REPEAL THE FEDERAL ARBITRATION ACT'S "ARISING OUT OF" REQUIREMENT

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I. INTRODUCTION

Suppose Pfizer and CVS agree to arbitrate not only any disputes that might arise out of their contract containing an arbitration agreement but also any disputes that might arise out of any of the many earlier contracts between these two large corporations. Or Apple and Samsung agree to arbitrate any patent infringement claims either has against the other for the next five years. Or FedEx and UPS agree to arbitrate any tort claims either has against the other due to any collision of their vehicles in the next ten years. Or members of the Walton (Walmart) family agree to arbitrate any dispute related to any existing or future will or trust, including its validity, over the next twenty years.

These hypothetical agreements should be enforceable, but the Federal Arbitration Act (FAA), as it is currently written, may not provide such enforcement. The FAA makes predispute arbitration agreements enforceable only as to "a controversy thereafter arising out of [the] contract" containing the arbitration agreement.[1] However, some or all of the disputes covered by each of the arbitration agreements described above do not arise out of the contracts containing those agreements. These, and other enforcement-worthy arbitration agreements, are excluded by the FAA's just-quoted "arising out of" requirement.

This absence of FAA enforcement for these agreements would be less concerning if all states' laws provided such enforcement, but they do not. Therefore, Congress should repeal the FAA's "arising out of" requirement. Congress should amend the FAA to enforce "an agreement to submit to arbitration any existing or subsequent dispute involving commerce, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4."

Concerns that this proposal would strengthen overly broad arbitration clauses in the adhesion contracts of consumers and workers are misplaced. So-called "infinite" arbitration clauses "mandate arbitration for all disputes between any related party in perpetuity."[2] Concerns about such clauses in adhesive arbitration agreements are better handled by other legal doctrines than by retaining the "arising out of" requirement. Those other legal doctrines, such as unconscionability or a federal agency's rule, target the

1. 9 U.S.C. § 2.
2. David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 633 (2020).

particular problems of adhesion contracts involving consumers, workers, and other unsophisticated parties.[3] Those problems are:

(1) the separability doctrine, which prevents courts from hearing defenses to contract enforcement, such as misrepresentation and duress, when the contract at issue has an arbitration clause;

(2) overly deferential judicial review inadequate for correcting arbitrators' erroneous rulings on questions of (even mandatory) law; and

(3) enforcement of arbitration clauses precluding class actions, even in circumstances in which nonarbitration clauses similarly precluding class actions would be unenforceable.[4]

These problems arise not just from overly broad "infinite" arbitration clauses but also from routine adhesive agreements merely requiring arbitration of disputes that plainly arise out of the contract containing the agreement. In other words, the problems of adhesive arbitration agreements transcend the problems of adhesive "infinite" arbitration agreements, and thus transcend the issue of enforcing agreements — such as the above examples involving Pfizer/CVS, Apple/Samsung, FedEx/UPS, and the Waltons — to arbitrate disputes that do not arise out of the contract containing the arbitration agreement.

While the problems of adhesive arbitration agreements transcend the "arising out of" requirement, that requirement unjustifiably limits the options of sophisticated, well-advised parties like those hypothesized above. If such parties want enforceable agreements to arbitrate disputes that do not arise out of the contract containing their arbitration agreement, why deprive them? Freedom of contract (party autonomy) is reason enough to enforce these parties' contracts without inquiring into the wisdom of their terms. And the parties' reasons for agreeing to arbitrate disputes that do not arise out of the contract containing the arbitration agreement may be quite thoughtful. Perhaps these parties consulted with their lawyers, made well-considered decisions about the pros and cons of arbitration versus litigation for their situations, and chose arbitration because they believe that, compared with

3. *See, e.g.*, Stephen J. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, 68 FLA. L. REV. 1227, 1279 app. A (2016) [hereinafter Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*] (proposing an arbitration-focused rule by the Consumer Financial Protection Bureau); STEPHEN J. WARE & ARIANA R. LEVINSON, PRINCIPLES OF ARBITRATION LAW § 24 (2d ed. 2023) (explaining unconscionability and similar regulation of arbitration).

4. Ware, *The Centrist Case Against Current (Conservative) Arbitration Law*, *supra* note 3, at 1231–32.

litigation, arbitration tends to be quicker and cheaper, as well as more confidential, and with a more expert decision maker.

In addition to giving these parties the enforceable agreements they seek, making their "infinite" arbitration agreements enforceable would provide opportunities to use public resources more effectively. While litigation receives a sizable government subsidy, arbitration does not.[5] Subsidizing Pfizer/CVS, Apple/Samsung, FedEx/UPS, and the Waltons is difficult to justify for several reasons discussed below,[6] including the fact that the parties can afford to pay adjudicator costs on their own, without any subsidy. Moving these parties' disputes from litigation to arbitration frees up the time of judges and others in the court system, so that time can instead be devoted to other cases. If enough disputes of sophisticated parties less deserving of the public subsidy of litigation move to arbitration, this would presumably relieve docket pressure on the court system, and thus presumably lower the average delay faced by other litigants more deserving of the subsidy. And perhaps the arbitration systems developed by these sophisticated parties will discover techniques that attract other parties to arbitration or inspire imitation by the court system, thus improving adjudication in both the private and public sectors.

In short, "infinite" and other arbitration agreements covering disputes that do not arise out of the contract containing the arbitration agreement can vary, much as other arbitration agreements do. So, when "infinite" arbitration agreements, like other arbitration agreements, are in adhesion contracts involving consumers, workers, and other unsophisticated parties, concerns about adhesion contracts take center stage. In contrast, sophisticated, well-advised parties also may agree to arbitrate disputes that do not arise out of the contract containing the arbitration agreement, and those agreements deserve enforcement, which may not currently be provided by the Federal Arbitration Act. Such enforcement can be provided by repealing the FAA's "arising out of" requirement.

After this Introduction, Part II briefly summarizes the history of the "arising out of" requirement, its long years of being "lost," and then its more recent rediscovery. Part II shows that its rediscovery — by scholars and courts — has been a tool for populist opponents of "corporate power" manifested in consumers' adhesive arbitration agreements. Part III contrasts this adhesive setting with a wide variety of hypothetical contracts among more sophisticated parties that agree to arbitrate disputes that do not arise out of the contract containing the arbitration agreement. Further, Part III

5. *See infra* note 67 and accompanying text.

6. *See infra* Part III(D).

argues that these agreements should be enforced and that repealing the FAA's "arising out of" requirement would further that enforcement. Part IV discusses federalism issues, and Part V briefly concludes.

II. THE "ARISING OUT OF" REQUIREMENT

A. The Lost "Arising Out Of" Requirement and Its Finders

The FAA makes predispute arbitration agreements enforceable only as to "a controversy thereafter arising out of [the] contract" containing the arbitration agreement.[7] This "arising out of" requirement, David Horton argues, "was a deliberate choice."[8] The FAA, enacted in 1925, largely follows the statutes of the only two states that had previously made predispute arbitration agreements enforceable, New York and New Jersey. However, while New York's statute broadly enforced predispute agreements to arbitrate any claim "arising between the parties to the contract," New Jersey's narrower enforcement of predispute arbitration agreements was limited to claims "arising out the contract."[9] The FAA's text resembles New Jersey's in making predispute arbitration agreements enforceable only as to "a controversy thereafter arising out of [the] contract" containing the arbitration agreement.[10]

This "arising out of" limitation on FAA enforcement seems not to have mattered much in the first six decades following the FAA's 1925 enactment. Arbitration agreements of that era apparently covered almost exclusively disputes arising out of the contract containing the arbitration agreement. For example, as late as 1985, a Supreme Court Justice asserted "that arbitration has functioned almost entirely in either the area of labor disputes or in

7. 9 U.S.C. § 2 ("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 or as otherwise provided in chapter 4.").

8. Horton, *supra* note 2, at 679.

9. *Id.* (internal quotations omitted) (quoting Metro. Cas. Ins. Co. of N.Y. v. Lehigh Valley R.R., 109 A. 743, 744 (N.J. Ct. Err. & App. 1920)).

10. *See id.* (quoting *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 2 (1924)).

'ordinary disputes between merchants as to questions of fact.'"[11] In these two contexts — labor and merchant — arbitrators traditionally heard almost entirely breach-of-contract claims. Labor arbitration traditionally consisted almost entirely of assertions that a party, typically an employer, had breached a collective bargaining agreement.[12] Similarly, merchants alleged breach of contracts for the sale of goods and raised "questions of fact — quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like."[13] So, from the FAA's 1925 enactment into the 1980s, the "arising out of" limitation on FAA enforcement may not have mattered because parties were not asking courts to enforce agreements to arbitrate claims that did not arise out of the contract containing the arbitration agreement.

This started to change in the 1980s when the Supreme Court began enforcing predispute agreements to arbitrate claims arising under various federal statutes — from antitrust to securities to employment discrimination[14] — and arbitration agreements grew to involve parties beyond businesses, such as individual consumers and workers.[15] Although the Supreme Court cases effecting these changes from the 1980s to the first

11. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 650 (1985) (Stevens, J., dissenting); *see also* WARE & LEVINSON, *supra* note 3, § 5(e) ("[F]rom the FAA's 1925 enactment into the 1980s, . . . courts generally refused to enforce pre-dispute agreements to arbitrate federal statutory claims.").

12. *See, e.g.*, Ariana R. Levinson et al., *Predictability of Arbitrators' Reliance on External Authority?*, 69 AM. U. L. REV. 1827, 1832 (2020) ("Labor arbitration was used by employers and unions to resolve disputes about the meaning of their collective bargaining agreements long before the more recent rise in arbitration of statutory employment law claims."); *id.* at 1833 ("Labor arbitrators have been settling disputes over workplace grievances and the interpretation of CBAs for hundreds of years as part of a grievance-arbitration system in unionized workplaces.").

13. *Mistubishi Motors Corp.*, 473 U.S. at 646 n.11. In this regard, merchants (who buy goods for resale) should be distinguished from the broader category of businesses. *See* STEPHEN J. WARE & ALAN SCOTT RAU, ARBITRATION 32–33, 36 (4th ed. 2020) (distinguishing merchants' trade association arbitration from the "general commercial arbitration" typified by the American Arbitration Association with which lawyers tend to be more familiar).

14. WARE & LEVINSON, *supra* note 3, § 5(e)(1) ("In addition to securities and antitrust, pre-1980s courts held many other federal statutory claims nonarbitrable, including RICO, patent, copyright, 'non-core' bankruptcy proceedings, Title VII, ADEA, and ERISA. Then in the 1980s, the Supreme Court revolutionized arbitration law to require enforcement of agreements to arbitrate federal statutory claims.").

15. *See id.* § 5(c), (d).

decade of the 2000s — such as *Southland Corp. v. Keating*,[16] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[17] and *Green Tree Financial Corp.-Alabama v. Randolph*[18] — relied on the FAA, they did not discuss the FAA's "arising out of" requirement.[19]

This omission by the Court was criticized in a 2012 article by Stephen Friedman; he argued that the "arising out of" requirement shows "that Congress intended the FAA to apply only to contract disputes arising out of an agreement that contains an arbitration provision."[20] In other words, Friedman argued that the Supreme Court's enormous expansion of the FAA by applying it to statutory claims should have been prevented by the FAA's "arising out of" requirement, but the Court simply ignored that requirement. Consequently, Friedman characterized the FAA's "arising out of" requirement as "lost" by courts.[21] The "arising out of" requirement was apparently lost by most scholars as well, as Friedman cites no scholarship on point.[22] However, I briefly argued in a 2006 book that the "arising out of" requirement should be repealed because it provides an argument to withhold the FAA's enforcement from what I contended then (as in this essay) are enforcement-worthy arbitration agreements.[23]

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16. 465 U.S. 1 (1984).

17. 473 U.S. 614 (1985).

18. 531 U.S. 79 (2000).

19. *See* Stephen E. Friedman, *The Lost Controversy Limitation of the Federal Arbitration Act*, 46 U. RICH. L. REV. 1005, 1021, 1023–28 (2012).

20. *Id.* at 1007.

21. *Id.* at 1006 ("The language the Supreme Court has largely ignored is the [FAA's] limitation to arbitrate a controversy only if it 'aris[es] out of' a contract with an arbitration provision or 'aris[es] out of' the failure to perform that contract."). Friedman similarly identifies not a single lower court case addressing the FAA's "arising out of" requirement. *Id.* at 1021, 1023–28.

22. *See generally id.*

23. Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 88, 104–05 (2006).

> For example, suppose that parties X and Y form two contracts a year apart, and in the second contract there is no arbitration clause, but in the first contract there is a clause providing for arbitration, not only of disputes arising out of that contract, but also disputes arising out of any later contracts between the parties. What if X and Y have a dispute about performance of the second contract? As a matter of standard contract law, each party should have the duty to arbitrate the dispute about the second contract because each party assumed this duty in the first contract and nothing later occurred to discharge, modify or excuse this duty. But it is not clear that this duty is enforced by the FAA because the FAA limits its enforcement

While little attention was paid to the FAA's "arising out of" requirement much before Friedman's article characterized it as "lost," a few other courts and scholars were also "finding" it around then. In 2011, the West Virginia Supreme Court apparently alluded to the "arising out of" requirement when it said, "Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement . . . ."[24] Accordingly, the West Virginia court held that the FAA did not preempt state law, refusing to enforce arbitration agreements against wrongful death suits by relatives of nursing home patients who had died allegedly due to the homes' negligence.[25] However, the Supreme Court reversed in *Marmet Health Care Center, Inc. v. Brown*,[26] a per curiam opinion that did not consider whether the wrongful death claims arose out of the contract containing the arbitration agreement.[27]

Similarly, a 2017 Supreme Court case, *Kindred Nursing Centers Ltd. v. Clark*[28] ("*Kindred*"), also involved wrongful death suits against nursing homes.[29] An amicus brief by Imre Szalai argued that, "[i]f a tort does not arise from a contract, then it is impossible for the FAA to cover such a tort claim . . . ."[30] While the Kentucky courts in *Kindred* denied motions to compel arbitration, they did not do so based on Szalai's "arising out of" argument.[31] The Supreme Court reversed, also without addressing Szalai's

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mandate to "controvers[ies] arising out of such contract," with "such" contract referring to the contract containing the arbitration clause.

Id. (internal citations omitted). "Similarly, it is not clear that the FAA requires courts to enforce the arbitration agreement in the opposite fact pattern in which the second contract contains a clause providing for arbitration, not only of disputes arising out of that contract, but also disputes arising out of any earlier contracts between the parties. Courts, nevertheless, generally seem to enforce these agreements." *Id*. at 105 n.56 (citing MACNEIL ET AL., FEDERAL ARBITRATION LAW § 20.3.6 (1994 & Supp. 1999)).

24. Brown ex rel. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 291 (W. Va. 2011), *cert. granted, judgment vacated sub nom.* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 534 (2012).

25. *Brown*, 724 S.E.2d at 291.

26. 565 U.S. 530 (2012).

27. *Id.* at 533.

28. 581 U.S. 246 (2017).

29. *Id.* at 247.

30. Brief of Arbitration Scholar Imre S. Szalai as Amicus Curiae in Support of Respondents at 7, Kindred Nursing Ctrs. Ltd. v. Clark, 581 U.S. 246 (2017) (No. 16-32).

31. Kindred Nursing Ctrs. Ltd. v. Cox, 486 S.W.3d 892, 893 (Ky. Ct. App. 2015) ("Under Kentucky precedent, wrongful death claims are not subject to arbitration.").

argument.[32] In short, the Supreme Court continued to avoid the "arising out of" requirement in the second decade of this century, even as the West Virginia Supreme Court and scholars were confronting the Court with arguments based on it. These arguments called for the Court to rule that the "arising out of" requirement excluded from FAA enforcement agreements to arbitrate negligence (*Brown*) and wrongful death (Szalai/*Kindred*) claims, as well as agreements to arbitrate to statutory claims (Friedman).[33] These efforts to highlight the "arising out of" requirement have been boosted by David Horton's 2020 article *Infinite Arbitration Clauses*, whose title seems to have caught on,[34] including among courts.[35]

B. Cases on Adhesive Agreements to Arbitrate Claims that Do Not Arise Out of the Contract Containing the Arbitration Agreement

Sophisticated parties have not generated many cases involving the sorts of agreements hypothesized at the start of this essay — Pfizer/CVS, Apple/Samsung, FedEx/UPS, and the Waltons — to arbitrate disputes that

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32. *See Clark*, 581 U.S. at 255–56 ("The Kentucky Supreme Court specially impeded the ability of attorneys-in-fact to enter into arbitration agreements. The court thus flouted the FAA's command to place those agreements on an equal footing with all other contracts.").

33. *See Brown*, 724 S.E.2d at 291; Brief of Arbitration Scholar Imre S. Szalai as Amicus Curiae in Support of Respondents, *supra* note 30, at 7; Friedman, *supra* note 19.

34. *See, e.g.*, *Contract Law — Federal Arbitration Act – Ninth Circuit Refuses to Enforce Infinite Arbitration Agreement.*- Revitch v. DIRECTV, LLC, *977 F.3d 713 (9th Cir. 2020)*, 134 HARV. L. REV. 2871, 2877 (2021) (referring to the "problem of infinite arbitration clauses").

35. *See, e.g.*, McFarlane v. Altice USA, Inc., 524 F. Supp. 3d 264, 275 (S.D.N.Y. 2021) (citing Horton, *supra* note 2, at 639–40) ("The Arbitration Provision is thus an example of . . . [what] one scholar has aptly dubbed an 'infinite arbitration clause.'"); Mey v. DIRECTV, LLC, 971 F.3d 284, 302 (4th Cir. 2020) (Harris, J., dissenting) (citing Horton, *supra* note 2, at 639) ("That kind of arbitration clause – what one scholar has termed an 'infinite arbitration clause' – is relatively new and untested."); Revitch v. DIRECTV, LLC, 977 F.3d 713, 720 (9th Cir. 2020) (citing Horton, *supra* note 2, 670–78) ("Moreover, we are aware that with our decision today, we are opening a circuit split on this difficult issue: Can anything less than the most explicit 'infinite language' in a consumer services agreement bind the consumer to arbitrate any and all disputes with (yet-unknown) corporate entities that might later become affiliated with the service provider—even when neither the entity nor the dispute bear any material relation to the services provided under the initial agreement?"); Davitashvili v. Grubhub Inc., No. 20-CV-3000 (LAK), 2023 WL 2537777, at *10 n.100 (S.D.N.Y. Mar. 16, 2023) (citing Horton, *supra* note 2, at 639–40) ("Defendants' arbitration clauses are examples of 'a "relatively new and untested" species of arbitration clause,' which one scholar aptly has described as an 'infinite arbitration clause.'").

do not arise out of the contract containing the arbitration agreement. Instead, consumers' adhesion contracts have generated most of the cases involving agreements to arbitrate disputes that do not arise out of the contract containing the arbitration agreement. Courts have often denied enforcement of such agreements, but they have overwhelmingly done so without relying on the FAA's "arising out of" requirement.

For example, in *Smith v. Steinkamp*,[36] a payday loan agreement required arbitration not only of claims arising out of that loan agreement but also any claims arising out of any other agreements (past or future) between the parties and "all common law claims, based upon contract, tort, fraud, and other intentional torts."[37] The parties then engaged in a later loan transaction that did not involve an additional arbitration agreement, and the borrower asserted usury claims arising out of that later transaction. The Seventh Circuit, in an opinion by Judge Posner, interpreted the arbitration agreement narrowly to conclude that it did not apply to disputes over loan agreements later than the loan agreement containing the arbitration agreement. But the Seventh Circuit opinion did so only after suggesting that the alternative interpretation (advocated by the lender) would lead to "absurd results" and "might be thought unconscionable."[38]

These suggestions of absurdity and unconscionability may be related, so let us consider the alleged absurdity in a similar situation without unconscionability. Suppose that, instead of a consumer's payday loan agreement, *Smith*-type facts arise in a series of multimillion-dollar loans to a major corporate borrower. Further, suppose the earlier loan agreement — with its arbitration agreement covering disputes not only arising out of that loan but also future loans — was negotiated by the high-priced lawyers of the lender and the corporate borrower and then signed by their CEOs, who also separately initialed the broad arbitration clause. If a dispute arose out of a later loan agreement that did not have an additional arbitration clause, one wonders whether the Seventh Circuit would have found absurd the contention that the earlier loan's arbitration agreement covered the dispute arising out of the later loan. In other words, one can doubt that the Seventh Circuit would have been as inclined to interpret the earlier loan's arbitration agreement narrowly — to conclude that it did not apply to disputes over later loans — for a major corporate borrower in a lawyered transaction as it was for a consumer using payday loans.

36. 318 F.3d 775 (7th Cir. 2003).

37. *See id.* at 776–77.

38. *Id.* at 777–78.

Since *Smith*, decided in 2003, a number of other cases have involved consumers' adhesion contracts with agreements to arbitrate disputes that do not arise out of the contract containing the arbitration agreement. These cases have often followed *Smith*'s approach of denying enforcement of such arbitration agreements by interpreting them narrowly, or engaging in other contract law techniques, rather than relying on the FAA's "arising out of" requirement. For example, a 2012 federal district court decision in California, *In re Jiffy Lube International, Inc.*,[39] held unconscionable a consumers' adhesion contract providing for arbitration of disputes that do not arise out of the contract containing the arbitration agreement.[40]

A 2016 federal district court decision in New York, *Wexler v. AT&T Corp.*,[41] "share[d] the concerns voiced in *Jiffy Lube*," but worried that "holding that Mobility's arbitration clause is unconscionably broad would be in tension with" *AT&T Mobility LLC v. Concepcion*.[42] *Wexler* mentioned the FAA's "arising out of" requirement[43] but did not rely on it in denying enforcement of the arbitration agreement. Instead, *Wexler* denied enforcement of the arbitration agreement due to "lack of mutual intent."[44] This is quite a stretch of contract law because, as David Horton explains, "conventional contract law" treats a consumer's manifestation of assent to a contract as a manifestation of assent to *all* of its terms.[45]

A later federal district court decision, *McFarlane v. Altice USA, Inc.*,[46] combined *Smith*'s approach avoiding "absurd" results with *Wexler*'s stretch

39. 847 F. Supp. 2d 1253 (S.D. Cal. 2012).

40. *See id.* at 1262–63.

41. 211 F. Supp. 3d 500 (E.D.N.Y. 2016).

42. 563 U.S. 333 (2011).

43. *See Wexler*, 211 F. Supp. 3d at 505 ("[T]he FAA explicitly limits itself to agreements '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.'") (emphasis omitted).

44. *See id.*; *see also id.* at 504 ("Notwithstanding the literal meaning of the clause's language, no reasonable person would think that checking a box accepting the 'terms and conditions' necessary to obtain cell phone service would obligate them to arbitrate literally every possible dispute he or she might have with the service provider . . . . Rather, a reasonable person would be expressing, at most, an intent to agree to arbitrate disputes connected in some way to the service agreement with Mobility.").

45. *See* David Horton, *Accidental Arbitration*, 102 WASH. U. L. REV. (forthcoming 2025) (manuscript at 22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4898026 (emphasis omitted) ("By finding that an individual only partially consented, these judges seem to be rewriting rather than applying conventional contract law.").

46. 524 F. Supp. 3d 264 (S.D.N.Y. 2021).

of contract law to deem narrowly interpreting an arbitration agreement a matter of "contract formation."[47] The *McFarlane* court stated that it need not choose between this approach or the *Jiffy Lube* approach of holding that an arbitration agreement was unconscionable, because both paths led to the conclusion that the arbitration agreement "[did] not apply to claims lacking a nexus to the [contract including the arbitration] agreement."[48]

Another fact pattern involving AT&T has split the federal courts of appeals. A close, literal of reading AT&T's cell service contract's arbitration clause, covering claims against "affiliates," shows that it covers a cell service customer's claims against DIRECTV, even though DIRECTV did not affiliate with AT&T until after the cell service contract was formed.[49] But a consumer who did not read that clause might well be shocked to learn that they have allegedly agreed to arbitrate claims against DIRECTV.[50] Whether to enforce this provision split the federal courts of appeals, with the Fourth Circuit enforcing it in *Mey v. DIRECTV, LLC*,[51] and the Ninth Circuit refusing to enforce it in *Revitch v. DIRECTV, LLC*.[52] *Revitch* is similar to

47. *Id.* at 277 ("First, as a matter of contract formation, New York law, like Georgia law, provides that 'a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties.'").

48. *Id.*

49. *See, e.g.*, Mey v. DIRECTV, LLC, 971 F.3d 284, 291 (4th Cir. 2020). Walmart and Airbnb have also used arbitration clauses that clearly cover disputes beyond even a broad reading of "arising out of" the contract containing them. *See* Smith v. Walmart, Inc., No. 7:22-CV-00568, 2023 WL 5215376, at *2 (W.D. Va. Aug. 14, 2023) ("Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of all disputes between the Parties, and requires all such disputes to be resolved on an individual basis and only by an arbitrator through final and binding arbitration and not by way of a court or jury trial, nor a proceeding before any other governmental body, and not by way of a class, collective, mass, or representative action or proceeding."); Airbnb, Inc. v. Rice, 518 P.3d 88, 89 (Nev. 2022) ("You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement or interpretation thereof, or to the use of the Airbnb Platform, the Host Services, the Group Payment Service, or the Collective Content (collectively, 'Disputes') will be settled by binding arbitration (the 'Arbitration Agreement').").

50. Such shock led to a "public relations backlash" against Disney when it moved to enforce its Disney+ streaming service's arbitration agreement against a Disney+ customer who brought a wrongful claim against Disney due to the plaintiff's wife's death at a Disney theme park restaurant. Danielle Braff, *Did You Read the Small Print? 'Infinite' Arbitration Clauses Are on the Rise*, A.B.A. J. (Sept. 6, 2024, 11:46 AM), https://www.abajournal.com/web/article/did-you-read-the-small-print-forced-arbitration-cases-are-on-the-rise#google_vignette.

51. *See Mey*, 971 F.3d at 295.

52. 977 F.3d 713 (9th Cir. 2020).

Smith in that *Revitch* did not rely on the FAA's "arising out of" requirement but instead narrowly interpreted the arbitration agreement to find that the consumer did not agree to arbitrate her claim against DIRECTV.[53] The *Revitch* court said California law does not require interpreting contracts according to their "written terms alone" when doing so would "lead to absurd results."[54] And *Revitch* found absurd the notion that "Revitch would be forced to arbitrate any dispute with any corporate entity that happens to be acquired by AT&T, Inc., even if neither the entity nor the dispute has anything to do with providing wireless services to Revitch — and even if the entity becomes an affiliate years or even decades in the future."[55]

The Ninth Circuit again avoided the FAA's "arising out of" requirement by interpreting an arbitration agreement narrowly in *Johnson v. Walmart Inc.*[56] By making an online purchase of tires from Walmart, the consumer plaintiff agreed that "all disputes arising out of or related to these Terms of Use or any aspect of the relationship between [the consumer] and Walmart . . . [would] be resolved through final and binding arbitration."[57] "While [at a Walmart Auto Care Center] waiting for his tires to be installed, [the plaintiff] purchased a lifetime tire balancing and rotation service agreement ('Service Agreement') from a Walmart employee at a separate, additional cost."[58] When a dispute arose out of the Service Agreement, the Ninth Circuit engaged in some interpretative gymnastics[59] to hold the dispute not covered by the plaintiff's tire-purchase agreement to arbitrate "all disputes arising out of or related to . . . any aspect of the relationship between [the consumer] and Walmart."[60]

While the above decisions refused to enforce agreements to arbitrate claims not arising out of the contract containing the arbitration agreement, these decisions did not rely on the FAA's "arising out of" requirement. In contrast, some judges have relied on it. Perhaps first was Judge O'Scannlain's concurring opinion in *Revitch*.[61] Judge O'Scannlain

53. *Id.* at 717.

54. *Id.* (quoting Kashmiri v. Regents of Univ. of Cal., 156 Cal. App. 4th 809, 845 (2007)).

55. *Id.* at 728.

56. 57 F.4th 677, 681 (9th Cir. 2023).

57. *Id.* at 679.

58. *Id.* at 680.

59. *See id.* at 682.

60. *Id.*

61. Revitch v. DIRECTV, LLC, 977 F.3d 713, 721 (9th Cir. 2020).

addressed the "arising out of" requirement directly, observing that "the FAA does not require the enforcement of an arbitration clause to settle a controversy that does not arise out of the contract or transaction."[62] Judge O'Scannlain wrote, "DIRECTV's decision to send Revitch unsolicited advertisements for its satellite television products — thereby allegedly violating the Telephone Consumer Protection Act — [did] not in any way involve the formation or performance of a contract for wireless services between Revitch and AT&T Mobility."[63] So, "the controversy between DIRECTV and Revitch [did] not come within the Federal Arbitration Act since it [did] not 'aris[e] out of' the contract between Revitch and AT&T Mobility."[64]

Judge O'Scannlain's concurring opinion "persuaded" the Eleventh Circuit in *Calderon v. Sixt Rent A Car, LLC*.[65] In *Calderon*, a consumer reserved a Sixt rental car on Orbitz, whose contract required the consumer to arbitrate disputes related to "any services or products provided."[66] Sixt argued that this agreement covered services or products provided not just by Orbitz but also by Sixt.[67] The Eleventh Circuit disagreed in an opinion that narrowly interpreted the agreement to exclude the claim against Sixt.[68] However, Sixt challenged this narrow interpretation by citing the Supreme Court's statement in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[69] that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[70] The Eleventh Circuit rejected this challenge because the consumer's "suit against Sixt [did] not 'aris[e] out of' his contract with Orbitz within the meaning of [FAA section] 2 — and, accordingly, that *Moses H. Cone*'s pro-arbitration canon of construction [did] not apply."[71]

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62. *Id.* (emphasis omitted).

63. *Id.* at 724 (emphasis omitted).

64. *Id.*

65. 5 F.4th 1204 (11th Cir. 2021).

66. *Id.* at 1206–07 (internal citation omitted).

67. *Id.* at 1208.

68. *Id.* at 1209 ("[T]he phrase 'any services or products provided' refers to services or products provided by Orbitz, not services or products by anyone. Accordingly, Sixt's rental-car service doesn't fall within the category of arbitrable 'Claims.'").

69. 460 U.S. 1 (1983).

70. *Calderon*, 5 F.4th at 1212 (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25).

71. *Id.* at 1213–14; *see also* Davitashvili v. Grubhub Inc., 20-CV-3000 (LAK), 2023 WL 2537777, at *9–11 (S.D.N.Y. Mar. 16, 2023) (relying at least partially on "arising

C. Adhesive and Negotiated Arbitration Agreements

The cases just discussed in the previous subpart of this essay arise out of adhesion contracts that businesses draft and present on a take-it-or-leave-it basis to consumers and workers who may not notice, let alone read and understand, the arbitration clause. Nearly every example discussed in Friedman's and Horton's articles involves an adhesive arbitration agreement.[72] This adhesive context pervades both of these articles, which argue for the "arising out of" requirement as a protection against what Horton calls "forced arbitration."[73] So, both articles treat the FAA's "arising out of" requirement largely as an under-enforced "check on corporate power."[74]

That populist approach, whatever its merit with respect to consumers' adhesive arbitration agreements, is inapplicable to arbitration agreements between sophisticated parties whose lawyers drafted the agreements. In the sophisticated, lawyered context, Judge O'Scannlain's assertion (made in the context of adhesion contracts) is implausible: "A party can hardly be said to consent to arbitrate disputes that have nothing at all to do with the subject of the contract the party signed or the provider-customer relationship the contract creates, let alone a claim against an entity not even in party at the time."[75] The implausibility of this statement in the sophisticated, lawyered context is shown by the examples in the next part of this essay.

III. THE "ARISING OUT OF" REQUIREMENT'S SHORTCOMINGS

A. Disputes Arising Out of a Different Contract Between the Same Parties

Consider the example above, where Pfizer and CVS carefully negotiate a contract in which they agree to arbitrate not only any disputes that might arise out of their contract containing this arbitration agreement but also any disputes that might arise out of any of the many earlier, unrelated contracts between these two large corporations. In signing this contract, the president

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out of," in which the court refused to compel arbitration of a class action claim by consumers against GrubHub, Uber, and PostMates, although the court found the claim would be covered by the arbitration agreements if literally interpreted).

72. *See generally* Friedman, *supra* note 19; Horton, *supra* note 2.

73. *See* Horton, *supra* note 2, at 649 ("Forced arbitration clauses became a routine part of consumer and employment contracts[] . . . ."); *see also id.* at 1006–07 ("This article challenges the judicial disregard of the controversy limitation . . . . Arbitration provisions that exceed the scope of the FAA are quite common, and it is often the party with superior bargaining power, such as an employer, who insists on such a provision.").

74. *See id.* at 678.

75. Revitch v. DIRECTV, LLC, 977 F.3d 713, 724 (9th Cir. 2020).

of each corporation separately initials the clause agreeing to "arbitrate all disputes between Pfizer and CVS, including but not limited to, disputes arising out of earlier contracts between Pfizer and CVS." After this arbitration agreement is formed, a dispute arises out of one of the earlier contracts. As a matter of standard contract law, each party should have the duty to arbitrate this dispute because each party assumed this duty in a valid contract, and nothing later occurred to discharge, modify, or excuse this duty. But this duty would not likely be enforced by the FAA if courts applied its requirement that its enforcement of predispute agreements be limited to "controvers[ies] arising out of such contract," with "such contract" referring to the contract containing the arbitration clause.[76]

The Oklahoma Court of Appeals refused to enforce an arbitration agreement in a case that was similar, except that it involved not a carefully negotiated contract with an arbitration clause separately initialed by corporate presidents but a bereaved family's adhesion contract with a cemetery.[77] The Rusts made two contracts with a cemetery years apart.[78] The first contract, to buy a crypt, did not have an arbitration agreement.[79] But the second contract, to buy a bench, said, "BY SIGNING THIS AGREEMENT, YOU ARE AGREEING TO HAVE ANY AND ALL DISPUTES BETWEEN YOU AND THE SELLER RESOLVED BY ARBITRATION."[80] The Oklahoma appellate court refused to compel arbitration of the Rusts' tort claims, which did not arise out of the bench contract but at least arguably arose out of the crypt contract.[81]

> Rusts' tort claims, to the extent they arise from a contractual relationship between the parties, relate only to the 1993 crypt purchase contracts. In those contracts, the parties expressed no intent to submit disputes to arbitration. The Bench Contract does clearly express such an intent. However, the nature of Rusts' claims do not depend on the existence of the Bench Contract, and do not arise from that contractual relationship. Only if we determined the parties intended the arbitration clause in the Bench Contract to retroactively modify the 1993 contracts could we compel arbitration. The Bench Contract does not state such an intent. Therefore, we hold the Bench Contract arbitration clause did not retroactively modify the earlier agreements, and does not apply to disputes

76. *Id.* at 721.

77. Rust v. Carriage Servs. of OK, Inc., 173 P.3d 805, 807 (Okla. Civ. App. 2007).

78. *Id.*

79. *Id.*

80. *Id.* (emphasis in original).

81. *Id.* 808–09.

> arising from the relationship of the parties commenced by the earlier agreement.[82]

Why insist that a duty to arbitrate disputes arising out of the 1993 crypt contract can arise only in a modification of those earlier contracts rather than in a later separate contract? And even given this insistence, why was the Rusts expressly "AGREEING TO HAVE ANY AND ALL DISPUTES BETWEEN YOU AND THE SELLER RESOLVED BY ARBITRATION" — as distinguished from the common agreement to arbitrate "all disputes arising out of or relating to this contract" — insufficient to show that they "intended the arbitration clause in the Bench Contract to retroactively modify the 1993 contracts"?[83]

Parties should be free to make enforceable agreements to arbitrate yet-to-arise disputes arising out of their earlier contracts, and the express terms of such agreements, like other contracts, should ordinarily be enforced.

But contract law has long-developed doctrines crafting exceptions that deny enforcement of particular terms and even of entire contracts. These exceptions — ranging from unconscionability's concern with unfair surprise to interpreting against the drafter and against absurd results — more likely apply to adhering parties like the Rusts than to the business that drafted the Rusts' adhesion contract or to contracts companies like Pfizer and CVS negotiate through their lawyers.

These exceptions to enforcement, like the presumption of enforcement, should apply to arbitration agreements, including agreements to arbitrate yet-to-arise disputes arising out of the parties' earlier contracts. So, arbitration law should enforce an agreement to arbitrate any existing or subsequent dispute — not just a dispute "arising out of" the contract containing this agreement — "save upon such grounds as exist at law or in equity for the revocation of any contract."[84] In other words, the FAA's savings clause permits case-by-case analysis separating agreements that should and should not be enforced, in contrast to the "arising out of" requirement, which throws out the baby (agreements that should be enforced) with the bathwater (agreements that should not be enforced).

B. Combining Contract Claims Arising Out of the Contract with Wholly Unrelated Non-Contract Claims

Suppose Costco sells a warehouse to Amazon in a carefully negotiated contract requiring arbitration not only of disputes arising out of this real

82. *Rust*, 173 P.3d at 808–09.

83. *Id.* at 807.

84. 9 U.S.C. § 2.

estate transaction but also "any other dispute between the parties, including but not limited to auto accidents." Suppose the president of each corporation separately initials the arbitration clause. If vehicles of these two corporations collide, would enforcing their agreement to arbitrate the resulting tort claims be absurd? No. If that is right, then why did Judge Posner, writing for the Seventh Circuit in *Smith*, find "absurd" the notion of enforcing a payday loan's agreement to arbitrate "all common law claims, based upon contract, tort, fraud, and other intentional torts"?[85]

Although an agreement to arbitrate both claims arising out of the contract containing the arbitration agreement and wholly unrelated tort claims is unusual, parties should be free to make enforceable agreements with unusual terms. However, the exceptions from enforcement discussed above are especially likely to apply to unusual — and therefore surprising — provisions of adhesion contracts. In contrast, sophisticated parties like Costco and Amazon can negotiate, draft, and form their unusual contracts under circumstances likely to convince a court that, yes, they really did want those unusual terms.

So again, arbitration law should enforce an agreement to arbitrate any existing or subsequent dispute — not just a dispute "arising out of" the contract containing this agreement — "save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4."[86] The case-by-case analysis of the FAA's saving clause is better than the "arising out of" requirement throwing out enforcement-worthy agreements.

C. Disputes Arising Out of No Contract

The hypothetical Pfizer/CVS and Costco/Amazon arbitration agreements covered disputes arising out of the contract containing the agreement, but parties can also form standalone predispute arbitration agreements that include only the promise to arbitrate. For example, suppose Apple and Samsung agree to arbitrate any patent infringement claims either has against

85. Smith v. Steinkamp, 318 F.3d 775, 776–78 (7th Cir. 2003) (stating that the case involved an initial transaction pursuant to an agreement "to arbitrate 'all disputes' between the [p]arties" followed by a later transaction which did not involve an additional argument. In rejecting the lender's argument that usury claims directed to the second transaction were covered by the arbitration agreement, Judge Posner suggested that such an interpretation would lead to "absurd results" and "might be thought unconscionable"); Consolidated Reply Brief of Defendants-Appellants at 1, *Smith*, 318 F.3d 775 (Nos. 02-2649, 02-2650), 2002 WL 32171900.

86. 9 U.S.C. § 2.

the other for the next five years. Or FedEx and UPS agree to arbitrate any tort claim either has against the other due to any collision of their vehicles in the next ten years. Or members of the Walton (Walmart) family agree to arbitrate any dispute related to any existing or future will or trust, including its validity, over the next twenty years.

These hypothetical standalone arbitration agreements are probably not enforceable under the FAA, which limits its enforcement of predispute agreements to "controvers[ies] thereafter arising out of such contract."[87] The disputes covered by standalone arbitration agreements do not arise out of the contracts containing those agreements and might instead be said to arise out of new products (Apple/Samsung), automobile accidents (FedEx/UPS), and wills or trusts (Waltons). But that should be no obstacle to their enforcement. Apple/Samsung, FedEx/UPS, and the Waltons deserve legal enforcement of their agreements for all the reasons courts have been enforcing contracts for centuries. No public policy is violated by these hypothetical agreements. To the contrary, these agreements advance the policy of access to justice.

D. Expanding Sophisticated Parties' Agreements to Arbitrate Can Help Courts Allocate Their Resources

"While litigation receives a sizable government subsidy, arbitration does not."[88] Subsidizing Pfizer/CVS, Apple/Samsung, FedEx/UPS, and the Waltons is difficult to justify because:

> (1) the parties can afford to pay adjudicator costs on their own, without any subsidy;
> (2) the parties had a pre-dispute contract and thus an opportunity to include a good pre-dispute arbitration clause in that contract;
> (3) the parties and their lawyers were sophisticated enough to include a good pre-dispute arbitration clause in their contract; and
> (4) an adjudicator's decision in [many of these] case[s] is unlikely to produce any significant "public good," (in either the economic or non-economic sense of that term).[89]

Moving these parties' disputes from litigation to arbitration frees up the time judges and others in the court system would devote to these disputes, so that time can instead be devoted to other cases. Moving enough disputes of parties less deserving of the public subsidy of litigation would relieve docket

87. *Id.*

88. Stephen J. Ware, *Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 905–06 (2013) (internal quotations omitted).

89. *Id.* at 909.

pressure on the court system, and thus presumably lower the average delay faced by other litigants more deserving of the subsidy.[90] Perhaps the arbitration systems developed by these sophisticated parties will discover techniques that attract other parties to arbitration or inspire imitation by the court system, thus improving adjudication in both the private and public sectors.

IV. FEDERALISM: WHY NOT LEAVE ARBITRATION TO STATE LAW?

Above, this essay argues for repealing the FAA's "arising out of" requirement, so the FAA would enforce "an agreement to submit to arbitration any existing or subsequent dispute involving commerce, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4." But retaining the FAA's "arising out of" requirement — even if courts apply it as stringently as Friedman or Szalai suggest — would not necessarily prevent enforcement of the agreements I have identified as enforcement-worthy. Courts could enforce these agreements under state law. As Horton notes, "even if [section] 2 of the FAA does not apply, state arbitration legislation can provide the infrastructure to enforce infinite language."[91] Many states' statutes enforce predispute agreements to arbitrate not only disputes arising out of the contract containing the arbitration agreement, but "any existing or subsequent controversy arising between the parties."[92] This is the language of the Revised Uniform Arbitration Act, which has been enacted by twenty-three states.[93] In addition, the original Uniform Arbitration Act, still

90. *See id.* at 917.

91. Horton, *supra* note 2, at 682.

92. UNIFORM ARBITRATION ACT (UAA) § 6 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2000).

93. *See id.* ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."); *Arbitration Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=a0ad71d6-085f-4648-857a-e9e893ae2736&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZW50cnkiOiIyNTAzNjVkMC05MGMyLTQ5ZDYtOTBmMi0zMjFlZmIzY2U5N2MifQ%3D%3D (last visited Jan. 13, 2025).

governing twelve states, similarly enforces agreements "to submit to arbitration any controversy thereafter arising between the parties."[94]

However, a statute in at least one recalcitrant state, Alabama, still prohibits courts from enforcing predispute arbitration agreements at all.[95] Additionally, some other states' arbitration statutes exclude various claims, such as tort claims, from enforcement of predispute arbitration agreements.[96] Moreover, even the relatively broad uniform acts limit enforcement to disputes "between the parties," which may deny enforcement of some enforcement-worthy agreements intending some promises to be enforceable by nonparties. For instance, suppose General Electric (GE) carefully negotiates a contract in which it agrees to make and install motors for a construction firm that is building a factory pursuant to the construction firm's contract with a manufacturer. GE's contract with the construction firm obligates GE to arbitrate not only its disputes with the construction firm but also its disputes with the manufacturer. GE sues the manufacturer, alleging that the manufacturer's negligence required GE to incur extra worker-safety costs to perform its contract with the construction firm. The manufacturer's motion to compel arbitration should be granted under long-established principles of general contract law, which hold that "[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."[97]

However, GE's promise to arbitrate its claim against the manufacturer may not be enforced by uniform state acts limiting enforcement to disputes "between the parties," which presumably refers to the parties to the contract. While courts generally have enforced promises to arbitrate with intended third parties,[98] those cases have been decided under the FAA, which does not limit enforcement to disputes "between the parties." So, leaving such cases to state law, by more rigorously enforcing the FAA's "arising out of" requirement, might lead to backsliding away from courts' enforcement of promises to arbitrate with intended third parties.

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94. UAA § 1 ("A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

95. *See* ALA. CODE § 8-1-41(3) (1975) ("The following obligations cannot be specifically enforced: . . . An agreement to submit a controversy to arbitration[] . . . .").

96. *See, e.g.*, ARK. CODE ANN. 16-108-233(b)(1) (West 2016).

97. RESTATEMENT (SECOND) OF CONTS. § 304 (AM. L. INST. 1981).

98. *See* WARE & LEVINSON, *supra* note 3, § 27(a).

These backsliding concerns grow with the list of intended beneficiaries. For example, GE might agree to arbitrate with not only the construction firm and manufacturer, but also their "subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns." When this language appears, as it did, in a consumer's adhesion contract,[99] the contract doctrines discussed above (such as unconscionability) might well prevent its enforcement. But if GE's lawyer carefully negotiated the clause — perhaps in exchange for a higher price on its motors — and GE's president separately initialed it, then those doctrines should not stand in the way of enforcement. Thus, contract doctrines permit a case-by-case analysis superior to the "between the parties" requirement of state statutes for much the same reasons case-by-case analysis is superior to the FAA's "arising out of" requirement.

In sum, many states' statutes are not currently up to the task of enforcing predispute arbitration agreements that should be enforced, and courts' inclinations to provide such enforcement as a matter of common law is in doubt. So, while there is a case for leaving arbitration law to the states, it is a case that accepts some backsliding to the bad old days, denying enforcement of predispute arbitration agreements that should be enforced. Further, the case for federalism is difficult to reconcile with the political reality of recent decades. That reality includes the Supreme Court's long record of broadly interpreting the FAA. Additionally, it includes Congress and the President continuing to nationalize arbitration law, as in their 2022 enactment of a new chapter 4 of the FAA, which nationalizes (precluding state-by-state variation of) a rule prohibiting enforcement of predispute arbitration agreements against a party asserting sexual harassment or sexual assault claims.[100]

V. CONCLUSION

Congress should repeal the FAA's "arising out of" requirement. The FAA should be amended to enforce "an agreement to submit to arbitration any existing or subsequent controversy involving commerce, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4."[101]

99. Mey v. DIRECTV, LLC, 971 F.3d 284, 287 (4th Cir. 2020).

100. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 136–37 (codified at 9 U.S.C. §§ 401(2), 402(a)).

101. *Cf.* 9 U.S.C. § 2 (current language).