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# EXPRESS PRECLUSION OF THE FEDERAL ARBITRATION ACT FOR ALL BANKRUPTCY-RELATED MATTERS

JOHN R. HARDISON<sup>†</sup>

## INTRODUCTION

At least since the early 1980s, the Supreme Court of the United States has taken a notably expansionist approach to the scope of the Federal Arbitration Act (“FAA”), steadfastly refusing to find exceptions to the enforceability of arbitration agreements.<sup>1</sup> The Court has rejected arguments that the Federal Arbitration Act’s mandate to enforce arbitration agreements is inapplicable to claims under the Sherman Act,<sup>2</sup> the Racketeer Influenced and Corrupt Organizations Act,<sup>3</sup> the Securities Exchange Act of 1934,<sup>4</sup> the Securities Act of 1933,<sup>5</sup> the Age Discrimination in Employment Act,<sup>6</sup> the Carriage of Goods by Sea Act,<sup>7</sup> the Credit Repair

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<sup>1</sup> See, e.g., Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 660 (2018) (“Since the 1980s, the Supreme Court has radically transformed and expanded the FAA’s reach, far beyond Congress’ original intent.”); Stephen A. Plass, *Federal Arbitration Law and the Preservation of Legal Remedies*, 90 TEMP. L. REV. 213, 216 (2018); Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 124 (2015) (“Starting in the 1980s, the Court has held that courts must apply a presumption of arbitrability when deciding such claims, the FAA applies to arbitration clauses in all agreements ‘involving commerce,’ and federal statutory claims are arbitrable as a matter of public policy unless Congress explicitly says they are not.”); Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 513 (2009); see also, e.g., *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) (“It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.”).

<sup>2</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

<sup>3</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

<sup>4</sup> *Id.* at 228–29.

<sup>5</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 477 (1989).

<sup>6</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991).

<sup>7</sup> *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995).

Organizations Act,<sup>8</sup> the Clayton Act,<sup>9</sup> or the National Labor Relations Act.<sup>10</sup> Indeed, the only case in which the Supreme Court had found an exception to the FAA for a federal statutory cause of action—1953's *Wilko v. Swan*<sup>11</sup> decision—was overruled in 1989.<sup>12</sup> Yet even in the face of this trend, every court of appeals<sup>13</sup> to have issued written opinions on the topic has found that federal courts exercising bankruptcy jurisdiction have authority to refuse to order arbitration or to stay a bankruptcy or bankruptcy-related proceeding in favor of arbitration, at least with respect to certain core bankruptcy issues.<sup>14</sup>

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<sup>8</sup> *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 95 (2012).

<sup>9</sup> *See generally* *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

<sup>10</sup> *See generally* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

<sup>11</sup> 346 U.S. 427, 438 (1953) (invalidating agreement for arbitration to the extent that it would have required arbitration of a claim under Section 12(2) of the Securities Act of 1933), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

<sup>12</sup> *Rodriguez de Quijas*, 490 U.S. at 484 (“We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.”).

<sup>13</sup> The Supreme Court has never directly addressed the applicability of the FAA to bankruptcy-related matters. One of the parties to the contract in the Court's decision in the arbitration case *Prima Paint Corporation* had filed for protection under Chapter 11 of the Bankruptcy Act of 1898, but neither party raised the issue, and the Supreme Court did not address it. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). It was the debtor-in-possession who sought to enforce the arbitration clause, not a third party or a creditor. *Id.* at 398–99. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the debtor, Soler, filed a petition under Chapter 11 of the Bankruptcy Code after the district court ordered arbitration of its claims against Mitsubishi. 473 U.S. 614, 620–21 (1985). The Supreme Court acknowledged that the arbitration proceeding “came to a halt . . . upon the filing by Soler of [its] petition for reorganization.” *Id.* at 623 n.12. But the effect of the bankruptcy stay was not an issue before the Supreme Court because Soler had sought and obtained a modification of the automatic stay permitting the appeal to go forward, asserting that “Supreme Court review of the case would be in the ‘best interest’ of the debtor estate.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 814 F.2d 844, 845 (1st Cir. 1987).

<sup>14</sup> *See, e.g.*, *Anderson v. Credit One Bank, N.A. (In re Anderson)*, 884 F.3d 382, 387, 392 (2d Cir. 2018); *Kirkland v. Rund (In re EPD Inv. Co., L.L.C.)*, 821 F.3d 1146, 1150 (9th Cir. 2016); *Phillips v. Congelton, L.L.C., (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 170 (4th Cir. 2005); *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 495, 500 (5th Cir. 2002).

However, these courts have relied on policy reasons alone,<sup>15</sup> finding no express textual support for the proposition that the Bankruptcy Code overrides the FAA.<sup>16</sup> This approach is inconsistent with rulings by the Supreme Court showing disfavor towards arguments of implied repeal<sup>17</sup> or statutory interpretation based solely on general notions of policy or equity.<sup>18</sup> Many of these court of appeals decisions also reference the “discretion” of the bankruptcy courts to not enjoin core bankruptcy matters based on conflict in policies,<sup>19</sup> which is difficult to reconcile with the Supreme Court’s statements that the FAA “leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”<sup>20</sup>

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<sup>15</sup> See, e.g., *U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass’n* (*In re U.S. Lines, Inc.*), 197 F.3d 631, 640 (2d Cir. 1999) (explaining that the FAA and the Bankruptcy Code “present[] a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution.” (citation omitted)).

<sup>16</sup> See, e.g., *Whiting-Turner Contracting Co. v. Elec. Mach. Enters.* (*In re Elec. Mach. Enters.*), 479 F.3d 791, 796 (11th Cir. 2007) (“find[ing] no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code” and therefore looking to “whether an inherent conflict exists between arbitration and the underlying purposes of the Bankruptcy Code”).

<sup>17</sup> There is a “‘stron[g] presum[ption]’ that repeals by implication are ‘disfavored’ and that ‘Congress will specifically address’ preexisting law when it wishes to suspend its normal operations in a later statute.” *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (quoting *United States v. Fausto*, 484 U.S. 439, 452–53 (1988), *superseded by statute*, Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990)).

<sup>18</sup> See, e.g., *Epic Sys.*, 138 S. Ct. at 1632 (criticizing dissent for “retreat[ing] to policy arguments” and concluding that the “policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written”).

<sup>19</sup> See, e.g., *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), 884 F.3d 382, 387 (2d Cir. 2018) (“If the bankruptcy court determines that arbitration would create a ‘severe conflict’ with the purposes of the Bankruptcy Code, it has discretion to conclude that ‘Congress intended to override the Arbitration Act’s general policy favoring the enforcement of arbitration agreements.’” (quoting *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006))).

<sup>20</sup> *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); see also Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 HARV. L. REV. 2296, 2304 (2004) (“There is no basis for the substantial discretion placed in courts by the current methodology. The FAA creates a mandatory binary framework: If a valid arbitration clause exists, arbitration must be ordered. If the FAA has been explicitly or impliedly repealed with respect to the type of claim raised, then arbitration cannot be ordered.”).

There is no need, however, for the courts to rely on general notions of policy, equitable considerations, or supposed equitable powers to find an exception to the FAA for bankruptcy-related matters. Congress has *expressly* authorized federal courts to hear all matters related to a bankruptcy case notwithstanding the FAA or any contractual agreement to arbitrate. Specifically, in the 1978 bankruptcy amendments—carried through in the current text under the 1984 amendments—Congress broadly granted original jurisdiction to the district courts, and by delegation the bankruptcy courts, over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.”<sup>21</sup>

While the Supreme Court has been hostile to implied repeal or preclusion of claims under one federal statute by another, the bankruptcy jurisdictional statute contains express language of preclusion, stating that the grant of jurisdiction shall be effective “notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts.”<sup>22</sup> Under this statutory authority, district courts exercising bankruptcy jurisdiction, and by delegation, bankruptcy courts, have express authority to hear all matters related to bankruptcy cases notwithstanding any arbitration agreement to the contrary.

In addition to the tenuous foundation of the lower courts’ policy-based approach, the approach is also in conflict with the bankruptcy statute in substance. First, the current approach is too narrow, giving no authority to bankruptcy courts to refuse to order arbitration of “non-core” matters even if related to a bankruptcy case and indeed not permitting bankruptcy courts to hear certain “core” bankruptcy matters. Second, the current approach places the burden upon the party opposing arbitration to demonstrate that a rare exception to the FAA is warranted. Instead, the jurisdictional grant gives original jurisdiction to federal courts to hear all matters related to bankruptcy cases, regardless of whether core or non-core. While a bankruptcy court may have authority to permit arbitration of such matters under

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<sup>21</sup> 28 U.S.C. § 1334(b) (2018).

<sup>22</sup> *Id.*

the doctrine of abstention,<sup>23</sup> or pursuant to statute<sup>24</sup> or rule,<sup>25</sup> the burden is on the party requesting arbitration to demonstrate that arbitration will not impede the rights of any party with an interest in the bankruptcy case. Importantly, that determination requires consideration of not only the rights of the counterparties to the arbitration agreement, but of all creditors and other parties with an interest in the bankruptcy estate. Because of the permanent and far-reaching effect of the bankruptcy proceeding—whether by statutory discharge or by the terms of a confirmed plan of reorganization<sup>26</sup>—the bankruptcy proceeding is generally the last and only opportunity for creditors to assert their claims and to share in the limited remaining assets of a bankruptcy debtor.<sup>27</sup> Through the structure of the Bankruptcy Code and related jurisdictional provisions, Congress has ensured that creditors will have notice and the opportunity to participate in matters affecting

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<sup>23</sup> See *infra* Part V; see also Patrick M. Birney, *Reawakening Section 1334: Resolving the Conflict Between Bankruptcy and Arbitration Through an Abstention Analysis*, 16 AM. BANKR. INST. L. REV. 619, 622–23 (2008) (suggesting that rather than viewing the FAA as restricting the ability of bankruptcy courts to hear matters unless arbitration is shown to inherently conflict with bankruptcy purposes, a “[more] appropriate analytical framework” to reconcile the two statutes is to see the grant of jurisdiction to the bankruptcy court as absolute unless permissive abstention is warranted under the authority to abstain expressly granted in the bankruptcy jurisdictional provisions).

<sup>24</sup> See 28 U.S.C. § 654 (2018) (authorizing, with certain exceptions, district courts to “allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent”).

<sup>25</sup> See FED. R. BANKR. P. 9019(c) (“On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.”).

<sup>26</sup> See, e.g., 11 U.S.C. § 524(a)(2) (2018) (noting that discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived”); 11 U.S.C. §§ 1123(b)(5), 1222(b)(2), 1322(b)(2) (2018). With certain exceptions, a bankruptcy plan of reorganization may “modify the rights of holders of secured claims . . . or of holders of unsecured claims.” § 1123(b)(5).

<sup>27</sup>

[D]ue to the impact on other creditors, consent should not be imputed even in debtor-derived claims. After all, a creditor who never signed an arbitration agreement may still have his recovery determined by arbitration, if another creditor has signed such an agreement and is allowed to enforce arbitration of his claims. Because the insolvent estate is finite and distributed pro rata to creditors, the arbitrator’s valuation of one creditor’s claim affects the recovery of other creditors as well. This effect is magnified if the arbitrated claim is entitled to priority and full payment before any payments are made on general claims.

Marianne B. Culhane, *Limiting Litigation over Arbitration in Bankruptcy*, 17 AM. BANKR. INST. L. REV. 493, 497 (2009).

the estate before their contract and property rights against the debtor are terminated.<sup>28</sup> If an arbitration agreement is enforced, and the creditors were not parties to the agreement, the creditors' due process rights may be jeopardized.<sup>29</sup>

The courts of appeals so far have either not considered the importance of the bankruptcy jurisdictional provisions to the issue or have not fully recognized the nature of and reasons Congress had for creating such jurisdictional structure. In particular, they have overemphasized the 1984 amendments and the "core"- "non-core" distinction contained within those amendments, which goes to the allocation of authority between district courts and bankruptcy courts, and not to the overall grant of bankruptcy jurisdiction to the federal courts. They have also drawn unwarranted conclusions from the Supreme Court's decisions on the interaction between the FAA and other federal statutes, none of which had language like the bankruptcy provisions. Finally, they have too narrowly described bankruptcy policies and thus too narrowly described the scope of the bankruptcy exception to the FAA. In particular, the courts of appeals have focused on notions of judicial economy rather than on the rights of other creditors and

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<sup>28</sup> See, e.g., FED. R. BANKR. P. 2018(a) ("In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter."); 11 U.S.C. § 1109(b) (2018) ("A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter."); 11 U.S.C. § 307 (2018) ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title . . .").

<sup>29</sup> See, e.g., Culhane, *supra* note 27, at 496 ("Bankruptcy is quintessentially a collective proceeding with centralized control of the property of the estate and creditors' claims . . . [and the] inescapable impact of arbitration on third parties who have not consented is a cause for concern, given the collective nature of bankruptcy process."); Note, *supra* note 20, at 2309 ("[A]lthough the FAA requires consent to be bound by an arbitration award, the Code has modified this background law by creating a system that will bind creditors through determinations of others' rights regardless of nonparty status; this modification suggests the need to depart from a formalistically narrow definition of whose consent is required for arbitration."). The Supreme Court has disfavored class arbitration as "rais[ing] serious due process concerns by adjudicating the rights of absent members of the plaintiff class . . . with only limited judicial review." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). Depriving bankruptcy creditors of their right to participate in matters affecting the estate raises even more serious due process concerns, as those creditors did not consent to any form of arbitration.

parties whose interests might be affected by the bankruptcy to notice and to the opportunity to participate in matters affecting the bankruptcy estate.

This Article sets forth a more solid justification for bankruptcy courts to refuse to order arbitration of any matter related to and affecting a bankruptcy case through express preclusion. First, this Article describes the historical development of the Supreme Court's holdings on preclusion of the FAA in general and on the courts of appeals' current formulation of a bankruptcy exception to the FAA. Next, this Article discusses the statutory, historical, and policy-based support for reading the bankruptcy jurisdictional provisions as creating an express exception to the FAA, or alternatively as supporting an implied exception to the FAA. As discussed, even if based on policy, the exception should extend to all matters relating to bankruptcy cases, and any presumption should be in favor of bankruptcy adjudication, not arbitration. Finally, this Article discusses the place of arbitration even within such framework.

## I. HISTORY OF THE FAA AND BANKRUPTCY

### A. *The Supreme Court on Preclusion of the FAA*

Through the FAA, enacted in 1925,<sup>30</sup> “Congress has instructed federal courts to enforce arbitration agreements according to their terms.”<sup>31</sup> “Section 2[,] the FAA’s substantive mandate,”<sup>32</sup> states that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>33</sup>

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<sup>30</sup> Act of Feb. 12, 1925, 43 Stat. 883 *recodified* as Title 9 of the United States Code by Act of July 30, 1947, 61 Stat. 674; *see* 31 MOORE’S FEDERAL PRACTICE—CIVIL § 904.2 (3d ed. 2019).

<sup>31</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

<sup>32</sup> *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629 (2009).

<sup>33</sup> 9 U.S.C. § 2 (2018).



Consistent with this provision, the Supreme Court has held that “courts must ‘rigorously enforce’ arbitration agreements according to their terms.”<sup>34</sup> While the text of the statute only refers to a “controversy [] arising out of” a “contract evidencing a transaction involving commerce,” the Supreme Court has broadly held that the mandate “holds true for claims that allege a violation of a federal statute, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”<sup>35</sup> Other portions of the Act provide for enforcement of this mandate, requiring federal courts to stay proceedings pending before them regarding issues covered by an arbitration agreement upon request,<sup>36</sup> providing authority for a federal district court to compel arbitration of such matters if the court would have had jurisdiction “save for such agreement,”<sup>37</sup> and requiring federal courts to enter orders confirming an arbitration award upon application.<sup>38</sup>

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<sup>34</sup> *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

<sup>35</sup> *Id.* at 232–33 (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012)).

<sup>36</sup>

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (2018).

<sup>37</sup>

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition [a federal district court which would have had jurisdiction save for such agreement] for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4 (2018).

<sup>38</sup>

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9 (2018). Under Section 10, an arbitration award may only be vacated “where the award was procured by corruption, fraud, or undue means,” the arbitrators were guilty of prejudicial misconduct or evidenced partiality or corruption, or exceeded

However, the Supreme Court has recently emphasized that while “a court’s authority under the Arbitration Act to compel arbitration may be considerable, it isn’t unconditional.”<sup>39</sup> The Act “applies only when the parties’ agreement to arbitrate is set forth as a ‘written provision in any maritime transaction or a contract evidencing a transaction involving commerce’ ” and only if the agreement is within the scope of the Act.<sup>40</sup> Although speedy determination and lower litigation costs are often espoused as benefits of arbitration over litigation, and Congress was not “blind to the potential benefit” of enforcing arbitration, the Supreme Court has “reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.”<sup>41</sup> Instead, the Court has held that “the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered” and thereby “overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”<sup>42</sup> Rather than “create[] . . . new legislation [or] grant[] . . . new rights,”<sup>43</sup> the FAA was intended only to create “a remedy to enforce an agreement in commercial contracts and in admiralty contracts” and thereby “place an arbitration agreement ‘upon the same footing as other contracts, where it belongs.’ ”<sup>44</sup>

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their powers or grossly and imperfectly executed such powers. 9 U.S.C. § 10 (2018). Section 11 limits the grounds upon which a district court can modify or correct an award. 9 U.S.C. § 11 (2018).

<sup>39</sup> *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019).

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

<sup>41</sup> *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

<sup>42</sup> *Id.* at 219–20 (citing H.R. REP. NO. 96, 68th Cong., 1st Sess., 1 (1924)). Because of “the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction.” *Id.* at 220 n.6 (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1-2 (1924)). Such principle had become “firmly embedded in the English common law and was adopted with it by the American courts” prior to the enactment of the Federal Arbitration Act. *Id.*

<sup>43</sup> *Id.* at 220 n.7 (quoting 65 CONG. REC. 1931 (1924)).

<sup>44</sup> *Id.* at 220 n.7, 219 (quoting H.R. REP. NO. 96–68, at 1 (1924)). The Court has highlighted that “a ‘rule[] of fundamental importance’ under the FAA [is] that arbitration ‘is a matter of consent, not coercion.’ ” *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010)).

As a federal statute, the FAA is subject to repeal or preclusion by another subsequent statute enacted by Congress.<sup>45</sup> While it might be easy to draw the conclusion from the Supreme Court's recent track record that the Court is unlikely to find that another federal statute supersedes the FAA, it is important to highlight what the Supreme Court has held and what it has not held. First, the Supreme Court has never actually adjudicated a case where it was claimed that another federal statute *expressly* repealed or precluded the FAA. In *Epic Systems Corp. v. Lewis*, the Supreme Court, in dicta, highlighted four recent statutes through which Congress demonstrated "that it knows how to override the Arbitration Act when it wishes."<sup>46</sup> However, *Epic Systems*

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<sup>45</sup> See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996) (explaining that the Court has long recognized that, with certain exceptions, "a general law . . . may be repealed, amended or disregarded by the legislature which enacted it," and "is not binding upon any subsequent legislature." (quoting *Manigault v. Springs*, 199 U.S. 473, 487 (1905))); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years."); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

<sup>46</sup> 138 S. Ct. 1612, 1626 (2018). These included:

- (i) a 2002 statutory provision that "[n]otwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." 15 U.S.C. § 1226(a)(2) (2018);
- (ii) provisions added by the 2010 Dodd-Frank Act to a commodity whistleblower protection statute providing that (1) "[t]he rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement" and (2) "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section," 7 U.S.C. § 26(n)(1)–(2) (2018);
- (iii) a 2010 provision in the statute establishing and governing the Bureau of Consumer Financial Protection, providing for employee protection of employees of entities regulated by the Bureau from retaliation for cooperation with the Bureau and providing with certain exceptions (1) "notwithstanding any other provision of law, the rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement" and (2) "notwithstanding any other provision of law, no predispute arbitration agreement shall be valid or enforceable

involved only an argument of implied repeal.<sup>47</sup> Similarly, in *CompuCredit Corp. v. Greenwood*, another case involving only implied repeal, the Court cited some of the same recent statutes as support for its conclusion that had Congress meant to prohibit arbitration agreements in contracts subject to the Credit Repair Organizations Act, “it would have done so in a manner less obtuse than what respondents suggest.”<sup>48</sup> Of course, not stated in *Epic Systems* or *CompuCredit* is that Congress equally knows how to make clear that it intends a statute *not* to override the FAA.<sup>49</sup> Nor should Congress’s recent use of specific language imply that its use of more general language years before did not express intent to supersede the FAA. As noted in Justice Ginsburg’s dissent in *Epic Systems*, the statutes cited by the majority “are of recent vintage” and “each was 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.”<sup>50</sup> The fact that Congress has been more

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to the extent that it requires arbitration of a dispute arising under this section,” 12 U.S.C. § 5567(d)(1)–(2) (2018); and

- (iv) a 2006 statute governing terms of consumer credit extended to members of the armed forces and dependents providing that

[n]otwithstanding section 2 of title 9, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.

10 U.S.C. § 987(f)(4) (2018); *see also* David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 686, 740 App. A (2018) (listing federal legislation since 2007 addressing arbitration).

<sup>47</sup> 138 S. Ct. at 1624.

<sup>48</sup> 565 U.S. 95, 103–04 (2012) (first citing 7 U.S.C. § 26; then citing 15 U.S.C. § 1226(a)(2); and then citing 12 U.S.C. § 5518(b)). The Court noted 12 U.S.C. § 5518(b) does not itself limit arbitration, but rather grants express “authority to the newly created Consumer Financial Protection Bureau to regulate predispute arbitration agreements in contracts for consumer financial products or services.” *Id.*

<sup>49</sup> *See, e.g.*, 28 U.S.C. § 651(e) (2018) (“This chapter shall not affect title 9, United States Code.”).

<sup>50</sup> 138 S. Ct. at 1646 (Ginsburg, J., dissenting). In contrast to the bankruptcy statute or the National Labor Relations Act at issue in *Epic Systems*, the statute at issue in *CompuCredit* was enacted well after the Supreme Court’s recent trend towards expansion of the FAA began. Indeed, the Court in *CompuCredit* emphasized that “[a]t the time of the CROA’s enactment in 1996, arbitration clauses in contracts of the type at issue here were no rarity [as] the early 1990s saw the increased use of arbitration clauses in consumer contracts generally, and in financial services contracts in particular.” 565 U.S. at 103; *see also, e.g.*, Noll, *supra* note 46, at 712 (“The more fundamental problem with the argument is that it places a burden on Congress

specific in several recent statutes does little, therefore, to show its intent in 1978 or 1984 when the bankruptcy jurisdictional provisions were enacted and modified, as “later enacted laws . . . do not declare the meaning of earlier law.”<sup>51</sup>

Second, in virtually all of the cases in which the Supreme Court addressed an argument that a claim under another federal statute should be excepted from the effect of the FAA, the argument was that enforcement of the substantive claim itself served an important societal purpose that could be jeopardized if left to arbitration. In most of these cases, the plaintiff had not pointed to any statutory text supporting the argument. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the court of appeals had found “the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration” despite “the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act.”<sup>52</sup> The Supreme Court reversed, rejecting policy-based arguments—at least in the context of international transactions<sup>53</sup>—that antitrust actions were too complex for arbitration, that contracts involving antitrust issues have an inordinate danger of being contracts of adhesion, that potential arbitrators are likely to be “innate[ly] hostile[e]” to antitrust law, or that the national interest in enforcing antitrust laws demonstrated by the “crucial deterrent” of the statute’s treble-damages provision could not be achieved outside an American court.<sup>54</sup> Instead, the Court found “no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism” and that “so long as the

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that makes no sense when the development of federal arbitration law is viewed in historical context.”).

<sup>51</sup> *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998).

<sup>52</sup> 473 U.S. 614, 628–29 (1985) (internal quotation marks omitted) (quoting *Am. Safety Equip. Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 827–28 (1968)).

<sup>53</sup>

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement, even assuming that a contrary result would be forthcoming in a domestic context.

*Id.* at 629. In *American Express Co. v. Italian Colors Restaurant*, the Court later applied the FAA to antitrust claims under the Sherman and Clayton Acts that apparently involved no international transactions or foreign arbitration with no discussion of the issue. 570 U.S. 228, 231–32 (2013).

<sup>54</sup> *Mitsubishi*, 473 U.S. at 632–35.

prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,<sup>55</sup> the statute will continue to serve both its remedial and deterrent function.”<sup>56</sup> The Court also noted that the legislative choice to provide for enforcement through a private right of action rather than a direct regulatory structure already risked lack of enforcement by placing the antitrust cause of action “at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, and the private antitrust plaintiff needs no executive or judicial approval before settling one.”<sup>57</sup> Similarly, the Court held that the general deterrent function of providing a private cause of action for claims under the Age Discrimination in Employment Act of 1967 and under the Racketeer Influenced and Corrupt Organizations Act did not justify a court-created implied or policy-based exception to the FAA.<sup>58</sup> Deterrence can be achieved through direct government

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<sup>55</sup> In *American Express Co. v. Italian Colors Restaurant*, the Court referred to this “effective vindication” exception as dicta, noting that while several later cases mentioned the phrase, none found it to apply. 570 U.S. at 235 (first citing 14 Penn Plaza L.L.C. v. Pyett, 556 U.S. 247, 273–74 (2009); and then citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Similarly, the Court in *Italian Colors* found that the mere possibility of increased litigation costs caused by a waiver of the right to class arbitration did not preclude a litigant from effectively vindicating the rights provided under the antitrust laws, particularly given the fact that federal law did not adopt the class action for legal relief until 1938. 570 U.S. at 236 (noting that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy”).

<sup>56</sup> *Mitsubishi*, 473 U.S. at 636–37; see also *Gilmer*, 500 U.S. at 26 (“[B]y 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.”) (quoting *Mitsubishi*, 473 U.S. at 628).

<sup>57</sup> *Mitsubishi*, 473 U.S. at 636 (citation omitted). In contrast, at least where a bankruptcy-related matter is brought by a trustee or debtor-in-possession on behalf of a bankruptcy estate, approval of the bankruptcy court is required with prior notice to creditors, the United States trustee, the debtor, and other parties in interest. FED. R. BANKR. P. 9019(a). Notice is also required for a trustee to abandon—and therefore choose not to pursue—a claim of the estate against third parties. 11 U.S.C. § 554(a) (2018) (“*After notice and a hearing*, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” (emphasis added)); FED. R. BANKR. P. 6007(a) (notice of proposed abandonment or disposition). Although Section 554(c) provides for automatic abandonment of scheduled but unadministered assets upon closure of the case, creditors and other parties in interest have the opportunity to object to a trustee’s final report prior to closure of the case. FED. R. BANKR. P. 5009(a).

<sup>58</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (noting “nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act” and “no hint in these legislative debates that Congress intended for RICO treble-damages claims to be excluded from the ambit of the Arbitration Act”); *Gilmer*, 500 U.S. at 26–27 (noting petitioner conceded that nothing in text or legislative history of ADEA

action without need to judicially create an exception to the FAA. For example, as the Court held in *E.E.O.C. v. Waffle House, Inc.*, an arbitration agreement between an employer and an employee does not bind the Equal Employment Opportunity Commission, and the “proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority [to bring an enforcement action under the Americans with Disabilities Act or the Civil Rights Act of 1991] if it has not agreed to do so.”<sup>59</sup>

The Supreme Court has also rejected arguments that vague and general statutory language protecting rights given under a federal statute demonstrate intent to override the FAA. For example, in *Epic Systems*, the Court found that the National Labor Relations Act’s guarantee of workers’ right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” did not make an arbitration agreement that barred class arbitration “illegal” or conflict with the FAA.<sup>60</sup> Similarly, the Court has rejected arguments that a statutory provision that broadly and generally invalidates waivers of rights under a federal statute demonstrates legislative intent to displace the FAA, even if the statute elsewhere provides a private right of action. In *CompuCredit*, the Court found that a statutory provision requiring credit repair organizations to provide consumers with disclosures, including a statement that they “have a right to sue a credit repair organization that violates the Credit Repair Organization Act,” together with a provision of the Act voiding and making unenforceable “[a]ny waiver by any consumer of any protection provided by or any right of the consumer under” the Credit Repair Organization Act did not reflect congressional intent to preclude the FAA.<sup>61</sup> As explained by the Court, the

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explicitly precludes arbitration and the Court found no inherent conflict); *see also 14 Penn Plaza*, 556 U.S. 247, 258 (holding that the ADEA is no different in the context of a collective bargaining agreement).

<sup>59</sup> 534 U.S. 279, 294 (2002).

<sup>60</sup> 138 S. Ct. 1612, 1624 (2018); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (interpreting provision of Carriage of Goods by Sea Act invalidating contract provisions “lessening such liability otherwise than as provided in” the statute as not invalidating an arbitration agreement requiring arbitration in a foreign jurisdiction, on the theory that the cost of international arbitration would lessen a plaintiff’s recovery, and therefore avoiding potential conflict with FAA).

<sup>61</sup> 565 U.S. 95, 99 (2012).

disclosure provision only created “the right to receive the statement,” not a specific right to bring an action in a judicial court of law.<sup>62</sup>

Similarly, the Court has found general antiwaiver provisions in the securities laws not to preclude the FAA. Although the Court had held in *Wilko* that a provision of the Securities Act of 1933 declaring “void” any “condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of the Securities Act invalidated an agreement for arbitration of issues arising under the Securities Act,”<sup>63</sup> the Court distinguished and later overruled that holding. First, in *Shearson/American Express, Inc. v. McMahon*,<sup>64</sup> the Court, in interpreting similar anti-waiver language in the Exchange Act of 1934,<sup>65</sup> held that the section invalidating any agreement “to waive compliance with any provision of [the Act]” did not apply to the section providing federal courts with jurisdiction over violations because the jurisdiction provision “itself does not impose any duty with which persons trading in securities must ‘comply.’”<sup>66</sup> Two years later, the Supreme Court resolved the tension between the holdings in *Wilko* and *McMahon* with respect to the similar statutory provisions by finding that *Wilko* was wrongly decided and was clouded by the “old judicial hostility to arbitration” that the FAA was intended to end.<sup>67</sup> The Court in *Rodriguez de Quilas* found that, as with the similar language in the Exchange Act of 1934, there was “no sound basis for construing the

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<sup>62</sup> *Id.*

<sup>63</sup> 346 U.S. 427, 430 (1953). The Court had also expressed concern that the Securities Act was intended to protect investors in securities, who often have an unequal bargaining position and unequal information, and to prevent fraud. *Id.* at 430–31.

<sup>64</sup> 482 U.S. 220, 220–21 (1987).

<sup>65</sup> The Court in *Scherk v. Alberto-Culver Co.* had previously suggested a “colorable argument” that the two provisions were distinguishable because, for example, the Securities Act of 1933 provided an express “special right” of a private remedy for civil liability while there was no statutory counterpart in the Exchange Act of 1934, for which only an implied private cause of action was established through case law. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513, 513–14 (1974). But the Court ultimately determined that the arbitration clause at issue was enforceable with respect to Exchange Act claims because of the international nature of the transaction and concerns for international comity. *Id.* at 515–16, 520 n.15 (relying also in part on the United States’s 1970 accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

<sup>66</sup> *Shearson /Am, Express Inc.*, 482 U.S. at 227–28. The Court also noted that “the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights.” *Id.* at 238.

<sup>67</sup> *Rodriguez de Quilas v. Shearson/Am. Express. Inc.*, 490 U.S. 477, 480 (1989).



prohibition . . . on waiving 'compliance with any provision' of the Securities Act [of 1933] to apply to . . . procedural provisions" such as the jurisdictional provision of the Act.<sup>68</sup>

In contrast, Congress's choice to place all matters with an impact on a bankruptcy case within the jurisdiction of the bankruptcy courts is primarily of procedural, not substantive, importance. It enables the bankruptcy court, the trustees appointed to administer the case, the debtor, and all creditors or other parties with an interest in the bankruptcy estate to monitor the progress of a matter affecting the estate and provides the opportunity to assert their respective rights or objections. It also places the matter before an adjudicator who can recognize the impact of the proceeding on the rights of parties to the bankruptcy case and can ensure those rights are respected. Finally, it promotes orderly and efficient administration of the bankruptcy case and estate, permitting the trustee and other parties to assert their interests in the same court and pursuant to the same rules of procedure, with centralized notice to all affected parties. Therefore, the decision to place the matters before the bankruptcy court is not simply a matter of distrust of arbitration as a method of enforcing parties' substantive rights. Indeed, Congress chose to place such matters before the bankruptcy courts not only in favor of arbitration, but also in favor of all other judicial courts, state or federal.<sup>69</sup>

Finally, it is important to note that while the Court mentioned jurisdiction in *Scherk*, *McMahon*, and *Rodriguez de Quilas*, the jurisdictional provisions of the securities laws were not themselves at issue in those cases. Instead, in all three cases the only arguments raised were that the statutory provision voiding contractual waiver of rights under the securities statute should be read to include waiver of the right to have an action adjudicated by a judicial court or that the general purposes of the securities acts and the FAA were at odds. No party raised a specific argument that the jurisdictional provisions of either the Securities Act or the Exchange Act themselves demonstrated congressional intent to repeal the FAA. The Court, therefore, has only at most suggested, but never actually ruled, that a statutory grant of jurisdiction by itself is insufficient to override the FAA and preclude arbitration. In *McMahon*, which held that the Exchange

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<sup>68</sup> *Id.* at 482.

<sup>69</sup> 11 U.S.C. § 105 (2018).

Act of 1934 did not override the enforceability of arbitration provisions under the FAA, the Court mentioned that the Exchange Act of 1934 provides that district courts “shall have exclusive jurisdiction of violations of this title . . . and of all suits in equity and actions at law brought to enforce any liability or duty created by this title” but did not discuss the direct relationship of this provision to the FAA—an argument apparently not raised by the respondents.<sup>70</sup> The Court has also briefly mentioned the exclusive jurisdiction provision of the Exchange Act in several other FAA cases in order to distinguish it from the Securities Act, which does not provide for exclusive jurisdiction—particularly while *Wilko* remained good law for the proposition that the FAA conflicted with the Securities Act. For example, in *Scherk v. Alberto-Culver Co.*, in the midst of a discussion of a “colorable argument” that the Securities Act and the Exchange Act are distinguishable because one provides an express private cause of action while in the other the right is only implied, the Court referenced the exclusive jurisdiction provision as additional support for its holding that the Exchange Act did not supersede the FAA.<sup>71</sup> While one would normally think of exclusive jurisdiction as being less consistent with arbitration, not more, the Court reasoned this way because the issue was waiver, not jurisdiction. The Court reasoned that because exclusive jurisdiction limits the number of potential judicial forums a plaintiff can choose, the deprivation of court access is somehow less of a hardship than if more forums were available.<sup>72</sup> The Court did not rule on this ground, however, and instead distinguished the facts in *Wilko* and found that enforcement of the arbitration agreement at issue did not conflict with the Exchange Act because an international transaction was involved.<sup>73</sup> The Court revisited the distinction between the Exchange and Securities Acts in *Rodriguez de Quijas*, noting as

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<sup>70</sup> 482 U.S. 220, 227 (1987).

<sup>71</sup> 417 U.S. 506, 513–14 (1974).

<sup>72</sup> *Id.* at 514 (“The analogous provision of the 1934 Act, by contrast, provides for suit only in the federal district courts that have ‘exclusive jurisdiction,’ thus significantly restricting the plaintiff’s choice of forum.” (citation omitted)).

<sup>73</sup> *Id.* at 519 (holding that invalidation of the international arbitration agreement would reflect a “parochial concept that all disputes must be resolved under our laws and in our courts [and] [w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.” (internal quotation marks omitted)). The petitioner had also argued that *Wilko* was distinguishable because *Wilko* involved parties “exhibit[ing] a disparity of bargaining power.” *Id.* at 512 n.6. Ruling on other grounds, however, the Court found no need to consider that contention. *Id.*

additional grounds for overruling *Wilko* that the antiwaiver provision of the Securities Act was “in every respect the same as that” in the Exchange Act found not to conflict with the FAA in *McMahon*.<sup>74</sup> Reasoning that the “only conceivable distinction in this regard” was that the Exchange Act provided for exclusive federal jurisdiction while the Securities Act did not, the Court found the concurrent jurisdiction provided by the Securities Act was more reason, not less, to overrule *Wilko*.<sup>75</sup> The Court did not, however, revisit the unasked question of whether the exclusive jurisdiction provision of the Exchange Act should have been reason enough to override the FAA.

*B. Application of the McMahon Test by the Courts of Appeals*

In *McMahon*, the Supreme Court stated that the “burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue” and “[i]f Congress did intend to limit or prohibit waiver<sup>76</sup> of a judicial forum for a particular claim, such an intent will be deducible from [the statute’s] text or legislative history, or from an inherent conflict between arbitration and the statute’s underlying purposes.”<sup>77</sup> The Second, Third, Fourth, Fifth, Ninth

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<sup>74</sup> 490 U.S. 477, 482 (1989).

<sup>75</sup> *Id.* at 482–83.

<sup>76</sup> None of the courts of appeals to apply this language from *McMahon* to bankruptcy-related matters discuss why limitations on “waiver” of rights is applicable to bankruptcy matters. Waiver was relevant to the Exchange Act at issue in *McMahon* because the statute contained a provision declaring void “[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act].” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (quoting 15 U.S.C. § 78cc(a)) (internal quotation marks omitted). The Exchange Act “was intended principally to protect investors against manipulation of stock prices,” and the anti-waiver provision helped ensure that protection was not easily given away. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976). In contrast, the courts of appeals do not rely upon or point to language in the Bankruptcy Code invalidating waivers of the right to proceed in a bankruptcy court. Additionally, while one purpose of bankruptcy laws is to protect debtors by providing a “fresh start,” an at least equally important purpose is to ensure a fair and equitable distribution to creditors. *See, e.g.*, *Kirgis*, *supra* note 1, at 505; *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (explaining that bankruptcy power to avoid certain prepetition preferential transfers facilitates “the prime bankruptcy policy of equality of distribution among creditors of the debtor.”). The concerns about arbitrating bankruptcy-related matters go beyond mere protection of debtors from the effect of agreements they entered into prepetition. Because the concerns and parties affected are broader, it is therefore not clear that the test set forth in *McMahon* is the correct one for bankruptcy-related matters.

<sup>77</sup> *McMahon*, 482 U.S. at 227 (citation and internal quotation marks omitted). The Fifth Circuit recently rejected an argument that language in the Supreme Court’s 2018 *Epic Systems* opinion overruled or abrogated the *McMahon* test. *Henry v. Educ.*

and Eleventh Circuits—the only circuit courts with written opinions on the issue of the intersection of bankruptcy law and the FAA subsequent to *McMahon*—have all relied on the third “inherent conflict” prong of this so-called “*McMahon* test”<sup>78</sup> to find or suggest that the FAA does not require enforcement of arbitration agreements in the context of certain bankruptcy-related matters.<sup>79</sup> Several of the courts of appeals have summarily concluded that there is nothing in the language of the bankruptcy statutes or their legislative history to show express congressional intent to override the FAA, though with little or no discussion of any actual statutory text or history.<sup>80</sup>

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Fin. Serv. (*In re Henry*), 944 F.3d 587, 592 (5th Cir. 2019). The creditor relied on language in *Epic Systems* stating that a party “seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow.” *Id.* at 590 (quoting 138 S. Ct. 1612, 1624 (2018)). The Fifth Circuit disagreed that the cases were in conflict, noting that while “the Supreme Court’s decision in *Epic Systems* has a different tone, the test it employs is substantially the same as *McMahon*’s.” *Id.* at 592.

<sup>78</sup> *But see Kirgis, supra* note 1, at 517, 523–24 (suggesting reliance on *McMahon* “rests on a flawed foundation,” both because *McMahon* expanded, not contracted, the scope of arbitration and because the issue in *McMahon* was preclusion of a “claim founded on statutory rights.” (quoting *McMahon*, 482 U.S. at 226)).

<sup>79</sup> *See, e.g., In re EPD Inv. Co., L.L.C.*, 821 F.3d 1146, 1151–52 (9th Cir. 2016); *Allegaert v. Perot*, 548 F.2d 432, 438 (2nd Cir. 1977); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156–57 (3d Cir. 1989); *Moses v. CashCall, Inc.*, 781 F.3d 63, 71, 72, 73 (4th Cir. 2015); *Matter of Nat’l Gypsum Co.*, 118 F.3d 1056, 1058 (5th Cir. 1997); *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 795–96, 798–99 (11th Cir. 2007). Additionally, courts both before the 1978 amendments and after have looked to whether a bankruptcy estate or trustee is even bound by an arbitration agreement signed prepetition by a debtor—generally finding that such an agreement does not apply to or bind the estate with respect to creditor-derived claims, such as fraudulent transfer or preference claims. *See, e.g., In re EPD Inv. Co., L.L.C.*, 821 F.3d at 1152 (“For the purpose of these claims, the Trustee stands in the shoes of the creditors, not the debtors. Only the *parties* to an arbitration agreement are bound by it.”); *Allegaert*, 548 F.2d at 436 (“Since the trustee stands in the creditor’s shoes for [the purpose of Bankruptcy avoidance actions], he too should not be compelled to arbitrate these claims.”). On the other hand, where either a debtor seeks relief on his or her own individual behalf or where the trustee is pursuing an action inherited from the debtor and for which the trustee “stands in the shoes of the debtor,” the courts have found the arbitration agreement to be binding unless otherwise overridden by the Bankruptcy Code. *See, e.g., Hays & Co.*, 885 F.2d at 1154 (internal quotation marks omitted) (In actions brought by the trustee as successor to the debtor’s interest under section 541 the “trustee stands in the shoes of the debtor and’ . . . is bound to arbitrate all of its claims that are derived from the rights of the debtor under section 541.”).

<sup>80</sup> *See, e.g., Hays & Co.*, 885 F.2d at 1157 (“Hays has pointed to no provisions in the text of the bankruptcy laws, and we know of none, suggesting that arbitration clauses are unenforceable in a non-core adversary proceeding . . . .”); *In re Elec. Mach.*

Others simply jumped to the “inherent conflict” prong of the *McMahon* test, finding it unnecessary to look to the statute or legislative history or not addressing the statutory text because the argument was not raised.<sup>81</sup> While several of these cases found under the circumstances that the bankruptcy court was required to stay the bankruptcy-related matter at issue and order arbitration,<sup>82</sup> others held that the court had “discretion” to refuse to order arbitration.<sup>83</sup> The courts of appeals have expressed mild

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Enters., Inc., 479 F.3d at 796 (“[W]e find no evidence within the text or in the legislative history that Congress intended to create an exception to the FAA in the Bankruptcy Code [and] [t]herefore look to the third factor of the *McMahon* test . . .”) (citation omitted); *Ackerman v. Eber* (*In re Eber*), 687 F.3d 1123, 1129 (9th Cir. 2012) (“This Circuit and sister circuits applying the *McMahon* factors to the Bankruptcy Code have found no evidence in the text of the Bankruptcy Code or in the legislative history suggesting that Congress intended to create an exception to the FAA in the Bankruptcy Code.”).

<sup>81</sup> The Fourth Circuit, in *Phillips v. Congelton, L.L.C.* (*In re White Mountain Mining Co., L.L.C.*), noted a possible “argument . . . that the statutory text giving bankruptcy courts core-issue jurisdiction reveals a congressional intent to choose those courts in exclusive preference to all other adjudicative bodies, including boards of arbitration, to decide core claims” but ultimately found it did not need to decide “whether the statutory text itself demonstrates congressional intent to override arbitration for core claims because [the] case [could] be decided under *McMahon*’s third line of analysis . . .” 403 F.3d 164, 169 (4th Cir. 2005) (first citing *Sisters of Providence Health Sys. Inc. v. Summerfield Pine Manor* (*In re Summerfield Pine Manor*), 219 B.R. 637, 638 (B.A.P. 1st Cir. 1998); and then citing *McMahon*, 482 U.S. at 227); see also, *Anderson v. Credit One Bank, N.A.* (*In re Anderson*), 884 F.3d 382, 386 (2d Cir. 2018) (noting that parties agreed “arguments regarding legislative history and statutory text were not raised below” and therefore the court only inquired “whether arbitration of Anderson’s claim presents the sort of inherent conflict with the Bankruptcy Code that would overcome the strong congressional preference for arbitration”).

<sup>82</sup> See *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 110–11 (2d Cir. 2006) (class action for automatic stay violation where bankruptcy case was already closed); *Mintze v. Am. Gen. Fin. Servs.* (*In re Mintze*), 434 F.3d 222, 231, 233 (3d Cir. 2006) (rescission; TILA, HOEPA, and HIFA claims); *Hays & Co.*, 885 F.2d at 1149–50 (3d Cir. 1989) (non-core securities law action); *In re Elec. Mach. Enters.*, 479 F.3d at 798–99 (contract-based action against third party); *Moses*, 781 F.3d at 66 (violation of North Carolina Debt Collection Act).

<sup>83</sup> See *In re Anderson*, 884 F.3d at 390, 392 (violation of discharge); *Netflix, Inc. v. Relativity Media, L.L.C.* (*In re Relativity Fashion, L.L.C.*), 696 F. App’x 26, 30 (2d Cir. 2017) (“collateral attack” on “factual findings and distributions of property” underlying confirmed plan); *In re EPD Inv. Co., L.L.C.*, 821 F.3d at 1150, 1152 (subordination and disallowance of claims); *344 Individuals v. Giddens* (*In re Lehman Bros. Holdings Inc.*), 663 F. App’x 65, 67–68 (2d Cir. 2016) (subordination claim impacting claims allowance and priority in bankruptcy); *Moore McCormack Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem., Inc.* (*In re U.S. Lines, Inc.*), 197 F.3d 631, 634, 641 (2d Cir. 1999) (declaratory action against insurers); *Moses*, 781 F.3d at 67 (declaratory action impacting claims allowance); *In re White Mountain Mining Co.*, 403 F.3d at 170 (characterization of investor advances as debt or equity); *Gandy v. Gandy* (*In re Gandy*), 299 F.3d 489, 493, 500 (5th Cir. 2002) (Chapter 11

variations in the standards they use on the issue. For example, some courts have applied a bright-line test by which arbitration of “non-core” matters<sup>84</sup> will never conflict with bankruptcy policy and purposes.<sup>85</sup> The Fifth Circuit apparently applies an even narrower test, requiring the issue to not only be “core” but also to have an “underlying nature [which] derives *exclusively* from the provisions

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debtor-in-possession’s avoidance actions); *Matter of Nat’l Gypsum Co.*, 118 F.3d 1056, 1058 (5th Cir. 1997) (violation of discharge or plan injunction); *In re Eber*, 687 F.3d at 1130–31 (11 U.S.C. § 523(a)(2), (4), (6) non-dischargeability action); *Cont’l Ins. Co. v. Thorpe Insulation Co.* (*In re Thorpe Insulation Co.*), 671 F.3d 1011, 1014, 1024 (9th Cir. 2012) (breach of contract claim asserted against estate).

<sup>84</sup> 28 U.S.C. § 157(b)(2) designates “core matters” to include:

- (A) matters concerning the administration of the estate;
- (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
- (C) counterclaims by the estate against persons filing claims against the estate;
- (D) orders in respect to obtaining credit;
- (E) orders to turn over property of the estate;
- (F) proceedings to determine, avoid, or recover preferences;
- (G) motions to terminate, annul, or modify the automatic stay;
- (H) proceedings to determine, avoid, or recover fraudulent conveyances;
- (I) determinations as to the dischargeability of particular debts;
- (J) objections to discharges;
- (K) determinations of the validity, extent, or priority of liens;
- (L) confirmations of plans;
- (M) orders approving the use or lease of property, including the use of cash collateral;
- (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;
- (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and
- (P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

28 U.S.C. § 157 (2018).

<sup>85</sup> *See, e.g., In re Elec. Mach. Enters.*, 479 F.3d at 796 (“In general, bankruptcy courts do not have the discretion to decline to enforce an arbitration agreement relating to a non-core proceeding.” (citing *Crysen/Montenay Energy Co. v. Shell Oil Co.* (*In re Crysen/Montenay Energy Co.*), 226 F.3d 160, 166 (2d Cir. 2000)); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1150 (3d Cir. 1989); *In re U.S. Lines, Inc.*, 197 F.3d at 640 (“[N]on-core proceedings . . . are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration.”)).

of the Bankruptcy Code.”<sup>86</sup> In contrast, the Ninth Circuit has stated that “the core versus non-core distinction . . . ‘though relevant, is not alone dispositive.’”<sup>87</sup> And unlike other circuits, the Second Circuit has stated that the conflict with bankruptcy purposes must be a “severe conflict.”<sup>88</sup>

The courts of appeals have been remarkably similar, however, in their identification of the bankruptcy policies potentially at issue with the FAA, though as this Article discusses below, they have too narrowly focused on centralization and judicial economy.<sup>89</sup> The Fifth Circuit in *National Gypsum* identified the purposes of the Bankruptcy Code as “including the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders.”<sup>90</sup> The Second Circuit, giving as examples the automatic stay and the bankruptcy court’s broad equitable powers under 11 U.S.C. § 105(a), has stated that the core purposes of bankruptcy “allow the bankruptcy court to centralize all disputes concerning property of the debtor’s estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.”<sup>91</sup> The Fourth Circuit has noted that the “very purpose of bankruptcy is to modify the rights of debtors and creditors, and Congress intended to centralize disputes about a debtor’s assets and legal obligations in the bankruptcy courts.”<sup>92</sup> In applying this test, courts of appeals

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<sup>86</sup> *In re Gandy*, 299 F.3d at 495 (emphasis added); see also *In re Mintze*, 434 F.3d at 231 (“[W]e believe that nonenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceedings, *i.e.*, whether the proceeding derives exclusively from the provisions of the Bankruptcy Code and, if so, whether the arbitration proceeding would conflict with the purposes of the Code.”) (quoting *In re Nat’l Gypsum*, 118 F.3d at 1067).

<sup>87</sup> *In re Eber*, 687 F.3d at 1130. No court of appeals applying the *McMahon* test has found a non-core matter to be excepted from the FAA, however. See, e.g., Julian Ellis, *A Comparative Law Approach: Enforceability of Arbitration Agreements in American Insolvency Proceedings*, 92 AM. BANKR. L.J. 141, 171 (2018) (noting that “the hesitation [of some courts] to subscribe to a categorical approach seems more to do with the ‘core’ side of the equation than the ‘non-core’ side”).

<sup>88</sup> *In re Anderson*, 884 F.3d at 387; see also *In re U.S. Lines, Inc.*, 197 F.3d at 641 (indicating that court must find “arbitration will seriously jeopardize a particular core bankruptcy proceeding”).

<sup>89</sup> See *infra* Section IV.b.

<sup>90</sup> 118 F.3d at 1069.

<sup>91</sup> *In re U.S. Lines, Inc.*, 197 F.3d at 640 (citations omitted).

<sup>92</sup> *Philips v. Congelton (In re White Mountain Mining Co.)*, 403 F.3d 164, 169 (4th Cir. 2005) (internal citation omitted).

have affirmed lower courts that refused to order arbitration of the following: discharge violations,<sup>93</sup> actions to enforce the terms of a confirmed Chapter 11 plan,<sup>94</sup> subordination or objections to claims against the estate,<sup>95</sup> a Chapter 11 reorganization trust's declaratory action against insurers to establish rights as part of conditional settlement with employees who had filed mass tort personal injury claims against the estate,<sup>96</sup> a Chapter 11 debtor in possession's avoidance actions against third parties under the Bankruptcy Code's fraudulent transfer and strong-arm provisions,<sup>97</sup> and non-dischargeability actions under Bankruptcy Code §§ 523(a)(2), (4) or (6).<sup>98</sup> On the other hand, courts of appeals have reversed and ordered lower courts to order arbitration of the following: a class action suit brought in a closed bankruptcy case for violation of the automatic stay;<sup>99</sup> a Chapter 13 debtor's action for rescission of a mortgage and claims under the Truth in Lending Act, the Home Owners Equity Protection Act of 1994, the Equal Credit Opportunity Act, and Pennsylvania consumer protection laws;<sup>100</sup> securities laws actions brought by a Chapter 11 trustee

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<sup>93</sup> *Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.3d 587 (5th Cir. 2019); *Anderson v. Credit One Bank (In re Anderson)*, 884 F.3d 382, 387–88 (2d Cir. 2018).

<sup>94</sup> *Netflix, Inc. v. Relativity Media, L.L.C. (In re Relativity Fashion, L.L.C.)*, 696 F. App'x 26, 30 (2d Cir. 2017); *see also Matter of Nat'l Gypsum Co.*, 118 F.3d 1056, 1058 (5th Cir. 1997) (declaratory judgment whether collection efforts barred by discharge or plan injunction).

<sup>95</sup> *344 Individuals v. Giddens (In re Lehman Bros.)*, 663 F. App'x 65, 67 (2d Cir. 2016); *see also Moses v. CashCall, Inc.*, 781 F.3d 63 (4th Cir. 2015) (Chapter 13 debtor's proceeding objecting to claim against estate, seeking to declare loan illegal and void); *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 671 F.3d 1011 (9th Cir. 2012) (objection by Chapter 11 debtor in possession to proof of claim against estate).

<sup>96</sup> *Moore McCormack Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem., Inc. (In re U.S. Lines, Inc.)*, 197 F.3d 631, 641 (2d Cir. 1999).

<sup>97</sup> *Gandy v. Gandy (In re Gandy)*, 299 F.3d 489 (5th Cir. 2002); *see also Kirkland v. Rund (In re EPD Inv. Co., L.L.C.)*, 821 F.3d 1146, 1150 (9th Cir. 2016) (fraudulent conveyance, subordination and disallowance actions brought by Chapter 7 trustee against creditor who had filed proof of claim against estate).

<sup>98</sup> *Ackerman v. Eber (In re Eber)*, 687 F.3d 1123, 1128 (9th Cir. 2012).

<sup>99</sup> *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 109 (2d Cir. 2006).

<sup>100</sup> *Mintze v. Am. Gen. Fin. Servs. (In re Mintze)*, 434 F.3d 222, 226, 233, (3d Cir. 2006); *see also Moses*, 781 F.3d at 66 (claim for money damages by a Chapter 13 debtor against a lender under a North Carolina consumer protection statute).



against third parties;<sup>101</sup> and a proceeding to determine that funds allegedly held in constructive trust by a third party were property of the bankruptcy estate.<sup>102</sup>

## II. EXPRESS PRECLUSION BY 28 U.S.C. § 1334

This Article argues that there is ample evidence within the jurisdictional provisions of the 1978 and 1984 bankruptcy amendments of Congress's intent to broadly displace the FAA for all bankruptcy-related matters. A "later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision," though " 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.' "<sup>103</sup> While the legislature may do violence to its own earlier legislation, courts should be cautious not to do the same on the basis of an incorrect assumption regarding the legislature's intent. Thus courts "will not infer a statutory repeal 'unless the later statute "expressly contradict[s] the original act" ' or unless such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.' "<sup>104</sup> "Outside these limited circumstances, a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."<sup>105</sup>

But no mere inference of intent to displace prior legislation is necessary for the current bankruptcy jurisdictional provisions, which express clear intent to repeal any inconsistent statute. The Bankruptcy Reform Act of 1978, enacted more than fifty years after the FAA, provided in 28 U.S.C. § 1471(b) that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of

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<sup>101</sup> *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1149, 1156–57 (3d Cir. 1989).

<sup>102</sup> *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 797–99 (11th Cir. 2007).

<sup>103</sup> *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)).

<sup>104</sup> *Id.* at 662–63 (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)); see also *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.' " (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936))); *Posadas*, 296 U.S. at 503 ("[T]he intention of the legislature to repeal must be clear and manifest.").

<sup>105</sup> *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (quotation and citation omitted).

all civil proceedings arising under title 11 or arising in or related to cases under title 11.”<sup>106</sup> Although repealed in 1984, its replacement in 28 U.S.C. § 1334(b) similarly provides that

[e]xcept as provided in subsection (e)(2),<sup>107</sup> and *notwithstanding any Act of Congress* that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.<sup>108</sup>

In both versions, the statute includes the phrase “notwithstanding any Act of Congress,” clearly showing that the statute is intended to displace at least *some* other acts of Congress. Thus, there should be no need to fear that Congress did not intend to repeal or modify its earlier legislation and no need for a presumption against repeal or preclusion.

True, it could be argued that the FAA does not fall within the *scope* of such preclusion. Strictly speaking, the bankruptcy statute does not mention the FAA or arbitration and refers instead to statutes conferring exclusive “jurisdiction” on other “courts” without specifically mentioning non-judicial adjudicators.<sup>109</sup> But in analyzing that scope, because of the express language of preclusion, there should be no general presumption against preclusion in analyzing the statute. Instead, ordinary principles of statutory interpretation should govern the issue of whether divestment of jurisdiction by the FAA in favor of non-judicial arbitration falls within the scope of the “notwithstanding” clause. As the Supreme Court has stated, courts should rely “on traditional rules of statutory interpretation [and that] does not change because the case involves multiple federal statutes.”<sup>110</sup>

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<sup>106</sup> Act of November 6, 1978, Pub. L. No. 95–598 (HR 8200), Pub. L. No. 95–598, 92 Stat. 2549 (codified at 11 U.S.C. § 1471 (1978)) (emphasis added).

<sup>107</sup> Section 1334(e)(2) protects the power of the court with bankruptcy jurisdiction to supervise bankruptcy professionals by granting exclusive jurisdiction “over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.” 28 U.S.C. § 1334(e)(2) (2018). Section 327 governs employment of professionals to assist and represent the bankruptcy estate. 11 U.S.C. § 327 (2018).

<sup>108</sup> 28 U.S.C. § 1334(b) (2018) (emphasis added).

<sup>109</sup> *See id.*; 28 U.S.C. § 1334(e)(2) (2018).

<sup>110</sup> *POM Wonderful L.L.C. v. Coca-Cola Co.*, 573 U.S. 102, 112 (2014) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137–39 (2000), *superseded by statute in part*, Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, § 907(d)(3)(A)–(B), 123, Stat. 1776 (codified at 21 U.S.C. § 387g)); *see also, e.g.*, Noll, *supra* note 46, at 703–07 (explaining why the FAA should not be treated as a “super-statute”).

The legislative history of the bankruptcy provisions makes clear that the jurisdictional grant in § 1334(b) was intended to ensure that federal courts hearing bankruptcy cases would have the jurisdiction and the ability to oversee all matters that could affect the bankruptcy case. The Supreme Court has explained:

The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate" and that the "related to" language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.<sup>111</sup>

Comments in the House Report show specific concern that "the extra expense entailed by the estate in litigating outside the bankruptcy court" or costs incurred in litigating "over whether the

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<sup>111</sup> *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citing S. REP. NO. 95-989, 2nd Sess., pt.1 at 153-54, 1978; *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (1984), *overruled in part by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 135-36 (1995)). Even with respect to the earlier Bankruptcy Act of 1895, the Supreme Court has indicated the strong legislative intent to have all matters affecting the allowance of claims and liquidation and distribution of estate property heard by the district courts exercising bankruptcy jurisdiction. In finding that taxing authorities "must submit to appropriate requirements by the controlling power" to "participate in the assets of a bankrupt" lest the "orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated," the Court quoted an earlier decision with respect to claims administration:

We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them. \* \* \* A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy.

*New York v. Irving Tr. Co.*, 288 U.S. 329, 332-33 (1933) (quoting *U.S. Fid. & Guar. Co. v. Bray*, 225 U.S. 205, 217-18 (1912)).

bankruptcy court has jurisdiction” could tax the estate or give unfair “bargaining leverage against” the trustee to parties who owe the estate money.<sup>112</sup>

An interpretation of the FAA as requiring federal courts exercising bankruptcy jurisdiction to stay “non-core” or “insufficiently core” matters in favor of arbitration would be disruptive to the system Congress intended through § 1334 no less than divestment of jurisdiction in favor of another court. For example, even though the automatic stay is “one of the fundamental debtor protections provided by the bankruptcy laws,”<sup>113</sup> the Second Circuit in *MBNA America Bank, N.A. v. Hill* required arbitration of an alleged violation of the automatic stay, holding under the *McMahon* test that arbitration of the alleged violation “would not necessarily jeopardize or inherently conflict with the Bankruptcy Code.”<sup>114</sup> As such, the Court of Appeals found that through the FAA, parties were able to contractually deprive bankruptcy courts of the power to enforce their own orders.<sup>115</sup> Similarly, despite § 1334(b)’s clear intent to provide a forum within the federal courts for trustees and debtors in possession to adjudicate claims by the estate against third parties, several courts of appeals have applied the *McMahon* test to divest bankruptcy courts of such jurisdiction and therefore deprive creditors, trustees, and the court itself of the right and power to monitor and participate in matters affecting the bankruptcy estate.<sup>116</sup>

For example, in characterizing an action for turnover of property of the estate as a mere claim of a debtor-in-possession against a third party, the Eleventh Circuit characterized a matter as “non-core” and therefore reversed and remanded the matter to

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<sup>112</sup> H.R. REP. No. 95–595, xv, at 45–46 (1978).

<sup>113</sup> *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 503 (1986).

<sup>114</sup> 436 F.3d 104, 110–11 (2d Cir. 2006).

<sup>115</sup> *Id.* at 109–10. *But see*, *Degen v. United States*, 517 U.S. 820, 823 (1996) (“Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.” (first citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991); then citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962); and then citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

<sup>116</sup> *See, e.g.*, *Walton v. Rose Mobile Homes L.L.C.*, 298 F.3d 470, 492 (5th Cir. 2002); *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002); *Mintze v. Am. Gen. Fin. Servs. (In re Mintze)*, 434 F.3d 222, 233 (3d Cir. 2006); *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 111 (2d Cir. 2006); *In re Elec. Mach. Enters., Inc.*, 479 F.3d 791, 799 (11th Cir. 2007).

the bankruptcy court “with instructions to compel the parties to arbitrate in accordance with the terms of their arbitration agreement.”<sup>117</sup> In *Moses v. CashCall, Inc.*,<sup>118</sup> the Fourth Circuit reversed the bankruptcy court and ordered arbitration of a Chapter 13 debtor’s counterclaim<sup>119</sup> against a creditor for damages under the North Carolina Debt Collection Act, even as the dissent expressed real concern that the particular “tribal arbitration procedure specified in the loan agreement [was] ‘illusory,’ ‘a sham,’ and ‘unconscionable.’”<sup>120</sup>

Nothing within § 1334 or the Bankruptcy Code makes exception for or requires a federal court exercising bankruptcy jurisdiction to divest itself of such jurisdiction in favor of arbitration or order arbitration.<sup>121</sup> Nor does the FAA contain language indicating an intent to modify Congress’s structure for bankruptcy law. Congress has had the opportunity to do so. For example, the Arbitration Act was amended in 1988 to provide that enforcement “of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State

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<sup>117</sup> *Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (In re Elec. Mach. Enters., Inc.)*, 479 F.3d 791, 798–99 (11th Cir. 2007).

<sup>118</sup> 781 F.3d 63, 66 (4th Cir. 2015).

<sup>119</sup> Counterclaims by the estate against persons filing claims against the estate are statutorily core matters. 28 U.S.C. § 157(b)(2)(C) (2018). However, the Supreme Court has held that Section 157(b)(2)(C) violated Article III of the Constitution to the extent it authorized non-Article III bankruptcy courts, as opposed to the district courts, from entering final orders over such matters if not resolved in the process of ruling on a creditor’s proof of claim and if without the consent of the parties. *Stern v. Marshall*, 564 U.S. 462, 503 (2011). The Court subsequently ruled that bankruptcy courts could enter final orders over such matters with the consent of the parties, *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1949 (2015), or could issue proposed findings of fact and conclusions of law to an Article III district court to enter final orders. *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 38 (2014).

<sup>120</sup> 781 F.3d at 67 (Niemeyer, J., writing for the court in part and dissenting in part).

<sup>121</sup> 28 U.S.C. § 1334(c)(2) requires a court exercising bankruptcy jurisdiction, upon timely motion, to abstain from hearing a non-core matter based upon state law “if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.” 28 U.S.C. § 1334(c)(2) (2018). It is questionable whether an arbitration proceeding constitutes “a State forum of appropriate jurisdiction.” And in any event, that provision applies only to state law non-core matters for which the federal court did not have diversity or other jurisdiction and in which the proceeding had already commenced. *Id.*

doctrine.”<sup>122</sup> But the Act has not been amended since the 1978 Bankruptcy Code or the 1984 bankruptcy amendments to repeal the effect of § 1334 upon the FAA.<sup>123</sup>

The Supreme Court has emphasized that “generalities” in an earlier federal statute “should not lightly be construed to frustrate a specific policy embodied in a later federal statute.”<sup>124</sup> Thus, in *United States v. Estate of Romani*, the Court found the later enacted Tax Lien Act of 1966’s more specific rule trumped the rule in the more general federal priority statute, 31 U.S.C. § 3713(a). The Tax Lien Act stated that federal tax liens “shall not be valid” against judgment lien creditors until prescribed notice was given, while the federal priority statute, “virtually unchanged since its enactment in 1797,” provided generally that the United States Government “‘shall be paid first’ when a decedent’s estate cannot pay all of its debts.”<sup>125</sup> As explained by the Court, the later tax statute was “the more specific statute, and its provisions are comprehensive, reflecting an obvious attempt to accommodate the strong policy objections to the enforcement of secret liens” and “represents Congress’ detailed judgment as to when the Government’s claims for unpaid taxes should yield to many different sorts of interests.”<sup>126</sup> Similarly, the highly detailed and comprehensive Bankruptcy Code of 1978 and its jurisdictional provisions within title 28, intended by Congress “to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,”<sup>127</sup> should not be deemed retroactively eroded by the short and much more general FAA, enacted more than fifty years before and not substantially changed thereafter.<sup>128</sup>

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<sup>122</sup> 9 U.S.C. § 15, added by Pub. L. No. 100-669, § 1, Nov. 16, 1988, 102 Stat. 3969.

<sup>123</sup> Indeed, the principal sections of the Arbitration Act, sections 1 through 9, have not been amended since the Act was codified into the United States Code in 1947, other than a minor amendment to section 7 in 1951, Oct. 31, 1951, ch 655, § 14, 65 Stat. 715, and a technical amendment to section 4 in 1954, Sept. 3, 1954, ch 1263, § 19, 68 Stat. 1233.

<sup>124</sup> *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (quoting *Massachusetts v. United States*, 333 U.S. 611, 635 (1948) (Jackson, J., dissenting)).

<sup>125</sup> *Id.* at 519–24.

<sup>126</sup> *Id.* at 532.

<sup>127</sup> *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (first citing H.R. REP. NO. 95–595, at 43–48 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6004–09; and then citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (1984)).

<sup>128</sup> The largest change to the FAA after 1984 was the addition of a new Chapter 3 providing for recognition and enforcement of the Inter-American Convention on International Commercial Arbitration, added Aug. 15, 1990, Pub. L. No. 101–369, 104 Stat. 448. Through this amendment Congress again showed its ability to make clear

Bankruptcy law also holds a special place in federal jurisprudence. Article I of the United States Constitution expressly grants Congress the power to establish “uniform Laws on the subject of Bankruptcies throughout the United States.”<sup>129</sup> This power “includes the power to discharge the debtor from his contracts and legal liabilities” and the “grant to Congress involves the power to impair the obligation of contracts, [something] the States were forbidden to do.”<sup>130</sup> While the FAA may have been intended “to place an arbitration agreement ‘upon the same footing as other contracts,’ ”<sup>131</sup> the Bankruptcy Code in its central provisions authorizes the modification of contractual rights.<sup>132</sup>

Indeed, this would not be the first time that bankruptcy laws constitute a rare example of precluding or partially repealing other earlier contrary statutes. The Court in *Estate of Romani* listed the Bankruptcy Act of 1898 as “an additional context in which another federal statute was given effect despite the [federal] priority statute’s<sup>133</sup> literal, unconditional text,” resolving “the tension between the new bankruptcy provisions and the priority statute by applying the former and thus treating the Government like any other general creditor.”<sup>134</sup> The Full Faith and Credit Act<sup>135</sup> is another longstanding but general statute that the Supreme Court has suggested has been partially repealed or precluded by bankruptcy laws. In *Matsushita Electric Industrial Co. v. Epstein*, the Court noted that as “an historical matter, we have seldom, if

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when Chapter 1 of the Arbitration Act should apply to subsequent statutory provisions. 9 U.S.C. § 307 (2018) (“Chapter 1 [9 U.S.C. §§ 1–16] applies to actions and proceedings brought under this chapter [9 U.S.C. §§ 301–07] to the extent chapter 1 [9 U.S.C. §§ 1–16] is not in conflict with this chapter [9 U.S.C. §§ 301–307] or the Inter-American Convention as ratified by the United States.”). Yet, Congress has not similarly indicated that the FAA should apply to the Bankruptcy Code of 1978 or its jurisdictional provisions.

<sup>129</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>130</sup> *Railway Labor Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 466 (1982) (quoting *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 186 (1902)).

<sup>131</sup> *Dean Witter Reynolds, Inc v. Byrd*, 470 U.S. 213, 219 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

<sup>132</sup> *See, e.g., Phillips v. Congelton, L.L.C. (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 169 (4th Cir. 2005) (stating the “very purpose of bankruptcy is to modify the rights of debtors and creditors” (internal citation and quotation omitted)).

<sup>133</sup> 31 U.S.C. § 3713 (2018).

<sup>134</sup> *United States v. Estate of Romani*, 523 U.S. 517, 531 (1998) (first citing *Guar. Title & Trust Co. v. Title Guar. & Surety Co.*, 224 U.S. 152, 158–60 (1912); and then citing *Davis v. Pringle*, 268 U.S. 315, 317–19 (1925)).

<sup>135</sup> 28 U.S.C. § 1738 (2018).

ever, held that a federal statute impliedly repealed § 1738,<sup>136</sup> but referenced the holding in *Brown v. Felson*<sup>137</sup> as a possible exception.<sup>138</sup> In *Brown*, the Court noted that in 1970 “Congress altered § 17 [of the Bankruptcy Act] to require creditors to apply to the bankruptcy court for adjudication of certain dischargeability questions,” including those under the predecessor to the current exception for intentional torts.<sup>139</sup> Having found “the bankruptcy court’s jurisdiction over these § 17 claims as ‘exclusive,’” the Court concluded that “it would be inconsistent with the philosophy of the 1970 amendments to adopt a policy of res judicata which takes these § 17 questions away from bankruptcy courts and forces them back into state courts.”<sup>140</sup> Although *Brown* was decided under the old Bankruptcy Act, § 523(c) of the Bankruptcy Code of 1978 similarly provides that debts for intentional torts under § 523(a)(2), (4) or (6) are discharged unless “on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge[.]”<sup>141</sup> The Court has continued to find applicable under the 1978 Bankruptcy Code *Brown*’s holding that state court judgments do not have res judicata or claim preclusive effect<sup>142</sup> on a bankruptcy court’s determination of non-dischargeability for intentional torts.<sup>143</sup> In an unpublished opinion, the Fifth Circuit has also found that the bankruptcy jurisdiction provisions were intended to override the requirement for administrative exhaustion under the earlier enacted Contract

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<sup>136</sup> 516 U.S. 367, 380 (1996) (first citing *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523–24 (1986) (Anti-Injunction Act does not limit § 1738); then citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 83–85 (1984) (§ 1983 does not limit claim preclusion under § 1738); then citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468–76 (1982) (Title VII of the Civil Rights Act of 1964 does not limit § 1738); and then citing *Allen v. McCurry*, 449 U.S. 90, 96–105 (1980) (§ 1983 does not limit issue preclusion under § 1738)).

<sup>137</sup> 442 U.S. 127, 138–39 (1979).

<sup>138</sup> *Matsushita Electric Indust. Co.*, 516 U.S. 367, 380–81 (1996) (describing *Brown*’s holding as “declining to give claim preclusive effect to prior state court debt collection proceeding in federal bankruptcy suit, without discussing § 1738, state law or implied repeals”).

<sup>139</sup> *Brown*, 442 U.S. at 129–30.

<sup>140</sup> *Id.* at 136.

<sup>141</sup> 11 U.S.C. § 523(c) (2018).

<sup>142</sup> However, the Supreme Court has found that state court judgments may have collateral estoppel or issue preclusive effect on discharge exception proceedings pursuant to Section 523(a). *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991).

<sup>143</sup> See, e.g., *Archer v. Warner*, 538 U.S. 314, 319 (2003) (“*Brown v. Felsen* . . . governs the outcome here.”).



Disputes Act.<sup>144</sup> Noting that “a later enacted statute may limit the scope of an earlier statute,” that “the Bankruptcy Code does not specifically mention administrative exhaustion,” and based on the legislative history and purposes of the bankruptcy statutes, the court concluded that “Congress intended these broad statutory provisions to override the [Contract Disputes Act]’s procedural requirements due to the perceived need for virtually all bankruptcy-related proceedings to be handled inexpensively and expeditiously in but one forum.”<sup>145</sup>

Therefore, even in light of the Supreme Court’s decisions finding other federal statutes not to override the FAA, bankruptcy is distinguishable.<sup>146</sup> The jurisdictional provisions in § 1334, together with the legislative history and purposes of the 1978 amendments make clear that courts exercising bankruptcy jurisdiction over any matter related to a bankruptcy case may continue to exercise that jurisdiction notwithstanding any agreement that would purport to require arbitration.

### III. IMPLIED PRECLUSION BY 28 U.S.C. § 1334

#### A. *Implied Preclusion Based on Text and History*

Even if § 1334(b) were read as not expressly repealing the FAA, the clause still demonstrates congressional intent through its text, history, and purpose to impliedly repeal the FAA. Much of the Supreme Court’s recent expansion of the FAA has involved preemption over state laws or rules seen to impede or impair arbitration rights.<sup>147</sup> But in *POM Wonderful L.L.C. v. Coca-Cola*

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<sup>144</sup> *United States v. MacLeod Co. (In re MacLeod Co.)*, 935 F.2d 270 (6th Cir. 1991).

<sup>145</sup> *Id.* at \*11, \*14–15.

<sup>146</sup> Indeed, the Bankruptcy Code has also been treated differently from other statutes for purposes of State sovereign immunity under the 11th Amendment. In *Tennessee Student Assistance Corp. v. Hood*, the Supreme Court, highlighting that bankruptcy at heart is an *in rem* proceeding, including the discharge, held that bankruptcy court adjudication of the dischargeability of a student loan owed to a state entity “is not a suit against a State for purposes of the Eleventh Amendment.” 541 U.S. 440, 450–51 (2004). The Court expanded that ruling two years later to cover “orders ancillary to the bankruptcy courts’ *in rem* jurisdiction, like orders directing turnover of preferential transfers,” finding that “the history of the Bankruptcy Clause, which shows that the Framers’ primary goal was to prevent competing sovereigns’ interference with the debtor’s discharge,” demonstrates that the States implicitly agreed not to assert sovereign immunity over such matters. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373 (2006).

<sup>147</sup> *See, e.g., Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1429 (2017) (Kentucky common law rule limiting ability to authorize waiver of right to court

Co., the Supreme Court emphasized the difference between preemption and preclusion. In this sense, preemption involves the relationship between federal and state law while preclusion involves the relationship between two federal laws. As the Supreme Court explained:

In pre-emption cases, the question is whether state law is pre-empted by a federal statute, or in some instances, a federal agency action. This case, however, concerns the alleged preclusion of a cause of action under one federal statute by the provisions of another federal statute. So the state-federal balance does not frame the inquiry. Because this is a preclusion case, any “presumption against pre-emption” has no force.<sup>148</sup>

Instead, “[a]nalysis of the statutory text, aided by established principles of interpretation, controls.”<sup>149</sup> In *POM Wonderful*, the defendant argued that the plaintiff’s false advertising claim under the Lanham Act was precluded by labeling requirements under the Federal Food, Drug, and Cosmetic Act (“FDCA”). The Court, noting that no “textual provision in either statute discloses a purpose to bar” Lanham claims over labels regulated by the FDCA, found that the “structures of the FDCA and the Lanham Act” complemented rather than conflicted with each other and permitted actions under either statute.<sup>150</sup> Additionally, the Court found no conflict in the purposes of the two statutes.<sup>151</sup> Similarly, in its FAA cases, the Court has looked to the text, the history, and the purposes of the FAA and the federal statute supposedly in

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in power of attorney); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466–67 (2015) (California common law unconscionability doctrine against waiver of class arbitration right); *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 337–38 (2011) (same); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530–31 (2012) (West Virginia common law principle against waivers of arbitration in nursing home admission agreements); *Preston v. Ferrer*, 552 U.S. 346, 351 (2008) (California statute referring certain disputes initially to an administrative agency); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (construing broadly FAA’s use of term “involving commerce” to the “broadest permissible exercise of Congress’ Commerce Clause”); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996) (involving a Montana statute making arbitration clauses unenforceable unless typed in underlined capital letters on first page of contract); *Perry v. Thomas*, 482 U.S. 483, 486 (1987) (involving a California statute providing that actions for collection of wages may be maintained without regard to private agreement to arbitrate); *Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984) (noting FAA requires state courts, not just federal courts, to stay proceedings and order arbitration).

<sup>148</sup> *Pom Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014) (citing *Wyeth v. Levine*, 555 U.S. 555, 563, 565 (2009)).

<sup>149</sup> *Id.* at 112.

<sup>150</sup> *Id.* at 113, 115.

<sup>151</sup> *Id.* at 117.

conflict with the FAA to determine whether one impliedly precludes or repeals the other. In *Epic Systems*, the Supreme Court generally explained:

When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at “liberty to pick and choose among congressional enactments” and must instead strive “to give effect to both.” . . . A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing “a clearly expressed congressional intention” that such a result should follow. . . . The intention must be “clear and manifest.” . . . And in approaching a claimed conflict, we come armed with the “stron[g] presum[ption]” that repeals by implication are “disfavored” and that “Congress will specifically address” preexisting law when it wishes to suspend its normal operations in a later statute.<sup>152</sup>

As discussed in the previous section, the jurisdictional provisions of both the 1978 and 1984 bankruptcy amendments show such a “clearly expressed congressional intention” that no other federal statute—including the FAA—may deprive bankruptcy courts of their original jurisdiction to hear bankruptcy-related matters.<sup>153</sup> This clear congressional intent is further supported by the legislative history.<sup>154</sup>

Indeed, the first court of appeals to address the issue after the 1978 Bankruptcy Amendments initially found that the bankruptcy jurisdiction provisions “impliedly modif[ied] the Arbitration Act.”<sup>155</sup> The Third Circuit in *Zimmerman* noted that the Bankruptcy Reform Act of 1978

significantly expands the jurisdiction of bankruptcy courts and is based on the notion that to protect the positions of both the bankrupt and its creditors, bankruptcy actions should not be subject to unnecessary delay and all claims and issues relevant to such actions should be resolved in one expeditious proceeding,

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<sup>152</sup> 138 S. Ct. 1612, 1624 (2018) (first quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974); then quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995); and then quoting *United States v. Fausto*, 484 U.S. 439, 452–53 (1988)).

<sup>153</sup> See *supra* Part III.

<sup>154</sup> See *supra* notes 111–112 and accompanying text.

<sup>155</sup> *Zimmerman v. Cont'l Airlines, Inc.*, 712 F.2d 55, 59 (3d Cir. 1983); see also, *Cross Elec. Co., Inc. v. John Driggs Co., Inc.* (*In re Cross Elec. Co. Inc.*), 9 B.R. 408, 410–11 (Bankr. W.D. Va. 1981).

finding that “[w]hile the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance.”<sup>156</sup> The court, relying upon *Wilko*, focused primarily on the “not easily reconcilable” competing policies behind the two statutes,<sup>157</sup> but also quoted the text of 28 U.S.C. § 1471<sup>158</sup> and its legislative history.<sup>159</sup>

However, the Third Circuit revisited *Zimmerman* six years later in *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*<sup>160</sup> and decided to depart from its earlier reasoning based on subsequent developments. In 1984, Congress had amended the bankruptcy jurisdiction provisions of Title 28 in an attempt to address the Supreme Court’s holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>161</sup> *Northern Pipeline* held that at least a portion of the 1978 amendments’ delegation of authority to the non-Article III bankruptcy courts violated Article III of the Constitution.<sup>162</sup> The court in *Hays*, noting that the 1984 amendments required certain types of claims to be brought in the federal district courts or in state courts, concluded that the “congressional policy of consolidating all bankruptcy-related matters in the bankruptcy court, relied upon by [the Third Circuit] in *Zimmerman*, is no longer applicable.”<sup>163</sup>

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<sup>156</sup> 712 F.2d at 56, 59.

<sup>157</sup> *Id.* at 59.

<sup>158</sup> *Id.* at 58 n.3.

<sup>159</sup> *Id.* at 58 (“The House Report reiterated the need for expanded jurisdiction in the bankruptcy court [and] further stated that, as a result of the increased jurisdiction, ‘all matters and proceedings that arise in connection with bankruptcy cases’ may now be tried in one action before the bankruptcy court.” (quoting H. REP. NO. 95–595, 95th Cong., 1st Sess., reprinted in 1978 U.S.C.C.A.N. 5963, 6007–6010)).

<sup>160</sup> *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1159–60 (3d Cir. 1989).

<sup>161</sup> 458 U.S. 50, 85–87 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333, *as recognized in* *Stern v. Marshall*, 564 U.S. 462, 486 (2011).

<sup>162</sup> Under the 1978 amendments, bankruptcy jurisdiction was nominally placed in the district courts but then entirely and automatically transferred to the bankruptcy courts. *Northern Pipeline* involved an action brought by a Chapter 11 debtor-in-possession against a non-creditor third party under state law. It therefore did not arise under Title 11 or arise in the case, but related to the bankruptcy case to the extent success would bring additional funds into the estate. The plurality of the Court found that to enable a bankruptcy court to “issue final judgments, which are binding and enforceable even in the absence of an appeal[]” over such matters “impermissibly removed most, if not all of ‘the essential attributes of the judicial power’ from the Art. III district court, and has vested those attributes in a non-Art. III adjunct.” 458 U.S. at 85–87.

<sup>163</sup> *Hays*, 885 F.2d at 1160.

Yet the *Hays* opinion does not seem to appreciate that the 1984 amendments affected the *allocation* of authority between the Article III district court and the non-Article III bankruptcy court, and not the scope of jurisdiction granted to federal courts exercising bankruptcy jurisdiction as a whole.<sup>164</sup> Nor in concluding that Congress had abandoned a policy of “consolidating all bankruptcy-related matters” in a single court does the Third Circuit mention that through the 1984 amendments Congress designated the bankruptcy courts as “a unit of the district court”<sup>165</sup> or that the district courts were given the power—including on their own motion—to “withdraw, in whole or in part, any case or proceeding” that the district court had referred to the bankruptcy court.<sup>166</sup> An earlier version of the proposed amendments passed by the Senate would have much more broadly required abstention regarding purely state law claims. But that proposal was ultimately deleted. As explained by one House Representative:

The change in the definition in the Senate-passed bill would have contradicted the basic purposes of the consolidated jurisdiction we adopted in 1978 in response to the recommendations of the commission on bankruptcy laws. Finally, it would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.<sup>167</sup>

The court in *Hays* also pointed to subsequent Supreme Court decisions, such as *McMahon* and the overturning of *Wilko* by *Rodriguez de Quijas*, as warranting reversal of its conclusion in *Zimmerman* that the jurisdictional provisions provided statutory evidence of a congressional intent to supersede the FAA.<sup>168</sup> As the court stated:

The message we get from these recent cases is that we must carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an

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<sup>164</sup> “Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. That allocation does not implicate questions of subject matter jurisdiction.” *Stern v. Marshall*, 564 U.S. 462, 480 (2011) (citation omitted).

<sup>165</sup> *Hays*, 885 F.2d at 1160; 28 U.S.C. § 151 (2018).

<sup>166</sup> 28 U.S.C. § 157(d) (2018).

<sup>167</sup> 130 CONG. REC. 20, 227–28 (1984) (statement of Rep. Kastenmeier).

<sup>168</sup> *Hays*, 885 F.2d at 1160.

arbitration clause and that we should enforce such a clause unless that effect would seriously jeopardize the objectives of the Code.<sup>169</sup>

But as discussed above,<sup>170</sup> it is dangerous to overgeneralize the recent holdings of the Supreme Court on the FAA, given that none of the federal statutes at issue in those cases had language similar to the bankruptcy jurisdiction provisions. The court also noted that in *McMahon* and *Rodriguez de Quijas* the Supreme Court had found the FAA to require arbitration of claims under the Securities Exchange Act of 1934 despite the fact that § 27 of the Exchange Act granted district courts *exclusive* jurisdiction to hear claims under the Exchange Act.<sup>171</sup> But as noted above, the Supreme Court in *McMahon* analyzed only whether the anti-waiver provision of the Exchange Act was inconsistent with the FAA and did not discuss how mandatory arbitration could be consistent with a grant of exclusive jurisdiction to the federal courts.<sup>172</sup> Nor did the statutes at issue include clear preclusion language overriding any act of Congress to the contrary. So even if *McMahon* or *Rodriguez de Quijas* could be read to include a holding that courts should not imply an exception to the FAA through a mere affirmative grant of jurisdiction to a federal court, the exception in 28 U.S.C. § 1334 is not merely implied.

Lower courts have found other provisions of the Bankruptcy Code to preempt the FAA based on text and legislative history even where the statute makes no express reference to arbitration. Most notably, courts have concluded that the automatic stay under 11 U.S.C. § 362(a) applies to and stays arbitration, even though there is no express reference to arbitration in the statute. The legislative history to § 362(a) makes clear that the broad language staying “the issuance or employment of process, of a judicial, administrative, or other action or proceeding”<sup>173</sup> was intended to include arbitration. The House Report for the Bankruptcy Reform Act of 1978 states that the automatic stay under § 362(a) “is broad [and a]ll proceedings are stayed, *including arbitration*, license revocation, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions as well, and all proceedings

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<sup>169</sup> *Id.* at 1161. Additionally, while all districts have, through local rules, provided for the automatic referral of bankruptcy matters to the bankruptcy courts within their district, they are not required to do so. See 28 U.S.C. § 157(a) (2018).

<sup>170</sup> See *supra* notes 46–70 and accompanying text.

<sup>171</sup> *Hays*, 885 F.2d at 1162 n. 12.

<sup>172</sup> See *supra* notes 72–75 and accompanying text.

<sup>173</sup> 11 U.S.C. § 362(a)(1) (2018).

even if they are not before governmental tribunals.”<sup>174</sup> As noted by then Judge Alito, under a “long-standing exception to th[e] general rule” requiring enforcement of an arbitration award, the “automatic stay provision of the Bankruptcy Code promotes a public policy sufficient to preclude enforcement of an award that violates its terms or interferes with its purposes.”<sup>175</sup> Additionally, while the bankruptcy jurisdiction statute *permits* certain matters to be adjudicated in other forums, it grants “original” jurisdiction over bankruptcy-related matters in the federal courts, and also authorizes removal of bankruptcy-related matters initiated in state courts to the federal courts in at least certain instances. While the grant is “not exclusive” with respect to such matters, parties are not necessarily at liberty to seek relief in a forum with concurrent jurisdiction during the pendency of the bankruptcy, or even attempt to negotiate or otherwise pursue matters in a non-judicial manner without first obtaining authorization from the bankruptcy court. For example, the automatic stay broadly stays collection efforts against the debtor or property of the estate unless relief is first sought and obtained from the bankruptcy court.<sup>176</sup> Additionally, the rights of the debtor against third parties become property of the estate,<sup>177</sup> and the bankruptcy trustee becomes the representative of the estate with the right to sue and be sued.<sup>178</sup> The Bankruptcy Code generally requires the trustee to seek bankruptcy court approval before selling or using property of the estate<sup>179</sup> or before compromising or settling a controversy.<sup>180</sup> This normally requires a hearing and notice to all parties

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<sup>174</sup> H.R. REP. NO. 95-595, at 340 (1977) (emphasis added); *see also* S. REP. NO. 95-989, at 50 (1978) (“The scope of this paragraph is broad. All proceedings are stayed, including arbitration, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions and all proceedings even if they are not before governmental tribunals.”).

<sup>175</sup> *Acands, Inc. v. Travelers Casualty & Surety Co.*, 435 F.3d 252, 258–59 (3d Cir. 2006) (“We agree that the automatic stay applied to the arbitration and that the panel should have halted the arbitration once it became apparent that proceeding further could negatively impact the bankruptcy estate. We also hold that the arbitration award is invalid because it diminishes the property of the estate.”).

<sup>176</sup> 11 U.S.C. § 362(a) (2018).

<sup>177</sup> 11 U.S.C. § 541 (2018).

<sup>178</sup> 11 U.S.C. § 323 (2018).

<sup>179</sup> 11 U.S.C. § 363 (2018).

<sup>180</sup> FED. R. BANKR. P. 9019.

in interest affected by the bankruptcy proceeding, including creditors, and the court must make a determination that the use, sale, or compromise is in the best interest of the estate.<sup>181</sup>

In this sense, the grant of concurrent jurisdiction over bankruptcy-related matters differs from the statutes at issue in the Supreme Court's FAA cases. Rejecting the argument that "compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by" the Age Discrimination in Employment Act, the Supreme Court noted that Congress had granted concurrent jurisdiction over such claims to state and federal courts and concluded that arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."<sup>182</sup> Similarly, the Supreme Court suggested in *Rodriguez de Quijas* that the Securities Act of 1933's grant of concurrent jurisdiction reflected a congressional decision to give plaintiffs choice over forum and enforcing arbitration agreements, as a form of "forum-selection clause," advanced "the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."<sup>183</sup> In contrast, § 1334's failure to grant exclusive jurisdiction over all bankruptcy-related matters does not mean that parties are at full liberty to use non-bankruptcy forums without first seeking stay relief or permission from the bankruptcy court. Nor does the failure to provide exclusive jurisdiction indicate that Congress did

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<sup>181</sup> See, e.g., Official Comm. of Unsecured Creditors v. Moeller (*In re Age Ref., Inc.*), 801 F.3d 530, 540 (5th Cir. 2015) ("A bankruptcy court may approve a compromise or settlement on motion by the trustee and after notice and a hearing pursuant to Rule 9019, but it should do so 'only when the settlement is fair and equitable and in the best interest of the estate.'" (quoting *In re Foster Mortg. Corp. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)); *Am. Prairie Constr. Co. v. Hoich*, 594 F.3d 1015, 1024 (8th Cir. 2010) ("In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable." (quoting *Reynolds v. Comm'r of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988)); *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994) ("In conducting a hearing under Rule 9019(a), the bankruptcy court is to determine whether the proposed compromise is fair and equitable, and in the best interests of the bankruptcy estate." (first citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); and then citing *LaSalle Nat'l Bank v. Holland (In re Am. Reserve Co.)*, 841 F.2d 159, 161 (7th Cir. 1987)).

<sup>182</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989)).

<sup>183</sup> *Rodriguez de Quijas*, 490 U.S. at 482–83.



not believe the federal procedural protections in the Bankruptcy Code are important or subject to waiver—including waiver in advance through an arbitration agreement. The Court in *Rodriguez de Quijas* found that federal procedural protections such as broad choice of venue and nationwide service of process in the Securities Act were not protected from waiver since “the grant of concurrent jurisdiction constitutes explicit authorization for complainants to waive those protections by filing suit in state court without possibility of removal to federal court.”<sup>184</sup> A similar conclusion cannot be drawn from the grant of concurrent jurisdiction in 28 U.S.C. § 1334(b), because these other features of title 11 and title 28 do permit removal to federal court and do protect the party from state court proceedings, at least temporarily. Moreover, the fact that the bankruptcy provisions permit concurrent litigation in other forums should not be read to imply that those provisions permit the bankruptcy courts to be deprived of their original jurisdiction. To the contrary, the statute is clear that the federal courts shall have original jurisdiction over bankruptcy-related matters notwithstanding any act of Congress to the contrary.<sup>185</sup> This is necessary to ensure that not only the signatories to the arbitration agreement, but all parties with an interest in the bankruptcy case receive the procedural protection and oversight given them by the Bankruptcy Code.<sup>186</sup> Thus, the early Third Circuit opinion in *Zimmerman* was correct to find that the bankruptcy jurisdictional provisions override the FAA, and the 1984 amendments and Supreme Court’s rulings in *McMahon* and *Rodriguez de Quijas* do not change that conclusion.

### B. *Implied Preclusion Based on Policy Conflict*

Even under *McMahon*’s “third prong,” the courts of appeals have too narrowly interpreted the policies behind the 1978 and 1984 bankruptcy amendments when deciding whether arbitration

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<sup>184</sup> *Id.* at 482.

<sup>185</sup> 28 U.S.C. § 1334(b).

<sup>186</sup> In this sense, too, the reasoning in *Rodriguez de Quijas* is distinguishable. Quoting Justice Frankfurter’s dissent from *Wilko*, the Court stated: “There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled.” *Rodriguez de Quijas*, 490 U.S. at 483 (quoting *Wilko v. Swan*, 346 U.S. 427, 439 (1953) (Frankfurter, J., dissenting) (internal quotation marks omitted)). In contrast, there is nothing to suggest that arbitration between two signatories affords non-signatory creditors and other parties in interest rights to which they are entitled under the Bankruptcy Code and Rules.

inherently conflicts with bankruptcy policies. As reflected in 28 U.S.C. § 1334, Congressional policy favors having *all* matters related to and affecting the bankruptcy proceeding heard in a centralized federal court with notice to all interested parties, not merely “core” matters. In narrowly interpreting bankruptcy policies, the courts of appeals have ignored other important reasons for Congress to wish for all matters affecting the bankruptcy estate—whether “core” or “non-core”—to be heard in the federal courts. In providing broad bankruptcy jurisdiction, the statute ensures that creditors and other parties in interest affected by claims by or against the estate have the right to notice and the opportunity to object or participate, sets forth consistent rules of procedure, and guarantees that the bankruptcy court is able to supervise matters affecting the estate as necessary.

“‘A fundamental principle of the bankruptcy process is the collective treatment of all of a debtor’s creditors at one time.’”<sup>187</sup> This principle is fundamental not only to preserve the parties’ and courts’ resources, but also to provide opportunity for all creditors and other interested parties to participate and have notice of the proceedings. Bankruptcy “is a collective process, designed to gather together the assets and debts of the debtor and to effect an equitable distribution of those assets on account of the debts,” and the “more participation there is; the better this process works.”<sup>188</sup> To ensure all affected parties’ interests are protected, the bankruptcy court is given specific power to monitor and hold open hearings on all bankruptcy-related matters.<sup>189</sup> The right to notice and to participate in matters affecting the estate are ensured through the Bankruptcy Code and Federal Rules of Bankruptcy Procedure.<sup>190</sup> Thus, the courts of appeals have overemphasized the

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<sup>187</sup> *Owens v. LVNV Funding, LLC*, 832 F.3d 726, 732 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 2157 (2017) (quoting 1 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, *NORTON BANKR. L. & PRAC.* § 3:9 (3d ed. 2019)).

<sup>188</sup> *Owens*, 832 F.3d at 732 (citation omitted).

<sup>189</sup> For example, Section 105(d) of the Bankruptcy Code provides that:

The court, on its own motion or on the request of a party in interest—

- (1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and
- (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically . . . .

11 U.S.C. § 105(d) (2018).

<sup>190</sup> *See, e.g.*, 11 U.S.C. § 102(1) (2018) (defining “after notice and a hearing”); 11 U.S.C. § 107(a) (2018) (“[A] paper filed in a case under this title and the dockets of a

fact that under the 1984 bankruptcy amendments, some matters must be heard by the district court instead of the bankruptcy court. In doing so, they have failed to appreciate that the bankruptcy court is a unit of the district court,<sup>191</sup> subject to review by and removal of proceedings by the district court,<sup>192</sup> and that the same Federal Rules of Bankruptcy Procedure apply to bankruptcy-related proceedings in the district court, giving the same right to notice and to participate to creditors and other parties in interest.<sup>193</sup> Thus while, for example, 28 U.S.C. § 157 provides for the district court to hear particular matters<sup>194</sup> and for the bankruptcy court to submit proposed findings of fact and conclusions of law to the district court for certain “non-core”

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bankruptcy court are public records and open to examination by an entity at reasonable times without charge.”); 11 U.S.C. § 342 (2018) (notice); FED. R. BANKR. P. 2002 (certain required notice); FED. R. BANKR. P. 7004 (process); FED. R. BANKR. P. 9013 (standard motions); FED. R. BANKR. P. 9014 (contested matters); FED. R. BANKR. P. 9019 (compromise and arbitration).

<sup>191</sup>

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 151 (2018).

<sup>192</sup> See, e.g., 28 U.S.C. § 158 (2018) (jurisdiction for district courts to hear appeals from the bankruptcy courts); 28 U.S.C. § 157(d) (2018) (district court’s power to remove proceedings previously referred to the bankruptcy court).

<sup>193</sup> See FED. R. BANKR. P. 1001 (“The Bankruptcy Rules and Forms govern procedure in cases under Title 11 of the United States Code.”); see also, e.g., *Phar-Mor, Inc. v. Coopers & Lybrand*, 22 F.3d 1228, 1237 (3d Cir. 1994) (“[W]e believe that nothing in the Bankruptcy Rules, and in Bankruptcy Rule 7001 in particular, suggests that the rules are limited to core (as opposed to non-core, ‘related to’) proceedings.”). As noted by the Eleventh Circuit, “Rule 1001 was amended in 1987 for the specific purpose of expanding the reach of the rules beyond the bankruptcy courts to all courts hearing bankruptcy matters.” *Rosenberg v. DVI Receivables XIV, LLC*, 818 F.3d 1283, 1287 (11th Cir. 2016). As stated in the advisory committee notes, “amended Bankruptcy Rule 1001 makes the Bankruptcy Rules applicable to cases *and proceedings* under title 11, whether before the district judges or the bankruptcy judges of the district.” *Id.* (quoting FED. R. BANKR. P. 1001 advisory committee’s note to 1987 amendments) (emphasis added).

<sup>194</sup> See, e.g., 28 U.S.C. § 157(b)(5) (2018) (providing that the “district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending”).

matters,<sup>195</sup> in either case the same Bankruptcy Code and same Federal Rules of Bankruptcy Procedure apply to the matter. This ensures that all parties affected by the bankruptcy are given notice and provided the right to participate, even for matters pending before the district court. The same procedures also apply whether a matter “arises under” the Bankruptcy Code or is “non-core” but related to a bankruptcy proceeding. As the Seventh Circuit has explained, given “the new jurisdictional scheme” created through the 1984 bankruptcy amendments in response to *Marathon*,

it would seem anomalous for different sets of procedural rules to govern related proceedings in the same court, given the bankruptcy scheme’s emphasis on centralization and efficiency. The creation of a dual procedural system would not be consistent with these goals, nor would it comport with Congress’s intent to streamline the bankruptcy process.<sup>196</sup>

In contrast, state courts and non-judicial forums such as arbitration may not provide the sort of rights given under the Bankruptcy Code and Bankruptcy Rules for notice and the right of third parties affected by the bankruptcy proceedings to object. This is especially true for some types of arbitration, which may bar participation by non-parties and make the proceedings and even awards confidential.<sup>197</sup>

One weakness of the current *McMahon*-based standard for bankruptcy matters is that the centralization and efficiency policies discussed by the courts of appeals are likely by themselves insufficient justification for the courts of appeals’ rulings, as the Supreme Court has held that judicial economy and avoidance of “piecemeal litigation” is not enough to override the FAA’s mandate. In reversing a court that had refused to order arbitration of some issues on the basis of non-arbitrable matters in the same proceeding, the Court stated, “We rigorously enforce

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<sup>195</sup> See 28 U.S.C. § 157(c)(1) (2018) (non-core but related proceedings in which the parties have not consented to final order by the bankruptcy court).

<sup>196</sup> *Diamond Mortg. Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1243 (7th Cir. 1990).

<sup>197</sup> See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1648 (2018) (“Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect.”) (Ginsburg, J., dissenting); *Am. Family Life Assurance Co. of Columbus v. Hubbard*, No. 18-11869, 2019 WL 115102, at \*6 (11th Cir. Jan. 7, 2019) (enforcing arbitration agreement requiring parties to arbitration to keep any rulings and decisions of the arbitrators strictly confidential); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1249, 1252 (10th Cir. 2018) (affirming arbitration award involving arbitration agreement requiring “all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards [to be kept] confidential”).

agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute."<sup>198</sup>

Additionally, even if the purpose of the Arbitration Act is to make arbitration agreements as enforceable as other contractual provisions, the 1978 Bankruptcy Code is grounded on the modification of contractual rights.<sup>199</sup> This both ensures that honest but unfortunate debtors can receive a fresh start<sup>200</sup> and that creditors are not unfairly treated due to the machinations between the debtor and particular creditors or other third parties.<sup>201</sup> Bankruptcy centralizes disputes affecting the estate not only for efficiency's sake, but to ensure the indirect rights of other interested parties are taken into account and protected. Bankruptcy is different from other litigation in this respect. Especially because of the discharge, the bankruptcy proceeding may be the last and only opportunity for creditors to share in the distribution of the debtor's assets, including proceeds of the debtor's claims against others. In individual creditor collection actions outside of bankruptcy, the first to act or the one most likely to gain the cooperation of the debtor may be able to obtain the lion's share of the debtor's limited assets. In contrast, bankruptcy law ensures a more equitable distribution by including all creditors and parties with an interest in the estate in the resolution of issues involving obligations owed by or owed to the debtor.

In that process, the two parties to the arbitration agreement—usually the debtor and a counterparty who may or may not be a creditor of the estate—may not adequately represent the interests of other affected parties. For example, an insolvent

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<sup>198</sup> Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

<sup>199</sup> See, e.g., Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co., L.L.C.), 403 F.3d 164, 169 (4th Cir. 2005) (explaining the "very purpose of bankruptcy is to modify the rights of debtors and creditors") (internal citation and quotation omitted).

<sup>200</sup> See, e.g., 11 U.S.C. § 524(a)(2) (2018) (discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived."); 11 U.S.C. §§ 1123(b)(5), 1222(b)(2), 1322(b)(2) (2018) (noting with certain exceptions, a bankruptcy plan of reorganization may "modify the rights of holders of secured claims . . . or of holders of unsecured claims").

<sup>201</sup> See, e.g., 11 U.S.C. §§ 544, 547, 548 (2018) (giving trustee power to avoid preferential, fraudulent, and certain other types of prepetition transfers by the debtor to third parties).

debtor in a liquidating bankruptcy case may care very little about objecting to claims against the estate, since the resolution affects only the distribution between creditors as to assets the debtor is not permitted to retain. Allowing the debtor and the counterparty to arbitrate a dispute outside of the purview of the bankruptcy court may therefore jeopardize creditors' indirect interest in the resolution of the issue. To address this concern, the Bankruptcy Code gives creditors and other parties in interest the right to notice of claims and the opportunity to object.<sup>202</sup> Even before the bankruptcy case commences, an insolvent debtor may have diminished incentive to protect his or her nonexempt assets or may be outright hostile to the interests of other creditors. The Bankruptcy Code addresses this issue by appointing a trustee<sup>203</sup> to represent the general pool of creditors and by giving the trustee the power to avoid certain prepetition transfers where the debtor, and therefore the estate, did not receive reasonably equivalent value, where the transfer was intended to defraud or hinder creditors, or where the transfer constituted an unfair preference in favor of a particular creditor.<sup>204</sup> In order to ensure that the trustee acts in the best interest of the estate, creditors are generally entitled by the Bankruptcy Code and Rules to notice and the opportunity to object to a trustee's proposed use or sale of estate property or to a settlement of a claim by or against the estate.<sup>205</sup> In contrast, arbitration proceedings between the two counterparties to the arbitration agreement may not similarly provide notice or the right to participate for nonparties who may be affected by the resolution.

Additionally, the Bankruptcy Code expresses a certain amount of paternalism, both because insolvent debtors may have skewed or insufficient financial incentives, making them act in a less than optimal fashion, and because one of the purposes of the bankruptcy system is to prevent insolvent debtors from becoming wards of the state.<sup>206</sup> A bankruptcy debtor's waiver of the right to

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<sup>202</sup> See 11 U.S.C. § 502(b) (2018); FED. R. BANKR. P. 3007.

<sup>203</sup> Generally, in a Chapter 11 proceeding the debtor-in-possession performs this role and is given the rights, powers, and duties of a trustee. 11 U.S.C. § 1107(a) (2018). *But see* 11 U.S.C. § 1104 (2018) (authorizing appointment of a trustee for cause or certain circumstances on motion of a party in interest or the United States trustee).

<sup>204</sup> 11 U.S.C. §§ 544, 547, 548, 550 (2018).

<sup>205</sup> 11 U.S.C. § 363 (2010); FED. R. BANKR. P. 2002(a)(2), 2002(a)(3), 6004, 9019(a).

<sup>206</sup> In addition to the statutory prohibitions or invalidations of waiver, there is a general equitable rule prohibiting a prepetition waiver of the protection of the Bankruptcy Code as against public policy. *See, e.g., Bank of China v. Huang (In re*

receive a discharge is valid only if made in writing, executed post-petition, and approved by the bankruptcy court.<sup>207</sup> If a debtor does receive a discharge, any waiver of discharge of a specific debt is ineffective.<sup>208</sup> A debtor's waiver of exemptions in favor of an unsecured creditor is ineffective with respect to bankruptcy exemptions.<sup>209</sup> Nor does such a waiver deprive the debtor of the bankruptcy right to avoid judicial and certain other liens on exempt property.<sup>210</sup> A waiver of the protections under the Bankruptcy Code of a debtor against a debt relief agency is unenforceable against the debtor "by any Federal or State court or any other person."<sup>211</sup> Additionally, the Bankruptcy Code invalidates any provision in a contract, lease, or applicable law conditioned on the commencement of a bankruptcy case or the insolvency or financial condition of the debtor which would preclude property from entering the estate or restrict the estate's ability to use, sell, or lease property or assume or assign an executory contract.<sup>212</sup> Similarly, if a debtor agreed to terms of an arbitration agreement that especially benefits a particular third party—either because of preferential allegiance towards that party or simply because on the verge of bankruptcy the debtor did not care or had no choice—the bankruptcy jurisdictional provisions ensure that the resolution of issues within the scope of such agreement, but related to the bankruptcy, will not jeopardize creditor interests.

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Huang), 275 F.3d 1173, 1177 (9th Cir. 2002) ("It is against public policy for a debtor to waive the prepetition protection of the Bankruptcy Code," and "[t]his prohibition of prepetition waiver has to be the law; otherwise, astute creditors would routinely require their debtors to waive."); *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) (stating in dictum that "[f]or public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy"); *Fallick v. Kehr*, 369 F.2d 899, 904 (2d Cir. 1966) (stating in dictum that "an advance agreement to waive the benefits of the [Bankruptcy] Act would be void"). *But see Franchise Servs. of N. Am., Inc. v. U.S. Trustee (In re Franchise Servs. of North America, Inc.)*, 891 F.3d 198, 207 (5th Cir. 2018) ("assum[ing] without deciding that such a waiver is invalid").

<sup>207</sup> 11 U.S.C. § 727(a)(10), 1141(d)(4), 1228(a), 1328(a) (2018).

<sup>208</sup> 11 U.S.C. § 524(a) (2018). The only exception is a reaffirmation of a debt pursuant to 11 U.S.C. § 524(c), requiring compliance with all provisions of that section—including filing the reaffirmation agreement with the court, that required disclosures were made and either approval by the bankruptcy court after a finding that the reaffirmation of the debt will not impose an undue hardship on the debtor or debtor's dependents or a certification of debtor's counsel to that effect. *See* 11 U.S.C. §§ 524(c), (d) (2018).

<sup>209</sup> 11 U.S.C. § 522(e) (2018).

<sup>210</sup> 11 U.S.C. § 522(f)(1) (2018).

<sup>211</sup> 11 U.S.C. § 526 (2018).

<sup>212</sup> 11 U.S.C. §§ 363(l), 365(b)(2) (2018); 11 U.S.C. § 541(c)(1) (2018).

Moreover, the bankruptcy court's and the United States trustee's ability to supervise bankruptcy cases and matters affecting the estate—and in particular to enforce respect for the automatic stay and the discharge—are essential to the integrity and proper functioning of the bankruptcy system. The United States trustee “may be heard on any issue” in a bankruptcy case and “protect[s] the integrity of the bankruptcy system.”<sup>213</sup> The bankruptcy court may, on its own initiative, “sanction litigants for filing documents with ‘any improper purpose’ as well as ‘tak[e] any action . . . necessary or appropriate . . . to prevent an abuse of process.’”<sup>214</sup> This includes the power under § 707(a) of the Bankruptcy Code to dismiss a bankruptcy case filed by a debtor in bad faith—a “tool[] Congress has given bankruptcy courts to protect their ‘jurisdictional integrity.’”<sup>215</sup> Bankruptcy courts also have both “civil contempt powers to impose compensatory sanctions” and statutory authority to award actual and punitive damages on creditors who knowingly violate the automatic stay.<sup>216</sup> Only the bankruptcy “court that issued the discharge . . . ‘possesse[s] the power to enforce compliance with’ the discharge injunction.”<sup>217</sup>

Thus, contrary to the suggestion of the Second Circuit in *MBNA America Bank, N.A. v. Hill*, an alleged violation of the automatic stay does implicate the fundamental purposes of the Bankruptcy Code even if a bankruptcy case had already closed and the debtor received a discharge by the time the action was brought before the bankruptcy court.<sup>218</sup> Regardless of whether the violation was a past or ongoing violation, the “automatic stay

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<sup>213</sup> *Harrington v. Simmons (In re Simmons)*, 810 F.3d 852, 855 (1st Cir. 2016) (first citing 11 U.S.C. § 307 (2012); and then citing *In re Youk-See*, 450 B.R. 312, 323 (Bankr. D. Mass. 2011)); *see also* *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 740 (7th Cir. 2015) (stating the “goal of the Trustee is to ‘promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders—debtors, creditors, and the public.’” (quoting 1 U.S. DEPARTMENT OF JUSTICE, UNITED STATES TRUSTEE PROGRAM POLICY AND PRACTICES MANUAL § 1-4.2.1 (2015), [https://www.justice.gov/ust/file/volume\\_1\\_overview.pdf/download](https://www.justice.gov/ust/file/volume_1_overview.pdf/download))).

<sup>214</sup> *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1262 (11th Cir. 2013) (alterations in original) (citations omitted) (first quoting FED. R. BANKR. P. 9011(b)(1); then quoting 11 U.S.C. § 105(a) (2012)).

<sup>215</sup> *Id.* at 1262.

<sup>216</sup> *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1098 (9th Cir. 2015) (citing 11 U.S.C. § 362(k) (2012)).

<sup>217</sup> *Jones v. CitiMortgage, Inc.*, 666 F. App'x 766, 774 (11th Cir. 2016) (quoting *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1318–19 (11th Cir. 2015)).

<sup>218</sup> 436 F.3d 104 (2d Cir. 2006).



provision of the Bankruptcy Code” is “one of the fundamental debtor protections provided by the bankruptcy laws.”<sup>219</sup> It is systemically important that creditors respect the automatic stay, both to protect debtors from pressure and harassment and to protect bankruptcy estates from dissipation. The “exercise of jurisdiction over the bankruptcy estate and the equitable distribution of the estate’s property among the debtor’s creditors are two of the three core *in rem* functions of a bankruptcy court.”<sup>220</sup> The automatic stay “allows the court to carry out both of these functions [by facilitating] the orderly administration and distribution of the estate” and “protect[ing] the bankrupt’s estate from being eaten away by creditors’ lawsuits and seizures of property before the trustee has had a chance to marshal the estate’s assets and distribute them equitably among the creditors.”<sup>221</sup> If routinely left unenforced, the bankruptcy stay loses its deterrence power.<sup>222</sup> So important is the need to enforce the automatic stay that, by expressly creating a cause of action for debtors to seek damages for a willful violation of the stay, “Congress sought to encourage injured debtors to bring suit to vindicate their statutory right to the automatic stay’s protection, one of the most important rights afforded to debtors by the

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<sup>219</sup> *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 503 (1986) (citing S. REP. NO. 95–989, 54; H.R. REP. NO. 95–595, 340).

<sup>220</sup> *Fla. Dep’t of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073, 1085 (11th Cir. 2011) (citing *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006)).

<sup>221</sup> *Id.* (quoting *Martin-Trigona v. Champion Fed. Sav. & Loan Ass’n*, 892 F.2d 575, 577 (7th Cir. 1989)).

<sup>222</sup> As explained by the court in *In re Bateman*:

More importantly, a court has a significant interest in enforcing any injunction it issues, and this court has not agreed to arbitrate its contempt powers. As discussed in more detail below, the court has a substantial interest in enforcing its own orders and protecting the integrity of the discharge injunction. Contempt powers are vital and significant to any judicial process, but are particularly crucial when enforcing injunctions. And they may include, in the proper case, those traditional sanctions for coercing compliance with an injunction such as incarceration or financial penalty. 585 B.R. 618, 628 (Bankr. M.D. Fla. 2018); *see also, e.g., In re Jorge*, 568 B.R. 25, 36 (Bankr. N.D. Ohio 2017) (“The parties, whether through a pre-dispute arbitration agreement or any other agreement, cannot strip a court of its inherent power and certainly not the inherent power to enforce its own orders. Violations of the discharge injunction are inherently non-arbitrable because the discharge injunction vindicates a federal right that this Court previously awarded the Debtors—i.e., the bankruptcy discharge.”).

Bankruptcy Code.”<sup>223</sup> But such purpose “can be carried out, of course, only if injured debtors are actually able to sue to recover the damages that § 362(k) authorizes.”<sup>224</sup>

It is also important not to confuse a debtor with a debtor’s estate, particularly in reorganization cases where the debtor maintains possession of property of the estate and in some respects acts as a fiduciary on behalf of creditors. The Third Circuit in *Mintze v. American General Financial Services, Inc. (In re Mintze)* may not have fully considered this in finding that fundamental bankruptcy purposes could not be impaired by mandatory arbitration of a Chapter 13 debtor’s adversary proceeding against a mortgage creditor who had filed a proof of claim in the case.<sup>225</sup> Seeking to enforce a prepetition rescission of the mortgage under the Truth in Lending Act, the debtor alleged that the lender had “induced her to enter into an illegal and abusive home equity loan,” and asserted several other claims under federal and state consumer protection laws. The court emphasized that it was the debtor who brought the action and “failed to raise any statutory claims that were created by the Bankruptcy Code.”<sup>226</sup> But the debtor was attacking the validity of a debt and security interest, for which the creditor had filed a proof of claim, and therefore likely constituted an objection to claim pursuant to 11 U.S.C. § 502(b).<sup>227</sup> An objection pursuant to § 502(b) is, of course, a statutory claim created by the Bankruptcy Code, and a fundamental part of the bankruptcy system.<sup>228</sup> Second, to the extent the proceeding sought to collect a claim for the benefit of the estate, the debtor was likely acting for the benefit of the estate and possibly exercising the powers of a trustee.<sup>229</sup> The Third

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<sup>223</sup> *Am.’s Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095, 1100 (9th Cir. 2015).

<sup>224</sup> *Id.*

<sup>225</sup> 434 F.3d 222, 226 (3d Cir. 2006).

<sup>226</sup> *Id.* at 226, 231.

<sup>227</sup> See FED. R. BANKR. P. 3007(b) (“A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding.”).

<sup>228</sup> See, e.g., *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58 (1989) (suggesting that allowance and disallowance of claims against the estate are “integral to the restructuring of debtor-creditor relations” in bankruptcy).

<sup>229</sup> See, e.g., 11 U.S.C. § 1303 (2018) (detailing the rights and powers of a Chapter 13 debtor); *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (“[A] Chapter 13 debtor retains standing to continue to pursue [a] civil claim”); *Smith v. SIPI, LLC (In re Smith)*, 811 F.3d 228, 241 (7th Cir. 2016) (“Chapter 13 grants debtors possession of the estate’s property, which includes legal interests and the right to bring legal claims that could be prosecuted for benefit of the estate.”) (citation

Circuit noted that the bankruptcy court had specifically found that “the outcome of Mintze’s rescission claim would affect her bankruptcy plan and the distribution of monies to her other creditors.”<sup>230</sup> Nonetheless, the Court of Appeals disagreed with such finding, in part due to an overemphasis on the importance that the debtor was an individual. But regardless of whether the underlying rights arose under state or non-bankruptcy law and whether brought by a trustee or a Chapter 13 debtor, the adjudication would still have a material impact on creditors, who would have shared in the distribution of any funds obtained or may have received a larger share of distributions if American General Financial Services’s claim was disallowed.

These holdings demonstrate the danger of the narrow bankruptcy exception the courts of appeals have drawn with respect to the FAA. More is at stake than simple efficiency. It is especially important to remember the distinction between the debtor and the debtor’s estate and remember the twin goals of bankruptcy: both to give a debtor a fresh start and to ensure an equitable distribution to the debtor’s creditors. Thus, while it might seem perfectly fair to hold a debtor to his or her voluntary agreement to arbitrate disputes outside of bankruptcy,<sup>231</sup> in bankruptcy those restrictions may have a greater impact on creditors who never consented to the agreement. Congress wisely provided a forum for those parties to participate, and they should not be deprived of that forum merely because of the prepetition agreement of the debtor.

#### IV. THE PLACE OF ARBITRATION WITHIN BANKRUPTCY

This is not to say that the Bankruptcy Code or the policies behind it *prohibit* arbitration. 28 U.S.C. § 654, enacted in 1988,<sup>232</sup> expressly provides that “[n]otwithstanding any provision of law to

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omitted); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 343 (4th Cir. 2013) (“[A] Chapter 13 debtor possesses standing—concurrent with that of the trustee—to maintain a non-bankruptcy cause of action on behalf of the estate.”).

<sup>230</sup> *In re Mintze*, 434 F.3d at 227 (3d Cir. 2006) (citing *Mintze v. Am. Gen. Fin., Inc. (In re Mintze)*, 288 B.R. 95, 99–100 (Bankr. E.D. Pa. 2003)).

<sup>231</sup> Though, of course, the discharge in bankruptcy reflects that at least with respect to financial obligations there comes a point where it is fairer to release debtors from their obligations—no matter how voluntary they originally were. One cannot draw blood from a stone, and at some point continuing to hold those who cannot pay accountable for debts becomes a cost for society.

<sup>232</sup> The provision was added by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4659-61 (1988).

the contrary,” with certain exceptions district courts “may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent . . . .”<sup>233</sup> This provision was enacted subsequent to the 1984 bankruptcy amendments and expressly applies to bankruptcy proceedings. But the provision does not *require* a court to refer matters to arbitration, and by its terms only applies “when the parties consent.”<sup>234</sup> The Bankruptcy Rules similarly provide that “[o]n stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.”<sup>235</sup> Like § 654, Rule 9019 requires agreement of the parties to the controversy and is in the discretion of the bankruptcy court.

Importantly, unlike mandatory arbitration under the FAA, these provisions give both the direct parties to the dispute and parties indirectly affected by the dispute because of its relation to the bankruptcy case—such as creditors, the United States trustee, and any case trustee—notice and the opportunity to object before arbitration is ordered. In many situations creditors might decide not to object. The issue in dispute may be so marginal or a creditor’s claim may be so proportionally small in comparison to the size of the bankruptcy estate and other creditors’ claims that the creditor would not find it worthwhile to spend the time or expenses of monitoring or participating even if the issue were litigated in the bankruptcy court. Or a small creditor may choose to rely on the bankruptcy trustee to represent its interests and might be satisfied so long as the trustee is able to monitor or participate in the arbitration proceeding. Indeed, to the extent arbitration is quicker or more cost efficient, a creditor may even prefer to allow the matter to go to arbitration.<sup>236</sup> On the other hand, a large creditor with a relatively large stake in the

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<sup>233</sup> 28 U.S.C. § 654 (2018).

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

<sup>235</sup> FED. R. BANKR. P. 9019(c) (1993).

<sup>236</sup> To the extent that a bankruptcy trustee seeks to enforce an arbitration clause *against* a third party with respect to a non-bankruptcy claim of the estate against such party, the trustee may be able to do so. The Bankruptcy Code gives the trustee and the estate “the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses,” and a “waiver of any such defense by the debtor after the commencement of the case does not bind the estate.” 11 U.S.C. § 558 (2018). But Bankruptcy Rule 9019 would still require notice and court approval with the opportunity for creditors and other parties with an interest in the bankruptcy proceeding to object. FED. R. BANKR. P. 9019 (1993).

bankruptcy estate or a creditor who distrusts or disagrees with the approach of a trustee<sup>237</sup> or debtor-in-possession may not want an issue that could impact the estate to go to an arbitration proceeding. The bankruptcy system gives such a creditor the right to object to arbitration that would take a matter from the federal court.

At least one commentator has noted that the abstention<sup>238</sup> framework already found within 28 U.S.C. § 1334(c) may work well as a standard for bankruptcy courts' decision whether or not to allow or order arbitration of matters within their jurisdiction.<sup>239</sup> 28 U.S.C. § 1334(c)(1) provides that "nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under

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<sup>237</sup> For example, a creditor may be more willing to invest in upfront litigation costs than a trustee where there are few liquid assets in the estate to fund such litigation.

<sup>238</sup> Similarly, to the extent the automatic stay would prevent litigation of certain matters against the debtor or estate, a party may be able to obtain relief from the automatic stay in certain circumstances. "Cause" may exist to grant relief from the automatic stay to permit a claim against the debtor to proceed in another forum. 11 U.S.C. § 362(d)(1) (2018). Courts have used various factors in determining whether "cause" exists, such as:

- (1) whether relief would result in a partial or complete resolution of the issues;
- (2) lack of any connection with or interference with the bankruptcy case;
- (3) whether the other proceeding involves the debtor as a fiduciary;
- (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (5) whether the debtor's insurer has assumed full responsibility for defending it;
- (6) whether the action primarily involves third parties;
- (7) whether litigation in another forum would prejudice the interests of other creditors;
- (8) whether the judgment claim arising from the other action is subject to equitable subordination;
- (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;
- (10) the interests of judicial economy and the expeditious and economical resolution of litigation;
- (11) whether the parties are ready for trial in the other proceeding; and
- (12) impact of the stay on the parties and the balance of harms.

*Mazzeo v. Lenhart* (*In re Mazzeo*), 167 F.3d 139, 143 (2d Cir. 1999) (citing *Sonnax Indus., Inc. v. Tri Component Prods. Corp.* (*In re Sonnax Indus., Inc.*), 907 F.2d 1280, 1286 (2d Cir. 1990)).

<sup>239</sup> Birney, *supra* note 23, at 670 ("[T]he bankruptcy courts' decision to decide to enforce an arbitration agreement, or rather, to require the parties to adjudicate the dispute in the bankruptcy court, should be exclusively analyzed through the framework contained in section 1334(c)(1), and not by treating the FAA as preempting bankruptcy jurisdiction."); *see also* *Stern v. Marshall*, 564 U.S. 462, 502 (2011) (noting Section 1334(c) as an example that "the framework Congress adopted in the 1984 Act already contemplates that certain state law matters in bankruptcy cases will be resolved by judges other than those of the bankruptcy courts").

title 11 or arising in or related to a case under title 11.”<sup>240</sup> Section 1334(c)(2), sometimes referred to as the “mandatory abstention” provision, *requires* a federal court to abstain

[u]pon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section . . . if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.<sup>241</sup>

There is a question of whether mandatory abstention under § 1334(c)(2) could ever apply to arbitration—namely, whether an arbitration proceeding constitutes “a State forum of appropriate jurisdiction” as used in the statute.<sup>242</sup> Even if it did apply, the statute suggests that it would only apply where such proceeding was commenced prepetition and involved only state law claims. In contrast, permissive abstention refers more generally to “the interest of justice”<sup>243</sup> in addition to comity for state courts as warranting abstention and therefore is likely broad enough to capture abstention in favor of arbitration.

In determining whether permissive abstention is appropriate, courts have “looked to factors such as the extent to which state law issues predominate over bankruptcy issues, the presence of a related proceeding commenced in state court, and the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the litigants.”<sup>244</sup> Other courts have set forth a longer list of factors to consider, including:

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<sup>240</sup> 28 U.S.C. § 1334(c)(1) (2018).

<sup>241</sup> 28 U.S.C. § 1334(c)(2) (2018); *see also, e.g.,* *Lindsey v. Dow Chem. Co. (In re Dow Corning Corp.)*, 113 F.3d 565, 570 (6th Cir. 1997) (“[F]or mandatory abstention to apply to a particular proceeding, there must be a timely motion by a party to that proceeding, and the proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding.”).

<sup>242</sup> Ironically, the Supreme Court’s holdings that the FAA requires arbitration as a matter of federal substantive law, even where state law would override an arbitration agreement, tends to further undercut the argument that arbitration could be seen as a “State forum of . . . jurisdiction.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006) (“[T]he FAA ‘create[d] a body of federal substantive law,’ which was ‘applicable in state and federal courts.’” (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984))).

<sup>243</sup> *See* 28 U.S.C. § 1334(c)(1) (2018).

<sup>244</sup> *Canzano v. Ragosa (In re Colarusso)*, 382 F.3d 51, 57 (1st Cir. 2004).

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted “core” proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court’s] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.<sup>245</sup>

Thus, the distinction between “core” and “non-core” matters drawn by courts such as *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* or the distinction between matters that involve “statutory claims that were created by the Bankruptcy Code” and that do not, as drawn by the court in *In re Mintze*, could ultimately be *relevant* to the determination of whether a bankruptcy court should order arbitration of a bankruptcy-related matter.<sup>246</sup> But there is no bright-line rule based on such distinctions. Instead, other factors such as (1) whether arbitration could jeopardize the efficient administration of the estate, (2) the degree of relatedness to the bankruptcy case, (3) the feasibility of severing the matter to be arbitrated from the bankruptcy case, (4) the likelihood that the request to arbitrate is based on forum shopping, (5) the presence and rights of nondebtor parties and (6) such parties’ ability or lack of ability to participate in the arbitration, may all warrant refusal to force arbitration of even non-core or state law bankruptcy-related matters. Moreover, unlike under the current approach, it should be the party

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<sup>245</sup> *Christensen v. Tucson Est., Inc. (In re Tucson Est., Inc.)*, 912 F.2d 1162, 1167 (9th Cir. 1990) (quoting *Republic Reader’s Serv., Inc. v. Mag. Serv. Bureau, Inc. (In re Republic Reader’s Serv., Inc.)*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)); *see also, e.g., In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993) (quoting the *Tucson Est.* factors).

<sup>246</sup> *In re Mintze*, 434 F.3d 222, 231 (3d Cir. 2006).

seeking arbitration who bears the burden of demonstrating that arbitration is appropriate and will not impair the rights of any party with an interest in the bankruptcy proceeding.

#### CONCLUSION

In *Epic Systems*, the Supreme Court explained that Congress enacted the FAA in 1925 because “in Congress’s judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved.”<sup>247</sup> But in 1978, Congress made a similar judgment about the bankruptcy system, recognizing that granting broad jurisdiction to bankruptcy courts over all matters relating to bankruptcy cases promised not only quicker and cheaper resolution but greater due process to all affected by the bankruptcy and the prevention of unfair bargaining leverage against trustees by parties who owed the estate money.<sup>248</sup> So broad was the grant of jurisdiction that the Supreme Court subsequently found it unconstitutional, at least to the extent it authorized non-Article III bankruptcy judges to issue final rulings on certain issues. Congress amended the statute in 1984, but again deliberately chose not to diminish the broad grant of jurisdiction to the federal courts, instead addressing the constitutional issue by slightly reallocating the grant of authority as between the bankruptcy courts and the district courts of which they were recast as a unit. In both cases, Congress stated its clear intent that the grant of original jurisdiction takes supremacy over any contrary federal statute that might otherwise divest the federal courts of their original jurisdiction over such matters.

The language is so clear it seems surprising that courts have not yet adopted the approach. The Third Circuit’s movement from *Zimmerman* to *Hays* seems to explain that the courts may have overestimated the import of the 1984 amendments or drawn conclusions about what they saw as a trend in the Supreme Court’s rulings on the FAA. Once *Hays* was decided, other courts seem to have followed its path rather than look for the language that was clearly present in the statute. But it is that approach ungrounded

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<sup>247</sup> 138 S. Ct. 1612, 1621 (2018).

<sup>248</sup> See *supra* notes 106–107 and accompanying text.



in statutory text that is “far out of step with [the Supreme Court’s] current strong endorsement of the federal statutes favoring [arbitration.]”<sup>249</sup>

This Article’s proposed approach is based on text, not mere policy, and is consistent with Supreme Court precedent on preclusion and repeal, both generally and in the context of the FAA. The approach is based on unique features of bankruptcy, recognizing Congress’s intent to create procedures for the adjudication of bankruptcy cases, and not a general attack on agreements to arbitrate. It does not invalidate arbitration agreements, but simply recognizes that an agreement between two signatories prior to a bankruptcy proceeding cannot take away the procedural protections Congress has given creditors and other parties to a bankruptcy case over matters affecting the bankruptcy estate—parties who were not signatories to the agreement. The approach also still leaves open the possibility of arbitration of even core bankruptcy matters, as authorized by 28 U.S.C. § 654 and Federal Rule of Bankruptcy Procedure 9019(c), but consistent with those provisions does not make arbitration mandatory, requires consent and bankruptcy court approval, and thus protects the interests and due process of creditors and the integrity of the bankruptcy system.

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<sup>249</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).