

# MANDATORY PRE-DISPUTE ARBITRATION: AN ALTERNATIVE APPROACH

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## INTRODUCTION

The history-defining current U.S. federal policy on the enforcement of mandatory pre-dispute arbitration clauses or contracts is characterized principally by (i) Congress passing the Federal Arbitration Act (FAA) in 1925<sup>1</sup> and (ii) a series of U.S. Supreme Court decisions perpetually harkening back to the FAA and leading to the recent *Epic Systems* decision.<sup>2</sup> The Supreme Court's jurisprudence enforcing mandatory pre-dispute arbitration has grown from early policy justification emphasizing the FAA directive to treat arbitration contracts like all contracts in reversing the prior disfavor of arbitration to the now seemingly incontestable defense of pre-dispute arbitration agreements in myriad form and context.<sup>3</sup> Perhaps the most impactful step along the way was the Court's setting out of the separability doctrine—viewing arbitration provisions included in larger contracts as though those clauses are independent contracts themselves.<sup>4</sup> More recently, the Court's impact has been forceful in declining to alter its jurisprudence when confronted with the impracticable consequences that class arbitration waivers have on consumer and small business claimants—disregarding the effective vindication doctrine, or the financial illogic of proceeding on a *de minimis solo* claim that similarly affects many others and is likely consequential only in the

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1. See 9 U.S.C. §§ 1–16 (2018).

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

*Id.* § 2.

2. See *Epic Sys. Corp. v. Lewis*, No. 16-285, slip op. 2 (U.S. 2018); see also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 15, 22 (1992) (discussing the history of arbitration prior to the FAA); G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon*, 26 AM. BUS. L.J. 397, 399–407 (1998) (summarizing FAA and early Supreme Court interpretations).

3. See Shell, *supra* note 2, at 397 (describing how the Court has liberally interpreted the FAA to apply nationally to pre-arbitration clauses).

4. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (holding that arbitration provisions may be enforced separately from the contract at large); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 514–15 (1974) (continuing the issue in *Prima Paint* and distinguishing its prior decision in *Wilko v. Swann*, 346 U.S. 427 (1953)).

aggregate.<sup>5</sup> Yet, even as the Supreme Court has continued to enforce mandatory arbitration in the face of challenges to employment agreements, consumer finance contracts, and broker-dealer or investment agreements, scholarly criticism of the Court's arbitration jurisprudence has only grown.<sup>6</sup>

This Article responds to the increasingly prolific Supreme Court jurisprudence enforcing mandatory pre-dispute arbitration agreements and the growing body of scholarly criticism of that jurisprudence.<sup>7</sup> Most recently, the U.S. Supreme Court continued its trend of robustly enforcing pre-dispute arbitration agreements in *Epic Systems Corp. v. Lewis*.<sup>8</sup> *Epic Systems* is only the latest decision in a now extensive body of Supreme Court precedent denying various challenges to mandatory arbitration.<sup>9</sup>

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5. See *Am. Express v. Italian Colors Rest.*, 570 U.S. 228, 235–36 (2013).

6. 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, 2811 (2015) [hereinafter *Diffusing Disputes*] (pointing out all that is given up in procedure, public reviewability, and appeal rights when civil litigation is replaced with arbitration); see also Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investment Contracts*, 11 N.Y.U. J.L. & BUS. 793, 805–06 (2015) (discussing the problems with arbitration agreements in investment contracts); J. Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3055 (2015) (identifying at least eight principles that have been lost with the shift from trials to settlements); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 80–81 (2011) [hereinafter *Fairness in Numbers*] (emphasizing due process and fairness concerns with class action waivers); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 LAW & CONTEMP. PROBS. 75, 102 (2004) (pointing to how defendants and the court systems may be undermined by class actions); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 99 (2001) (considering several factors that go into deciding whether judicial decisions in arbitration are good policy).

7. Referring to agreements made before disputes have arisen, requiring arbitration of disputes, and generally precluding any court involvement or review. See *Fairness in Numbers*, *supra* note 6, at 80 (criticizing the Court's decisions in several major cases on fairness grounds).

8. See *Epic Sys. Corp. v. Lewis*, No. 16-285, slip op. 25 (U.S. 2018) (holding that arbitration agreements will be enforced by the Court).

9. See *infra* Part II; see also Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown over the Right to Collective Action in the Workplace*, 52 AM. BUS. L.J. 75, 82–88 (2015) (discussing earlier arbitration precedent closely related to the Supreme Court's *Epic Systems* consolidated decision); Christine Neylon O'Brien, *Will the Supreme Court Agree with the NLRB that the Pre-Dispute Employment Arbitration Provisions Containing Class and Collective Action Waivers in Both Judicial and Arbitral Forums Violate the National Labor Relations*

While many have written critiquing the Supreme Court's consistent support for, if not promotion of, mandatory sole arbitration, including the Court's enforcement of class arbitration waivers, this Article offers a new idea.<sup>10</sup> Rather than focusing primarily on attacking (or supporting) the Supreme Court's jurisprudence, this Article proposes the volitional implementation of contractually required *mediation* (in no one form) before or in place of mandatory arbitration (or litigation).<sup>11</sup> It proposes a best practice to nudge bigger businesses toward better treatment of consumers and small businesses, suggesting that this first step mediation may well work in the favor of bigger business as instrumental marketing, even if not adopted for normative purposes.<sup>12</sup>

Part I discusses the proliferation of mandatory pre-dispute arbitration in the contexts of employment, consumer finance, and broker-dealer agreements, relying on empirical studies.<sup>13</sup> Part II seeks to distill the current Supreme Court jurisprudence on the topic and offers a chronology of important Supreme Court decisions on mandatory arbitration through *Epic Systems*.<sup>14</sup> Part III proposes making mediation, rather than mandatory arbitration, a first course of action for contractual dispute resolution.<sup>15</sup> This proposal of first step mediation is to establish a best practice that will nudge the bigger businesses that appear to favor mandatory arbitration toward better treatment of the individual consumers and small businesses that often seem to find mandatory sole arbitration impractical or unjust.<sup>16</sup> Finally, this Article concludes that some version of this mediation proposal may be the most plausible way to fairly and justly attempt to resolve disputes about or governed by contracts, particularly in light of the continued Supreme Court precedent on the topic and the commensurate hardening (albeit ineffective) scholarly opposition to the Supreme Court.

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*Act – Whether There Is an Opt-Out or Not?*, 19 U. PA. J. BUS. L. 515, 535–41 (2017) (setting up key issues heard by the Supreme Court in the *Epic Systems* case primarily in § 7 violations of the NLRA).

10. See Sternlight & Jensen, *supra* note 6, at 102 (describing a critique of forced class arbitration).

11. See *id.* (criticizing Supreme Court jurisprudence on the grounds that class actions hurt defendants).

12. See *infra* Part III (discussing the merits of mediation as a better practice for business).

13. See *infra* Part I.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *id.*

## I. THE PROLIFERATION OF MANDATORY PRE-DISPUTE ARBITRATION

While certainly not voluminous, a body of empirical work has accumulated assessing just how ubiquitous mandatory pre-dispute arbitration clauses have become and how arbitration claims filed pursuant to them actually proceed.<sup>17</sup> While the studies do not line up perfectly in the categories instrumental in this work, the data does enable one to draw basic conclusions in each of the employment, consumer finance, and broker-dealer contexts.

Though varied in exact data and in attention to narrower issues of consumer or employee win rates, award amounts, repeat player effects, class action bans, and arbitrator bias, among other topics, these studies appear to consistently indicate high rates of reliance (generally between 35% and upwards of 75% of contracts studied) on mandatory pre-dispute arbitration clauses in each of the employment, consumer finance, and broker-dealer fields.<sup>18</sup> As further evidence of proliferation, the reader might simply consider how many form contracts she has entered into in paper or online recently and recall or examine how many of them contain pre-dispute arbitration provisions.

## A. Employment

Several studies have focused on American Arbitration Association (AAA) data, the AAA being one of, if not the, primary facilitators of commercial arbitration.<sup>19</sup> Earlier work examining repeat

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17. See generally, e.g., ERNST & YOUNG LLC, OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES (2005) (detailing the results of mass arbitration).

18. See *id.*; see also Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISP. RESOL. L.J. 56–58 (2003) (taking account the popularity of arbitration in employment disputes); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 98–100 (1974) (one of the earliest studies concerned with repeat players); David Horton & Andrea Cann Chandraskher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 76–87 (2015) (discussing and critiquing major studies). See generally SEARLE CIVIL JUSTICE INSTITUTE, CONSUMER ARBITRATION (2009) (stating the study’s purpose as, “[t]o better understand the issues surrounding consumer arbitration and to begin developing a factual record for policy discussion, SCJI commissioned a Task Force on Consumer Arbitration”).

19. See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777, 792 (2003) (describing that data used was from AAA arbitration).

player effects in mandatory pre-dispute arbitration in the employment context undertaken by Lisa Bingham has been enhanced (and criticized) in subsequent studies by Elizabeth Hill and Alexander Colvin.<sup>20</sup> Bingham's work recognized a strong increase in employer use of mandatory arbitration in employment agreements in the early 1990s and proceeded to look at win rates of repeat player employers and repeat player plaintiff's lawyers.<sup>21</sup> Bingham's focus on the repeat player effect stems from Marc Galanter's prior work really defining the repeat player effect.<sup>22</sup> Hill cites still more dramatic increases in mandatory pre-dispute arbitration provisions among employers, noting a rate change of mandatory arbitration provisions in employment agreements from 19% to 62% during the late 1990s.<sup>23</sup> In analyzing recently updated related data, Colvin has subsequently found that the frequency of mandatory pre-dispute arbitration provisions in employment agreements has more than doubled since the early 2000s to a present rate of over 55%.<sup>24</sup>

Adding to Bingham, Hill, and Colvin's analyses of data on employment disputes in AAA arbitration is Lamare and Lipsky's study of employment disputes arbitrated via FINRA.<sup>25</sup> FINRA

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20. See Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 191 (1997) [hereinafter *The Repeat Player Effect*] (interpreting the data to find less employee success against repeat player employers); see also Lisa Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 235–40 (1998) (finding that repeat employers enjoy more success than non-repeat employers in employment arbitration); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 3–20 (2011) (analyzing only AAA employment disputes in California); Hill, *supra* note 19, 792–824 (focusing only on employment disputes).

21. See *The Repeat Player Effect*, *supra* note 20, at 190, 197–200.

22. See Galanter, *supra* note 18, at 97–114 (elaborating on the “repeat player effect,” which describes unique advantages that individuals who “engage[] in many similar litigations over time” acquire to the detriment of those “who have only occasional recourse to the courts”).

23. Hill, *supra* note 19, at 779–80; see also U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE, GAO/GGD-97-157, 2 (1997) (reporting that 19% of employers surveyed were using arbitration to resolve employment disputes).

24. ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICANS 1 (2018).

25. J. Ryan Lamare & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELEY J. EMP. & LAB. L. 113, 118–30 (2014) (presenting evidence of the Financial Industry Regulatory Authority's (FINRA) influence over employment arbitration). FINRA

arbitration is the broker-dealer industry norm for resolution of disputes not only between customers and broker-dealers but also between brokers and broker-dealers.<sup>26</sup> The latter principally concerns employment disputes.<sup>27</sup> Virtually all of these disputes are subject to FINRA arbitration, which Lamare and Lipsky find to be less biased and less subject to negative repercussions of the repeat player effect than the above cited studies outside FINRA.<sup>28</sup>

Another study by Stewart Schwab and Randall Thomas has found that mandatory arbitration shows up often even in employment agreements with CEOs (in over 41% of examined contracts).<sup>29</sup> Moreover, work by Eisenberg, Miller, and Sherwin provides a more general assessment of mandatory arbitration, finding high rates in both employment and consumer finance contexts.<sup>30</sup>

Clearly, mandatory pre-dispute arbitration provisions in the labor and employment context have become commonplace and are on the rise.<sup>31</sup>

## B. Consumer Finance

The consumer finance category offers the most recent and robust data and analysis, chiefly in the congressionally ordered Consumer Finance Protection Bureau (CFPB) study.<sup>32</sup> David Horton and Andrea Cann Chandrasekher's detailed and critical work and work by

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was previously NASD. (The author has been a FINRA neutral since 2012 and, while informed by this experience, is not generally relying on it for purposes of this Article.).

26. See *id.* at 115–16.

27. See *id.* (stating that the employment dispute arbitration program governed by FINRA applies to those employees registered with the Securities and Exchange Commission).

28. See *id.* at 120–25.

29. See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 234 (2006).

30. See Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880–86 (2008).

31. See, e.g., *id.* at 882–83, 886.

32. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 2, at 6–25 (2015) [hereinafter CFPB STUDY]; see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). See generally 12 U.S.C. §§ 5301–641 (2010) (containing law relevant to the Dodd-Frank Wall Street Reform and Consumer Protection Act).

Demaine and Hensler also show high rates of mandatory arbitration provisions in consumer finance contracts.<sup>33</sup>

The CFPB study, reported to Congress in 2015, provides the most comprehensive data on the proliferation of mandatory pre-dispute arbitration agreements.<sup>34</sup> CFPB data on student loans, bank accounts, payday loans, prepaid cards, and mobile wireless subscriptions showed very high rates (generally between 83% and 92%) of mandatory arbitration.<sup>35</sup> The CFPB's still recent study on consumer finance arbitration, mandated by the Dodd-Frank Act in the wake of the 2008 financial tsunami, offers some useful data in understanding the reality of disputes in the field.<sup>36</sup> Not least meaningful is the CFPB Report's conclusion that upwards of 85% of consumers who entered into contracts with mandatory pre-dispute arbitration clauses during the period studied were unaware of having done so.<sup>37</sup>

The same CFPB data shows a contrastingly lower rate (under 16%) of mandatory arbitration in credit card agreements.<sup>38</sup> This lower rate of mandatory arbitration in credit card agreements has been confirmed in studies by Drahozal and Rutledge.<sup>39</sup> Yet, for our purposes, this data shows very high rates of mandatory arbitration provisions in the general consumer finance category.<sup>40</sup>

Eisenberg, Miller, and Sherman make the interesting observation that among corporations that include mandatory arbitration provisions in their consumer and employment contracts, few include arbitration clauses in their non-consumer corporate contracts such as supplier agreements and other material contracts disclosed in their SEC filings.<sup>41</sup> Myriad interpretations of the

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33. See Horton & Chandraskher, *supra* note 18, at 98–115; see also Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROB. 55, 58–64 (2004).

34. See CFPB STUDY, *supra* note 32, § 2, at 6–8.

35. See *id.* at 6–26.

36. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a); see also CFPB STUDY, *supra* note 32, § 5, at 11–15, 35–38, 67.

37. See CFPB STUDY, *supra* note 32, § 1, at 11.

38. See *id.* § 2, at 8–10.

39. See Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 557–60 (2012); see also Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 17–18 (2013).

40. See CFPB STUDY, *supra* note 32, § 2, at 8.

41. See Eisenberg, Miller & Sherman, *supra* note 30, at 886–87.

motivation for this can be proffered, and Eisenberg, Miller, and Sherman offer some.<sup>42</sup>

Tangentially, Mark Budnitz and Christopher Drahozal have studied the costs of consumer finance arbitration, the study itself a testament to the high rates of mandatory pre-dispute arbitration in consumer contracts.<sup>43</sup> Thus, overall, in the relatively broad consumer finance category, mandatory pre-dispute arbitration provisions have become ubiquitous.

### C. Broker-Dealer

The vast majority of consumer and registered person employee disputes with brokers and broker-dealers are resolved by FINRA arbitration pursuant to FINRA Rule 12200.<sup>44</sup> Importantly, though, FINRA rule 12204 provides that class action claims may not be

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42. See *id.* at 887.

43. See Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROB. 133, 135–43 (2004); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 817–26 (2008).

44. See 12200. *Arbitration Under an Arbitration Agreement or the Rules of FINRA*, FINRA, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12200> [<https://perma.cc/HLN5-AP5V>] (last visited Dec. 19, 2019) (“Parties must arbitrate a dispute under the Code if: Arbitration under the Code is either[] (1) Required by a written agreement, or (2) Requested by the customer; [t]he dispute is between a customer and a member or associated person of a member; and [t]he dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.”); FINRA DISPUTE RESOLUTION TASK FORCE, FINAL REPORT AND RECOMMENDATION at 1 (2015); see also Barr, *supra* note 6, at 800 (referring to very high rates of mandatory arbitration provisions in broker dealer contracts but offering no actual data).

arbitrated.<sup>45</sup> Rather, FINRA directs class action claims to court.<sup>46</sup> This class claim exception exists as a way around the principal FINRA rule providing that a dispute must be resolved by arbitration if it is subject to a written agreement so requiring or if a brokerage customer requests arbitration.<sup>47</sup> While arbitration of broker-dealer disputes can proceed under AAA, JAMS, or another arbitration forum, the vast majority proceed through FINRA, the self-regulatory body overseen by the U.S. Securities and Exchange Commission (SEC).<sup>48</sup>

Black and Gross have attributed the ubiquitous use of mandatory pre-dispute arbitration agreements in the securities industry to the Supreme Court's *McMahon* decision.<sup>49</sup> Related work by Gross and

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45. See 12204. *Class Action Claims*, FINRA, <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12204> [<https://perma.cc/3XKZ-B82F>] (last visited Dec. 19, 2019) (“(a) Class action claims may not be arbitrated under the Code. (b) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following: (1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or (2) a notice that the party will not participate in the class action or in any recovery that may result from the class action. (c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel. (d) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until: the class certification is denied; the class is decertified; the member of the certified or putative class is excluded from the class by the court; or the member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any. This paragraph does not otherwise affect the enforceability of any rights under this Code or any other agreement.”).

46. See *id.* (establishing an important distinction between FINRA arbitration and any other variety of arbitration discussed herein and offering a good example of a way that at least some of the unsuccessful recent challenges to class waivers in arbitration clauses might be avoided or redressed).

47. See *id.* (stating how FINRA Rule 12204, which does not allow for class action arbitration, is an exception to the FINRA Rule 12200, which enforces all written arbitration agreements).

48. See Jill I. Gross, *The Customer's Nonwaivable Right to Choose Arbitration in the Securities Industry*, 10 BROOK. J. CORP. FIN. & COM. L. 383, 385–86, 395–401 (2016).

49. See Barbara Black & Jill I. Gross, *Making It Up as They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 992–95 (2002) (attributing the proliferation of mandatory pre-dispute arbitration provisions in the

Black surveying 25,000 investors demonstrates that investors perceive unfairness in mandatory broker-dealer arbitration but speaks further simply as testament to the uniform use of written agreements requiring arbitration in the investment field.<sup>50</sup>

For purposes of this Article, the primary take away from these studies, in aggregate, is that mandatory pre-dispute arbitration clauses have become the norm in each of the employment, consumer finance, and investment arenas.<sup>51</sup> Certainly, these studies do not arrive at a consensus as to the superiority of either arbitration or litigation. One should note, though, that the clear majority of the studies cited above are critical of mandatory arbitration.<sup>52</sup> Of course, the very existence of a large body of Supreme Court cases on the topic is further evidence that many contracts include mandatory arbitration provisions and that they have been repeatedly challenged.<sup>53</sup>

## II. THE U.S. SUPREME COURT'S *EPIC SYSTEMS* DECISION AND ITS PRECURSORS

With the proliferation of mandatory pre-dispute arbitration provisions in mind, the enforceability of such provisions takes on heightened import. The springboard for considering the Supreme Court's treatment of such provisions is the recent *Epic Systems* decision.<sup>54</sup>

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securities industry to *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), and noting a 2000 GAO study and personal knowledge of commonplace use of mandatory pre-dispute arbitration provisions in the securities industry).

50. See Barbara Black & Jill I. Gross, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RES. 349, 357–61 (2008).

51. See, e.g., *id.* at 350–51 (describing the commonality of arbitration clauses in the financial securities market and consumers' general wariness of such clauses).

52. See *id.* at 400–01 (recognizing that critics have raised certain problems with arbitration, suggesting the need for change).

53. See, e.g., *Shearson/Am. Express*, 482 U.S. at 222; *Wilko v. Swan*, 346 U.S. 427, 429–30 (1953).

54. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623–24 (2018) (describing the Court's treatment toward conflicting acts which precribe how to treat pre-dispute arbitration provisions). Between draft and print of this Article, the Court handed down yet another decision on arbitration in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). The author does not believe this more recent decision requires alteration of the present work.

### A. The Long Lead-Up to *Epic Systems*

If the FAA was a watershed shifting federal legislative and court policy from general disfavor of arbitration to express endorsement of or even promotion of arbitration, subsequent Supreme Court interpretation of the FAA has been still more altering.<sup>55</sup> Both the jurisprudence enforcing, and the scholarly commentary opposing, Supreme Court enforcement of mandatory arbitration provisions has been consistent (post *Wilko*) across each of the employment, consumer finance, and investment categories.

The Court's earliest interpretation of the FAA was in the securities field and in retrospect would belie the future of the Court's approach. Broadly, in *Wilko v. Swan*,<sup>56</sup> the Court refused to enforce a pre-dispute arbitration clause in a margin agreement between a brokerage firm and its customer, finding that Section 14 of the Securities Act of 1933 ('33 Act) effectively blocked a waiver of the right to bring a court action for a Section 12(2) fraud claim under the '33 Act and trumped the FAA directive toward enforcement of arbitration agreements like all other contracts.<sup>57</sup>

In *Wilko*, then, the Court found congressional intent in a federal law (the '33 Act) that made the right to select a judicial forum to adjudicate disputes relating to a contract unwaivable to be superior to another earlier federal law, the FAA (1925).<sup>58</sup> At the time of *Wilko* (1953), the FAA Section 2 requirement to treat agreements about arbitration as enforceable like any other contract, subject to defenses to enforceability as with any other contract, was still, more than twenty-five years after its passing, seen by the Court as a redress countering the prior federal disfavor of arbitration.<sup>59</sup> It was, as yet, in no way a mandate to aggressively preference the FAA and arbitration agreement enforcement over other federal law or state law, whether substantive or procedural.<sup>60</sup> Note that the '33 Act came eight years

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55. See Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 265–82 (1998); *Diffusing Disputes*, *supra* note 6, at 2862–74.

56. 346 U.S. 427.

57. See *id.* at 435–36; see also 15 U.S.C. § 77n (2018) (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules, and regulations of the Commission shall be void.”).

58. See *Wilko*, 346 U.S. at 434–45.

59. See 9 U.S.C. § 2 (2018); *Wilko*, 346 U.S. at 438 (describing its position on 9 U.S.C. § 2).

60. See *Wilko*, 346 U.S. at 438.

after the FAA and that the 1953 *Wilko* decision expressly considered distinctions between arbitral and judicial decision making.<sup>61</sup>

Thirteen years after *Wilko*, in 1967, the Court flipped in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, creating the “separability doctrine,” holding that the FAA controlled and required enforcement of an arbitration clause in a consulting agreement relating to the purchase and sale of a paint business.<sup>62</sup> One party sought to rely on a consulting agreement arbitration clause to resolve a dispute alleging fraud in the inducement to the consulting agreement.<sup>63</sup> The Court held that pursuant to Section 4 of the FAA, while arbitrators should not decide a fraud in the inducement claim relating specifically to an arbitration clause in itself, arbitrators should decide a fraud in the inducement claim as to the whole contract containing the clause.<sup>64</sup> In *Prima Paint*, the Court flipped to express no concern with arbitrators deciding “legal” issues and emphasized the freedom of contract to justify enforcement of whatever dispute resolution terms parties agreed to in a contract.<sup>65</sup>

From *Prima Paint* to the present *Epic Systems* decision, the Court has consistently held its course counter to *Wilko*, tacking through repeated challenges to arbitration in each of the employment, consumer finance, and securities contexts.

The Court looked at another securities related case in 1974, *Scherk v. Alberto-Culver Co.*,<sup>66</sup> where it heard a claim in part reliant upon Section 10(b) of the Securities Exchange Act of 1934 (‘34 Act).<sup>67</sup> Alberto Culver argued that the ‘34 Act precluded its dispute from arbitration pursuant to Section 29 of the ‘34 Act, analogous to Section 14 of the ‘33 Act at the heart of *Wilko*.<sup>68</sup> The *Scherk* case involved an international business transaction including a stock purchase governed

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61. *See id.* at 435–37.

62. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967).

63. *See id.* at 397–98.

64. *See id.* at 404–07.

65. *Id.* at 406.

66. *See generally* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (noting the action is brought under the Securities Exchange Act).

67. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2018); SEC Commission Rule, 17 C.F.R. § 240.10b-5 (2019).

68. *See* Securities Exchange Act of 1934 § 78cc (a) (“Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.”); *Scherk*, 417 U.S. at 513–19.

in part by an agreement to arbitrate related disputes in France.<sup>69</sup> In finding that Section 29 did not prohibit a litigation waiver, the *Scherk* Court relied primarily on the international nature of the transaction at issue in the case and held that the agreement to arbitrate was in effect a kind of forum selection clause that must be upheld to avoid interfering with and unsettling international commerce.<sup>70</sup> Thus, *Scherk* expanded the more pronounced pro-arbitration precedent of *Prima Paint* which had flipped *Wilko*.<sup>71</sup> The *Scherk* Court, essentially opposite the *Wilko* Court, found the FAA directive supporting arbitration to be stronger than the policy behind the litigation waiver prohibition of Section 29 of the '34 Act.<sup>72</sup> *Scherk* emphasized the established norm and import of arbitration for dispute resolution in international business and broadened the enforcement of mandatory arbitration in the securities or investment field.

In 1983 with *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* and in 1984 with *Southland Corp. v. Keating*, the Court respectively entertained challenges first to contractual arbitration between a hospital and a construction company and then to contractual arbitration between franchisees and a franchisor.<sup>73</sup> In these decisions, the Court firmly established that the FAA and its decisions under the FAA constitute a body of federal substantive law on arbitration enforcement that preempts state law, full stop.<sup>74</sup> *Moses Cone* held that federal appellate court jurisdiction was proper to review a state district court action staying a federal district court action to compel arbitration under Section 4 of the FAA and proceeded to find arbitrable a contract dispute between the hospital and its contractor.<sup>75</sup> The *Southland* decision emphatically promoted arbitration and grounded this promotion in the legislative history of the FAA, casting aside the view that the character of the law concerning arbitration was procedural.<sup>76</sup> The *Southland* Court held

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69. See *Scherk*, 417 U.S. at 508.

70. See *id.* at 515–19.

71. See *id.* at 513–15 (noting the Court's discussion of *Wilko* and the effect of *Prima Paint*).

72. See *id.* at 515–17.

73. See *Southland Corp. v. Keating*, 465 U.S. 1, 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 5 (1983).

74. See, e.g., *Southland*, 465 U.S. at 12–13; Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 468–77 (1998) (discussing the central issue in *Southland*).

75. See *Moses H. Cone*, 460 U.S. at 28–29.

76. See *Southland*, 465 U.S. at 13–14.

that under the Supremacy clause, Section 2 of the FAA controlled the question of arbitrability of a dispute between a franchisor and several franchisees, not the state law of California.<sup>77</sup> Notably, *Southland* expressly left open the question of whether the FAA barred class arbitration—a question, of course, that was later to arise again.<sup>78</sup>

In 1985, the Court addressed a challenge to mandatory arbitration for the third year in a row with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>79</sup> In *Mitsubishi*, the Court found arbitrable a claim brought by a Swiss-Japanese joint venture automobile supplier against a Puerto Rican car dealership with whom it had a sales agreement.<sup>80</sup> In finding arbitrable the claim which arose in part under the Sherman Antitrust Act,<sup>81</sup> the Court looked to its precedent in *Scherk*, again noting the pro-arbitration context of international commerce.<sup>82</sup> Thus, with *Mitsubishi*, the purview of enforceable arbitration grew to explicitly incorporate arbitral decisions over federal statutory claims, *contrary to Wilko*.<sup>83</sup>

In 1987, the Court returned to another securities industry arbitration challenge in *Shearson/American Express Inc. v. McMahon*.<sup>84</sup> Unlike the securities claims made in *Scherk*, the securities claims in *McMahon* involved a wholly domestic contract-based dispute between a brokerage customer and brokerage.<sup>85</sup> In *McMahon*, the Court more comprehensively addressed the issue of whether Section 29(a) of the '34 Act indicated congressional intent regarding the waiver of litigation rights in the '34 Act that would trump the FAA—an argument again grounded in the then-flipped *Wilko* reasoning regarding Section 14 of the '33 Act.<sup>86</sup> Distinguishing Section 14 of the '33 Act and Section 29 of the '34 Act based upon interpretation of legislative intent, the *McMahon* Court proceeded to enforce the mandatory arbitration provision in the consumer

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77. *See id.*

78. *See id.* at 16.

79. *See generally* 473 U.S. 614 (1985) (addressing the arbitrability of RICO claims).

80. *See id.* at 616–20.

81. *See* 15 U.S.C. §§ 1–7 (2018).

82. *See Mitsubishi*, 473 U.S. at 628–32.

83. *See id.*

84. *See generally* *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (addressing arbitration in private securities fraud claims arising under the Securities Exchange Act of 1934).

85. *See id.* at 222–23.

86. *See id.* at 228–31.

investment contract at issue.<sup>87</sup> Looking back to statements of policy embodied in the FAA and amplified in *Prima Paint*, *Scherk*, *Moses Cone*, *Southland*, and *Mitsubishi*, the Court seemed to catalogue its precedent, solidifying whole-hearted enforcement of mandatory pre-dispute arbitration provisions.<sup>88</sup> Pointedly, in *McMahon*, one can note the major shift in the character of challenges to arbitration from the earlier, mostly business-to-business challenges (stemming from the origins of arbitration as a primarily business-to-business, sophisticated commercial practice) to consumer-versus-business challenges.<sup>89</sup>

In 1989, just two years after *McMahon*, the Court explicitly overturned *Wilko* in the '33 Act context in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, now stating that Section 14 of the '33 Act did *not* preclude waivers of litigation rights to Section 12(2) fraud claims.<sup>90</sup> The *Rodriguez de Quijas* Court relied again on the Court's own expanding pro-arbitration precedent since *Wilko*, giving particular weight to *McMahon*.<sup>91</sup> Like *McMahon*, *Rodriguez de Quijas* was again a consumer-versus-brokerage battle over an investment contract.<sup>92</sup> The Court once again noted "the old judicial hostility to arbitration," harkening back to the policy justifications for the FAA's passage back in 1925, and assessed the effect of its own precedent as constituting the erosion of that anti-arbitration view.<sup>93</sup>

In the 1991 *Gilmer v. Interstate/Johnson Lane Corp.* decision, the Court enforced mandatory pre-dispute arbitration of an Age Discrimination in Employment Act of 1967 (ADEA) claim pursuant to an agreement between a securities representative and a brokerage (which agreement was not characterized as an employment agreement), subject to New York Stock Exchange rules (prior to the establishment of FINRA).<sup>94</sup> Thus, the Court continued to strengthen the enforcement of mandatory pre-dispute arbitration even regarding a broadening array of statutory-based claims.<sup>95</sup> Moreover, the Court robustly cast aside the unconscionability argument that the individual plaintiff in *Gilmer* stood no chance of equal bargaining power against

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87. *See id.*

88. *See id.*

89. *See id.*

90. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483–85 (1989).

91. *See id.* at 480–85.

92. *See id.* at 478.

93. *Id.* at 480–81 (quoting *Kulkundis Shipping Co. v. Armtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

94. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

95. *See id.* at 27–33.

the big corporation brokerage, in this instance the employee against the large employer.<sup>96</sup> *Gilmer*, then, straddles the categories of investment and employment and continues the Court's strong enforcement of arbitration in both of these categories of concern.<sup>97</sup>

The attention of the Court turned to the class action component of mandatory pre-dispute arbitration in 2010 with *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*<sup>98</sup> In *Stolt-Nielsen*, the Court interpreted the FAA and its precedent to find that an arbitration clause that does not explicitly provide for class arbitration does not permit class arbitration.<sup>99</sup> The *Stolt-Nielsen* decision looked repeatedly to the Court's decade earlier decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,<sup>100</sup> reiterating that arbitration agreements should be read and enforced strictly according to their terms.<sup>101</sup> The *Volt* Court's reasoning appeared consistent with earlier freedom-of-contract-based arguments, emphasizing that parties to a contract may consent to whatever terms they choose and those terms should be enforced.<sup>102</sup>

In 2011, class arbitration moved further to the forefront of Supreme Court jurisprudence just a year after *Stolt-Nielsen* in the quintessential consumer finance context of *AT&T Mobility LLC v. Concepcion*.<sup>103</sup> In *Concepcion*, consumers who had entered into cell phone contracts with AT&T sought to bring a class arbitration against AT&T.<sup>104</sup> However, the arbitration clause at issue specifically required *individual* arbitration.<sup>105</sup> The same clause entitled AT&T to make unilateral amendments to the controlling agreement.<sup>106</sup> The Supreme Court reversed lower courts which had found the contract between AT&T and the *Concepcions* unconscionable.<sup>107</sup> The lower courts, looking to California's *Discover Bank* rule, had found the terms of the AT&T agreement not offering class arbitration to be an

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96. *See id.* at 32–33.

97. *See id.* at 35 (continuing the enforcement of arbitration).

98. 559 U.S. 662 (2010).

99. *See id.* at 687.

100. *See id.* at 681–82 (discussing *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989)).

101. *See Volt*, 489 U.S. at 468–69.

102. *See id.* at 478.

103. 563 U.S. 333 (2011).

104. *See id.* at 337.

105. *See id.* at 336.

106. *See id.*

107. *See id.* at 338, 352.

unconscionable denial of consumer rights.<sup>108</sup> In reversing, the Court again grounded its decision in a freedom of contract analysis, looking back to the policies buttressing the FAA and referencing its now increasingly voluminous Supreme Court precedent enforcing, if not promoting, mandatory pre-dispute arbitration.<sup>109</sup> While referring to Section 2 of the FAA, stating that the FAA required the Court to put agreements about arbitration on the same footing as other contracts, the Court wrestled with the FAA's Section 2 savings clause.<sup>110</sup> The Section 2 savings clause further provides that general defenses to contract must also be recognized and applied to agreements including arbitration clauses, but such defenses do not include defenses unique to arbitration provisions alone.<sup>111</sup> Ultimately, the *Concepcion* decision stands more as a testament to federal preemption of state law, even as it built the Court's enforcement of arbitration clauses crafted to preclude class arbitration and further undermined any real consideration by the Court of general unconscionability defenses based upon the unequal bargaining power between consumers like the *Concepcions* and large corporations like AT&T.

In 2012, the Court considered the issue of whether the FAA excluded employment agreements from its purview of enforcing arbitration clauses in *Circuit City Stores, Inc. v. Saint Clair Adams*.<sup>112</sup> The Court determined that the language at issue in Section 1 of the FAA indicated the exclusion of employment agreements only concerned workers in the transportation field and not generally.<sup>113</sup> In so doing, the Court noted that the Ninth Circuit's more encompassing interpretation of the FAA's Section 1 was both incorrect and inconsistent with prior Supreme Court precedent.<sup>114</sup>

The plight of consumers who entered into mandatory pre-dispute arbitration agreements again reached the Supreme Court just a year after *Concepcion* in the 2012 *CompuCredit Corp. v. Greenwood* decision.<sup>115</sup> In *CompuCredit*, the Court considered whether a non-waiver of litigation provision in the Credit Repair Organizations Act

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108. *See id.* at 338.

109. *See id.* at 344–48.

110. *See* 9 U.S.C. § 2 (2018); *Concepcion*, 563 U.S. at 336.

111. *See* § 2.

112. 532 U.S. 105, 109 (2001).

113. *See* § 1 (“[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”); *Circuit City*, 532 U.S. at 113–21.

114. *See Circuit City*, 532 U.S. at 113–21.

115. 565 U.S. 95 (2012).

(CROA), which created a private right of action to pursue remedies via class action, constituted a contrary congressional command to the FAA.<sup>116</sup> The *CompuCredit* Court held that the CROA provision did not constitute a contrary congressional command that would favor the CROA over the FAA directive of enforcing agreements to arbitrate.<sup>117</sup> The Court emphasized that the CROA did not mention arbitration and so proceeded to enforce the consumer credit card agreement that mandated arbitration.<sup>118</sup>

Another important case arising in the securities industry in 2012 and regarding mandatory pre-dispute arbitration that did *not* reach the U.S. Supreme Court is *Department of Enforcement v. Charles Schwab & Co., Inc.*<sup>119</sup> *Schwab* concerned an investment contract between the brokerage and its customers requiring them to waive their rights to class arbitration and class civil litigation.<sup>120</sup> In *Schwab*, the FINRA Board of Governors avoided the contrary congressional command precedent from the Supreme Court, which had consistently held that the FAA trumped other legislation.<sup>121</sup> The Board of Governors found FINRA Rule 12204 (prohibiting class arbitration and permitting class civil litigation) enforceable notwithstanding the FAA and its Supreme Court interpretation.<sup>122</sup> The decision emphasized the policy behind the FINRA rule permitting or requiring class action only through the civil courts and noted that the very reason for the rule was to provide access to the courts that have “developed procedures and the expertise to manage class actions.”<sup>123</sup> While the Board of Governors found that the FAA certainly applied to the FINRA Rule and the Schwab arbitration policy, unlike the Supreme Court, the Board of Governors also found that Section 15 of the ‘34 Act empowered FINRA to regulate

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116. *See id.* at 96.

117. *See id.* at 102–03 (“It takes a considerable stretch to regard the nonwaiver provision as a ‘congressional command’ that the FAA shall not apply.”).

118. *See id.* at 104 (“Because the CROA is silent on whether claims under the Act can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms.”).

119. *See* Dep’t of Enforcement v. Charles Schwab & Co., Complaint No. 2011029760201 1, 2 (FINRA April 24, 2014).

120. *See id.* at 1–2.

121. *See id.* at 23–25.

122. *See* FINRA, *supra* note 45; *see also Schwab*, Complaint No. 2011029760201 at 7 (“We affirm the Hearing Panel’s findings that Schwab’s Waiver violated NASD and FINRA rules, but reverse the finding that the FAA precludes FINRA from enforcing the rule violations in causes one and two.”).

123. *Schwab*, Complaint No. 2011029760201 at 14.

arbitration in FINRA's forum.<sup>124</sup> Then, in overturning a prior Hearing Panel decision on the case, the Board of Governors drew an analogy of FINRA with the CFPB finding that FINRA regulations have the force of law and that the SEC, and through it, FINRA, has congressional command via the '34 Act to make and enforce the rule permitting class civil litigation notwithstanding the Supreme Court interpretation of the FAA enforcing class waivers.<sup>125</sup>

Class arbitration came before the Court again in 2013 with *American Express v. Italian Colors Restaurant*.<sup>126</sup> In *Italian Colors*, small business merchants accepting American Express cards for payment attempted to seek redress as a class.<sup>127</sup> The mandatory pre-dispute arbitration clause the claimants had entered into with American Express contained an explicit prohibition of class arbitration.<sup>128</sup> The Court again found no contrary congressional command in other federal law (this time asserted to lie in antitrust laws) that would trump the FAA.<sup>129</sup> The Court eschewed concern for the illogic of small claimants bearing the burden of sole arbitration, holding that the cost of individual arbitration was no bar to enforcing contracts in which the parties agreed to it, even where the remedy sought was of less value than the cost to the sole claimant to arbitrate.<sup>130</sup> Thus, the Court refused to recognize the asserted "'effective vindication' doctrine."<sup>131</sup> Yet again, in 2015, the Court propounded its enforcement of class arbitration waivers against

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124. *See id.* at 18 ("Exchange Act § 15A empowers FINRA to regulate broker-dealers including how they resolve disputes with their customers, subject to SEC oversight.").

125. *See id.* at 21 ("The Exchange Act's broad authorization encompassing FINRA arbitration rules that are approved by the SEC constitutes the Supreme Court's required congressional command to overcome the general mandate of the FAA to enforce arbitration agreements."); *see also* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 44–48 (2012) (detailing the authority FINRA and the SEC have regarding arbitration).

126. *Am. Express v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013) ("We consider whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.").

127. *See id.*

128. *See id.* at 236–39.

129. *See id.* at 228.

130. *See id.* at 235–36.

131. *Id.*; *see also* Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 131 (2015) (discussing how the majority rejected the doctrine, while Justice Scalia defended it in his dissent).

consumers in *DirecTV, Inc. v. Imburgia*.<sup>132</sup> In *DirecTV*, the Court again drove home federal preemption of the FAA over state law even where a contract expressly deferred legality of a class waiver to the law of the contracting consumer's state.<sup>133</sup> Had the Court found that the state law reference controlled, under the California *Discover Bank* rule, the DirecTV class waiver would have been found unconscionable.<sup>134</sup> However, once again the still-expanding Supreme Court precedent on mandatory arbitration continued to strongly disfavor consumer challenges.<sup>135</sup>

### B. *Epic Systems*

Coming full circle, in June of 2018 the Court handed down its decision in *Epic Systems Corp. v. Lewis*.<sup>136</sup> While the Court considered arguments more focused on the National Labor Relations Act (NLRA), it again did not find in the NLRA a contrary congressional command superior to the FAA.<sup>137</sup> The Court held that Section 7 of the NLRA, protecting the right of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" did not include in its protection class arbitration by employees who believed their employers were violating the Fair Labor Standards Act.<sup>138</sup> Moreover, the Court reiterated its now well-established position that the FAA requires enforcement of whatever arbitration provisions parties agree to in a contract.<sup>139</sup> The Court held that the FAA savings clause defenses to contract generally, including illegality based upon the alleged blocking of concerted action protected by the NLRA, did not apply.<sup>140</sup>

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132. See generally *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (addressing enforceability of a DirecTV's class arbitration waivers and whether state or federal law controlled).

133. See *id.* at 465–68 (noting the state court's opinion that if state law's prohibition of the class waiver applied, it would contractually invalidate the entire arbitration clause).

134. See *id.* at 466.

135. See *id.* at 471.

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

137. See *id.* at 1624; O'Brien, *supra* note 9, at 540–45 (setting up the NLRA arguments heard by the Court in the cases consolidated in the *Epic Systems* decision); see also Greene & O'Brien, *supra* note 9, at 96–98 (furthering the § 7 NLRA claims).

138. See 29 U.S.C. §§ 157, 216(b) (2018).

139. See *Epic Sys.*, 138 S. Ct. at 1623–24.

140. See *id.* at 1622–25.

Writing for the majority in *Epic Systems*, Justice Gorsuch commented,

You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the [FAA] was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.<sup>141</sup>

Once again, the Court looked backward to its own repeated recasting of the 1925 passage of the FAA only to justify the apparent implausibility of defenses to contract that might apply to arbitration provisions yet not be characterized as particular to defending arbitration provisions.<sup>142</sup> Indeed, Gorsuch found the fatal flaw in the *Epic Systems* plaintiff's defense to contract argument under the FAA savings clause to lie in the failure to convince the majority that the defense applied to "any" contract, not specifically to the arbitration contract provision.<sup>143</sup>

Thus, for over fifty years, the U.S. Supreme Court has constructed a solid and expansive jurisprudence strengthening the enforcement of mandatory pre-dispute arbitration provisions in each of the areas of employment, consumer finance, and investment contracts.<sup>144</sup> As the Court has built the enforcement precedent, defenses to contract in each of these areas have further eroded; justified by the original policies given by Congress when passing the FAA back in 1925, freedom of contract and the proclaimed superiority of the FAA over other federal (and state) legislation alleged to embody contrary congressional commands.<sup>145</sup> In the twenty-first century, the Court has included in this project the enforcement of class action waivers and class arbitration prohibitions, most recently in the employment context with the *Epic Systems* Court's refusal to find concerted action protected under the NLRA.<sup>146</sup>

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141. *Id.* at 1621–22.

142. *See id.*

143. *See id.* at 1622–23 (emphasis added).

144. *See, e.g.,* Greene & O'Brien, *supra* note 9, at 82–88 (discussing earlier arbitration precedent closely related to the Supreme Court's *Epic Systems* decision).

145. *See, e.g., Epic Sys.*, 138 S. Ct. at 1621–23.

146. *See, e.g., id.* at 1624–27.

### C. Criticism of Supreme Court Arbitration Jurisprudence (and Arbitration Generally)

*Epic Systems* would appear to leave the law on enforcing mandatory pre-dispute arbitration well-settled while leaving unheeded the scholarly criticism of both the Court's enforcement of arbitration contracts and its rejection of the many arguments for a parallel recognition of contract defenses under the FAA savings clause.<sup>147</sup> That scholarly criticism includes claims that the Court has falsely inflated the now well-aged FAA policy directive (literally to put arbitration contracts on equal footing with other contracts) and flouted any concern for resulting social injustice disempowering consumers and small businesses.<sup>148</sup> Related to concerns of social injustice, the diminution of constitutional rights, and excessive delegation, many have cried out that the entire civil litigation system is rapidly being replaced with a private, unreviewable dispute resolution system.<sup>149</sup>

Notwithstanding the spirited criticism of the Supreme Court's pro-arbitration jurisprudence, there now would seem to be little chance of the Court reversing itself on its quite substantial body of precedent enforcing mandatory pre-dispute arbitration.<sup>150</sup> This reality leaves us with the central motivation for this Article—contemplating a solution to the discord between the Court's jurisprudence on arbitration and the weighty, yet unembraced, scholarly criticism of it.

This Article suggests that we consider volitional contractual mediation as an alternative. This proposal is, in a sense, a response to Justice Gorsuch's pondering in *Epic Systems*; indeed, we might wonder if that purported 1925 balance "should be revisited in light of more contemporary developments."<sup>151</sup>

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147. See, e.g., Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 738–40 (2016) (proposing alternative positions on enforcement and defense such as unconscionability).

148. See *Diffusing Disputes*, *supra* note 6, at 2894–98 (pointing out all that is given up in procedure, public reviewability, and appeal rights when civil litigation is replaced with arbitration); *Fairness in Numbers*, *supra* note 6, at 154–68 (emphasizing due process and fairness concerns with class action waivers).

149. See *Fairness in Numbers*, *supra* note 6, at 160–68; Ware, *supra* note 147, at 739–40 (discussing five approaches to enforcing arbitration, arguing for a "centrist" position and giving particular attention to the political alignment of justices on the Supreme Court as treatment of arbitration enforcement changed, particularly in the 2000s).

150. See *supra* Part II.

151. *Epic Sys.*, 138 S. Ct. at 1622.

Parts I and II of this paper should make clear that much is wrong with arbitration.<sup>152</sup> If intended to be a less costly, less time-consuming, less complex, just alternative to civil litigation, present day arbitration in the big versus small contexts of employment, consumer finance, and investment contracts is largely a failure.<sup>153</sup> It has become ever more expensive, more time-consuming, and more like the civil litigation it was intended to avoid.<sup>154</sup> It has shifted from business-to-business to business-to-consumer, and unlike civil litigation, it offers little or no chance of appeal, public reviewability, or accountability, and it relies on often only summarily trained neutrals to make life-altering decisions.<sup>155</sup> Hence, some have proposed modifications to arbitration practice.<sup>156</sup> Perhaps motivated chiefly by the extremely narrow grounds for review of arbitration, legislators have attempted to work around the FAA and the Court's interpretation of it.<sup>157</sup> Indeed, a number of legislative attempts have been made to counter the Court in our system of federal government where the three branches are always at play counterbalancing one another.<sup>158</sup>

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152. See *supra* Parts I, II.

153. See *id.*

154. See *Diffusing Disputes*, *supra* note 6, at 2848–49.

155. See *id.* at 2847–60; *Fairness in Numbers*, *supra* note 6, at 154–61.

156. See Glover, *supra* note 6, at 3055 (discussing the private contract character of arbitration); see also Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1582–91 (2013) (proposing contractual “procedural optionality” in litigation as an alternative to arbitration). See generally Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000) (proposing that state action is present in private civil arbitration and extrapolating the ramifications of applying constitutional norms to arbitration and dispute resolution generally).

157. See Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 183–86 (2011) (calling on the courts to enforce the manifest disregard of the law standard of review of arbitration decisions).

158. See Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009). Most recently, this has been introduced in the House by Rep. David Cicilline and in the Senate by Sen. Leahy in March of 2017. See Restoring Statutory Rights and Interests of the States Act of 2017, H.R. 1396, 115th Cong. (2017); Restoring Statutory Rights and Interests of the States Act of 2017, S. 550, 115th Cong. (2017). First, this legislation would exempt from the FAA claims brought by individuals or small businesses arising from violations of federal or state law, the U.S. Constitution or a state constitution and, accordingly, would permit these claims to proceed in a court of law. See Restoring Statutory Rights and Interests of the States Act of 2017, H.R. 1396 § 3(b) (discussing how arbitration is still an option if the parties voluntarily choose to arbitrate a dispute after it arises). Second, the bill would allow federal and state courts to apply their respective jurisdictional laws concerning

Critics have characterized the very nature of arbitration as undemocratic, pointing particularly to its questionable upholding of the legal values of equal protection and due process yet holding out potential benefits of arbitration as part of a larger judicial system.<sup>159</sup> In looking at the increased prominence of arbitration in place of litigation and at arbitration's flaws, Jacqueline Nolan-Haley has recognized part of the critical problem concerning this work—the scholarly criticism of the Court's "favorable attitudes" toward arbitration in the consumer and employment settings.<sup>160</sup> "The Court has thrown the U.S. out of step with other advanced countries and made arbitration agreements a focus of criticism."<sup>161</sup> It would seem that the Court has spurred the growth of a form of dispute resolution that is on many accounts exacerbating conflict.<sup>162</sup> Of course, civil litigation, though a constitutional guarantee and though indisputably governed by doctrines of equal protection and due process, is hardly an ideal alternative. It is perhaps also ironic that the very concerns that drove the flight from court to arbitration have not been sufficiently diminished.<sup>163</sup> Cost, time, complexity, and lawyerly gamesmanship have come to plague arbitration itself.<sup>164</sup>

Moreover, the contract-defense-based arguments countering the Court's propensity to enforce mandatory pre-dispute arbitration provisions have left unequal bargaining power and the doctrine of unconscionability virtually meaningless in the arbitration context.<sup>165</sup>

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contract interpretation to find arbitration provisions unconscionable or unenforceable notwithstanding the FAA. *See id.* § 3(c). Third, the bill would give to the courts, not arbitrators, the essential task of determining whether an arbitration agreement is enforceable in the first place. *See id.* § 3(d).

159. *See* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 *LAW & CONTEMP. PROBS.* 279, 290–308 (2004). *See generally* David Horton, *Arbitration as Delegation*, 86 *N.Y.U. L. REV.* 437 (2011) (making the point that the Court's enforcement of mandatory arbitration effectively violated the non-delegation doctrine by delegating lawmaking to private organizations and people).

160. Jacqueline Nolan-Haley, *Mediation: The "New Arbitration"*, 17 *HARV. NEGOT. L. REV.* 61, 67 (2012).

161. Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 *CARDOZO J. CONFLICT RESOL.* 513, 536 (2017).

162. *See id.*

163. *See id.* at 513–14.

164. *See id.* at 536–37.

165. *See, e.g.,* Davis, *supra* note 55, at 278–98; William Alan Nelson II, *Take It or Leave It: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, 17 *U. PA. J. BUS. L.* 573, 609–11 (2015); Sternlight & Jensen, *supra* note 6, at 77–90.

The extreme inequality of bargaining power evident in each of the contexts of employment, consumer finance, and securities industry related agreements has failed to move the Court in the many cases constituting the now-solidified jurisprudence the Court has built to sustain and enhance mandatory arbitration.<sup>166</sup>

We are at an impasse in scholarly assessment of the Court's arbitration jurisprudence.<sup>167</sup> We are at an impasse culturally, where unknowing, relatively powerless citizens enter into mandatory arbitration provisions routinely in order to conduct commonplace transactions in our consumer society.<sup>168</sup> The only redress of the relatively powerless is often an economically irrational option to proceed with sole arbitration for de minimis individual wrongs that, in the aggregate, may yield tens or hundreds of millions of dollars for the wrongdoer.<sup>169</sup> Yet, routine waivers of class actions and class arbitration claims are now enforced.<sup>170</sup> So the aggregate check on large scale wrongdoing affecting individuals in minimal ways, yet reaping quite sizeable unjust rewards, is dead.<sup>171</sup> We need an alternative to the unacceptable stalemate that is our current milieu.

### III. THE MEDIATION ALTERNATIVE TO ARBITRATION

We should consider promoting contractual mediation as an alternative to the mandatory arbitration gridlock.<sup>172</sup> Of course, the distinctions between arbitration and mediation are great.<sup>173</sup> As critics have pointed out, arbitration entails the practically unreviewable final

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166. See Barr, *supra* note 6, at 806 (noting that consumers generally do not give opportunity for meaningful consent due to inequality of bargaining power).

167. See, e.g., Nolan-Haley, *supra* note 160, at 66 (“Arbitration is, in many respects, in crisis mode.”).

168. See Barr, *supra* note 6, at 806 (noting that “consumers pay little or no attention to arbitration clauses at the time of contracting”).

169. See *Fairness in Numbers*, *supra* note 6, at 122 (arguing that “enforcing boilerplate class waivers raises problems of equipage, equality, and fairness”).

170. See *id.* at 124–26 (noting two cases in which the Supreme Court has enforced contract waivers of class arbitration).

171. See *id.* at 127 (explaining that part of the reason courts have enforced contract waivers of class arbitration is that courts fear putting too much power in the hands of class arbitration plaintiffs).

172. See Nolan-Haley, *supra* note 160, at 63, 66 (arguing that mediation is the natural replacement for arbitration, which has become the new litigation).

173. See *id.* at 69 (describing the main difference between mediation and arbitration as mediation's voluntariness).

decision by a neutral third party or panel.<sup>174</sup> The arbitration process in many instances is very akin to litigation and involves an increasing amount of lawyering.<sup>175</sup> Discovery may include multiple subpoenas for people or documents.<sup>176</sup> Document production may include troves of bates numbered pages of e-correspondence and material agreements.<sup>177</sup> Witness lists may be akin to parades.<sup>178</sup> In short, the brevity and simplicity of arbitration has yielded to lawyered formalities recreating civil litigation in a private, unreviewed world.<sup>179</sup>

Mediation is not a process of adjudication.<sup>180</sup> Parties to mediation only resolve their disputes volitionally, by coming to an agreement in some way aided by a neutral third party.<sup>181</sup> The approach is one of self-determination, in great contrast to determination by a judge-like third party in arbitration.<sup>182</sup> Variations of mediation may require court approval of agreements reached by the parties, varying levels of involvement by the mediator, emphasis on joint sessions or party separating caucuses and more.<sup>183</sup> In its ideal form, the mediation process broadens the possibility of agreement addressing underlying issues in a dispute rather than focusing on narrow, legal conflicts

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174. See Nelson, *supra* note 165, at 600 (explaining that courts have a very narrow and limited ability to review arbitration decisions).

175. See Nolan-Haley, *supra* note 160, at 66–67 (describing the trend in arbitration toward more litigation practices).

176. See Stipanowich, *supra* note 161, at 536–37 (noting that pretrial discovery and document discovery is permitted in arbitration proceedings).

177. See *id.* (listing the various forms of discovery allowed in arbitration proceedings).

178. See *id.* (explaining generally that arbitration proceedings have become more like litigation over time).

179. See *id.* (criticizing arbitration by stating that “the pendulum has swung too far in the direction of court-like procedure and away from expedition and cost-effectiveness”).

180. See Nolan-Haley, *supra* note 160, at 68 (emphasizing the self-determination and voluntary aspects of mediation).

181. See *id.* (stating that most mediation is defined by its voluntariness).

182. See *id.* at 68–69 (explaining that the major difference between mediation and arbitration is that mediation is self-determined).

183. See Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1, 29 (2003) [hereinafter *The New Old Grid and the New Grid System*] (describing the variety in mediation experiences based on the differences among mediators).

determined by a judge-like arbitrator.<sup>184</sup> Its hallmarks are self-determination and fairness.<sup>185</sup>

Yet, any proposal to precede or replace arbitration with some version of mediation must recognize and address shortcomings of mediation that show up in differing versions of mediation.<sup>186</sup>

## A. Versions of Mediation

### 1. *Approaches*

Approaches neutral third parties employ in mediation and the contexts of mediation can vary quite substantially.<sup>187</sup> Leonard Riskin's basic rubric for categorizing approaches to mediation is well-settled in the field of alternative dispute resolution, though he has modified the rubric over time and cautions against overemphasizing it in any form.<sup>188</sup> A commonly accepted modification of Riskin's original "grid" includes the fundamental distinction of the evaluative, facilitative, and also the transformative approach to mediation.<sup>189</sup> "Evaluative" references an approach where a neutral third party mediator offers an informed assessment and prediction regarding each party's position in the mediation.<sup>190</sup> "Facilitative" refers to an approach where the third party neutral mediator does not evaluate but assists the

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184. See Nolan-Haley, *supra* note 160, at 69 (describing individual remedies that may be had in mediation but are not available in litigation or arbitration).

185. See *id.* at 68–69 (praising mediation based upon its characteristics of self-determination and "individualized justice").

186. See *id.* at 74 (describing mediation's slide toward litigation- and arbitration-type practices and the problems associated with that shift).

187. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 8 (1996) (recognizing the variety of approaches to mediation).

188. See *id.* at 44–46 (describing Riskin's original formulation of the grid rubric for mediation approaches); Leonard L. Riskin, *Replacing the Mediator Orientation Grids, Again: The New Grid System*, 23 ALTERNATIVES 127, 127, 129–31 (2005) (explaining Riskin's changes to the grid system as he would make them in 2005); *The New Old Grid and the New Grid System*, *supra* note 183, at 5–13 (explaining Riskin's changes to the grid system in 2003); Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873, 878–82 (2016) (analyzing the evaluative and facilitative approaches from Riskin's original grids); see also ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* 44 (2005) (citing Riskin to describe the development of a diversity of views regarding what mediation can and should be).

189. See BUSH & FOLGER, *supra* note 188, at 44.

190. See *id.*

parties in understanding one another's positions and interests and assists in their consideration of possible outcomes to their dispute.<sup>191</sup> In a "transformative" approach, the third party neutral mediator is concerned with empowering the parties in dispute to relate to one another and address, perhaps not even resolve, their conflict so that they may continue to be in relationship with one another, realize their impact on one another, and communicate further in the future.<sup>192</sup> Perhaps the greatest criticism of mediation lies in the overly aggressive use of the evaluative approach that can border on mediator coercion pushing parties toward settlement, as discussed below.<sup>193</sup> The transformative approach is probably the least understood and least knowingly employed. Hence, the facilitative approach, somewhat of a middle ground, would seem to offer a reasonable practice standard. Facilitative mediators are not as passive as transformative mediators, nor as proactive as evaluative mediators.

## 2. Context

In assessing mediation as an alternative to mandatory arbitration or civil litigation, we should be mindful of context in addition to approach. Mediation is conducted in myriad contexts. One major growth area for mediation is court itself. Perhaps the most often cited study of court-related mediation was conducted in Ohio nearly twenty years ago<sup>194</sup> Wissler's court-connected mediation data included roughly 1,000 civil cases assigned to mediation in Ohio state courts—primarily during a settlement week program.<sup>195</sup> Such settlement programs are common in many state courts and were instituted primarily in the attempt to clear court dockets.<sup>196</sup> Similar to the author's own experience of mediating for the state Superior Court in Rhode Island, 52% of the cases included in Wissler's data were personal injury claims from automobile accidents.<sup>197</sup> This is one particularly narrow application of mediation. In practice, personal

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191. *See id.*

192. *See id.* at 109.

193. *See infra* Section III.B.

194. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 644–46 (2002) [hereinafter *Court-Connected Mediation*]; *see also* Roselle L. Wissler, *Representation in Mediation: What We Know from Empirical Research*, 37 FORDHAM URB. L.J. 419, 426–27 (2010) (discussing additional studies).

195. *Court-Connected Mediation*, *supra* note 194, at 645.

196. *See id.* at 668–71.

197. *Id.* at 652.

injury automobile accident suits are a voluminous niche involving many industry-specialist plaintiff counsel bringing such cases as well as a large industry of insurance defense counsel battling against and settling such claims. The work of a mediator in this milieu is heavily skewed toward inducing settlement.<sup>198</sup> The mediator's role in such cases is almost that of a broker shuttling offers between separate caucuses chiefly with plaintiff and defense counsel in an effort to settle cases while focused virtually exclusively on monetary damages, incited by courts pushing to get such cases off the docket.<sup>199</sup> Direct communication between the parties, or even participation in joint sessions, in these situations is often minimal or entirely absent.<sup>200</sup>

Yet, other versions of mediation can involve the most complex and high stakes conundrums involving many parties.<sup>201</sup> Private commercial mediation often involves much more than reaching agreement on monetary damages.<sup>202</sup> It can open disputes to creative solutions addressing underlying business challenges that have manifested themselves in almost proxy-like legal battles. Complex cases, very unlike automobile accident settlements, can expand resolution of a narrow legal dispute into enhanced relationships addressing underlying business interests. Mediator roles in these complex cases can facilitate direct party listening and brainstorming that go to the heart of mediation's best qualities of flexibility and self-determination.

Studies on mediation can be misleading in that their context—run-of-the-mill auto accident cases in court-connected mediation—can often determine or limit their associated mediation process. That is, conducting a transformative mediation in a court-annexed auto accident case to many may seem counterintuitive.<sup>203</sup> Indeed, whether

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198. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The "Problem" in Court Ordered Mediation*, 15 GEO. MASON L. REV. 863, 875 (2008) (discussing prevalence of settlements).

199. See *id.*

200. See *id.* at 875–76.

201. See Eric D. Green, *The Role of the Judge in the Twenty-First Century: Re-examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L. REV. 1171, 1179–91 (2001) (describing a Microsoft mediation among others).

202. See *id.* at 1179 (discussing how private actions involving Microsoft related to money but also other commercial issues).

203. See Elad Finkelstein & Shahar Lifshitz, *Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation Contracts*, 25 OHIO ST. J. ON DISP. RESOL. 667, 674–76 (2010). But see Jody B. Miller, *Mediating Commercial Cases in U.S. Municipal Courts: A Case for Transformative Mediation*, 1 OPINO JURIS COMPARATIONE 1, 4 (2012) (“Transformative mediation is well suited for commercial

court-connected mediation is a positive or negative development is the subject of spirited debate.<sup>204</sup> Again, tremendous pressure to settle often exists, and an intense cultural expectation of damages-focused caucused exchange underlies the court-connected setting.<sup>205</sup> The reality of mediation is often determined by the distinctions between court-annexed mediation and private mediation<sup>206</sup>

### 3. *Developments in Mediation*

Regardless of its shortcomings, mediation is now intimately intertwined with the courts.<sup>207</sup> Early mediation in the United States grew largely out of the urban social unrest of the 1960s.<sup>208</sup> Early mediation's combined address of labor and criminal law issues led to the formation of community mediation centers, the connection of those centers with the criminal justice system, and then direct

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cases since it affords parties a forum to move out of the negative, deconstructive experience that led to the escalation of the conflict, providing them with the ability to articulate the experience and its relation to the claim before the court. The idea that commercial cases are best addressed with a focus on the dollar amount misunderstands why cases make their way to court in the first place: because conflict has become negative and destructive, affecting the way the parties relate to one another, and leaving them few if any other options to resolve it.”).

204. See Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 NOTRE DAME L. REV. 705, 706 (2008) (“[T]he current ambivalence about the relationship of mediation to the courts is only the latest phase of a four-decade-long tension in this ‘partnership’ of two very different dispute resolution processes. From the earliest beginnings of the ‘modern mediation field’ in the late 1960s to the present, the relationship of mediation to the courts has fluctuated between two orientations. In the first, mediation has been seen and has served as a faithful ‘servant’ of the court system, performing functions vital to the courts and to effective judicial administration. In the second, mediation has been encouraged and has sought to ‘break free’ and establish itself as a separate and distinct conflict resolution process, performing very different functions that are vital to society but unrelated to judicial administration per se. The cycling between these two orientations is driven by the very different potentials mediation offers as a social process, as viewed through different professional eyes. These different views explain why some today are gratified by what they see as mediation’s success in finding a firm place in the court system, while others are discouraged by what they see as the court system ‘capturing’ mediation and depriving it of its real social value.”).

205. See Riskin & Welsh, *supra* note 198, at 874–75 (discussing how mediation cases are resolved by lawyers who focus on damages).

206. See Rubinson, *supra* note 188, at 882–84.

207. See Bush, *supra* note 204, at 706 (offering a history of mediation with an emphasis on the tension the court-connection has on conceptions of mediation).

208. See *id.* at 709.

involvement with courts.<sup>209</sup> Early family court (divorce) mediation programs have expanded and civil programs have grown—again often in attempts to clear dockets.<sup>210</sup> These court-connected programs have been much criticized for their emphasis on settlement and their lawyer-focused process—much like settlement conferences.<sup>211</sup> Again, they are generally seen as heavily influenced by evaluation, if not coercion, from mediators incented to resolve cases with settlements.<sup>212</sup> Yet, alternative applications of mediation have also grown. So, the tension between mediation as a relational, community-based process separate from the courts and the court-connected drive toward self-determined settlement remains a challenge.

#### 4. *Public Justice, Private Process*

A primary flaw in mediation shared with arbitration is its private, confidential nature, closed off from public review and visible public justice.<sup>213</sup> Finkelstein and Lifshitz have sought to address this with the proposal of a communitarian approach to mediation that would put a court-affiliated mediator in position as a community representative in the mediation process.<sup>214</sup> While this idea is a well-intentioned notion primarily meant to address concern for public justice, it raises a countervailing concern of converting mediation back into civil litigation or legalistic arbitration.<sup>215</sup> Finkelstein and Lifshitz' communitarian proposal would not only entail court approval of settlement contracts but the public disclosure of post-mediation contracts, which may or may not help to resolve the public-private tension.<sup>216</sup> The communitarian proposal also relies heavily on notions of informed consent as a cornerstone of procedural justice intended to address social psychology research emphasizing the import of disputant perception of procedure as fair.<sup>217</sup> Finkelstein and Lifshitz

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209. *See id.*

210. *See id.* at 717–20.

211. *See id.* at 731–33.

212. *See id.*

213. *See Diffusing Disputes*, *supra* note 6, at 2855–83.

214. *See Finkelstein & Lifshitz*, *supra* note 203, at 674–75.

215. *See id.*

216. *See id.* at 692–94. *Contra* Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 64–65 (2004) (looking at the law's coopting of mediation as analogous to the law's prior coopting of equity).

217. *See Finkelstein & Lifshitz*, *supra* note 203, at 701; *see also* Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly*

acknowledge that their proposal undermines the confidential nature of mediation yet deem the increased public review necessary and ultimately not worse than the disclosure consequences of post-mediation contract litigation.<sup>218</sup>

### 5. Procedural Justice and Fairness

A paramount concern with any approach to mediation must be procedural justice.<sup>219</sup> Nancy Welsh makes a strong case for the paramount import of procedural justice in court-annexed mediation, calling attention to the close connection to constitutional rights recognized in civil litigation.<sup>220</sup> The role of lawyers in the process is a major factor in distinguishing court-annexed mediation from settlement conferences.<sup>221</sup> Much of Welsh's focus is on the sense of fairness that parties to mediation derive from the process—centering the existence of due process on the perception of the parties.<sup>222</sup> Process control and participation are essential elements of fairness in mediation.<sup>223</sup>

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*Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 787–88 (1999) (fleshing out informed consent as the distinguishing feature of mediation); Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 50–51 (2000) (focusing on what mediators should tell disputants to fairly inform them in the mediation process).

218. Finkelstein & Lifshitz, *supra* note 203, at 708.

219. See Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 619 (2004) [hereinafter *Looking Glass*]; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L. Q. 787, 817–19 (2001) [hereinafter *Making Deals*]; see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 129–30 (1988); John R. Allison, *A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest*, 32 AM. BUS. L.J. 481, 488–89 (1995) (discussing constitutional and non-constitutional origins of process, though focused on bias).

220. See *Making Deals*, *supra* note 219, at 838–41.

221. See *id.* at 838–39, 843.

222. See *id.* at 818.

223. See Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 284–85, 290 (2012) (“A careful reading of mediation literature and provisions in codes of conduct for mediators that refer to fairness considerations reveals two general meanings attached to fairness. First, a normative meaning of fairness, i.e., an understanding of fairness as a concept that describes a norm of behavior that ought to be followed; second, an understanding of fairness as a *perception* that describes an experience of fairness perceived by various people.”).

Welsh draws on significant work by social psychologists pointing to the importance of parties' subjective perception of procedural fairness in dispute resolution.<sup>224</sup> It is the sense that the process of dispute resolution is fair that matters in giving the disputants the sense that justice has been done, almost independent of outcome.<sup>225</sup> Indeed, more than outcomes, procedure seems to determine disputants' sense of justice and commensurate satisfaction with the method of dispute resolution.<sup>226</sup> Note, however, that we should not conflate the perception of procedural fairness that Welsh refers to with the notion of normatively fair procedure in terms of accurate rule following.<sup>227</sup>

Social psychologists assessing procedural justice and fairness of dispute resolution, Lind and Tyler, consider Levanthal's theory of procedural justice which offers some objectively reasonable measures with which to judge qualitative fairness in dispute resolution.<sup>228</sup> Those measures are the elements of consistency, bias suppression, accuracy of information, correctability, representativeness, and ethicality.<sup>229</sup> Lind and Tyler sort through numerous studies to arrive at a conclusion that disputants' conception of fairness in dispute resolution is largely explained by the group value theory of procedural justice as opposed to the self-interested model.<sup>230</sup> That is, people are more concerned with their treatment in the dispute resolution process as a function of their perception of its impact on their standing in society.<sup>231</sup> How people perceive their treatment compared to others—the relational context—may be determinative as to whether they feel a dispute resolution process has been fair.<sup>232</sup>

Other factors that matter in disputants' perception of fairness are the disputants' sense that they have control over the process and that

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224. See *Looking Glass*, *supra* note 219, at 619–20; see also LIND & TYLER, *supra* note 219, at 130.

225. See *Looking Glass*, *supra* note 219, at 629.

226. See *id.* (notwithstanding that several studies have indicated that Americans have a propensity to prefer adversarial dispute resolution, selecting arbitration as a first-choice method).

227. See Shapira, *supra* note 223, at 300–01 (“A perception and conception of procedural fairness are not necessarily the same for several reasons. One reason is that one could wrongly believe that he has been mistreated in violation of the rules even though this has not been the case.”).

228. See LIND & TYLER, *supra* note 219, at 131.

229. See *id.* at 131–32.

230. See *id.* at 230.

231. See *id.* at 237.

232. See *id.* at 230–40.

the process allows them to express themselves.<sup>233</sup> Indeed these points are particularly salient to one favoring mediation as mediation's essential volitional element and emphasis on being heard by and listening to opponents are so at the heart of the process.<sup>234</sup> An additional benefit that this research calls attention to is post-conflict relations—which are generally more positive in the mediation context than in arbitration. Presumably, again, this is due at least in part to the volitional nature of any mediation outcome.<sup>235</sup> Yet, Lind and Tyler call for much more research on this after effect, perhaps even more so because of contrary work emphasizing the public benefits of civil litigation in our constitutional system.<sup>236</sup>

Further critiques of mediation point to flaws in its fundamental claim to self-determination.<sup>237</sup> Horror stories of mediator bias and influence have been told.<sup>238</sup> Indeed, ample litigation arising over failed mediation has been cataloged.<sup>239</sup> Moreover, much of the relational benefit of mediation appears to have been lost in the growing propensity of mediators to forego joint sessions and conduct mediations as go-betweens for parties in exclusive caucus formats.<sup>240</sup>

While much of the literature addressing disputants' perception of fairness in dispute resolution focuses on participant perception, public perception matters also.<sup>241</sup> This of course feeds back into the social justice critique shared with arbitration—the lack of public disclosure and reviewability.<sup>242</sup> Yet, the very experience of mediation

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233. See *id.* at 100.

234. See *id.* at 121–22.

235. See *id.*

236. See *id.*

237. See James Coben, *Ruminations on the "Culture" of Law: Recognizing an Inevitable Influence on the Evolution of Dispute Resolution Alternatives*, 2 J. ALTERNATIVE DISP. RESOL. EMP. 4, 4 (2000) (arguing that mediators engage in manipulation to foster settlement); Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RESOL. 123, 137–39 (2016).

238. See *id.* See generally Ellen Waldman, *Story as Sermon and Seduction*, 34 CARDOZO L. REV. 2443 (2013) (presenting a collection of mediation stories).

239. See James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43, 49–57 (2006).

240. See Love & Waldman, *supra* note 237, at 138.

241. See LIND & TYLER, *supra* note 219, at 160; Shapira, *supra* note 223, at 302–04.

242. See *Diffusing Disputes*, *supra* note 6, at 2855–83; see also Robert A. Baruch Bush & Joseph A. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 3 (2012) (“The criticism of mediation as inimical to the achievement of justice has taken two major forms, although both point to similar elements of the process as problematic. The first type of critique

can be seen to have public externalities.<sup>243</sup> In the transformative (party-centered) approach to mediation, the very awareness of the interaction of the process is enhancing of civility and therefore productive of positive public externalities.<sup>244</sup> Social justice refers to “achieving relative equality of conditions (not just opportunities) as between all groups or classes within the society.”<sup>245</sup> Another version of the justice critique asks, “[I]s it sufficient . . . for the outcome to be acceptable to the parties or must those settlement terms match the requirements of some external standard of evaluation?”<sup>246</sup>

Concern for fairness is so palpable that it shows up strongly in similar research in politics with implications for public policy formation.<sup>247</sup> Again, the process, not simply the outcome, matters.

### 6. *Legalization and Lawyers*

The expansion of court-connected mediation and the associated legalization of mediation has been prominently critiqued. Jacqueline Nolan-Haley has called attention to the commonalities of mediation

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focuses on the ‘individuating’ nature of the mediation process, in which every case is handled on its own unique terms. The second type of critique focuses on the informality of the process, both procedurally and substantively, and the absence of formal rules and outside scrutiny.”)

243. See Bush & Folger, *supra* note 242, at 36 (“Parties to mediation are affected in two ways by the process: in terms of their capacity for self-determination, and in terms of their capacity for consideration and respect for others. And *that itself* is the public value that mediation promotes. In other words, going through mediation [can be] a direct education . . . as to self-determination on the one hand and consideration for others on the other. . . . The experience of the mediation process . . . serves the public value of civic education in self-determination and respect for others. . . . In our contemporary society, citizens increasingly suffer from learned dependency—whether on experts, on institutions . . . or otherwise—and from mutual alienation and mistrust, especially along lines of race, gender and class. The resulting civic weakness and division threaten the very fabric of our society. Personal experiences that reinforce the civic [practices] of self-determination and mutual consideration are of enormous public value—and this is precisely what the process of [mediation] provides. This [strengthening of civility] is the public benefit . . . critical to discussions of the public value of mediation, by comparison to the formal legal process or other ADR processes.”).

244. See *id.*

245. *Id.* at 3.

246. Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 214, 227–28 (2005) (proposing, inter alia, six principles supporting mediation as procedurally just: voluntariness, inalienability of interests, publicity of outcomes, dignity and respect, informed decision-making, and toleration of conflicting fundamental values).

247. See LIND & TYLER, *supra* note 219, at 147–72.

with equity in her look back to Pound's lament of the legalization of equity—the American folding of equity into the general body of civil litigation despite its separate origins.<sup>248</sup> She finds a similar legalization of today's versions of mediation.<sup>249</sup> She notes mediation's "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>250</sup> In criticizing the increasingly legalistic quality of mediation, Nolan-Haley appears to emphasize fairness and individualized, self-determined justice as the heart and soul of mediation:

The wholesale integration of mediation into our civil procedure points toward a de-facto merger of law and mediation. While less formal than the official merger of law and equity, it is nonetheless real. Perhaps more than any other ADR process, mediation has easily blended into the civil justice system and is greatly accepted.<sup>251</sup>

Indeed, Nolan-Haley asserts that mediation has become the normal end to litigation.<sup>252</sup> She describes the nature of court-connected mediation as both public and private.<sup>253</sup> She advocates for separate and distinct mediation practice not so intertwined with civil litigation, calling for procedural justice through mediation that is not rule bound.<sup>254</sup> Not surprisingly, as agreements in mediation have become less voluntary, resulting from more coercive mediators pushing for settlement, challenges to agreements have risen.<sup>255</sup>

Nolan-Haley also has been critical of developments with mediation which she describes as moving mediation toward arbitration.<sup>256</sup> She argues that increased involvement of lawyers and the resultant adversarial posturing, together with the expansion of the evaluative approach to mediation, are particularly demonstrative of this shift.<sup>257</sup> She worries that as a consequence, the core mediation values of self-determination and individualized justice are being

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248. See Nolan-Haley, *supra* note 216, at 62–65.

249. See *id.*

250. *Id.* at 64 (quoting Lon Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971)).

251. See *id.* at 66.

252. See *id.*

253. See *id.*

254. See *id.* at 70–71.

255. See Nolan-Haley, *supra* note 160, at 87–89.

256. See *id.* at 63.

257. See *id.*

corrupted.<sup>258</sup> Indeed, in her survey of New York lawyer-mediators, Nolan-Haley found much to criticize about the influence of lawyers on mediation.<sup>259</sup> She found that the lawyers have framed issues narrowly and legalistically, used adversarial tactics and inflammatory language, and employed other tactics not akin to party-focused self-determination.<sup>260</sup> Part of the problem she finds lies outside of lawyers in the adversarial nature of our very culture.<sup>261</sup>

Similarly, Nancy Welsh proposes modifications of present versions of mediation to restore its essential elements of self-determination and procedural justice.<sup>262</sup> Much of Welsh's remedy lies in the training of mediators to address bias, develop trust, and promote self-reflection and fairness in the process.<sup>263</sup> Welsh draws on a collection of scholarly work to conclude that a fair dispute resolution process includes the opportunity for disputants to express themselves, demonstration that the decision makers have heard the disputants, objective neutrality in the forum, and dignified treatment.<sup>264</sup> She notes that systems having these features can be shams and can be fraught with inequality of social status, resulting in skewed experiences, diminishing the voice of those with low social status.<sup>265</sup> Perhaps controversially, Welsh supports others' calls for mediators to take an active role in preventing unconscionable outcomes to mediation—giving mediators a duty to censor and alter agreed-to outcomes.<sup>266</sup> This references the also controversial concept of mediators serving as power balancers—knowingly and actively offsetting the resource-laden and powerful party to give the resource-deprived and relatively less powerful party a stronger voice in the mediation process on the notion that this will more likely result in a fair outcome.<sup>267</sup>

Yet, while scholars have criticized the role of lawyers in mediation and blamed them for turning mediation into arbitration or litigation, others have seen them as a more positive instrumental

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258. *See id.* at 65.

259. *See id.* at 74–84.

260. *See id.*

261. *See id.* at 90.

262. *See* Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721, 721–22 (2017).

263. *See id.*

264. *See id.* at 733–34.

265. *See id.* at 737–50.

266. *See id.* at 760–61.

267. *See* BUSH & FOLGER, *supra* note 188, at 16–18.

resource.<sup>268</sup> Jean Sternlight has noted that lawyer knowledge of processes and strategy in dispute resolution appears to be the most compelling benefit of counsel in a mediation context, though she points out additional benefits such as the skills of legal argument and information gathering.<sup>269</sup> Sternlight makes the compelling point that it is those with the least resources who can benefit the most from lawyer representation in dispute resolution.<sup>270</sup> Perhaps the greatest impact of Sternlight's position derives from her assessing the mediation experience as it actually is and not as the ideal form it ought to be.<sup>271</sup> In its present form, she argues persuasively, mediation can benefit from lawyers' skills.<sup>272</sup>

### 7. Diversity of Dispute Resolution Practices

Part of the challenge in assessing definitively what the challenges with current mediation practices are and how to modify and improve them to preempt or provide an alternative to mandatory arbitration is the very diversity of mediation practices, both court-connected and otherwise.<sup>273</sup> Thomas Stipanowich has referenced his work with Ian Macneil and Richard Speidel in finding much opportunity in contractual provisions for managing disputes, including mediation and arbitration.<sup>274</sup> Stipanowich notes that some companies have found opportunities in implementing creative dispute resolution programs, holding open alternative dispute resolution processes beyond largely lawyer-driven mediation and arbitration.<sup>275</sup> Diverse and innovative approaches to dispute resolution may include technology-enabled approaches, such as online communication and greatly enhanced data collection and access, and need not be limited

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268. See Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 *FORDHAM URB. L.J.* 381, 383–84 (2010).

269. See *id.* at 405–10.

270. See *id.* at 395–96.

271. See *id.* at 417–18.

272. See *id.*

273. See Stipanowich, *supra* note 161, at 521.

274. See *id.* at 538 (referencing IAN R. MACNIEL et al., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT* (1996)); see also Larry A. DiMatteo, *Questioning the Ubiquitousness, But Not the Value, of Arbitration Carve-Outs*, 66 *FLA. L. REV. F.* 11, 11 (2015) (providing for discussion of related contractual provisions); Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 *FLA. L. REV.* 1945, 1945 (2015).

275. See Stipanowich, *supra* note 161, at 538 (looking to the construction industry as an imperfect example).

to narrow versions of mediation and arbitration.<sup>276</sup> Stipanowich mentions a contrasting Chinese approach where adjudicator and mediator can switch hats, unlike most U.S. alternative dispute resolution models.<sup>277</sup> Of course, such innovations raise the already-existing criticism of med-arb that characterize such combinations as continued legalization of mediation, as discussed above.<sup>278</sup>

Internationally, many see a trend toward mixed-mode dispute resolution, combining aspects of mediation, conciliation, arbitration, as well as mixing the roles of neutrals and adjudicators.<sup>279</sup> Such combinations involve variations on mediation attempts that if unsuccessful result in arbitration that may or may not be constrained by offers made in mediation.<sup>280</sup> Stipanowich sets out a taxonomy of approaches to adjudication and evaluation in an attempt to create a definitive international lexicon for varied combinations and innovations of dispute resolution.<sup>281</sup> He calls for further work by his task force to conduct a multiphase study of these approaches to develop international guides and best practices for an increasingly complex array of alternative dispute resolution structures.<sup>282</sup>

## B. Building the Mediation Alternative

The preceding challenges to mediation are real but are not so damning as to impede the suggestion that some attempt at mediation is a better means of dispute resolution than pure reliance on mandatory pre-dispute arbitration. Several of the flaws of arbitration are shared with mediation, most particularly the flaws of confidentiality, privacy,

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276. See *id.* at 533–34, 546 (mentioning online crowd community courts and the EU online platform for resolving online consumer contract disputes); see also Thomas J. Stipanowich & Zachary P. Ullrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators*, 25 AM. REV. INT'L ARB. 395, 398–99 (2014) (providing a related survey).

277. See *id.* at 541–42.

278. See generally Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157 (2015) (arguing that the “core values of mediator neutrality . . . cannot be satisfied by Med[iation]-Arb[itation]”).

279. See Thomas J. Stipanowich & Véronique Fraser, *The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay Between Mediation, Evaluation and Arbitration in Commercial Cases*, 40 FORDHAM INT'L L.J. 839, 853 (2017) (discussing the shifting roles of a mediator).

280. See *id.* at 853.

281. See *id.* at 871–73.

282. See *id.* at 877–85.

and lack of public review or public conception of justice.<sup>283</sup> Additional flaws with mediation include its creep toward arbitration and legalization—especially in court-connected contexts.<sup>284</sup> Yet, even in the midst of all these flaws and criticisms, the winning attributes of self-determination, better actual and perceived procedural justice, and flexible, volitional resolution unconfined by rules-based adjudication make it the better approach—even when unsuccessful at reaching negotiated outcomes. Second steps that do not result in agreement-resolving disputes can follow mediation.<sup>285</sup> Attention to mediation's challenges can help us to craft an alternative to mandatory pre-dispute arbitration that best addresses these important concerns.

Even if mediation does not satisfactorily solve the privatization of dispute resolution problem or the related public justice demand, it does in many of its forms offer an accessible, flexible means for parties in conflict to hear and be heard and to choose outcomes in a way that neither arbitration nor litigation in their rule-driven legalism make possible. Mediation is, at the very least, a best first attempt at resolving disputes.

Mediation's best hope is that it opens doors to full communication between parties in conflict, enabling them a fair, self-driven process to determine their own mutually acceptable outcomes. When most successful, mediation leads to win-win solutions addressing underlying interests that otherwise might be cloaked in limited, adversarial legal issues and arguments. While the adjudicative processes of litigation and arbitration can at most resolve those adversarial legal issues and arguments, mediation can do much more.

To some extent, mediation remains the wild west of dispute resolution. Yet, to harken back to the point Stipanowich makes, this is in part its value and appeal.<sup>286</sup> If we are guided by best practices, why can we not experiment with creative contractual solutions to incorporate mediation as at least a first step in innovative, possibly combined, forms of dispute resolution to supplant mandatory arbitration? It is the most logical alternative to mandatory arbitration. Though imperfect, contractual mediation would offer low cost, speed, and simplicity, in addition to self-determination, flexibility, and fairness in process. It would mitigate against coercive entrapment in private adjudication decided by an unreviewed private judge and

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283. See Coben, *supra* note 237, at 4–7.

284. See Pappas, *supra* note 278.

285. See *Looking Glass*, *supra* note 219, at 580.

286. See Stipanowich, *supra* note 161, at 538.

would allow for subsequent versions of dispute resolution in the event that it resulted in impasse.

A best version of the mediation alternative to mandatory pre-dispute arbitration must account for the challenges discussed above. That is, a best version would first incorporate the promotion of a facilitative approach to mediation, alleviating concerns of coercion in too aggressive evaluative approaches.<sup>287</sup> Second, a best version of the mediation alternative would allow experimentation with court-connected and court-separated contractual arrangements.<sup>288</sup> Third, the best version would allow for public awareness and education about mediation and create some component of public reviewability—perhaps with heavily redacted public disclosure of post-mediation agreements.<sup>289</sup> Fourth, a best version would require paramount attention to procedural fairness and the perception of procedural fairness both by disputants and the public.<sup>290</sup> Fifth, the best version must attend to the role of lawyers in mediation and work, through training, to control their involvement so that parties have active and meaningful participation in the process, even as advised and benefited by lawyers' experience, information providing, and advocacy skills.<sup>291</sup> Finally, the best mediation alternative (or at least precursor) to mandatory pre-dispute arbitration should allow for innovation and resist constraint by existing and preceding forms of mediation and combinations of mediation with other forms of dispute resolution.<sup>292</sup>

### C. Volitional Mediation as a Best Practice

It should be clear from Parts I and II of this work that the Court and the critics are at an impasse over mandatory arbitration and that alternative proposals are needed to move dispute resolution in the direction of greater fairness and justice, while still honoring the driving interests of simplicity and speed that first spurred the development of alternative dispute resolution in lieu of crowded civil court calendars, complex rules of procedure, and opaque lawyering.<sup>293</sup>

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287. See *supra* Section III.A.1.

288. See *supra* Section III.A.2–3.

289. See *supra* Section III.A.4; see also Finkelstein & Lifshitz, *supra* note 203, at 686.

290. See *supra* Section III.A.5.

291. See *supra* Section III.A.6.

292. See *supra* Section III.A.7.

293. See generally *supra* Parts II, III (discussing different court and critic approaches to mandatory mediation).

In addition to the constraints of arbitration and its increasingly litigation-like legalism, the Supreme Court's effective refusal to recognize defenses to contractual mandatory pre-dispute arbitration under Article 2 of the FAA leaves critiques of injustice, particularly toward individual employees, individual consumers, and individual investors, too credible and too disturbing to leave unheeded. Simply continuing to criticize (no matter how accurately and convincingly) the Supreme Court's firmly established precedent enforcing myriad versions of mandatory arbitration is not enough. Promoting the contractual requirement of mediation as at least a first step alternative to arbitration is a plausible, constructive modification of dispute resolution. While mediation as at least a first step will not cure all the ills of dispute resolution, it offers substantially more hope of fairness and would directly counter the problem of forced arbitration with mediation's inherently participatory process and volitional outcomes.

From a consumer perspective, much of the concern over due process in dispute resolution lies in preventing or redressing the systemic injustice of large businesses controlling many relatively much less powerful employees, consumers, and investors through mandatory pre-dispute arbitration contract clauses. This policy interest provides a compelling rationale for class action lawsuits or class action arbitration.<sup>294</sup> Yet, present Supreme Court common law aggressively enforces mandatory pre-dispute class arbitration and general class waivers in relationships papered with adhesive contracts between large corporations and many uninformed employees, consumers, and investors.

### 1. *FINRA Model*

The discussion in Section III.B, above, suggests the key considerations to account for in building a mediation alternative to mandatory pre-dispute arbitration.<sup>295</sup> To get a better sense of how this alternative could work and look, we might consider the existing FINRA model.<sup>296</sup> A variation of the present FINRA model provides a

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294. See *Fairness in Numbers*, *supra* note 6, at 148–49 (emphasizing due process concerns with class action lawsuits).

295. See *supra* Section III.B (discussing the flaws of pre-dispute arbitration).

296. See FIN. INDUS. REGULATORY AUTH., CODE OF MEDIATION PROCEDURE § 14104, at 3 (“(a) Mediation under the Code is voluntary, and requires the written agreement of all parties. No party may be compelled to participate in a mediation or to settle a matter by FINRA, or by any mediator appointed to mediate a matter pursuant to the Code. (b) If all parties agree, any matter that is eligible for arbitration

potential example for how a combined dispute resolution protocol including mediation as a first step might work.<sup>297</sup> Though FINRA dispute resolution appears to focus on arbitration, FINRA actively promotes mediation to parties who file for arbitration and directs class claims to the civil courts. FINRA mediation can proceed either prior to or simultaneously with arbitration and results in the settlement of four out of five cases.<sup>298</sup>

If we simply made a first attempt at mediation a contractual obligation for dispute resolution in employment, consumer finance, and investment contracts, we would provide a volitional opportunity for mutually agreed-to outcomes without the rules-based formality and legalization of arbitration or litigation.<sup>299</sup> And, again, any outcome would be volitional, not the result of forced adjudication.<sup>300</sup>

## 2. Italian Model

One area of the world that has been embracing mediation is the European Union.<sup>301</sup> EU Directive 2013/11/EU mandated EU member countries to create consumer alternative dispute resolution programs.<sup>302</sup> Of course, a full survey of EU member countries on

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under the Customer Code or Industry Code, or any part of any such matter, or any dispute related to such matter, including procedural issues, may be submitted for mediation under the Code. (c) A matter is submitted to mediation when the Director receives an executed Submission Agreement from each party. (d) The Director shall have the sole authority to determine if a matter is eligible to be submitted for mediation.”).

297. *See id.*

298. *See* FIN. INDUS. REGULATORY AUTH., INITIAL PRE-HEARING CONFERENCE ARBITRATORS SCRIPT § F, at 4 (2018) (“We want to remind the parties that FINRA Dispute Resolution has a successful, voluntary mediation program. Mediation is an informal process in which a mediator facilitates negotiations between disputing parties. The mediator’s role is to help the parties find a mutually acceptable solution to the dispute. Parties who mediate at this forum resolve four out of every five cases.”).

299. *See* Nolan-Haley, *supra* note 216, at 64–65 (explaining that mediation is self-determined by the parties and offers relief from rigid rules).

300. *See id.* at 65 (“[Mediation] provides opportunities for individualized justice through the exercise of party self-determination . . .”).

301. *See generally* Directive 2013/11, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) 2009/22/EC, 2013 O.J. (L 165) (stating that mediation is to apply horizontally with other types of alternative dispute resolution).

302. *See id.* § 4 (“Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market.

mediation practices is far beyond the scope of this Article. Indeed, a comprehensive look at one country is beyond the scope of this Article. However, a cursory look at one country may be instructive.

One of the most changeable of countries subject to EU directives on dispute resolution is Italy.<sup>303</sup> With Legislative Decree no. 28/2010 passed in response to European Directive 2008/52/EC for cross border mediation, Italy implemented a compulsory initial mediation session upon court filing for certain civil causes of action, then made it volitional, and then again made mandatory an initial mediation session (with mandatory lawyer assistance) for those causes of action in the span of under ten years.<sup>304</sup> The Italian experience has shown greatest success in the mandatory initial mediation sessions resulting in volitional agreements to resolve disputes by mediation.<sup>305</sup>

Another possible model for an alternative mediation approach might look like the Italian requirement of first session mediation for many civil claims—but in a manner less settlement driven than existing U.S. court-connected programs.<sup>306</sup> These Italian mediations accounted for 90% of all mediations under the directive and showed an almost 50% success rate among them in reaching agreements resolving disputes.<sup>307</sup> As a mandatory first session for certain civil claims has shown, on this model, volitional agreement resolving disputes would be likely to increase substantially and yield a 50% settlement rate.<sup>308</sup>

Where mediation fails, second step arbitration or litigation might continue. Current U.S. court-connected mandatory mediation programs could be modified to better accommodate the challenges discussed in Section III.B above. Most particularly, less court-driven pressure toward settlement and more training of mediators in a

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That access should apply to online as well as offline transactions, and is particularly important when consumers shop across borders.”).

303. See Guisepppe Conte, *The Italian Way of Mediation*, 6 Y.B. ON ARB. & MEDIATION 180, 180 (2014) (stating that Italy is constantly experimenting with methods of alternative dispute resolution).

304. See *id.*

305. See Leonardo D’Urso, *Italy’s Required Initial Mediation Session: Bridging the Gap Between Mandatory and Voluntary Mediation*, 36 NEWSL. INT’L INST. FOR CONFLICT PREVENTION & RESOL. 49, 58 (2018).

306. See *id.*

307. *Id.*

308. *Id.*

facilitative or transformative approach would help open the potential of mediation as at least a first step.<sup>309</sup>

### 3. Best Practice

Thus, this Article proposes that a best practice in dispute resolution is to contractually require a first attempt at mediation prior to any mandatory arbitration. This best practice would be an easily accepted modification for individuals and small businesses in each of the employment, consumer finance, and investment contract fields. Large businesses would be incentivized to adopt this best practice as a consumer-friendly marketing incentive. In the same way the sustainability promotion has an instrumental marketing benefit, publicly adopting first step mediation would offer big businesses consumer-friendly marketing, attracting business by reason of less coercive, more consumer-friendly first step mediation in the event of disputes. Large businesses might even fully fund mediation programs with independent third-party mediators. In the current parlance, offering this best practice is a nudge toward the volitional contractual inclusion of mediation as a first step in dispute resolution in employment, consumer finance, and investment contracts.<sup>310</sup> There is ample reason to believe such a nudge can work.<sup>311</sup>

A window into the plausibility of this best practice marketing incentive for business opened recently in the employment market for summer associates and first year attorneys.<sup>312</sup> When a law professor or two called out law firms for requiring summer associates and first year associates to sign mandatory pre-dispute arbitration provisions (rather like the plaintiff(s) in *Morris v. Ernst & Young*,<sup>313</sup> consolidated in the

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309. See Conte, *supra* note 303, at 180–81 (discussing the role of mediation in coming to an agreement before going to court and the role of competent mediators).

310. See Shala F. Ali, *Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation User Experience in Twelve Regions*, 19 CARDOZO J. CONFLICT RESOL. 269, 269 (2018) (“In recent years, policy makers, economists, and behavioral scientists have examined the use of positive reinforcement to encourage non-forced compliance with a given social objective.”).

311. See *id.*

312. See Angela Morris, *Why 3 Biglaw Firms Ended Use of Mandatory Arbitration Clauses*, ABA JOURNAL (June 1, 2018, 12:15 AM), [www.abajournal.com/magazine/article/biglaw\\_mandatory\\_arbitration\\_clauses](http://www.abajournal.com/magazine/article/biglaw_mandatory_arbitration_clauses) [<https://perma.cc/22JU-5KJV>] (discussing the reason three law firms discontinued their mandatory arbitration agreements for some employees in the wake of the #MeToo movement); see also Aidan F. Ryan, *Harvard Law Students Push Major Firm to Drop Controversial Contract Provision*, HARV. CRIMSON, Nov. 6, 2018, at 7.

313. 834 F.3d 975, 989 (9th Cir. 2016).

*Epic Systems* case), law students also spoke up in protest, and the firms responded by dropping the policy. On this notion, promoting firm-sponsored mediation programs and/or promoting the absence of mandatory arbitration agreements could advance a firm's market position.

Employers or businesses that promote a consumer-friendly best practice by offering mediation as at least a first step prior to mandatory arbitration can appeal to the marketplace and benefit instrumentally— notwithstanding any normative imperative to cease mandatory arbitration, which imperative was clearly felt at large law firms wanting to recruit law school students and graduates.

#### CONCLUSION

Though this work does not offer a definitive prototype of a mediation alternative to mandatory arbitration, it does offer both the features to employ in this endeavor and the best practice of volitional contractual first step mediation. This is intended to advance dispute resolution models that put mediation first. It is, in effect, a call for further innovation in developing mediation as a first step contractual solution to the impasse of the Supreme Court's hardened precedent enforcing mandatory arbitration and the scholarly criticism that the Court appears to have dismissed. Big businesses, step up to the nudge.