

# Rethinking Judicial Review of Arbitration

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*Mandatory arbitration is everywhere in the daily life of most Americans — when they sign a cell phone contract, buy a cable subscription, or sign up for a checking account. For most Americans, there is no avenue to acquire these basic goods and services without giving up the right to litigate disputes before a court of law. The increased use of mandatory arbitration clauses is not an accident. Buoyed by the Supreme Court's expansive interpretation of the Federal Arbitration Act over the last few decades, businesses have used mandatory arbitration clauses to insulate themselves from liability by, for example, including class-action waiver provisions in arbitration agreements that can make it financially impossible for plaintiffs to bring substantive claims.*

*A key aspect of the current arbitral system is that arbitrators' decisions are subject to extremely limited judicial review, which is an underlying assumption of both Supreme Court jurisprudence and scholarship in this area. This Note seeks to question that assumption. First, it considers traditional rationales for limited judicial review of arbitral decisions and argues that these justifications fail to take into account the realities of the current arbitral system. Second, borrowing from administrative law, it offers a proposal for how states could tailor a system of increased judicial review of arbitration decisions that would better promote fairness while preserving the positive effects of arbitration.*

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## I. INTRODUCTION

“Arbitration [is] everywhere.”<sup>1</sup> So begins the title of a three-part New York Times investigative series into the exploding use of arbitration in our civil justice system. Once a specialty model of alternative dispute resolution, arbitration really is everywhere in the daily experiences of most Americans. In credit card, cable, and bank contracts, mandatory clauses require that disputes be settled by arbitration, a practice that affects tens of millions of consumers.<sup>2</sup> Municipalities and public sector unions arbitrate disputes over collective bargaining contracts, and large corporations regularly arbitrate commercial disputes. Cutting across legal fields, arbitration has become central to our civil justice system.

The rise in the use of arbitration has been strongly influenced by a series of Supreme Court decisions over the last thirty years expanding the scope and power of the Federal Arbitration Act (FAA).<sup>3</sup> Passed in 1925, the FAA provides that agreements to arbitrate are “valid, irrevocable, and enforceable.”<sup>4</sup> Focusing on Congress’s intent in passing the FAA to “place arbitration on the same level as contracts,”<sup>5</sup> the Court has consistently increased the preemptive power of the FAA, finding that it preempts both state consumer protection statutes as well as the common law of contracts. For instance, in 2011, the Court held that the FAA preempted a California state law requiring the availability of class-wide arbitration.<sup>6</sup> And in 2013, the Court held that arbitra-

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1. Jessica Silver Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0) [https://perma.cc/92BB-TMEP].

2. See Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(A) § 1.4.1* (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [https://perma.cc/B26L-74PC].

3. 9 U.S.C. § 2 (2012). When enacted in 1925, Congress called the act the “United States Arbitration Act.” See Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886. Congress neglected, however, to include the section setting forth the title when it codified the Act in 1937. See Act of July 30, 1947, ch. 392, 61 Stat. 669. The Supreme Court, lower courts, and commentators refer to the Act as the FAA. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

4. 9 U.S.C. § 2 (2012).

5. H.R. REP. NO. 68-96, at 2 (1924).

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

tion clauses outlawing class actions do not violate the Sherman Anti-Trust Act.<sup>7</sup>

Perhaps most importantly, these Supreme Court decisions laid the groundwork for the explosion of the use of “mandatory arbitration” clauses by businesses. Mandatory arbitration clauses, found in most all contracts for everyday services like banking and cable, require that all disputes between a company and a consumer be settled through arbitration rather than traditional litigation. Because of the Court’s decisions, businesses can include terms in these mandatory arbitration agreements, such as banning class actions, that are extremely beneficial to the businesses, even if these terms would be considered “unconscionable” under state law.<sup>8</sup> Unable to move forward as a class, for instance, consumers rarely have the time, money, or patience to arbitrate over what are often small dollar disputes. The result is that the Court has conferred “immunity from potentially meritorious federal claims” upon companies employing these arbitration clauses.<sup>9</sup>

Absent a new Court or new Congress,<sup>10</sup> large businesses will continue to require arbitration as their preferred dispute resolution method. One aspect of the arbitration system that could be susceptible to reform, however, is the standard of review judges use when evaluating the ultimate decisions reached by arbitrators. Under both the FAA and many state statutes, judges must apply an extremely deferential standard of review to arbitration decisions.<sup>11</sup> The rationale for this extreme deference rests on assumptions about party autonomy to choose arbitration over traditional dispute resolution and the efficiency gains associated with that choice; as well as the fear that increased review would hinder these twin aims. As one scholar has explained, the “prevailing wisdom” is that arbitration’s relatively enhanced efficiency

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7. *Am. Exp. Corp. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

8. *See Concepcion*, 563 U.S. at 340 (finding that § 2 of the FAA preempted the California Supreme Court’s finding that AT&T’s class action ban was unconscionable under California law).

9. *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

10. Such a change appears unlikely in the short term. At the time of writing, Neil Gorsuch has recently been sworn in as an Associate Justice of the United States Supreme Court. Most commenters believe Gorsuch will be a reliable conservative vote on the Court, and thus unlikely to break with any of the Court’s recent decisions on the FAA. Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. Times (Feb. 1, 2017), [https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html?\\_r=0](https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html?_r=0). [<https://perma.cc/6SQW-B493>].

11. *See* 9 U.S.C. § 10 (2012); *See, e.g.*, N.Y. C.P.L.R. 7511 (McKinney 2015).

“improves upon the court system for dispute resolution” and thus makes it an attractive dispute resolution model.<sup>12</sup> Increasing the standard of review, the argument goes, would threaten that which makes arbitration attractive in the first place.

This Note seeks to question that prevailing wisdom. In particular, it argues that many of the traditional arguments in favor of a highly deferential standard of review do not square with the current realities of how arbitration is used, and goes on to examine the assumptions on which those arguments rest. Furthermore, this Note suggests that the current model fails to address certain deficiencies in arbitration, such as potential bias and egregious misapplication of the law, that increased review would address more satisfactorily.

This Note proceeds in three parts. Part II analyzes the evolving manner in which the Supreme Court has interpreted the FAA, and documents the exploding use of mandatory arbitration clauses by businesses as a result of those decisions. Part III considers scholars’ traditional arguments in favor of limited review of arbitration decisions — including autonomy, efficiency, finality, and flexibility — and argues that these justifications often rely on assumptions that do not take the way the arbitration system has changed into account. Part IV puts forward a proposal to change the standard of review state judges apply to arbitration decisions. Using New York State as an illustration, this Part suggests two main proposals that borrow from administrative law. First, judges should analyze arbitration decisions in the same way that Courts analyze agency opinions under the test articulated in *Skidmore v. Swift & Co.*,<sup>13</sup> and evaluate whether decisions should be subject to increased review in the same way courts determine if agency opinions should be subject to deference. The goal of this first layer of analysis is to look at certain indicia of a given arbitration decision, such as whether the decision is likely to be susceptible to bias or clear misapplication of the law, to determine if increased review is merited. Second, depending on the results of a *Skidmore*-inspired analysis, courts should apply different levels of review to findings of fact and law by arbitrators. For arbitrations that do not trigger increased review under a *Skidmore*-inspired analysis, courts should apply “arbitrary and capricious”

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12. Christopher R. Drahozal, Why Arbitrate? Substantive Versus Procedural Theories of Private Judging, 22 AM. REV. INT’L ARB. 163, 173 (2011).

13. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

review.<sup>14</sup> For arbitrations that do trigger increased review, courts should apply *de novo* review to questions of law and mixed questions of law and fact, and “substantial evidence” review to questions of fact.<sup>15</sup> Proceeding in this way would make arbitrations more likely to vindicate the substantive rights of the parties, thereby moderating some negative aspects of the current arbitration system.

## II. LIMITATIONS OF THE CURRENT ARBITRATION MODEL

### A. SUPREME COURT’S ENDORSEMENT OF THE FAA’S PREEMPTIVE POWER

Prior to the enactment of the FAA, an agreement to arbitrate was revocable until an award was rendered.<sup>16</sup> Congress viewed this practice as an “anachronism of the law” in which American courts had unnecessarily adopted the practice of English common law courts “jealously” guarding their jurisdiction by refusing to enforce specific agreements to arbitrate.<sup>17</sup> Seeking to “shake off the old judicial hostility to arbitration”<sup>18</sup> and place arbitration agreements “upon the same footing as other contracts,” Congress enacted the FAA in 1925.<sup>19</sup> The FAA provides that agreements to arbitrate are “valid, irrevocable and enforceable.”<sup>20</sup> Demonstrating its desire to place arbitration agreements on the same level as contracts, Congress did allow for revocation if there were “such grounds as exist at law or in equity for the revocation of any contract.”<sup>21</sup>

The Supreme Court’s initial interpretations of the scope of the FAA differed dramatically from the current Court’s interpretations. Initially, the Court was concerned that better resourced parties might use the FAA to take advantage of less resourced parties by “weakening the protections afforded in substantive law by would-be complainants.”<sup>22</sup> As a result, the Court balanced

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14. N.Y. C.P.L.R. 7803(3) (McKinney 2015).

15. *Id.*

16. *See Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984) (O’Connor, J. dissenting).

17. H.R. REP. NO. 68-96, at 1–2 (1924).

18. *Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942).

19. *See* H.R. REP. NO. 68-96, at 2 (1924).

20. 9 U.S.C. § 2 (2012).

21. *Id.*

22. *Rodriquez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989).

Congressional intent to increase the scope of arbitration with considerations about “differently resourced parties entering into contracts and about the utility of the arbitral form.”<sup>23</sup> For instance, in *Wilko v. Swan*, the Court examined the enforceability of an agreement that lawsuits between customers and brokerage firms would be stayed in favor of arbitration at the behest of either party.<sup>24</sup> Granting that some buyers and sellers did deal “at arm’s length on equal terms,” the Court concluded that the federal securities laws were “drafted with an eye to the disadvantages under which buyers labor” and therefore precluded application of the FAA.<sup>25</sup> Of particular concern to the Court was that arbitrators’ awards “may be made without explanation of reasons and without a complete record of their proceedings,” thus making it impossible to determine an “arbitrator’s conception of the legal meaning of such statutory requirement as ‘burden of proof,’ ‘reasonable care’ or ‘material fact.’”<sup>26</sup>

In the last thirty years, however, the Court has moved away from its prior structural concerns about bargaining power and consent in arbitration. In a 1984 case, *Soler Chrysler-Plymouth, Inc. (Soler)*, a car distributor, argued that its allegations of federal antitrust violations by Mitsubishi Motors Corporation (Mitsubishi), a car manufacturer, were not subject to arbitration because the parties’ arbitration clause did not mention the federal statute upon which the counterclaims were based.<sup>27</sup> Soler made two related claims as to why it would be inappropriate to compel arbitration of its statutory claims. First, distinguishing between its contractual and statutory rights, Soler argued that compelling arbitration of statutory rights designed to protect parties in its situation “may effectively deny that party the protection a legislature intended to afford it.”<sup>28</sup> Soler articulated the *Wilko*-inspired fear that arbitration might not appropriately vindicate substantive rights, noting that, because of the “extremely important role that anti-trust laws play in our system of juris-

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23. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 114 (2011).

24. *Wilko v. Swan*, 346 U.S. 427 (1953).

25. *Id.* at 435.

26. *Id.*

27. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (finding that an auto manufacturer’s federal antitrust claims were subject to arbitration). The counterclaim at issue involved claims arising under the Sherman Antitrust Act.

28. Brief for Cross-Petitioner at 26, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Nos. 83-1569, 83-1733).

prudence,” a court should be hesitant in construing a “limited arbitration clause” so as to “encompass an anti-trust claim.”<sup>29</sup> Second, Soler argued that the fact the parties’ arbitration clause did not identify the particular statutory rights at issue indicated that compelling arbitration of those claims would not reflect Soler’s true consent.<sup>30</sup>

The Court rejected Soler’s argument, concluding that arbitration “was a choice of the parties” that did not affect substantive rights, but merely “traded the procedures and opportunity of review” of traditional dispute resolution for the “simplicity, informality, and expedition of arbitration.”<sup>31</sup> For the Court, arbitration represented a purely voluntary choice about whether to submit to “resolution in an arbitral, rather than judicial forum,” and did not mean that parties deciding to arbitrate must “forgo the substantive rights afforded” to them by statute.<sup>32</sup>

The view of arbitration as an “informal” and “expeditio[us]” alternative to traditional litigation that did not take into account the structural inequalities present in many arbitration contracts represented a radical break from the Court’s past precedent. Indeed, in *Rodriquez de Quijas v. Shearson/American Express*, the Court, in a 5–4 decision divided along ideological lines, explicitly rejected the structural concerns underlying the *Wilko* decision: “to the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”<sup>33</sup>

No longer concerned with how arbitration might be used to take advantage of pre-existing structural inequality between contracting parties, the Court, often in 5–4 decisions, dramatically enlarged the FAA’s scope.<sup>34</sup> First, the Court interpreted the FAA

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29. *Id.* at 24.

30. *Id.*

31. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628.

32. *Id.*

33. *Rodriquez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989).

34. *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Crop.*, 500 U.S. 20 (1991) (holding the FAA required compulsory arbitration of a claim under the Age Discrimination and Employment Act, and explaining that “mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context”); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (holding that invalidating an arbitration agreement on the grounds that one of the parties is unable to afford arbitration costs would undermine the FAA’s “liberal federal policy favoring arbi-

as preempting state laws addressing the substantive concerns about arbitration articulated in *Wilko*. For instance, in *Southland Corp. v. Keating*, the Court held that the FAA preempted California's Franchise Investment Law, which explicitly required "judicial consideration of the claims brought under" it.<sup>35</sup> Second, the Court held that certain statutory rights could be subject to arbitration even if Congress had contemplated judicial enforcement of those rights.<sup>36</sup> As Judith Resnik has explained, "the long arm of the FAA overrides many other federal statutory schemes that assign roles for rights enforcement to courts."<sup>37</sup>

In the last five years, the Roberts Court has gone even further. In 2011, the Court held in *AT&T v. Concepcion* that the FAA preempted California's prohibition on arbitration agreements that waived class arbitration.<sup>38</sup> The California Supreme Court's prohibition was based on the view that the provision was "unconscionable" because bilateral arbitration does not adequately substitute for the deterrent effects of class actions.<sup>39</sup> Characterizing the purpose of the FAA as the "enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Court rejected the California Supreme Court's argument and held that the California prohibition on waivers of class arbitration stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>40</sup> Underlying the Court's analysis was its view of the merits of arbitration itself. The Court explained that bilateral arbitration embodies "the principal advantage of arbitration — its informality"<sup>41</sup> and emphasized the relative speed and low cost of bilateral arbitrations as compared with class arbitrations.

Two years later, the Court in *Italian Colors* held that an arbitration clause prohibiting class actions did not violate the Sher-

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tration agreements); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (holding that the FAA required that a claim that an arbitration agreement violated state law by charging usurious rates must be determined first by the arbitrator and not the court).

35. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (emphasis added).

36. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628.

37. Resnik, *supra* note 23, at 112.

38. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

39. *See Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005) (finding Discover Bank's waiver of class arbitration in its consumer contracts of adhesion unconscionable and not preempted by the FAA).

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

41. *Id.* at 348.



man Antitrust Act.<sup>42</sup> The restaurant owners in that case argued that the cost of expert analysis necessary to prove their antitrust claims against American Express in individual arbitration would greatly exceed the maximum recovery for each individual plaintiff.<sup>43</sup> Therefore, they argued, the clause in their contract prohibiting class actions was unenforceable because it effectively made it impossible for the restaurant owners to vindicate their rights under the Antitrust laws.<sup>44</sup> Writing for the majority, Justice Antonin Scalia rejected that argument, explaining that “antitrust laws do not guarantee an affordable procedural path to vindication of every claim.”<sup>45</sup> In dissent, Justice Elena Kagan argued that the result of the decision was that American Express could use the arbitration clause to “insulate itself from antitrust liability — even if it in fact violated the law.”<sup>46</sup>

## B. RESULT OF THE COURT’S DECISIONS

The Court’s decisions over the last three decades interpreting the FAA have facilitated an explosion in the use of arbitration agreements of all kinds. In March 2015, the Consumer Financial Protection Bureau (CFPB) published a report analyzing the use and effect of arbitration agreements.<sup>47</sup> The CFPB analysis found that arbitration agreements are ubiquitous in many different types of consumer contracts. In the mobile phone market, for instance, seven of the eight largest facilities-based mobile wireless providers — covering 99.9% of subscribers — used arbitration clauses in their 2014 customer agreements.<sup>48</sup> In the storefront payday loan market, out of a sample of 55 payday lenders, 46 used arbitration clauses, and all of the 11 largest lenders nation-

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42. *Am. Exp. Corp. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

43. *Id.* at 2308.

44. *Id.*

45. *Id.* at 2309.

46. *Id.* at 2313.

47. See CONSUMER FIN. PROTECTION BUREAU, *supra* note 2, at 2. The report was published pursuant to Congress’s mandate in Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 to “study the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services.”

48. See *id.* at § 2.3.6.

wide used arbitration clauses.<sup>49</sup> Over 50% of outstanding credit card loans are subject to arbitration clauses.<sup>50</sup>

Not only is the use of arbitration clauses widespread, but the import of the Court's decision in *AT&T v. Concepcion* has also not gone unnoticed by companies when they decide the content of these agreements. Indeed, the CFPB report explains that "nearly all arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis."<sup>51</sup> Of the six product markets studied, the report estimates that "close to 100 percent" of market share subject to arbitration include these no-class arbitration provisions.<sup>52</sup>

The result has been a decrease in corporate liability across the board. As with the respondents in *Italian Colors*, going forward with an individual arbitration claim is often prohibitively expensive, especially in instances in which the individual harm to be recouped is relatively small.<sup>53</sup> Without the tool of bringing claims on a class basis, consumers do not have the financial incentives to bring individual claims. The numbers bear this out. The *New York Times* analyzed arbitration claims brought against Sprint, Verizon, and Time Warner between 2010 and 2014.<sup>54</sup> The investigation found that while Sprint has more than 57 million subscribers, it faced only six consumer arbitrations in those five years.<sup>55</sup> Verizon, which has more than 125 million consumers, faced 65 consumer arbitrations and Time Warner Cable, which has 15 million customers, faced only seven.<sup>56</sup>

Another example comes from AT&T, the company at the center of one of the Court's recent landmark decisions in this area. Between 2009 and 2014, the federal government charged the company with a range of legal violations, including systematic overcharging for extra services and insufficient payments of re-

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49. *See id.* at § 2.3.4.

50. *See id.* at § 2.3.1.

51. *Id.* at § 1.4.1.

52. The markets studied by the CFPB Arbitration Study included credit cards, checking accounts, prepaid cards, storefront payday loans, private student loans, and mobile wireless.

53. As Judge Posner famously explained, "only a lunatic or a fanatic sues for \$30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661(7th Cir. 2004).

54. *See Greenberg & Gebeloff, supra note 1.*

55. *See id.*

56. *See id.*

funds when customers complained.<sup>57</sup> During that same time period, while the number of AT&T's wireless customers grew to roughly 120 million, just 134 customers, filed individual claims against the company.<sup>58</sup> In other words, notwithstanding a clear pattern of misconduct on the part of AT&T likely to affect many of its customers, just 0.0001 percent of customers actually filed claims.

The small fraction of individual consumers that do pursue claims in arbitration face nearly unbeatable odds. The *Times* study found that “roughly two-thirds of consumers contesting credit card fraud, fees or costly loans received no monetary awards in arbitration.”<sup>59</sup> In addition, the cost of simply pursuing arbitral claims can be prohibitively expensive.<sup>60</sup> Thus, the practical effect of the Supreme Court's decisions has been to “further degrad[e] the rights of consumers and further insulat[e] already powerful economic entities from liability for unlawful acts.”<sup>61</sup> As such, there is a real need to investigate possibilities for better vindicating the rights of parties subject to arbitration, especially those who have been forced into arbitration, as explained in Part III.B. If they could be, appealing from an arbitration decision would become a less futile exercise, and thus would encourage those whose rights have been seriously compromised to come forward.

### III. RETHINKING THE STANDARD OF REVIEW OF ARBITRATION DECISIONS

As the preceding analysis makes clear, the breadth and power of the FAA is greater than it has ever been. And absent a change in composition of the Court, that reality is not likely to change anytime soon. This Note focuses on changes that can be made to the arbitration system that take for granted the underlying realities of the current Court's FAA jurisprudence. In other words,

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57. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2813 (2015).

58. *See id.* at 2812–13.

59. Greenberg & Gebeloff, *supra* note 1.

60. Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 *LAW & CONTEMP. PROBS.* 133, 161 (2004).

61. *DirectTV, Inc., v. Imburgia et al.*, 136 S. Ct. 463, 478 (2015) (Ginsburg, J., dissenting).

inheriting the current landscape in which arbitrations are used so ubiquitously, how could the system operate more fairly?

One needed reform concerns the standard of review applied to arbitration decisions. As the use of arbitration continues to explode, more and more substantive rights will be subject to the decisions of arbitrators — decision-makers who are often forced upon at least one of the parties (in the case of mandatory arbitration). This general shift in our civil justice system towards arbitration means that whether or not arbitrators are adjudicating disputes in a fair and competent manner has massive ramifications in society. While reexamining the proper scope of judicial review of arbitration decisions will not solve all the problems of the current system, increasing the role of courts in policing these decisions is an important tool in making sure arbitrators make fair and accurate decisions, and would have positive, system-wide impact.

This Part proceeds in four sections. First, it explains the current standard of review of arbitration decisions under the FAA, and how rare it is for arbitration decisions to be disturbed by reviewing judges under that standard. Second, it considers traditional arguments in favor of a deferential standard of review and calls into question many of the assumptions underlying those arguments. Third, it looks at how the current system of limited judicial review fails to adequately address the problems of potential bias and egregious misapplication of law. Fourth, it argues that there is no constitutional or federal statutory barrier for states to legislate their own standard of review and explores some of the challenges states would have in doing so absent a change in Congress or the Supreme Court.

#### A. CURRENT STANDARD OF REVIEW UNDER THE FAA

At the federal level, the standard of review that judges must use to review arbitration decisions is set by the FAA, which provides for expedited judicial review to confirm, vacate, or modify arbitration awards.<sup>62</sup> Under the terms of Section 9 of the FAA, a court “must confirm an arbitration award” unless it is vacated,

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62. See 9 U.S.C. §§ 10, 11 (2012).

modified or corrected “as prescribed” in Section 10,<sup>63</sup> which lists grounds for vacating an award as follows:

- Section 10(a)(1) provides for an award to be vacated “where the award is procured by corruption, fraud, or undue means.”<sup>64</sup>
- Section (10)(a)(2) provides that an arbitral award may be vacated “where there was evident partiality or corruption in the arbitrators, or either of them.”<sup>65</sup>
- Section 10(a)(3) provides that an arbitral award may be vacated “where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”<sup>66</sup>
- Section 10(a)(4) provides that an arbitral award may be vacated “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”<sup>67</sup>

Meeting any of these statutory grounds for vacatur is extremely difficult.<sup>68</sup> For instance, while Section 10 does allow parties to challenge arbitral awards on a showing of “evident partiality or corruption” on the part of the arbitrator, in practice, individuals “are incapable of mounting challenges in all but the most obvious cases.”<sup>69</sup> Furthermore, “misconstruing contracts” and the “erro-

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63. 9 U.S.C. § 9 (2012).

64. *Id.* at § 10(a)(1).

65. *Id.* at § 10(a)(2).

66. *Id.* at § 10(a)(3).

67. *Id.* at § 10(a)(4).

68. In addition to the four statutory grounds set out in Section 10(a), many of the federal appeals courts permit challenge to an arbitral award based on one or more of the following grounds: manifest disregard of the law by the arbitrator; the award is arbitrary and capricious; the award violates a clear public policy; the award fails to draw its essence from the parties’ contract; and the award is completely irrational. *See* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 450–51 (1998) (citing federal appeals court cases); Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 B.Y.U. L. REV. 759, 767 (1992) (stating that “[f]ew if any” arbitration decisions are vacated under the manifest disregard standard).

69. Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2357 (2012).

neous application of rules of law” do not reach the level of “imperfect execution” of Section 10(a)(4).<sup>70</sup> Grounds for vacatur are not met even if these sorts of errors are “serious.”<sup>71</sup> The result is an arbitration system that is extremely deferential to arbitrators’ decisions. One study, for instance, analyzed a sample of challenges to arbitration awards in the employment context and found that federal district courts vacated the arbitrator’s award in just 4.3 percent of cases.<sup>72</sup> As one court explained, “no matter how dubious an arbitrator’s decision might appear,” the arbitrator’s award must be upheld “if the arbitrator did not stray beyond the four corners of the agreement to find the essence of his decision.”<sup>73</sup>

## B. TRADITIONAL ARGUMENTS AND RESPONSES

### 1. *Party Autonomy*

A central argument put forward against a more robust standard of review of arbitration decisions is that increased review would run counter to party autonomy. At the core of this argument is the idea that, just like with any other contractual term, the decision to arbitrate reflects a voluntary and informed choice of the parties.<sup>74</sup> This choice represents the parties’ decision as to the best mode of dispute resolution, after weighing the benefits and burdens of the traditional civil justice system with the benefits and burdens of resolving disputes through arbitration. Implicit in this choice is the decision that the risks that come from forgoing the traditional appellate review process in the civil sys-

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70. See, e.g., *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892–93 (2d Cir. 1985) (“the erroneous application of rules of law is not a ground for vacating an arbitrator’s award . . . nor is the fact that an arbitrator erroneously decided the facts. . .”).

71. See *United Paperwork’s Int’l Union v. Misco, Inc.*, 484 U.S. 29, 39 (1987).

72. See Michael H LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 2 (2009). The author of the study created a sample of arbitrations involving an individual and employer in which an arbitrator’s ruling was challenged. The author excluded pre-arbitration disputes from the study as well as cases involving unions and employers, because of the unique characteristics of labor-management relations. The author’s study contained cases decided between 1975 and 2008.

73. *Loughridge v. Allen*, 25 F.3d 1057, 1057 (10th Cir. 1994).

74. To bolster this point about the importance of respecting the intent of the parties, courts often point to the legislative history of the FAA which made explicit Congress’s desire to place arbitration “on equal footing with other contracts” and “enforce them according to their own terms.” See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

tem are outweighed by the perception that arbitration will yield a faster and less costly resolution. As one scholar has put it, parties enter a “quid pro quo,” in which parties trade a limited right of appeal of the award in exchange for a cheap and quick resolution.<sup>75</sup> Thus, the argument continues, increasing the level of review would be foisting a system of dispute resolution upon the parties that the parties explicitly chose not to use.

One can appreciate the importance of respecting the parties’ contractual intent in the context of two parties that have independently made a judgment to arbitrate. For instance, most contracts between public sector unions and municipalities include arbitration clauses to settle a range of disputes.<sup>76</sup> In those cases, both the unions on the one hand and the municipalities on the other come to the independent conclusion that using arbitration with an expert is a more effective means of dispute resolution for their purposes than always using the traditional civil justice system. Similarly, two sophisticated businesses dealing at arm’s length might agree that calling on an arbitrator, whom both parties have had a say in selecting, is a better dispute resolution method for the purposes of a given deal. In these contexts, in which the voluntary nature of the decision to arbitrate from all parties is clear, the party-autonomy justification for limited review makes sense.

The main problem with this justification for the current model, however, is that it assumes that all parties who are subject to an arbitration agreement *voluntarily choose* its terms. Such a view fails to take into account that so much of arbitration today involves mandatory arbitration in which a business makes agreeing to settle all disputes through arbitration a prerequisite for getting a particular service. The use of these mandatory arbitration clauses is ubiquitous.<sup>77</sup>

The ubiquity of mandatory arbitration agreements belies the notion that all parties that agree to resolve disputes through ar-

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75. Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 261–62 (1999).

76. See ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW ANALYSIS AND ADVOCACY* 385 (2013); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL’Y J. 405, 407 (2008). This shift has led to concern from employee-rights advocates that mandatory arbitration allows employers to take advantage of their employees. See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, *ECON. POLICY INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* (2015).

77. See *supra* Part II.

bitration do so voluntarily. Consumers seeking services like mobile phones and banking from large corporations are in a completely different posture with respect to the party with whom they are contracting than two sophisticated businesses negotiating at arm's length. For sophisticated businesses, bargaining over whether to include an arbitration clause is a small piece of a larger negotiation. In addition, sophisticated parties often negotiate almost every piece of the process, "including the number of arbitrators . . . ; the location of the hearing; the applicable law; the availability, types and amounts of discovery; . . . and whether or not attorneys will represent the parties."<sup>78</sup> Consumers, on the other hand, are not in a similar position to negotiate. Rather, for services integral to modern life such as leasing a car, taking out a student loan, or opening a bank account, companies present contracts with arbitration clauses as "take it or leave it" propositions.<sup>79</sup> Unlike the sophisticated business that hashes out every detail of an arbitration clause, the clauses in these consumer contracts are pre-written by businesses to include terms most favorable to themselves. The choice for the consumer is thus not between a contract with an arbitration clause or a contract without one; rather, it is a contract with an arbitration clause or no service at all.

The presence of mandatory arbitration clauses in consumer adhesion contracts cuts directly against the party-autonomy rationale for maintaining highly deferential review of arbitration awards. Consumers are not electing to use arbitration as their preferred dispute resolution model after carefully conducting a cost benefit analysis weighing arbitration against the merits and negatives of the civil justice system and deciding that arbitration is superior. One clear sign that this is the case is that "consumers are generally unaware of whether their credit card contracts include arbitration clauses."<sup>80</sup>

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78. Sarah Rudolph Cole & Kristen M. Blankley, *Arbitration*, in THE HANDBOOK OF DISPUTE RESOLUTION 318, 320 (Michael L. Moffit & Robert C. Bordone eds., 2005).

79. The contract at issue in *Concepcion* is exemplary. In that case, Vincent and Liza Concepcion entered into an agreement for cellphone service from AT&T. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011).

The contract required the Concepcions to arbitrate all disputes between the parties. *Id.* Importantly, there was not an option for the Concepcions to contract with AT&T for cellphone service and *not* agree to arbitrate all their disputes — as such, the choice the Concepcion's faced was either to agree to the arbitration clause or forego cellphone service from AT&T. *Id.*

80. CONSUMER FIN. PROTECTION BUREAU, *supra* note 2, at § 1.4.2.



Consequently, increasing the level of review applied to arbitration awards would not be a violation of the parties' intent to enter into a "quid pro quo" in this context. Consumers are not voluntarily choosing what they perceive to be the cost and efficiency gains of arbitration over the benefits of increased review. In other words, given that consumers are not affirmatively considering the pros and cons of arbitration at all — including its deferential review standard — increasing that standard would not offend party-autonomy.

## 2. *Anti-Efficiency and Finality*

Another key argument put forward for limited review of arbitration decisions is that arbitration as it stands now is more efficient than traditional civil dispute resolution, and that increasing the level of review will limit that efficiency. That arbitration is more efficient than traditional civil litigation — that it is faster, less expensive, and carries with it fewer delays — is a central assumption for those in favor of the current model. The Supreme Court has explained that promoting arbitration eliminates the "costliness and delays of litigation."<sup>81</sup> Scholars and judges point to the ability of arbitrating parties to avoid the discovery costs associated with civil litigation,<sup>82</sup> its informality as compared with civil litigation,<sup>83</sup> the ability with arbitration to avoid the long waiting time for a trial,<sup>84</sup> and the opportunity with arbitration to avoid the legal and expert witness fees generated by extensive pre-trial motions and long complex trials<sup>85</sup> as reasons for why arbitration is more efficient than traditional civil dispute resolution. As one scholar explains, the "prevailing wisdom" is that arbitration's relatively enhanced efficiency "improves upon the court system" and thus makes it an attractive dispute resolution model.<sup>86</sup> In other words, parties wanting to avoid the cost and

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81. *Concepcion*, 563 U.S. 333 at 360.

82. IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW VOL. 3 34.1 (1992) ("[A]voidance of the delay and expense associated with discovery is still one of the reasons parties choose to arbitrate.").

83. See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009).

84. See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1130 (2009).

85. *Id.*

86. Drahozal, *supra* note 12.

delay of traditional civil litigation would use arbitration as a substitute only if arbitration offered lower cost and less delay.

For proponents of this position, a key reason for arbitration's increased efficiency is that the low level of review on appeal lends arbitration decisions finality not available in civil litigation. In traditional civil litigation, the ability to appeal a lower court's ruling will often delay the time until a final decision is reached. The argument for the current model of arbitration is that because there is such limited review of decisions, final decisions can be reached much more quickly and with less cost. As the Supreme Court has explained, limited judicial review is "needed to maintain arbitration's essential virtue of resolving disputes straightaway."<sup>87</sup> In the business context, reaching certainty on a dispute quickly is advantageous because it allows businesses to plan based on the result, instead of waiting in limbo not knowing how the dispute will be resolved.

Nonetheless, the problem with this rationale for maintaining minimal review of arbitration decisions is that it rests upon two assumptions about the role of efficiency in arbitration. First, it assumes that increased review of arbitration decisions will unduly decrease efficiency. Under the current system of deferential review, courts — while restrained from vacating or modifying the arbitration decision in front of them save for rare exceptions — still read and analyze the arbitration decision itself. That same process would take place if courts analyzed the decision with less deference; the only difference would be that courts would be empowered to vacate and modify the awards on more grounds. While it is true that there likely would be a decrease in efficiency for the decisions in which reviewing courts vacated an arbitration decision and sent it back to the arbitrator to rehear, the actual process of reviewing the decisions with greater scrutiny would not unduly decrease efficiency.<sup>88</sup>

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87. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 578 (2008); *see also* Reuben, *supra* note 84, at 1129 ("[F]inality is a defining difference between commercial arbitration under the FAA and public adjudication.").

88. The problem of overburdened judicial dockets is not something that would uniquely affect court review under the standards proposed in this paper — any such delay affects arbitrations being reviewed under the current system too. The key point is that once the issue has made its way through the docket and is before the reviewing judge, applying a heightened standard of review will not drastically decrease the time it takes for the judge to reach a conclusion in the way proponents of the current system suggest.

Second, proponents of the current model assume that efficiency is the only interest of parties who have agreed to settle disputes through arbitration. Given the possibility that cases could be sent back to arbitrators, adherents of the current model are likely right that increased review would decrease the efficiency of some arbitrations.<sup>89</sup> Yet, the important question is not whether a less deferential system would completely mimic the speed and cost of arbitration under the current level of review. Rather, it is whether the overall result of a new system that included both potential losses in efficiency and benefits of increased review would be worthwhile. There is a strong argument that many parties would find it worthwhile. For instance, increased review would allow judges to correct for egregious misapplications of the law that result from either incompetence or bias.<sup>90</sup>

In the context of mandatory arbitration especially, it is not tenable to argue that efficiency — as opposed to substantive accuracy or freedom from partiality — is the only goal of the parties. This is because one of the parties in the arbitration did not voluntarily choose to settle disputes in that matter, and often is not even aware of the fact that the contract he or she signed stipulates that disputes will be settled by arbitration. Furthermore, while truly voluntary agreements to arbitrate suggest both parties are opting for the efficiency of arbitration, even in those circumstances it is not clear that efficiency is the only relevant value. For instance, any party would likely object if the arbitrator decided the outcome of the dispute by flipping a coin. This is because every party has at least some interest in rational decision making by the arbitrator. Thus, if the method by which a system

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89. The actual empirical changes to efficiency would be hard to calculate. This is because, as many scholars have noted, empirical analysis of the efficiency of arbitration as compared with the civil dispute resolution system is difficult to determine due to the lack of good data. See, e.g., Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 422 (2011) (noting it is notoriously difficult to “obtain[ ] sufficient reliable data on largely private arbitration processes”); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1283 (2009) (“[T]en years of empirical research into the fairness of mandatory arbitration have produced only a handful of empirical studies, and these have told us very little.”).

90. See *infra* Part III.C.A. This process itself might actually work to *increase* overall system efficiency because it would work to catch more mistakes that led to sub-optimal decisions. If we assume that incorrect decisions by arbitrators are not the most efficient outcome of a given dispute, then ratcheting up review so as to limit those mistakes will increase efficiency more than the added cost to efficiency of requiring the review in the first place.

of dispute resolution increases arbitral review properly balances the interests of given parties, then the anti-efficiency argument does not successfully preclude a model of increased review. This is especially true because, in a properly nuanced system that selectively increases review and incentivizes thorough and accurate arbitration awards, most arbitration decisions would not be so problematic as to be open to reversal by a reviewing court in the first place.

### 3. *Anti-Flexibility*

A final argument in favor of the current model is that increased review of arbitration decisions will threaten another perceived benefit of arbitration: its flexibility. Supporters of deference point out that parties can often “specify that the decision-maker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets.”<sup>91</sup> In other words, parties might seek arbitration because an arbitrator could more readily adapt to a party’s needs than the traditional civil court system would. Heightened scrutiny would threaten that flexibility, scholars argue, because it forces arbitrators to “focus less on the merits of the particular dispute, or the relationship between the parties, and more on the task of producing opinions or building a record that would enable their awards to survive later challenge.”<sup>92</sup>

The problem with this argument is that it overstates the effect that increased scrutiny would have on arbitral flexibility. While it is true that arbitration can offer some types of flexibility that traditional civil adjudication cannot — for instance, an arbitrator with specialized knowledge in a certain unique field — that flexibility would still be available under a system of heightened review. Parties could still agree to use a particular expert or stipulate that the proceedings needed to be confidential to protect trade secrets even if there was also a more robust review process. In essence, the flexibility arguments really collapse into efficiency arguments. The concern with “producing opinions” or “building a

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91. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). Note that this is not applicable for mandatory arbitrations, in which consumers are unable to negotiate these sort of specific terms.

92. John S. Murray et al., *Processes of Dispute Resolution: The Role of Lawyers* 624, 666 (2d ed. 1996).

record” is another way of arguing that increased review would cause increased time between the initial dispute and final decision of the arbitrator.<sup>93</sup> Yet, there is no reason that flexibility in selection of an arbitrator could not be maintained.

### C. ADDITIONAL PROBLEMS WITH THE CURRENT SYSTEM

There are additional problems with the current system that could also be remedied by the switch to a more robust arbitral review system. First, because institutional entities arbitrate more than individuals and thus often dictate which arbitrators get hired, the incentive structure of the current system creates a strong risk that arbitrators will be biased. Second, because under the current system reviewing judges often cannot vacate an arbitration award even if the arbitrator makes an egregious factual or legal error, the current system does not incentivize accuracy and thoroughness in arbitral decision making.

#### 1. *Bias*

One major problem with the current model of arbitration is the strong risk of arbitrator bias. Large companies participate in the arbitration process more than individual consumers. According to the CFPB, in over 80 percent of the arbitration disputes it studied, the arbitrating business had participated in at least three other disputes relating to the same product market in a three-year period.<sup>94</sup> In its analysis, the *Times* found that 41 arbitrators each handled *ten or more* cases for one single company,<sup>95</sup> and the CFPB further noted that all of the arbitration proceedings it studied “involved companies with repeat experience in the forum.”<sup>96</sup> These numbers make intuitive sense. While an individual might have credit card, bank account, and student loan contracts from which arbitration could potentially arise, each credit card company, bank, and lender has millions of these sorts of contracts that are subject to arbitration. In fact, repeatedly

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93. See Part IV.B.4, explaining the benefits of more fully developed arbitral records.

94. See CONSUMER FIN. PROTECTION BUREAU, *supra* note 2, at § 5.2.1.

95. See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a Privatization of the Justice System*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/L6HW-LBH4>].

96. CONSUMER FIN. PROTECTION BUREAU, *supra* note 2, at § 1.3.5.

going to arbitration — to avoid resolving disputes in court — is an integral part of these companies' business models.

Especially in the context of mandatory arbitration, in which the parties do not negotiate over who the arbitrator will be, the business prospects of arbitrators depends upon whether they are selected by repeat customers.<sup>97</sup> Thus, arbitrators have an incentive to develop relationships with companies and to resolve disputes in their favor so as to increase their chances of getting hired in the future. The individual's perception (or, for that matter, an impartial determination) of the quality and fairness of the arbitrator, by contrast, will not play a role in whether or not the arbitrator gets more work, because the arbitrator will likely never see the individual again.

The incentive to favor institutional clients — what scholars refer to as “selection bias”<sup>98</sup> — plays out in practice. In its analysis, the CFPB looked at cases that involved consumer claims of \$1,000 or less filed in 2010.<sup>99</sup> In these cases, arbitrators granted affirmative relief to consumers in four of the nineteen claims they resolved, or roughly 21%.<sup>100</sup> On the other hand, in cases in which companies made claims or counterclaims, arbitrators granted relief to companies in 227 out of 244 they resolved, or 93%.<sup>101</sup> A statistical analysis from the Center for Responsible Lending found that “companies that have more cases before arbitrators get consistently better results from these arbitrators” and that “individual arbitrators who favor firms over consumers receive more cases in the future.”<sup>102</sup>

Increasing the level of review of arbitration decisions could help to mitigate the risk of bias in two ways. First, increased review would help to identify instances of bias. Under the current system, “many instances of arbitrator bias are likely occurring

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97. See Drew Hushka, *How Nice to See You Again: The Repetitive Use of Arbitrators and the Risk of Evident Partiality*, 5 Y.B. ON ARB. & MEDIATION 325, 326 (2015) (noting the incentive for arbitrators to “favor a particular party if the arbitrator desires additional employment opportunities from that party in the future” is “particularly strong in today’s consumer arbitrations”).

98. See Farmer, *supra* note 69, at 2356.

99. See CONSUMER FIN. PROTECTION BUREAU, *supra* note 2, at § 1.4.3.

100. *Id.* at § 1.4.3.

101. *Id.* at § 1.4.3. While it is not possible for each of these cases to determine the extent to which arbitrators were simply following the law, it seems unlikely that such a large gap could be explained through virtue of that alone.

102. JOSHUA M. FRANK, STACKED DECK: A STATISTICAL ANALYSIS OF FORCED ARBITRATION, CTR. FOR RESPONSIBLE LENDING 1, 2 (2009), [www.responsiblelending.org/credit-cards/research-analysis/stacked\\_deck.pdf](http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf) [<https://perma.cc/8ZAM-E4T3>].

undetected.”<sup>103</sup> Even a limited analysis by a reviewing judge may find red flags that point to bias, such as findings of fact that are in contradiction to one another, egregious misapplication of the law, and the impermissible exclusion of evidence that favors one side. Second, increased review would exert a general deterrent effect against bias. Under the current model, there is no counterweight against the incentives for arbitrators to be biased in favor of repeat corporate customers. With increased review, however, arbitrators will be wary about being repeatedly overturned for failing to properly address the facts or interpret the law. Thus, arbitrators would be incentivized to be more thorough and fair so as not to be overturned.

These incentives will have important consequences for the arbitration system across the board. Take, for instance, the *Times*' finding that 41 arbitrators each handled ten or more cases for one single company.<sup>104</sup> A system that allows for more review is likely to convince at least one of the individuals facing off against a repeat customer in arbitration that appeal is not futile, and thus the work of more arbitrators will be reviewed. Even if a reviewing judge confirms the arbitrator's award in an individual case, the arbitrator will know that his pattern of decision-making is now being analyzed — not rubber-stamped — by reviewing judges. Furthermore, the arbitrator will know that there is a potential of exposure of his wrongful decisions because of the risk that more than just one individual will seek review of the arbitrator's decision. Thus, having a vehicle through which more rigorous review is possible for just one individual can produce system-wide improvement for all individuals that find themselves in arbitration. In addition, a system in which appeal is not completely futile will encourage people who have been wronged to come forward in the knowledge that serious mistakes will be fixed. Together, these effects of the proposed new system will result in better arbitration decisions overall, while decisions that need to be remedied do not fall through the cracks.

## 2. *No Remedy for Egregious Mistakes*

Another problem with the current arbitration model is that there is no check on arbitrators who simply get it wrong. One of

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103. Farmer, *supra* note 69, at 2357.

104. Silver-Greenberg & Corkery, *supra* note 95.

the hallmarks of the current system, both at the federal and state levels, is that arbitration awards are not reviewed for errors of law or fact.<sup>105</sup> The stated rationale for this policy collapses into the same party autonomy and efficiency arguments discussed above: that the parties agree to accept the decision of the arbitrator in spite of any errors when they agree to arbitrate and that reviewing for these errors would delay a final decision. Yet, not reviewing for these errors carries with it many risks. As the Supreme Court has noted, arbitrators “do not have the benefit of judicial instruction.”<sup>106</sup> In addition, under the current system, arbitrators can often decide awards “without any real explanation of the arbitrator’s reasons and without a complete record of their proceedings.”<sup>107</sup> This combination means that there is not a check on the significant risk that arbitrators make outcome-determinative mistakes in interpreting the law, such as improperly applying “important statutory requirements.”<sup>108</sup>

This model ties the hand of a reviewing judge even if she identifies an egregious error of law. For instance, in *Matter of Falzone*, the arbitrator misapplied the doctrine of collateral estoppel in an uninsured motorist dispute by failing to give effect to a prior no-fault arbitration award involving the same event and the same factual issue between the same parties.<sup>109</sup> The facts of the case are straightforward. Carmen Falzone was involved in a car collision and subsequently filed a claim for no-fault benefits with her insurer, alleging she had injured her shoulder.<sup>110</sup> The New York Central Mutual Fire Insurance Company (New York Fire) denied Falzone’s no-fault claim on the ground that her shoulder injury was not related to the accident. She then challenged the denial in arbitration.<sup>111</sup> The arbitrator found that New York Fire’s denial based on lack of relatedness was inappropriate and awarded Falzone approximately \$4,000 in no-fault benefits.<sup>112</sup> After settling with the driver of the other vehicle, Falzone sought supplementary uninsured/underinsured motorist (SUM) benefits from New York Fire. Despite the prior ruling finding that the

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105. See 9. U.S.C. § 10 (2012); see, e.g., N.Y. C.P.L.R. 7511 (McKinney 2015).

106. Wilko v. Swan, 346 U.S. 427, 436 (1953).

107. *Id.*

108. *Id.*

109. *In re Falzone*, 939 N.E. 2d 1197 (N.Y. 2010).

110. *Id.* at 1198.

111. *Id.*

112. *Id.*



collision caused Falzone's injury, the SUM arbitrator concluded that her injury was *not* caused by the accident, and issued an award in favor of New York Fire denying SUM benefits.<sup>113</sup>

The New York Court of Appeals affirmed the SUM arbitrator's award despite his failure to properly apply the doctrine of collateral estoppel. The Court relied on the "well-established rule" that arbitrators' rulings are "largely unreviewable," including those that "misapplied substantive law."<sup>114</sup> Thus, even though the arbitrator "erred in failing to apply collateral estoppel to preclude litigation of the causation issue in SUM arbitration," such an error was within the category of claims "courts cannot review."<sup>115</sup> As a result, Falzone was denied more than \$70,000 in benefits.<sup>116</sup>

*Matter of Falzone* does not represent a mere aberrational instance. Rather, it exemplifies the consequences of deferential review where arbitrators remain "[un]bound by principles of substantive law or rules of evidence."<sup>117</sup> Another useful example is *Diaz v. Kleinknecht Electric*.<sup>118</sup> In that case, Diaz was injured while running electrical cables for his employer, Kleinknecht Electric (Kleinknecht), near the World Trade Center site begin-

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113. *Id.*

114. *In re Falzone*, 939 N.E. 2d 1197, 1199 (N.Y. 2010).

115. *Id.*

116. *Id.* at 1198.

117. *Id.* at 1196. It is not possible to track comprehensively all the illustrations of this phenomenon, especially because most state appellate courts uphold a lower court's confirmation of an arbitration decision in an unsigned memorandum without any discussion of the legal or factual issues involved. It is also reasonable to believe that the current system deters people who have suffered wrongful decisions in arbitration from appealing, because the chance of success in such an appeal is so slim. However, many examples exist, both in New York, *see, e.g.*, *Pierre v. General Acc. Ins.*, 100 A.D.2d 705, 706 (N.Y. App. Div. 1984) (upholding an arbitration award denying petitioner's death benefit claim even though arbitrator relied on unsworn statement of physician (who was not available to testify) and no other pieces of evidence in making determination); *Aftro v. Geico Ins. Co.*, 110 A.D.3d 1062, 1064 (N.Y. App. Div. 2013) (reversing a Supreme Court judgment that vacated an arbitration award, finding that fact that arbitrator's award was contradicted by Geico's supplementary uninsured/underinsured motorist coverage was not grounds for vacatur); *Yoonessi v. Givens*, 78 A.D.3d 1622, 1623 (N.Y. App. Div. 2010) (finding that an arbitrator's failure to consider damages for economic loss or loss of consortium as a result of plaintiff's personal injury suit was not able to be reviewed), and in other states with similar statutory frameworks like Illinois, *see, e.g.*, *Int'l Ass'n of Firefighters, Local No. 37 v. City of Springfield*, 378 Ill. App. 3d 1078, 108 (Ill. App. Ct. 2008) (reversing trial court's vacatur of arbitration award because arbitrator's misapplication of the Family Medical Leave Act was not an appropriate grounds for Vacatur, and the trial court improperly considered the merits of the case), and Florida, *see, e.g.*, *Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1329 (Fla. 1989) (reversing trial court's reversal of arbitrator's decision, finding that the arbitrator's erroneous interpretation of statutes governing sales tax obligations was not adequate grounds for reversal).

118. *Diaz v. Kleinknecht Elec.*, 123 A.D.3d 1304 (N.Y. App. Div. 2014).

ning in September 2001. As a result of the collective bargaining agreement between Diaz's union and Kleinknecht, the claim was subject to arbitration.<sup>119</sup> The arbitrator classified Diaz as having a "permanent total disability" as a result of the injuries sustained on the job, but set the "date of disablement" at the time of Diaz's first medical treatment in April 2003, instead of his last day of work, which was March 2011.<sup>120</sup> Setting the "date of disablement" at the time of the first medical treatment in April 2003 meant that Diaz's weekly award would be capped by the maximum allowed in 2003, which was \$400 per week.<sup>121</sup> Had the arbitrator set the date in March 2011, Diaz would have been entitled to more than \$700 a week.<sup>122</sup>

On appeal, Diaz argued to New York's Third Department that the arbitrator's decision to set the date of disablement in 2003 was an error of law in violation of Workers' Compensation Law § 164.<sup>123</sup> Section 164, which concerns the "disablement of a participant in World Trade Center rescue, recovery and clean-up operations," provides that the determination of the date of disablement should be the date that is "most beneficial to the claimant."<sup>124</sup> In *Diaz*, the date "most beneficial to the claimant" would have been March 2011 and not April 2003.<sup>125</sup> In reviewing the arbitrator's decision, however, the Third Department explained that its hands were tied. Granting the possibility that the "arbitrator committed an error of law by setting a date of disablement that violated Workers' Compensation Law § 164," the court explained that this error was not a ground upon which it could overturn the arbitrator's ruling.<sup>126</sup>

This model does not make sense. First, much of the rationale for this system relies on assumptions about the absolute importance of efficiency in arbitration discussed above. Both *Falzone* and *Diaz* are good examples of why this purely pro-efficiency perspective neglects important considerations like fairness that increased review is able to take into account. For instance, it is

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119. *Id.* at 1304.

120. *Id.*

121. *Id.*

122. *Id.*

123. See N.Y. WORKERS' COMP. LAW § 164 (McKinney 2013); Brief for Claimant-Appellant at 15, *Diaz v. Kleinknecht Elec.*, 123 A.D. 3d 1304 (N.Y. App. Div. 2014) (No. 517828).

124. *Id.*

125. *Diaz v. Kleinknecht Elec.*, 123 A.D.3d 1304 (N.Y. App. Div. 2014).

126. *Id.* at 1306.

possible that had the Third Department in *Diaz* vacated the arbitrator's decision, more time would pass before the dispute reached finality, thereby decreasing net efficiency.<sup>127</sup> On the other hand, the arbitrator made a clear error of law in misapplying a straightforward statute, the result of which meant that the injured petitioner did not receive the compensation he was entitled to.

Similarly, in *Falzone*, the arbitrator's clear error of law meant that the injured motorist did not receive the benefits she should have. Importantly, these cases are not ones in which reasonable arguments could be made in support of the arbitrator's decision. Rather, in both cases, courts were not able to vindicate clear substantive rights that the arbitrator had failed to honor because of the current model's deferential standard of review. If arbitral efficiency is all that matters, why have substantive protections at all? Surely fidelity to the law — especially, as was the case for the petitioners in both *Falzone* and *Diaz*, when a party finds itself in arbitration not by individual choice but because of the overarching legal structure — must play a more important role in arbitration.

Furthermore, the assumption that arbitrators do not need to be subject to review does not square with other realities of the civil justice system. There is no reason to think that arbitrators are more able than trial judges. Trial judges are respected lawyers with considerable talent and experience — often, the best and brightest of the legal community become judges. Yet, it is universally acknowledged that trial court judges should be subject to review. This is because trial judges are understood to be fallible — subject to making mistakes of both law and fact — such that a fair process requires the possibility of meaningful review. Especially given the explosion of arbitration, in which more and more substantive rights are determined by an arbitrator, the same rationale for meaningful review of trial judges applies to arbitrators too.

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127. In fact, it is likely that, if so empowered, the Third Department would have accepted the factual findings and applied the later date as a matter of law, thus avoiding sending the case back to the arbitrator. Thus, there would not be any lost time.

## D. CAN STATES LEGISLATE A DIFFERENT STANDARD OF REVIEW?

Many states, like New York, have statutes analogous to the FAA that outline extremely limited grounds for vacatur of an arbitration decision in state court.<sup>128</sup> There is no constitutional or federal statutory barrier, however, for states to adopt a different system that imposes a more rigorous standard of review for arbitration decisions. Nothing in the Supreme Court's cases interpreting the FAA suggests that the FAA preempts states from so legislating. In *Hall Street*, for instance, the Court held that the FAA's statutory grounds were exclusive, and that parties — subject to the FAA by the terms of their contracts — could not contract around them and agree to expand judicial review beyond what the FAA permits.<sup>129</sup> However, the Court in *Hall Street* was explicit that “the FAA is not the only way into courts for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.”<sup>130</sup> In other words, the Court has expressly suggested the possibility that a state might have enforcement rules different from the FAA that the parties favor.

Furthermore, the Court's decisions finding that the FAA preempts state law are limited to §§ 1 and 2 of the FAA — what the Court has termed the FAA's “substantive provisions.”<sup>131</sup> In *Southland Corp. v. Keating*, the Court held that Congress, in enacting § 2, established a body of “federal substantive law that is applicable in both state and federal courts.”<sup>132</sup> However, the Court has also made clear that other sections of the statute, such as §§ 3 and 4, are “not applicable in state court.”<sup>133</sup> Thus, while a state judge could not vacate an arbitration award subject to the FAA on grounds not outlined in Section 10 of the FAA, a state could legislate different grounds for vacatur for arbitrations in which that state's law, and not the FAA, applied.

This proposal does face a significant challenge that, as a practical matter, can only be overcome if a future Court or Congress

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128. See N.Y. C.P.L.R. 7511 (McKinney 2015).

129. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 583–84 (2008).

130. *Id.* at 590.

131. *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 485 (1989).

132. *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984).

133. *Volt*, 489 U.S. at 477 n.6.

granted states the discretion to impose higher standard of review of arbitration decisions of any transactions arising in that state's jurisdiction. Without such a change, the proposed new system could be too easily avoided. For mandatory arbitration in particular, the party selecting the terms of the arbitration agreement would not elect to be subject to a higher standard of review. Rather, given the current Court's interpretation of the FAA, all the incentives would be for the party to elect for its arbitrations to be determined under the federal standard.

It would not, however, be a radical departure for a future Court or Congress to determine that the current system did not allow for a high enough level of state autonomy. Federalism concerns are already a motivating factor in a wide range of the Court's jurisprudence, such as its interpretation of Congress's power to abrogate state sovereign immunity,<sup>134</sup> the scope of Congress's power under Section 5 of the Fourteenth Amendment,<sup>135</sup> and the Court's requirement of a Congressional "clear statement" to find that a statute has "upset the usual constitutional balance of federal and state power."<sup>136</sup> In the area of arbitration and the FAA, some Justices have already voiced concern that the Court's current interpretation does not allow for enough state autonomy.<sup>137</sup> For instance, while Justice Stevens concurred in the judgment of the Court's decision in *Southland*, he stressed his concern that "Congress had not intended entirely to displace state authority" in passing the FAA.<sup>138</sup> If a majority of the Court adopted this federalism-motivated approach, it might affirmatively allow states like New York and California, for instance, in which much commerce is done, to require that their statutes applied to arbitrations concerning transactions that occurred primarily in their state. Or, a future Congress attuned to these federalism concerns could adopt a model akin to federal civil rights

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134. See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding Congress lacked the power to abrogate state sovereign immunity under its Article I powers).

135. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act exceeded Congress' powers under Section 5 of the Fourteenth Amendment).

136. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (holding Missouri's mandatory retirement age for state judges did not violate the Age Discrimination in Employment Act).

137. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting) (arguing that the FAA should not be applied to state courts).

138. *Southland Corp.*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part).

laws,<sup>139</sup> by treating federal standards as only baseline requirements, and then allowing states to ratchet up more stringent review models individually.<sup>140</sup>

#### IV. PROPOSAL TO CHANGE STANDARD OF REVIEW ON THE STATE LEVEL

This Part suggests a two-step review model states could adopt to increase the level of review of arbitration decisions.<sup>141</sup> First, it proposes that courts reviewing arbitration awards should adopt the factors used by courts analyzing agency determinations under the Supreme Court's decision in *Skidmore v. Swift & Co.* to help determine what level of review is appropriate.<sup>142</sup> Applying the *Skidmore* factors will allow a court to assess whether aspects of a given arbitration decision — such as whether the arbitration was mandatory or if the arbitrator's decision contained clear misapplication of the law — suggest that a more stringent standard of review is necessary. At the same time, the *Skidmore* factors allow for enough flexibility for the reviewing judge to determine that a given arbitration that does not contain these red flags does not require a stricter standard of review.

Second, it proposes what the different standards of review should be based on the result of the Court's *Skidmore*-inspired analysis. On the one hand, for the arbitrations that do not raise concerns after initial analysis, courts should apply the “arbitrary and capricious” standard borrowed from New York State admin-

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139. Title VII, which explicitly disclaims a certain type of preemption in its text, is a perfect example. 42 U.S.C. § 2000e-7 (2012) (originally enacted as § 708 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (July 2, 1964)) (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”).

140. As noted at the outset, such changes from Congress or the Supreme Court are unlikely to occur in the short term.

141. As noted above, much of the proposal's impact would be limited by the ability of corporations to avoid agreeing to arbitrate their disputes in states that followed this model, which could only be truly remedied by a change at the Congressional or Supreme Court level. However, it is not unreasonable to suppose that some parties that can choose where to arbitrate will choose a state that adopts the proposed new system out of a desire for more accurate arbitration decisions. This Note's main goal is to provide a suggested template that states could use that, in tandem with federal reform, could vastly improve this country's arbitration system.

142. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

istrative law.<sup>143</sup> While this standard would be more demanding than the current FAA standard, it would be deferential enough so the vast majority of arbitration decisions would not be disturbed. By contrast, for the arbitrations that do raise concern after initial analysis, courts should apply *de novo* review for questions of law and mixed questions of law and fact, and “substantial evidence” review for questions of fact. This increased level of review would allow courts to correct clear misapplication of substantive law and force arbitrators to explain the factual basis for their decisions more clearly and thoroughly.

#### A. *SKIDMORE* v. *SWIFT & CO.*

*Skidmore* deference is a creature of administrative law that dictates the deference courts must give to certain agency decision-making. The *Skidmore* analysis comes from the Supreme Court’s 1944 decision *Skidmore v. Swift & Co.*<sup>144</sup> *Skidmore* involved the question of what weight the court should give to the Administrator of the Wage and Hour Division’s interpretive memoranda suggesting factors to be considered in determining when inactive duty counted as working time. Because Congress had merely assigned enforcement authority, and not interpretative lawmaking power to the agency, the Court found that the agency bulletins were not “controlling.”<sup>145</sup> However, the Court recognized that the Administrator “had accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs.”<sup>146</sup> Thus, the Court needed to develop a new level of deference that was less deferential than for when Congress expressly delegated lawmaking power to an agency but still took into account agency experience and expertise.

As a result, the Court articulated four factors that should guide a court’s level of deference in these cases. The first three factors look directly at the substance of the decision, requiring courts to analyze the “thoroughness evident in consideration,” the “validity of its reasoning,” and its “consistency with earlier and

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143. N.Y. C.P.L.R. 7803(3) (McKinney 2015).

144. *Skidmore*, 323 U.S. at 134.

145. *Id.* at 135.

146. *Id.* at 137–38.

later pronouncements.”<sup>147</sup> The fourth factor — “all those factors which give it the power to persuade” — allows a court to take into account any other factors it finds applicable to the given analysis.<sup>148</sup> These other factors might include the expertise required in promulgating the given agency decision, whether the decision represented a longstanding and consistent interpretation by the agency, or the possibility of congressional acquiescence.<sup>149</sup>

## B. APPLYING THE *SKIDMORE* ANALYSIS IN THE ARBITRATION CONTEXT

The analysis required by the *Skidmore* factors will help to ensure that reviewing judges are aware of those arbitration decisions that manifest some of the problems with the current system explored earlier, such as potential for bias and misapplication of substantive law. At the same time, the factors give enough discretion to the reviewing judge for her to quickly conclude that the arbitration in front of her does not seem to be subject to those maladies. Using this *Skidmore*-inspired analysis, courts have leeway to calibrate what the appropriate level of deference to the arbitrator’s decision should be.

### 1. *Mandatory versus Voluntary*

One key aspect of the *Skidmore* analysis is that it gives courts discretion to analyze any “other factors” they deem to be relevant to their determination. A *Skidmore*-inspired arbitration model would give reviewing judges the same discretion. One important “other factor” reviewing judges could analyze would be whether or not a given arbitration was truly voluntary. If an arbitration, such as a dispute between a union and a municipality over the firing of certain employees, is deemed to be truly voluntary, then the award would receive “arbitrary and capricious” review. If, however, the reviewing judge determines that the agreement to arbitrate was *not* voluntary, it would receive heightened review.

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147. *Id.* at 140.

148. *Id.*

149. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992).



First, making mandatory arbitrations subject to the proposed enhanced review<sup>150</sup> would not unduly impinge on arbitral efficiency. One of the main rationales for deference is founded on the idea that parties choose arbitration because efficiency is paramount, and increasing the level of review will decrease that efficiency. For arbitrations in which the parties voluntarily agree to resolve certain disputes in arbitration, there is a risk that increasing the level of review too much would unduly impede party autonomy. For instance, if a public sector union and a municipality agree that regular grievances should be subject to arbitration as part of a larger collective bargaining agreement, it is a fair assumption that the parties selected to resolve disputes in this manner in part because of the efficiency of the arbitral system. Yet, this argument is not applicable in the mandatory arbitration context, because consumers subject to these clauses did not actually voluntarily select the arbitrators in the first place.<sup>151</sup> Thus, increasing the level of review in these cases would not violate the *ex ante* “quid pro quo” of the arbitrating parties in the same way that it might for two, more equally positioned, parties.

Second, the mandatory versus voluntary divide is a helpful proxy for potential for bias. The types of contracts in which mandatory arbitration clauses are the most present — in consumer adhesive contracts between individual consumers and large bank, telecom, and loan companies — is the paradigm that most incentivizes arbitrators to favor the institutional parties over individual consumers. If arbitrators hearing mandatory arbitration disputes know that they will be subject to heightened scrutiny, it will counteract the potential incentive for bias with incentives for thoroughness and accuracy. On the other hand, for truly voluntary arbitrations between two sophisticated businesses that have negotiated all the terms of the arbitration, there is not the same potential incentive for an arbitrator to favor one side over the other.

Finally, there is a strong fairness rationale to support using this divide as a factor that triggers heightened review. Consumers who find themselves disputing claims in mandatory arbitration have much less bargaining power than their counterparts across the table. They lack both the experience their counter-

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150. See *infra* Part IV.C for a proposal on what heightened review would look like in practice.

151. See *supra* Part III.B.1.

parts have from participating in so many arbitration disputes and the overall resources their opponents have to hire high-quality legal counsel. This reality, coupled with the way in which mandatory arbitration is growing so rapidly to cover so many areas of substantive rights, warrants increased scrutiny by the judiciary as a check against the potential for abuse of power in the system, and the quasi “immunity” these companies that employ mandatory arbitration clauses enjoy.<sup>152</sup>

## 2. *Expertise of the Arbitrator*

Another factor this review system would allow judges to take into account would be the relative expertise or experience of a particular arbitrator. Indeed, recognizing certain expertise is at the core of courts’ application of *Skidmore* in the administrative law context. As Professor John Manning has explained, the *Skidmore* approach “recognizes that agency experience and expertise may be valuable in the interpretive process.”<sup>153</sup> Recognition of expertise is similarly important in the arbitration context. Just as *Skidmore* allows courts in the administrative law context to recognize that “an expert agency may be better positioned than a generalist court” to understand how specialized regulatory communities use “terms of art,” it would allow courts in the arbitration context to recognize that certain expert arbitrators might be in a better position to adjudicate a certain type of dispute than the reviewing court.<sup>154</sup> In those situations, the higher relative expertise of the arbitrator would be a factor in favor of more deferential review.

One important caveat to this general rule is that deference to the arbitrator’s expertise would only be applicable for the parts of her decisions that utilized that expertise. For instance, an increasing number of intellectual property disputes are being resolved through arbitration.<sup>155</sup> These cases can often involve com-

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152. *Am. Exp. Corp. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting).

153. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 619 (Apr. 1996).

154. *Id.* at 687.

155. See Phillip J. McConaughay, *ADR of Intellectual Property Disputes*, in 2002 SOFTIC SYMPOSIUM 1 (Nov. 15, 2002), <http://euro.ecom.emu.edu/program/law/08-732/Courts/ADRPMcCon.pdf> [<https://perma.cc/7SLE-ZHHW>].

plex, highly technical facts.<sup>156</sup> Thus, an arbitrator with deep technical knowledge might be in a better position to make technically-dependent factual findings than a reviewing judge. These sorts of findings should be a factor that points to less deference. However, a reviewing judge would still need to apply other *Skidmore* factors to parts of an arbitrator's decision not based on her expertise. In other words, while increased deference would be given to the factual findings of an arbitrator who is an expert on DNA coding technology in a patent dispute between two DNA coding companies, it is still incumbent upon a reviewing judge to make sure other aspects of that decision — such as legal conclusions or evidentiary rulings — meet the bars set by the “thoroughness” and “validity” *Skidmore* factors.

### 3. *Misapplication of the Law*

The flexibility allowed for by *Skidmore*'s “other factors” prong permits judges reviewing arbitration decisions to take into account important factors specific to the arbitral process. *Skidmore*'s other factors are also helpful for judges in determining what level of deference is appropriate in reviewing arbitration decisions. For instance, applying the “validity of reasoning” factor to arbitration awards would help judges quickly determine if arbitration awards contain erroneous or unexplained findings of law and fact that required increased deference.

The application of the “validity of reasoning” prong is a good reminder that the proposed arbitration model is not designed to exactly mirror the inquiries *Skidmore* courts use. Some scholars point out that, in practice, courts analyzing the “validity of reasoning” prong often use it as a way of assessing the reasonableness of the merits of a decision.<sup>157</sup> This view sees *Skidmore* as merely an “independent judgment model,” and is part of a larger legal realist critique that courts only invoke deference standards to justify their preferred outcomes.<sup>158</sup> The merits of those arguments are beyond the scope of this Note. Nevertheless, the con-

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156. *Id.* at 4.

157. See Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1285 (2007).

158. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 564 (1985) (acknowledging and dismissing legal realist critique); see also Hickman & Krueger, *supra* note 157, at 1251 (noting the “independent judgment” conception of *Skidmore* finds support in more recent case law).

tours of exactly how courts today apply the “validity of reasoning” prong should not dictate how judges use this analysis in the arbitration context.

For the new arbitration model, the “validity of reasoning” prong should mean that courts analyze the arbitrator’s decision for any *apparent* holes — both factual and legal — that warrant further scrutiny. For instance, the Third Department in *Diaz* could have used the “validity of reasoning” prong to notice a clear tension between the Workers Compensation Law on the one hand and the arbitrator’s decision to set the date of disablement at a less beneficial time for the petitioner.<sup>159</sup> The reason why this approach is optimal is that most arbitration decisions will not likely trigger increased review based on this prong. That is because, ideally, most arbitration decisions will not have obvious factual or legal inaccuracies. Giving the courts the option to take arbitration decisions on their face and analyze their “validity of reasoning,” however, ensures increased review of those decisions that do have the sort of glaring errors seen in *Falzone* or *Diaz*. This model allows for an appropriate balance between efficiency concerns — not unnecessarily increasing time and cost by relitigating sound arbitration decisions — and concerns about substantive accuracy — making sure that egregious errors are not allowed to stand.

Of course, this new model will not benefit every individual who is on the losing side of a bad arbitration decision. For instance, it likely would not change Judge Posner’s “30 dollar” case,<sup>160</sup> and some individuals will not have the resources or wherewithal to take advantage of the new system of review. However, it is reasonable to expect the new system will encourage more appeals on two fronts. For individuals who are unrepresented, the incentives for fairness and thoroughness the new system creates for arbitrators will mean that they will need to appeal fewer decision. When an appeal is appropriate, the new system will at least make doing so less futile (as opposed to the current system, where the chance for success is quite small). And for people who are represented, attorneys will be more willing to appeal a clearly incorrect decision because they know they will have a real opportunity in front of a reviewing judge.

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159. *Diaz v. Kleinknecht Elec.*, 123 A.D.3d 1304, 1306 (N.Y. App. Div. 2014).

160. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661(7th Cir. 2004); *see supra* Part II.

#### 4. *Incentivizing Better Arbitration Decisions*

Finally, a related factor that courts could borrow from *Skidmore* is the “thoroughness evident in consideration” of the arbitrator’s award. For *Skidmore* courts, the “thoroughness” factor is used to analyze whether an agency’s explanation is extensive enough or if the procedures it followed were formal enough. For instance, in *Coke v. Long Island Care at Home*, the Second Circuit found that the Department of Labor failed to “exhibit thoroughness in its consideration” because it “offered virtually no explanation for the direct inconsistency” of its regulations.<sup>161</sup> In *De La Mota v. United States Department of Education*, in which the government sought deference for an interpretation put forward by agency officials through two handbooks and an email, the court held the thoroughness factor against the agency for lack of formality, noting that “thoroughness is impossible for an agency staff member to demonstrate when the staff member does not report to the Secretary, bears no lawmaking authority, and is unconstrained by political accountability.”<sup>162</sup>

As applied in the arbitration context, the “thoroughness” prong would look more towards the extensiveness concerns of *Coke* than the formality concerns of *De La Mota*. The use of this prong would serve two important purposes. First, in conjunction with the “validity” prong, it would allow courts to apply more scrutiny to arbitration decisions that appeared to lack the extensiveness that the court expected. For instance, an arbitration decision resolving a complex, multi-party securities dispute that contained only a short resuscitation of the facts and no legal reasoning would trigger increased review. Second, the “thoroughness” prong would help incentivize more thoughtful arbitration decisions across the board. If clarity and explication of reasoning are factors reviewing courts look for, arbitrators are going to want to be more clear and explicit in order to avoid getting overturned. In turn, forcing arbitrators to be more thorough will lead to fewer egregious errors of fact or law, which will further decrease the need for increased review.

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161. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 134–35 (2d Cir. 2004), *rev’d on other grounds*, 127 S. Ct. 2339 (2007).

162. *De La Mota v. United States Dep’t of Educ.*, 412 F.3d 71, 80 (2d Cir. 2005).

C. AFTER *SKIDMORE*, WHAT STANDARD OF REVIEW?

Looking at these *Skidmore*-inspired factors should allow a reviewing judge to establish whether or not increased review is called for because the context of the given arbitration decision raises concerns about bias, accuracy, or any other problems that raise doubt about the veracity and trustworthiness of the decision. The result of this analysis should translate into two different statutorily mandated standards of review. If nothing about the given arbitration triggers increased concern based on the *Skidmore* factors, then the Court should apply an “arbitrary and capricious” standard borrowed from New York State administrative law.<sup>163</sup> If, on the other hand, the arbitration does trigger increased concern, the Court should apply *de novo* review for questions of law and mixed questions of law and fact, and apply the “substantial evidence” test for questions of fact.<sup>164</sup>

The “arbitrary and capricious” test comes from New York State administrative law. Under New York law, an action is arbitrary and capricious “when it is taken without sound basis in reason or regard to the facts.”<sup>165</sup> Put another way, if the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable.<sup>166</sup> For instance, in *Harpur v. Cassano*, the Second Department held that the New York City Fire Department had not acted in an “arbitrary and capricious” manner by not promoting the petitioner, Barry Harpur.<sup>167</sup> Harpur claimed that the Fire Department had violated both Civil Service Law § 61(1) and article V, § 6 of the New York Constitution when it failed to promote him. Without going into a detailed analysis of either law, and stressing the deference owed to the Fire Department, the court held that the Fire Department had broad authority in its promotion policy and had a “rational basis for the determination not to appoint the petitioner to the rank of fire marshal.”<sup>168</sup>

At the same time, the “arbitrary and capricious” standard is more demanding than the FAA’s standards. For instance, in

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163. See N.Y. C.P.L.R. 7803(3) (McKinney 2015).

164. See N.Y. C.P.L.R. 7803(4) (McKinney 2015).

165. *In re Peckham v. Calogero*, 12 N.Y.3d 424, 431 (N.Y. 2009).

166. See *id.*

167. *In re Harpur v. Cassano*, 129 A.D.3d 964 (N.Y. App. Div. 2015), *leave to appeal denied*, 47 N.E.3d 91 (N.Y. 2016).

168. *Id.* at 966.

*Ward v. City of Long Beach*, the Court of Appeals held that a city's denial of work-related disability retirement benefits to an injured fire department officer lacked a rational basis because he had already been found eligible for disability benefits from the state, based on the same medical evidence that was presented to the city.<sup>169</sup> Thus, while the standard is very deferential, it still requires a level of rationality and logic not required by Section 10 of the FAA or the analogous New York State statute.

Under the new arbitration model, courts would apply this “arbitrary and capricious” rationality review to those arbitrations that did not trigger increased scrutiny after a *Skidmore* analysis. Because nothing in the *Skidmore* analysis suggested the need for increased review, the high level of deference under “arbitrary and capricious” review will ensure that the reviewing court does not expend unnecessary time and resource analyzing every aspect of the arbitrator's decision. Furthermore, the standard will protect against courts impermissibly vacating or modifying the awards based on disagreement with the arbitrator's conclusions. At the same time, the standard is stringent enough so that decisions that do not meet the rationality level, even after an initial *Skidmore* analysis, can still be modified or vacated if necessary. For instance, even if an initial review of *Diaz* did not trigger heightened review, the court, under the “arbitrary and capricious” standard, would still be able to correct the arbitrator's clear error of law in incorrectly setting petitioner's date of disablement.<sup>170</sup>

Arbitration decisions that do trigger increased review after the initial *Skidmore* analysis will receive different standards of review for questions of law and questions of fact. For questions of law and mixed questions of law and fact, these decisions should receive *de novo* review. First, courts are well equipped to determine questions of law and mixed questions of law and fact — indeed, that is what appellate courts do every day. Second, the very problem triggering increased review for many of these decisions will be apparent errors of law, so it makes sense for courts in these situations to apply its more expert analysis to those issues. Third, reviewing question of law, and how that law is applied, *de novo* will mean greater protection of substantive rights of the parties.

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169. *Ward v. City of Long Beach*, 985 N.E.2d 898, 899 (N.Y. 2013).

170. *Diaz v. Kleinknecht Elec.*, 123 A.D.3d 1304, 1306 (N.Y. App. Div. 2014).

For instance, in *Raiola v. Union Bank of Switzerland, LLC*, the Southern District confirmed an arbitration panel's decision that plaintiff failed to make a prima facie case of sex discrimination.<sup>171</sup> In so doing, the court noted that the arbitration panel "reasonably concluded" that plaintiff was "not qualified for the position" she sought, based on testimony from her co-workers.<sup>172</sup> Under the "arbitrary and capricious" model, this analysis by the arbitrator would be acceptable, because the arbitrator is able to demonstrate a rational basis for its decision.

If, however, this case triggered heightened review after a *Skidmore* analysis, a court reviewing the arbitrator's decision *de novo* could probe more deeply. For instance, the court might have determined that the fact that "males with less experience than [Raiola] were given the position" instead of Raiola, that Raiola was "the only woman" on the trading floor, and that Raiola presented evidence that some of her colleagues' testimony about her performance was in fact contradicted by prior statements to determine that Raiola did in fact make out a prima facie case.<sup>173</sup> Importantly, the reason that the new system allows for the change in posture between "arbitrary and capricious" review — which would accept the rationale of the arbitrator that the evidence of Raiola's poor performance was enough to prove she did not make out a prima facie case of discrimination and *de novo* review — which might lead the court to come to a different conclusion based on the applicable law and facts — is because an initial *Skidmore* analysis triggered that increased review. One of the reasons why this system makes sense and would not be unduly burdensome is that, as was likely in *Raiola*, the presumption is that arbitration decisions will not often trigger increased review, and the reviewing court will thus be explicitly precluded from substituting its own judgment for that of the arbitrator. When increased review is called for, however, the new model of *de novo* review will allow for courts to reanalyze the case and come to their own conclusions.

For pure questions of fact, courts should apply the "substantial evidence" test borrowed from New York State administrative

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171. See *Raiola v. Union Bank of Switzerland, LLC*, 230 F. Supp. 2d 355 (S.D.N.Y. 2002).

172. *Id.* at 360.

173. *Id.* at 359–60.



law.<sup>174</sup> “Substantial evidence,” however, is somewhat more exacting. Under this standard, the court must find “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.”<sup>175</sup> This standard does not demand that a given inference is the *most* probable, but only that it is reasonable and probable.<sup>176</sup> For example, in *Garvey v. Sullivan*, a town’s hearing officer determined that a police officer’s knee injury was not related to a line-of-duty incident, and he was thus not eligible for certain benefits.<sup>177</sup> In making that determination, the hearing officer credited the testimony of the town’s expert over the conflicting opinion of the petitioner treating orthopedic surgeon.<sup>178</sup> Despite the conflicting evidence, the Second Department found that the town’s decision met the substantial evidence test, because the testimony of the town’s expert, which was supported by medical evidence, was enough for a reasonable person to conclude that the injury was not related to the work incident.<sup>179</sup>

For questions of fact at issue in arbitration decisions where a *Skidmore* analysis triggered enhanced review, the “substantial evidence” test allows for the court to apply a more searching review than “arbitrary and capricious” while still giving some deference to arbitrators on issues of fact. On the one hand, the standard allows courts to investigate the factual findings of the arbitrator for reasonableness, ensuring that important facts in the decision are not based on illogical or contradictory findings. This is important because ensuring that those types of factual findings are not permitted to go forward will help protect parties from unjust results — just as much as correcting an egregious error of law does. At the same time, the standard requires enough deference so that the reviewing judge cannot simply replace her judgment for that of the arbitrator’s.

Just like as in *Garvey*, in which the court showed deference to the town’s conclusion of which expert to credit in making a final determination,<sup>180</sup> arbitrators under this new model would still have the ability to use their expertise and judgment to come to

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174. See N.Y. C.P.L.R. 7803 (McKinney 2015).

175. See, e.g., *In re Ridge Road Fire Dist. v. Schiano*, 16 N.Y.3d 494, 499 (N.Y. 2011).

176. *Id.* (quoting *In re Miller v. DeBuono*, 90 N.Y.2d 783, 793 (N.Y. 1997)).

177. *In re Garvey v. Sullivan*, 129 A.D.3d 1078, 1080 (N.Y. App. Div. 2015).

178. *Id.*

179. *Id.* at 1082.

180. *Id.*

conclusions when there is not an obvious answer. What the new model requires is that the ultimate decision is based on real proof. For instance, if the evidence to support the town's claim in *Garvey* was simply a non-expert's affidavit from the town itself not based on the testimony of a medical expert, a reviewing court could find that the decision not to credit the petitioner's medical expert was not founded on "substantial evidence."

## V. CONCLUSION

"Arbitration [is] everywhere." This Note seeks to confront the fact that this is not likely to change any time soon. On the contrary, given the Supreme Court's interpretations of the FAA, the scope and breadth of arbitration is likely only to grow. Accepting this reality, this Note seeks to question some assumptions about how arbitration itself should function. In particular, this paper questions assumptions underlying what the standard of review should be for arbitration awards.

This Note recognizes that the proposed reforms — the incorporation of the *Skidmore* factors as an initial analysis conducted by reviewing judges and the differing standards of review to be applied based on that initial analysis — may need certain adjustments. It is possible that the two-step approach would be too cumbersome for judges and should instead be fused into one new test. Or, it is possible that there need to be more safeguards in place to prevent reviewing judges from supplanting the views of a given arbitrator with his or her own.

What is essential, however, is that the standard of review of arbitration decisions needs to be rethought so it is more in tune with the realities of arbitration today. With the rise of arbitration in almost all sectors and the increase in the use of mandatory arbitration as a business strategy, courts need to play a more hands-on role in the arbitration process. This Note proposes a method to accomplish this goal while still remaining sensitive to the nuances of different types of arbitration. In addition, the Note demonstrates that efficiency losses potentially resulting from a new system of standard of review would not destroy arbitration's usefulness.

The hope is that this Note's proposal would address cases like that of Dr. Deborah L. Pierce, whose mandatory arbitration was a

subject of the *Times* investigation.<sup>181</sup> Dr. Pierce, an emergency room doctor in Philadelphia, was forced into arbitration over a claim that the medical group for whom she worked had discriminated against her on the basis of sex. The *Times* explains that the arbitrator, a corporate lawyer with no training in sexual harassment or discrimination law, had a previous relationship with the medical group executives and ultimately ruled against Dr. Pierce in a decision that “contained passages pulled, verbatim, from legal briefs prepared by lawyers for the medical practice.”<sup>182</sup> Under the current system, a reviewing judge would likely be unable to vacate or modify the arbitrator’s award because of the deference they must show to him. Under the proposed *Skidmore*-inspired model, however, this decision would raise doubts, both because of the potential bias coming from the mandatory nature of the arbitration, the preexisting relationship between the arbitrator and the defendant, and the lack of thoroughness in the decision itself. Those doubts would free judges to apply a more stringent review of the decision. That is what Dr. Pierce — and the many individuals who find themselves subject to arbitration over important statutory claims — deserve.

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181. Silver-Greenberg and Corkery, *supra* note 95.

182. *Id.*