

# A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration

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*In the last century arbitration has grown to be a large and important part of the U.S. legal system. However, mandatory arbitration has been used in recent years to bar class action lawsuits and limit the procedural remedies available to certain classes of litigants. At the same time, the routes to challenging the use of mandatory arbitration have been increasingly closed off, with the courts broadly ruling in favor of its use and agency action likely foreclosed in the immediate future. In turn, the debate over mandatory arbitration has calcified, with one side arguing for an almost total ban on mandatory arbitration and the other arguing for few, if any, limits.*

*Despite these prevailing currents, Congress has enacted a handful of statutes that limit or regulate the use of mandatory arbitration in some way. This Note examines each of these statutes in turn with particular focus on the mechanisms by which they limit mandatory arbitration and the likely interests embodied in their passage. Drawing on the structure of these prior enactments, this Note ultimately argues in favor of a more holistic approach towards mandatory arbitration reform focused on the contexts in which mandatory arbitration is available and the processes applied in those contexts. This compromise position would curb the abuses of mandatory arbitration while retaining its benefits.*

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## I. INTRODUCTION

Arbitration serves as an alternative method for dispute resolution in the U.S. legal system running alongside traditional litigation in the courts. But arbitration does not act as a perfect substitute and can bar the availability of certain procedures in the courts. Arbitration limits the scope of discovery and other evidentiary processes.<sup>1</sup> Most arbitration awards are also binding, and therefore typically cannot be appealed.<sup>2</sup> Finally, when individual arbitration is contractually obligated through mandatory arbitration clauses, it bars access to the courts entirely.<sup>3</sup> By requiring arbitration on an individual basis, mandatory arbitration clauses can also prohibit large groups of consumers or workers from bringing their claims as a class.<sup>4</sup> Since individual claims are often quite small in commercial and employment contexts, mandatory arbitration clauses effectively shield large companies from what might otherwise be massive adverse judgments made possible by the joining together of a great number of harmed consumers as a class.<sup>5</sup>

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1. See generally Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. MAR. L. & COM. 35 (2003).

2. See Edna Sussman, *Why Arbitrate? The Benefits and Savings*, 81 N.Y. ST. B.J. 20, 22 (2009).

3. Since the Supreme Court's decision in *AT&T Mobility v. Concepcion*, the use of mandatory arbitration clauses to bar class action lawsuits has become a point of ever-increasing contention. See 563 U.S. 333 (2011); see, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1645 (2018) (Ginsburg, J., dissenting) ("As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns."); *The Problem with the Craze for Mandatory Arbitration*, THE ECONOMIST (Jan. 27, 2018), <https://www.economist.com/leaders/2018/01/27/the-problem-with-the-craze-for-mandatory-arbitration> [<https://perma.cc/VV5P-ZEWZ>]; Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration> [<https://perma.cc/SLU4-HRB2>] ("Mandatory arbitration is a controversial practice. . ."); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631–32 (2005) ("The involuntary imposition of arbitration in lieu of open court procedures is a new and most controversial phenomenon.").

4. See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5–6 (2000) ("[P]otential defendants, in a broad array of industries, hope that they have found a surreptitious way to defeat the feared class action: mandatory binding arbitration. These companies and their attorneys assert that they may use contracts of adhesion . . . to require that such arbitration must proceed on an individual rather than class basis.").

5. The amount in dispute in *Concepcion* itself was \$30.22 in sales tax for what had been a purportedly free cell phone. See 563 U.S. at 337.

Court challenges to the routine use of mandatory arbitration clauses have largely faltered,<sup>6</sup> so consumer advocacy and special interest groups have turned to Congress for help.<sup>7</sup> In turn, Congress has passed a number of relatively narrow prohibitions on mandatory arbitration clauses in specific contexts such as residential mortgages, motor vehicle franchises, and the poultry industry.<sup>8</sup> Yet Congress has blocked a broader prohibition on mandatory arbitration clauses proposed by the Consumer Financial Protection Bureau (CFPB).<sup>9</sup> Because state legislation pertaining to mandatory arbitration is preempted by federal statutes, Congress has become the sole legislative body in the United States with the power to regulate mandatory arbitration.<sup>10</sup> Yet the overall regime Congress has created through different pieces of legislation is poorly explored and patchwork in nature.

This Note makes sense of this patchwork regime by examining and critiquing federal legislative limitations on mandatory arbitration clauses. Part II discusses the history and debate involving the use of mandatory arbitration to understand the background concerns against which more recent statutes operate. Part III first discusses how and why those statutes were passed and the courts' subsequent responses to them before reviewing the defeated 2017 CFPB proposal and examining how this proposal would have fit into the larger legal framework of mandatory arbitration clauses. Though defeated, the CFPB proposal offers a robust version of mandatory arbitration regulation and the most

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6. See, e.g., *Epic Sys. Corp.*, 138 S. Ct. at 1645; *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Concepcion*, 563 U.S. 333.

7. See Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 491 (2011) ("Following *Concepcion*, remedies for consumers with low value claims will no longer be available through the judicial system. Thus, consumers and their advocates must turn to Congress for assistance with this major concern.").

8. See *infra* Part III.A.

9. See, e.g., Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1309–10 (2011) ("[W]hen Congress finally passed bills prohibiting mandatory arbitration, the bills applied to very narrow categories of disputes[.]"); Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html> [<https://perma.cc/HQT3-GLXE>].

10. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) ("Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."); see also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 640 n.15 (1996) (collecting cases); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 298 (2000) (discussing the Supreme Court's self-consciously broad approach to preemption under the Federal Arbitration Act).

recent source of legislative debate. Part IV reviews potential approaches to mandatory arbitration reform and suggests a more holistic approach to replace the existing approach.

Ultimately, this Note recommends mandatory arbitration reform based on the patterns of existing federal legislation. As discussed more thoroughly in Part IV, certain types of claims and certain classes of disputants should be exempt from mandatory arbitration clauses — the former based on either the public interest in participation in the adjudicatory process or the likelihood that a claim could not be reasonably adjudicated through arbitration and the latter depending on the vulnerability of a particular class of disputants. Congress should look beyond the false binary of either banning mandatory arbitration or doing nothing, and instead implement industry reforms focused on curbing the worst abuses that inhere through mandatory arbitration.

## II. INTRODUCTION TO MANDATORY ARBITRATION CLAUSES

Any substantial future change to the framework regulating arbitration demands Congressional action, but it is not Congress alone that raised this framework. The Federal Arbitration Act of 1925 laid the foundation on which arbitration today rests, but it is through attitudes towards arbitration and developments in the courts that modern mandatory arbitration took form.<sup>11</sup>

### A. ATTITUDES TOWARDS MANDATORY ARBITRATION

A mandatory arbitration clause is what the Supreme Court has called “in effect, a specialized kind of forum-selection clause” that determines not only the place in which a dispute will be resolved, but the procedure and mode of that resolution.<sup>12</sup> Although mandatory arbitration clauses are common today,<sup>13</sup>

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11. The FAA provides the basis for modern mandatory arbitration, but the current framework did not emerge until years later when the Supreme Court began to expand its scope. A series of decisions beginning in the 1960s and continuing through today, in effect, federalized arbitration law, drastically expanding the scope of the FAA. See Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 250 (2008).

12. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

13. For example, more than fifty-five percent of workers in the United States are subject to mandatory arbitration today, compared to just over two percent in 1992. See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration->

their place in the American contractual landscape was not always so secure.<sup>14</sup> Over the course of the twentieth and twenty-first centuries, a series of legislative and judicial developments gave mandatory arbitration clauses greater validity, making their use increasingly attractive, especially in the consumer context.<sup>15</sup> The growing use of mandatory arbitration clauses reflects the growing reach and size of individual corporations; as corporations' consumer bases have expanded over the past several decades,<sup>16</sup> corporations have increasingly used mandatory arbitration clauses to limit their legal exposure.<sup>17,18</sup> Assessing how exactly mandatory arbitration benefits or harms different actors in contracting situations is key to understanding the statutory framework for limiting mandatory arbitration and identifying potential areas for improvement.

The use of mandatory arbitration has been favored by legislators, judges, and private parties for a variety of reasons, including its relative speed, finality, and effect on courts. One of the earli-

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access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers [https://perma.cc/6SE7-VXHX].

14. Although "forum-selection clauses [had] historically not been favored by American courts," the Supreme Court's 1972 decision in *Bremen v. Zapata Off-shore Co.* largely removed judicial resistance by holding such clauses to be "*prima facie* valid." 407 U.S. 1, 10 (1972). *Zapata* involved a contract between an American company and a foreign company that contained a forum selection clause requiring any dispute to be resolved between by the London Court of Justice. Although courts had frequently invalidated such clauses "on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court," the *Zapata* Court found that such clauses "should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 9–10. See also 7 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW § 21:39 (2017).

15. See Burch, *supra* note 9, at 1309.

16. Matt Stoller, *The Return of Monopoly*, THE NEW REPUBLIC (July 13, 2017), <https://newrepublic.com/article/143595/return-monopoly-amazon-rise-business-tycoon-white-house-democrats-return-party-trust-busting-roots> [https://perma.cc/DTW7-XGCV] ("Economic power . . . is more concentrated than ever: According to a study published earlier this year, half of all publicly traded companies have disappeared over the past four decades.").

17. As businesses grow, so too do aspects of their legal exposure. For example, doing business with more people in more places naturally increases jurisdictional risk. See, e.g., Todd V. Mackey, *Limiting Exposure for Internet Vendors: Separating the Wheat from the Chaff*, 21 J. MARSHALL J. COMPUTER & INFO. L. 207 (2003).

18. In 2015, the CFPB found that over fifty percent of all consumer credit card loans were subject to a mandatory arbitration agreement. See CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 9 (2015). More than half of all employment agreements are subject to mandatory arbitration agreements. *The Problem with the Craze for Mandatory Arbitration*, THE ECONOMIST (Jan. 27, 2018), <https://www.economist.com/leaders/2018/01/27/the-problem-with-the-craze-for-mandatory-arbitration> [https://perma.cc/TB22-K87S].

est claims, and perhaps the most important justification for the Federal Arbitration Act of 1925, was that arbitration could reduce the caseload of courts, which have seen both their dockets and delay from filing to trial grow throughout the modern history of the United States.<sup>19</sup> However, researchers widely dispute whether arbitration is in fact a faster or cheaper method of dispute resolution than full-out litigation.<sup>20</sup> Nonetheless, proponents of mandatory arbitration continue to argue that it is cheaper than litigation on the whole, in large part because it limits the availability of appeals.<sup>21</sup> Although arbitration awards are enforceable in court, whereupon there is some opportunity for review, the grounds upon which a court can reverse an arbitration award are largely procedural and extraordinarily narrow.<sup>22</sup> Two other key benefits advanced for mandatory arbitration are that it can ensure adjudication by a specialized trier of fact who is well-versed in the subject matter of the dispute, and that, unlike a trial or judicial determination, the proceedings and outcome are private and confidential.<sup>23</sup>

On the other hand, opponents of mandatory arbitration argue that it presents substantial drawbacks, particularly in situations of unequal bargaining power.<sup>24</sup> In the context of consumer con-

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19. The scarcity of judicial resources was cited as a justification for arbitration when the FAA was passed in 1925.

See David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 *BUS. LAW.* 55, 59 (2007). However, that burden has grown substantially in recent decades. See Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 *YALE L.J.* 2346, 2353 (2012).

20. See Farmer, *supra* note 19, at 2354–55. One particular challenge with determining whether arbitration is, in fact, faster or cheaper is that “it is difficult to assess whether perfectly analogous cases are being compared” across arbitration and traditional litigation. *Id.* One explanation is that, in aggregate, implementing mandatory arbitration diverts more potential litigants away from settlement than it does from trial, increasing the overall amount of time and money spent on dispute resolution. See Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 *JUST. SYS. J.* 229 (1991).

21. See Martha Nimmer, *The High Cost of Mandatory Arbitration*, 12 *CARDOZO J. CONFLICT RESOL.* 183, 202 (2010).

22. For a thorough discussion the role of judicial review in arbitration, see Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 *HOUS. L. REV.* 739 (2007).

23. See Nimmer, *supra* note 21, at 202–204; see also Łukasz Gembiś, *Are We Dealing With the Trend of Specialized Arbitration?*, *KLUWER ARBITRATION BLOG* (May 9, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/05/09/are-we-dealing-with-the-trend-of-specialised-arbitration/> [<https://perma.cc/BYW7-UPZW>].

24. See, e.g., Sternlight, *supra* note 10, at 676 (“While the pure freedom of contract rationale has some appeal as applied to two entities engaging in an arm’s length transaction, it cannot realistically be used to justify imposing binding arbitration through con-

tracts, mandatory arbitration clauses can be archetypal contracts of adhesion resulting from deeply inequitable bargaining power between individual consumers and large corporations.<sup>25</sup> When one party is able to choose the arbitrator, as the more sophisticated contracting party typically does — in fact, some employment contracts require that the arbitrator be chosen by the employer<sup>26</sup> — it creates a substantial risk for a repeat-player bias.<sup>27</sup> Since large corporations with access to counsel typically draft these mandatory arbitration clauses, they are able to ensure that claims are brought before arbitrators who are friendly towards their own desires (or those of business entities in general).<sup>28</sup> Arbitration also typically limits the scope of discovery and *always* removes the jury from the dispute resolution process.<sup>29</sup> Finally, when class action waivers are incorporated into mandatory arbitration clauses, they remove one of the most powerful consumer tools for checking corporate overreach: the class action lawsuit.<sup>30</sup> Mandatory arbitration clauses with class action waivers prohibit the aggregation of individually small claims that might not make economic sense to litigate, or even to arbitrate, on an individual

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tracts of adhesion on unwitting consumers.”). Arbitration is used in a great variety of contexts where there is more or less equal bargaining power. *See, e.g.*, Gembiś, *supra* note 23 (discussing the development of specialized arbitration institutions for companies in the energy, finance, and civil aviation industries). However, mandatory arbitration clauses as such are used vastly more often in consumer and employment contracts than in business-to-business contracts. *See* Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (“Over three-quarters of the studied companies’ consumer agreements provided for mandatory arbitration of disputes. Yet less than 10% of their negotiated nonconsumer, non-employment contracts included arbitration clauses. The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers. The systematic eschewing of arbitration clauses in business-to-business contracts also casts doubt on the corporations’ asserted beliefs in the superior fairness and efficiency of arbitration clauses.”).

25. *See* Farmer, *supra* note 19, at 2355.

26. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 204 (1997).

27. *See* U.S. Equal Emp. Opportunity Comm’n, EEOC-915.002, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT (1997) (“First, the employer accrues a valuable structural advantage because it is a ‘repeat player.’ . . . [T]he employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator’s record.”). *See generally* Bingham, *supra* note 26.

28. *See* Farmer, *supra* note 19, at 2356–58.

29. *See* Nimmer, *supra* note 21, at 206–207.

30. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

basis.<sup>31</sup> In short, opponents of mandatory arbitration largely view it as rife with potential and realized abuses since the drafting party, typically a large corporation, exercises substantial structural power over the non-drafting party, often an individual consumer or employee.<sup>32</sup>

Mandatory arbitration was historically developed and is today debated against the background of these ostensibly opposing positions, but they are not necessarily in tension. Proponents argue that arbitration provides procedural benefits like a streamlined process and access to specialized decision-makers, while opponents argue that arbitration in practice opens the door for abuse through unequal bargaining power. Both of these things can be true, and considering both positions against the current statutory framework reveals solutions that will be amenable to both sides.<sup>33</sup>

## B. HISTORY OF MANDATORY ARBITRATION

Mandatory arbitration clauses in the United States<sup>34</sup> are authorized by the Federal Arbitration Act of 1925 (FAA). The section of the FAA that validates arbitration agreements (and in so doing has been read to invalidate most restrictions on them) is itself fairly short, and so is reproduced here in its entirety:

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

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31. Such was the case in *American Express Co. v. Italian Colors Restaurant*, where the Court explicitly found that claims that could not be economically adjudicated individually were nonetheless subject to a class action waiver because statutes “do not guarantee an affordable procedural path to the vindication of every claim.” 570 U.S. at 233; *see also infra* text accompanying note 53.

32. *See* Farmer, *supra* note 19, at 2355.

33. *See infra* Part IV.

34. For a comparison to international approaches, *see* Jean R. Sternlight, *Is the U.S. Out on A Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002).



enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>35</sup>

In short, both pre- and post-dispute arbitration agreements are presumptively valid, unless there are some grounds on which a contract would typically be revoked.<sup>36</sup>

The drafting of the FAA largely occurred among groups outside of Congress, like the American Bar Association and the New York Chamber of Commerce, so there is relatively little legislative history pertaining to the Act.<sup>37</sup> Some commentators have argued the extra-congressional context in which the FAA was passed indicates it was never meant to supersede the power of individual state statutes, as it has been held to do,<sup>38</sup> and was “intended to support a modest system of arbitration of contractual disputes between merchants.”<sup>39</sup> In fact, the FAA may not have been designed to radically alter the contracting landscape at all, but instead was simply meant to recognize and legitimize a system of alternative dispute resolution that *already existed* in New York.<sup>40</sup> However, a series of Supreme Court decisions beginning in the 1980s and continuing through to the present day vastly expanded the scope of the FAA, resulting in what Justice Sandra Day O’Connor described as “an edifice of [the Court’s] own creation.”<sup>41</sup> That edifice was built up piece-by-piece as the Court gradually expanded the scope and reach of the FAA — and with it the scope and reach of mandatory arbitration clauses in the United States generally.<sup>42</sup>

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

36. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (“The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.”) (internal quotations and modification omitted).

37. See Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115 (2016).

38. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

39. Szalai, *supra* note 37, at 122.

40. The antecedent to the FAA was passed in 1920 in New York, where major business interests had grown tired of the backlog in the courts and wanted a more efficient way to resolve disputes while preserving business relationships. See Burch, *supra* note 9, at 1313. However, the need for federal recognition of state laws allowing arbitration agreements led reformers to lobby Congress for what would become the FAA. See Sternlight, *supra* note 10, at 646.

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

42. “Over the last dozen years, the Supreme Court has rewritten the law governing commercial and employment arbitration in the United States. So bold has the Court been that its work in this field could be said to exemplify the indeterminacy of American law,

Much of the modern framework supporting mandatory arbitration was developed in the 1984 case *Southland Corp. v. Keating*, in which the Court held that the FAA preempted state laws that prohibited mandatory arbitration clauses.<sup>43</sup> The result of this decision was a sweeping preemption of those state laws that restrained the use of mandatory arbitration.<sup>44</sup> The federal framework of the FAA, highly favorable to the use of mandatory arbitration clauses, instead applied to all contracting situations.

After *Southland*, the Supreme Court embarked on a broad project subjecting a broad swathe of disputes to mandatory arbitration, holding more state laws to be preempted by the FAA. Moving afield of the contractual disputes that the FAA was designed to govern, the Court held antitrust claims;<sup>45</sup> secondary market securities transactions and RICO<sup>46</sup> claims;<sup>47</sup> primary market securities transactions;<sup>48</sup> and statutory claims<sup>49</sup> all to be subject to mandatory arbitration.

The most notable post-*Southland* case is the 2011 *AT&T Mobility v. Concepcion*<sup>50</sup> decision, in which the Court further limited any potential state restrictions on mandatory arbitration. In *Concepcion*, the Court held that a California common law doctrine prohibiting contracts from incorporating a class action waiver provision was preempted by the FAA, and therefore void.<sup>51</sup> In other words, mandatory arbitration clauses with class action waivers are presumptively valid, and state doctrines that would hold such waivers presumptively unconscionable are preempted

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confirming the hypothesis of Critical Legal scholars that our judges (or at least our Justices) are uncontrolled by legal texts or precedents and free to decide cases according to their own political predilections.” Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996).

43. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

44. See Sternlight, *supra* note 10, at 640 n.15 (collecting cases). *Southland* itself, for example, preempted a California law that had been interpreted to forbid arbitration of certain claims. See 465 U.S. at 16. An explicit state statutory ban on mandatory arbitration was also preempted. See *Allied-Bruce Terminix Cos.*, 513 U.S. at 271–72. Even a state law regulating the form in which a mandatory arbitration clause must be presented was preempted in the Second Circuit. See *David L. Threlkeld & Co. v. Metallgesellschaft, Ltd.*, 923 F.2d 245, 249 (2d Cir. 1991).

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

46. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2012).

47. See *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987).

48. See *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

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

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

51. See *id.* at 343–44.

by the FAA.<sup>52</sup> This holding was reinforced two years later by *American Express Co. v. Italian Colors Restaurant*, where the Court held that class action waivers are valid even if the plaintiffs can prove that it would not be economically viable to arbitrate each claim individually.<sup>53</sup>

The Supreme Court's arbitration jurisprudence has created a contracting environment with very few impediments to the use of mandatory arbitration clauses, such that statutory or common law rights may easily be contracted away.<sup>54</sup> Virtually no remaining contract doctrine might serve to limit the use of mandatory arbitration clauses given the broad favor with which the Court has treated such clauses.<sup>55</sup> While the Supreme Court reemphasized in *Concepcion* that, per the FAA itself,<sup>56</sup> unconscionability can be used to invalidate agreements to arbitrate, unconscionability cannot be applied in a way that affects only arbitration or derives its "meaning from the fact that an agreement to arbitrate is at issue."<sup>57</sup> In other words, the mere fact that the contract provides for mandatory arbitration cannot be a per se ground for unconscionability. Similarly, any state law that might serve to limit the use of mandatory arbitration is preempted by the FAA.<sup>58</sup> As a practical matter, decades of Supreme Court cases, with *Concepcion* standing as the crown jewel, have "gradually, systematically, and significantly eroded consumers and employees' ability to de-

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52. "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 339 (quoting *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

53. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013).

54. See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 406 (2016) ("Consequently, as I have discussed elsewhere, almost any case where the defendant stands in a contractual relation to the plaintiffs is a candidate for an arbitration clause and class action waiver.").

55. See Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 179 (2015) ("[I]t is now clear that pre-dispute arbitration agreements can be enforced for virtually every cause of action that is brought against businesses in class actions today. . . .").

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

57. *Id.*

58. The Supreme Court's treatment of arbitration has been described as a system of "rigorous equality," whereby only state laws that apply to all contracts survive preemption, but this "perfectionist conception of equality ensures the preemption not just of arbitration-related state law, but of virtually any state law that happens to result in the non-enforcement (in whole or in part) of arbitration agreements." Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1192-93 (2011).

fend themselves in compulsive-arbitration trials.”<sup>59</sup> As recently as May of 2018, the Court continues to issue decisions almost every year that further expand the reach and durability of arbitration agreements.<sup>60</sup>

In this environment of practically unlimited mandatory arbitration, a number of reforms have been proposed and advanced by Congress, other government entities, and non-government organizations. One of the most sweeping proposals is the Arbitration Fairness Act, which would place limits on the enforceability of mandatory arbitration clauses in several contexts, and, most importantly, would ban their use between (1) corporations and consumers and (2) corporations and non-union employees.<sup>61</sup> The Arbitration Fairness Act has been introduced in a number of different sessions of Congress since 2007 but has never passed.<sup>62</sup> In February 2019, Democrats in the House of Representatives and Senate introduced in each chamber the Forced Arbitration Injustice Repeal (FAIR) Act, which would prohibit the use of mandatory arbitration clauses in employment, consumer, antitrust, and civil rights disputes.<sup>63</sup> Those bills have been referred to committees and a hearing, indicating some bipartisan support has been held in the Senate.<sup>64</sup> However, passage of the FAIR Act still appears to be fairly unlikely as of writing.<sup>65</sup>

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59. Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees’ Contractual Rights? — Legal and Empirical Analyses of Courts’ Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under The Federal Arbitration Act, 1800–2015*, 25 B.U. PUB. INT. L.J. 143, 234 (2016).

60. In *Epic Systems Corp. v. Lewis*, the Court held that even the National Labor Relations Acts protection for “concerted activities” did not serve to overcome the FAA’s presumption that individual mandatory arbitration is enforceable. 138 S. Ct. 1612, 1624 (2018).

61. See Arbitration Fairness Act of 2017, S. 537, 115th Congress (2017).

62. See, e.g., Arbitration Fairness Act of 2007, S. 1782, 110th Congress (2007); Arbitration Fairness Act of 2018, S. 2591, 115th Congress (2018).

63. Force Arbitration Injustice Repeal Act, S. 610, 116th Cong. (2019); FAIR Act, H.R. 1423, 116th Cong. (2019). See Emily Birnbaum, *Google Employees Join Lawmakers Pushing Bills to End Forced Arbitration*, THE HILL (Jan. 28, 2019, 2:14 PM), <https://thehill.com/policy/technology/432065-lawmakers-introduce-bills-to-end-forced-arbitration> [<https://perma.cc/GS5H-ST3W>].

64. Alexia Fernández Campbell, *Democrats Want to Ban Mandatory Arbitration at Work. Senate Republicans Are Listening.*, VOX (Apr. 3, 2019, 5:00 PM), <https://www.vox.com/2019/4/3/18292168/forced-arbitration-senate-bill-hearing> [<https://perma.cc/BW8W-DLTW>].

65. See Garen E. Dodge & David A. Alvarez, *New Federal Legislation Seeks to Eliminate Mandatory Arbitration Agreements*, NAT’L L. REV. (Mar. 21, 2019) <https://www.natlawreview.com/article/new-federal-legislation-seeks-to-eliminate-mandatory-arbitration-agreements> [<https://perma.cc/V6ZZ-LVCZ>].

However, Congress did create a mechanism by which mandatory arbitration clauses might be studied and regulated. In 2010, prior to *Concepcion*, Congress passed the Dodd-Frank Act, creating the CFPB and charging it with studying mandatory arbitration clauses in consumer financial markets.<sup>66</sup> The CFPB was also given the authority to issue regulations in the public interest for the protection of consumers based on the findings of its previous research.<sup>67</sup> Following through on its mandate, the CFPB issued a rule in July 2017 prohibiting the use of mandatory arbitration clauses to prevent class actions in most but not all consumer financial contexts.<sup>68</sup> However, the rule was repealed by Congress, exercising its authority under the Congressional Review Act.<sup>69</sup>

Sweeping reform of the use of mandatory arbitration clauses has faltered. Other than a few narrow contexts, Congress has declined to act or reversed any action that might serve to roll back the reach of mandatory arbitration clauses.<sup>70</sup> There are likewise few remaining legal or judicial routes to reign in the use of mandatory arbitration. Congress has already expressed willingness to limit mandatory arbitration clauses in a few specific contexts. By identifying those contexts and analyzing the interests they advance, it is possible to identify a framework within which mandatory arbitration could continue to exist, but be limited so as to control its harms. The world of mandatory arbitration regulation that currently exists illustrates the potential approaches to building such a framework.

### III. EXISTING CONGRESSIONAL APPROACHES TO MANDATORY ARBITRATION

Congress has limited or prohibited the use of mandatory arbitration clauses in five relatively narrow contexts. A careful examination of each reveals common threads that can offer a unified framework for regulating mandatory arbitration clauses.

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66. Dodd-Frank Act, 12 U.S.C. § 5518 (2012).

67. *Id.*

68. Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017).

69. Silver-Greenberg, *supra* note 9.

70. The debate over mandatory arbitration is extremely partisan. Defenders of mandatory arbitration “tend to be business-oriented conservatives,” while proposals to ban or limit mandatory arbitration “tend to be supported by progressives.” Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 713–14 (2016). These divides stretch back for decades and are so deeply entrenched that “finding a moderate middle ground acceptable to both sides is a difficult task.” *Id.* at 715.

## A. STATUTORY RESTRICTIONS ON MANDATORY ARBITRATION

As the Supreme Court's interpretation of the FAA makes clear, Congress has occupied the field of mandatory arbitration, effectively preempting any state laws that might otherwise apply.<sup>71</sup> Accordingly, the few restrictions on mandatory arbitration clauses are federal. At present, five federal statutes limit the use of mandatory arbitration clauses, each slightly different from the others. These five statutes are (1) the 2002 Motor Vehicle Franchise Contract Arbitration Fairness Act, which permits the use of arbitration involving motor vehicle franchise contracts only if each party to any dispute consents to the use of arbitration in writing after that dispute arises;<sup>72</sup> (2) the 2006 Military Lending Act, which prohibits mandatory arbitration clauses in consumer credit contracts with active duty military personnel;<sup>73</sup> (3) 7 U.S.C. Section 197c, passed as part of the Food, Conservation, and Energy Act of 2008, which allows parties to a livestock or poultry contract containing a mandatory arbitration clause to decline to agree to the inclusion of that clause in the final agreement;<sup>74</sup> (4) the 2010 Dodd-Frank Act, which bans the use of mandatory arbitration clauses in residential mortgage contracts and in whistleblower disputes;<sup>75</sup> (5) and several iterations of the Department of Defense Appropriations Act, which, beginning with the inclusion of the Franken Amendment in 2010 and thereafter, prohibits federal contractors who receive Department of Defense funds from requiring their employees or independent contractors to arbitrate Title VII claims.<sup>76</sup>

Although these statutes vary widely in scope, effect, and subject matter, a careful analysis of the context in which each statute was passed, the mechanics of their operation, and subsequent judicial interpretation highlights possibilities for further reform. First, the statutes identify the interests and contexts in which certain exceptions from mandatory arbitration clauses make

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71. *See supra* note 10.

72. Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2012).

73. Military Lending Act, 10 U.S.C. § 987(e)(3) (2012).

74. Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c(a) (2012).

75. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C., 12 U.S.C., 15 U.S.C., and 18 U.S.C.).

76. *See, e.g.*, Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017).

greatest sense. Second, the statutes, read as a whole, suggest methods of reforming the use of mandatory arbitration so as to preserve its most important benefits while limiting its drawbacks. Finally, judicial reactions to future reforms might be predicted based on the judiciary's response to the present limitations on mandatory arbitration and in turn provide blueprints for more durable legislation. Each of these statutes is part of the overall landscape of mandatory arbitration today, so considering the approaches they represent as a whole suggests a more useful picture on the whole than analysis of any single existing or proposed regime can produce individually.

1. *The 2002 Motor Vehicle Franchise Contract Arbitration Fairness Act*

The Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002 (MVFCFAFA) is relatively simple in its operative anti-arbitration portions. It provides in part:

Notwithstanding 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.<sup>77</sup>

MVFCFAFA was a direct response to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, in which the Supreme Court held that motor vehicle franchise contracts with auto manufacturers were subject to arbitration.<sup>78</sup> Although MVFCFAFA overruled this particular aspect of *Mitsubishi*, its core holding that antitrust claims were arbitrable was untouched and remains good law.<sup>79</sup>

The Act was primarily the result of lobbying efforts by the National Automobile Dealers Association (NADA), which considered

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77. Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2012).

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

79. *Id.*

the Act's passage its "biggest legislative victory" in fifty years.<sup>80</sup> This was not an exaggeration — MVFCAFA was the first ever special-interest exemption to the FAA.<sup>81</sup> According to the Committee Report, the Act was necessary for a few key reasons: the disparity in bargaining power between manufacturers and dealers; the coercive and one-sided nature of vehicle franchise contracts; and the desire to preserve dealer access to specialized state administrative agencies, which are often viewed as more favorable to dealers.<sup>82</sup>

The application of the Act is fairly straightforward.<sup>83</sup> Typically, in MVFCAFA cases, the only issue is whether the Act applies, given that its application is limited to "contracts entered into, amended, altered, modified, renewed, or extended after November 2, 2002."<sup>84</sup> MVFCAFA also has a narrow scope. It forbids only the enforcement of pre-dispute binding arbitration agreements in the context of "motor vehicle franchise agreements" and does not extend to other types of contracts that touch on the relationship between motor vehicle dealers and manufacturers — for example, shareholder agreements.<sup>85</sup>

One notable procedural peculiarity of MVFCAFA is that it requires a bilateral, post-dispute agreement in order to commence arbitration.<sup>86</sup> So, even where the contract at issue includes an arbitration agreement, the dealer cannot choose to exercise that agreement without the written, post-dispute consent of the manufacturer, even when the manufacturer was the one to include the pre-dispute mandatory arbitration clause.<sup>87</sup> Although some litigants have argued that the legislative intent of MVFCAFA was to

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80. Carl J. Chiappa & David Stoelting, *Tip of the Iceberg? New Law Exempts Car Dealers from Federal Arbitration Act*, 22 FRANCHISE L. J. 219 (2003).

81. *Id.* at 219.

82. *Id.*

83. Indeed, the Supreme Court held up MVFCAFA as an example of the "clarity" with which Congress has acted to restrict the use of mandatory arbitration clauses. *Compu-Credit Corp. v. Greenwood*, 565 U.S. 95, 103–04 (2012).

84. Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(b) (2012).

85. "The Amended Stockholders Agreement is not an agreement by which GM 'sells motor vehicles to any other person for resale to an ultimate purchaser.' Nor does the agreement authorize anyone 'to repair and service' GM motor vehicles. Thus, by its plain and unambiguous language, [MVFCAFA] does not apply to the Amended Stockholders Agreement." *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 235 (2d Cir. 2006).

86. "[A]rbitration 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) (2012) (emphasis added).

87. *Volkswagen of Am., Inc. v. Sud's of Peoria, Inc.*, 474 F.3d 966, 975 (7th Cir. 2007).



protect dealers and so should allow them to force manufacturers into arbitration if they so choose, the Seventh Circuit has held that the plain language of the statute requires bilateral agreement.<sup>88</sup> Further, MVFCAFA has been found to not apply to franchise agreements between domestic manufacturers and foreign dealers.<sup>89</sup> Ultimately, some attorneys have argued MVFCAFA has not had its intended effect, in that a variety of contracts involving motor vehicle franchises remain subject to arbitration.<sup>90</sup>

The reasons articulated by Congress and the NADA for a car dealer exemption from the strictures of the FAA are not unusual in the universe of industries, consumer classes, and employees that seek to be made exempt from mandatory arbitration clauses.<sup>91</sup> Yet car dealers are far less vulnerable than other groups to whom protection has been denied.<sup>92</sup> Dealers are typically sophisticated business entities that negotiate with manufacturers with the assistance of counsel.<sup>93</sup> A relatively small number of motor vehicle franchise agreements contained arbitration clauses in the

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88. *Id.* at 976.

89. The court held that Congress had enacted MVFCAFA with domestic dealers in mind and found “no convincing indication” that Congress intended it to apply to foreign dealers. *Arabian Motors Grp. W.L.L. v. Ford Motor Co.*, 228 F. Supp. 3d 797, 805 (E.D. Mich. 2017).

90. “Although the Fairness Act was intended to protect dealers from being forced to arbitrate disputes by manufacturers, that purpose has not been fulfilled for several reasons. Courts have narrowly construed the term ‘Franchise Contract’ by looking only to the statutory definition without resort to policy or legislative intent. The result of this narrow construction is that manufacturers may enforce arbitration provisions found in separate agreements which are not considered Franchise Contracts within the meaning of the Fairness Act. Dealers are left with the slight chance that courts will refuse to compel arbitration because the separate agreement was incorporated into the Franchise Contract under state contract law.” Christopher C. Genovese & Erik T. Norton, *The Motor Vehicle Franchise Agreement Arbitration Fairness Act*, NELSON MULLINS RILEY & SCARBOROUGH LLP (Apr. 5, 2010), [https://www.nelsonmullins.com/DocumentDepot/Motor\\_Vehicle\\_Franchise\\_Agreement\\_Arbitration\\_Fairness\\_Act\\_4.5.10.pdf](https://www.nelsonmullins.com/DocumentDepot/Motor_Vehicle_Franchise_Agreement_Arbitration_Fairness_Act_4.5.10.pdf) [<https://perma.cc/KM24-DUKS>].

91. *Compare* Chiappa & Stoelting, *supra* note 80, at 219 (“The Act was necessary, according to the Committee Report, because of the disparity in bargaining power between motor vehicle dealers and manufacturers. In addition, the report found that motor vehicle franchise agreements between dealers and manufacturers are inherently coercive and on-sided contracts of adhesion.”), *with* Michael Z. Green, *Opposing Excessive Use of Employer Bargaining Power in Mandatory Arbitration Agreements Through Collective Employee Actions*, 10 TEX. WESLEYAN L. REV. 77, 78–79 (2003) (“These one-sided, adhesion agreements to arbitrate future disputes . . . represent a private contractual response by employers to limit an individual employee’s publicly-developed rights and remedies. Sadly, the average individual who recoils at the proposal of such an agreement to arbitrate future disputes with an employer has little bargaining power to actually refuse when the arbitration agreement is offered as a condition of employment.”).

92. *See* Chiappa & Stoelting, *supra* note 80, at 220.

93. *Id.*

first place, while dealers frequently employ such clauses when selling to the consumer.<sup>94</sup> Finally, the substantive protections that states have created to even the playing field between dealers and manufacturers apply with equal force in arbitration as in court.<sup>95</sup> In short, the relationship between car dealers and manufacturers seems to be particularly well-suited for the kind of “modest system of arbitration of contractual disputes between merchants” contemplated during the passage of the FAA.<sup>96</sup>

In a contemporaneous article discussing the nature and impact of MVFCFAFA, Carl Chiappa and David Stoelting warned that, in passing the Act, Congress might be pressured to create a variety of exemptions from the FAA that “would weaken the FAA and create greater uncertainty in contractual dispute resolution.”<sup>97</sup> While restrictions on mandatory arbitration clauses have grown since MVFCFAFA’s passage, these restrictions have not grown with the scope or consequences of which Chiappa and Stoelting warned. Instead, MVFCFAFA remains a somewhat one-off artifact in the universe of statutory arbitration regulation, protecting a very specific interest group that arguably did not need protection in the first place.

That said, MVFCFAFA has proven to be durable.<sup>98</sup> While its subject matter seems questionable, the means by which MVFCFAFA exempts certain types of contracts from the FAA could act as a model for future mandatory arbitration reform. Yet it also serves as a cautionary tale: against the backdrop of the “national policy favoring arbitration,”<sup>99</sup> courts may tend to construe even clear exemptions relatively narrowly. The more flexible the target of a statute, the more likely it seems that it will be pressed into a fairly small box.

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94. *Id.*

95. *Id.*

96. *See Szalai, supra note 37, at 122.*

97. *See Chiappa & Stoelting, supra note 80, at 220.*

98. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617 (2018) (“Congress has shown that it knows exactly how . . . to override the [FAA].”).

99. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

## 2. *Military Lending Act*

The Military Lending Act (MLA) was passed in 2006 as an amendment to the John Warner National Defense Authorization Act.<sup>100</sup> The MLA was, at least in part, a product of a report produced by the Department of Defense (DoD) on predatory lending practices as they impacted members of the armed forces.<sup>101</sup> Among other things, the DoD report recommended:

Loan contracts to Service members should not include mandatory arbitration clauses or onerous notice provisions, and should not require the Service member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver is not a matter of “choice” in take-it-or-leave-it contracts of adhesion.<sup>102</sup>

The report further concluded that predatory lending practices, including mandatory arbitration, “undermine[] military readiness, harm[] the morale of troops and their families, and add[] to the cost of fielding an all volunteer [sic] fighting force.”<sup>103</sup>

The MLA largely mirrored the DoD’s recommendations, and the final bill provided that “[i]t shall be unlawful for any creditor to extend consumer credit to a covered member or a dependent of such a member with respect to which . . . the creditor requires the borrower to submit to arbitration or imposes onerous legal notice provisions in the case of a dispute.”<sup>104</sup> The MLA also includes a robust enforcement mechanism. Any contract that violates the MLA is void from the inception of the contract,<sup>105</sup> no agreement to arbitrate any dispute involving consumer credit is enforceable against a member of the armed forces or their dependents (specif-

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100. Dawn Goulet, *Protecting Our Protectors: The Defense Department’s New Rules to Prevent Predatory Lending to Military Personnel*, 20 LOY. CONSUMER L. REV. 81, 89 (2007).

101. Meghan Stringer Musselman, *Talent Amendment: Limitations on Military Lending*, MD. B.J., Nov./Dec. 2007, at 38, 40.

102. DEP’T OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 7–8 (2006), [http://archive.defense.gov/pubs/pdfs/Report\\_to\\_Congress\\_final.pdf](http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf) [<https://perma.cc/VPY5-WCXM>].

103. *Id.* at 9.

104. Military Lending Act, 10 U.S.C. § 987(e)(3) (2012).

105. *Id.* at § 987(f)(3).

ically “notwithstanding [the FAA]”),<sup>106</sup> and a creditor who knowingly violates the MLA is guilty of a misdemeanor.<sup>107</sup>

The MLA did not specifically define “creditor” or “consumer credit,” but rather directed the Secretary of Defense to promulgate a regulation defining these terms in consultation with a number of other government actors.<sup>108</sup> Those regulations are codified at 32 C.F.R. Section 232.3, which, as of a 2015 amendment to the regulation, defines a “creditor” as “[a person who is] engaged in the business of extending consumer credit”<sup>109</sup> and “consumer credit” as “credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is [s]ubject to a finance charge; or [p]ayable by a written agreement in more than four installments”<sup>110</sup> with a number of exceptions.<sup>111</sup> The MLA itself notably exempts two types of credit from its arbitration prohibition: residential mortgages<sup>112</sup> and loans for the purchase of cars that are secured by the car itself or other personal property.<sup>113</sup>

The MLA has rarely been tested in the courts, with one notable exception: *Cox v. Community Loans of America, Inc.*<sup>114</sup> *Cox* involved a putative class action suit involving vehicle title pawns containing mandatory arbitration clauses.<sup>115</sup> Since the MLA’s anti-arbitration provisions covered vehicle title loans, at issue was whether the challenged transactions were “vehicle title

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106. *Id.* at § 987(f)(4).

107. *Id.* at § 987(f)(1).

108. *Id.* at § 987(h).

109. 32 C.F.R. § 232.3(i) (2018).

110. *Id.* at § 232.3(f).

111. Those exceptions include residential mortgages, a credit transaction intended to finance the purchase of a motor vehicle that is secured by the vehicle being purchased, a credit transaction intended to finance the purchase of personal property that is secured by the personal property being purchased, any credit transaction that is an exempt transaction for the purposes of the Truth in Lending Act (Regulation Z) or is otherwise not subject to disclosure requirement under Regulation Z, or any credit transaction for which the creditor determines that the consumer is not a covered borrower. *Id.* at § 232.3(f)(2).

112. Residential mortgages were later exempted from mandatory arbitration by Dodd-Frank. *See infra* Part III.A.4.

113. Military Lending Act, 10 U.S.C. § 987(i)(6) (2012).

114. 2012 WL 773496, at \*5 (M.D. Ga. Mar. 8, 2012).

115. *Id.* at \*1. Vehicle title pawns are consumer loans secured by the title for a vehicle. *See infra* note 116. This is distinct from a traditional auto loan, which is exempt from the MLA under 10 U.S.C. Section 987(i)(6) and is a loan for the purchase of a car secured by the car itself. *See, e.g.*, Christina Majaski, *Personal Loans vs. Car Loans: What’s the Difference?*, INVESTOPEDIA (last updated Apr. 18, 2019), <https://www.investopedia.com/articles/personal-finance/070915/personal-loans-vs-car-loans-how-they-differ.asp> [<https://perma.cc/2WK8-7XZV>].

loans”<sup>116</sup> per the MLA definition — if they were, they would be unenforceable.<sup>117</sup> The court held that the pawn agreements did indeed constitute vehicle title loans, and that the arbitration clauses were therefore unenforceable.<sup>118</sup>

The MLA’s purpose and scope are summarized clearly by the DoD report that lead to its passage.<sup>119</sup> Its restrictions on mandatory arbitration are meant to provide financial security to members of the military, constituents whom members of Congress feel particularly bound to protect. It might be argued that what is appropriate for military personnel is likewise appropriate for civilians, but that would overlook the unusual benefits and vulnerabilities that accrue to active duty military personnel and veterans.<sup>120</sup> Congress has often taken steps through a variety of veteran benefits, like the GI Bill and home loan programs, to set aside participants in the military for special treatment, either as a reward for service or as prophylactic measures to protect what can otherwise be a somewhat vulnerable population.<sup>121</sup> Similar logic may well have been at work in the MLA.

The MLA provides an important point of departure from the baseline set by the FAA: Congress has identified certain groups that are particularly vulnerable to mandatory arbitration clauses. This logic, rather than a blanket ban, may be the clearest route towards restraining the excesses of mandatory arbitration without sacrificing its benefits.

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116. “Vehicle title loans” are defined as “[c]losed-end credit with a term of 181 days or fewer that is secured by the title to a motor vehicle, that has been registered for use on public roads and owned by a covered borrower” other than a “credit transaction to finance the purchase or lease of a motor vehicle when the credit is secured by the vehicle being purchased or leased.” *Cox*, 2012 WL 773496 at \*5 (quoting Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,586 (Aug. 31, 2007)).

117. *Id.* at \*6.

118. *Id.* at \*8. The district court later granted class certification for the case, which was affirmed by the Eleventh Circuit Court of Appeals. *Cox v. Cmty. Loans of Am. Inc.*, 625 F. App’x 453, 454 (11th Cir. 2015).

119. See DEP’T OF DEF., *supra* note 102.

120. See, e.g., U.S. DEP’T OF VETERANS AFFAIRS, SUMMARY OF VA BENEFITS, <https://benefits.va.gov/BENEFITS/benefits-summary/SummaryofVABenefitsFlyer.pdf> [<https://perma.cc/C4JF-HKDF>] (last visited Apr. 10, 2019).

121. See *id.*

### 3. 7 U.S.C. Section 197c

Standing alongside MVFCAFA, 7 U.S.C. Section 197c, passed as part of the Food, Conservation, and Energy Act of 2008, represents an oddly specific exemption from the FAA. It provides in part:

Any livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision.<sup>122</sup>

The statute further provides, much like MVFCAFA, that an arbitration agreement is valid “if, after the controversy arises, both parties consent in writing to use arbitration to settle the controversy.”<sup>123</sup>

Unlike other limitations on mandatory arbitration, the Food, Conservation, and Energy Act does not ban or exempt a particular party from pre-dispute mandatory arbitration.<sup>124</sup> Rather, it requires that poultry and livestock growers be given an option to decline to be bound by any such arbitration agreement.<sup>125</sup> The implementing regulation requires that any livestock or poultry contract containing an arbitration provision include language on the signature page indicating that it is the livestock or poultry grower’s choice whether to be bound by the arbitration agreement.<sup>126</sup>

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122. Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c(a) (2012).

123. *Id.* at § 197c(c).

124. *Id.* at § 197c(a).

125. *Id.*

126. “In any livestock or poultry production contract that requires the use of arbitration the following language must appear on the signature page of the contract in bold conspicuous print: ‘Right to Decline Arbitration. A poultry grower, livestock producer or swine production contract grower has the right to decline to be bound by the arbitration provisions set forth in this agreement. A poultry grower, livestock producer or swine production contract grower shall indicate whether or not it desires to be bound by the arbitration provisions by signing one of the following statements; failure to choose an option will be treated as if the poultry grower, livestock producer or swine production contract grower declined to be bound by the arbitration provisions set forth in this Agreement:

I decline to be bound by the arbitration provisions set forth in this Agreement \_\_\_\_\_

I accept the arbitration provisions as set forth in this Agreement \_\_\_\_\_.” 9 C.F.R. § 201.218(a) (2018).

There are, at present, only two occasions in which *any* court has so much as mentioned this particular anti-arbitration provision. In one case, the plaintiff argued unsuccessfully that a pre-enactment arbitration clause should be invalidated on the grounds that Congress had indicated disfavor towards such agreements.<sup>127</sup> Another case simply found that “[the] arbitration provision in the contract does not comply with 7 U.S.C. § 197c.”<sup>128</sup>

There is also little legislative history on the anti-arbitration provision’s inclusion.<sup>129</sup> However, the Food, Conservation, and Energy Act of 2008 as a whole was passed in response to a transformation in economics of livestock and poultry farming over the course of the twentieth century.<sup>130</sup> The livestock industry had been governed in large part by the Packers and Stockyard Act of 1921 and periodic farm bills beginning in 1933.<sup>131</sup> Since the time those bills were passed, many livestock operations had consolidated into large, vertically integrated corporations that frequently used contract-grower agreements to provide for facilities and labor.<sup>132</sup> The Food, Conservation, and Energy Act was focused largely on regulating that increasingly important relationship.

The inclusion of an anti-arbitration provision in this specific context can therefore be viewed as part of a larger project to reorganize the relationship between two different economic actors — a relationship that had arguably gotten out of balance. This approach demonstrates a pair important point involving mandatory arbitration. First, reform need not be a sweeping or universal, but instead might come as part of a larger regulatory framework. Second, regulating the availability of arbitration between specific parties in a given economic relationship with one another may be

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127. *Bell v. Koch Foods of Mississippi, LLC*, 2009 WL 1259054, at \*9 (S.D. Miss. May 5, 2009), *aff’d*, 358 F. App’x 498 (5th Cir. 2009).

128. *Oldham v. O.K. Farms, Inc.*, 177 F. Supp. 3d 1319, 1320 (E.D. Okla. 2016).

129. The anti-arbitration provision was included by Senator Tom Harkin of Iowa, who said of an earlier, similar proposal, “Producers or growers who feel they have been subject to breach of contract, fraud or illegal activity should be allowed to pursue their rights and remedies in our courts and not forced into arbitration.” P. Scott Shearer, *Change in Livestock Contracts Arbitration Eyed*, BEEF MAG. (Jan. 22, 2007), [http://www.beefmagazine.com/Change\\_Livestock\\_Contracts\\_Arbitration](http://www.beefmagazine.com/Change_Livestock_Contracts_Arbitration) [https://perma.cc/3768-B3WZ].

130. See Matthew Berger & Christopher Bowler, *An Expansive Leap: The Grain Inspection, Packers and Stockyards Administration’s Unjustified Attempt to Grow the Packers and Stockyards Act*, 43 MITCHELL HAMLINE L. REV. 345, 359 (2017).

131. See generally *id.* at 348–59.

132. *Id.* at 358–59.

warranted when the circumstances of that relationship have either changed significantly or were hitherto unknown.

#### 4. *The 2010 Dodd-Frank Act*

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) limits the use of mandatory arbitration in two distinct circumstances. First, it prohibits the use of mandatory arbitration in residential mortgage contracts.<sup>133</sup> Second, it limits the use of mandatory arbitration in a variety of whistleblower anti-retaliation provisions.<sup>134</sup>

Dodd-Frank implements its limitation on mandatory arbitration in residential mortgage contracts by amending the Truth in Lending Act of 1968. The key portion of the statute reads as follows:

No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.<sup>135</sup>

This specific provision has received no federal appellate treatment at present, but a number of district courts have interpreted the statute, primarily on the issue of its retroactivity. Every court that has had a chance to weigh in on the issue has determined that the residential mortgage arbitration limits of Dodd-Frank do not apply retroactively.<sup>136</sup> In other words, residential mortgage contracts executed prior to Dodd-Frank's enactment date — July 21, 2010 — remain subject to mandatory arbitration.

However, in discussing the issue of retroactivity, some courts have also discussed the nature of a contracting party's right to

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133. Dodd-Frank Act, 15 U.S.C. § 1639c(e)(1) (2012).

134. Dodd-Frank Act § 922, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C., 12 U.S.C., 15 U.S.C., and 18 U.S.C.).

135. Dodd-Frank Act, 15 U.S.C. § 1639c(e)(1) (2012).

136. See, e.g., *McCants v. CitiFinancial Servicing, LLC*, 2017 WL 5473744, at \*10 (S.D. Ala. Feb. 23, 2017), (report and recommendation adopted, appeal dismissed); *Jaludi v. Citigroup*, 2016 WL 4528352, at \*3 (M.D. Pa. Aug. 30, 2016) (judgment appealed); *Richards v. Gibson*, 2015 WL 926594, at \*3 (S.D. Miss. Mar. 4, 2015).



demand that a dispute be resolved through mandatory arbitration.<sup>137</sup> Several district courts have also held that the statute is not “merely jurisdictional,” but rather “affects the parties’ substantive contractual right[s].”<sup>138</sup> Mandatory arbitration clauses not only determine the forum in which the dispute will be heard, but create a right to demand arbitration as between the two contracting parties.

Dodd-Frank also amended or expanded on a number of related acts of Congress in order to enhance protections for whistleblowers.<sup>139</sup> The Sarbanes-Oxley Act was amended to prohibit mandatory arbitration of whistleblower anti-retaliation claims brought under 18 U.S.C. Section 1514A.<sup>140</sup> The Commodity Exchange Act was amended to prohibit mandatory arbitration of whistleblower claims brought under 7 U.S.C. Section 26.<sup>141</sup> The portion of Dodd-Frank relevant to the Consumer Financial Protection Bureau included whistleblower anti-retaliation provision with an anti-arbitration clause in 12 U.S.C. Section 5567.<sup>142</sup> And finally, Dodd-Frank created a standalone whistleblower anti-retaliation provision, codified at 15 U.S.C. Section 78u-6.<sup>143</sup> However, unlike Dodd-Frank’s other amendments to whistleblower protections, Section 78u-6 does not contain an explicit anti-arbitration provision.<sup>144</sup> So while Dodd-Frank amended Sarbanes-Oxley to prohibit mandatory arbitration in the whistleblower anti-retaliation context, it added an additional provision that left the door open for mandatory arbitration in virtually identical situations.

Sarbanes-Oxley and Dodd-Frank overlap so substantially that a single set of factual circumstances can easily give rise to claims

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137. See *McCants*, 2017 WL 5473744 at \*10 (declining to apply the statute retroactively because it “would affect substantive rights, liabilities, or duties on the contracting parties”).

138. See *Weller v. HSBC Mortg. Servs., Inc.*, 971 F. Supp. 2d 1072, 1079 (D. Colo. 2013) (“An arbitration agreement creates a right, one that under the FAA is ‘irrevocable.’”); *Beckwith v. Caliber Home Loans, Inc.*, 2015 WL 3767187, at \*4 (N.D. Ala. June 17, 2015) (“the Dodd-Frank Act does not merely confer or oust jurisdiction”); *Gibson*, 2015 WL 926594, at \*3.

139. Dodd-Frank Act § 922, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C., 12 U.S.C., 15 U.S.C., and 18 U.S.C.).

140. 18 U.S.C. § 1514A (2012).

141. 7 U.S.C. § 26 (2012).

142. 12 U.S.C. § 5567 (2012).

143. 15 U.S.C. § 78u-6 (2012).

144. *Id.*

under both statutes.<sup>145</sup> Sarbanes-Oxley provides that “[n]o pre-dispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”<sup>146</sup> Yet its analog in 15 U.S.C. Section 78u-6 includes no such anti-arbitration provision.<sup>147</sup> The result is that the same facts can justify two claims, one of which is exempt from arbitration, and the other of which is subject to mandatory arbitration.

The interaction of these two statutes places the courts in a somewhat uncomfortable position. In *Wussow v. Bruker Corp.*, the plaintiff brought anti-retaliation claims under both Sarbanes-Oxley and Dodd-Frank, meaning one claim was arbitrable and the other was not.<sup>148</sup> Wussow was an employee of the Bruker Corporation who discovered that Bruker was engaging in fraudulent conduct.<sup>149</sup> After repeatedly reporting the conduct to his superiors and coworkers, Wussow was eventually fired from Bruker, allegedly for his continuous complaints about the fraudulent conduct.<sup>150</sup> Wussow brought claims against Bruker under both Sarbanes-Oxley and Dodd-Frank “based on the same factual allegations and adverse employment actions.”<sup>151</sup>

As the court pointed out in *Wussow*, “whichever claim is decided first is likely to have a largely preclusive, if not definitive, effect on the other.”<sup>152</sup> A majority of courts that have considered the issue — including the Third Circuit Court of Appeals — have determined that claims under Section 78u-6 are susceptible to arbitration agreements, despite their similarity to claims brought

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145. Compare 18 U.S.C. § 1514A(a) (2012) (“No company with a class of securities registered under . . . the Securities Exchange Act of 1934 . . . may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . to provide information . . . or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [the securities laws.]”), with 15 U.S.C. § 78u-6(h)(1)(A) (2012) (“No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in providing information to the Commission in accordance with this section. . .”).

146. Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A(e)(2) (2012).

147. See 15 U.S.C. § 78u-6.

148. *Wussow v. Bruker Corp.*, 2017 WL 2805016, at \*1 (W.D. Wis. June 28, 2017).

149. *Id.* at \*3.

150. *Id.*

151. *Id.* (citations omitted).

152. *Id.* at \*1.

under Section 1514A.<sup>153</sup> Yet *Wussow* itself presents a somewhat novel question that other courts have yet to address: What must a court do when presented with claims under both statutes? As the court in *Wussow* pointed out, it is typical for courts faced with a mixture of arbitrable and non-arbitrable claims to use their discretion to stay court proceedings for the non-arbitrable claims pending arbitration if there is a risk of inconsistent outcomes.<sup>154</sup> However, this was not a typical case. Citing Congress's explicit intent to make Sarbanes-Oxley claims non-arbitrable, the court determined that the appropriate remedy was to "[allow] the two claims to proceed on parallel tracks, each in its appropriate forum as determined by Congressional intent and the agreement of the parties."<sup>155</sup> As a result, the plaintiff's two claims, both for whistleblower retaliation, had to be adjudicated in two different forums simultaneously, and the court agreed to "entertain a motion to expedite the trial" if the arbitration proceedings threatened to overtake those in the court.<sup>156</sup>

Simply put, Dodd-Frank, the most wide-ranging Congressional attempt at arbitration reform to date, presents an occasionally contradictory vision of mandatory arbitration regulation.<sup>157</sup> The limitations it places on mandatory arbitration for residential mortgages undoubtedly represent a substantial step in the direction of consumer protection over the desires of large corporate financial institutions.<sup>158</sup> At the same time, those protections are limited by the lack of retroactivity and the nature of arbitration rights as interpreted by the courts.<sup>159</sup>

Dodd-Frank's whistleblower arbitration exemptions seem internally inconsistent, limiting the use of arbitration for some claims but permitting it for others, even when those claims can easily have identical factual bases. The courts impute intent ra-

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153. See *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488 (3d Cir. 2014); *Murray v. UBS Sec., LLC*, 2014 WL 285093 (S.D.N.Y. Jan. 27, 2014); *Wussow*, 2017 WL 2805016.

154. *Wussow v. Bruker Corp.*, 2017 WL 2805016, at \*7–8 (W.D. Wis. June 28, 2017).

155. *Id.* at \*9.

156. *Id.*

157. See, e.g., Alison Frankel, *Dodd-Frank Leaves Muddle on Forced Arbitration of Whistleblower Claims*, REUTERS (July 5, 2017), <https://www.reuters.com/article/usa-otc-doddfrank-idUSKBN19Q2KL> [<https://perma.cc/BB75-SZ8X>].

158. See Gregory J. Pulles, *The End of the Beginning: A Revolution in the World of Consumer Financial Products and Services*, 10 U. ST. THOMAS J.L. & PUB. POL'Y 33, 49 (2015) (describing the ban on mandatory arbitration in residential mortgages as "an extremely significant change").

159. See, e.g., *supra* notes 135–137.

ther than mistake on this statutory framework — not a particularly unreasonable assumption given that Dodd-Frank’s whistleblower reforms are listed in sequence in the bill itself, and so would have been fairly clear to any drafters.<sup>160</sup>

This approach underlines an important aspect of Congress’s approach to mandatory arbitration. Although Congress will occasionally limit the use of mandatory arbitration in narrow factual situations, like poultry contracts, it seems to favor protecting certain remedies and procedures when making broader changes. While there are slight differences in definitions in each of the whistleblower statutes, the most important difference is the remedies and procedures they produce.<sup>161</sup> An approach to mandatory arbitration reform that recognizes this distinction between sets of facts and sets of remedies would align with existing statutory approaches.

### 5. *The Franken Amendment*

The Franken Amendment first appeared in the Defense Appropriations Act for Fiscal Year 2010,<sup>162</sup> and most recently was re-enacted in the Consolidated Appropriations Act for 2018.<sup>163</sup> The amendment reads, in part:

None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of \$1,000,000, unless the contractor agrees not to . . . enter into any agreement with any of its employees or independent contractors that requires, as a condition

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160. Dodd-Frank § 922, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C., 12 U.S.C., 15 U.S.C., and 18 U.S.C.).

161. Comparing the Dodd-Frank and Sarbanes-Oxley whistleblower anti-retaliation provisions, there are a few other key differences: Dodd-Frank, which permits arbitration, provides for double back pay damages and allows the whistleblower to sue directly in federal court if there is not arbitration agreement, while Sarbanes-Oxley, which forbids arbitration, does not offer double damages and requires administrative exhaustion. In *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767 (2018), the Supreme Court also held that the Dodd-Frank is not applicable unless the whistleblower actually goes to the Securities and Exchange Commission with their information. *Id.* at 780. Ultimately, the two regimes are fairly dissimilar in application. One allows arbitration, but provides for increased damages, lacks an administrative exhaustion requirement, and was meant to encourage reporting to the SEC. The other forbids arbitration, but requires administrative exhaustion and was meant to “disturb the corporate code of silence.” *Id.* at 778.

162. Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3409 (2009).

163. The Consolidated Appropriations Act of 2017, Pub. L. No. 115-141 (2018).

of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or . . . take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any [similar claims.]<sup>164</sup>

The initial motivation for the Franken Amendment is evident from the Congressional Record. According to Senator Al Franken, Jamie Leigh Jones entered into an employment agreement with military contractor Kellogg Brown & Root (KBR) that contained an arbitration agreement.<sup>165</sup> She was later drugged and raped while on the job in Iraq.<sup>166</sup> Jones brought a suit against KBR, which in turn sought to enforce the arbitration agreement in the employment contract.<sup>167</sup> The district court granted in part and denied in part the motion to compel arbitration, holding that the claims relating to Jones's rape fell outside the scope of her employment.<sup>168</sup> The Fifth Circuit ultimately affirmed and ruled that Jones's claims were unrelated to her employment, and therefore not arbitrable.<sup>169</sup> Although there was no contrary appellate authority, the Fifth Circuit used the limiting language of the arbitration clause itself to dismiss KBR's motion, opening the possibility of arbitration for similar claims under broader language.<sup>170</sup> Franken argued the amendment was necessary to implement this part of the Fifth Circuit's reasoning nationwide. Stated by Franken, arbitration "has its place in our justice system," especially in business-to-business commercial contexts, "but

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164. *Id.*

165. 155 CONG. REC. S10,009–02 (daily ed. Oct. 6, 2009) (statement of Sen. Franken).

166. *Id.*

167. *Jones v. Halliburton Co.*, 583 F.3d 228, 232–33 (5th Cir. 2009).

168. *Id.* at 233.

169. *Id.* at 242.

170. See generally Eric Koplowitz, "I Didn't Agree to Arbitrate That!" — How Courts Determine If Employees' Sexual Assault and Sexual Harassment Claims Fall Within the Scope of Broad Mandatory Arbitration Clauses, 13 CARDOZO J. CONFLICT RESOL. 565, 587 (2012) (discussing broad arbitration agreements in employment contracts in the context of sexual assault claims).

handling claims of sexual assault and egregious violations of civil rights is not its place.”<sup>171</sup>

The Franken Amendment’s limited treatment by the courts has created a somewhat unusual procedural approach, when compared to other anti-arbitration statutes. As a preliminary matter, the Franken Amendment “imposes no substantive prohibitions on arbitration,”<sup>172</sup> rather, it “preclude[s] the government from doing business with [eligible] contractors if a condition of employment is mandatory arbitration of civil rights claims. . . .”<sup>173</sup> Choosing to accept a government contract in excess of \$1 million triggers the Amendment’s protections, not the claims or the contractual relationship between the employee and the employer.<sup>174</sup> When a military contractor accepts a protected contract, the contractor waives the ability to demand arbitration of the covered claims.

If a claim is non-arbitrable under the Franken Amendment, any other claim included in the complaint remains susceptible to arbitration, and may be “easily sever[ed].”<sup>175</sup> However, in *Alim v. KBR, Inc.*, the court stayed proceedings for the non-arbitrable claim and allowed arbitration to proceed. The court did not, however, stay the non-arbitrable claim indefinitely, and permitted the plaintiff to move to lift the stay after “a reasonable time.”<sup>176</sup> This outcome illuminates a key difference between the Franken Amendment’s and Dodd-Frank’s approaches to arbitration. In separating the arbitrable claims from the non-arbitrable claims under Dodd-Frank, the court determined that Congress’s specific intent to prohibit pre-dispute arbitration agreements in one context meant that that non-arbitrable claims must proceed concurrently with the arbitrable claims.<sup>177</sup> In the looser, more discretionary framework of the Franken Amendment, such an unusual outcome is unnecessary.<sup>178</sup> Nonetheless, the procedural workings of the Franken Amendment highlight a point already clear under Dodd-Frank: Congress will exempt certain claims and remedies

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171. See *supra* note 165.

172. *Phifer v. Mich. Sporting Goods Distributors, Inc.*, 2010 WL 3609376, at \*7 (W.D. Mich. July 28, 2010), *report and recommendation adopted*, 2010 WL 3609370 (W.D. Mich. Sept. 9, 2010).

173. *Id.*

174. See *supra* note 163.

175. *Alim v. KBR, Inc.*, 2012 WL 12857421, at \*11 (N.D. Tex. Mar. 15, 2012).

176. *Id.* at \*12.

177. *Wussow v. Bruker Corp.*, 2017 WL 2805016 (W.D. Wis. June 28, 2017).

178. See *Alim*, 2012 WL 12857421 at \*12.

from mandatory arbitration, while leaving others intact. Expanding on this trend may offer another reasonable path towards more unified mandatory arbitration regulation.

In one form or another, each of the statutory restraints on mandatory arbitration discussed by this Note has been relatively constrained. They were either limited to relatively narrow factual circumstances, triggered by circuitous mechanisms, or involved the availability of specific remedies in arbitrable or non-arbitrable settings. More sweeping legislation has largely faltered, though Congress approached broader reform in authorizing the CFPB to issue rules restricting mandatory arbitration.

## B. A RESTRICTION REVERSED

Congress opened the door for what could have been the most sweeping restriction on the use of mandatory arbitration by authorizing the CFPB to “prohibit or impose conditions or limitations on the use of an agreement . . . providing for arbitration of any future dispute . . . if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”<sup>179</sup> The 2017 CFPB rule prohibiting mandatory arbitration clauses in all consumer financial contracts might have been the most sweeping change to the mandatory arbitration landscape, had it not been overturned by Congress.<sup>180</sup>

Congress has taken a number of relatively substantial steps to restrict the use of mandatory arbitration: it has exempted a specific type of contract from mandatory arbitration with the Motor Vehicle Franchise Contract Arbitration Fairness Act in 2002;<sup>181</sup> a specific class of consumer with the Military Lending Act in 2006;<sup>182</sup> a specific industry with the Food, Energy, and Conservation Act of 2008;<sup>183</sup> whole segments of the economy and specific types of claims with Dodd-Frank in 2010;<sup>184</sup> and other types of

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179. 12 U.S.C. § 5518 (2012).

180. Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

181. Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2012).

182. Military Lending Act, 10 U.S.C. § 987(e)(3) (2012).

183. Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c(a) (2012).

184. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C., 12 U.S.C., 15 U.S.C., and 18 U.S.C.).

claims involving particular industries with the Franken Amendment beginning later in 2010.<sup>185</sup> However, there may come a point when restrictions on mandatory arbitration go too far.<sup>186</sup> After all, mandatory arbitration clauses do have benefits in the economic and legal landscape of the United States.<sup>187</sup> The CFPB rule may have been that point too far, where a sweeping restriction on mandatory arbitration threatened to consume the entire system in order to solve comparatively narrow problems. Striking a balance between preserving the benefits of arbitration while limiting harm is the ultimate key to a more complete, holistic statutory framework in which to situate mandatory arbitration.

#### IV. ALTERNATIVE STATUTORY FRAMEWORKS FOR MANDATORY ARBITRATION

Approaches to mandatory arbitration reform can be categorized from most to least restrictive.<sup>188</sup> The Arbitration Fairness Act anchors the most restrictive end, which restricts mandatory arbitration clauses across a variety of contexts.<sup>189</sup> The least restrictive end encompasses limitations like MVFCAFA or the anti-arbitration clause in the Food, Conservation, and Energy Act — very narrow, highly specific carve-outs for particular groups of people or contexts.<sup>190</sup> The defeated CFPB rule, or a similarly consolidated approach to mandatory arbitration regulation, fits in the middle of the spectrum, and limits the use of mandatory arbitration in broader contexts for specific reasons.<sup>191</sup>

At present, statutory limitations on mandatory arbitration represent somewhat of a “Swiss-cheese” approach, only prohibit-

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185. See, e.g., Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017).

186. See, e.g., Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predisputes Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (arguing that arbitration allows more claimants to have their claims heard more quickly and cheaply).

187. See Farmer, *supra* note 19, at 2352 n.14.

188. See, e.g., Burch, *supra* note 9, at 1337; see also Ware, *supra* note 69, at 732–44.

189. See Arbitration Fairness Act, S. 537, 115th Congress (2017).

190. See Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2012); Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c(a) (2012).

191. See Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).



ing use in relatively narrow circumstances.<sup>192</sup> The most logical step to reforming the use of mandatory arbitration in the United States would be to reexamine existing statutory approaches with an eye towards rationalization and unification. Overall, mandatory arbitration reform can be broken down into two broad camps: context regulation and process regulation. Generally speaking, context regulation involves absolute limitations on the use of mandatory arbitration agreements in certain contracting situations. Process regulation involves limitations or modifications of certain mechanisms and dynamics inherent in mandatory arbitration. One approach simply bans mandatory arbitration; another installs release valves. Congress has used both approaches in the past,<sup>193</sup> and should use both approaches in the future. Certain situations, either involving the nature of the claim or the claimant, recommend limiting the use of pre-dispute mandatory arbitration altogether. Yet even where a particular context does not necessarily indicate that mandatory arbitration should be banned altogether, the remedies to which it applies and the processes by which it may be used may also demand some level of oversight. A conciliatory approach to reform incorporates both of these considerations.

#### A. CONTEXT REGULATION

Most current arbitration statutes restrict the use of mandatory arbitration clauses to particular contexts.<sup>194</sup> Indeed, almost all proposed statutes over the past twenty years that would effect some kind of change to the mandatory arbitration landscape would have simply banned their use in certain contexts.<sup>195</sup> Various iterations of the Arbitration Fairness Act, as well as much of the existing landscape of narrow carve-outs, have taken this approach.<sup>196</sup> This kind of slash-and-burn approach to mandatory arbitration ignores the public benefits that arbitration can offer, such as reducing both the burden on courts and the cost of dispute-resolution.<sup>197</sup>

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192. Ramona L. Lampley, *The CFPB Anti-Arbitration Proposal: Let's Just Give Arbitration A Chance*, 48 ST. MARY'S L.J. 313, 315–16 n.10 (2016).

193. See *supra* Part III.

194. See *supra* Parts III.A.1–3.

195. See Burch, *supra* note 9, at 1335.

196. See *supra* note 62.

197. See Burch, *supra* note 9, at 1337.

Rather than paint with an overly broad brush, reformers should look to existing statutes — both as examples of what to do and what not to do. As seen in the MLA, MVFCAFA, and the Food, Conservation, and Energy Act, it may well be the case that certain classes of people, disputes, or industries are particularly ill-suited to any kind of mandatory arbitration.<sup>198</sup> In the consumer context especially, individual pre-dispute mandatory arbitration is likely a death knell for any claims that are very small on an individual basis, like fraudulent credit card charges.<sup>199</sup> Any meaningful change to the mandatory arbitration statutory framework will need to address the issue raised in *Italian Colors* — namely, that there is no practical remedy for claims that cannot be individually arbitrated economically.<sup>200</sup> Congress has also shown a willingness to implement claim and remedy-based reforms, as seen in Dodd-Frank for whistleblower anti-retaliation claims and in the Franken Amendment for Title VII claims. The class action context may warrant a similar approach.

Building on Congress's existing approaches should therefore involve two aspects of the adjudicatory process: the claimants and the claims. Focusing on these categories would ensure that the reform process centers on those contexts where mandatory arbitration is likely to be particularly burdensome. Claimant-based restrictions would ensure that the people most likely to be unduly coerced into agreeing to mandatory arbitration have some modicum of protection. Claim-based restrictions would protect the classes of claims that are effectively barred by class action waivers, solving the *Italian Colors* problem, and the classes of claims in which there is particular interest in public adjudication.

Certain claimants should be exempt from mandatory arbitration in certain contexts, just as the MLA exempts military personnel in consumer credit contracts. For example, given their relative lack of bargaining power, non-union, low-wage employees should be outright exempt from mandatory arbitration involving employment claims.<sup>201</sup> Tailoring the applicability of mandatory arbitration based on the claimant hews closely to existing stat-

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198. See *supra* Part III.A.2.

199. See Sternlight, *supra* note 4, at 13 n.28, 13–14.

200. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013).

201. For a discussion of mandatory arbitration in the context of wage theft involving low-wage employees, see Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1126 (2012).

utes and would simply require determining who is harmed most by mandatory arbitration and in what contexts. Focusing solely on claim-based exceptions rather than claimant-based exceptions could result not only in an overly-broad system of context regulations, but would also leave the people who are most likely to be harmed by exposure to mandatory arbitration without recourse. Both types of exceptions are necessary.

Claim-based exemptions would have the benefit of preserving arbitration across most contexts while allowing a more focused approach to exempting claims that seem particularly ripe for abuse if subjected to arbitration. One of the biggest drawbacks of mandatory arbitration is the lack of jury participation.<sup>202</sup> This is not always a problem. After all, the public does not necessarily have a compelling interest in weighing in on a business dispute between two sophisticated corporate entities, and neither is there a particularly strong interest in requiring an inexpert public body to do the fact-finding instead of an expert private arbitrator. However, some claims are firmly rooted in the sort of collective moral judgments that a jury is designed to offer.<sup>203</sup> As it did with the Franken Amendment, Congress might reasonably choose to exempt other claims it feels are particularly important to hear and decide publicly — perhaps civil rights claims, discrimination claims, or other claims that involve community standards to some extent.

While these two categories demand individual consideration, they do not present an either/or decision. Claims are not independent of the claimants in most situations, so considering the particular needs of particular claimants when they bring particular claims is likewise critical.<sup>204</sup> Both the claim and the claimant

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202. Arbitration occurs before an arbitrator. The jury — on of the key features of the American legal system — is therefore cut out of the decision-making process. For a discussion of the implications mandatory arbitration has on the right to a jury trial, see Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to A Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).

203. For a discussion of the jury's responsibility for determining normative standards, see Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 416 (1999).

204. For example, as the #MeToo Movement against sexual harassment has grown, it has often run up against the barrier of mandatory arbitration. Employees subject to these agreements often have their potential routes to resolution of sexual harassment claims severely curtailed, and when they have no other route available, their stories must be told in private. For example, former Fox News anchor Gretchen Carlson was required to sue Roger Ailes directly — a mandatory arbitration agreement barred her from suing Fox itself in open court. See Alexia Fernández Campbell & Alvin Chang, *There's a Good*

need to be considered in conjunction in order to reform the use of mandatory arbitration in a way that meets the needs of consumers, employees, and companies.

## B. PROCESS REGULATION

Simply limiting the available contexts for mandatory arbitration is not the only route exercised by Congress, nor should it be. Dodd-Frank and the Supreme Court's recent decision in *Digital Realty Trust, Inc. v. Somers*<sup>205</sup> recommend one such approach — situating mandatory arbitration within a remedial or procedural context. For example, Congress might look to the intent behind certain laws, as it did with the whistleblower provisions of Dodd-Frank, and decide that claims under those laws ought to be exempt from arbitration. Sarbanes-Oxley was meant to encourage public reporting to the SEC, so it would make little sense to subject claims based on it to private, confidential adjudication.<sup>206</sup> Furthermore, exempting claims that nonetheless require administrative exhaustion simply redirects resources for adjudication into a different channel for resolution.<sup>207</sup> Rather than treating arbitration as a separate and parallel system, Congress could take steps to incorporate it more fully into the justice system.<sup>208</sup>

The Food, Conservation, and Energy Act represents a fairly unusual approach to arbitration regulation that could potentially be applied on a broader basis.<sup>209</sup> Under such a regime, the non-drafting party would have the option to refuse to abide by a mandatory arbitration clause in any agreement before agreeing to the

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*Chance You've Waived the Right to Sue Your Boss*, VOX (Sept. 7, 2018), <https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration> [<https://perma.cc/P4MM-EMDY>].

205. The Court in *Somers* held that the protections offered by Dodd-Frank and Sarbanes-Oxley applied only to whistleblowers who had actually reported directly to the Securities and Exchange Commission. Under the Court's reasoning, it was not necessarily the claim or the claimant that Congress had sought to protect, but rather the reporting process itself. *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018).

206. See *supra* note 161.

207. Given that one of the oft-stated justifications for mandatory arbitration is its ability to reduce judicial caseloads, that benefit could be maintained by simply funneling more claims into administrative or adjunct procedures.

208. At present, the existence and vitality of mandatory arbitration represents a deviation from the typical understanding of U.S. adjudicatory processes, wherein judicial power is vested in Article III courts and appeals are typically available. The fact that our current landscape allows arbitration to abrogate this system entirely, while not the focus of this Note, should at least be one important consideration for future reform.

209. See Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c(a) (2012).

contract as a whole. If the non-drafting party does agree to the clause, then it becomes binding. Such a regime in, for example, credit card contracts might involve some line in the contract that would require a signature from the consumer agreeing to submit any disputes to arbitration. A lack of a signature should be construed as a lack of agreement to submit to arbitration, since post-dispute arbitration will always remain available. In digital contracts, consumers could simply be presented with two boxes letting them decide whether to agree to mandatory arbitration and explaining clearly the consequences of choosing one or the other. At the very least, controlling the forms in which these clauses are presented to consumers and employees would remove some of the element of surprise in these situations and give less sophisticated parties the inalienable right to decide whether or not to enter into such agreements, if not necessarily the ability to understand the agreements themselves.

Certainly, rolling back the all-encompassing reach of mandatory arbitration is the first step towards a fairer system. But existing statutes suggest that more creative solutions might not only be possible, but more durable in the courts as well. The creation of novel legal structures, combined with careful restriction and regulation, may well be the best route to limiting the abuses of mandatory arbitration while preserving its most important benefits. Claim regulation and process regulation are, again, not either/or approaches. Instead, they must be considered in tandem in order to create a system mandatory arbitration more fully committed to protecting the interests that are either promoted or harmed by its continued use. Focusing on one to the detriment of the others would result in either an over- or under-inclusive system that would leave one party poorly served. Striking a balance between each of these considerations would more fully realize the goals of everyone involved in the debate over mandatory arbitration.

## V. CONCLUSION

Mandatory arbitration is undoubtedly a large part of the modern legal landscape in the United States, and with approval from both Congress and the Supreme Court, it will not be going anywhere any time soon. Overly polarized positions in either direction might not just be counterproductive, but practically ineffec-

tive as well. Too many reformers see only the drawbacks of mandatory arbitration, while too many proponents see only its benefits or the potential for excess that restrictions can open up. Congress occupies the arbitration field, and so it falls on Congress to thread the needle between these two positions.

Thus far, Congress has engaged in a relatively piecemeal approach that mostly serves to simply abolish mandatory arbitration in certain contexts rather than address the aspects of mandatory arbitration that make it so prone to abuse. However, careful consideration of each of Congress's limiting statutes shows that there are a variety of statutory approaches and lenses through which mandatory arbitration can be understood. Indeed, it seems evident that certain types of claimants and claims can be understood as more or less appropriate for arbitration.

Reexamining the current statutory framework upon which mandatory arbitration rests may be difficult, but it is not an impossible task. By focusing on the claims and claimants who are most likely to be made vulnerable by mandatory arbitration, the processes and remedies by most demand protection or improvement, and by weighing these interests against the benefits of maintaining mandatory arbitration, a fairer system is possible.