
Note

A Blueprint for States To Solve the Mandatory Arbitration Problem While Avoiding FAA Preemption

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INTRODUCTION

When she started working at Chipotle in 2010, Araceli Gutierrez had a dream to become a chef.¹ She believed that her new job would bring her closer to realizing this dream.² But not long after she started, she was working fifteen-hour days and only getting paid for eight.³ Although this seemed strange to her, Gutierrez soldiered on.⁴ She wanted to advance within the company and believed that speaking up would jeopardize this goal.⁵ When she eventually became an assistant manager of the store, she tried to speak up about the issue, but those above her told her that working extra, unpaid hours was “part of the job” and that she could not sue.⁶

Low-wage workers who were forced to work unpaid hours were, at this point, not without recourse. In 2013, a former employee sued Chipotle for lost wages.⁷ The complaint alleged vio-

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1. See Heather Long, *Why I'm Suing Chipotle for "Wage Theft,"* CNN BUS. (Sept. 1, 2016), <https://money.cnn.com/2016/09/01/news/economy/chipotle-lawsuit-wage-theft/index.html> [<https://perma.cc/UN48-XSC6>].

2. *Id.*

3. *See id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Turner v. Chipotle Mexican Grill, Inc.*, 123 F. Supp. 3d 1300, 1303 (D. Colo. 2014).

lations of the Fair Labor Standards Act wage and hour provisions and requested compensation for wages withheld by Chipotle.⁸ While the lawsuit was pending, the Supreme Court decided *Epic Systems v. Lewis*, a case testing the enforceability of employment contracts that require claims to be brought in one-on-one arbitration with the company, rather than collectively in a class action or class arbitration.⁹ The Supreme Court ruled that those provisions were enforceable.¹⁰ Mere weeks after this decision, nearly three thousand members of the class action were dismissed from the suit.¹¹ Sometime around 2014, Chipotle began inserting a clause in its employment contracts mandating all disputes that may arise between the employer and employee be resolved in one-on-one arbitration.¹² Just like that, a significant number of potential class members who had suffered lost wages were left effectively without legal recourse.

The Chipotle case illustrates the mammoth effect that mandatory arbitration agreements have in the employment context. Wage theft and other employment-related harms are big problems that make life materially worse for the most vulnerable.¹³ Amongst the most effective ways of dealing with this widespread problem is collective action, through either a class-action lawsuit or class arbitration.¹⁴ Knowing this, and sensing the increasingly arbitration-friendly disposition of the courts,¹⁵ employers began

8. Complaint at 56–69, *Turner*, 127 F. Supp. 3d 1300 (No. 1:14-cv-02612-JLK).

9. 138 S. Ct. 1612, 1619 (2018).

10. *Id.*

11. See Order Granting Defendant's Motion to Dismiss Opt-in Plaintiffs Bound by Chipotle's Arbitration Agreement, *Turner*, 123 F. Supp. 3d 1300 (No. 1:14-cv-02612-JLK); see also Dave Jamieson, *The Supreme Court's Arbitration Ruling Is Already Screwing Thousands of Chipotle Workers*, HUFFINGTON POST (May 27, 2018), https://www.huffingtonpost.com/entry/supreme-courts-ruling-this-week-is-already-screwing-thousands-of-chipotle-workers_us_5b0844aae4b0568a880b3e26?x6c [<https://perma.cc/5XJV-YSQX>].

12. Sparky Abraham, *This Burrito Includes an Arbitration Clause*, CURRENT AFF. (Aug. 16, 2018), <https://www.currentaffairs.org/2018/08/this-burrito-includes-an-arbitration-clause/> [<https://perma.cc/7KN9-GCAU>].

13. See *infra* Part I.D.

14. See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 85–88 (2004) (noting that individual claims may not be financially feasible, among other problems with them).

15. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1637 (2005).

inserting mandatory arbitration clauses in employment contracts.¹⁶ While being shunted into secret one-on-one arbitrations to resolve a dispute with an employer would offend many peoples' sense of justice,¹⁷ employers are now entitled to do just this.

There are not many options to effectively remedy the problem posed by this situation. The already arbitration-friendly Supreme Court has become even more pro-arbitration and hostile to employee claims.¹⁸ Indeed, the Supreme Court has "exhibited singular determination in upholding t[his] federal policy on arbitration."¹⁹ While federal legislation would be a preferable solution,²⁰ Congress has not shown an appetite for taking on arbitration in recent years.²¹ The ability of agencies to help remedy this problem is doubtful, as shown in *Epic Systems*, where an agency's interpretation of a statute was found to be secondary to the force of the Federal Arbitration Act (FAA).²²

16. *Id.* at 1638 ("Once the Supreme Court began to issue decisions stating that commercial arbitration was 'favored' and that arbitration of employment claims could be permitted, businesses jumped on the opportunity to compel arbitration in contexts where they previously thought arbitration agreements would not be enforced.").

17. See *infra* Part I.C.

18. See Russ Bleemer et al., *Kavanaugh on Arbitration*, CPR SPEAKS (July 16, 2018), <https://blog.cpradr.org/2018/07/16/kavanaugh-on-arbitration/> [<https://perma.cc/JF8J-86RM>] (explaining that Kavanaugh's decisions show a pro-business, pro-arbitration leaning); Erin Mulvaney, *Brett Kavanaugh "Looks for Ways To Rule for Employers,"* NAT'L L.J. (July 12, 2018), <https://www.law.com/nationallawjournal/2018/07/12/brett-kavanaugh-looks-for-ways-to-rule-for-employers/?kw=&slreturn=20200205141045> [<https://perma.cc/J3QZ-Y6QY>].

19. THOMAS CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* xix (2d ed. 2007).

20. See Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PA. ST. L. REV. 1081, 1085 (2009) (explaining why Congress changing the laws regarding arbitration is a more realistic outcome).

21. A house bill, H.R. 1374, 115th Cong. (2017), prohibiting pre-dispute arbitration agreements in an employment, consumer, antitrust, or civil rights dispute did not make it out of committee. Senator Richard Blumenthal introduced similar legislation in the Senate, S. Res. 2591, 115th Cong. (2018), which also failed to make it out of committee. Similar legislation had been introduced before and was met with equal apathy. *E.g.*, S. Res. 1133, 114th Cong. (2015); S. Res. 878, 113th Cong. (2013).

22. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622–23 (2018) (citing 9 U.S.C. § 2 (2018)).

Considering the degree to which federal remedies seem unlikely, the answer to stemming mandatory arbitration in the employment context likely rests with the states.²³ Individual states have attempted to counteract the preference towards arbitration, but these approaches have heretofore been unsuccessful.²⁴ This Note proposes a novel approach: for states to limit the ill-effects of mandatory arbitration by crafting laws governing contract formation.²⁵ These laws would be grounded in bedrock contract formation principles and would, if properly drafted, avoid the looming preemption issues with state laws concerning arbitration.²⁶ If written in a way that does not single out arbitration, such laws could significantly curtail, if not eliminate, the negative effects of mandatory arbitration in employment contracts.²⁷ This Note provides a roadmap to state legislatures and state courts to effect this approach.

Part I examines the history of the Federal Arbitration Act, specifically as it relates to mandatory arbitration in employment contracts. It also explains the reasons why these clauses are problematic and focuses on the effects they have on low-wage workers. Part II discusses efforts, heretofore unsuccessful, to stem the tide of mandatory arbitration. The Supreme Court has closed off many of the possible avenues of combating the injustice posed by mandatory arbitration clauses in employment contracts, but all hope is not yet lost. Part III proposes a solution that threads the needle through the thicket of the Supreme Court's FAA preemption jurisprudence. In order to combat mandatory arbitration clauses, state legislatures can look to basic contract principles in order to require a "back to the basics" approach to contract formation. Any state attempting this approach will need to be acutely aware of the potential pitfalls and traps inherent in this strategy, but should it be successful, states can significantly curtail negative effects associated with mandatory pre-dispute arbitration.²⁸ Not only that, but such laws

23. See *infra* Part II.C.

24. See, e.g., *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (upholding an arbitration clause despite the Kentucky Supreme Court's holding that the arbitration clause was unenforceable).

25. See *infra* Part III.

26. See *infra* Part III.B.

27. See *infra* Part III.B.

28. See *infra* Part II.B.

would also have a secondary effect of stemming other inequitable terms in adhesive contracts.²⁹

I. THE HISTORY OF THE FEDERAL ARBITRATION ACT AND MANDATORY ARBITRATION CLAUSES

The FAA as originally enacted had a much narrower scope than the way it has been interpreted since.³⁰ The current interpretation has strayed far from Congress's original intention.³¹ Far from being inconsequential, this drift has proved to be harmful to some of the most vulnerable segments of the population,³² an effect which is exacerbated by other changes that have made for a hostile environment for workers.³³ In order to illuminate the solution proposed by this Note, this Part gives background information on the history of the FAA, the Supreme Court's FAA jurisprudence broadening the scope of the statute, the rise of the use of mandatory arbitration in contracts of adhesion, and the state of workers' rights.

A. THE HISTORY OF THE FEDERAL ARBITRATION ACT

The use of arbitration has a long history.³⁴ Arbitration was used in what is now the United States as early as 1650,³⁵ but its use was almost always limited to disputes between businesses.³⁶ In the early days, powerful parties did not use arbitration as a way to deny parties with less bargaining power (such as employees, consumers, or franchisees) the ability to vindicate their claims.³⁷

In the nineteenth and early twentieth centuries there was a perceived "judicial hostility" to arbitration,³⁸ although there is

29. See *infra* Part III.B.

30. See *infra* Part I.A.

31. See *infra* Part I.B.

32. See *infra* Part I.C.

33. See *infra* Part I.D.

34. See JACKSON H. RALSTON, INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO 153–89 (discussing, among other topics, arbitration between Greek gods, the arbitration system in ancient Greece, Roman participation in the Greek form of arbitration, and arbitration in the Middle Ages).

35. *Id.* at 190.

36. See Sternlight, *supra* note 15, at 1636.

37. *Id.*

38. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) ("As the Court has explained, the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from

doubt about whether American courts were truly hostile to arbitration or whether they simply felt “bound by a precedent they no longer agreed with but which they felt required legislative action to undo.”³⁹ To abrogate the use of these doctrines, foster certainty,⁴⁰ and abolish these “anachronism[s] of our American law,”⁴¹ which were employed despite “frequent protest” by courts,⁴² Congress enacted the Federal Arbitration Act (FAA) in 1925.⁴³

Most of the support for passage of the FAA came from business groups and commercial organizations which had already been effectively using arbitration.⁴⁴ Business came to favor arbitration for its efficiency, ease, preservation of business relationships, and quickness.⁴⁵ Much of the FAA’s legislative history shows that Congress only contemplated arbitration between

then-longstanding English practice.”). This hostility was inherited from the English system of law, which relied on principles of “ouster” and “revocability,” which disfavored arbitration. See David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1224 (2013).

39. Stephen E. Friedman, *Trusting Courts with Arbitration Provisions*, 68 CASE W. RES. L. REV. 821, 846 (2018). Indeed, courts were expressing skepticism about the doctrines of revocability and ouster as early as fifty years prior to the enactment of the FAA. *Id.* at 847.

40. See David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History*, 63 BUS. LAW. 55, 61 (2007) (“This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it. It does not involve any new principle of law except to provide a simple method by which the parties may be brought before the court in order to give enforcement to that which they have already agreed to.” (citing 65 CONG. REC. 1931 (1924) (statement of the Chairman of the House Judiciary Committee))).

41. See Horton, *supra* note 38, at 1225 (citing H.R. REP. NO. 68-96, at 1 (1924)).

42. *Id.*

43. Federal Arbitration Act, ch. 392, § 1, 61 Stat. 669 (1947) (codified at 9 U.S.C. §§ 1–16 (1947)).

44. *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comm. on the Judiciary*, 68th Cong. 16 (1924) (statement of Julius Cohen) (“[T]he statement I make is backed up by 73 commercial organizations in the country who have, by a formal vote, approved of the bill before you gentlemen.”).

45. See *id.*

businesses.⁴⁶ Additionally the FAA was not meant to reach employment contracts.⁴⁷ W.H.H. Piatt, an advocate for the FAA, stated that the Act would not cover workers,⁴⁸ and the constitutional understanding at that time was that employment contracts were strictly intrastate, and thus outside of Congress's plenary powers.⁴⁹ To ensure that employees were not covered by the FAA, Congress expressly excluded "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"⁵⁰ those being the only employees that Congress thought it had power to regulate at that time.⁵¹ Drafters of the FAA similarly did not intend for it to cover contracts of adhesion.⁵² Piatt stated that "I would not favor any kind of legislation that would permit the forcing a man to sign . . . [an adhesive] contract [containing a mandatory arbitration clause]"⁵³ since the primary use of arbitration agreements was to settle disputes between merchants.⁵⁴

46. In arguing for why the FAA was needed, one of the bill's biggest proponents, Julius Cohen, stated that an agreement to arbitrate was essentially a business contract and should be honored just like other business contracts. The then-chairman of the Committee of Commerce Trade and Commercial Law of the American Bar Association, W.H.H. Piatt, stated that the FAA was "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it." Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 104, 106 (2006) (citing *Sales and Contracts to Sell in Interstate and Foreign Commerce*, and *Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923)).

47. *Id.* at 105.

48. *Id.*

49. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 136 (2001) (Souter, J., dissenting) ("When the Act was passed (and the commerce power was closely confined) our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce.").

50. 9 U.S.C. § 1 (2018).

51. See Moses, *supra* note 46, at 106.

52. Contracts of adhesion are offered on a "take-it-or-leave-it" basis where one party is in a substantially stronger bargaining position than the other. See Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 855–56 (1964) (discussing contracts of adhesion and compulsory contracts).

53. See Moses, *supra* note 46, at 107.

54. *Id.*; see also Sternlight, *supra* note 15, at 1636 n.18 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting)).

Finally, the FAA's language and legislative history portend that Congress did not intend to supersede states' public policy regarding contracts nor for the FAA to apply in state courts. Sections three and four of the FAA state that the statute applies to "the courts of the United States" and "United States district court[s]."⁵⁵ The legislative history also evinces an intent for the FAA to be a procedural rule to apply only in federal courts.⁵⁶ States would still retain their traditional authority to determine if an enforceable contract exists in the first place.⁵⁷ Indeed, in his testimony, Cohen, who helped draft the FAA, emphasized that "[t]here is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement."⁵⁸ The FAA was enacted during the "golden age of the public policy doctrine" when courts found contracts unenforceable due to violations of public policy more than often than they invoked other defenses such as mistake, duress, lack of consideration, or the statute of frauds.⁵⁹ As such, a legislator in 1925 would likely have thought that the public policy defense would fit within the § 2 savings clause.⁶⁰

B. THE PERVERSION OF THE FEDERAL ARBITRATION ACT

While those who passed the FAA viewed it as having a limited scope,⁶¹ the Supreme Court's interpretation of the law since, and especially in the past few decades, has morphed the FAA into a law that no legislator in 1925 would recognize. Justice O'Connor called the Court's FAA jurisprudence "an edifice of its own creation" which the Court built by "abandon[ing] all pretense of ascertaining congressional intent."⁶²

55. 9 U.S.C. §§ 3–4; *see also* Horton, *supra* note 38, at 1226–27 (“[H]alf of the FAA’s . . . sections expressly apply only to federal courts.”).

56. *See* Horton, *supra* note 38, at 1227 (“[T]he House Report on the FAA declares that ‘[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law [of the] court in which the proceeding is brought and not one of substantive law.’”); *see also* Moses, *supra* note 46, at 110 (explaining that the Committee members envisioned the FAA as a procedural statute related only to federal court).

57. Horton, *supra* note 38, at 1260.

58. *Id.*

59. *Id.* at 1223–24.

60. *Id.*

61. *See supra* Part I.A.

62. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

1. Initial Expansion of the Scope of the FAA

In the decades following the enactment of the FAA, the use of arbitration remained largely the same and courts' interpretations hewed rather closely to the FAA's purpose. In the 1970s and 1980s, however, the Supreme Court's view of the FAA changed dramatically.⁶³ In 1983 the Court first announced that federal policy favors the arbitration of claims.⁶⁴ Saying that the FAA was a "congressional declaration of a liberal federal policy favoring arbitration agreements,"⁶⁵ the Court declared that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."⁶⁶ The Court would use this language and the broad federal policy which it purports to have brought to light numerous times in the ensuing years to expand the scope of the FAA.⁶⁷

A year later in *Southland Corp. v. Keating* the Supreme Court held, for the first time, that the FAA applies in state courts and that it supersedes contrary state law.⁶⁸ The Court explained that Congress made a substantive rule by enacting the FAA and that it applies regardless of the forum in which the claim is brought.⁶⁹ Congress, according to the Court, "intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."⁷⁰

The next major expansion of the scope of the FAA came in 1991 in *Gilmer v. Interstate/Johnson Lane Corp.*⁷¹ Although the

63. Sternlight, *supra* note 15, at 1637.

64. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also Sternlight, *supra* note 15, at 1637.

65. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; see Sternlight *supra* note 15, at 1637.

66. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

67. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting "liberal federal policy favoring arbitration agreements" in support of enforcing the parties' arbitration agreement); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (same); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 n.14 (2001) (same).

68. *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) ("[S]ince the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal-court jurisdiction."); see also Horton, *supra* note 38, at 1227 (discussing the Supreme Court decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

69. *Southland Corp.*, 465 U.S. at 11, 15.

70. *Id.* at 16.

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

Age Discrimination in Employment Act of 1967 created a cause of action for those who were victims of age discrimination, the Court in *Gilmer* held that an agreement to arbitrate trumped the statutory right of action.⁷² The extension of the FAA to cover a statutory claim in an employment context was seen as a significant expansion of the scope of the FAA.⁷³

2. State Preemption

A significant portion of the judicial expansion of the FAA has occurred by narrowing the scope of the statute's savings clause.⁷⁴ The wheels of FAA preemption were set in motion in *Southland*,⁷⁵ but the frequency with which the Supreme Court finds state laws to be preempted by the FAA has increased since.

Perry v. Thomas represents the beginning of the Court's expansion of the scope of FAA preemption of state laws.⁷⁶ In *Perry*, a securities salesman brought suit against his former employer under a California statute that provided for actions to collect wages "without regard to the existence of any private agreement to arbitrate."⁷⁷ The Court held that under the Supremacy Clause the FAA preempts the state statute.⁷⁸ Perhaps the most important aspect of *Perry* lies in footnote nine, which clarifies the scope of FAA preemption:

An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, "save upon such grounds as exist at law or in equity for the revocation of *any* contract." Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.⁷⁹

Thus, state laws that single out arbitration are preempted, while those that govern "contracts generally" are not.

72. *Id.* at 35.

73. See George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177, 182 (1998) (explaining that the extension of the FAA to the employment context, rather than just commercial contracts, was "a significant extension of previous rulings").

74. See 9 U.S.C. § 2 (2018).

75. *Southland Corp.*, 465 U.S. at 11–12.

76. *Perry v. Thomas*, 482 U.S. 483 (1987).

77. CAL. LAB. CODE § 229 (West 2015).

78. *Perry*, 482 U.S. at 491.

79. *Id.* at 492 n.9 (citations omitted) (emphasis in original).

The Court bolstered this preemption doctrine in *Allied-Bruce Terminix Cos. v. Dobson*.⁸⁰ Prior to *Allied-Bruce*, courts were unsure how to apply § 2 of the FAA which states that an agreement to arbitrate is enforceable in “a contract evidencing a transaction involving commerce.”⁸¹ In *Allied-Bruce*, the Supreme Court adopted the broadest possible interpretation—that the FAA covers all contracts affecting commerce.⁸² In addition to “eviscerat[ing] state statutes meant to protect consumers,” the Court’s holding “expanded the FAA to cover transactions for which it was never designed.”⁸³

In *Doctor’s Assocs., Inc. v. Casarotto*, a franchisee brought suit against a franchisor with whom he had signed an agreement to arbitrate.⁸⁴ The Montana Supreme Court concluded that the agreement was covered by the FAA, but held that the agreement was rendered unenforceable by a violation of a Montana state law requiring agreements to arbitrate to be on the first page of the agreement in underlined capital letters.⁸⁵ In deciding whether the state law was preempted, the Montana Supreme Court considered the question of whether the state law would “undermine the goals and policies of the FAA.”⁸⁶ The Supreme Court clarified that this consideration was unnecessary.⁸⁷ Instead, the Court plainly stated that “Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”⁸⁸ Threshold limitations, such as the notice provision, the Court said, are “antithetical” to the goals and policies of the FAA.⁸⁹

Undeterred by the legislative history suggesting that the contracts of employees were intended to not be covered by the FAA,⁹⁰ the Court held in *Circuit City Stores v. Adams* that the

80. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

81. *See id.* at 269–70 (discussing different court interpretations of § 2 of the FAA).

82. *Id.* at 270.

83. Janet M. Grossnickle, *Allied-Bruce Terminix Cos. v. Dobson: How the Federal Arbitration Act Will Keep Consumers and Corporations Out of the Courtroom*, 36 B.C. L. REV. 769, 769 (1995) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282–83 (1995) (O’Connor, J., concurring)).

84. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

85. *Id.* at 684.

86. *Id.* at 685.

87. *Id.* at 688.

88. *Id.* at 687.

89. *Id.* at 688.

90. *See supra* Part I.A.

contracts of transportation workers are the only employment contracts outside the scope of the FAA.⁹¹ *Circuit City* clarified what had before been the subject of debate:⁹² businesses may require their employees to resolve disputes through arbitration.⁹³ *Circuit City* was heralded as a “big[] pro-business decision” that signaled “a very good year for big corporations.”⁹⁴

In *AT&T Mobility v. Concepcion* the Court not only bolstered the state preemption doctrine, but also laid the groundwork to preclude class-wide arbitrations.⁹⁵ In *Concepcion*, consumers received “free” phones from AT&T but were later charged sales tax.⁹⁶ The agreement that consumers entered into mandated arbitration and prohibited class arbitrations.⁹⁷ However, when the plaintiff brought this claim in federal district court and AT&T moved to compel arbitration, the court refused to compel arbitration, relying on California’s rule⁹⁸ that unconscionable agreements to arbitrate would not be enforced.⁹⁹ When the case reached the Supreme Court, the Court held that this rule was preempted by § 2 of the FAA.¹⁰⁰ In *Concepcion*, the Court extended the preemption doctrine to cover “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”¹⁰¹ Even though the *Discover Bank* rule rested on unconscionability, a doctrine that would seem to be a “ground[] [that]

91. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

92. The Court in *Circuit City* noted the circuit split on this question. *Id.* at 110–11; see also Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693, 707–09 (1993) (noting the uncertainty regarding which employment contracts are covered by the FAA); David E. Feller, *Putting Gilmer Where It Belongs: The FAA’s Labor Exemption*, 18 HOFSTRA LAB. & EMP. L.J. 253 (2000) (discussing different interpretations of the labor exception).

93. Kristin McCandless, Comment, *Circuit City Stores, Inc. v. Adams: The Debate over Arbitration Agreements in the Employment Context Rages On*, 80 DENV. U. L. REV. 225, 235 (2002).

94. *Id.* (citing Robert S. Greenberger, *Businesses See Gains in High-Court Term*, WALL STREET J., June 29, 2001, at B4).

95. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

96. The *Concepcions* paid only \$30.22 in sales tax for the phone, making this case the perfect example of how many claims only make sense to bring as a class. *Id.* at 337.

97. See *id.* at 336.

98. This is often called the *Discover Bank* rule, alluding to the case in which this rule was announced. See *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005).

99. *Concepcion*, 563 U.S. at 338; see also *Discover Bank*, 113 P.3d 1100 .

100. *Concepcion*, 563 U.S. at 352.

101. *Id.* at 343.

exist[s] at law or in equity for the revocation of any contract,”¹⁰² the Supreme Court nevertheless held it to be preempted.¹⁰³

Another key holding of *Concepcion* is that class arbitration is inconsistent with the FAA,¹⁰⁴ a holding which the Supreme Court’s expanded in *Epic Systems Corp. v. Lewis*.¹⁰⁵ The cases consolidated in *Epic Systems* all involved employment contracts with agreements to arbitrate on an individual basis.¹⁰⁶ The National Labor Relations Board (NLRB) had, in 2012, held that requiring an employee to sign an agreement to arbitrate claims individually as a condition of employment violated the National Labor Relations Act (NLRA).¹⁰⁷ This holding “effectively nullified” the FAA in cases where employees wished to assert claims as a class against an employer.¹⁰⁸ In *Epic Systems*, employees argued that this interpretation of the NLRA is a “ground” that “exists at law . . . for the revocation of their arbitration agreements,” and thus fits within the savings clause.¹⁰⁹

The Court rejected this argument, relying again on its narrow interpretation of the “any contract” language of the savings clause.¹¹⁰ Rather than being based on a ground that would apply to all contracts, the court reasoned, employees objected to the agreements to arbitrate specifically because they require individual arbitration in violation of the NLRB’s interpretation of the NLRA.¹¹¹ Doing so interferes with one of the fundamental attributes of arbitration, according to the Court.¹¹² Relying on *Concepcion*, the Court stated that “courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class wide arbitration procedures without the parties’ consent.”¹¹³ The Court refused to distinguish the case from *Concepcion*, saying that *Concepcion*’s “rationale and rule” apply

102. 9 U.S.C. § 2 (2018); *supra* note 98 and accompanying text.

103. *See Concepcion*, 563 U.S. at 352.

104. *Id.* at 344.

105. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

106. *Id.* at 1619–20.

107. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2292 (2012).

108. *Epic Sys. Corp.*, 138 S. Ct. at 1620.

109. *Id.* at 1622.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1623.

to a case where a contract term is rendered illegal the same way it applied in *Concepcion*.¹¹⁴

In conclusion, the scope of the FAA today would be virtually unrecognizable to the Congress that originally enacted it. The FAA has been interpreted to encompass contracts between employers and employees, contrary to what Congress intended in 1925. Furthermore, the Supreme Court's interpretation of the FAA has led to a trampling of state contract and arbitration law, which Congress did not intend when it enacted the FAA. In a series of 5–4 decisions¹¹⁵ the Court has transformed what was originally understood to be a narrow procedural rule for federal courts into an all-encompassing beast trampling state contract law and tenets of basic fairness.

C. RISE OF MANDATORY ARBITRATION CLAUSES AND THE HARMS THAT EMANATE

Mandatory arbitration clauses pervade many facets of our everyday life. A 2004 study found that more than a third of consumer transactions made an average person living in Los Angeles subject to mandatory arbitration.¹¹⁶ One would expect that this number has gone up, in part due to decisions like *Concepcion*, which incentivize corporations to use mandatory arbitration clauses in their contracts. Use of mandatory arbitration clauses by employers has increased from only two percent in 1992 to fifty-four percent today.¹¹⁷ This percentage corresponds to 60.1 million American workers who are now barred from bringing a suit against their employer in court.¹¹⁸ Of those 60.1 million, nearly 25 million are contractually forbidden from bringing or participating in a class action lawsuit.¹¹⁹

114. *Id.*

115. Among other FAA cases, *Epic Systems*, *Concepcion*, and *Circuit City* were all 5–4 decisions.

116. Linda J. Demaine & Deborah R. Hensler, "Volunteering" To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004).

117. The Editorial Board, *The Supreme Court Sticks It to Workers, Again*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/opinion/supreme-court-workers-payment.html> [<https://perma.cc/C4ED-WDVG>].

118. ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 5 (2018).

119. *Id.* at 11.

Mandating arbitration negatively impacts an employee's ability and willingness to bring a claim.¹²⁰ One of the most significant critiques of mandatory arbitration, however, is not related to individuals, but rather the public harm that occurs as a result of mandatory arbitration.¹²¹ The "public justice" critique posits that the curtailing of public trials and the retardation of the development of public precedent are some of the biggest harms that come from mandatory arbitration.¹²² This critique suggests that the private market (arbitration) cannot be counted on to provide the same public good that courts can.¹²³ Aside from the fairness and consistency usually demonstrated by courts, they also serve an "educative function" of informing the public how laws are being interpreted.¹²⁴ Private means of dispute resolution, like arbitration, typically do not serve these same functions.¹²⁵

Another critique of arbitration is that its use runs counter to democratic values.¹²⁶ When arbitration is mandatory and binding, arbitration may "erode public trust in the courts and in the law."¹²⁷ By taking place in non-public forums and by allowing parties to exclude arbitrators, arbitration fails to be participatory in a democratic sense.¹²⁸ Arbitration also offers little in the way of accountability,¹²⁹ another key democratic tenet. Arbitration is also less transparent than proceedings in an open court.¹³⁰

Rather than the philosophical considerations of the inadequacy of arbitration system, what matters most for workers is the actual ability to bring a claim in an impartial forum and to obtain relief. Unfortunately for workers, arbitration often does

120. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990's*, 73 DENV. U. L. REV. 1017, 1019 (1996).

121. See Sternlight, *supra* note 15, at 1661.

122. *Id.*

123. *Id.* at 1662 (citing David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622 (1995)).

124. See Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 369 (2006).

125. Sternlight, *supra* note 15, at 1672.

126. See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279 (2004) (examining the "relationship between arbitration and constitutional democracy").

127. *Id.* at 295.

128. *Id.* at 299.

129. *Id.* at 300–01.

130. *Id.* at 301.

not provide such a forum. The drafter of a contract containing a mandatory arbitration clause, which is almost always the employer,¹³¹ is in a position to game the terms of the arbitration in their favor.¹³² The drafter, or the “pinstriped exploiter[,],” as one court has referred to them,¹³³ selects the arbitrator or the arbitration provider, which can lead to bias on the part of the arbitrator.¹³⁴ An arbitrator’s desire to appease the employer-contract drafter in hopes of future business may influence the arbitrator’s decision-making process in favor of that employer.¹³⁵ The employer is significantly more likely than the employee to have been through multiple arbitrations before, leading to a “repeat player” problem where the employer knows the rules and proclivities of the arbitrator far better than the employee.¹³⁶ Finally, the drafter of the arbitration provision may tailor the provision to impose additional costs on the employee.¹³⁷ This costliness problem is compounded when an employer prohibits employees from proceeding with their claims jointly.¹³⁸

Empirics support the assertion that requiring mandatory arbitration works against workers’ rights. Lower-income employees are often made to pay forum fees or attorney fees, or both.¹³⁹ These high costs may price employees out of the arbitration market.¹⁴⁰ Generally, damage awards are lower in arbitration than they are in a judicial forum.¹⁴¹ The data on this is subject to some qualification, but median awards are higher in

131. *Accord* Nicholas S. Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT’L & COMP. L.Q. 172, 173 (1965).

132. *See* Sternlight, *supra* note 15, at 1650.

133. *Lytle v. Citifinancial Services, Inc.*, 810 A.2d 643, 661 (Pa. Super. Ct. 2002).

134. Sternlight, *supra* note 15, at 1650.

135. *Id.*

136. *Id.* (citing Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974)).

137. *Id.* at 1651. This may be done by holding the arbitration in a distant place, increasing transaction costs, selecting an arbitrator with high fees, or limiting discovery to expensive means. *Id.*

138. *Id.* at 1651–52.

139. *See* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May–July 2003, at 12 (discussing how arbitration clauses can be used to impose costs on customers and employees).

140. *See* Bales, *supra* note 124, at 346 (“[H]igh arbitration costs can risk pricing employees out of the market.”).

141. *See id.* at 350 (comparing arbitration and litigation costs).

judicial forums than arbitral forums,¹⁴² and damages awarded as a percentage of damages demanded are significantly higher in judicial awards than arbitral awards.¹⁴³ Additionally, arbitration has been shown to have disparate impacts on different groups. Notably, women are less likely than men to obtain a “win” at arbitration.¹⁴⁴ Due to the relatively racially homogenous makeup of arbitration panels, some have speculated that people of color may be disadvantaged in an arbitral forum.¹⁴⁵ This problem is compounded by the fact that arbitrators are selected by the parties rather than randomly assigned, as with judges.¹⁴⁶

In sum, mandatory arbitration is damaging to both individual worker’s rights and the public good writ large. Employers mandating individual arbitrations would be less problematic if employers and employees entered into employment contracts at arm’s length. Unfortunately, this is almost never the case.¹⁴⁷ As such, requiring individuals to bring their claims on an individual basis is at odds with basic tenets of fairness.¹⁴⁸

D. THE STATE OF WORKERS’ RIGHTS

The state of worker rights and worker power in America has reached what some consider to be a “crisis level[.]”¹⁴⁹ Such a crisis is due to a multitude of factors. The power of unions has been

142. *Id.* (citing Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison* 16–19 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 65, 2003), <https://ssrn.com/abstract-id=389780>).

143. *See id.* at 350 (citing Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 48–49 (1998) (“[Maltby] found that the mean litigated award was 70% of the demand, while the mean arbitrated award was 25% of the demand.”)).

144. *See id.* at 351–52 (discussing effects of mandatory arbitration on different classes of employees).

145. *See generally* Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. AM. ARB. 1 (2005) (claiming that the race of the arbitrator has a significant impact on employment discrimination disputes).

146. *See Bales, supra* note 124, at 352 (explaining how arbitrators are selected).

147. *See infra* Part II.A.

148. *See generally* Sternlight, *supra* note 15 (discussing why mandatory arbitration is problematic).

149. MICHELLE MILLER & ERIC HARRIS BERNSTEIN, ROOSEVELT INST., *NEW FRONTIERS OF WORKER POWER: CHALLENGES AND OPPORTUNITIES IN THE MODERN ECONOMY* 2 (2017).

diminishing for decades¹⁵⁰ due to legislative¹⁵¹ and judicial¹⁵² assaults on unions. Additionally, many unionized jobs have been shipped abroad, further weakening union power and making good-paying jobs that do not require a college degree scarcer.¹⁵³ Wages for some workers have been stagnant for the past few decades,¹⁵⁴ and the rise¹⁵⁵ of the “gig economy” means less predictability and fewer benefits for workers.¹⁵⁶

150. See *Union Members: 2019*, BUREAU OF LAB. STAT. (Jan. 22, 2020), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/8QSX-XGUS>] (showing that only 10.3% of U.S. workers are union members, down from 20.1% in 1983, the first year the Bureau of Labor Statistics kept statistics on union membership).

151. See DAVID MADLAND & ALEX ROWELL, *ATTACKS ON PUBLIC-SECTOR UNIONS HARM STATES 2* (2017), <https://cdn.americanprogress.org/content/uploads/sites/2/2017/11/15074954/ImpactofWisconsinAct10-brief.pdf> [<https://perma.cc/JT4D-YFEJ>] (showing the ill-effects of Wisconsin’s Act 10); FRANK MANZO IV & ROBERT BRUNO, *THE IMPACT OF “RIGHT-TO-WORK” LAWS ON LABOR MARKET OUTCOMES IN THREE MIDWEST STATES: EVIDENCE FROM INDIANA, MICHIGAN, AND WISCONSIN (2010–2016)* (2017), <https://ler.illinois.edu/wp-content/uploads/2017/03/RTW-in-the-Midwest-2010-2016.pdf> [<https://perma.cc/W8ZN-T9HJ>] (showing that workers in states that had adopted “right-to-work” laws earned less and were less likely to be a member of a union).

152. See *Janus v. Am. Fed’n State, Cty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2449 (2018) (holding that a state cannot require non-union members to contribute agency fees to the union); Dana Goldstein & Erica L. Green, *What the Supreme Court’s Janus Decision Means for Teacher Unions*, N.Y. TIMES (June 27, 2018), <https://www.nytimes.com/2018/06/27/us/teacher-unions-fallout-supreme-court-janus.html> [<https://perma.cc/49H7-PT37>] (speculating that the *Janus* decision may harm teachers’ unions specifically).

153. See generally Charles R. Perry, *Outsourcing and Union Power*, 18 J. LAB. RES. 521 (1997) (explaining how outsourcing has diminished the power of unions).

154. See Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RESEARCH: FACTTANK (Aug. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades/> [<https://perma.cc/YQ9K-HPLM>] (“[T]oday’s real average wage [-] has about the same purchasing power it did 40 years ago.”); Lawrence Mishel et al., *Wage Stagnation in Nine Charts*, ECON. POL’Y INST. (Jan. 6, 2015), <https://www.epi.org/publication/charting-wage-stagnation/> [<https://perma.cc/4SKS-YCXF>] (discussing wage trends of the last three decades).

155. The “gig economy” is estimated to include 34% of U.S. workers and was projected to increase to 43% by 2020. Patrick Gillespie, *Intuit: Gig Economy Is 34% of US Workforce*, CNN BUS. (May 24, 2017), <https://money.cnn.com/2017/05/24/news/economy/gig-economy-intuit/index.html> [<https://perma.cc/2U9R-KSVQ>].

156. See Adrian Chen, *Next Stop, Uberland: The Onrushing Algorithmic Future of Work*, N.Y. MAG.: INTELLIGENCER (Nov. 15, 2018), http://nymag.com/intelligencer/2018/11/alex-rosenblats-uberland-review.html?utm_campaign=

Against this worker-unfriendly backdrop the problem of wage theft runs rampant. Wage theft is when an employer fails to pay an employee money that the employee is legally entitled to.¹⁵⁷ Wage theft includes instances where an employee is not paid the mandated minimum wage, not paid overtime, misclassified as an independent contractor, or made to work unpaid time before or after a shift, among other violations.¹⁵⁸ Wage theft is a “transfer from low-income employees to business owners that worsens income inequality, hurts workers and their families, and damages the sense of fairness and justice that a democracy needs to survive.”¹⁵⁹ The problem of wage theft disproportionately affects women and foreign-born workers,¹⁶⁰ and those who report it may face retaliation in the workplace.¹⁶¹

When workers wish to vindicate their rights and obtain their rightfully-earned pay that is due to them, the most effective course of action is often collective action.¹⁶² Typically, no individual is owed enough money to make it worth it for an attorney to take the case on an individual basis.¹⁶³ To cure this problem,

nym&utm_medium=s1&utm_source=tw [https://perma.cc/JG8T-5DP6] (detailing the invasiveness inherent in driving for Uber as well as the poverty-wage level pay); see also Robert Reich, *The Downside of the Gig Economy*, NEWSWEEK (Aug. 24, 2015), https://www.newsweek.com/downside-gig-economy-365422/ [https://perma.cc/JHR9-HSVT] (explaining how the “gig economy” negatively affects workers’ benefits).

157. See BRADY MEIXELL & ROSS EISENBREY, ECON. POL’Y INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 1 (2014) (explaining the definition of “wage theft”); *What Is Wage Theft?*, UCLA LABOR CTR. (May 6, 2015), https://www.labor.ucla.edu/wage-theft/ [https://perma.cc/4V9S-7LTK] (same).

158. See ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 2–4 (2009) (explaining different kinds of violations of employment and labor laws).

159. MEIXELL & EISENBREY, *supra* note 157, at 1–2.

160. See BERNHARDT ET AL., *supra* note 158, at 5 (“Women were significantly more likely than men to experience minimum wage violations, and foreign-born workers were nearly twice as likely as their U.S.-born counterparts to have a minimum wage violation.”).

161. See *id.* at 24–25 (finding that 43% of those who reported wage theft faced retaliatory action at work).

162. See SEYFARTH SHAW LLP, 14TH ANNUAL WORKPLACE CLASS ACTION LITIGATION REPORT 3 (2018), https://www.seyfarth.com/dir_docs/publications/2018_Workplace_Class_Action_Report.pdf [https://perma.cc/E8S8-8K27] (showing that class action settlements against employers exceeded \$2.72 billion in 2017).

163. See Noah Feldman, *This Is What a More Conservative Supreme Court Looks Like*, BLOOMBERG (May 22, 2018), https://www.bloomberg.com/opinion/

bringing the claims as a class action is often a more efficient method of asserting employees' claims.¹⁶⁴ Class actions make it easier for employees to bring claims against their employer.¹⁶⁵ Instead of finding a lawyer, initiating a lawsuit, and going through discovery, often for someone to join a class action, all they need to do is opt in. Employers also fear class actions, as these lawsuits can result in the company being liable for hundreds of millions of dollars.¹⁶⁶

II. THE NUMEROUS OBSTACLES TO AN EFFECTIVE SOLUTION FOR THE MANDATORY ARBITRATION PROBLEM

The collision of Supreme Court jurisprudence distorting the FAA and the rise of the use of mandatory arbitration clauses spells harm for vulnerable parties—a harm exacerbated by an already hostile environment for these parties. While this result is clearly unjust and unpalatable, whether an effective solution exists is less clear. The combination of judicial drift from bedrock contractual principles, the creation of a monolithic FAA through preemption of state contract law, and the insufficiency and unlikelihood of meaningful action at either the federal or state level creates a thicket through which the emergence of solutions seems unlikely. This is not to say, however, that solutions are impossible, only that any attempt at a solution must be aware of

articles/2018-05-22/this-is-what-a-more-conservative-supreme-court-looks-like [https://perma.cc/2VC9-ZUDG] (explaining why individuals in the cases brought up class actions). It is important to note that this should not be taken to mean that these claims are insignificant. To many employees, the sums they are due would be significant. However, the amount owed is often less than what it would cost for the attorney to spend the time necessary to obtain a judgement. As an example, see Dee DePass, *Surly Settles \$2.5 Million Class-Action Lawsuit over Mandatory Tip-Pooling*, STAR TRIB. (Mar. 30, 2018), <https://www.startribune.com/surly-settles-2-5-million-class-action-lawsuit-over-alleged-mandatory-tip-pooling/478407383/> [https://perma.cc/RU7H-SUKS] (noting that each member of the class action would be entitled to \$11,600).

164. See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUDS. 47, 48–54 (1975) (explaining the comparative efficiency of class actions).

165. See *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214 (11th Cir. 2011) (describing sworn affidavits submitted by consumer law attorneys stating that the consumers' claims would not be cost-effective for them to take unless the claims were brought as a class action).

166. See SEYFARTH SHAW LLP, *supra* note 162, at 33 (listing the top two settlements in privately-brought plaintiff wage and hour class actions as \$227 million and \$110 million).

the potential pitfalls past attempted solutions have fallen victim to. By avoiding these pitfalls, a workable, effective solution may come to light, as this Note proposes in Part III.

A. DRIFT FROM BASIC CONTRACTUAL PRINCIPLES

At the core of any first-year contracts course in law school are various bedrock contractual principles.¹⁶⁷ These basic contractual principles¹⁶⁸ serve to promote fairness,¹⁶⁹ efficiency,¹⁷⁰ and predictability.¹⁷¹ Although these principles are generally regarded as black letter law,¹⁷² courts do not always strictly adhere to them. Straying from these principles causes harm to parties with weaker bargaining positions, especially in the context of the enforceability of agreements to arbitrate.

One of the most fundamental doctrines in contract law is the requirement of mutual assent.¹⁷³ Mutual assent to a contract

167. See, e.g., Daniel Schwarcz, Syllabus for Contract Law 2–3 (2017) (unpublished course syllabus) (on file with author) (listing mutual assent, consideration, and promissory estoppel as concepts that will be taught).

168. These include concepts such as mutual assent through offer and acceptance, unconscionability, voiding contracts as against public policy, mistake, and duress.

169. See Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the “Law of Satisfaction”—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 368 (1995) (stating that many strict contract law principles have been supplanted by a growth of more equitable doctrines); Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 648 (2009) (noting that contract law developed largely to preserve fundamental fairness for contracting parties). See generally Josse Klijnsma, *Contract Law as Fairness*, 28 RATIO JURIS 68 (2015) (applying John Rawls’s theory of justice as fairness to the field of contract law).

170. See Larry A. DiMatteo, *Justice, Fault, and Efficiency in Contract Law*, 3 ITALIAN L.J. 37, 38 (2017) (explaining that the capitalist conception of contract law is that it should be facilitative and increase efficiency); e.g., Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 PHIL. ISSUES 420, 420 (2001) (“Economic contract theories seek to explain and justify contract law by analyzing the extent to which contract doctrines promote efficiency.”).

171. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 577 (2003) (noting that businesses prefer a textualist approach to contract interpretation due to the certainty and predictability provided by that approach).

172. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . .”).

173. See *id.* § 18 (“Manifestation of mutual assent to an exchange requires

means that the parties have had a “meeting of the minds,” meaning that both parties to a contract have reached a tacit agreement regarding the meaning of contract.¹⁷⁴ The concept of mutual assent through a meeting of the minds is offended, however, when a contract isn’t negotiated between two parties, but is rather offered on a take-it-or-leave-it-basis, so-called “contracts of adhesion.”¹⁷⁵ The term “contract of adhesion,” often used pejoratively,¹⁷⁶ refers to those contracts in which “a single will is exclusively predominant, acting as a unilateral will which dictates its law . . . to the adhesion of those who would wish to accept the law.”¹⁷⁷ Adhesive contracts are the “dominant means of regulating exchanges between organizations and individuals in contemporary life.”¹⁷⁸ Even the Supreme Court has recognized that “the times in which consumer contracts were anything other than adhesive are long past.”¹⁷⁹

Although adhesive contracts promote efficiency by reducing transactional costs,¹⁸⁰ these contracts are typically neither read nor understood by the non-drafting party. Form contracts are generally long, complex, and not negotiated for by the non-drafting party.¹⁸¹ Additionally, it is considered a “modern reality” that employers have the power to require a potential employee to

that each party either make a promise or begin or render a performance.”); LINTON CORBIN, CORBIN ON CONTRACTS § 3 (one vol. ed. 1952) (describing elements of forming a contract).

174. See *Mutual Assent*, BALLENTINE’S LAW DICTIONARY (William S. Anderson ed., 3d ed. 1969).

175. The term “contract of adhesion” was coined by Edwin W. Patterson, who derived it from a study of the German Civil Code by a French jurist. Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856 (1964).

176. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 627 (2002).

177. Patterson, *supra* note 175, at 856 (citing RAYMOND SALEILLES, DE LA DÉCLARATION DE VOLONTÉ § 89, at 229–30 (Raymond Saleilles trans., 1901)).

178. Zev J. Eigen, *Empirical Studies of Contract*, 8 ANN. REV. L. SOC. SCI. 291, 299 (2012) (citing BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS (Omri Ben-Shahar ed., 2007)).

179. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011) (citations omitted).

180. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (explaining the efficiency of standard form contracts).

181. Cf. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 233 (2002) (explaining the characteristics of consumer contracts).

agree to these form contracts as a precondition to employment.¹⁸² Research has shown that many adults are incapable of comprehending the contents of these contracts or picking out the important provisions within the contracts.¹⁸³ Further, drafting parties sometimes deliberately structure their contracts to discourage the non-drafting party from reading or objecting to the terms of the contract.¹⁸⁴ Of course the fact that the non-drafting party often does not read the contract does not render the contract invalid, but it does severely undermine the idea that these contracts are bargained-for manifestations of mutual assent.

Another basic contractual principle which is often rendered inapplicable when it comes to arbitration clauses is unconscionability. The doctrine of unconscionability reflects a recognition that contracts are sometimes so unfair that the only possible explanation for the imbalance in terms is some sort of intrinsic fraud.¹⁸⁵ The unconscionability doctrine has been called “the primary check on drafter overreaching,”¹⁸⁶ giving it special primacy with regard to contracts of adhesion. The unconscionability doctrine varies slightly from jurisdiction to jurisdiction, but establishing unconscionability usually requires a showing of both procedural unconscionability (some form of oppression through unequal bargaining power) and substantive unconscionability (contract terms that produce “overly harsh” or “one-sided” results).¹⁸⁷ It is generally easy to establish procedural unconscionability for adhesive contracts that are offered on a take-it-or-

182. Sarah E. Belton & F. Paul Bland, Jr., *How the Arbitration-at-All-Costs Regime Ignores and Distorts Settled Law*, 35 BERKELEY J. EMP. & LAB. L. 135, 150 (2014).

183. White & Mansfield, *supra* note 181, at 239–40. Comprehension assumes that the contracting party reads the contract; empirical studies show that the non-drafting party is unlikely to have read the contract before “assenting” to it. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983).

184. See Sternlight, *supra* note 15, at 1648–49 (citing *Ting v. AT&T*, 182 F. Supp. 2d 902, 911–13 (N.D. Cal. 2002)).

185. John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 937 n.20 (1969) (noting that one of the earliest references to unconscionability rested heavily on an analogy to fraud).

186. David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012).

187. See Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 48 (2006) (citations omitted).

leave-it basis, since the non-drafting party lacks real choice regarding contractual terms, and sometimes whether or not to enter into the contract in the first place.¹⁸⁸ Sometimes being forced to arbitrate claims at all can be enough to establish substantive unconscionability.¹⁸⁹

Unconscionability thus appears to be a contract law principle that is almost tailor-made to address unfair arbitration clauses. In fact, unconscionability was used so often to strike down arbitration provisions that the doctrine became closely associated with arbitration.¹⁹⁰ However, while unconscionability had before been considered a general contract defense that would fit within the § 2 savings clause of the FAA, when the doctrine of unconscionability became so closely associated with arbitration it started to seem less like a general contractual defense and more like a specialized tool to attack arbitration, thus removing it from the savings clause.¹⁹¹ The Supreme Court's decision in *Concepcion* thus signaled a death knell for the ability of courts to freely apply unconscionability to arbitration clauses.¹⁹²

Finally, the public policy defense, despite appearing to make sense to apply to arbitration, has been rendered inapplicable to agreements to arbitrate. This doctrine of refusing to enforce contracts that are against public policy is, similar to unconscionability, aimed at protecting the public good and promoting fairness.¹⁹³ Even if a contract is properly entered into, it may be invalidated by a court if it is found to be contrary to public policy.¹⁹⁴ The source of this public policy through which a contract may be invalidated can be statutes, regulations, prior case law proclaiming policy precedent, or through the court's "reasoning

188. *Id.* at 59.

189. See Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, with Emphasis on Class Action/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 673 (2010).

190. See Horton, *supra* note 186, at 393.

191. *Id.* at 394.

192. *Id.*

193. See 15 GRACE MCLANE GIELSEL, CORBIN ON CONTRACTS § 79.1 (Joseph M. Perillo ed. 2003) ("[F]reedom of contract is not an absolute right or superior to the general welfare of the public. [Rather,] it is subject to reasonable restraint and regulation by the state, under the police power, to protect the safety, health, morals, and general welfare of the people." (quoting *South Dakota v. Nuss*, 114 N.W.2d 633, 635 (1962))).

194. *Id.*

not convincingly or completely adumbrated.”¹⁹⁵ While it would appear that the public policy defense would often be relevant when dealing with mandatory arbitration clauses, similar to the use of unconscionability, most arbitration-related uses of the public policy doctrine did not survive the Supreme Court’s decision in *Concepcion*.¹⁹⁶

The upshot of the discussion in this section is that basic contractual principles have often been disregarded in the context of enforcing mandatory arbitration. This trend means that “contract law threatens to be less of a body of true law—with rules and limits—and more [of] a device for the powerful drafters of contracts to demand and receive whatever they want.”¹⁹⁷ The consent of the non-drafting party to these terms is effectively involuntary, since they often have no other alternatives.¹⁹⁸ Despite attempts by states to avoid knee-jerk automatic enforcement of arbitration provisions, such attempts have largely been foreclosed upon by the Supreme Court’s FAA preemption jurisprudence.¹⁹⁹

Thus, taking any one of the few doctrines explained above and applying it to a typical employer-employee contract would likely render an arbitration provision contained therein invalid. However, as explained above, for various reasons these doctrines have been become inapplicable to arbitration provisions. Consequently, an effective solution to mandatory pre-dispute arbitration clauses in employment contracts cannot rely on bare applications of these doctrines by courts.

B. STATE ATTEMPTS TO LIMIT MANDATORY ARBITRATION ARE OFTEN PREEMPTED BY THE FAA

States that wish to ameliorate the harsh effects of mandatory arbitration face the FAA preemption problem. Although contract law is regarded as the prerogative of the states,²⁰⁰ the

195. David Adam Friedman, *Bring Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 564, 565 (quoting M. P. Furmston, *The Analysis of Illegal Contracts*, 16 U. TORONTO L.J. 267, 308 (1966)).

196. See Horton, *supra* note 38, at 1238.

197. Belton & Bland, *supra* note 182, at 150.

198. Stephen A. Plass, *Reforming the Federal Arbitration Act To Equalize the Adjudication Rights of Powerful and Weak Parties*, 65 CATH. U. L. REV. 79, 96 (2015).

199. See *infra* Part II.B.

200. See Brief for Contract Law Scholars as Amici Curiae in Supporting Respondent, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2018) (No. 17-988).

Supreme Court has progressively built up what some call a federal common law regarding arbitration,²⁰¹ frequently displacing state laws governing contracts. Since mandatory pre-dispute arbitration provisions in consumer and employee contracts produce unjust results, it is no surprise that various states have crafted laws, rules, or policies designed to eliminate, curtail, or soften the harsh effects of arbitration. Many states have passed legislation restricting the use of mandatory arbitration in certain contexts or establishing rules regarding contract formation in contracts with mandatory arbitration clauses.²⁰² Additionally, many state courts have gone out of their way to lessen the sometimes harsh impact of mandatory arbitration.²⁰³ Unfortunately, many of these state-crafted rules to deal with mandatory arbitration have been invalidated by the Supreme Court's interpretation of the FAA's preemptive impact.²⁰⁴

Many states have passed laws intended to shield their citizens from mandatory pre-dispute arbitration by limiting the use of arbitration provisions or trying to eliminate mandatory arbitration altogether. For example, Montana enacted a statute that declared arbitration clauses unenforceable unless it was underlined and in capital letters on the first page of the contract.²⁰⁵ When a franchisee brought a suit against a franchisor, the Montana Supreme Court held that the arbitration clause contained within their contract was unenforceable since it was not underlined nor on the first page of the contract.²⁰⁶ The Supreme Court,

201. See, e.g., Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 227 (2006) (“*Southland* removed the lid from a Pandora’s Box of possibilities for enforcement of arbitration under the FAA because it created a federal common law with regard to arbitration.”); Isham R. Jones, *The Federal Arbitration Act and Section 2’s “Involving Commerce” Requirement: The Final Step Towards Complete Federal Preemption over State Law and Policy – Allied-Bruce Terminix v. Dobson*, 1995 J. DISP. RESOL. 327, 335 (explaining how *Southland v. Keating* initiated the process of preempting state laws).

202. See, e.g., MONT. CODE ANN. § 27-5-114 (2019).

203. For example, in *Picardi v. Eighth Judicial District Court*, the Nevada Supreme Court invalidated a class-arbitration waiver to further a range of state interests, including deterring corporate wrongdoing and resolving claims efficiently. 251 P.3d 723 (Nev. 2011). Likewise, in *Feeney v. Dell Inc.*, the Massachusetts Supreme Court held that a class-arbitration waiver violated the Commonwealth’s “strong commitment to consumer protection legislation.” 908 N.E.2d 753, 765 (Mass. 2009).

204. See *supra* Part I.B.

205. MONT. CODE ANN. § 27-5-114(4).

206. *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994).

however, reversed, holding that the Montana statute was preempted by the FAA.²⁰⁷ The majority opinion noted that the Montana statute singles out arbitration clauses and thus does not fall within the § 2 savings clause since it is not a ground for revocation of any contract.²⁰⁸ Another example is *Concepcion*.²⁰⁹ It is important to note the marked shift in these cases; even though the Montana statute and California's *Discover Bank* rule are generally applicable contract defenses, they are no longer considered generally applicable when applied to mandatory arbitration clauses. The most impactful portion of *Concepcion* was the shift from focusing on the text of the FAA savings clause to focusing on accomplishing the FAA's objectives.²¹⁰ No longer is the Court bound by the text of the FAA, but rather it is free to decide the scope of FAA preemption based on which result would best accomplish the goals of the FAA. The Court was clear that no longer could arbitration clauses be invalidated by legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."²¹¹ Nor could rules which covertly accomplish the same objectives by disfavoring contracts that have the defining features of arbitration agreements.²¹²

One final example of the preemptive force of the FAA is found in *Kindred Nursing Centers Ltd. Partnership v. Clark*.²¹³ In *Kindred*, plaintiffs brought suit against the nursing home that their family members resided at prior to passing away.²¹⁴ Their suit alleged that the nursing home provided sub-standard care, contributing to the death of their family members.²¹⁵ At the time the deceased had moved into the nursing home, plaintiffs completed the paperwork, which included an agreement to arbitrate, under their powers of attorney.²¹⁶ The nursing home moved to dismiss the case based on the arbitration provisions the plaintiffs signed, but the trial court ruled that the suit could

207. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 689 (1996).

208. *Id.* at 687.

209. *See supra* Part I.B.2.

210. This is called the "purposivist shift." *See Horton, supra* note 38, at 1244.

211. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011).

212. *Id.* at 342.

213. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017).

214. *Id.* at 1425.

215. *Id.*

216. *Id.*

proceed.²¹⁷ The Kentucky Supreme Court affirmed, finding that the arbitration agreements were invalid.²¹⁸ The Kentucky Supreme Court stated that the right of access to the courts, rooted in the state constitution, is “sacred” and “inviolable”²¹⁹ and thus a power of attorney does not enable a representative to waive that right unless it does so explicitly.²²⁰ Since the power of attorney documents in this case did not expressly allow the representatives to enter into arbitration agreements, the Court held that the rights to a trial could not be waived absent a clear statement of authority to do so.²²¹

The case was appealed to the Supreme Court, where a unanimous court reversed.²²² Following the trend towards preemption, the Court held that since the Kentucky Supreme Court’s new rule was not generally applicable, but instead targeted arbitration, it was preempted by the FAA.²²³ The “clear-statement rule” announced by the Kentucky Supreme Court failed to put agreements to arbitrate on an equal plane as other contracts.²²⁴ According to the Court, Kentucky did exactly what *Concepcion* forbade—adopting a legal rule that hinges on a primary characteristic of arbitration.²²⁵ The Court was unpersuaded by the Kentucky Supreme Court’s attempt to avoid preemption by framing the rule as one of general applicability, pointing out that the Kentucky Supreme Court’s proposed general applications of the rule, such as waiving the right to worship freely, consent to an arranged marriage, or bind to personal servitude, were outrageous.²²⁶ Finally, the Court rejected the argument that the FAA applies only to contract enforcement, rather than contract formation.²²⁷ Adopting such a view of FAA preemption would, according to the Court, “make it trivially easy for States to undermine the Act—indeed, to wholly defeat it.”²²⁸

217. *Id.*

218. *Extencicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 313 (Ky. 2015).

219. *Id.* at 330.

220. *Id.* at 329.

221. *Id.* at 332.

222. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1429.

223. *Id.*

224. *Id.* at 1426–27.

225. *Id.* at 1427.

226. *Id.* at 1427–28.

227. *Id.* at 1428.

228. *Id.*

Critics have pointed out that the Supreme Court is often not clear about the scope of FAA preemption.²²⁹ Two theories abound: the “any-contract test” and the “total-preemption theory.”²³⁰ Using the any-contract test draws from the last two words of the § 2 savings clause to strike down arbitration provisions under rules that apply to any contract.²³¹ The common understanding is that this includes doctrines such as fraud, duress, and mistake.²³² However, *Concepcion* and other FAA preemption cases have been seen as a “ringing endorsement of the total-preemption theory.”²³³ Under the total-preemption theory, state contract defenses are completely preempted and may almost never be used to invalidate or render unenforceable an agreement to arbitrate.²³⁴ This theory is supported by the fact that state legislatures rarely legislate in general terms. Instead, legislatures legislate to solve problems, and these problems typically afflict only slices of the population, leading to specialized laws. Additionally, to allow states too much control over determining contract defenses that could be used to invalidate agreements to arbitrate would be to create the possibility of a “loop-hole the size of the [FAA] itself.”

Further evidence of the move towards total preemption lies in the Court’s purposivist shift regarding FAA preemption.²³⁵ Some have argued that the Court’s FAA preemption jurisprudence, and especially *Concepcion*, move beyond mere conflict preemption into a new and more wide-ranging “impact preemption.”²³⁶ Impact preemption develops in a field without Congress expressly mandating it and is free from many of the checks that come into play with other types of federal preemption of state

229. See, e.g., Horton, *supra* note 38, at 1225.

230. *Id.*

231. *Id.* at 1219.

232. *Id.* at 1220.

233. *Id.* at 1244.

234. See *id.* at 1220 (examining this theory as it relates to state public policy defense); Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1143 (2019) (“The Supreme Court has Catch 22-ed the savings clause out of existence.”).

235. Horton, *supra* note 38, at 1223–24.

236. Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Preemption*, 67 FLA. L. REV. 711, 714–15 (2015).

laws.²³⁷ For these reasons, it is considered a “dangerous expansion of federal power” and is regarded as “particularly ill suited to the FAA.”²³⁸

Although total preemption seems to be the most popular view of the current state of FAA preemption, some disagree. Even though it is called an “extreme interpretation,” some believe that the fifth vote of Justice Thomas in *Concepcion* signaled that the preemption doctrine may be limited to cases that arise in federal courts.²³⁹ Others have argued that FAA preemption has “never completely eclipsed” state contract law doctrines such as public policy.²⁴⁰

In sum, the Supreme Court has augmented FAA preemption to a degree where it threatens to eclipse state rules, if it has not already done so. Through minimizing the scope of the savings clause, the Court has effectively precluded state contract law from invalidating arbitration provisions. As controversial as this jurisprudence has been, it is precedential and unlikely to change anytime soon.²⁴¹ As such, any effective state solution to the arbitration-at-all-costs regime²⁴² must find a way to thread a needle through this thicket.

C. OTHER APPROACHES TO CURTAILING MANDATORY ARBITRATION ARE EITHER UNLIKELY OR INEFFECTIVE

As with most problems, there are a host of possible solutions to remedy the problem of mandatory arbitration. Unfortunately, none of these are currently feasible or effective.

1. Federal Governmental Action

One of the easiest and most straightforward solutions would be action by the federal government. All three branches of the

237. *Id.* at 714.

238. *Id.*

239. Michael A. Wolff, *Is There Life After Concepcion? State Courts, State Law, and the Mandate of Arbitration*, 56 ST. LOUIS U. L.J. 1269, 1276 (2012) (reading Justice Thomas’s fifth vote to signal a more restrained preemption doctrine).

240. *See Horton*, *supra* note 38, at 1221 (citing instances where public policy or unconscionability are still used to void arbitration agreements).

241. *See infra* Part II.C.

242. *See Belton & Bland*, *supra* note 182, at 138 (using the phrase “arbitration-at-all-costs regime” to describe the Supreme Court’s FAA jurisprudence).

federal government hold power to remedy the problem of widespread mandatory arbitration;²⁴³ however, action from any of them appears unlikely.

Congress could amend the FAA to create additional exceptions or completely repeal it.²⁴⁴ Additionally, Congress could create causes of action and exempt those causes of action from arbitration. The Supreme Court has consistently stated that Congress holds the power to render certain claims non-arbitrable.²⁴⁵ Although some progress has been made in chipping away at mandatory arbitration, such as the Dodd-Frank Act's prohibition of pre-dispute arbitration in residential mortgages,²⁴⁶ it is unlikely that a general reform to the system of arbitration would pass in the Senate in its current composition.²⁴⁷

The Supreme Court is an unlikely source of a solution, especially considering that the Court is one of the main causes of the problem.²⁴⁸ The Court could reverse course at any time²⁴⁹ and treat arbitration agreements more skeptically, but this is supremely unlikely to happen, especially considering the current composition of the Court.²⁵⁰ Even though earlier arbitration

243. See Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. LEGIS. 711, 714 (2016).

244. *Id.*

245. Sternlight, *supra* note 15, at 1643.

246. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1414(e)(1), 124 Stat. 2151 (2010) (“No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.”).

247. See Ware, *supra* note 243, at 719 (noting that generally the left opposes mandatory arbitration and the right supports it and noting that the Arbitration Fairness Act was sponsored by twenty-four Democrats but zero Republicans).

248. See *supra* Part I.B.

249. Subject, of course, to principles of *stare decisis*.

250. See Ware, *supra* note 243, at 720 (noting that votes on major arbitration cases tend to follow a “highly partisan voting pattern” where justices appointed by Republican presidents favor arbitration and justices appointed by Democratic presidents disfavor arbitration); Bleemer et al., *supra* note 18 (noting that Kavanaugh “leans hard toward business arguments and away from employees’ interests”); Adam Liptak, *In His First Supreme Court Opinion, Justice Brett Kavanaugh Favors Arbitration*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/us/politics/supreme-court-brett-kavanaugh-opinion.html> [<https://perma.cc/9Y5S-KN6L>] (detailing Justice Kavanaugh’s pro-arbitration bent); Oliver Roeder, *How Long Will the Supreme Court’s Conservative Bloc Survive?*, FIVETHIRTYEIGHT (July 19, 2018), <https://fivethirtyeight.com/features/how-long-will-the-supreme-courts-conservative-bloc-survive/> [<https://perma.cc/>

cases garnered broader support amongst the justices, the current Republican-appointed judges now “seem farther from the political center on law governing adhesive arbitration agreements.”²⁵¹

Although federal legislative action and the Supreme Court reversing course seem unlikely, the executive branch, through agency action, could theoretically provide a solution to mandatory arbitration.²⁵² Upon closer examination, this avenue can be shown to be unlikely and fickle. Remember that *Epic Systems*²⁵³ concerned an agency action.²⁵⁴ When the case reached the Supreme Court, the agency’s rule was rejected, resolving the apparent conflict between the FAA and the NLRB’s rule in favor of the FAA.²⁵⁵

Yet, the NLRB is not alone in terms of agencies that have the power to curtail mandatory pre-dispute arbitration. The Consumer Financial Protection Bureau (CFPB) has express authorization to create rules to restrict mandatory pre-dispute arbitration.²⁵⁶ In July 2017, the CFPB proposed a new rule that would have prohibited “providers of certain consumer financial products and services” from using mandatory pre-dispute arbitration clauses and would require disclosure of arbitration records for those entities who were covered but still allowed to conduct arbitration.²⁵⁷ Unfortunately, before the rule could become final, Congress passed a joint resolution disapproving of the rule

TJ9K-U485] (noting that most expect the Supreme Court to remain solidly conservative for decades to come).

251. Ware, *supra* note 243, at 720.

252. See, e.g., Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 993–95 (2017) (exploring how agencies can play a role in mandatory arbitration, especially in the consumer and employment contexts); Ware, *supra* note 243, at 714.

253. See *supra* Part I.B.

254. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

255. *Id.*

256. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1841, 1841 (2010).

257. Arbitration Agreements, 82 Fed. Reg. 33210 (proposed July 19, 2017); *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROTECTION BUREAU, (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/> [https://perma.cc/58AH-NX4F].

and President Trump signed the resolution, nullifying the proposed rule.²⁵⁸

A similar example of how administrative action in this realm is insufficient is the fluctuating level of enforcement through the Wage and Hour Division of the Department of Labor. During the final days of George W. Bush's second term, the Labor Department issued numerous opinion letters which provided guidance to employers about how they planned to enforce wage and hour laws.²⁵⁹ These guidance letters were considered to be pro-business in that they softened rules regarding pay for overtime as well as other wage and hour issues.²⁶⁰ President Obama rescinded these letters immediately when he took office in 2009.²⁶¹ President Trump, in addition to cutting funding for the Labor Department,²⁶² reversed course and reinstated these letters.²⁶³ The upshot of both this example and the CFPB example is that while agency action to enforce wage and hour laws or stem mandatory arbitration can be helpful, they are often insufficient due to their fickleness and their ability to change with each administration. No lasting solution to this problem can be forged through agency action.

2. Past State Attempts To Limit Mandatory Arbitration

Some states have attempted to limit or prohibit the use of mandatory pre-dispute arbitration. New York has prohibited

258. H.R.J. Res. 111, 115th Cong. (2017); Arbitration Agreements, 82 Fed. Reg. 55,500 (Nov. 22, 2017); Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2570 (2019).

259. See U.S. DEP'T OF LABOR WAGE & HOUR DIV., FLSA2009-1 TO FLSA2009-36 (2009), <https://www.dol.gov/whd/opinion/search/index.htm?FLSA> [<https://perma.cc/8GL6-9WHE>]; Juliet Eilperin, *The Trump Administration Just Changed Its Overtime Guidance—and Business Cheers*, WASH. POST (Jan. 8, 2018), https://www.washingtonpost.com/politics/the-trump-administration-just-changed-its-overtime-guidance--and-business-cheers/2018/01/08/f00d3eee-f4a6-11e7-beb6-c8d48830c54d_story.html [<https://perma.cc/GHT4-SW9M>].

260. See Eilperin, *supra* note 259 (explaining that the guidance letters are “another example of how this administration is siding with big business to make it harder to get paid for working overtime and to make it easier for companies to reap the benefits of young workers’ labor without paying a cent for it”).

261. *Id.*

262. Ben Penn, *Trump’s 20 Percent Cut in Labor Budget Aims at Job Training*, BLOOMBERG L. (May 23, 2017), <https://news.bloomberglaw.com/daily-labor-report/trumps-20-percent-cut-in-labor-budget-aims-at-job-training> [<https://perma.cc/58BX-ZFVY>].

263. See Eilperin, *supra* note 259.

mandating arbitration of workplace sexual harassment claims.²⁶⁴ This law seems to fit squarely within the group of laws that expressly prohibit arbitration in a certain context and is thus likely to be preempted by the FAA.²⁶⁵ California's Assembly and Senate passed a bill that would have prohibited all mandatory arbitration in employment contracts,²⁶⁶ though this bill was vetoed by Governor Jerry Brown, who cited the fact that this bill would be preempted under the Supreme Court's FAA preemption regime.²⁶⁷ A similar attempt was made in Vermont, when both chambers of the state's legislatures passed a bill that would have made standard form contracts containing an arbitration clause presumptively unconscionable.²⁶⁸ This bill was vetoed by Governor Philip Scott, who cited the concerns of business groups as his reason for vetoing the bill.²⁶⁹ However, even if this bill had been signed by the Governor and was found not to be preempted by the FAA,²⁷⁰ it would have provided minimal protections to employees.²⁷¹

264. See N.Y. C.P.L.R. 7515 (CONSOL. 2018).

265. Cf. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding California's *Discover Bank* rule is preempted by the FAA); see also *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 681–82 (1996) (invalidating a Montana state statute prohibiting mandating arbitration as conflicting with the FAA).

266. Assemb. B. 3080, 2018 Leg., Reg. Sess. (Cal. 2018).

267. David G. Hagopian, *Governor Vetoes AB 3080—Says Banning Employment Arbitration Agreements Violates Federal Law*, CAL. LAB. & EMP'T. L. BLOG, <https://www.callaborlaw.com/entry/governor-vetoes-ab-3080says-banning-employment-arbitration-agreements-violates-federal-law> [https://perma.cc/CMC4-745C]. Governor Gavin Newsom later signed a bill into law that addresses mandatory arbitration clauses; however, this law is probably too narrow to have any real effect. See Scott P. Jang & Samia M. Kirmani, *New California Law Attacks Mandatory Arbitration Again . . . But Is It More Bark than Bite?*, JACKSON LEWIS (Oct. 15, 2019), <https://www.jacksonlewis.com/publication/new-california-law-attacks-mandatory-arbitration-again-it-more-bark-bite> [https://perma.cc/AGK6-BV53].

268. S. 105, 2017–18 Leg., Reg. Sess. (Vt. 2018).

269. JOURNAL OF THE S., S. 2036–38 (Vt. 2018).

270. It is also likely that this statute would have been preempted, since it closely resembles previous attempts to use unconscionability to soften the impact of mandatory arbitration.

271. The bill seemingly would not have even prevented arbitration. If anything, it could have forced companies to provide more friendly arbitration, but it would not have eliminated mandatory arbitration in employment contracts.

3. Scholarly Proposals

Beyond these more straightforward governmental actions, many scholars have proposed other ways of stemming mandatory pre-dispute arbitration.²⁷² While these ideas are generally helpful, their effects may be more temporary or less effective than the solution proposed in Part III of this Note.

For example, Sarath Sanga has argued that states should focus more on deterring arbitration clauses rather than enforcing (or not enforcing) them.²⁷³ Sanga argues that rather than relying on contract enforcement, states should deter the formation of such contracts in the first place.²⁷⁴ By focusing on deterring the formation of contracts that include mandatory arbitration clauses, Sanga argues, states can circumvent the preemption issues regarding acting in contracts.²⁷⁵ The fatal flaw to this approach is that it fails to address the root problem and the reason why employers can insert mandatory pre-dispute arbitration clauses in their contracts in the first place—the gargantuan disparity in bargaining power. Would-be employees would likely fear retaliation or other ill-effects and may be prevented from reporting for these reasons. As discussed earlier,²⁷⁶ employment contracts are almost always offered on a take-it-or-leave-it basis. Employees would presumably be forced to “leave it” to report an employer whose contract had an arbitration clause. This is, of course, assuming the employee in this situation is even aware of the illegality of including a mandatory arbitration clause and the reward offered for blowing the whistle on the employer. Additionally, some employers, especially large ones, may treat the fine more as a fee, and choose to simply pay the fine.²⁷⁷ The risk

272. *E.g.*, Stephen A. Plass, *Federal Arbitration Law and the Preservation of Legal Remedies*, 90 TEMP. L. REV. 213 (2018); Sanga, *supra* note 234, at 1152.

273. *See* Sanga, *supra* note 234, at 1121.

274. *Id.*

275. *Id.* at 1127.

276. *See supra* Part I.A.

277. *Cf.* Darlene R. Wong, *Stigma: A More Efficient Alternative to Fines in Deterring Corporate Misconduct*, 3 CAL. J. CRIM. L. REV. 3, ¶ 2 (2000) (“‘Pay to pollute’ dynamics result when predictable fines allow corporations to consider even punitive damages as fixed costs, thereby rendering the fining system ineffective.”); Patricia Cohen, *When Company Is Fined, Taxpayers Often Share Bill*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/04/business/when-a-company-is-fined-taxpayers-often-share-the-punishment.html> (explaining that corporate fines are often written off on the company’s taxes, shifting the burden to taxpayers); David Gillen, *Video: A Year of Corporate Fines*, N.Y. TIMES (Dec. 30, 2013), <https://www.nytimes.com/2013/12/30/business/video-a>

of enforcement multiplied by the fine may be less than the financial benefit to the employer by staying out of court. The fine would have to be set at a point where it would still have a deterring effect.

Another potential solution involves ensuring that a substantive remedy for employees is preserved.²⁷⁸ This solution rests on the idea that the Supreme Court's evolution of its preference for arbitration occurred on the assumption that arbitration would serve as a "fair adjudicatory alternative."²⁷⁹ Of course, considering the current widespread use of mandatory pre-dispute arbitration provisions,²⁸⁰ this is no longer always the case. One way to reconcile this is to restructure the "effective vindication" rule.²⁸¹ The effective vindication principle helped the Court move towards its current arbitration-friendly position by noting that as long as claims can be vindicated in an arbitral forum, no substantive claims are lost.²⁸² The Court, as we know, later retreated from the effective vindication rule,²⁸³ but if the Court were to return to it, many arbitration provisions of the type that are discussed in this Note would become invalid.²⁸⁴ While this would be a satisfying and just result, it is extremely unlikely.²⁸⁵

Others have proposed solutions to the effects of employees signing mandatory pre-dispute arbitration agreements, such as the inability to pursue wage theft claims.²⁸⁶ For instance, Nantiya Ruan has argued for increased enforcement of wage and hour claims, the establishment of a wage and hour claims court, and increased education about wage and hour claims for employees.²⁸⁷ Although increased enforcement is currently unlikely and

-year-of-corporate-fines.html (noting that many companies view fines as a cost of doing business).

278. See Plass, *supra* note 272, at 273.

279. *Id.*

280. See *supra* Part I.C.

281. See Plass, *supra* note 272, at 274–76.

282. See *id.* at 264 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

283. *Id.* at 263.

284. *Id.* at 275.

285. See *supra* Part II.C.

286. E.g., Nantiya Ruan, *What's Left To Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1139–44 (2012).

287. See *id.*

generally a fickle solution,²⁸⁸ Ruan's other solutions are quite interesting. She proposes "changing the forum to fit the need,"²⁸⁹ which includes making arbitration friendlier to low-wage workers and establishing a wage claims court.²⁹⁰ In Ruan's proposals for making arbitration friendlier to low-wage workers, she suggests making the terms of arbitration more generous to employees (ironically, she notes, similar to the terms in *Concepcion*) and allowing non-lawyer advocates in arbitration through the relaxation of regulations related to the unauthorized practice of law.²⁹¹ In addition, Ruan argues that the establishment of wage claims courts, which would be modeled after small claims courts, would help resolve wage claims "quickly and efficiently."²⁹² This approach could be pursued on the state or federal level.²⁹³ While this solution seems unlikely, Ruan argues that it could materialize "if spearheaded by a collaboration of worker organizations, unions, practitioners, and scholars."²⁹⁴

Others have suggested that establishing a third-party liability regime for wage and hour violations would remedy the problem of wage theft.²⁹⁵ While this solution may help remedy the problem of wage theft, it does not address the fact that even if third-party liability was imposed on a company, the claims would still need to be arbitrated if the employer and employee had agreed to arbitrate.

In sum, an impactful and lasting solution to the problem of mandatory pre-dispute arbitration clauses is necessary to protect low-wage workers from wage theft and other employment-related harms. Such a solution is proposed in the following section.

III. A STATE-BASED SOLUTION TO THE MANDATORY ARBITRATION PROBLEM THAT AVOIDS FAA PREEMPTION

Any attempt at dealing a blow to mandatory pre-dispute arbitration clauses through state legislative and judicial action

288. See *supra* Part II.C.

289. See Ruan, *supra* note 286, at 1141.

290. See *id.* at 1141–46.

291. *Id.* at 1142–43.

292. *Id.* at 1144.

293. *Id.* at 1145.

294. *Id.* at 1146.

295. See, e.g., Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010).

must be aware of the various pitfalls and traps inherent in such a fix.²⁹⁶ While some believe that the current FAA preemption regime leaves no avenues through which states may curtail or ban arbitration provisions,²⁹⁷ there is simply too much at stake to not exhaust every possible remedy to this problem. Even if the solution posed below has a slight chance of success, the scope of those who would benefit and the degree to which the solution would make it easier for them to have their claims vindicated mandates that every possible avenue that may eliminate mandatory pre-dispute arbitration be pursued.

State law has long provided the rules of interpretation to understand contracts.²⁹⁸ Although the Court has strayed away from this doctrine in its FAA preemption jurisprudence,²⁹⁹ the principle remains. Considering the unlikelihood of action at the federal level,³⁰⁰ state action is the best bet for an impactful solution. However, as we have seen time and time again, the Court's FAA preemption regime leaves little wiggle room to weave a state solution.³⁰¹

As such, states should enact statutes that define a set of contractual terms and mandate that these terms be highlighted or otherwise brought to the attention of the accepting party. State courts should then interpret these statutes in a way where they apply not only to arbitration (the chief target of the statutes), but also to other provisions, as to avoid FAA preemption. Enacting these statutes and interpreting them in this way will foster awareness of the contents of the adhesive contracts and will ensure that true mutual assent exists between the parties.

296. See *supra* Part II.

297. See Sanga, *supra* note 234, at 1143.

298. See Brief for Contract Law Scholars as Amici Curiae, *supra* note 200.

299. See, e.g., *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (finding that courts may not invalidate an arbitration agreement on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011))); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (discussing how courts may not invalidate arbitration agreements under state laws which are applicable only to arbitration provisions).

300. See *supra* Part II.C.

301. See Plass, *supra* note 278, at 237 ("The new federal rules of preemption have nullified state laws that enforce arbitration contracts but provide contract defenses designed to limit oppression and unfair surprise embedded at the formation stage.").

A. LESSONS FROM STATES' PAST FAILED ATTEMPTS

Any state solution must navigate the potential preemption problem. The solution must not “derive [its] meaning from the fact that an agreement to arbitrate is at issue.”³⁰² An informative example of a state trying to do this, but failing, is provided in *Kindred*.³⁰³ Although the Kentucky Supreme Court nominally attempted to base its holding on a generally applicable contract rule, the Supreme Court considered this “clear statement rule” a pretext used to disfavor arbitration.³⁰⁴ The fatal flaw in the Kentucky Supreme Court’s effort to avoid the long reach of the Supreme Court’s FAA preemption regime was, in the words of the Supreme Court, “adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial.”³⁰⁵ The Court did not believe the Kentucky Supreme Court’s explanation that this was in fact a general contractual principle since this clear statement rule would also apply to other “fundamental constitutional rights,” such as the right to worship freely, consent to an arranged marriage, or bind the principal to servitude, among others.³⁰⁶ Far from being convinced that this passes muster to avoid preemption, the Supreme Court called these examples a “slim set of both patently objectionable and utterly fanciful contracts”³⁰⁷ and analogized them to a black swan.³⁰⁸ Notably, however, the Court goes out of its way to reiterate that it leaves the door open for state courts to announce new, generally applicable rules in an arbitration case, so long as those rules truly apply generally, rather than singling out the unique aspects of arbitration.³⁰⁹

A couple lessons can be learned from *Kindred* in developing a workable solution to mandatory arbitration in employment contracts. First, a lot can be learned from the mistakes made by the Kentucky Supreme Court. These mistakes include announcing the rule for the first time in this case, especially applying the

302. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

303. See *Kindred Nursing Ctrs.*, 137 S. Ct. at 1421; *supra* Part I.B.

304. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426–27.

305. *Id.* at 1427.

306. *Id.* at 1426 (citing *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328 (Ky. 2015)).

307. *Id.* at 1427.

308. *Id.* at 1428.

309. *Id.* at 1428 n.2.

rule to arbitration before applying it to other “fundamental constitutional rights” that it claimed the rule would also apply to.³¹⁰ Second, one could argue that the clear statement rule was either too narrow or too broad. It was too narrow in the sense that there are few other fundamental constitutional rights which one would normally waive in a contract. This led to the far-fetched and strange examples given by the Kentucky Supreme Court.³¹¹ On the other hand, the clear statement rule, if applied consistently, would include many clauses in “routine contracts” that are “executed day in and day out.”³¹² This overbreadth allowed the Supreme Court to pierce the Kentucky Supreme Court’s pretextual veil by pointing out that if this new rule were strictly followed, it would sweep too broadly to be practicable.³¹³

Other state attempts have been even cruder than the Kentucky Supreme Court’s in *Kindred*. For instance, in *Marmet Health Care Center, Inc. v. Brown*, the Supreme Court summarily reversed the West Virginia Supreme Court of Appeals decision that held arbitration of personal injury or wrongful death claims violate public policy.³¹⁴ This was a straightforward case for the Court to decide considering the rule that when state law prohibits the arbitration of certain claims, that state law is displaced by the FAA.³¹⁵ The lesson from *Marmet* is simple: the state law must not outrightly prohibit arbitration of any certain type of claim.³¹⁶

Another source to draw from when considering how to craft a state law solution is the well-intentioned but ill-fated attempt made by the Vermont Legislature in 2018.³¹⁷ Drafters initially stated that their aim was “to prohibit forced arbitration of consumer disputes.”³¹⁸ While it is not clear whether a court would

310. *Id.* at 1427.

311. *Id.* at 1426.

312. *Id.*

313. *Id.* at 1427.

314. See *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012) (per curiam).

315. *Id.* at 533.

316. Therefore, an outright prohibition of mandatory arbitration in employment contracts is not a workable solution.

317. S. 105, 2017–18 Leg., Reg. Sess. (Vt. 2018).

318. See Alison Frankel, *How Can States Block Mandatory Arbitration Clauses? Vermont May Have Found a Way*, REUTERS (May 14, 2018), <https://www.reuters.com/article/legal-us-otc-vermont/how-can-states-block-mandatory-arbitration-clauses-vermont-may-have-found-a-way-idUSKCN1IF2R3> [<https://perma.cc/84HG-HZDU>].

take legislative history like this into account when determining whether the statute is preempted by the FAA, it is hard to imagine even the most textualist members of the Supreme Court not using this as ammunition to strike down the statute, even if the text were sufficiently generally applicable.

The other lesson that the Vermont attempt teaches is that the state statute must actually be effective. The Vermont bill does many things, including prohibiting resolution of a claim that takes place in an inconvenient venue,³¹⁹ prohibiting waiver of rights to assert statutory claims,³²⁰ prohibiting waiver of one's right to seek punitive damages, and prohibiting arbitration being more costly to the individual than seeking a judicial remedy would have been.³²¹ However, even if contract drafters obeyed these provisions, the best case scenario is that consumers would face a friendlier version of arbitration, which is, after all, still arbitration. Doing away with some of the worst and most unjust aspects of arbitration does nothing to resolve the fact that even a friendlier version of arbitration is still immensely harmful to employees seeking redress for a grievance.³²²

With these lessons in mind, we can begin to sketch out what a workable and effective solution might look like. The best bet, considering states' past failed attempts at using the doctrines of unconscionability and public policy, is to focus on other aspects of contract formation and to ensure that the new rule is broad enough to apply not only to arbitration, but also to other contractual terms.

B. WHAT STATES SHOULD DO (LEGISLATIVELY AND JUDICIALLY)

As discussed above, the non-drafting party is often unaware of the contractual terms in an adhesive contract.³²³ Although there is typically a duty to read a contract and know its contents, expecting a contract adherent to do this is not always realistic, and this duty must be squared with another core contract law principle—the requirement of mutual assent.³²⁴ Adhesive contracts often offend the notion of bargained-for-exchange that is often assumed to exist in all contracts. Courts sometimes rely on

319. S. 105 § 6055(a)(1), 2017–18 Leg., Reg. Sess. (Vt. 2018).

320. *Id.* § 6055(a)(2).

321. *Id.* § 6055(a)(5).

322. *See supra* Part I.C.

323. *See supra* Part II.A.

324. *See supra* Part I.A.

basic contractual principles when posed with a new contract law issue.³²⁵ Courts should use the same approach to deal with the numerous issues posed by adhesive contracts. Using this approach is one way to curtail the use and abuse of mandatory arbitration. To effect this reinvigoration and return to basic common law contract principles, state legislatures should mandate this return. In order to craft an effective statute, we must determine both (1) which terms will be covered by the statute and (2) how the statute will treat these terms.

1. Identifying Which Contractual Provisions Would Be Covered by the Rule

The first step is considering which contractual terms would be covered by such a statute. To have the statute reach every term in every contract would almost certainly be unwieldy, inefficient, and unnecessary. Instead, state legislatures should focus on a narrower set of terms. Additionally, it is important to keep in mind that enumerating the exact contractual terms that would be covered (arbitration clauses, for example) would likely lead to the statute being preempted by the FAA.³²⁶ One way to strike this balance is to take a results-oriented approach and focus on effects of certain clauses. For instance, the statute could be written in a way where it would cover all contractual terms that have the effect of curtailing the rights of the non-drafting party. Worded this way, the statute would cover arbitration clauses and other clauses that limit the rights of the adhering party without being overly broad. The statute would then cover choice of law provisions (curtailing the party's right to be governed by the law where the contract was signed), restrictions of liability (curtailing the party's rights to redress), unreasonable liquidated damages provisions (curtailing the party's right to be free from unreasonable damages and the right to efficient breach), non-compete agreements (curtailing the right to work elsewhere) and, most importantly for the purpose of this Note,

325. See, e.g., *Berkson v. Gogo*, 97 F. Supp. 3d 359, 402–06 (E.D.N.Y. 2015) (applying basic common law contractual principles to deal with issues posed by e-contracting).

326. The application of the statute to arbitration would almost certainly be preempted by the FAA if arbitration clauses were enumerated in the statute.

mandatory arbitration provisions (curtailing the right to seek redress in a judicial forum, or, in some cases, to seek redress at all).³²⁷

Another approach would be to use other jurisdictions' unfair contract terms rules to inform which terms will be covered by this statute. The United Kingdom's Consumer Rights Act regulates terms in consumer contracts and renders "unfair terms" not binding on the consumer.³²⁸ The Act defines an unfair term as one which "causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."³²⁹ Mandatory arbitration of claims is included in the schedule of terms that may be regarded as unfair.³³⁰ Previous iterations of this rule limited "unfair terms" to those which were not negotiated,³³¹ however, this requirement was abrogated in the 2015 version.³³² The European Union has a similar rule that defines an unfair term as one that was not individually negotiated and "causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer."³³³ Similar to the UK rule, the EU rule only reaches consumer contracts.³³⁴ Other examples abound of countries having similar rules governing unfair contractual terms in adhesive contracts.³³⁵ The statute proposed here could use the same criteria for determining which terms are covered, but

327. As would be the case in the types of claims that would only make financial sense to bring as a class action. *See supra* Part I.B.2.

328. Consumer Rights Act 2015, c. 15 § 61–76 (U.K.).

329. *Id.* § 62(4).

330. *Id.* at sched. 2(20). Other examples include liability-limiting terms, unfair liquidated damages provisions, and terms that purport to allow for unilateral modification of the contract.

331. The Unfair Terms in Consumer Contracts Regulations 1999 § 5(2) (U.K.).

332. COMPETITION AND MARKET AUTHORITY, UNFAIR CONTRACT TERMS GUIDANCE ANNEX B: INDEX TO MAIN REFERENCES IN THE GUIDANCE TO NEW ELEMENTS OF UNFAIR TERMS LAW INTRODUCED BY THE CONSUMER RIGHTS ACT AS OF 1 OCTOBER 2015 (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450414/Unfair_Terms_Annex_B_-_post_comms.pdf.

333. Council Directive 93/13/EEC, art. 3, 1993 O.J. (L 95/29) 1 (EC).

334. *Id.* at pmb1.

335. *See, e.g.,* Sinai Deutch, *Control of Unfair Terms in Consumer Contracts in Israel: Law and Practice*, 13 J. CONSUMER POL'Y 181, 184–97 (1990) (discussing Israel's rule).

should, for obvious reasons,³³⁶ avoid enumerating arbitration-specific terms.

One final approach to determining which terms will be covered by this statute would be to distinguish between “visible” and “invisible” terms in an adhesive contract.³³⁷ Visible terms are those which bargained for and those which a “customary shopper”³³⁸ would be expected to have shopped around for.³³⁹ The price term is considered the paradigmatic example of a visible term.³⁴⁰ Invisible terms are all the rest of the terms. Considering what we know about mandatory arbitration provisions,³⁴¹ they would almost certainly be considered an invisible term in an adhesive employment contract. The proposed statute could apply to invisible terms in adhesive contracts.

It is beyond the scope of this Note to decide which of these approaches would be best for a state to use. Instead, deciding which terms will be covered by such a statute should be a policy decision that is left up to the states. As long as the statute is broad enough to cover arbitration provisions and does not single out arbitration, any one of these approaches would be adequate to address the problem. However, merely determining what terms will be covered by the statute is inadequate. The next subpart explores the question of how these terms should be treated to ensure true mutual assent between the adhering party and the drafting party.

2. What Should Be Done with These Provisions?

Now that we have defined what terms could be covered by this statute, the next thing to determine is how the statute will treat these terms. Given the fact that completely eliminating these terms would not be practicable,³⁴² the solution must be something short of an outright prohibition on these terms. One

336. See *supra* Part II.B.

337. Rakoff, *supra* note 183, at 1250–55 (drawing the distinction between visible and invisible terms and explaining this taxonomy).

338. A customary shopper can be thought of as a reasonable person seeking to enter into a contract, usually an adhesive one. *Id.* at 1252–53.

339. *Id.* at 1251.

340. *Id.*

341. See *supra* Part II.A.

342. Liability waivers are a good example of a term that some contract drafters absolutely rely upon. Some businesses would cease to exist if there were an outright ban on those provisions. Such an approach would also offend the freedom to contract. See Edwards, *supra* note 169, at 647.

possibility is that these terms are singled out and must require some additional showing of assent on the part of the non-drafting party. This solution would address the problem that these invisible terms are rarely assented to by the non-drafting party.

Such a solution calls to mind the Montana Legislature's attempt that was held to be preempted by the FAA in *Casarotto*.³⁴³ Specifically, the statute required that any contract subject to arbitration must provide notice of that fact on the first page of the contract in underlined capital letters.³⁴⁴ It is probably safe to guess that the Montana legislature was seeking to foster awareness of arbitration clauses by enacting this statute, much the same as the solution proposed here is seeking to do. The critical difference, however, is that the Montana statute singled out arbitration specifically in the statute, whereas the solution proposed herein is of general applicability and is therefore considerably more likely to survive FAA preemption.

As this solution hinges on ensuring the non-drafting party truly assents to the adhesive contract, it would be helpful to step back to define what assent would mean in this context. First, for the non-drafting party to truly assent to the term, that party must know that the term is in the contract. It is unlikely that the non-drafting party has read the contract, and even if they have, they are unlikely to have understood it.³⁴⁵ That shows that while knowledge of the presence of a term in a contract is a necessary element of true assent, it is not sufficient. The non-drafting party must also be able to understand the term. Finally, even if the non-drafting party knows of the presence of the term and nominally understands it, they may not fully understand the implications of the term, such as the procedural differences between arbitration and bringing a claim in court and how arbitration procedures may lend an advantage to the contract drafter.³⁴⁶ Assent, therefore, also requires at least a basic understanding of the implications of the terms in the contract.

With those points in mind, this statute should identify a mechanism that leads to the non-drafting party truly assenting by making sure the party knows of the presence of the term, understands what it means, and understands the implications of

343. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996).

344. MONT. CODE ANN. § 27-5-114(4) (1995), *invalidated by Casarotto*, 517 U.S. 681.

345. See, e.g., Rakoff, *supra* note 183, at 1179; White & Mansfield, *supra* note 181, at 242.

346. See *supra* Part I.C.

the term being present. This could be accomplished in a variety of ways, including highlighting the terms in the contract, instituting mandatory readability requirements, requiring the terms to be explained orally at the time of executing the contract, or mandating inclusion of explanatory blurbs within the contract. Some combination of these mechanisms would move the needle in terms of awareness of the non-drafting party and bring adhesive contracts closer to being in line with foundational contractual principles. If these requirements are not followed, the terms should be declared unenforceable.

3. Need for Legislative and Judicial Cooperation

Finally, it should be noted that state courts will be instrumental in instituting this new rule. It is critical, in order to avoid FAA preemption, to ensure that the statute is applied generally and evenly, rather than singling out arbitration. Being able to point to cases where this statute was used in relation to contractual terms that do not involve arbitration would be immensely helpful in proving to the Supreme Court, were this statute to be challenged, that it is truly of general applicability and that it does not draw its meaning from the fact that arbitration is at issue.

For an example of an approach to avoid, state courts can look to what the Kentucky Supreme Court did in *Kindred*.³⁴⁷ Specifically, the Kentucky Supreme Court announced a rule that the Supreme Court rather easily snuffed out as targeting arbitration.³⁴⁸ Although the Kentucky Supreme Court claimed the rule would apply to other contractual terms, these examples were fanciful and far-fetched.³⁴⁹ State courts in states that would enact a statute similar to what is proposed herein should work diligently to ensure they are applying that statute not only to arbitration clauses, but also to other clauses that would be covered. Doing this would be immensely helpful in withstanding FAA preemption.

347. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017).

348. *Id.* at 1426–27.

349. The Supreme Court accused the Kentucky Supreme Court of “hypothesiz[ing] a slim set of both patently objectionable and utterly fanciful contracts” such as those where a representative waives her principal’s right to worship freely, consent to an arranged marriage, or bind her principal to personal servitude. *Id.* at 1427–28.

C. ADDRESSING COUNTERARGUMENTS

The solution proposed in this Note will of course be subject to some degree of skepticism. The most important criticism to address is that this solution just won't work. This argument is likely to come from those who believe that there is no daylight in the Supreme Court's preemption regime through which to weave a solution, sometimes called the total preemption theory.³⁵⁰ Those who subscribe to this view of FAA preemption would say that if a state enacted a law like the one in Part III and it was interpreted by a state court as applicable to arbitration clauses, the Supreme Court would hold that the statute and interpretation would be preempted by the FAA, similar to what the Court has done in many previous cases. Even though the statute would be facially generally applicable and would have to be interpreted as applying to contractual terms other than arbitration clauses, if challenged, the Supreme Court may, consistent with its purposivist move in *Concepcion*,³⁵¹ hold that applying the rule to arbitration clauses frustrates the purposes of the FAA and is thus preempted as it applies to arbitration clauses.

To say that this view does not pose a very serious threat to undermining the purpose of this solution would be disingenuous. As has been proven time and time again, the Supreme Court has a very strong preference for arbitration and will go to great lengths to strike down rules which impede that preference. Even though preemption is a serious threat, the solution proposed in this Note traces some of the approaches used in previous attempts to curtail the use of mandatory arbitration clauses while ironing out the kinks that ultimately made ruling these attempts to be preempted relatively easy calls post-*Concepcion*.³⁵² If there is any room for a non-preempted solution to the use of mandatory pre-dispute arbitration clauses, the solution proposed here is it.

Additionally, it is still unclear whether this is the correct view of the scope of FAA preemption. It may be likely, but it has yet to receive a full-throated, clear endorsement by the Supreme Court. Considering the huge financial, social, and psychological

350. See Horton, *supra* note 38, at 1220.

351. See *supra* Part I.B.2.

352. E.g., *Kindred Nursing Ctrs.*, 137 S. Ct. at 1421 (a 7-1 decision); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 463 (2015) (6-3); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530 (2012) (per curiam). Even some FAA preemption cases before *Concepcion* were easy calls for the Court, such as *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996) (8-1).

costs of the effects of mandatory arbitration in employment contracts, even if this solution has a marginal chance at being successful, it is worth it for states to pursue.

Another argument against this approach is that it would be politically infeasible. Some state legislatures may be unlikely to enact legislation that would curtail the use of arbitration.³⁵³ However, efforts in states like Vermont, New York, and California have shown that state legislatures have the political will to pass bills aiming to curtail the use of mandatory arbitration in adhesive contracts.³⁵⁴ It is true that the states' governors vetoed two of these attempts—one citing concern over preemption and the other citing business concerns. This solution would remedy the former concern, but not the latter. However, governors that prefer to cater to business interests over protecting its most vulnerable citizens were never likely to endorse a solution like this in the first place.

It is also possible that the solution proposed herein would be seen as a rather transparent attempt to limit mandatory arbitration. This may be true, but, as discussed above, this proposal is truly more far reaching. Although mandatory arbitration clauses harm consumers and employees, they are far from the only provisions that have this effect. Thus, the fact that this solution applies to those other terms means that it both offers more protection to those parties and renders the solution less likely to be preempted.

A final critique of this solution is that it may be accompanied by substantial, and perhaps prohibitive, compliance costs. Especially if one of the broader classifications of contractual terms suggested in Part III.B were adopted by a state, a large number of terms in an adhesive contract would be swept up within it. This would likely produce substantial compliance costs on businesses who use contracts of adhesion. Even if this is the case, the fundamental purpose of the rule proposed above is to protect consumers, not to protect the bottom line of businesses that are governed by them. Businesses have long gotten away with contracting with relatively few restrictions and have doubtless profited greatly from this freedom. Making contracts more equitable and fairer should be primary to protecting the freedom to contract of businesses. One realm in which this critique deserves a more

353. See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010) (discussing the reasons why businesses prefer arbitration).

354. See *supra* notes 264–72.

thorough consideration is as it applies to small businesses, some of which may be greatly impacted by a rule like the ones proposed above. However, such a detailed analysis is outside of the scope of this Note.

CONCLUSION

More and more employers are using mandatory pre-dispute arbitration clauses in employment contracts. Doing so gives employers benefits, such as privacy, the ability to select the arbitrators, and repeat players benefits, but they often leave employees without meaningful recourse when they are wronged, especially when class waivers are used. This effect on employees is unjust and unpalatable in a society dedicated to the rule of law. However, there is a dearth of workable, effective solutions to this growing problem. Action at the federal level is unlikely and many attempts by states to soften the ill-effects of arbitration have been held to be preempted by the FAA. The challenge then, which this Note attempts to find a solution to, is to craft a new rule that would mitigate the ill-effects of arbitration while avoiding FAA preemption.

To that end, this Note provides a path for state legislatures and state courts to effect such a rule. The key to avoiding FAA preemption is to craft a rule that is of general applicability, but that will still combat the use of mandatory arbitration clauses. The way this Note proposes to achieve that is to institute rules that address the fact that many of these adhesive contracts offend basic contractual principles such as the requirement of mutual assent. States can enact laws that require terms that typically aren't assented to by the non-drafting party, so called "invisible terms," to be highlighted or brought to the attention of the non-drafting party at the time of contracting. Furthermore, true assent requires the non-drafting party to not only know the clause is in the contract, but also to understand the term and the implications that flow from it. If states enact rules that achieve true assent, the use of arbitration clauses, or at the very least the most odious uses of them, are likely to decrease. This would be a desirable outcome that helps protect the most vulnerable in our society and would reaffirm this country's commitment to preserving the right to vindicate one's claims.