbitration and consequently use consumer law-specific terms, but the distinction could be easily adapted to be employee and employer, or even drafting and non-drafting party. Distinguishing the consumer from the non-consumer, like the California rules require,<sup>238</sup> can be a proxy for determining the bargaining power that led to the arbitration agreement in the first place. The non-consumer party will ordinarily be a business which drafted the contract that included the arbitration agreement, and thus, is the party who prefers arbitration. If searching for biased arbitrators, this is useful information because the non-

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<sup>231</sup> *Id.*

<sup>232</sup> Compare CAL. CIV. PROC. CODE §§ 1281–1284.3 (West 2015) and MODEL ACT, *supra* note 82, at 51.

<sup>233</sup> CAL. CIV. PROC. CODE § 1281.96(a).

<sup>234</sup> *Id.*

<sup>235</sup> Compare CAL. CIV. PROC. CODE §§ 1281–1284.3 and MODEL ACT, *supra* note 82, at 51.

<sup>236</sup> CAL. CIV. PROC. CODE § 1281.96(a).

<sup>237</sup> *Id.* § 1281.96(a)(2), (4)–(6).

<sup>238</sup> *Id.* § 1281.96(a)(2).

consumer, or drafting party, is the party who prescribes the rules of the arbitration, including who the arbitrator would be.<sup>239</sup> If one gives any merit to the repeat player bias argument, the non-consumer is the repeat player who the arbitration administrator should theoretically favor.<sup>240</sup> Searching for bias in arbitration proceedings is therefore easier if the administrator's records reflect the consumer/non-consumer classification of each party, as opposed to merely the names of each party as required by the Model Act.<sup>241</sup>

Relatedly, section 1281.96(a)(4)–(5) maintain the consumer and non-consumer distinction when identifying the parties, but also require the arbitration administrator to record both if the non-consumer party prevailed at the proceeding<sup>242</sup> and the total number of times the non-consumer party has been a party to an arbitration administered by the arbitration company.<sup>243</sup> Both subsections 1281.96(a)(4) and (5) require the recording of information extremely useful to exposing any bias by the arbitration provider.<sup>244</sup> If a party with a pending arbitration wanted to look for any biases of the arbitrator towards an adverse party prior to the arbitration, one would naturally look to see if an arbitration administrator has arbitrated a dispute for the adverse party in the past, and if so, how frequently and if the adverse party usually prevailed under that arbitrator. If an individual knew that she would be before an arbitrator who routinely arbitrates matters in a particular industry or area of law, one would more generally look to see if the arbitrator favors non-consumers, consumers, or is truly impartial. The Model Act does not have analogous provisions to section 1281.96(a)(4)–(5) of the California rules. As a result, exposing bias under the Model Act would be much more tedious due to the relatively limited data arbitration administrators are required to collect and record. The California rules require arbitration administrators to record data that facilitate more direct inquiries that may expose biased arbitration administrators than do the model rules.

There is considerable overlap between the Model Act and the California rules, and it would be an overstatement to suggest the

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<sup>239</sup> Sergeant, *supra* note 5, at 164.

<sup>240</sup> *Id.*

<sup>241</sup> MODEL ACT, *supra* note 82, at 51.

<sup>242</sup> CAL. CIV. PROC. CODE. § 1281.96(a)(4).

<sup>243</sup> *Id.*

<sup>244</sup> CAL. CIV. PROC. CODE. § 1281.96(a)(4), (5).

differences between both codes render the Model Act ineffective. The Model Act requires arbitration providers to record and compile very similar data, albeit by metrics not necessarily helpful in exposing bias.<sup>245</sup> For example, section 2(a)(vi) requires arbitration administrators to record the date they received the demand for arbitration, the date the arbitrator was appointed, and the date of the arbitration's disposition.<sup>246</sup> The dates required to be reported by section 2(a)(iv) are important because they provide a reference point for an investigator going through volumes of data; however, this section won't expose any biased arbitrators unless the dates are compared with other information.

Similarly, the fact that the California rules apply to arbitration administrators who administer less than five arbitrations in a year, and to arbitration administrators who are involved in, and not just administering arbitrations make the California rules only marginally better than the Model Act. Although Title VI is narrower in scope than the California rules, it is sufficiently broad to apply to a majority of arbitrators. There is very little opportunity for a conflict of interest or bias by an arbitrator who administers less than five proceedings a year, given that the arbitrator would often have simply seen too few parties for bias to be present. However, even an arbitrator who oversees fewer than five proceedings in a year would give the perception of partiality if all the proceedings involved the same party. If an arbitrator administered four proceedings in a year, and the same party was not only involved in each proceeding, but always prevailed, would one not have a reasonable suspicion of bias by the arbitrator? Were this the case, under Title VI, the arbitration administrator would not be obligated to collect and record any information from the arbitrations.<sup>247</sup> However, under the California standards, information of these arbitrations would not only be recorded, it would be clear from the arbitration administrator's records which party was the business and whether or not that business prevailed.<sup>248</sup>

The Model Act exposes a conflict of interest only if someone were to comb the records specifically looking for grounds for potential bias and don't require arbitration administrators to record any information that would necessarily draw one's attention to a biased arbitrator. To be sure, Title VI could expose some bias, but only if a party were

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<sup>245</sup> MODEL ACT, *supra* note 82, at 51.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> CAL. CIV. PROC. CODE § 1281.96(a).

willing to sort through volumes of records on arbitration proceedings, deliberately searching for patterns of particular arbitrators repeatedly favoring particular parties or interests. Surely, such a purpose is better served under the California rules that require arbitration administrators to record how often they arbitrate for non-consumers and when the non-consumer prevails.

### *E. Appellate Jurisdiction*

The purpose of Title VII is to increase the efficiency of arbitration proceedings.<sup>249</sup> To do so, Title VII provides that appellate courts “shall not have jurisdiction to review a trial court’s interlocutory order denying a motion to compel arbitration or otherwise concluding that an arbitration agreement is unenforceable or does not cover a particular claim.”<sup>250</sup> Moreover, “appellate review of the denial of a motion to compel arbitration may be had after a final judgment has been issued.”<sup>251</sup> Finally, “an interlocutory appeal shall be allowed if the trial court orders arbitration and dismisses the suit, or orders arbitration and stays litigation.”<sup>252</sup>

Because Title VII only precludes an interlocutory appeal of a court order denying a motion to compel arbitration and allows an interlocutory appeal for a court order to compel arbitration, Title VII is very one-sided in favor of the plaintiff in a dispute. However, since interlocutory appeals increase the cost of pursuing a claim and ultimately lower the potential reward for the plaintiff, interlocutory appeals can chill low-value claims and thus harm only plaintiffs.<sup>253</sup> In low-value disputes, the economic viability of the claim deteriorates when a plaintiff must expend time and money enforcing an arbitration agreement before either a court or an arbitrator gets to the merits of the claim. A defendant can extinguish a low-value claim with interlocutory appeals that deplete the resources of the plaintiff before the merits of the claim are even heard. Therefore, the language of Title VII is one sided in favor of plaintiffs for a good reason: to prevent arbitration agreements from frustrating plaintiffs’ efforts to pursue their claims under state law.<sup>254</sup>

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<sup>249</sup> See MODEL ACT, *supra* note 82, at 54.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

Additionally, Title VII runs so clearly counter to business interests that state legislatures may have trouble enacting it. Just as strong support from the business community helped enact the FAA despite procedural concerns with arbitration at the time,<sup>255</sup> the business community's significant lobbying strength may in some states prevent Title VII from ever being adopted. Moreover, the business lobby has been credited with stopping the Arbitration Fairness Act (AFA) from being enacted, despite a ripe political climate.<sup>256</sup> Since Title VII very clearly disfavors the business community, it may be practically difficult to pass through the legislatures of some states.

Title VII, in eliminating interlocutory appeals for trial court decisions denying motions to compel arbitration, presents a legally sound method of countering the practice of using arbitration agreements as a method of deterring putative claims. A putative plaintiff is more likely to assert a claim under state law if she knows she will not have to expend time and money disputing an arbitration agreement before the merits of the case are heard. However, again, because Title VII so clearly disfavors the business community, it may prove difficult to enact into law in some state legislatures.

#### *F. Improper Delay*

Title VIII, added in a revised edition of the Model Act, is intended to “protect[] parties’ rights to enter into private agreements to resolve their private disputes expeditiously.”<sup>257</sup> By proposing Title VIII, the NCLC aimed to combat parties who use the procedures of the arbitration administrator that they have chosen to prevent the arbitration proceeding from going forward in an expeditious manner.<sup>258</sup> Simply put, Title VIII is a mechanism through which arbitration administrators can enforce their own procedural rules “to ensure that they arbitrate disputes efficiently and speedily.”<sup>259</sup> Although Title VIII is well conceived and may serve to expedite some arbitration proceedings, the NCLC is the first to point out the title’s shortcoming—namely that a business may designate an arbitration

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<sup>255</sup> Aragaki, *supra* note 11, at 1253.

<sup>256</sup> Cole, *supra* note 59, at 458 (stating that the AFA would have “restrict[ed] forced arbitration and allow[ed] consumers and employees to choose arbitration after a dispute occurs”); *see also* H.R. 1873, S. 987, 112th Cong. (2011).

<sup>257</sup> MODEL ACT, *supra* note 82, at 55.

<sup>258</sup> *Id.* In particular, the NCLC seeks to prevent parties from not paying their share of the arbitration expenses so that the arbitration hearing cannot go forward. *Id.*

<sup>259</sup> *Id.*

administrator that is not subject to Title VIII or specify rules and procedures in the arbitration agreement that will prolong the resolution of the dispute.<sup>260</sup>

Title VIII is organized like the others in the Model Act, beginning with a findings section in section 1.<sup>261</sup> Section 2 covers arbitration administrators and indicates that Title VIII applies to arbitration administrators in that state who administered at least three arbitration proceedings in the last twelve months.<sup>262</sup> Section 3 provides that when a respondent subject to an arbitration agreement that requires the respondent to pay fees has not paid fees within seven days of his or her due date, the arbitration administrator must either schedule a hearing notwithstanding the respondent's failure to pay fees or refuse to administer the arbitration.<sup>263</sup> Section 4 contains provisions identical to section 3, but seeks to prevent pending cases from being suspended, as opposed to section 3, which seeks to ensure that arbitration proceedings can get underway.<sup>264</sup> Section 5 contains disclosure requirements for arbitration proceedings covered by this title. Arbitrators must disclose

when each arbitration demand was made, when each demand for payment of costs and fees is made, the date the respondent paid all fees and costs requested, when a hearing was held, when the award was issued, when the arbitration administrator provided a letter indicating the arbitration would not proceed, and when the arbitration proceeding was terminated for lack of payment in resulting award is made . . . .<sup>265</sup>

Section 6 is the enforcement provision of Title VIII, providing for declaratory or injunctive relief brought by private parties or the state attorney general.<sup>266</sup> Lastly, section 7 provides that arbitrators who administer an arbitration proceeding notwithstanding the non-payment of fees by the respondent under sections 3(b) or 4(b) may pursue a breach of contract action against the respondents for outstanding fees.<sup>267</sup>

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<sup>260</sup> *Id.* at 58.

<sup>261</sup> *Id.* at 55.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 55–56.

<sup>265</sup> *Id.* at 56.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

The provisions of Title VIII may well be effective in expediting arbitration proceedings to those agreements which it applies, but as the NCLC explains, it is powerless to expedite a proceeding to which it does not apply.<sup>268</sup> In states that do not adopt Title VIII, or in arbitration agreements that expressly provide that the agreement will not be subject to the provisions of Title VIII, the protections will be inapplicable. In a predispute arbitration agreement, the parties could contract around the provisions of Title VIII through specifying that certain other arbitral rules apply.<sup>269</sup>

Furthermore, although Title VIII, section 6 allows for a private cause of action to require compliance with the substantive provisions (sections 3 and 4), the preceding Title VII is predicated on the notion that the financial burden of enforcing arbitration agreements can be prohibitive.<sup>270</sup> The notes to Title VII specifically provides that having to appeal a trial court decision denying a motion to compel arbitration is problematic because the appeal is expensive and can chill claims.<sup>271</sup> It follows that enforcing arbitration agreements is inefficient for a plaintiff regardless of whether the plaintiff is in trial or appellate court. If one accepts that the burden of having to enforce arbitration agreements is prohibitively expensive for some claimants, or at least economically frustrated, a private cause of action is a seemingly superficial enforcement mechanism. A party who prolongs an arbitration proceeding by not paying its share of the arbitration expenses will not be deterred from doing so by private causes of action against it that the party knows will never come to fruition. Thus, assuming the premise of Title VII is true—that having to enforce arbitration agreements can chill claims—the only true enforcement mechanism is the potential of a suit brought by the attorney general.<sup>272</sup>

#### CONCLUSION

The NCLC assumes a tall task in offering the Model Act as potential statutory language to preserve state autonomy in enforcing arbitration agreements while avoiding federal preemption by the FAA. Rather than look to the Supreme Court or Congress to overhaul

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<sup>268</sup> *Id.* at 59.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 54–55.

<sup>271</sup> *Id.* at 54.

<sup>272</sup> *See id.* at 56.

the FAA, the Model Act proposes statutory language intended to be effective even absent judicial or legislative intervention. The NCLC's approach should thus be commended for its pragmatic restraint in an area of law where federal preemption of state statutes is all but inevitable. However, the Model Act does not address some major harms of current FAA jurisprudence, particularly those resulting from class action waivers and arbitration's tendency to chill low-value claims. For having not addressed the more major issues with arbitration, the Model Act is a more modest proposal than what is needed to meaningfully loosen the grip federal law holds on arbitration. Despite the shortcomings of the Model Act, it is hard to fault the NCLC for not finding more room for state statutes in an area of law increasingly dominated by the FAA. Despite its pragmatism and restraint, still, some sections of the Model Act do little to enhance the protection of consumers or employees and yet still flirt with preemption by the FAA. This suggests that the FAA would almost certainly subsume any bolder approach that might attempt to protect against arbitration's more serious harms. The shortcomings of the Model Act suggest that if there is ever to be a body of state law on arbitration, there will first have to be a re-evaluation of the national policy in favor of arbitration.

