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## Arbitration Conflicts

David L. Noll

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## Article

### Arbitration Conflicts

David L. Noll<sup>†</sup>

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## INTRODUCTION

On the first day of the Supreme Court's 2017 term, the Court heard argument in a case that affected the rights of some 60 million American workers.<sup>1</sup> At issue in *Epic Systems Corp. v. Lewis* was the lawfulness of an individual employment agreement that required all employment-related disputes to be resolved in one-on-one arbitration and foreclosed access to any form of collective dispute resolution.<sup>2</sup> The Federal Arbitration Act (FAA) provides that covered arbitration agreements are "valid, irrevocable, and

1. See Transcript of Oral Argument at 54, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285) ("[A]pproximately 55 percent of non-union private employees have contracts that are covered by mandatory arbitration agreements, and that covers about 60 million people.").

2. *Epic Sys.*, 138 S. Ct. at 1619–21.

enforceable”<sup>3</sup> and has been interpreted by the Supreme Court as requiring arbitration agreements to be enforced “according to their terms.”<sup>4</sup> But the Norris-LaGuardia Act and National Labor Relations Act (NLRA) guarantee workers’ right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>5</sup> And the NLRA has long been interpreted by courts and the National Labor Relations Board (NLRB) to protect workers’ right to seek legal remedies as a group<sup>6</sup> and to prohibit employers from demanding that employees waive the NLRA’s protections in individual employment agreements.<sup>7</sup> Under the FAA, the agreement in *Epic Systems*

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3. U.S. Arbitration Act, Pub L. No. 68-401, § 2, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 2 (2012)) (hereinafter referred to as the Federal Arbitration Act, FAA, or Act).

4. *Epic Sys.*, 138 S. Ct. at 1612; *see, e.g.*, *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) (“By its terms . . . the Act cares not only about the ‘enforce[ment]’ of arbitration agreements, but also about their initial ‘valid[ity]’—that is, about what it takes to enter into them.”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”).

5. *See* National Labor Relations Act, 29 U.S.C. § 157 (2012) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .”); Norris-LaGuardia Act, 29 U.S.C. § 102 (2012) (recognizing the public policy of the United States that the individual worker “be free from the interference, restraint, or coercion of employers of labor . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”).

6. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978) (dictum) (“[I]t has been held that the ‘mutual aid or protection’ clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees’ appeals to legislators to protect their interests as employees are within the scope of this clause.”); *see, e.g.*, *Harco Trucking, LLC*, 344 N.L.R.B. 478, 478–79 (2005) (filing a wage and hour class action on behalf of similarly situated employees); *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 948–49 (1942) (filing of consolidated Fair Labor Standards Act (FLSA) claims concerted activity); *Poultrymen’s Serv. Corp.*, 41 N.L.R.B. 444, 460–61, n.28 (1942) (filing of FLSA suit on behalf of employee and others similarly situated), *enforced*, 138 F.2d 204 (3d Cir. 1943).

7. *See, e.g.*, *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (“Wherever private contracts conflict with [the NLRB’s] functions, they obviously must yield or the [NLRA] would be reduced to a futility.”); *Nat’l Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940) (finding contracts founded on “the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the [NLRA] . . . were appropriate subjects for [] affirmative remedial action”).

seemed to be enforceable.<sup>8</sup> The NLRB, however, deemed the agreement unlawful under Norris-LaGuardia and the NLRA.<sup>9</sup> Three courts of appeals concurred in its reasoning.<sup>10</sup>

Seven months after oral argument, a sharply divided Court ruled that Epic System's agreement should be enforced.<sup>11</sup> In his first major opinion for the Supreme Court, Justice Neil Gorsuch concluded that the "emphatic" language of the FAA "clearly" required that the agreement be enforced according to its terms<sup>12</sup> and that the NLRA's right to concerted activity did not modify the FAA's commands.<sup>13</sup> Dissenting, Justice Ruth Bader Ginsburg reasoned that the agreement's waiver of the right to engage in collective dispute resolution was the exact type of employee-disempowering "agreement" that Norris-LaGuardia and the NLRA aimed to prevent.<sup>14</sup> Pointing out that the Court's decision would undermine enforcement of federal wage and hour law, Justice Ginsburg wrote that "[c]ongressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."<sup>15</sup> Justice Gorsuch conceded that the legal status of collective action waivers was contested and invited Congress to revisit the issue.<sup>16</sup> But he maintained that, under the law as it stood, the agreement's lawfulness was "clear."<sup>17</sup>

The debate in *Epic Systems* highlights a problem of statutory interpretation with important consequences for access to civil justice and the powers of federal administrative agencies.<sup>18</sup>

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8. See *Epic Sys.*, 138 S. Ct. at 1616 ("[T]he Federal Arbitration Act generally requires courts to enforce arbitration agreements as written.")

9. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2292–93 (2012) (denying enforcement).

10. See *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393, 402 (6th Cir. 2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016), *vacated*, 894 F.3d 1093 (9th Cir. 2018); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

11. See *Epic Sys.*, 138 S. Ct. at 1632.

12. *Id.* at 1621–22.

13. *Id.* at 1624.

14. *Id.* at 1641 (Ginsburg, J., dissenting).

15. *Id.* at 1633 (majority opinion).

16. *Id.* at 1632 ("Congress is of course always free to amend this judgment.")

17. *Id.* at 1619. Justice Gorsuch apparently did not recognize the irony of labelling the answer to a question that had divided the courts of appeals, the NLRB, and two solicitor general's offices "clear."

18. See David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 368–69 (2018) (describing legal disputes over the "flurry of [agency] regulation" restricting the use of arbitration as "the next battleground in the 'arbitration war'"); cf. Maureen A. Weston, *The Accidental Preemption Statute: The Federal*

Beginning in the 1980s, the Supreme Court dramatically expanded the scope of arbitration under the FAA, discarding readings of the statute that for most of the twentieth century limited arbitration's impact on federal regulatory programs.<sup>19</sup> As the scope of arbitration expanded, regulated parties increasingly used it in ways that conflicted with statutes such as the NLRA.<sup>20</sup> Agencies such as the NLRB responded by drawing on statutes they administered to limit or prohibit the use of arbitration.<sup>21</sup> Those statutes often contain broad delegations of regulatory authority.<sup>22</sup> For example, the NLRA gives the NLRB exclusive jurisdiction to adjudicate federal unfair-labor practice claims, and courts have extended *Chevron* deference to the Board's interpretation of the Act.<sup>23</sup> But the statutes do not explicitly address agencies' authority to regulate arbitration.<sup>24</sup> Seizing on this ambiguity, businesses challenged agency regulations on the ground that they violated the FAA.<sup>25</sup>

The validity of the challenged agency regulations depends in the first instance on how the FAA relates to other federal laws. But the Supreme Court's jurisprudence is strangely inconclusive on that subject. The Court has said that Section 2 of the FAA expresses a "liberal federal policy favoring arbitration agreements,"<sup>26</sup> and that a party opposing arbitration of a claim covered by an arbitration agreement has the burden of showing why

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*Arbitration Act and Displacement of Agency Regulation*, 5 Y.B. ARB. & MEDIATION 59, 65 (2013) (suggesting that the Supreme Court's current interpretation of the FAA "poses a risk to deny access to, and the operation of, administrative agency procedures specifically established to handle certain claims").

19. See *infra* notes 74–79 and accompanying text.

20. See *infra* notes 94–98 and accompanying text.

21. See *infra* notes 94–98 and accompanying text.

22. See *infra* notes 82–86 and accompanying text.

23. See 29 U.S.C. § 160(a) (2012) ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce."); see, e.g., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) (reviewing the NLRB's interpretation of the NLRA using the *Chevron* framework); *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1015 (7th Cir. 1998) (concluding that *Chevron* affords the NLRB broad interpretive discretion).

24. See generally 29 U.S.C. § 160(a).

25. See *infra* notes 109–11 and accompanying text.

26. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

the claim is not arbitrable.<sup>27</sup> The Court has also ruled that statutory claims are presumptively arbitrable,<sup>28</sup> and it has rejected arguments that Congress necessarily intended claims under various regulatory statutes to be asserted in court rather than arbitration.<sup>29</sup> But the Supreme Court has not set out a framework that explains how the FAA relates to other laws and the circumstances in which another federal statute qualifies the FAA's rules of dispute resolution procedure—most prominently, the principle that courts should enforce agreements to arbitrate “according to their terms.”<sup>30</sup>

This Article develops a theory that answers those questions.<sup>31</sup> Because this Article aims to contribute to ongoing de-

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27. See *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018) (noting that the Court had rejected attempts to “conjure” conflicts between the FAA and other statutory regimes).

28. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *McMahon*, 482 U.S. at 226.

29. See, e.g., *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 96, 117 (2012) (holding that claims under the Credit Repair Organizations Act, 15 U.S.C. § 1679 (2012), are arbitrable); *Gilmer*, 500 U.S. at 35 (holding claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 (2012), are arbitrable); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485–86 (1989) (holding that claims can be arbitrated under the Securities Act of 1933, 15 U.S.C. § 77a (2012)).

30. See *CompuCredit*, 565 U.S. at 98; cf. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989) (holding the FAA preempts inconsistent state laws).

31. This Article's theory of the FAA's place in federal law builds on two related literatures. The first considers agency arbitration regulation from normative and institutional perspectives and evaluates the costs and benefits of arbitration and agency action regulating how it is used. See, e.g., Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 275–76 (2013) (noting regulation by federal administrative agencies as a possible regulatory response to the rise of mandatory arbitration in consumer and employment contracts); Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 992 (2017) (examining “the roles that federal administrative agencies have begun to play in response to the rise of private arbitration” and “how agencies can partially address some of the concerns that scholars of regulation and civil procedure have noted regarding the rise of arbitration”); David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 990–91 (2017) [hereinafter Noll, *Regulating Arbitration*] (examining the policy rationales for regulating arbitration through federal regulation and administrative action and arguing that policymakers should focus on arbitration's effects on the implementation of statutory policy). The second literature considers the relationship between the Supreme Court's arbitration jurisprudence and specific regulatory regimes such as the NLRA. See, e.g., Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of D.R. Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 179 (2014) (explaining “why

bates over the limits of arbitration and the validity of agency arbitration regulations, it does not revisit the questions of statutory interpretation that have preoccupied federal arbitration jurisprudence for the past three decades—whether the FAA permits arbitration of federal statutory claims, the circumstances in which the FAA preempts state regulation, and the extent of contracting parties’ control over the procedures used in arbitration.<sup>32</sup> Instead, this Article develops a general theory of the FAA’s place in federal law. What type of statute is the FAA? When are the Act’s commands affected by another federal law? And what must another statute say to modify the FAA?<sup>33</sup>

That theory of the FAA proceeds from two basic propositions: (1) the FAA establishes default rules governing the status and enforceability of arbitration agreements; and (2) whether another law modifies the FAA’s background commands presents an ordinary question of statutory interpretation. The FAA is not,

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collective action waivers or requirements to arbitrate individually are unenforceable under the National Labor Relations Act and the Norris-LaGuardia Act”); Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 55–56 (2015) (suggesting that the Federal Trade Commission and Department of Justice Antitrust Division should address arbitration’s anti-competitive effects by conditioning merger approval on firms not imposing mandatory arbitration clauses in their contracts); Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: The Quintessential Chevron Case*, 16 LOY. CONSUMER L. REV. 1, 5 (2003) (arguing that the Federal Trade Commission has authority to regulate the use of arbitration under the Magnuson-Moss Warranty Act); Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1032 (2013) (defending the National Labor Relations Board’s conclusion that an employment agreement that waives the employee’s right to engage in collective dispute resolution violates the NLRA); Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 907–09 (2015) (examining the conflict between the FAA and the right to engage in concerted activity under the NLRA and arguing that the NLRB’s interpretation of the Act qualifies for judicial deference). Neither of these literatures offers a general theory of the FAA’s place in federal law or the circumstances in which other statutes modify the FAA’s rules of dispute resolution procedure. In addition, most scholars that have considered the question conclude that a statute which allows an agency to speak with the force of law under *Chevron* authorizes the agency to regulate the use of arbitration. As shown below, that argument misapplies *Chevron*. See *infra* notes 339–52 and accompanying text.

32. See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 148–55 (1992).

33. In considering these questions, this Article relies on the text, historical context, and textually discernable purposes of the FAA and other federal statutes. None of this Article’s claims depend on drawing an equivalence between statutory meaning and intentions revealed in forms of legislative history such as committee hearings or floor statements.



on any accepted theory of statutory interpretation, a “super-statute” that occupies a special position in federal law.<sup>34</sup>

Enacted in 1925 “to overcome judicial hostility to arbitration,”<sup>35</sup> the FAA does not take precedence over other laws in the same manner as cross-cutting statutes such as the Endangered Species Act or Religious Freedom Restoration Act.<sup>36</sup> Instead, the FAA functions like the Administrative Procedure Act (APA) and establishes procedural defaults that apply unless and until another statute modifies its commands.<sup>37</sup> As is widely recognized, statutes that expressly address the validity, enforceability, or revocability of agreements to arbitrate qualify the FAA. But under ordinary principles of statutory interpretation, a range of laws also impliedly qualify the FAA.<sup>38</sup> Among them are federal statutes governing primary conduct, statutes that prescribe specific procedures and remedies for statutory claims, statutes that charge an agency with overseeing regulated parties’ contracting, and statutes that direct an agency to promulgate a subsidiary statutory policy that is negatively affected by the use of arbitration.<sup>39</sup>

These statutes provide authority for a number of contested agency arbitration regulations, among them the 2016 Long Term Care Rule promulgated by the Centers for Medicaid and Medicare Services (CMS),<sup>40</sup> the Consumer Financial Protection Bureau’s 2017 Arbitration Rule (which has been repealed by Congress),<sup>41</sup> and the 2016 Borrower Defense rule promulgated by the Department of Education (DOE).<sup>42</sup> But there is an important category of statutes that do not qualify the FAA, and therefore do not provide authority for agency arbitration regulation. These are the type of statutes at issue in *Chevron U.S.A. Inc. v. Natural*

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34. See generally WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 16–17 (2010) (describing the developmental process that results in a statute acquiring “super” status).

35. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

36. See *infra* text accompanying note 149.

37. See *infra* note 148 and accompanying text.

38. See *infra* Part III.B.

39. See *id.*

40. See Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016).

41. See Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017), repealed by Pub. L. No. 115-74, 131 Stat. 1243 (2017).

42. See Student Assistance General Provisions, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (final rule).

*Resources Defense Council, Inc.*<sup>43</sup> *Chevron* teaches that an agency's reasonable interpretation of a statute that it is charged with administering is authoritative.<sup>44</sup> But *Chevron* addresses a different set of "statutory circumstances" than those relevant to agency arbitration regulation, one in which Congress has charged a *single* agency with administering a *single* law.<sup>45</sup> In contrast to the scenario *Chevron* addresses, agency arbitration regulation implicates at least two statutes. And one of those statutes, the FAA, detracts from rather than supports the agency's regulatory authority. This difference makes *Chevron* basically irrelevant to agencies' statutory authority to regulate the use of arbitration.

This Article's theory of the FAA's relationship to other federal laws shows that many of the Trump administration's efforts to rollback Obama-era arbitration rules are based on a legally erroneous premise insofar as they assume that the regulating agency lacks statutory authority to regulate arbitration. More broadly, this Article demonstrates that the FAA is less exceptional than critics and supporters of the Supreme Court's arbitration jurisprudence both tend to assume. In reality, the FAA is qualified by a range of laws that directly constrain parties' freedom to arbitrate on terms of their own choosing or authorize an agency to regulate the use of arbitration in particular domains. Understanding this provides fresh context for current and future conflicts over agency arbitration regulation.

Part I of this Article explains the origins of conflicts over agency arbitration regulation and then explains why those conflicts turn on the FAA's relationship to other federal laws. Part II begins to work out a theory of the FAA's place in federal law by showing that the FAA functions as a statutory floor that establishes baseline rules of procedure. Despite the Supreme Court's expansive interpretations of the Act, Part II shows that the FAA does not enjoy any special place in federal law; it is a statute like any other. Part III turns to the FAA's relationship

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43. 467 U.S. 837 (1984); *see infra* note 349 and accompanying text (collecting scholarship that contends agencies may regulate arbitration under statutes that support *Chevron* deference).

44. *See Chevron*, 467 U.S. at 839–40.

45. *See United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (explaining that in this scenario "[i]t can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fill[ing] in a space in the enacted law").

to other federal laws. Applying ordinary tools of statutory interpretation, this Part demonstrates that the FAA's background rules of dispute resolution procedure are modified by a range of statutes that modify the FAA expressly and impliedly. Those statutes supply statutory authority for many contested arbitration regulations. But as Part IV shows, the FAA is not modified by *Chevron*-type statutes, rendering *Chevron* essentially irrelevant to agency arbitration regulation. Together, Parts II through IV present a complete picture of the FAA's place in federal law. As the Supreme Court's jurisprudence recognizes, the FAA establishes a federal policy favoring arbitration.<sup>46</sup> That policy, however, is constrained in important respects by other federal statutes and agency action taken under their authority.

### I. THE INTERPRETIVE PROBLEM

Until recently, there were few situations where the use of arbitration conflicted with federal regulatory statutes. This Part explains why, after a long period of peace, conflicts between arbitration and regulatory statutes suddenly appeared in the past decade. It then explains why those conflicts turn on the FAA's relationship to other federal laws.

#### A. THE RISE OF ARBITRATION CONFLICTS

##### 1. The Arbitration Revolution

The story of the FAA's origins, transformation, and expansion "has been told many times."<sup>47</sup> Enacted by the 68th Congress in 1925, the FAA provides that a covered arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>48</sup> As is now familiar, the statute was the capstone of a decade-long campaign led by the New York State Chamber of

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46. See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 1 ("[In the FAA there is] a liberal policy favoring arbitration agreements.").

47. Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 71 VAND. L. REV. (forthcoming 2019) (manuscript at 11), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3253407](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253407).

48. Federal Arbitration Act, Pub L. No. 68-401, § 2, 43 Stat. 883 (1925) (codified at 9 U.S.C. § 2 (2012)). The FAA covers any "maritime transaction or a contract evidencing a transaction involving commerce," *id.* § 2, but the FAA does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1.

Commerce and the American Bar Association to shore up the legal basis for commercial arbitration.<sup>49</sup> Before the early twentieth century arbitration reform movement, courts often refused to enforce arbitration agreements between commercial parties on the ground that arbitration “ousted” courts from exercising jurisdiction conferred by law or because damages adequately compensated a party whose counter-party refused to honor an agreement to arbitrate.<sup>50</sup> Courts also allowed parties to repudiate (revoke) arbitration agreements at any point before an arbitration award was issued on the basis of similar concerns.<sup>51</sup> State legislation in New York and New Jersey overturned these doctrines, but did not apply in federal court under then-prevailing conflicts of law principles.<sup>52</sup> In providing that an arbitration

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49. The FAA’s historical origins are now the subject of two monographs: (1) MACNEIL, *supra* note 32; and (2) IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013). *See also* Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring) (describing the statute’s legislative history); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1946–48 (2014) (describing the FAA as part of a broader movement to simplify legal procedure in the 1920s and 1930s); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 301–02 (2015) (tracing the legislative history of the FAA); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. L. REV. 99, 101–03 (2006) (describing the 68th Congress’s goals in the FAA); Luke P. Norris, *The Parity Principle*, 93 N.Y.U. L. REV. 249, 252–53 (2018) (tracing the history of FAA § 1 and concluding that § 1 excludes contracts characterized by “wide economic disparities . . . between the parties” from arbitration); *cf.* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105–07 (2002) (seeking to show that the Supreme Court’s current interpretation of the FAA is not ruled out by the statute’s legislative history). *See generally* Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940 (2015) (describing early twentieth century legal reform movements that influenced thinking about arbitration).

50. *See, e.g.*, *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 120–22 (1924) (discussing the common law rules and analysis for arbitration disputes).

51. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 14 (1924) [hereinafter *Arbitration of Interstate Commercial Disputes*] (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce) (“The difficulty is that men do enter into [arbitration] agreements and then afterwards repudiate the agreement, and the difficulty has been that for over 300 years . . . the courts have said that . . . an [arbitration] agreement was one that was revocable at any time.”).

52. *See, e.g.*, *Red Cross Line*, 264 U.S. at 124 (“The [New York] Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty.”).

agreement is “valid, irrevocable, and enforceable,”<sup>53</sup> the FAA expressly overrode the common law “revocability” and “unenforceability” doctrines, making arbitration agreements enforceable in federal court.<sup>54</sup>

The FAA is a “barebones statute.”<sup>55</sup> During congressional hearings on the bill that became the FAA, Julius Cohen, the New York lawyer considered the FAA’s architect, testified that federal and state regulatory agencies had broad authority to regulate the use of arbitration.<sup>56</sup> But the FAA’s text does not address the question one way or the other.<sup>57</sup> Nor does the FAA address the arbitrability of statutory rights, arbitrators’ duty to follow statutory procedures and remedies, or the extent of parties’ authority over the procedures used in arbitration.<sup>58</sup> Enacted thirteen years before the Federal Rules of Civil Procedure took effect,<sup>59</sup> and before Congress passed the first statute contemplating class action enforcement (the Fair Labor Standards Act of 1938),<sup>60</sup> the FAA says nothing about aggregate dispute resolution.<sup>61</sup>

The FAA’s effect on other federal laws depends largely on how these interpretive questions are resolved. Although the text of FAA Section 2 can be read literally as saying that any piece of paper that is denominated an agreement to arbitrate must be enforced, this literal reading would produce absurd results. No

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53. 9 U.S.C. § 2.

54. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018) (“In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements . . .”).

55. Noll, *Regulating Arbitration*, *supra* note 31, at 994.

56. *Arbitration of Interstate Commercial Disputes*, *supra* note 51, at 15 (“[W]e have the regulation of the Federal Government, through its regularly constituted bodies, and they protect everybody. Railroad contracts and express contracts and insurance contracts are provided for. You can not get a provision into an insurance contract to-day unless it is approved by the insurance department. In other words, people are protected to-day as never before.”). For more on Cohen’s role in the FAA’s enactment, see, e.g., MACNEIL, *supra* note 32, at 28; Hiro N. Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L.J. 541, 557 (2018).

57. See generally 9 U.S.C. § 2.

58. *Id.*

59. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (describing the promulgation of the Federal Rules of Civil Procedure).

60. *The Federal Wages and Hours Act*, 52 HARV. L. REV. 646, 669 (1939) (describing the FLSA’s collective action provisions).

61. See 9 U.S.C. § 2.

one thinks that an arbitrator could kill the losing party if the agreement so provided. And for most of the twentieth century, the statute was interpreted less expansively.<sup>62</sup> Three specific assumptions limited the scope of arbitration under the FAA, and with it, arbitration's impact on other federal laws.

First, courts assumed that the FAA applied only in federal courts and did not preempt state laws that guaranteed a judicial forum for specific claims.<sup>63</sup> Second, courts held that the FAA did not allow arbitration of federal statutory claims, based on fears that arbitration was not an appropriate forum for vindicating those statutes' public regulatory goals.<sup>64</sup> Finally, courts harbored doubts about the enforceability of arbitration clauses in standard form contracts of adhesion, which reflected uncertainty in the law of contract about how to approach contractual boilerplate.<sup>65</sup>

The FAA has not been substantively amended since the 68th Congress enacted it in 1925.<sup>66</sup> Notwithstanding Congress's inaction—and in spite of the “super-strong” form of *stare decisis* that applies to Supreme Court interpretations of federal statutes<sup>67</sup>—

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62. See MACNEIL, *supra* note 32, at 134–38 (providing a historical overview of the FAA from 1938 to 1967).

63. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 288 (1995) (Thomas, J., dissenting) (surveying caselaw prior to *Southland Corp. v. Keating Corp.*, 465 U.S. 1 (1984), and concluding that, “to judge from the reported cases, it appears that no state court was even *asked* to enforce the statute for many years after the passage of the FAA”).

64. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (declining to give claim preclusive effect to an arbitration agreement because “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII”); *Wilko v. Swan*, 346 U.S. 427, 435, 437 (1953) (reasoning that “the Securities Act was drafted with an eye to the disadvantages under which buyers labor,” and that its “protective provisions . . . require the exercise of judicial direction to fairly assure their effectiveness”), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 447 (1989).

65. See Francis M. Dougherty, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404, 437 (1984) (“Historically, agreements which purport to exclude jurisdiction of courts, other than those specifically named, and which relate to the adjudication of controversies that might arise in the future, have been found to be against public policy and have not been enforced.”) For an introduction to modern economic theories supporting enforcement of contractual boilerplate, see Symposium, “Boilerplate”: *Foundations of Market Contracts*, 104 MICH. L. REV. 821 (2006).

66. Federal Arbitration Act, 9 U.S.C. § 2 (2012) derivation note.

67. See *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (“[S]tare decisis carries enhanced force when a decision . . . interprets a statute . . . Congress can correct any mistake it sees.”). See generally William N.

the Court rejected each of the above limitations in a series of decisions beginning in 1983.

The backdrop to these decisions was a marked increase in entrepreneurial plaintiffs' litigation and inter-governmental regulatory conflicts to which such litigation contributed.<sup>68</sup> Between the end of the Second World War and 1983, Congress enacted more than 100 statutes that contained financial incentives for private parties and their attorneys to enforce statutory rights.<sup>69</sup> During the same era, amendments to Federal Rule of Civil Procedure 23 and the extension of the equitable "common fund" doctrine to class action litigation gave rise to new forms of self-financing plaintiffs' litigation organized by lawyers who conceived of themselves as "private attorneys general."<sup>70</sup> Meanwhile, the expansion of interstate and international trade increased the number of situations where private civil litigation led to conflicts in different sovereigns' approaches to regulating cross-border activity.<sup>71</sup> The perceived costs of entrepreneurial

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Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (identifying statutory stare decisis as a separate form of stare decisis).

68. See generally JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* (2015) (discussing the development of class action litigation); Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) (discussing the growth of doctrines designed to limit U.S. courts' influence on foreign affairs); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41 (2014) (explaining how private civil litigation generates conflicts among state and national governments' approaches to regulation).

69. See SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 66 fig.3.1 (2010).

70. See STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* 1–24 (2017); COFFEE, *supra* note 68, at 52–85; FARHANG, *supra* note 69, at 60–84; David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587 610–14 (2013). On the common fund doctrine's extension to class action litigation, see John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1602–03 (1974); John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 915–19 (1975); John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1410 (1974). On the private attorney general concept, see John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); William B. Rubenstein, *On What a "Private Attorney General Is"—And Why it Matters*, 57 VAND. L. REV. 2129 (2004); see also David L. Noll, *The Effect of Contingent Fees and Statutory Fee-Shifting*, in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* 170 (Samuel Estreicher & Joy Radice eds., 2016) (considering the efficacy of contingent attorney's fees and rules providing for statutory fee-shifting in increasing access to civil justice).

71. See Noll, *supra* note 68, at 49–56.

litigation and interjurisdictional regulatory conflicts led influential commentators to argue for expanded use of alternative dispute resolution. Among them was Chief Justice Warren Burger, who harbored an almost visceral dislike of the use of litigation to address social problems.<sup>72</sup> In a 1982 address to the annual meeting of the American Bar Association, Chief Justice Warren Burger chronicled the supposed ills of the American civil justice system and asked, pointedly, “Isn’t [t]here a [b]etter [w]ay?”<sup>73</sup>

Burger’s thinking soon appeared in Supreme Court decisions interpreting the FAA. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* and *Southland Corp. v. Keating*, the Court stated in dicta and then held that the FAA reflects a “liberal federal policy favoring arbitration agreements” that applies “in either state or federal court . . . notwithstanding any state substantive or procedural policies to the contrary.”<sup>74</sup> In *Shearson/American Express Inc. v. McMahon* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court held that the FAA allows arbitration of federal statutory claims in both international disputes and those that arise from domestic transactions.<sup>75</sup> And the Court impliedly accepted that arbitra-

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72. See generally SARAH L. STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 38–78 (2015) (discussing the Chief Justice’s support of ADR to curb the influx of litigation).

73. Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274 (1982).

74. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (citing *Cone*). In *Cone*, the Court considered whether a district court could abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), from resolving a petition to compel arbitration when another petition based on the same underlying controversy was pending in an earlier-filed state-court action. Justice William Brennan’s opinion stated, without citation, that FAA § 2 was a “congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.” *Cone*, 460 U.S. at 24. The Court reasoned that because the state and federal court actions involved the same question of law (the agreement’s validity under the FAA), “the fact that federal law provides the rule of decision on the merits” weighed against federal court abstention. *Id.* at 23.

*Southland* directly considered whether the FAA preempted a provision of California’s Franchise Investment Law which barred franchisees from agreeing to arbitration was preempted by the FAA. *Southland*, 465 U.S. at 3, 8. Although the franchisee waived the argument that the FAA does not apply outside of the federal courts by failing to raise the argument in the lower courts, the Supreme Court adopted the *Cone* dictum as a holding and concluded that state courts were bound by FAA § 2. *Id.* at 15–17.

75. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987);



tion agreements contained in standard form contracts of adhesion had the same status as those contained in contracts negotiated by sophisticated parties.<sup>76</sup>

The “arbitration revolution”<sup>77</sup> culminated in a pair of decisions which signaled that contracting parties have broad authority over the procedures used in arbitration. *AT&T Mobility v. Concepcion* held that the FAA preempted a California doctrine that required the availability of classwide arbitration in consumer cases as a check against corporate wrongdoing, because the California doctrine conflicted with the FAA’s “purposes and objectives.”<sup>78</sup> And *American Express Co. v. Italian Colors Restaurant* held that, in a challenge to the enforceability of an arbitration agreement, the fact that arbitration makes it economically irrational for a plaintiff to pursue a non-frivolous federal statutory claim (in *Italian Colors*, for violations of the Sherman Act) is not a valid defense to enforcement of the arbitration agreement.<sup>79</sup>

The Court’s decisions expanding the scope of arbitration under the FAA openly embraced Burger’s view that channeling disputes to arbitration was the cure to the problem of entrepreneurial litigation and the regulatory conflicts that it created.<sup>80</sup> By

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*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

76. The turning point in the Supreme Court’s jurisprudence was *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), which enforced a forum selection clause that appeared in the eighth of the twenty-five numbered paragraphs attached to a cruise ticket. *Id.* at 588. Later arbitration cases impliedly accepted the enforceability of boilerplate arbitration agreements or rejected contract law challenges to validity of boilerplate agreements out of hand. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (per curiam) (enforcing a boilerplate arbitration clause that appeared in a nursing home admission contract); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012) (credit card agreement); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336–37 (2011) (cellular telephone service agreement). For skepticism about the Court’s decision to apply the logic of classical contract law to adhesive arbitration clauses, see for example Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 *FORDHAM L. REV.* 1899, 1930 (2017).

77. *See generally* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *GEO. L.J.* 57, 70–76 (2015).

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

79. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013).

80. *See generally* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 *SUP. CT. REV.* 331 (1997) (identifying the Court’s trends of internationalism and privatization); Noll, *supra* note 31, at 998–1002 (discussing the benefits of enforcing arbitration).

reinterpreting the FAA to apply in state courts, preempt inconsistent state law, and allow arbitration of statutory claims, the Court ensured that defendants doing business in national and international markets could channel litigation from local courts to a private forum specified by contract.<sup>81</sup> This change of forum not only reduced procedural costs for defendants engaged in interstate and international commerce but also blunted the impact of local regulation to the extent that arbitrators applied the law less aggressively than elected state-court judges.<sup>82</sup> At the same time, the expansion of arbitration allowed defendants who are regular targets of entrepreneurial litigation to disable much of the procedural infrastructure such litigation depends upon, a result that conservative interest groups had struggled to attain through legislation and court rulemaking.<sup>83</sup> In *Concepcion*, the Court reasoned, counter-historically, that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of

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81. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (refusing to interpret FAA in a way that would “carv[e] out an important statutory niche in which a State remains free to apply its antiarbitration law or policy”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (describing an agreement to arbitrate as “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction”); *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (stating that the Court was “unwilling to attribute to Congress the intent . . . to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted”).

82. See Noll, *supra* note 68, at 68–72 (explaining why the Supreme Court’s arbitration decisions fit into a broader line of decisions that aim to reduce inter-jurisdictional regulatory conflicts). There is a debate, not resolved by existing empirical studies, over the extent of local courts’ favoritism toward local parties. See generally Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) (discussing whether win rates are due to removal of cases or case selection).

83. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005) (discussing judicial preference for arbitration); Noll, *Regulating Arbitration*, *supra* note 31, at 1026 (explaining how, “by changing the forum and procedures for dispute resolution,” arbitration can influence the returns from private statutory enforcement); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 126 (2000) (anticipating the Court’s holding that arbitration can be used to block class action litigation in certain circumstances). On conservative interest groups’ use of judicial interpretation to accomplish results they struggled to achieve through legislation and court rulemaking, see BURBANK & FARHANG, *supra* note 70, at 214.

dispute,” and held that a state law that interferes with this congressional objective is preempted by the FAA.<sup>84</sup>

The result was a “180-degree turn” in the Supreme Court’s approach to arbitration under the FAA.<sup>85</sup> In 1983, few U.S. courts would have ordered arbitration of consumer or employee disputes, much less when a state sought to guarantee access to a judicial forum to advance the state’s regulatory interests.<sup>86</sup> By 2013, arbitration of such disputes was common.<sup>87</sup> And the Supreme Court repeatedly intervened to ensure that state courts followed its interpretation of the FAA, summarily reversing state court decisions that attempted to carve out exceptions to the new FAA.<sup>88</sup>

This shift was reflected in discussion of the FAA. Law professors spoke of the FAA as if it were a quasi-constitutional enactment that steamrolled any legal impediment to the enforcement of arbitration agreements according to their terms.<sup>89</sup>

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84. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). On *Concepcion*’s creative understanding of arbitration, see for example, Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 388 (2011) (“In the commercial world, there are numerous examples of arbitration procedures that specifically contemplate multi-party proceedings.”).

85. See Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 817 (2009).

86. See MACNEIL, *supra* note 32, at 138–39.

87. See generally Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2870–71 (2015) (discussing expansion of arbitration in the employment context).

88. See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (holding West Virginia’s prohibition of pre-dispute arbitration agreements is preempted by the FAA); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012) (per curiam) (holding an Oklahoma statute does not govern over a federal statute allowing arbitration); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam) (holding that the FAA requires arbitration as to disputes where an arbitration agreement is signed). See generally Christopher R. Drahozal, *Error Correction and the Supreme Court’s Arbitration Docket*, 29 OHIO ST. J. DISP. RESOL. 1, 2–3 (2014) (attributing the phenomenon to state court resistance to the Supreme Court’s arbitration jurisprudence).

89. See William N. Eskridge Jr. & John Ferejohn, *Super Statutes*, 50 DUKE L.J. 1215, 1260 (2001) (noting that the “Supreme Court has construed the FAA broadly, with a breadth sweeping well beyond the statute’s plain meaning and the probable expectations of its framers in 1925”); see also Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409 (2016) (suggesting under the Court’s interpretation of the FAA, that “entire areas of the law were shunted off into the black box of arbitration”); J. Maria Glover, *“Encroachments and Oppressions”: The Corporatization of Procedure and the Decline of Rule of Law*, 86 FORDHAM L. REV. 2113, 2114 (2018) (Under the new FAA, the judiciary no longer “fulfill[s] its unique role in our

Arbitration supporters happily embraced this reading, and claimed that a wide variety of federal and state law regulating dispute resolution procedure was precluded or preempted by the Supreme Court's interpretation of the FAA.<sup>90</sup>

## 2. The Agency Response

Businesses responded to the Supreme Court's interpretation of the FAA by dramatically increasing their use of arbitration.<sup>91</sup> But contrary to many accounts, the arbitration revolution did not usher in an era of contract procedure in which businesses were free to mandate arbitration on terms of their choosing. Instead, federal regulatory agencies stepped into the vacuum created by the Supreme Court's interpretation of the FAA and regulated the use of arbitration in many domains.

Agency action regulating the use of arbitration came in two waves. Two federal agencies—the Federal Trade Commission (FTC) and Securities Exchange Commission (SEC)—have long regulated the use of arbitration by actors within their jurisdiction under statutes that do not expressly refer to arbitration.<sup>92</sup> Until recently, this regulation has been uncontroversial. Indeed,

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tripartite structure of government to preserve the rule of law”).

90. See, e.g., Brief of the Chamber of Commerce as Amicus Curiae in Support of Petitioners at 8, *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017) (No. 16-285) (“This Court has been loath to find that [another statute modifies the FAA.]”); Brief Amici Curiae of Law Professors at 7, *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017) (No. 16-285) (“[A] federal statute will not be interpreted to forbid arbitration of claims within its ambit unless it does so *expressly* . . .”).

91. See, e.g., ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION 1* (2017) (finding that 53.9% of nonunion private-sector employers in the United States have mandatory arbitration procedures); CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 2*, at 7 (2015) (finding that “[s]even of the eight largest facilities-based mobile wireless providers (87.5%), covering 99.9% of subscribers, used arbitration clauses in their 2014 customer agreements”); see also Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682, 708 (2018) (surveying prior empirical studies of employment arbitration and concluding it is a “black hole” that serves primarily to suppress claims).

92. See Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 512–17 (2008) (describing the SEC's regulation of mandatory arbitration in the securities industry under the Securities Exchange Act of 1934); Lloyd, *supra* note 31, at 18–21 (describing the history of the FTC's regulation of mandatory arbitration under the Magnuson-Moss Warranty Act).

the Supreme Court in 1987 spoke approvingly of the SEC's oversight of securities arbitration in approving arbitration of claims under the Securities Exchange Act of 1934.<sup>93</sup>

Beginning in the late 1990s and accelerating in the final years of the Obama administration, a new wave of agency arbitration regulations appeared.<sup>94</sup> Some agency regulations, such as the CMS Long-Term Care Rule, sought to address harms caused by the confidentiality of the arbitration process.<sup>95</sup> Some agency regulations, such as the NLRB rulings that the Supreme Court rejected in *Epic Systems*, targeted uses of arbitration that the agency concluded violated statutory rights it enforced.<sup>96</sup> Other agency regulations attempted to address arbitration's effects on private enforcement of state and federal regulatory programs.<sup>97</sup> Still other regulations sought to address broader market failures linked to arbitration. For example, in response to the collapse of several for-profit colleges, the Department of Education (DOE) Borrower Defense Rule prohibited schools that par-

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93. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233–34 (1987) (“[T]he Commission has broad authority to oversee and to regulate the rules adopted by the [self-regulatory organizations] relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.”).

94. See *infra* Appendix B.

95. See 82 Fed. Reg. 26,649 (proposed June 8, 2017) (proposing to drop the arbitration bar in favor of a requirement that arbitration agreements be explained in “plain language”); Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016) (barring nursing homes from mandating arbitration in their admission contracts).

96. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2292 (2012) (concluding that an individual employment agreement that prevents the employee from participating in aggregate dispute resolution to the extent permitted by generally applicable procedural rules violates the employee's right to engage in concerted activities for the purpose of mutual aid and protection under the NLRA and Norris-LaGuardia Acts), *enforced in part*, 737 F.3d 344, 364 (5th Cir. 2013), *adhered to on reconsideration*, *Murphy Oil*, 361 N.L.R.B. 774 (2014), *enforcement denied*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, *NLRB v. Murphy Oil USA, Inc.* 137 S. Ct. 809 (2017). For the pertinent statutory text, see *supra* note 5.

97. For instance, the Consumer Financial Protection Bureau (CFPB) arbitration rule prohibited consumer financial companies from using arbitration clauses to block class actions filed in public court based on concerns that arbitral class action waivers brought enforcement of federal and state consumer protection laws below the optimal level. Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017), *repealed by* Pub. L. No. 115-74, 131 Stat. 1243 (2017).

ticipate in the federal direct loan program from mandating arbitration and using other contract provisions that interfered with students' ability to litigate predatory lending claims.<sup>98</sup>

In regulating arbitration, agencies drew on diverse statutory authorities. CMS issued the Long-Term Care Rule under a provision of the Nursing Home Reform Act that directed the agency to promulgate regulations "to protect the health, safety, welfare, and rights" of nursing home residents.<sup>99</sup> The NLRB based its rulings prohibiting collective action waivers on provisions of the NLRA and Norris-LaGuardia Act that guarantee workers' right to engage in "concerted activities for the purpose of . . . mutual aid or protection."<sup>100</sup> The DOE issued the Borrower Defense Rule under a provision of the Higher Education Act that authorizes the department to proscribe contractual provisions for educational institutions that "the Secretary [of Education] determines are necessary to protect the interests of the United States and to promote the purposes of [the Act]."<sup>101</sup> The CFPB promulgated its arbitration rule under Section 1028(b) of the Dodd-Frank Act, which expressly authorizes the bureau to "prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties."<sup>102</sup> Agencies used a range of administrative policymaking forms, from legislative rules under

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98. Student Assistance General Provisions, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (final rule), *amended by* 82 Fed. Reg. 49,114 (Oct. 24, 2017). For an account of the rise of for-profit colleges and their dependence on predatory lending financed by the federal government, see generally Blake Shinoda, Note, *Enabling Class Litigation as an Approach to Regulating For-Profit Colleges*, 87 S. CAL. L. REV. 1085 (2014) (discussing the regulation of for-profit schools and conditional funding to allow collective actions).

99. See 42 U.S.C. §§ 1395i-3(f)(1), 1396r(f)(1) (2012).

100. 29 U.S.C. § 157 (2012) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."); 29 U.S.C. § 102 (2012) (recognizing the public policy of the United States that the individual worker "be free from the interference, restraint, or coercion of employers of labor . . . in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").

101. 20 U.S.C. § 1087d(a)(6) (2012).

102. 12 U.S.C. § 5518(b) (2012).

Section 553 of the APA to informal applications of agency discretion.<sup>103</sup>

By January 2016, fifteen proposed or final agency actions regulated the use of arbitration.<sup>104</sup> These regulations added to a small number of statutes that expressly addressed the use of arbitration in particular domains<sup>105</sup> and a handful of longstanding agency arbitration regulations that predated the revolution in the Supreme Court's FAA jurisprudence.<sup>106</sup>

The result was a variegated body of law in which the rules governing arbitration depended on the parties, the type of contract they entered into, and the claims that the parties asserted. In some areas, firms could be certain that arbitration agreements would be enforced according to their terms. Elsewhere, the use of arbitration was constrained—sometimes prohibited—by domain-specific agency regulation.

### 3. The Attack on Agency Regulation

Agencies' efforts to regulate arbitration were controversial.<sup>107</sup> With a handful of exceptions, every agency action restricting the use of arbitration that became final between 2007 and the end of the Obama administration was challenged in court by an assortment of business groups aligned with the U.S. Chamber of Commerce.<sup>108</sup>

The central theme of the challengers' arguments was that the FAA precluded agency regulation that restricted parties' freedom to mandate arbitration on terms of their choosing.<sup>109</sup> In

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103. See, e.g., Student Assistance General Provisions, 81 Fed. Reg. at 75,926 (legislative rule promulgated under APA § 553); Alison Frankel, *Shareholder Alert: SEC Commissioner Floats Class-Action-Killing Proposal*, REUTERS (July 18, 2017), <https://www.reuters.com/article/us-otc-arbitration-idUSKBN1A326T> (describing the SEC's historical refusal to grant accelerated registration to initial public offerings where the issuer attempts to require arbitration of shareholder claims).

104. See *infra* Appendix B.

105. See *infra* note 110.

106. See Gross, *supra* note 92 (describing longstanding arbitration regulations of the SEC); Lloyd, *supra* note 31 (describing longstanding arbitration regulations of the FTC).

107. See Horton, *supra* note 18, at 369 (observing that the “flurry of [agency] regulation may be the next battleground in the ‘arbitration war’”).

108. See *infra* Appendix A.

109. See, e.g., Brief for the United States as Amicus Curiae at 9, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285); Brief for Chamber of Commerce Plaintiffs-Appellants at 59, *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360 (2018) (No. 17-10238); Complaint at ¶¶ 100–132, *Cal. Ass'n of Private*

a few recent statutes enacted after the revolution in the Supreme Court's arbitration jurisprudence was underway, Congress explicitly authorized agencies to regulate arbitration.<sup>110</sup> But for the most part, agencies regulated arbitration under statutes that establish substantive rights, direct an agency to regulate specific harms or particular sectors of the economy, direct an agency to police regulated actors' contracting, or authorize an agency to grant exemptions from regulatory requirements. Challengers contended that regulations promulgated under the latter statutes conflicted with the "liberal federal policy favoring arbitration agreements" and the FAA-based requirement that arbitration agreements be enforced according to their terms.<sup>111</sup>

Courts hearing the challenges splintered. For example, in *Chamber of Commerce v. Hugler*, a Texas district court upheld a provision of the Department of Labor (DOL) Fiduciary Rule that required investment advisors to forego using arbitral class action waivers as a valid exercise of DOL's authority under the Employee Retirement Income Security Act of 1974 (ERISA).<sup>112</sup> By contrast, in *Thrivent Financial Services for Lutherans v. Acosta*, a Minnesota district court preliminarily enjoined enforcement of the same provision based on a concession by the

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Postsecondary Sch. v. Devos, No. 1:17-cv-00999, 2018 WL 5017749 (D.D.C. May 24, 2017) (No. 17-999).

110. See, e.g., Consolidated Appropriations Act, Pub. L. No. 115-31, § 8096, 131 Stat. 135 (2017) (forbidding defense contractors from requiring employees to arbitrate claims for sexual assault and employment discrimination); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 748(n)(2), 124 Stat. 1376 (2010) (codified at 7 U.S.C. § 26(n)(2)) (2012) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."); *id.* § 922(a) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.") (codified at 18 U.S.C. § 1514A(e)(2) (2012)); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11004, 122 Stat. 923 (codified at 7 U.S.C. § 197c(a)) ("Any livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision.").

111. See *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

112. *Chamber of Commerce v. Hugler*, No. 3:16-CV-1476-M, 2017 WL 514424 (N.D. Tex. Feb. 8, 2017), *rev'd following partial concession of invalidity*, *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018).



Sessions Justice Department to the effect that DOL lacked authority to regulate arbitration.<sup>113</sup>

Beyond disagreeing over the validity of particular agency regulations, courts disagreed more broadly over the circumstances in which agencies have authority to regulate arbitration. The Supreme Court in *Epic Systems* reasoned that the NLRB's regulation of arbitral class action waivers was invalid because the NLRA does not contain a contrary congressional command that modifies the FAA's instruction that parties are free to select arbitral procedures of their choosing.<sup>114</sup> In contrast, the Seventh Circuit in the decision below concluded that procedural choices in an agreement to arbitrate are constrained by the guarantee of workers' right to engage in concerted activity for mutual aid and protection, which has long been interpreted as prohibiting waivers of employees' right to join together to petition for judicial and administrative relief to the extent provided by generally applicable law.<sup>115</sup> Because a waiver of that right is a "ground[] . . . at law . . . for the revocation of any contract," the court concluded that it took precedence over the general commands of FAA Section 2.<sup>116</sup>

Questions about agencies' authority to regulate arbitration have played a central role in the Trump administration's efforts to roll back Obama-era arbitration regulations.<sup>117</sup> For example, after filing a petition for certiorari that took the NLRB's side in *Epic Systems* under President Obama,<sup>118</sup> the solicitor general switched positions after the change in administrations and filed an amicus brief arguing that the board's reading of the NLRA was inconsistent with the FAA.<sup>119</sup> In Fifth Circuit litigation over the DOL Fiduciary Rule, the Justice Department declined to defend the district court decision upholding the rule's arbitration

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113. Thrivent Fin. for Lutherans v. Acosta, No. 16CV03289SRNDTS, 2017 WL 5135552, at \*5 (D. Minn. Nov. 3, 2017).

114. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623–24 (2018).

115. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016).

116. *Id.*

117. See generally David L. Noll, *Deregulating Arbitration*, 30 LOY. CONSUMER L. REV. 51 (2017).

118. Petition for Certiorari, *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (Sept. 2016).

119. See Brief of the United States as Amicus Curiae at 13, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285).

provisions “[i]n light of the position adopted by the Acting Solicitor General in [*Epic Systems*].”<sup>120</sup> The DOE, now led by billionaire philanthropist Betsy DeVos, cited “legal uncertainty” created by a legal challenge to the Borrower Defense Rule’s arbitration provision as a reason for staying and then reconsidering the rule.<sup>121</sup>

Backers of Obama-era rules responded to agencies’ attempts to rollback arbitration restrictions by challenging the rollbacks under the APA. For example, state attorneys general have filed two suits challenging the DOE’s attempt to roll back the Borrower Defense Rule and its refusal to enforce the original rule.<sup>122</sup> The department has defended those suits on the ground that the original rule’s arbitration provisions exceeded DOE’s statutory authority.<sup>123</sup> That defense joins issue on DOE’s authority to regulate arbitration, even as the department refuses to enforce a regulation that is currently on the books.<sup>124</sup>

Thus, notwithstanding the change in administrations, the extent of agencies’ authority to regulate arbitration remains an important and contested question. And the issue’s importance is likely to increase. Historically, control of the executive branch has shifted between the political parties frequently.<sup>125</sup> When and if a pro-regulatory administration assumes power, more agencies are likely to regulate arbitration under more statutes, giving rise to new conflicts over their authority to do so.

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120. Brief for Appellees at 59, *Chamber of Commerce v. Dep’t of Labor*, 885 F.3d 360 (2018) (No. 17-10238).

121. Student Assistance General Provisions, 82 Fed. Reg. 49,114 (Oct. 24, 2017) (interim final rule).

122. Complaint, *California v. Dep’t of Education*, No. 3:17-cv-07106 (N.D. Cal. Dec. 14, 2017); Complaint, *Massachusetts v. DeVos*, No. 1:17-cv-01331-RDM (D.D.C. July 6, 2017).

123. See Cross Motion for Summary Judgment and Response in Opposition to Plaintiffs’ Motion for Summary Judgment at 9, *Massachusetts v. DeVos*, No. 1:17-cv-01331-RDM (Dec. 1, 2017) (citing “serious questions concerning the validity” of the Borrower Defense Rule raised by the California Association of Private Postsecondary Schools’ challenge to the rule as justification for staying it).

124. On September 12, 2018, the district court presiding over the Borrower Defense rule litigation issued a preliminary injunction vacating the 2017 stay of the rule on the ground that the stay was arbitrary and capricious. *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018). This injunction resulted in the original 2016 rule going into effect on October 12, 2018. *Bauer v. DeVos*, No. CV 17-1330 (RDM), 2018 WL 4483783, at \*1 (D.D.C. Sept. 17, 2018). The district court has indicated that it will address arguments that the 2016 rule is inconsistent with the FAA at summary judgment. See Minute Order, *Bauer v. DeVos*, No. CV 17-1330 (RDM), 2018 WL 4483783 (D.D.C. May 24, 2018).

125. See, e.g., DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002*, at 1 (2d ed. 2005).

B. AUTHORITY TO REGULATE ARBITRATION AS A PROBLEM OF STATUTORY INTERPRETATION

Litigation over agency arbitration regulation highlights an institutional dimension to the way that federal law approaches arbitration.<sup>126</sup> If courts reject agency arbitration regulation on the ground that it is precluded by the FAA, the judiciary is the only institution that will regulate arbitration.<sup>127</sup> (Recall that FAA preemption jurisprudence largely excludes states from regulating arbitration in ways that conflict with the FAA.)<sup>128</sup> The rules governing arbitration will reflect the courts'—ultimately, the Supreme Court's—reading of the FAA. In contrast, if courts uphold agencies' efforts to regulate arbitration, courts and agencies will work together in a kind of partnership to define the rules governing arbitration, the longstanding practice in the area of securities arbitration.<sup>129</sup>

The institutional dimension to conflicts over agency arbitration regulation has led commentators to approach agencies' authority to regulate arbitration as a problem of institutional choice.<sup>130</sup> Seen from this perspective, the question is not whether agencies have *legal authority* to regulate arbitration but *which institution*—the courts or an agency with subject-matter expertise—is better positioned to do so.<sup>131</sup> Agency regulation can take

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126. See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

127. See Deacon, *supra* note 31, at 1027–28 (observing that the “current system [for regulating arbitration], at least at the federal level, is not one of non-regulation or congressional control but rather a system characterized by delegation to the courts,” and that “the current system . . . is largely trans-substantive . . . what the Supreme Court says about the FAA in the context of one area of law will also apply to another”).

128. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (holding that the FAA preempts “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives”).

129. See generally *L.B. Wilson, Inc. v. FCC*, 397 F.2d 717, 723 (D.C. Cir. 1968) (“Courts and agencies are, after all, in a kind of partnership to serve the public interest.”); Samuel Estreicher, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 COLUM. L. REV. 894, 907–08 (1980) (describing Judge Harold Leventhal’s vision of the court-agency partnership in administrative law).

130. See Deacon, *supra* note 31, at 995 (suggesting that in general “agencies’ ability to amass information about particular regulatory areas will often make them better area-specific regulators than either the courts or Congress”).

131. Cf. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (“The central question is not ‘how, in principle, should a text be interpreted?’ The question instead is ‘how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?’”).

advantage of agencies' information-gathering abilities and technical expertise, and respond to changed circumstances more easily than a court's interpretation of a statute.<sup>132</sup> Insofar as the rules governing arbitration raise contested questions of regulatory policy, agencies' accountability to democratic politics through the president potentially makes them a better site for regulation than the federal courts.<sup>133</sup> On the other hand, court regulation is comparatively more stable than agency regulation. It is better-insulated from electoral politics. And, so long as the Supreme Court privileges the FAA over other federal laws, court regulation captures the usual benefits of "procedural trans-substantivity"—the principle that disputes should be resolved using the same procedures regardless of the substantive area in which they arise.<sup>134</sup>

As a legal matter, however, the extent of an agency's authority to regulate arbitration turns fundamentally on the FAA's relationship to other laws. That "agencies may act only pursuant to authority delegated to them by Congress" is a blackletter principle of administrative law.<sup>135</sup> A statute authorizing an agency to regulate harms such as nursing home abuse ordinarily would authorize the agency to regulate uses of arbitration that impact that mandate.<sup>136</sup> Indeed, the difficulty of anticipating all the de-

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132. See Deacon, *supra* note 31, at 1030–31.

133. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

134. See Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 781 (2017) ("That procedural rules are cast at a broad level of generality and defined in advance of disputes by lawmakers who are unaware of how their enactments will affect particular groups provides a powerful guaranty of procedural fairness."). See generally David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191 (2013) (noting that trans-substantivity advances the values of generality and equality, protects against political influence, capture, and bias, and lowers barriers to entry by helping generalist lawyers to practice in different practice areas).

135. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017).

136. See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) (holding that the provision of the Public Utility Holding Company Act of 1935, 49 Stat. 803, that authorized the SEC to regulate reorganization plans authorized the Commission to regulate management trading during reorganization); *FTC v. RF Keppel & Bro., Inc.*, 291 U.S. 304 (1934) (holding that the provision of the Federal Trade Commission Act, 38 Stat. 717, that authorized FTC to regulate unfair methods

velopments that might warrant regulation is a classic justification for Congress to delegate broad regulatory authority to an agency that it charges with administering a statute in light of contemporary conditions.<sup>137</sup> But the delegations of regulatory authority that agencies have invoked to regulate arbitration exist alongside the FAA's instruction that agreements to arbitrate are "valid, irrevocable, and enforceable."<sup>138</sup> And the Supreme Court has interpreted the FAA to require that covered arbitration agreements be enforced "according to their terms."<sup>139</sup> Agency regulation thus implicates conflicting statutory mandates: one that broadly supports agency action regulating arbitration (the substantive statute the agency bases its regulation upon), and another that, as interpreted by the Rehnquist and Roberts Courts, is broadly deregulatory (the FAA).

Hence, to understand the extent of agencies' authority to regulate arbitration, one must understand how the FAA relates to other federal laws. Is the FAA the only federal statute that governs the use and status of agreements to arbitrate? If not, when do other statutes supplement or qualify the FAA? And what must a statute say to qualify the FAA-based requirement that arbitration agreements be enforced according to their terms? These questions of statutory interpretation define the extent of parties' authority to mandate arbitration on terms of their own choosing, and the circumstances in which an agency acting under a substantive regulatory statute may regulate the use of arbitration.

## II. THE FAA AS BASELINE

The remaining three Parts of this Article develop a theory of how the FAA relates to other federal statutes, focusing specifically on substantive regulatory statutes that federal administra-

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of competition permitted FTC to regulate "break and take" candy packaging).

137. See, e.g., RANDALL B. RIPLEY & GRACE A. FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY 17 (1987) ("Government has assumed increasing responsibility in an ever-expanding number of issue areas in the twentieth century . . . . The sheer volume and technical complexity of the world are more than Congress, with its limited membership and staff, can manage alone."); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5–6 (2014) (describing areas where "agencies have been left for relatively long periods to adapt existing law to new challenges").

138. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

139. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

tive agencies have invoked to regulate arbitration. Some elements of that theory have been recognized in caselaw or prior scholarship,<sup>140</sup> but they have not been integrated into a general theory of the FAA's relationship to other federal laws. Developing such a theory and explaining its implications for administrative agencies' efforts to regulate arbitration are this Article's primary contributions to debates over the limits and regulation of arbitration.

Of course, understanding the FAA's relationship to other federal laws does not answer all questions about the appropriate legal and policy response to arbitration. The Supreme Court's conclusion that the FAA's "purposes and objectives" preempt state regulation that the Court deems inconsistent with the FAA remains controversial and undertheorized.<sup>141</sup> And understanding the extent of agencies' legal authority to regulate arbitration does not answer whether they should do so as a policy matter. Elsewhere, I have surveyed the economic arguments for judicial enforcement of arbitration agreements and arbitration's costs for consumer welfare, democratic governance, and the implementation of federal statutory policy, and argued that federal legislation and regulation should focus on arbitration's effects on the implementation of federal statutory policy.<sup>142</sup> The #MeToo movement has shed light on the role that arbitration has played in shielding powerful actors from accountability for wrongdoing.<sup>143</sup> In light of those revelations, and the policy coalitions they have mobilized, the debate over the proper policy response to arbitration will continue.<sup>144</sup>

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140. See *infra* notes 215–17 (noting Supreme Court cases that recognize that the FAA may be displaced by a contrary congressional command); *infra* notes 244–48 (noting cases which hold that arbitrators must respect substantive rights and statutory procedures and remedies).

141. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see, e.g., David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 *GEO. L.J.* 1217 (2013); Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 *NOTRE DAME L. REV.* 1831, 1878–88 (2016).

142. See Noll, *Regulating Arbitration*, *supra* note 31.

143. See Ronan Farrow, *Donald Trump, a Playboy Model, and a System for Concealing Infidelity*, *NEW YORKER*, Feb. 16, 2018; Ronan Farrow, *Harvey Weinstein's Secret Settlements*, *NEW YORKER*, Nov. 21, 2017; Megan Twohey et al., *Weinstein's Complicity Machine*, *N.Y. TIMES*, Dec. 5, 2017.

144. See Letter from Pamela Jo Bondi, Attorney Gen. of Fla. et al., to Paul Ryan, Speaker of the House, *Mandatory Arbitration of Sexual Harassment Disputes* (Feb. 12, 2018) (bi-partisan letter from fifty-six state attorneys general

But first, there is the question of legal authority. If the FAA precludes agencies from regulating arbitration in areas of their authority, as arbitration supporters contend, then agencies are powerless to regulate arbitration until Congress passes new legislation authorizing them to do so. On the other hand, if agencies have authority to regulate arbitration under statutes they already administer, the questions are how that discretion should be exercised, and whether agencies under Trump have abused their discretion in rolling back Obama-era arbitration restrictions. The question of authority is also central to legal challenges such as *Epic Systems*, which are premised on the view that the FAA takes precedence over conflicting laws.<sup>145</sup>

This Part begins by showing that the FAA functions as a statutory floor: the statute establishes baseline rules of dispute-resolution procedure that apply unless and until the Act is qualified by another law. And contrary to arbitration supporters' claims, the FAA does not enjoy special status in federal law. Rather, basic principles of statutory interpretation and constitutional law show that it is a law like any other.

#### A. FLOOR OR CEILING?

The first question when considering the FAA's relationship to other federal laws is whether the FAA functions as a statutory floor or ceiling.<sup>146</sup> This distinction, which is commonly invoked in preemption jurisprudence, captures the different ways that a cross-cutting statute may interact with other laws.<sup>147</sup> Some cross-cutting statutes, such as the APA, establish default rules that apply unless and until they are modified by another law.<sup>148</sup> Others, such as the Endangered Species Act and Religious Freedom Restoration Act, impose requirements that supersede other

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urging Congress to enact "appropriately-tailored legislation to ensure that sexual harassment victims have a right to their day in court").

145. See *supra* text accompanying notes 2–17.

146. See *Wyeth v. Levine*, 555 U.S. 555, 563 (2009).

147. See *generally* SAMUEL ESTREICHER & DAVID L. NOLL, *LEGISLATION AND THE REGULATORY STATE* 173 (2d ed. 2017) (discussing the challenges of applying cross-cutting government-wide statutes in situations that lawmakers did not explicitly contemplate).

148. 5 U.S.C. §§ 551–59 (2012); see *Dimaren v. Immigration & Naturalization Serv.*, 398 F. Supp. 556, 559 (S.D.N.Y. 1974) (noting that the Administrative Procedure Act "governs all administrative proceedings except to the extent that another statute exempts the agency from coverage"). On the APA's status as a procedural default that applies in the absence of an "exemption," see *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

laws.<sup>149</sup> If the FAA functions as a floor, it establishes default rules for dispute resolution that other statutes can modify. If the FAA functions as a ceiling, its requirements trump those imposed by other federal laws.

Several factors show that the FAA functions as a floor, not a ceiling. First, it is widely accepted that Congress enacted the FAA to overcome the “*judicial* hostility to arbitration” reflected in the common law revocability and unenforceability doctrines.<sup>150</sup> There is no apparent reason why a statute intended to overcome *judicial* hostility to arbitration would take precedence over other federal laws enacted by *Congress*. Second, the FAA lacks language specifying that it “applies to all Federal law”<sup>151</sup> or that Federal departments and agencies “shall . . . insure that any action authorized, funded, or carried out by [them]” are consistent with the FAA.<sup>152</sup> The presence of similar language in statutes that function as a ceiling is evidence that the FAA does not do so.

Congress’s legislative activity since the FAA’s enactment is further evidence that it functions as a floor and not a ceiling. A number of statutes, many enacted long after the FAA, establish special rules governing the use of arbitration in particular domains.<sup>153</sup> For example, 1982 amendments to the Patent Act provide that while parties may resolve patent infringement claims by arbitration, an arbitration award resolving a patent infringement claim does not take effect until it is delivered to the Patent and Trademark Office for recording in the patent’s prosecution history.<sup>154</sup> Under ordinary interpretive principles, these statutes

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149. See 16 U.S.C. § 1536(a)(2) (2012) (“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical . . . .”); 42 U.S.C. § 2000bb–1(a) (2012) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).”); *id.* § 2000bb–2(1) (defining “government” as “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity”).

150. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (emphasis added).

151. 42 U.S.C. § 2000bb–3.

152. See 16 U.S.C. § 1536(a)(2).

153. See *supra* note 110.

154. Pub. L. No. 97-247, § 3(a), 96 Stat. 317, 322 (1982) (codified at 35 U.S.C. § 294(c)-(e) (2012)) (“An award by an arbitrator shall be final and binding between the parties to the arbitration but shall have no force or effect on any other



modify the FAA's general command that agreements to arbitrate are "valid, irrevocable, and enforceable."<sup>155</sup> That result would be impossible if the FAA functioned as a statutory ceiling that trumped other laws.

FAA Section 2's savings clause, which provides that arbitration agreements are not enforceable for reasons that exist "at law or in equity for the revocation of any contract," does identify one situation in which the FAA's general rules do not apply.<sup>156</sup> Parties challenging agency arbitration regulations have pointed to the savings clause to argue that, unless a law applies to contracts generally, it cannot modify the FAA, and the Supreme Court in *Epic Systems* appeared to embrace this argument.<sup>157</sup> According to this argument, the savings clause functions as a conflicts-of-law rule. It says, by negative implication, that the *only* situation in which another statute modifies the FAA's rules of dispute resolution procedure is when the statute establishes a generally applicable contract law defense.

But this reading cannot be right. To see why, consider the provision of the Patent Act noted above.<sup>158</sup> If the savings clause identified the only circumstance in which an arbitration agreement is unenforceable, the Patent Act would have no effect on the validity of an arbitration award resolving a patent infringement claim, because the Act does not establish a defense to enforcement of "any contract." That interpretation conflicts with the ordinary and natural reading of the two acts. Its implausibility suggests that the savings clause does not address the FAA's relationship to other federal laws but to the common law

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person. . . . When an award is made by an arbitrator, the patentee, his assignee or licensee shall give notice thereof in writing to the Director. . . . The award shall be unenforceable until the notice required by subsection (d) is received by the Director.").

155. Federal Arbitration Act, 9 U.S.C. § 2 (2012); *see, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general . . ."); *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("[T]he more recent of two irreconcilably conflicting statutes governs.").

156. 9 U.S.C. § 2.

157. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) ("[A]n argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind . . . is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability."); *cf.* Brief of the United States as Amicus Curiae at 33, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) ("Just as the saving clause was held not to encompass the state-law rule at issue in *Concepcion*, it does not encompass the analogous federal-law rule that the Seventh and Ninth Circuits derived from the NLRA.").

158. 35 U.S.C. § 294(c)–(d).

of contracts. The clause says that, while Section 2 overrides the common law non-enforceability and revocability doctrines, “a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement.”<sup>159</sup>

Were there any doubt about the matter, the Supreme Court expressly held in *Shearson/American Express Inc. v. McMahon* that the FAA functions as a statutory floor.<sup>160</sup> *McMahon* was the first case on the arbitrability of statutory rights that the Supreme Court decided after *Mitsubishi* rejected the view that statutory claims are categorically ineligible for arbitration.<sup>161</sup> The question was whether to extend *Mitsubishi* to domestic transactions,<sup>162</sup> particularly whether parties could bind themselves to arbitrate claims under Section 10(b) of the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act.<sup>163</sup>

The Court answered “yes,” reasoning in an opinion by Justice Sandra Day O’Connor that the FAA’s meaning did not vary depending on the domestic or international nature of the transaction that gave rise to a demand for arbitration.<sup>164</sup> This did not mean that claims under federal regulatory statutes were automatically arbitrable, however. The Court reasoned that the FAA “standing alone. . . mandates enforcement of agreements to arbitrate statutory claims.”<sup>165</sup> But, “[l]ike any statutory directive, the Arbitration Act’s mandate may be overridden by a contrary congressional command.”<sup>166</sup> The party opposing arbitration had the “burden” of “show[ing] that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>167</sup> “If Congress *did* intend to limit or prohibit waiver of a judicial forum for a particular claim,” that intent would be “deducible

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159. *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984).

160. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987).

161. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

162. *McMahon*, 482 U.S. at 224.

163. *Id.* at 222.

164. *See id.* at 232 (reasoning that “the competence of arbitral tribunals to resolve § 10(b) claims is the same” in both the domestic and international contexts).

165. *Id.* at 226.

166. *Id.*

167. *Id.* at 224, 227.

from [the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes."<sup>168</sup>

*McMahon* thus clarified what is plain from the FAA's text, structure, and other federal laws. The FAA establishes default rules of dispute-resolution procedure that apply in the absence of another law qualifying the FAA. "Like any statutory directive," however, the FAA's defaults may be modified by other laws.<sup>169</sup>

#### B. DOES THE FAA OCCUPY A SPECIAL POSITION IN FEDERAL LAW?

Opponents of agency arbitration regulation generally concede that the FAA functions as a statutory floor. But they contend that, even so, the FAA may only be modified by specific kinds of statutory language. This argument posits that the FAA functions as a "super-statute" that occupies a special place in federal law. Because of its specialness, the FAA exerts a kind of gravitational pull on federal law that favors arbitration. Although Congress is free to modify the FAA's defaults in particular domains, it must speak clearly if it wishes to do so.<sup>170</sup>

This argument, however, gives the FAA a status that the statute itself does not contemplate, and that Congress could not constitutionally confer on it. And arguments for treating the FAA as a super-statute ignore the deep controversy that surrounds the Supreme Court's expansion of arbitration under the FAA and the fact that, with one exception, Congress has not embraced the Court's expansion of the FAA. The upshot is that the FAA is a statute like any other. Because arguments for treating

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168. *Id.* at 227 (emphasis added) (citations and internal punctuation omitted).

169. *Id.* at 226.

170. *See, e.g.*, Brief of the United States as Amicus Curiae at 18–19, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285) (party seeking to show that FAA has been displaced bears a "formidable burden. . . . When examining text and legislative history, the Court has looked for evidence that Congress intended to address arbitration agreements *in particular*"); Complaint at ¶ 20, *Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016) (No. 3:16CV233-MPM-RP) ("[W]hen Congress wishes to vest federal agencies with the authority to regulate or prohibit the use of arbitration agreements in certain industries, Congress has used unambiguous statutory language to confer that authority."). *See also* Brief Amici Curiae of Law Professors at 7, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (16-285) ("[A] federal statute will not be interpreted to forbid arbitration of claims within its ambit unless it does so *expressly* . . .").

the FAA as a super-statute are unpersuasive, the FAA's relationship to other federal laws presents an ordinary question of statutory interpretation.

### 1. Textual Silence

The most basic reason why the FAA does not enjoy special status in federal law is that the statute says nothing about its relationship to other federal laws. True, Section 2's savings clause provides that courts may refuse to enforce arbitration agreements on generally applicable contract grounds.<sup>171</sup> But as shown above, that clause merely preserves common law contract defenses to the enforcement of arbitration agreements rather than addressing the FAA's relationship to other federal laws.

The FAA's silence about its relationship to other statutes is unsurprising when the statute is considered in historical context. When the 68th Congress enacted the FAA, a total of thirteen executive agencies and departments existed.<sup>172</sup> Federal court procedure was controlled by the Conformity Act, an 1872 statute that directed federal courts to follow procedures used by state courts.<sup>173</sup>

Congress had yet to enact major regulatory statutes that entered federal law during the New Deal and the many post-World War II statutes that mobilized private enforcement through financial incentives for civil litigation.<sup>174</sup> The Rules Enabling Act would not be enacted for nine years, the Federal Rules of Civil Procedure for thirteen, and the APA for twenty-one.<sup>175</sup> Before any of these laws entered the U.S. Code, the nation would plunge

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171. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

172. They were: the Departments of Interior, Agriculture, State, Defense, Treasury, Commerce, and Labor; the Mississippi River Commission; the Federal Trade Commission; and the U.S. International Trade Commission. CTR. FOR THE STUDY OF DEMOCRATIC INSTS., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, SOURCEBOOK (Dec. 2012), <http://www.vanderbilt.edu/csdi/sourcebook.php>.

173. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196.

174. See FARHANG, *supra* note 69, at 30 (describing mechanisms through which financial incentives for litigation contribute to the development of a bar of private lawyers who enforce public regulatory statutes).

175. See *generally* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-59, 701-06 (2012)); Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2071-77 (2012)). For the original 1938 Federal Rules of Civil Procedure, see Cumulative Supplement V to the Code of the Laws of the United States of America 852-900 (1939).

into depression and elect a new liberal government that undertook a massive reconfiguration of the national economy.<sup>176</sup> Although it is inaccurate to describe the pre-New Deal government as thoroughly *laissez-faire*,<sup>177</sup> the federal regulatory state was early in development. In this environment, there was little reason for Congress to have been concerned with the FAA's relationship to other federal regulatory statutes. The administrative state was in its infancy. The modern "litigation state" created by Congress's delegations of enforcement authority to private litigants and their lawyers did not exist.<sup>178</sup>

Nor could Congress have given the FAA a special position in federal law if it had wished to do so: "[j]ust as a corporate board of directors cannot adopt an immutable policy, legislators cannot make their laws irrevocable or disable themselves or their successors from taking action[.]"<sup>179</sup> This non-entrenchment principle reflects the co-equal status of different Congresses and is itself an entrenched feature of federal constitutional law.<sup>180</sup> Under it, "there is no legal effect to a statutory provision stating that any exceptions to the statute's requirements must be express, or

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176. See Nicholas Crafts & Peter Fearon, *Lessons from the 1930s Great Depression*, 26 OXFORD REV. ECON. POL'Y, 285, 303–06 (2010).

177. See DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, 10–15 (2016); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 13–14 (2012); see also Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1579 (2018).

178. See generally FARHANG, *supra* note 69 (noting the low rate of private statutory enforcement in the late nineteenth and early twentieth century).

179. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 278 (2012).

180. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872–73 (1996) (plurality opinion); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932). See generally Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 381–93 (1987) (defining the entrenchment principle and discussing its practical concerns); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997) (noting that entrenchment violates "the democratic principle that present majorities rule themselves"); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1775 (2003) ("[C]onventional wisdom is that . . . one legislature cannot bind a future legislature."). But see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002) (arguing "that the rule barring legislative entrenchment should be discarded; legislatures should be allowed to bind their successors, subject to any independent constitutional limits in force").

must specifically refer to the statute.”<sup>181</sup> Thus, even if the FAA contained a provision stating that it controls unless it is expressly modified, that provision would be a nullity.

## 2. Arguments from Arbitrability Jurisprudence

The central legal argument for approaching the FAA as if it occupied a special place in federal law is based on the Supreme Court’s arbitrability jurisprudence—the body of law that addresses disputes that may be resolved via arbitration.<sup>182</sup> After the Court abandoned its view that the FAA categorically excludes arbitration of statutory claims in *Mitsubishi*, it had to explain which statutory claims could be arbitrated.<sup>183</sup> As already noted, *McMahon* held that the FAA generally requires arbitration of statutory claims that are covered by a valid arbitration agreement, and that a “contrary congressional command” could qualify this requirement.<sup>184</sup> The Court then decided a series of cases holding that claims under particular statutes were arbitrable because they lacked a sufficiently clear congressional command to modify the FAA.<sup>185</sup> Opponents of agency arbitration regulation draw on these cases to argue that, unless a statute specifically mentions arbitration, it does not affect the FAA.<sup>186</sup>

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181. SCALIA & GARNER, *supra* note 179, at 279 (citing the APA’s conflict-of-laws clause, 5 U.S.C. § 559 (2012), as an example of such a provision).

182. See generally Deborah Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 383–93 (2018) (describing the Supreme Court’s expansion of arbitrability under the FAA); see also David L. Noll, *Response: Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477 (2018) (considering the possibility that arbitrability be tied to the public or private nature of disputes).

183. See Mark A. Cleaves, *An Irresistible Force Meets an Immovable Object: Reforming Current Standards as to the Arbitration of Statutory Claims*, 8 J.L. & COM. 245, 262 (1988).

184. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226–27 (1987).

185. See CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012) (Credit Repair Organizations Act); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (Age Discrimination in Employment Act); Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477 (1989) (Securities Act of 1933) (overruling Wilko v. Swan, 346 U.S. 427 (1953)).

186. See Brief for the United States as Amicus Curiae Supporting Petitioners at 15, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285) (“Bilateral arbitration agreements should be enforced absent a specific congressional command to the contrary.”); Brief of the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner at 6, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285) (“When . . . a party maintains that another federal statute provides grounds for invalidating an arbitration agreement, this

But the Supreme Court's arbitrability cases do not hold that a statute must use magic words to qualify the FAA. To the contrary, those cases have long recognized that other statutes may impliedly modify the FAA, most obviously when they establish rules governing primary conduct (*e.g.*, prohibiting discriminatory employment practices) or establish specific procedures and remedies for statutory claims.<sup>187</sup> An arbitration agreement that waived those rights would be enforceable if it were judged under the FAA alone provided it did not violate generally applicable contract-law principles. But the Court's long-standing and oft-stated view is that, where an agreement's "choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies," the agreement cannot be enforced.<sup>188</sup>

Opponents of agency arbitration regulation also invoke the canon against implied repeals to argue that Congress must expressly authorize departures from the FAA.<sup>189</sup> But this argument distorts the canon.

The implied-repeals canon holds that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest."<sup>190</sup> It represents a judicial rule-of-thumb for cases where the legislature enacted a law that addresses a specific problem and then enacted a more general law that conflicts with the earlier law. The canon teaches that in these circumstances, the later and more general

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Court has asked whether the other federal statute contains a 'contrary congressional command' overriding the FAA's mandate that arbitration agreements be enforced according to their terms.").

187. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (reasoning that when "Congress has taken some measures to facilitate the litigation of [particular] claims," those measures must be followed in arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

188. *Mitsubishi*, 473 U.S. at 637 n.19.

189. See, *e.g.*, Brief for Epic Systems Corporation and Murphy Oil USA, Inc. at 14, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285); Complaint at ¶ 20, *Am. Health Care Ass'n v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016) (No. 3:16CV233-MPM-RP); see also Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1093 (2011) ("Like implied repeals of statutes generally, implied repeals of the FAA are disfavored, such that the inclusion of a private right of action in another statute—even an unwaivable right—will not operate to displace the FAA.").

190. *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (quoting *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009)).

law does not override (repeal) the earlier law unless finding an implied repeal is the only way to give effect to the later-enacted statute.<sup>191</sup> As the Supreme Court has explained, the rationale for the rule is that the later legislature would not intend its handiwork to take priority over the earlier enactment, even though the later enactment's literal language can be read as doing so:

[W]hen the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.<sup>192</sup>

The FAA is not the kind of statute that the implied-repeals canon aims to protect against accidental repeal. Far from addressing a *specific* problem, the FAA's cross-cutting, government-wide commands were enacted to override the *general* hostility to arbitration reflected in the common law revocability and unenforceability doctrines.<sup>193</sup> From the perspective of the implied-repeals canon, it is natural that later statutes enacted to address specific regulatory problems would qualify the FAA's cross-cutting commands.

### 3. The FAA as "Super-Statute"

Apart from textual and legal arguments for requiring Congress to use specific language if it wishes to modify the FAA, one might argue that the FAA has acquired the status of a super-statute. On this view—advanced by both critics and supporters of the Supreme Court's FAA jurisprudence—the FAA occupies a

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191. See *Nat'l Ass'n of Home Builders v. Def. of Wildlife*, 551 U.S. 644, 663 (2007); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Descriptions of the canon in other cases can be read as stating that it establishes a kind of general presumption against statutory change, which protects earlier-enacted laws against being modified until they are expressly repealed. See, e.g., *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) ("As we have emphasized, repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." (quoting *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 174 (2009))). But this understanding of the statute is ahistorical and is in tension with the principle that one legislature may not insulate its enactments from modification by another.

192. *Radzanower*, 426 U.S. at 153 (quoting THEODORE SEDGWICK, *THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* 98 (2d ed. 1874)).

193. *Mitsubishi*, 473 U.S. at 625–27.



place between that of a normal statute and a constitutional enactment.<sup>194</sup> Because the FAA is, de facto, higher law, it controls the treatment of arbitration unless Congress makes unmistakably clear that it wishes to depart from the FAA's defaults.

But the FAA is not a super-statute. Although scholars disagree over the conditions in which a statute acquires "super" status,<sup>195</sup> a helpful guide is provided by Professor William Eskridge and John Ferejohn's exhaustive recent treatment of the subject. Eskridge and Ferejohn posit that the transition from ordinary to super-statute reflects a process of deliberation, implementation, and entrenchment that cements a statute's normative commitments in legal and popular culture. In their telling, "[e]very super-statutory policy begins with an important public need and, usually, strong political demand."<sup>196</sup> Policy entrenchment usually involves administrators and courts finding "practical and cost-effective ways to implement the putative super[-]statute" and "ways to appeal to the values and concerns held by opponents."<sup>197</sup> And "the emerging super-statute must be sufficiently valuable to an important and expanding group in American society that it generates an enthusiastic and dynamic and growing base of popular support."<sup>198</sup> Popular and ambitious laws mature into super-statutes via "repeated legislative refinement and reaffirmation of the new norm or institution over a period of time."<sup>199</sup> It is only when this entrenchment has occurred that, on Eskridge and Ferejohn's account, courts should interpret the statute expansively to accomplish its purposes.<sup>200</sup>

Eskridge and Ferejohn identified the FAA as a super-statute in their tentative 2001 treatment of the subject<sup>201</sup> but omitted it from their longer 2010 monograph, and for good reason.

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194. See *supra* notes 89–90 and accompanying text.

195. See Robert A. Katzmann, *Introduction to The Yale Law Journal Online Symposium on Eskridge and Ferejohn's A Republic of Statutes: The New American Constitution*, 120 YALE L.J. ONLINE 293 (2011), <https://www.yalelawjournal.org/forum/introduction-to-the-yale-law-journal-online-symposium-on-eskridge-and-ferejohns-a-republic-of-statutes-the-new-american-constitution>.

196. See ESKRIDGE & FEREJOHN, *supra* note 34, at 16–17.

197. *Id.* at 17.

198. *Id.*

199. *Id.* at 17–18.

200. See *id.* at 465 (suggesting that in the event of ambiguity, interpreters should consider "meta-purposes suggested by small 'c' constitutional goals and norms"); Eskridge & Ferejohn, *supra* note 89, at 1249 ("For *super-statutes*, which are to be construed liberally and purposively, interpreters should apply words broadly and evolutively . . .").

201. Eskridge & Ferejohn, *supra* note 89, at 1261–63.

Recent historical research has shown that while the FAA emerged from a lengthy lobbying campaign, it was also classic interest-group legislation, enacted to address turn-of-the-century merchants' difficulties in using arbitration to resolve time-sensitive disputes.<sup>202</sup> The statute's opponents have decidedly *not* been brought into the fold as the Court has expanded the scope of arbitration to retrench statutes enforced through private civil litigation,<sup>203</sup> nor, as detailed above, have courts uniformly embraced agencies' efforts to reconcile the FAA with regulatory regimes they administer.<sup>204</sup> And while the modern FAA enjoys strong support of interest groups that oppose regulation of the private sector, the FAA decidedly lacks a dynamic and growing base of popular support.<sup>205</sup> Nor has Congress embarked on a program of refining and reaffirming the FAA: where it has acted, Congress has worked at the margins, trimming or expanding the availability of arbitration in particular domains as part of substantive regulatory overhauls or in response to interest group pressure.<sup>206</sup> Congress's most significant intervention in recent decades—the repeal of the Consumer Financial Protection Bureau's arbitration rule—passed by a razor-thin margin and depended on the Congressional Review Act to overcome the vetogates that ordinarily slow the progress of procedural legislation.<sup>207</sup>

It might be argued that the “liberal federal policy favoring arbitration agreements” shows that the FAA should exercise the

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202. See SZALAI, *supra* note 49, at 34–51, 184 (describing how early arbitration reform bills that evolved into the FAA emerged from the New York Chamber of Commerce's arbitration committee, formed initially in response to the failings of the New York courts revealed by the 1907 Bankers' Panic and recounting the celebration held at Mr. and Mrs. Vincent Astor's Fifth Avenue mansion upon the FAA's enactment); see also STASZAK, *supra* note 72, at 53 (noting that the FAA was supported by “leaders from regional chambers of commerce and leading members of the ABA”).

203. See, e.g., Mark Joseph Stern, *Neil Gorsuch Just Demolished Labor Rights*, SLATE (May 21, 2018), <https://slate.com/news-and-politics/2018/05/neil-gorsuch-demolished-labor-rights-in-epic-systems-v-lewis.html> (describing the *Epic Systems* decision as “a frontal attack on the New Deal” that “effectively legalizes wage theft”).

204. See *supra* text accompanying notes 112–16.

205. See, e.g., Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System”*, N.Y. TIMES, Nov. 2, 2015, at A1.

206. See *infra* Appendix A.

207. Pub. L. No. 115-74, 131 Stat. 1243 (2017); see David L. Noll, *The Dangerous Consequences of Repealing the CFPB's Arbitration Rule*, REG. REV. (Nov. 6, 2017), <https://www.theregreview.org/2017/11/06/noll-repealing-arbitration-rule>.

gravitational pull exercised by super-statutes.<sup>208</sup> But that judicially recognized policy is an interpretation of the FAA alone. As the Court reasoned in *Moses H. Cone*, “Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements.”<sup>209</sup> It does not purport to describe the FAA’s relationship to *other* laws.

There, of course, remains the fact that “the Supreme Court has construed the FAA broadly, with a breadth sweeping well beyond the statute’s plain meaning and the probable expectations of its framers in 1925.”<sup>210</sup> But this is not evidence that the FAA occupies a privileged position in federal law under an accepted theory of statutory interpretation. It is, rather, evidence that the Court has interpreted the FAA dynamically and aggressively, to address perceived problems with civil litigation in U.S. courts.

The Supreme Court’s interpretive creativity in cases such as *Southland*, *Mitsubishi*, and *Concepcion* may be evidence of the general approach it is likely to take toward future arbitration conflicts, assuming that its membership remains stable and that its arbitration jurisprudence is not disrupted by legal or political shocks. But the Court’s past creativity is neither a reliable nor normatively attractive guide to the FAA’s relationship to other laws. The Court’s arbitration decisions have been characterized by shifting coalitions of Justices and a peculiar combination of statutory literalism and Burger-Court purposivism.<sup>211</sup> Although the current majority has solidified around an anti-class-action reading of the FAA, there is reason to think that majority will not hold in the long term.<sup>212</sup>

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208. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

209. *Id.* But see *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 481 (1989) (noting the Court’s “current strong endorsement of the federal statutes favoring this method of resolving disputes”). Justice Kennedy’s opinion for the Court in *Rodriguez de Quijas* did not cite any statutes other than the FAA that favor resolving legal disputes through arbitration.

210. See Eskridge & Ferejohn, *supra* note 89, at 1260.

211. See generally *Moses*, *supra* note 49, at 122–54 (analyzing the Court’s arbitration cases).

212. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632–33 (2018) (Thomas, J., concurring) (following Justice Thomas’s *Concepcion* concurrence); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 353 (2011) (Thomas, J., concurring) (advancing an idiosyncratic interpretation of the FAA that preempts laws regulating arbitral collective action waivers while rejecting the majority’s reliance on “purposes-and-objectives pre-emption”); Ronald Mann, *Argument Analysis: Justices Dubioius About Enforcing Arbitration Agreements for Transportation Workers*, SCOTUSBLOG (Oct. 3, 2018), <http://www.scotusblog.com/2018/10/>

More fundamentally, that the Court in past cases “has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act” is not a license for it to continue to do so in the future.<sup>213</sup> Decisions interpreting the FAA to allow arbitration of statutory claims, preempt state law, and immunize procedural choices from judicial second-guessing oversight do not answer the questions of statutory interpretation presented by conflicts between the FAA and substantive regulatory statutes. To answer those questions, the Court will be required to reconcile the FAA with other statutes that bear on the enforceability of agreements to arbitrate. The expansive, textually-unconstrained mood of the Court’s past decisions is no reason for it to avoid deciding those cases on the merits, using traditional tools of statutory interpretation.

In short, there is no legitimate reason for concluding that the FAA occupies a special place in federal law. The statute says nothing to indicate that it takes precedence over other laws, the Court’s arbitrability cases deal with a different problem, and the FAA lacks the defining characteristics of a super-statute. Instead, as *McMahon* recognized, the FAA’s rules of dispute resolution procedure function “[l]ike any statutory directive.”<sup>214</sup>

### III. THE EFFECT OF OTHER LAWS

The prior Part demonstrated that the FAA establishes default rules governing the status of arbitration agreements and that the FAA does not enjoy a special place in federal law. Once these points are recognized, the question is when another statute modifies the FAA.

Under ordinary interpretive principles, that question depends on the text, structure, and purpose of statutes that bear

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argument-analysis-justices-dubious-about-enforcing-arbitration-agreements-for-transportation-workers/ (describing Chief Justice Roberts’s and Justice Gorsuch’s defection from the “pro-arbitration” position in *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), *cert. granted*, 138 S. Ct. 1164 (2018)). See generally *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (rejecting practice of “invalidat[ing] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law” on the ground that it is unconstitutional).

213. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring) (“[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”).

214. *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

on the use of arbitration in particular domains and on those statutes' functional relationship to the FAA.<sup>215</sup> In particular, a statute that is more specific than the FAA—or that was enacted after the FAA and conflicts irreconcilably with it—supersedes the FAA under the specific-over-general and last-in-time canons.<sup>216</sup>

Those principles show that the FAA is not only modified by statutes that *expressly* address the status of arbitration in particular domains—a point that is widely accepted in the doctrine and scholarship—but also is *impliedly* modified by a wide range of federal laws. There is, however, an important category of statutes that do not modify the FAA's default rules. In contrast to most scholarship that has considered the question, this Article shows that statutes that merely charge an agency with administering a statute in general terms—the subject of the Supreme Court's *Chevron* decision—do not modify the FAA.

This Part describes the statutes that expressly and impliedly modify the FAA. Part IV then turns to *Chevron* and explains why it is irrelevant to agencies' authority to regulate arbitration.

#### A. EXPRESS QUALIFICATIONS

##### 1. Statutes Expressly Addressing the Validity, Enforceability, or Revocability of Agreements to Arbitrate

The statutes that most obviously modify the FAA are those that expressly address the validity, enforceability, or revocability of agreements to arbitrate. For example, the Patent Act amendments noted above provide that, while parties may agree to arbitrate patent infringement claims, an arbitration award resolving infringement claims is not enforceable until it is delivered to the Patent and Trademark Office.<sup>217</sup>

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215. See, e.g., *Epic Sys. Corp.*, 138 S. Ct. at 1621–32 (relying on these guides to statutory meaning to analyze the NLRA's relationship to the FAA); *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2237–42 (2014) (same; Lanham Act and Federal Food Drug and Cosmetics Act).

216. See *infra* notes 218–20.

217. See 35 U.S.C. § 294 (2012). Similarly, the Food, Conservation, and Energy Act of 2008 provides that “[a]ny livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision.” 7 U.S.C. § 197c(a) (2012). And the 2010 Dodd-Frank Act provides: “No residential mortgage loan . . . may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy

“[I]t is a commonplace of statutory construction that the specific governs the general.”<sup>218</sup> And when laws enacted at different times irreconcilably conflict, the later law controls.<sup>219</sup>

Under these principles, statutes such as the Patent Act take precedence over the FAA. These statutes conflict with the FAA insofar as they require a result other than enforcement of arbitration agreements according to their terms. But they generally were enacted after the FAA. And they are more specific than the FAA, both in terms of their literal language and the problem that they address. Thus, the statutes control where they apply.<sup>220</sup>

## 2. Statutes that Delegate Authority to Regulate Arbitration to an Administrative Agency

Only slightly more complicated than statutes that expressly address the validity, revocability, or enforceability of specific agreements to arbitrate are statutes that delegate authority to an administrative agency or executive department to regulate the use of arbitration. For instance, Section 1028(b) of the Dodd-Frank Act provides that the CFPB, “by regulation, may prohibit or impose conditions or limitations” on consumer financial companies’ use of arbitration if the bureau finds doing so “is in the public interest and for the protection of consumers.”<sup>221</sup> Dodd-Frank Section 921 similarly authorizes the Securities Exchange Commission to regulate the use of arbitration by securities brokers and dealers.<sup>222</sup>

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or settling any claims arising out of the transaction.” 15 U.S.C. § 1639c(e)(1) (2012).

218. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *see also* SCALIA & GARNER, *supra* note 179, at 183 (explaining that the general/specific canon recognizes that “the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence” and that “the particular provision is established upon a nearer and more exact view of the subject than the general, of which it may be regarded as a correction.” (quoting 3 Jeremy Bentham, *A Complete Code of Laws, in THE WORKS OF JEREMY BENTHAM* 210 (John Bowring ed., 1843))).

219. *Watt v. Alaska*, 451 U.S. 259, 266 (1981).

220. *See, e.g., Oldham v. O.K. Farms, Inc.*, 177 F. Supp. 3d 1319, 1320 (E.D. Okla. 2016) (refusing to enforce an arbitration clause that was invalid under the Food, Conservation, and Energy Act of 2008); *Nationstar Mortg., LLC v. West*, 785 S.E.2d. 634, 641 n.14 (W. Va. 2016) (noting that as a result of the Dodd-Frank Act’s prohibition of arbitration agreements in mortgage loan contracts, “mandatory arbitration clauses can no longer be included in residential home loans”).

221. 12 U.S.C. § 5518(b) (2012).

222. 15 U.S.C. § 78o(o) (2012) (“The Commission, by rule, may prohibit, or

These statutes post-date the FAA and are more specific than it. Thus, they qualify the FAA for the same reasons that statutes that expressly address the enforceability of specific arbitration agreements do so.<sup>223</sup> Compared to statutes that directly address the status of arbitration agreements, they differ only in that they delegate regulatory authority to an administrative agency or department instead of legislating directly. That is a common design choice in modern regulatory legislation, whose constitutionality has been accepted since the late New Deal.<sup>224</sup>

Critics have argued that statutes which allow an agency to regulate the use of arbitration violate the non-delegation doctrine because they authorize an institution other than Congress to amend the FAA.<sup>225</sup> But that argument misunderstands what statutes such as Section 1028(b) of the Dodd-Frank Act do. That section authorizes the CFPB to regulate uses of arbitration that

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impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.”). Under the Securities Exchange Act, “[t]he term ‘broker’ means any person engaged in the business of effecting transactions in securities for the account of others.” 15 U.S.C. § 78c(a)(4)(A). A “‘dealer’ means any person engaged in the business of buying and selling securities . . . for such person’s own account through a broker or otherwise.” *Id.* § 78c(a)(5)(A).

223. See *supra* notes 218–20.

224. See *Yakus v. United States*, 321 U.S. 414, 424 (1944) (“The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.”); DAVID EPSTEIN & SHARYN O’HALORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 115–16 (1999) (surveying statutes that delegate regulatory authority to executive branch institutions in the post-World War II era).

225. See John Villa & Ryan Scarborough, *The Law of Unintended Consequences: How the CFPB’s Unprecedented Legislative Authority and Enforcement Approach Has Invited Increasing Challenges*, 35 BANKING & FIN. SERVICES 22, 26 (2016) (suggesting that Congress “abdicated” its constitutional responsibilities in delegating authority to regulate arbitration to the CFPB). See generally *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472–76 (2001) (summarizing modern non-delegation doctrine); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (cataloguing ways in which non-delegation concerns influence statutory interpretation and judicial review of agency actions).

are generally allowed under the FAA.<sup>226</sup> Such a statute no more amends the FAA than one authorizing an agency to regulate anti-competitive trade practices amends the provision of the Coinage Act providing that U.S. currency is legal tender for all debts, public and private.<sup>227</sup> In both cases, a cross-cutting statute establishes general rules of play for the market. A more specific, later-enacted statute qualifies parties' freedom of action by authorizing an agency to regulate forms of contracting that, in Congress's view, create risks that require regulation. Regulation that operates in this manner is not a problem of constitutional dimensions, but the stuff of ordinary administrative law.

### 3. The Relevance of Statutes that Expressly Modify the FAA

Although statutes that expressly qualify the FAA do not present difficult interpretive issues, critics of agency arbitration regulation invoke them to argue that if Congress wishes to restrict parties' freedom to arbitrate or authorize an agency to regulate arbitration, it "knows how to override the FAA."<sup>228</sup> Like the argument that the FAA functions as a super-statute, this argument seeks to narrow or eliminate the circumstances in which other laws bear on agreements to arbitrate, again through a rule requiring Congress to speak clearly to displace the FAA's defaults.<sup>229</sup>

An initial problem with this argument is that it fails to account for the many statutes that impliedly modify the FAA by establishing rules governing primary conduct.<sup>230</sup> As discussed below, scores of statutes limit parties' freedom to arbitrate on terms of their own choosing by establishing substantive rights

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226. See 12 U.S.C. § 5518(b) (2012) ("The Bureau, by regulation, may *prohibit or impose conditions or limitations* on the use of an agreement . . . providing for arbitration of any future dispute between the parties . . ." (emphasis added)).

227. Compare 31 U.S.C. § 5103 (2012) ("United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues."), with 15 U.S.C. § 45(a)(2) (authorizing the FTC to prevent parties doing business in interstate commerce "from using unfair methods of competition").

228. Brief Amici Curiae of Law Professors in Support of Petitioners at 7, 9, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285) ("[A] federal statute will not be interpreted to forbid arbitration of claims within its ambit unless it does so *expressly* . . .").

229. See Brief for the United States as Amicus Curiae Supporting Petitioners at 9, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (No. 16-285).

230. See *infra* note 244 and accompanying text.



that must be respected in arbitration. The most persuasive explanation is that those statutes impliedly modify the FAA's requirement that agreements to arbitrate be enforced according to their terms.<sup>231</sup>

The more fundamental problem with the argument is that it places a burden on Congress that makes no sense when the development of federal arbitration law is viewed in historical context.<sup>232</sup> For most of the twentieth century, there was no reason for Congress to expressly address how new regulatory legislation modified the FAA. It was not until the mid-1980s that the Supreme Court reinterpreted the FAA to allow arbitration of federal statutory claims that arose out of actions in the United States,<sup>233</sup> not until the 1990s that the Court accepted arbitration agreements contained in boilerplate attached to standard form contracts of adhesion,<sup>234</sup> and not until the past decade that the Supreme Court delineated the extent of contract drafters' control over the procedures used in arbitration.<sup>235</sup> Understandably fail-

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231. See *supra* note 217 and accompanying text.

232. See *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 178 (2008) (holding that when interpreting a statute, a federal court "must take into account its contemporary legal context" (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 698–99 (1979))).

233. See *Shearson/Am. Express Inc. v. McMahan*, 482 U.S. 220, 241 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

234. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) (enforcing an arbitration clause in "a standard form franchise agreement for the operation of a Subway sandwich shop in Montana"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (enforcing arbitration clause contained in "a lifetime 'Termite Protection Plan'"). The Supreme Court did not explicitly accept the enforceability of arbitration clauses in standard form consumer contracts until *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). Relying on the Seventh Circuit's deeply controversial decision in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), Justice Scalia's opinion for the Court proclaimed "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346–47.

235. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236–37 (2013) (concluding that an arbitration agreement's effects on plaintiffs' ability to assert a claim for violation of the Sherman Act were not a defense to its enforcement); *Concepcion*, 563 U.S. at 343 (FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."). *But cf.* *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572–73 (2013) (recognizing an arbitrator's authority to conduct class proceedings where agreement that is silent on class arbitration gives arbitrator all the powers of a court).

ing to anticipate that parties could require arbitration of statutory claims and agree to arbitrate through standard form boilerplate, lawmakers were content for most of the twentieth century to legislate substantive rights and policies. It was only *after* the revolution in the Court's FAA jurisprudence—a shift in the background rules of dispute resolution procedure that originated in the Supreme Court, not Congress—that Congress began to address arbitration expressly in statutes such as the Dodd-Frank Act.<sup>236</sup>

#### B. IMPLIED QUALIFICATIONS

Because of the dynamic just described, the majority of statutes that modify the FAA will not do so expressly, but impliedly. Precisely when a statute impliedly qualifies the FAA is contested. As Part I noted, some courts have concluded that a substantive regulatory statute allows an administrative agency to regulate uses of arbitration that negatively impact the statute, while other courts deny that regulatory statutes have this effect.<sup>237</sup> Legal uncertainty over the circumstances in which substantive regulatory statutes qualify the FAA is a focal point in cases such as *Epic Systems* as well as in battles over the Trump administration's efforts to deregulate arbitration.<sup>238</sup>

Applying ordinary principles of statutory interpretation, this section demonstrates that a federal statute impliedly qualifies the FAA in four circumstances: (1) when the statute establishes rules governing parties' primary conduct; (2) when the statute establishes specific procedures or remedies for statutory claims; (3) when the statute authorizes an administrative agency to police regulated parties' contracting to prevent a harm that Congress determined warrants regulation; and (4) when the statute charges an agency with implementing a specific statutory policy that is affected by the use of arbitration.

In each of these circumstances, ordinary interpretive principles show that the substantive regulatory statute modifies the FAA's default rules of dispute procedure. In the third and fourth scenarios, agency regulation limiting the use of arbitration

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236. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting) (observing that statutes which expressly address the use of arbitration were "enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court").

237. See *supra* notes 114–16 and accompanying text.

238. See *supra* note 100 and accompanying text; *supra* note 212.

draws its authority from statutes that qualify the FAA's defaults.

### 1. Statutes Governing Primary Conduct

The first situation where a statute impliedly qualifies the FAA is when it lays down rules governing primary conduct such as Title VII's prohibition of discriminatory employment practices.<sup>239</sup> An agreement to arbitrate might purport to bar parties from asserting claims for violations of those rules.<sup>240</sup> Alternatively, the arbitration agreement itself might violate the conduct-regulating rule—say, by instructing the arbitrator to discriminate against women.<sup>241</sup> And a party seeking to compel arbitration might contend that the agreement is valid and enforceable by reason of FAA Section 2.<sup>242</sup>

It is a mainstay of the Supreme Court's arbitration jurisprudence, however, that substantive statutory rights survive the switch from litigation to arbitration.<sup>243</sup> In *Mitsubishi*, the Court reasoned that “a party does not forgo the substantive rights afforded by the statute” by agreeing to arbitrate statutory claims; it “only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>244</sup> In so holding, *Mitsubishi* approached arbitration as if it were merely another court, one that follows the traditional choice-of-law principle that a court may apply its own procedures in cases governed by another sovereign's substantive law.<sup>245</sup>

Why do substantive rights survive the switch from litigation to arbitration? One might argue that following the applicable

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239. 42 U.S.C. § 2000e-2(a)(1) (2012) (providing that it is “an unlawful employment practice” for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”).

240. *Cf. Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (describing arbitration rules that required employees to follow notice procedures that were not required by law).

241. *Cf. EEOC v. Doherty Enters.*, 126 F. Supp. 3d 1305, 1307 (S.D. Fla. 2015) (discussing the EEOC's position that an employer's use of arbitration formed part of a broader pattern of employment discrimination).

242. *See generally* Federal Arbitration Act, 9 U.S.C. § 2 (2012).

243. *See Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013).

244. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

245. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1977) (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”).

substantive law is simply inherent in what arbitration *is*.<sup>246</sup> This argument posits that when Congress provided in the FAA that an arbitration agreement shall be “valid, irrevocable, and enforceable,” it adopted a quasi-judicial model of arbitration and impliedly instructed arbitrators to follow the law.<sup>247</sup>

But the suggestion that Congress adopted this understanding of arbitration in the FAA does not stand up to scrutiny. A central historical rationale for arbitration was to allow parties to resolve disputes without observing legal “formalities.”<sup>248</sup> And arbitration could only perform this function if the arbitrator were free to resolve disputes according to extra-legal standards.<sup>249</sup> Decisions from the nineteenth and early twentieth centuries thus described arbitrators operating essentially free of law: “Arbitrators are a law unto themselves and may decide according to their views of justice.”<sup>250</sup> In her study of the nineteenth century origins of mandatory securities arbitration, Professor Jill Gross

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246. See generally Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 45 (1999) (noting that modern arbitration procedures increasingly follow a “judicialized model,” which resembles litigation); Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459 (1996) (“[L]itigation and securities arbitration have become mirror images of one another.”); Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433, 1438–39 (1996) (discussing the Supreme Court’s acceptance of securities arbitration procedures as “sufficiently capable” of protecting statutory rights).

247. Federal Arbitration Act, 9 U.S.C. § 2 (2012); cf. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) (“In the absence of contrary indication, we assume that when a statute uses such a term, Congress intended it to have its established meaning.”).

248. See Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 602 (1934); cf. Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 151 (2011) (“[N]ineteenth century arbitration served two distinct purposes—to provide courts with adjuncts and to allow parties to make their own arrangements for resolving disputes. Because the former purpose brought arbitrators into closer union with judges, arbitrator rulings were subject to review for legal errors. In contrast, common law arbitrations were treated as inventions of the disputing parties. Therefore, courts only reviewed these awards for gross procedural defects, such as arbitrator corruption.”).

249. Phillips, *supra* note 250, at 602.

250. *Mayberry v. Mayberry*, 28 S.E. 349, 349 (N.C. 1897); cf. *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339, 361 (N.Y. Ch. 1817) (“If every award must be made conformable to what would have been the judgment of this Court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied.”). Julius Cohen adopted a similar view testifying in favor of the FAA: “[T]he right of freedom of contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own

concluded that the New York Stock Exchange required members to arbitrate customer disputes “to ensure that industry norms would be enforced, even if those norms were unlawful and not enforceable in court, and secondarily to provide a rapid resolution of a dispute whose value changed quickly as the stock market rose or fell.”<sup>251</sup> Viewed against the backdrop of this historical usage, the 1925 FAA cannot plausibly be read as adopting a quasi-judicial model of arbitration.<sup>252</sup> “Arbitration,” as known in the early twentieth century, did not necessarily entail fidelity to law.

Even if the FAA does not adopt a judicial model of arbitration, one could argue that every arbitration agreement contains an implied term directing the arbitrator to follow the applicable substantive law.<sup>253</sup> On this view, the arbitrator applies relevant substantive law not because doing so is inherent in the nature of arbitration, but because the parties have directed the arbitrator to do so. But this argument is also ahistorical.<sup>254</sup> And it does not explain why arbitrators must respect substantive rights even when the arbitration agreement directs them to resolve disputes according to a nonlegal standard, as *Mitsubishi* contemplated and many courts have held.<sup>255</sup>

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fashion.” *Arbitration of Interstate Commercial Disputes*, *supra* note 51, at 18 (testimony of Julius Cohen).

251. Jill Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 176 (2016).

252. See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (“[Arbitration] is not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes. . . . It is not a proper remedy for what we may call casual questions—questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law.”). As noted, Cohen is considered an architect of the FAA. See *supra* note 56.

253. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.”).

254. See *supra* note 220 and accompanying text.

255. *Mitsubishi*, 473 U.S. at 637 n.19 (“[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”); see also, e.g., *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 335–36 (4th Cir. 2017) (refusing to enforce arbitration agreement that required claims against payday lender to be resolved using tribal law because agreement effectively waived federal Racketeer Influenced and Corrupt Organizations Act); *Graham Oil Co. v. ARCO Prod. Co.*, 43 F.3d 1244, 1247–48 (9th Cir. 1994) (refusing to enforce arbitration clause that waived party’s “statutorily-mandated right to recover reasonable attorney’s fees” under the federal Petroleum Marketing Practices Act).

Instead of reflecting the nature of arbitration or terms of the parties' agreement, the fact that federal statutory rights survive the switch from litigation to arbitration reflects the operation of ordinary principles of statutory interpretation. Under those principles, a statute that addresses a specific problem such as the prevalence of job discrimination takes precedence over a cross-cutting statute that deals in general terms with the procedures used to resolve legal disputes.<sup>256</sup> The last-in-time principle leads to the same conclusion.<sup>257</sup> If an agreement to arbitrate directs the arbitrator to discriminate against women, the FAA and Title VII command irreconcilably conflicting results.<sup>258</sup> Because Title VII postdates the FAA, Title VII controls.<sup>259</sup>

The fact that laws governing primary conduct qualify the FAA explains why the debate between the Justices in *Epic Systems* focused on the meaning of the right to engage in concerted activity under the Norris-LaGuardia Act and NLRA rather than that right's relationship to the FAA.<sup>260</sup> Justice Gorsuch's opinion for the Court reasoned that because the right to engage in concerted activities "appears at the end of a detailed list of activities" dealing with union organizing and collective bargaining in Section 7 of the NLRA, that right stops at the courthouse door.<sup>261</sup> Like the activities that precede it, the right to engage in concerted activities "serve[s] to protect things employees 'just do' for

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256. See *supra* note 218.

257. See *supra* text accompanying note 216.

258. See Federal Arbitration Act, 9 U.S.C. § 2 (2012).

259. The fact that federal conduct-regulating statutes qualify the FAA does not explain why those statutes apply in international arbitrations that are not governed by the FAA, or why state substantive rights survive the switch from litigation to arbitration. See *supra* text accompanying note 81; *supra* note 164 and accompanying text; *supra* text accompanying notes 246–48. With respect to the former question, *Mitsubishi* suggested, somewhat implausibly, that ex post review at the award-confirmation stage would ensure that international arbitrators applied federal regulatory statutes in transnational disputes. See *Mitsubishi*, 473 U.S. at 638 ("Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."). Perhaps the best explanation for the applicability of state substantive rights in arbitration is that, under traditional federalism principles, a clearer congressional statement than those that appear in the FAA would be necessary for the FAA to override state substantive rights. See generally *Morris v. Hobart*, 39 F.3d 1105, 1112 (10th Cir. 1994) (noting that principles of federalism "militate against" the Court's jurisdiction over contract actions because they "are traditionally reserved for states to resolve").

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

261. *Id.* at 1625.

themselves in the course of exercising their right to free association in the workplace, rather than ‘the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.’”<sup>262</sup> Dissenting, Justice Ginsburg countered that a coercive “waiver” of the right to engage in forms of aggregate dispute resolution that are permitted by generally applicable law is the precise type of exploitative agreement that Norris-LaGuardia and the NLRA aim to prevent.<sup>263</sup> Those acts reflect Congress’s concern that “the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor.”<sup>264</sup> Following seventy-five years of judicial and administrative precedent, Justice Ginsburg concluded that the NLRA prevents employers from interfering with employees’ right to “pursue joint, collective, and class suits related to the terms and conditions of their employment” through individual employment agreements that purport to deny employees the power to function as a collective.<sup>265</sup>

On the merits, Justice Ginsburg has the better of the debate over the meaning of the right to engage in concerted activities.<sup>266</sup> But for present purposes, the important point involves that right’s relationship to the FAA’s rules of dispute resolution procedure. If the NLRA in fact guaranteed a right to engage in collective dispute resolution to the extent permitted by generally applicable procedural rules, as Justice Ginsburg contended, that

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262. *Id.* (quoting *NLRB v. Alternative Entm’t, Inc.*, 858 F.3d 393, 414–15 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

263. *Id.* at 1635–36 (Ginsburg, J., dissenting).

264. *Id.* at 1635 (quoting 29 U.S.C. § 102 (2012)).

265. *Id.* at 1637.

266. As Justice Ginsburg observed, an individual employment agreement that waives the right to engage in collective dispute resolution via an undertaking to arbitrate disputes on an individual basis is strikingly similar to the yellow-dog contracts that the Norris-LaGuardia Act and NLRA § 7 were enacted to address. *Id.* See generally Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917–1932*, 30 LAB. HIST. 251, 270–74 (1989). Those statutes refer to “concerted activity” in general terms rather than specifically addressing dispute resolution procedure because Congress could not have anticipated all the ways that employers might interfere with employees’ concerted activity. *Id.* Indeed, it was not until the early 2000s that the legal foundations for barring collective action via arbitration were established. See David L. Noll, *With Arbitration Case, SCOTUS Can Protect Both Federal Law, Workers’ Rights*, HILL (Oct. 7, 2017), <http://thehill.com/opinion/judiciary/354386-with-arbitration-case-scotus-can-protect-both-federal-law-workers-rights> (so arguing).

right would take precedence over the FAA, as even Justice Gorsuch concedes.<sup>267</sup> It is only because the NLRA confers no such right that the *Epic Systems* Court concluded employees' obligation to arbitrate is controlled by the FAA alone.<sup>268</sup>

Of course, an agency that seeks to regulate the use of arbitration on the ground that it violates a statutory right must have authority to enforce the right that the agency regulation vindicates.<sup>269</sup> If, say, the NLRB asserted authority to regulate uses of arbitration that violate the antitrust laws, its action would be invalid because the NLRB is not charged with enforcing the antitrust laws.<sup>270</sup> And agency arbitration regulation must comply with generally applicable administrative law requirements such as being supported by substantial evidence and reflecting a reasoned exercise of the agency's delegated authority.<sup>271</sup> If these requirements are satisfied, agency regulation based on the agency's conclusion that arbitration violates a substantive right it enforces is a valid exercise of the agency's authority under a substantive regulatory statute.

## 2. Litigation-Structuring Statutes

The same principles that explain why conduct-regulating rules apply in arbitration explain why statutes governing the dispute-resolution process—such as those governing the burden

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267. *Epic Sys.*, 138 S. Ct. at 1632 (“Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act.”).

268. *Id.*

269. See 5 U.S.C. § 706(2)(C) (2012) (directing reviewing courts to “hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”).

270. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151–52 (2002) (NLRB may not order relief for actions made illegal by statutes it does not administer). See generally 29 U.S.C. § 160(a) (2012) (providing that the Board is “empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce”).

271. See 5 U.S.C. § 706(2)(E) (directing reviewing courts to set aside agency action “unsupported by substantial evidence”); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (establishing the principle that, when reviewing agency action, the court must consider “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment”); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (defining substantial evidence as “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”).



of proof,<sup>272</sup> remedies,<sup>273</sup> and attorneys' fee-shifting<sup>274</sup>—do so as well. Compared to conduct-regulating laws, it is more difficult to explain these statutes' applicability in arbitration on the ground that they create substantive rights that apply in any forum where a litigant seeks to vindicate her legal rights.<sup>275</sup> Nevertheless, the Supreme Court has stated—and lower courts have expressly held—that they apply in arbitration.<sup>276</sup>

The reason is that these statutes are more specific than the FAA's cross-cutting command that agreements to arbitrate are valid, enforceable, and irrevocable. For instance, the Civil Rights Attorneys' Fees Act provides that “[i]n any action or proceeding to enforce [specified civil rights laws], the court, in its discretion,

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272. See, e.g., 42 U.S.C. § 2000e-2(m) (2012) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

273. See, e.g., 15 U.S.C. § 15(a) (2012) (providing that a prevailing plaintiff in an action to enforce the antitrust laws “shall recover threefold the damages by it sustained, and the cost of suit”).

274. See, e.g., 42 U.S.C. § 1988(b) (“In any action or proceeding to enforce [specified civil rights laws] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity such officer shall not be held liable for any costs, including attorney’s fees, unless such action was clearly in excess of such officer’s jurisdiction.”).

275. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1977). *But see, e.g.*, *Browning-Ferris Indust., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277–80 (1989) (concluding that a state-law cap on damages is “substantive” for purposes of the *Erie* doctrine and the Rules of Decision Act); *Guar. Tr. Co. v. York*, 326 U.S. 99, 112 (1945) (same; state-law statute of limitations).

276. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (“In enacting such measures [as the Sherman Act’s treble damages provision], Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice.”); *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (holding that an arbitration agreement may not waive the right to treble damages and attorney’s fees under federal antitrust laws); *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 217 (3d Cir. 2003) (finding that where arbitration agreement modifies parties’ responsibility to pay for attorney’s fees, “final responsibility for attorney’s fees should be governed by the appropriate statute”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 682 (Cal. 2000) (“The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed.”). *But cf.* *Carbajal v. H & R Block Tax Servs., Inc.*, 372 F.3d 903, 906–07 (7th Cir. 2004) (stating in dictum that “no general doctrine of federal law prevents people from waiving statutory rights (whether substantive or procedural) in exchange for other things they value more, such as lower prices or reduced disputation”).

may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."<sup>277</sup> Similarly, the Sherman Act provides that a prevailing plaintiff "shall recover threefold the damages by it sustained, and the cost of suit."<sup>278</sup> While the statutes' reference to the "court" might be read as a signal that they do not apply in arbitration, their obvious intent is to establish statutory remedies that apply in any action seeking to impose civil liability.<sup>279</sup>

This contrasts with procedural laws that do *not* apply in arbitration, such as the Federal Rules of Civil Procedure. The rules provide that they "govern the procedure in all civil actions and proceedings *in the United States district courts*,"<sup>280</sup> and they are promulgated under a statute which gives the U.S. Supreme Court "the power to prescribe general rules of practice and procedure and rules of evidence *for cases in the United States district courts . . . and courts of appeals*."<sup>281</sup> Explicitly limited to the district courts, the rules do not establish procedures that apply in any proceeding where a litigant seeks to impose civil liability.

### 3. Statutes that Subject Regulated Parties' Contracting to Agency Oversight

A third category of statutes that impliedly qualify the FAA are those that authorize an agency or department to police regulated parties' contracting. For example, amendments to the Higher Education Act of 1965 authorize the Education Department to promulgate language that schools participating in the federal direct loan program must incorporate into their student agreements "to protect the interests of the United States and to promote the purposes of [the direct loan program]."<sup>282</sup> Prior to the change of administrations, the DOE invoked this authority to prohibit schools from mandating arbitration of predatory lending claims and using other contract provisions that had contributed to the collapse of several for-profit colleges.<sup>283</sup> Similarly,

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277. 42 U.S.C. § 1988(b).

278. 15 U.S.C. § 15(a).

279. *Cf. CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100–01 (2012) (reasoning that statutory disclosure provisions referring to an "action," "class action," and "court" reflected Congress's intent that regulated parties be subject to civil liability for statutory violations).

280. FED. R. CIV. P. 1.

281. 28 U.S.C. § 2072(a) (2012).

282. 20 U.S.C. § 1087d(a)(6) (2012).

283. Student Assistance General Provisions, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (final rule). The rule responded to Corinthian Colleges' successful use of

1975 amendments to the Securities Exchange Act give the Securities Exchange Commission (SEC) authority to oversee rules of securities self-regulatory organizations.<sup>284</sup> Acting under this authority, the SEC has long regulated mandatory arbitration in the securities industry.<sup>285</sup>

Like statutes that create substantive rights or address the structure of dispute resolution, these statutes were enacted to address specific problems. For instance, the Higher Education Amendments seek to protect the public fisc and to ensure that money spent via direct loans is only used for bona fide educational expenses.<sup>286</sup> And the statutes generally post-date the FAA. Thus, they qualify the FAA for the same reasons that statutes which create substantive statutory rights or statutory procedures do so.<sup>287</sup> They are more specific than the FAA because they address the problem that is more particularized than common law courts' general hostility to arbitration. And to the extent that they irreconcilably conflict with the FAA, they take precedence because they were enacted later in time.

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arbitration clauses to obtain the dismissal of proposed class actions alleging that it had engaged in predatory lending. *See, e.g.*, *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928 (9th Cir. 2013); *Montgomery v. Corinthian Coll., No. 11-C-365*, 2011 WL 1118942, at \*1 (N.D. Ill. Mar. 25, 2011). The Department concluded that Corinthian's arbitration requirements, with other contractual liability protections, effectively immunized it from liability for predatory lending. 81 Fed. Reg. at 75,926.

284. Pub. L. No. 94-29, § 16, 89 Stat. 97 (1975) (codified at 15 U.S.C. § 78s(b)(2)(C)) (2012) ("The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.")

285. Rule 12,200 of the Financial Industry Regulatory Authority, which took effect following SEC approval, generally requires broker-dealers and their customers to arbitrate all disputes, subject to a carve-out for securities class actions that are filed in court. FINRA CODE, RULE 12,200 (2008), [http://finra.complinet.com/en/display/display\\_viewall.html?rbid=2403&element\\_id=607&record\\_id=609](http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=607&record_id=609) (requiring arbitration of all disputes); FINRA CODE, RULE 12,204 (2008) [http://finra.complinet.com/en/display/display\\_viewall.html?rbid=2403&element\\_id=4906&record\\_id=5174&filtered\\_tag=\(class action carve-out\)](http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4906&record_id=5174&filtered_tag=(class%20action%20carve-out)); Gross, *supra* note 92, at 512 ("Since virtually all broker-dealers are members of FINRA, 'no broker-dealer can escape the self-regulatory system.'" (quoting NORMAN S. POSER & JAMES A. FANTO, *BROKER-DEALER LAW AND REGULATION* § 4.01[C] (4th ed. 2007))).

286. *See* Student Assistance General Provisions, 81 Fed. Reg. at 75,933 (observing that the 2016 Borrower Defense Rule sought to further DOE's statutory mandate to "protect student loan borrowers while also protecting the Federal and taxpayer interests").

287. *See supra* notes 218–20 and accompanying text.

Opponents of agency arbitration regulation contend that statutes which subject regulated parties' contracting to agency oversight do not allow an agency to regulate arbitration, because the statutes do not specifically mention arbitration and the decision to regulate arbitration conflicts with the liberal federal policy favoring arbitration.<sup>288</sup> But these arguments ignore the logic of statutory provisions that grant agencies authority to police regulated parties' contracting. The point of these provisions is to circumscribe parties' freedom of contract because Congress judged that their actions give rise to a problem that warrants regulation.<sup>289</sup> On the basis of that congressional judgment, the statutes prototypically give an agency general authority over regulated parties' contracting. That power not only includes authority to restrict regulated parties' choices regarding dispute resolution, but also choices concerning price, conditions of performance, remedies, warranties, and other matters. It makes no sense to insist that Congress spell out agencies' authority to restrict the use of arbitration in so many terms, because this would defeat Congress's judgment that regulated parties' contracting should be subject to a second look to ensure that it does not create the harms Congress sought to prevent.

The test of the validity of arbitration regulation promulgated under a statute that authorizes an agency to police regulated parties' contracting, then, is simply whether the agency adhered to the terms of the substantive statute it acted under and followed generally applicable administrative-law requirements. For instance, the DOE has authority under the Higher Educa-

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288. Complaint at ¶¶ 100–12, *California Ass'n of Private Postsecondary Sch. v. DeVos*, No. 1:17-cv-00999, 2018 WL 5017749 (D.D.C. May 24, 2017) (No. 17-999). On the "freedom of contract" protected by the FAA, see *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) ("By its terms . . . the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them."); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").

289. See 20 U.S.C. § 1087(d)(a)(2) (2012) (providing that a participation agreement between DOE and a college seeking to enroll in the direct loan program shall "provide assurances that the institution will comply with requirements established by the Secretary relating to student loan information with respect to loans made under this part"). See generally 2 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 86–90 (1971) (noting that regulation is often a "negative process" wherein agencies "react" to the initiatives of companies and private parties).

tion Act to prescribe contractual provisions that it deems necessary to promote the purposes of the direct loan program and protect the interests of the United States.<sup>290</sup> The 2016 Borrower Defense Rule unquestionably satisfies that standard.<sup>291</sup> Following the collapse of Corinthian Colleges, DOE studied the conditions that contributed to Corinthian's collapse and concluded that contractual restrictions on private civil litigation allowed the school to engage in predatory lending for longer than otherwise would have been possible.<sup>292</sup> The Borrower Defense rule operates within the space that the Higher Education Amendments carve out from the FAA's default procedural regime.

#### 4. Statutes that Delegate Authority to an Agency to Promulgate Subsidiary Administrative Policy

The final category of statutes that impliedly qualify the FAA are those that charge an agency with implementing subsidiary administrative policy under a regulatory statute.<sup>293</sup> For example, the Nursing Home Reform Act of 1987 directs CMS to promulgate regulations governing nursing homes that receive money from Medicare and Medicaid, and "to assure that requirements which govern the provision of care in skilled nursing facilities . . . are adequate to protect the health, safety, welfare, and rights of residents."<sup>294</sup> Other statutes delegate policymaking authority to an agency by authorizing the agency to grant exemptions or waivers from generally applicable regulatory requirements. For

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290. See *supra* note 247 and accompanying text.

291. See *supra* note 81 and accompanying text.

292. See Student Assistance General Provisions, 81 Fed. Reg. 75,926, 75,933 (Nov. 1, 2016) ("Since the collapse of Corinthian, the Department has received a flood of borrower defense claims stemming from the school's misconduct. In order to streamline and strengthen this process, we believe it is critical that the Department proceed now in accordance with its statutory authority, as delegated by Congress, to finalize regulations that protect student loan borrowers while also protecting the Federal and taxpayer interests.").

293. This term originates in *Yakus v. United States*, 321 U.S. 414, 425 (1944) ("It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.").

294. 42 U.S.C. §§ 1395i-3(f)(1), 1396r(f)(1) (2012). The Act additionally provides that nursing homes must "protect and promote" eleven enumerated rights, including rights "established by the [HHS] Secretary." *Id.* §§ 1395i-3(c)(1)(A)(xi), 1396r(c)(1)(A)(xi).

instance, ERISA authorizes the Labor Department to grant individual or classwide exemptions from the fiduciary obligations that the statute imposes on investment advisors.<sup>295</sup>

By now, it should be obvious why statutes that authorize an agency to promulgate subsidiary administrative policy qualify the FAA. Those statutes reflect Congress's judgment that a problem warrants regulation through federal legislation.<sup>296</sup> Rather than set regulatory standards directly—a task that may be impossible or politically unattractive for lawmakers—Congress delegates.<sup>297</sup> When the agency reasonably concludes that the use of arbitration should be limited or prohibited because arbitration negatively impacts the agency's statutory mandate, it acts under a statute that impliedly modifies the FAA.<sup>298</sup>

That a statute authorizes an agency to prescribe subsidiary administrative policy by *waiving* statutory requirements does not change the conclusion that the statute impliedly modifies the FAA. Like an affirmative grant of regulatory authority, a grant of waiver authority reflects Congress's judgment that a problem in a particular area warrants regulation. Waiver authority differs from a grant of affirmative regulatory authority only in the baseline that the agency operates against. Instead of (or in addition to) authorizing the agency to establish affirmative standards, the statute authorizes the agency to establish conditions in which those requirements are waived.<sup>299</sup>

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295. 29 U.S.C. § 1108(a) (2012).

296. See Charles Grassley, *The Resurrection of Nursing Home Reform: A Historical Account of the Recent Revival of the Quality of Care Standards for Long-Term Care Facilities Established in the Omnibus Reconciliation Act of 1987*, 7 ELDER L.J. 267, 268 (1999) (describing the problems that Congress sought to address in the Act).

297. See *Yakus*, 321 U.S. at 424 (“The Constitution . . . does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.”). On the considerations that inform Congress's choice to delegate or directly establish regulatory standards by law, see EPSTEIN & O'HALLORAN, *supra* note 224, at 1–10.

298. See *Chamber of Commerce v. Hugler*, 231 F. Supp. 3d 152, 209 (N.D. Tex. 2017) (concluding that arbitration restrictions in the DOL fiduciary rule “fit[] within the DOL's authority to grant ‘conditional or unconditional’ exemptions [under ERISA], and do not violate the FAA”).

299. On the policy logic of statutes that grant agencies waiver authority, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism*, 103 CALIF. L. REV. 565 (2015).

Perhaps the most common objection to the conclusion that statutes such as the Nursing Home Reform Act qualify the FAA is that those statutes are no more or less specific than the FAA.<sup>300</sup> Regulating arbitration under a substantive regulatory statute is thus said to involve a paradox of specificity. The substantive statute is more specific than the FAA with respect to uses of arbitration that impact its objectives (*e.g.*, ensuring the health and safety of nursing home residents). But the FAA is more specific than the substantive statute with respect to dispute resolution procedure.

When reconciling overlapping statutes, however, courts do not look exclusively to the *language* used in conflicting statutes but also to the breadth or specificity of the *problem* that motivated Congress to legislate.<sup>301</sup> A leading case illustrating this principle is *Radzanower v. Touche Ross & Co.*<sup>302</sup> At issue was the relationship between Section 94 of the National Bank Act, which provides that “a national bank may be sued only in the district in which it is established,”<sup>303</sup> and Section 27 of the Securities Exchange Act of 1934, which provides that an action to enforce the Act “may be brought in any . . . district [where the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business.”<sup>304</sup> In securities fraud suits against national banks, the two statutes gave rise to a paradox of specificity similar to the one in disputes over agency arbitration regulation. The Bank Act is more specific about the venue

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300. See Deacon, *supra* note 31, at 1039 (“The FAA . . . is likely to be the earlier statute but also more general than subject-area-specific statutes that might be read to limit it. . . . That the specific controls the general does not end the matter, however. After all, one might object that the FAA is actually the more specific statute in that it mentions arbitration whereas the statute being invoked by the agency (by hypothesis) does not.”); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (“[T]he question before us is whether courts must enforce particular arbitration agreements according to their terms. And it’s the Arbitration Act that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn’t mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction.” (dictum)).

301. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (“In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. . . . [T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” (citing *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998))).

302. 426 U.S. 148 (1976).

303. *Id.*

304. 15 U.S.C. § 78aa (2012).

for suits against banks, while the Exchange Act is more specific about the venue for securities-fraud claims.<sup>305</sup> Neither statute addresses its effect on the other.

Confronted with this paradox, the Supreme Court held that the Bank Act's venue provision controlled. The Court observed that—

When Congress enacted the narrow venue provisions of the National Bank Act, it was focusing on the *particularized problems* of national banks that might be sued in the state or federal courts. When, 70 years later, Congress enacted the Securities Exchange Act, its focus was on the objective of promoting fair dealing in the securities markets, and it enacted a general venue provision applicable to the broad universe of potential defendants subject to the prohibitions of that Act.<sup>306</sup>

Because the problem Congress addressed in the National Bank Act was more “particularized” than the one it addressed in the Securities Act, the Bank Act controlled.

Analyzed this way, the paradox presented by agency arbitration regulation under a provision that charges an agency with promulgating subsidiary administrative policy evaporates. The FAA and the pertinent substantive statute may be equally specific at a linguistic level. But the substantive statute almost always deals with a “particularized problem[]” that is more specific than the problem that motivated the FAA.<sup>307</sup> For instance, Congress adopted the Nursing Home Reform Act “amidst stories of unnecessary death and suffering in nursing homes” to “reform the nursing home industry, improve the quality of nursing home care, and protect the residents of long-term care facilities.”<sup>308</sup> That objective is more particularized than the FAA's general objective of overriding the judicial hostility to arbitration reflected in the common law non-enforceability and revocability doctrines.<sup>309</sup>

Of course, an arbitration regulation promulgated under a statutory provision that directs the agency to promulgate subsidiary administrative policy can be challenged on the ground that arbitration does not actually have effects that implicate the agency's statutory mandate. Thus in *American Health Care Ass'n v. Burwell*, a Mississippi district court concluded that CMS had not compiled an adequate administrative record to support its view that mandatory arbitration threatened nursing home

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305. *Radzanower*, 426 U.S. at 152.

306. *Id.* at 153–54 (emphasis added).

307. *Id.* at 154.

308. Grassley, *supra* note 296, at 268.

309. *See supra* text accompanying note 54.



residents' health and safety.<sup>310</sup> Regulation under a statute that charges an agency with elaborating subsidiary administrative policy can also be challenged on the ground that the agency did not comply with requirements such as considering material, non-frivolous comments and giving a reasoned analysis of its regulatory approach.<sup>311</sup>

But again, this is the stuff of ordinary administrative law. Agency arbitration regulation under a statute that charges the agency with implementing subsidiary administrative policy may or may not satisfy standard administrative-law requirements. Because the statute the agency acts under impliedly qualifies the FAA, the regulation does not fail for lack of statutory authority.

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In sum, ordinary principles of statutory interpretation show that the FAA's background rules of statutory interpretation are qualified by a range of federal statutes. Of course, there remains the possibility of genuine conflicts between the FAA and other laws, when principles of statutory interpretation do not answer whether the FAA or the other law prevails.<sup>312</sup> But in many scenarios relevant to agency arbitration, another statute expressly or impliedly qualifies the FAA's defaults. In addition to laws that expressly address arbitration, the FAA is qualified by laws governing primary conduct, laws that establish specific procedures and remedies for statutory claims, laws that charge an administrative agency with policing regulated parties' contracting, and laws that direct an administrative agency to promulgate subsidiary statutory policy. Between them, these statutes provide authority for a substantial swath of agency arbitration regulation.

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310. 217 F. Supp. 3d 921, 939 (N.D. Miss. 2016) (“[T]his court believes that CMS would be required to actually *prove* that this negative impact is occurring, with proof considerably more reliable than comments received from the public.”). The finding that CMS had failed to prove that arbitration harmed nursing home residents was striking in light of the district court's separate conclusions that arbitration serves as a tool for “pure delay” in nursing home litigation, and that the Long-Term Care Rule was “based upon sound public policy.” *Id.* at 928, 946.

311. See *Dana-Farber Cancer Inst. v. Hargan*, 878 F.3d 336, 345 (D.C. Cir. 2017); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

312. See *Anderson v. Credit One Bank, N.A.*, 884 F.3d 382, 391 (2d Cir. 2018) (concluding that a discharge injunction entered under § 524 of the Bankruptcy Code barred enforcement of a pre-dispute arbitration clause that related to core bankruptcy proceedings, because enforcing the clause conflicted with bankruptcy's fresh start policy).

#### IV. LAWS THAT DO NOT QUALIFY THE FAA: *CHEVRON* AND AGENCY ARBITRATION REGULATION

As the preceding Parts of this Article demonstrate, the FAA establishes default rules of dispute resolution procedure that apply unless it is modified by another law. Those defaults are modified by a range of statutes that expressly or impliedly modify the FAA and provide authority for many of the agency arbitration regulations that have been issued over the past decade. There is, however, an important category of statutes that do not qualify the FAA. These are the type of statutes addressed by the Supreme Court's landmark decision in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*<sup>313</sup>

This Part completes this Article's theory of the FAA's relationship to other federal laws by explaining why what one might call "*Chevron* statutes" do not modify the FAA. Sections A and B review *Chevron* and explain why its holding that an agency may speak with the force of law depends on the circumstances the Supreme Court confronted in *Chevron*, in which an agency acts under a single statute that it is charged with administering. Section C then explains why a *Chevron*-type statute, standing alone, does not qualify the background rules established by the FAA, and thus does not provide authority for an agency charged with administering the statute to regulate arbitration in ways that conflict with the FAA.

##### A. THE *CHEVRON* DECISION

The backdrop to *Chevron* is familiar but worth repeating to clarify exactly what the Court there decided. In the decades following World War II, Congress enacted a large number of statutes that to a significant extent define the modern federal regulatory state.<sup>314</sup> The statutes prototypically created an administrative agency and charged it with implementing policy under a statute, or charged an existing agency or department with doing so.<sup>315</sup> But lawmakers often neglected to specify which

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313. 467 U.S. 837 (1984).

314. For histories of Congress's activity in the post-War era, see generally LAWRENCE FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* Part IV (3d ed. 2005); JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* (2014); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1272-94 (1986); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2078-82 (1990).

315. See, e.g., Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 101, 61 Stat. 136, 146 (carrying forward the NLRA provision providing that

institution—the courts or the implementing agency (or agencies) charged with administering a statute—was authorized to interpret statutory gaps and ambiguities.<sup>316</sup> Both courts and administrative agencies claimed the authority to interpret indeterminate statutory provisions—courts because “say[ing] what the law is” is an archetypal judicial function, and agencies, because administering a statute requires the agency to interpret it and many agency interpretations will never be reviewed in court.<sup>317</sup> Prior to *Chevron*, the Supreme Court’s doctrine on the status of agency statutory interpretation was inconsistent and contradictory.<sup>318</sup>

At issue in *Chevron* were 1977 amendments to the Clean Air Act that directed the Environmental Protection Agency (EPA) to administer a new licensing program for states that had failed to bring air pollution within limits required by the 1970 Clean Air Act.<sup>319</sup> The amended Clean Air Act directed EPA to perform a long list of tasks and authorized the EPA administrator “to prescribe such regulations as are necessary to carry out his functions” under the statute.<sup>320</sup> But the statute did not specify EPA’s authority to interpret the statutory term “major stationary

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the Board “is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce”) (codified at 29 U.S.C. § 160(a) (2012)); Civil Rights Act of 1964, Pub. L. 88-352, § 602, 78 Stat. 241, 252 (codified at 42 U.S.C. § 2000d-1 (2012)) (“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of Section 601 [prohibiting discrimination in federally assisted programs] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.”); Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690 (codified at 42 U.S.C. § 7521(a)) (“The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment causes or contributes to, or is likely to cause or to contribute to, air pollution which endangers the public health or welfare.”).

316. See 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.1 155–57 (5th ed. 2010).

317. See Henry Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 26 (1983) (arguing “[i]t is in light of agency competence to make law that the ‘duty of the judicial department to say what the law is’ must be evaluated”).

318. See 1 PIERCE, *supra* note 316, at 155.

319. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified at scattered sections of 42 U.S.C. ch. 85).

320. 42 U.S.C. § 7601(a)(1).

source[.]”<sup>321</sup> That mattered because if every piece of pollution-producing equipment (e.g., each smokestack) were considered a “source,” EPA could not authorize states to treat power plants and factories as a single source of pollution—an idea known as the “bubble concept.”<sup>322</sup> Regulatory reformers favored the bubble concept because it encouraged firms to find cost-effective ways of reducing pollution; environmentalists opposed the bubble concept because it allowed firms to put off adopting state-of-the-art pollution control technology.<sup>323</sup>

*Chevron* famously held that when Congress enacts a statute such as the 1977 Clean Air Amendments, it impliedly delegates authority to the implementing agency to interpret the statute provided that the agency interpretation is reasonable.<sup>324</sup> Justice John Paul Stevens’s opinion for the Court began by noting that Congress might “explicitly [leave] a gap for the agency to fill,” which evidenced “an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”<sup>325</sup> Here, the agency’s “legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>326</sup> Congress, however, might also delegate authority to the agency via an “implicit rather than explicit” delegation by enacting indeterminate language or leaving a “gap” in a statute that it “charged [an agency] with responsibility for administering.”<sup>327</sup> Here, the agency’s “reasonable” interpretation is controlling.<sup>328</sup>

The theoretical rationale for this holding is the subject of considerable debate.<sup>329</sup> To briefly summarize, the “intentionalist” reading of *Chevron* posits that most questions about how an

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321. *Id.* § 129(b) (codified at 42 U.S.C. § 7502(c)(5)).

322. *See Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984).

323. *See* Jody Freeman, *The Story of Chevron: Environmental Law and Administrative Discretion*, in *ADMINISTRATIVE LAW STORIES* 171, 179–81 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

324. *Chevron*, 467 U.S. at 843.

325. *Id.* at 843–44.

326. *Id.* at 844. This is the standard of review prescribed by § 706 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012).

327. *Chevron*, 467 U.S. at 865.

328. *Id.* at 866.

329. *E.g.*, David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201 (2001); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735 (2002); Antonin Scalia,

agency-administered statute is “interpreted” are actually questions of subsidiary statutory policy.<sup>330</sup> As between the courts and an agency charged with administering a statute, the agency is better positioned to make policy under the statute because of its expertise and accountability to democratic politics via the president.<sup>331</sup> Congress knows or should be presumed to know that agencies are better policymakers than courts. Courts therefore read indeterminate statutory provisions as delegating interpretive authority to the agency.

By contrast, the “structural” reading of *Chevron* posits that a statutory ambiguity or gap creates space for the agency to exercise its background authority to make regulatory policy through rulemaking or agency adjudication.<sup>332</sup> The agency’s interpretation is controlling because Congress generally authorized the agency to make policy under the statute, and the agency regulation works in the interstices of the specific provisions Congress enacted.

Whatever its theoretical rationale, the conclusion that indeterminate statutory language impliedly delegates regulatory authority to the agency charged with implementing a statute yielded *Chevron*’s familiar two-step process for judicial review of agency statutory interpretation. “First, always, is the question whether Congress has directly spoken to the precise question at issue.”<sup>333</sup> If Congress has not addressed that issue, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>334</sup>

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*Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273 (2011); Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight,” 112 COLUM. L. REV. 1143 (2012); Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580 (2006); Sunstein & Vermeule, *supra* note 131; *see also* Evan J. Criddle, *Chevron’s Consensus*, 88 B.U. L. REV. 1271, 1272 (2008) (“*Chevron* does not rest exclusively upon any of these competing rationales. Instead, *Chevron* forges a pragmatic consensus between several leading theories, none of which can be properly considered redundant.”).

330. *See, e.g.*, Seidenfeld, *supra* note 329.

331. *See, e.g.*, Breyer, *supra* note 329, at 370; Scalia, *supra* note 329, at 517; Sunstein & Vermeule, *supra* note 131, at 925–27.

332. *See, e.g.*, ESTREICHER & NOLL, *supra* note 147, at 590–91; Strauss, *supra* note 329, at 1145.

333. *Chevron*, 467 U.S. at 842.

334. *Id.* at 843.

B. *CHEVRON'S* LIMITS

Although *Chevron* clarified that Congress may delegate interpretive authority to an agency by enacting indeterminate language, many statutes fall outside of its scope.<sup>335</sup> In *United States v. Mead Corp.*, the Supreme Court clarified that a statute only delegates interpretive authority to an agency if “the agency’s generally conferred authority and other statutory circumstances [reveal] that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law.”<sup>336</sup> *Mead* focused on the procedures that Congress authorized an agency to use in promulgating administrative policy. While declining to lay down a bright-line rule, the Court intimated that a statute must authorize the agency to engage in rulemaking or adjudication to impliedly delegate interpretive authority to the agency.<sup>337</sup>

Another “statutory circumstance” that affects the agency’s authority to speak with the force of law is the place of the agency-administered statute in broader body of federal law. As Professors Thomas Merrill and Kristin Hickman observe in a leading article on “*Chevron’s* domain,” *Chevron* addresses scenarios in which “a single agency is responsible for developing and enforcing policy under a statute.”<sup>338</sup> It is in this context, *Chevron* holds, that indeterminate statutory language delegates interpretive authority to the administering agency.

On either the intentionalist or structural reading of *Chevron*, the single-statute single-agency structure is crucial to *Chevron’s* applicability. Consider a statute that multiple agencies administer.<sup>339</sup> On the intentionalist reading, all of the agencies charged with administering the statute have an interpretive edge over the courts. That Congress opted for agency administra-

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335. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001); see also Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

336. 533 U.S. 218, 229 (2001).

337. *Id.* at 229 (“We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.”).

338. See Merrill & Hickman, *supra* note 335, at 893.

339. See generally *City of Arlington v. FCC*, 133 S. Ct. 1863, 1883–84 (2013) (Roberts, C.J., dissenting) (describing phenomenon of “statutes that parcel out authority to multiple agencies, which ‘may be the norm, rather than an exception’” (quoting Jacob Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 208 (2006))).

tion does not answer *which* of these agencies' views should control. The structural reading of *Chevron* points to the same conclusion. While indeterminate language creates space in which an agency can exercise its background authority to make regulatory policy, multiple agencies have background lawmaking authority. And the mere fact that Congress has left space for the exercise of that background authority does not indicate which agency's view should control.<sup>340</sup>

Based on this reasoning, courts have not accorded controlling weight to an agency interpretation when more than one agency administers a statute,<sup>341</sup> and where an agency seeks deference for its interpretation of a government-wide statute that is not administered by that agency alone.<sup>342</sup> Under this line of precedent, no agency speaks with the force of law when it interprets the FAA as opposed to a statute the agency administers. This conclusion follows from the basic problem *Chevron* addresses: how interpretive authority is allocated between the courts and a single agency that is "charged with the administration of the statute in light of everyday realities."<sup>343</sup>

### C. *CHEVRON*-TYPE STATUTES AS AUTHORITY FOR AGENCY ARBITRATION REGULATION

Although the statutes described in sections A and B provide authority for much agency arbitration regulation, executive branch actors have also relied on *Chevron*-type statutes as authority to regulate arbitration in ways that conflict with the FAA. For example, President Obama's Fair Pay and Safe Workplaces Executive Order<sup>344</sup> directed federal contracting officers to

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340. *See id.* at 1884 ("When presented with an agency's interpretation of such a statute, a court cannot simply ask whether the statute is one that the agency administers.").

341. *See, e.g.,* Grant Thornton, LLP v. Office of the Comptroller of the Currency, 514 F.3d 1328, 1331 (D.C. Cir. 2008); Proffitt v. FDIC, 200 F.3d 855, 863 n.7 (D.C. Cir. 2000); Rapaport v. Dep't of Treasury, 59 F.3d 212, 215–17 (D.C. Cir. 1995); Wachtel v. Office of Thrift Supervision, 982 F.2d 581, 585 (D.C. Cir. 1993). *But see* 1185 Ave. of Americas Assocs. v. Resolution Tr. Corp., 22 F.3d 494, 497 (2d Cir. 1994) (affording less than "full deference" to an agency's interpretation of a statute administered by multiple agencies).

342. *See, e.g.,* AT&T, Inc. v. FCC, 582 F.3d 490, 496 (3d Cir. 2009), *rev'd on other grounds*, 131 S. Ct. 1177 (2011); ACLU v. Dep't of Def., 543 F.3d 59, 66 (2d Cir. 2008).

343. *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

344. Exec. Order No. 13,673, 79 Fed. Reg. 150 (July 31, 2014), *amended by* Exec. Order No. 13,683, 79 Fed. Reg. 241 (Dec. 16, 2014), *repealed* Pub. L. No. 115-111, 131 Stat. 2273; *see* Federal Acquisition Circular 2005–90, 81 Fed. Reg.

ensure that certain federal contractors did not require their employees to arbitrate claims for sexual harassment and assault, as is generally allowed by the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*.<sup>345</sup> Challengers contended that the order was precluded by the FAA.<sup>346</sup> The Department of Justice responded that the Fair Pay Order was a valid exercise of the president's authority under the Procurement Act of 1949, which authorizes the president in general terms to prescribe policies and directives to "provide the Federal Government with an economical and efficient system" for purchasing goods and services.<sup>347</sup>

The Procurement Act does not authorize the president to regulate arbitration in so many words, nor does it authorize the president to police regulated parties' contracting or direct the president to implement a specific statutory policy that arbitration negatively impacts. Instead, the Act addresses a problem (the need for a federal procurement system) which is at least as broad as the one addressed by the FAA (the hostility to arbitration reflected in the common law revocability and unenforceability doctrines). DOJ's position was that the Procurement Act's *Chevron*-style delegation—its general direction to administer a statutory program—authorized the president to displace the FAA's background rules of dispute resolution procedure.<sup>348</sup>

But there is a crucial difference between the statutory circumstances *Chevron* addresses and those implicated by an arbitration regulation such as the Fair Pay order. Whereas *Chevron* addresses a *single* agency's interpretation of a *single* statute it administers, the Fair Pay order implicates two statutes—the

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165 (Aug. 25, 2016) (specifying contractual language that contracting agencies must use to comply with the Order).

345. 532 U.S. 105, 112 (2001) (holding that FAA § 1's "employment" exception applies only to employees "actually engaged in the movement of goods in interstate commerce").

346. See *Associated Builders & Contractors v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at \*1 (E.D. Tex. Oct. 24, 2016).

347. 40 U.S.C. §§ 101, 121(a) (2012) ("The President may prescribe policies and directives that the President considers necessary to carry out this subtitle.").

348. Defs.' Opp. to Plaintiffs' Motion for Temp. Restraining Order and Preliminary Injunction, *Associated Builders & Contractors v. Rung*, No. 1:16-cv-00425-MAC, 2016 WL 8292054 (E.D. Tex. Oct. 20, 2016) (No.16-cv-00425) ("As courts . . . have recognized, the Procurement Act authority is broad." (citing *AFL-CIA v. Kahn*, 618 F.2d 784, 792 (D.C. Cir. 1979) (Procurement Act gives the president "direct and broad-ranging authority"))).



Procurement Act and the FAA. And those two statutes give conflicting signals about the extent of the delegate's authority over arbitration. As in the typical *Chevron* context, the statute the president administers supports his authority to regulate. But the FAA tugs in the opposite direction.

This difference undermines the inference that Congress impliedly delegated authority to the president to speak with the force of law concerning arbitration in the Procurement Act. On the intentionalist reading of *Chevron*, the executive's relative advantages as a policymaker vis-à-vis the courts do not support the inference that Congress intended the White House to make subsidiary statutory policy that carries the force of law, because one of the statutes that bears on the Fair Pay Order's validity—the FAA—does not invite any institution apart from the courts to make subsidiary statutory policy. Nor do the statutes relevant to the Fair Pay order show that the agency has authority to regulate arbitration. The Procurement Act certainly delegates regulatory authority to the president. But as it is no more specific than the FAA, it does not create space in which the president may make subsidiary policy. The FAA fills the field.

The conclusion that a *Chevron*-type statute such as the Procurement Act does not allow agencies to regulate arbitration is at odds with much scholarly writing on the question.<sup>349</sup> In arguing otherwise, scholars generally rely on the following syllogism: (1) a substantive regulatory statute's effect on the FAA is often ambiguous; (2) *Chevron* teaches that an agency's reasonable in-

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349. See, e.g., Deacon, *supra* note 31, at 1035 (arguing “that, as a general matter, agencies should have authority to reasonably interpret their statutes in order to regulate arbitration” under *Chevron*); *Deference and the Federal Arbitration Act*, *supra* note 31, at 908 (arguing that *Chevron* deference is “warranted for the [National Labor Relations] Board’s finding that the NLRA provides employees with a substantive statutory right to pursue legal claims collectively, which would render the arbitration agreements waiving that right unenforceable under the FAA”); Fisk, *supra* note 31, at 181 (same); Lloyd, *supra* note 31, at 25 (arguing that FTC regulations restricting the use of arbitration under the Magnuson-Moss Warranty Act are entitled to *Chevron* deference and take precedence over the FAA). *But cf.* Rebecca Hanner White, *Arbitration and the Administrative State*, 38 WAKE FOREST L. REV. 1283 (2003) (arguing that arbitrators are bound by agency statutory interpretations that are binding under *Chevron*, but not considering the extent of agencies’ authority to regulate arbitration under substantive regulatory statutes); Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 428, 431 (2012) (suggesting that while “several formidable arguments against deference deserve mention . . . portions of the NLRB ruling and FINRA Rules . . . remain eligible for *Chevron* deference”).

terpretation of a statute it administers is authoritative; therefore (3) if the agency charged with implementing a statute reasonably concludes that the statute modifies the FAA, the statute in fact modifies the FAA.

For instance, an important recent contribution to the debate over agency arbitration regulation contends that “[w]hether there is a contrary congressional command [qualifying the FAA] . . . is a question, essentially, of the meaning of the non-FAA statute being invoked.”<sup>350</sup> Because *Chevron* holds that “Congress intends the agency and not the courts to be the principal interpreters of [indeterminate] legislation,” an implementing agency’s reasonable view of “whether that statute ‘evinces’ an intention to preclude a waiver of judicial remedies for the statutory rights at issue” is authoritative.<sup>351</sup> “Congress has chosen the agency and not the court as the body to resolve the ambiguity. And such a delegation [includes], by its nature, the power to disrupt background legal rules within prescribed bounds.”<sup>352</sup> On this view, an agency-administered statute standing alone may or may not qualify the FAA’s background rules of dispute resolution procedure. But once the statute’s meaning is established through a procedurally-proper agency interpretation, the statute may qualify the FAA.

This argument, however, depends on the agency’s interpretation qualifying for *Chevron* treatment. And for reasons just explained, the usual inference that indeterminate statutory language signals that Congress intended to delegate interpretive authority to the implementing agency does not hold when an agency invokes a *Chevron*-type statute to regulate arbitration. If the agency’s interpretation does not qualify for *Chevron* treatment, there is no basis for holding that an agency’s interpretation of a statute it administers is controlling—and no basis for saying that statute modifies the FAA.

It follows that the district court’s decision in *Associated Builders and Contractors of Southeast Texas* enjoining the Fair Pay and Safe Workplace Order’s arbitration rules for lack of statutory authority was correct.<sup>353</sup> The court there held that those rules were not based on a “congressional command that would

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350. Deacon, *supra* note 31, at 1036.

351. *Id.* at 1036–37 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

352. *Id.* at 1039.

353. *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at \*1 (E.D. Tex. Oct. 24, 2016).

override the requirement that arbitration agreements be enforced in accordance with their terms.”<sup>354</sup> Although the court’s order contains language suggesting that the FAA may only be modified by legislation that expressly addresses arbitration<sup>355</sup>—a proposition that Part III(b) showed is incorrect—the conclusion that the Procurement Act does not modify the FAA’s background rules of dispute resolution procedure correctly understands the relationship between the two statutes. The president’s policies implementing the Procurement Act may well carry the force of law on an ordinary *Chevron* analysis. But the Act’s sweeping delegation of authority to the president to run the federal procurement system does not qualify the FAA’s defaults.

### CONCLUSION

Regulation of arbitration by federal administrative agencies is a flashpoint in larger conflicts over the U.S. civil justice system. In an effort to address the costs of procedural and regulatory balkanization and blunt the impact of entrepreneurial plaintiffs’ litigation, the Supreme Court expanded the scope of arbitration under the FAA, eliminating constraints that limited arbitration’s impacts on federal regulatory policy for most of the twentieth century. As the use of arbitration increased, agencies charged with administering substantive regulatory statutes invoked those statutes to regulate the use of arbitration within their areas of authority. But agencies’ efforts to limit arbitration’s policy impacts have been plagued by persistent questions about agencies’ statutory authority. Those questions took on new importance following the 2016 election, as opponents of agency arbitration regulation—some now operating from within the agencies they previously attacked—invoked agencies’ supposed lack of authority to regulate arbitration as a justification for rolling back Obama-era arbitration regulations.

This Article offers a general theory of the legal question at the heart of disputes over agency arbitration regulation: how the FAA relates to other federal laws. The Article shows that the FAA functions as a statutory floor whose rules of dispute resolution procedure apply unless and until it is qualified by another law. Statutes that expressly qualify the FAA include those that specifically address the validity, revocability, and enforceability of arbitration agreements and those that delegate authority to

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354. *Id.* at \*14.

355. *See id.* (“Congress may choose to modify one statute with another and . . . it knows how to limit arbitration policies when it so desires.”).

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regulate arbitration to an administrative agency. Statutes that impliedly qualify the FAA include those that establish statutory rights and remedies, as the Supreme Court's FAA jurisprudence recognizes. But they also include statutes that authorize an agency to police regulated parties' contracting, and laws that charge an agency with implementing subsidiary administrative policy. Conspicuously absent from the list of statutes that qualify the FAA are *Chevron*-type statutes that charge an agency with administering a statutory scheme without directing the agency to implement a specific statutory policy. Although *Chevron* holds that such a statute delegates regulatory authority to the implementing agency, the statutory circumstances that this holding is based on are missing in the context of agency arbitration regulation.

The Article's theory has immediate implications for judicial review of the Trump administration's efforts to rollback Obama-era arbitration regulations, many of which are premised on the incorrect conclusion that the regulating agency lacks authority to regulate the use of arbitration under a substantive grant of regulatory authority. But the Article's theory is relevant beyond the current deregulatory moment. The FAA is less exceptional than supporters and critics of the Supreme Court's arbitration jurisprudence both tend to assume. Understanding this point is essential for evaluating conflicts such as *Epic Systems*. And it sheds light on the extent of agencies' authority to regulate arbitration when and if control of the executive branch returns to a pro-regulatory administration.

## APPENDIX A

POST-2007 ARBITRATION STATUTES<sup>356</sup>

| Title   | Summary   |
|---|---|
| Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234 § 11004, 122 Stat. 923 (2008)                     | Allows covered poultry farmers to opt out of arbitration agreements with poultry processors   |
| American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 § 1553, 123 Stat. 115 (2009)                    | Prohibits pre-dispute agreements to arbitrate whistleblower claims under Act  |
| Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 531(b)(1), 124 Stat. 1376 (2010) | Preempts state law restrictions on insurers' power to resolve disputes pursuant to contractual arbitration                          |
| Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 748, 124 Stat. 1376 (2010)       | Prohibits pre-dispute agreements to arbitrate commodities industry whistleblower claims   |
| Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 921, 124 Stat. 1376 (2010)       | Authorizes Securities Exchange Commission to regulate broker/dealers' use of arbitration  |
| Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 922, 124 Stat. 1376 (2010)       | Prohibits agreements requiring arbitration of securities whistleblower claims   |
| Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1028, 124 Stat. 1376 (2010)      | Authorizes Consumer Financial Protection Bureau to regulate consumer financial companies' use of pre-dispute arbitration agreements |

356. This table aims to gather all federal statutes that address the validity, enforceability, or revocability of pre-dispute agreements to arbitrate that were enacted between January 1, 2007, and May 1, 2018. The table excludes statutes providing for arbitration under the auspices of a court or agency, statutes that address arbitration of labor disputes, and those that provide for arbitration of claims involving the United States under an international agreement. The table was generated by searching ProQuest's database of public laws for statutes that mention the terms "arbitration" or "arbitrate" and reviewing the data manually to exclude false positives.

|   |   |
|---|---|
| Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1057(d), 124 Stat. 1376 (2010)   | Prohibits pre-dispute agreements to arbitrate consumer finance industry whistleblower claims  |
| Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 1414, 124 Stat. 1376 (2010)      | Prohibits pre-dispute arbitration agreements in mortgage loan contracts   |
| Department of Defense and Full-Year Continuing Appropriations Act, Pub. L. No. 112-10 § 8102, 125 Stat. 38 (2011) | Prohibits covered Defense Department contractors from requiring employees to arbitrate claims under Title VII of the Civil Rights Act of 1964 and claims for sexual assault and sexual harassment (Franken Amendment) |
| Consolidated Appropriations Act, Pub. L. No. 112-74 § 8101, 125 Stat. 786 (2012)                                  | Franken Amendment   |
| Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-6 § 8097, 127 Stat. 198 (2013)            | Franken Amendment   |
| Consolidated Appropriations Act, Pub. L. No. 113-76 § 8096, 128 Stat. 5 (2014)                                    | Franken Amendment   |
| Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235 § 8101, 128 Stat. 2130 (2014)         | Franken Amendment   |
| Consolidated Appropriations Act, 114-113 § 8097, 129 Stat. 2242 (2015)  | Franken Amendment   |
| Consolidated Appropriations Act, Pub. L. No. 115-31 § 8096, 131 Stat. 135 (2017)                                  | Franken Amendment   |
| Pub. L. No. 115-74, 131 Stat. 1243 (2017)   | Disapproves Consumer Financial Protection Bureau Arbitration Rule   |

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|--|---|
| Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act, Pub. L. No. 115-126 § 202, 132 Stat. 318 (2018) | Provides that the United States Center for Safe Sport may utilize arbitration to resolve allegations of sexual abuse within its jurisdiction but preserves victims' right to pursue civil remedies through the courts for personal injuries                   |
| Consolidated Appropriations Act, Pub. L. No. 115-141 § 8095 (2018)   | Franken Amendment   |
| Consolidated Appropriations Act, Pub. L. No. 115-141 § 7029 (g) (2018)   | Directs Secretary of Treasury to instruct the United States executive director of each international financial institution to require that institution is following best practices for protection of whistleblowers, including access to external arbitration |
| Consolidated Appropriations Act, Pub. L. No. 115-141 § 7058(b) (2018)  | Requires Secretary of State to ensure that Global Fund to Fight Aids follows best practices for protection of whistleblowers, including access to external arbitration  |

## APPENDIX B

AGENCY ARBITRATION REGULATION SINCE 2007<sup>357</sup>

| Agency & Regulation  | Date of last agency action | Summary  | Status   |
|--|----------------------------|--|--|
| Commodities Futures Trading Commission, Regulation 7.201   | Aug. 6, 2009               | Requires members of Chicago Board of Trade to arbitrate customer disputes. No class action carve-out   | In effect  |
| Department of Defense, Defense Federal Acquisition Regulation Supplement; Extension of Restrictions on the Use of Mandatory Arbitration Agreements | June 29, 2011              | Implements Franken Amendment prohibitions on defense contractors' use of mandatory arbitration   | In effect  |
| National Labor Relations Board, <i>D.R. Horton/Murphy Oil</i> rule   | Oct. 28, 2014              | Prohibits individually negotiated employment agreements that bar employees from joining together to assert claims in arbitration or litigation | Invalidated by Supreme Court in <i>Epic Systems Corp. v. Lewis</i> |

357. This table aims to gather all proposed or final agency actions regulating the use of arbitration that were announced between January 1, 2007, and May 1, 2018. The table excludes agency regulations that address arbitration under the auspices of a court or agency, regulations that address arbitration of labor disputes, and regulations that provide for arbitration of claims involving the United States under an international agreement. It was compiled by searching the Federal Register for documents that contain the terms "arbitration" or "arbitrate" and reviewing the results by hand to exclude false positives.



|  |               |   |   |
|--|---------------|---|---|
| Equal Employment Opportunity Commission, case-specific challenges to arbitration agreements used as part of a pattern or practice of employment discrimination | Nov. 21, 2014 | EEOC challenges mandatory arbitration agreement that agency contends was used as part of pattern and practice of employment discrimination                | Last complaint filed Nov. 21, 2014                |
| Executive Office of the President, Fair Pay and Safe Workplaces Executive Order  | Aug. 23, 2016 | Directs federal contracting officers to ensure that contractors do not mandate arbitration of claims for sexual assault and harassment                    | Repealed by Congress via Congressional Review Act |
| Department of Defense, Military Lending Act Regulation   | Aug. 26, 2016 | Prohibits covered creditors from mandating that military borrowers agree to arbitration   | In effect   |
| Consumer Financial Protection Bureau, Regulation Z Amendments  | Nov. 22, 2016 | Implements Dodd-Frank Act provision prohibiting arbitration clauses and waivers of statutory causes of action for loans secured by a residential dwelling | In effect   |

|   |               |   |   |
|---|---------------|---|---|
| Federal Communications Commission, Broadband Privacy Regulation     | Dec. 2, 2016  | Commits to initiating a rulemaking on use of mandatory arbitration in consumer contracts for broadband and other communications services                      | Proposed arbitration rulemaking never initiated. Broadband Privacy Regulation repealed by Congress via Congressional Review Act |
| Commodities Future Trading Commission, Whistleblower Awards Process | May 30, 2017  | Implements provision of Dodd-Frank Act that prohibits arbitration of whistleblower claims under section 23 of the Commodities Exchange Act                    | In effect   |
| Center for Medicaid and Medicare Services, Long-Term Care Rule      | June 6, 2017  | Prohibits nursing homes from including mandatory arbitration clauses in admission contracts   | Preliminarily enjoined. Amended rule proposed June 6, 2017  |
| Consumer Financial Protection Bureau, Arbitration Rule              | July 19, 2017 | Prohibits use of arbitration agreements to block class actions filed in public courts. Requires submission of data on arbitral filings and outcomes to Bureau | Repealed by Congress via Congressional Review Act   |

|  |               |   |  |
|--|---------------|---|--|
| Department of Education, Borrower Defense Rule | Oct. 24, 2017 | Prohibits schools that participate in federal direct loan program from mandating arbitration of students' claims or making use of arbitral class action waivers | In effect pursuant to judicial vacatur of interim rule proposing to postpone 2016 rule's effective date      |
| Department of Labor, Fiduciary Rule            | Nov. 29, 2017 | Requires retirement plan advisors to forego use of arbitral class action waivers to use compensation practices otherwise prohibited by ERISA                    | Effective date stayed pending agency reconsideration; vacated by U.S. Court of Appeals for the Fifth Circuit |

## APPENDIX C

HISTORICAL AGENCY ARBITRATION REGULATION<sup>358</sup>

| Agency & Regulation  | Summary   | Current status                        |
|--|---|---------------------------------------|
| Securities Exchange Commission, FINRA Arbitration Rules          | Carries forward New York Stock Exchange rules requiring arbitration of broker-dealer disputes subject to class action carve-out | In effect                             |
| Federal Trade Commission, Magnuson-Moss Warranty Act Regulations | Prohibits arbitration of breach of warranty claims under Magnuson-Moss Act  | In effect. Courts divided on validity |

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358. This table aims to gather all proposed or final agency actions regulating the use of arbitration that were announced before January 1, 2007. It was compiled through a review of the secondary literature.