

## CREATING A FRAMEWORK FOR EXAMINING FEDERAL AGENCY RULES IMPACTING ARBITRATION

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### ABSTRACT

*Since 1985, the analysis for determining how to resolve a conflict between the Federal Arbitration Act and another federal statute has been clear—courts should consider whether Congress evidenced a “contrary congressional command” stating that arbitration agreements may not be enforced under the statute. In contrast, no court has created an analytical framework to consider how to compare federal regulatory actions (by rule or adjudication) prohibiting enforcement of pre-dispute arbitration agreements. This article fills the gap and suggests two frameworks under which agency actions prohibiting enforcement of arbitration agreements could be considered—a “contrary congressional command” rule focused on the enabling legislation or a “contrary regulatory command” rule focused on the regulation itself. Although both rules can be supported by public policy, the “contrary congressional command” rule more closely applies current arbitration law to this new context of regulatory actions. This article traces the origins of the “contrary congressional command” rule and demonstrates how that rule can be used in cases involving agency action. This article also gives concrete examples of how the different frameworks would lead to different results depending on the statutory language at issue, the agency action, and the conceptual framework chosen to analyze the case.*

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## INTRODUCTION

The Federal Arbitration Act (FAA) appears to be almost as immutable as the Ten Commandments. Congress enacted the FAA in 1925, and the Act remains almost completely unrevised in its more than ninety years of existence.<sup>1</sup> The world has changed significantly since the FAA's passage, and arbitration practice has evolved while the statutory framework has not. At that time, most arbitration involved breaches of contracts between commercial entities.<sup>2</sup> Merchants used arbitration to take advantage of its expediency and ability to appoint expert decision-makers. As time progressed, parties began using arbitration to resolve a wide variety of disputes, including cases involving statutory rights,<sup>3</sup> consumer claims,<sup>4</sup> employment claims,<sup>5</sup> class actions,<sup>6</sup> and countless other types of disputes. Likely, Congress did not envision a system of arbitration dealing with consumers, franchisees, and non-unionized workers,<sup>7</sup> and the FAA is ill-

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1. In 1947, the FAA was codified, and Congress slightly modified some of the provisions in 1956. Chapter Two, enacting the New York Convention for international arbitration awards, was passed by Congress in 1970. Pub. L. No. 91-368, 84 Stat. 692 (codified as amended at 9 U.S.C. §§ 201-208 (2012)). In 1988, Congress made the "act of the state" doctrine inapplicable to the FAA and enacted procedures for litigants to appeal immediately certain district court orders unfavorable to arbitration. Pub. L. No. 100-669, § 1, 102 Stat. 3969 (codified as amended at 9 U.S.C. §§ 15-16 (2012)). Congress enacted Chapter Three, dealing with certain international arbitral awards in 1990. Pub. L. No. 101-369, § 1, 104 Stat. 448 (codified as amended at 9 U.S.C. §§ 301-307 (2012)).

2. See Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 122 ("What is immediately apparent from studying the history of the FAA is that the statute was intended to support a modest system of arbitration of contractual disputes between merchants through limited procedures available in federal court."); see also KRISTEN M. BLANKLEY & MAUREEN A. WESTON, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION, §9.02 (2017).

3. Even as early as the 1950s, consumer claims—including statutory claims—were subject to arbitration. As discussed below, *Wilko v. Swan*, 346 U.S. 427 (1953), was one of the first cases to reach the Supreme Court involving both the resolution of statutory rights as well as a claim between a business and a consumer.

4. See *id.*

5. As the Supreme Court became more favorable towards arbitration, more and more companies began to require arbitration of employment claims. The landmark case in which the Supreme Court blessed the use of arbitration to resolve statutory employment claims was *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The *Gilmer* case involved a claim of age discrimination in Gilmer's work as a broker/dealer in the securities industry.

6. Class action arbitration began gaining traction around the turn of the twenty-first century. The first case dealing with a class action issue reached the Supreme Court in 2003. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

7. In an article written contemporaneously with the passing of the FAA, Julius Henry Cohen and Kenneth Dayton describe the FAA as a "necessity" for "American business" to have cost-effective and speedy dispute resolution. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration*

equipped to deal with the intricacies that have arisen in these areas of arbitration law.

Given the changes in arbitration practice over time, unsurprisingly, some congresspersons have attempted to amend the FAA. Most notably, Congress considered variations of a bill, colloquially titled the Arbitration Fairness Act (AFA), between 2007 and 2018, that would invalidate pre-dispute arbitration agreements in the consumer, employment, and franchise contexts, as well as certain types of civil rights disputes.<sup>8</sup> In 2019, Congress considered the Forced Arbitration Injustice Repeal Act (FAIR Act), similar to the AFA, but also including a prohibition on class-action waivers.<sup>9</sup> These bills, however, have not progressed out of committee and have not been passed into law. Congress appears equally unwilling to pursue less sweeping legislation that would regulate arbitration, as opposed to bar it outright.<sup>10</sup>

Despite Congress's inability to reform arbitration practice as a whole, it has been able to pass arbitration legislation in limited areas. In the Dodd-Frank Act, for instance, Congress prohibited the use of pre-dispute arbitration agreements in residential mortgage contracts.<sup>11</sup> Amidst the Jamie Leigh Jones sexual assault controversy,<sup>12</sup> former senator Al Franken (who

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*Law*, 12 VA. L. REV. 265 (1926). Further, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 249 (2011), Justice Scalia stated that "class arbitration was not even envisioned by Congress when it passed the FAA in 1925," and argued that anything other than bilateral arbitration interferes with the "fundamental attributes of arbitration," *id.* at 344. Compared with non-unionized workplaces, collective bargaining agreements have a long history of including arbitration procedures as part of their grievance processes. The 1947 Taft-Hartley Act provides an enforcement mechanism for labor arbitration. See MAUREEN WESTON, KRISTEN BLANKLEY, JILL GROSS & STEPHEN K. HUBER, *ARBITRATION: LAW, POLICY, AND PRACTICE* 27 (2018).

8. See, e.g., Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015).

9. Forced Arbitration Injustice Repeal Act of 2019, H.R. 1423, 116th Cong. § 402(a) (2019).

10. Academics have suggested for years that regulating arbitration through amendments to the FAA might ease concerns about the process. See, e.g., Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1310 (2011) (proposing a compromise solution that Congress allow mandatory arbitration, provided that stricter regulation also be allowed).

11. 15 U.S.C. § 1639c(e) (2012) ("No residential mortgage loan . . . may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.").

12. Jamie Leigh Jones worked for KBR, which was a subsidiary of Halliburton, as an administrative assistant. She worked in Iraq and lived in housing provided by her employer. In July 2005, she claimed that she had been gang raped, and she attempted to sue Halliburton in court, despite the presence of an arbitration agreement in her employment contract. She won a protracted legal battle regarding whether she could present her case to an arbitrator or a jury, and she had her day in court in 2011. See *Jones v. Halliburton Co.*, 583 F.3d 228, 230 (5th Cir. 2009) (affirming a ruling by the district

also proposed the AFA each year) proposed an amendment—which passed—to an appropriations bill that would bar funding of military contractors that use pre-dispute arbitration clauses in their employment contracts.<sup>13</sup>

With Congress virtually unable to act in the area of wholesale arbitration reform, some federal agencies are now attempting to regulate arbitration within their own areas of expertise.<sup>14</sup> In some instances, Congress gave the agency specific authorization to consider arbitration.<sup>15</sup> In other instances, agencies appear to be considering arbitration regulations on their own initiative.

An agency's willingness to tread into this ground varies significantly from administration to administration. During Barack Obama's presidency, a number of agencies attempted to limit companies' ability to require arbitration in some consumer and employment contracts. For example, the U.S. Department of Education promulgated a final regulation that went into effect on July 1, 2017, prohibiting colleges and universities from entering into a pre-dispute arbitration agreement with direct-loan borrowers.<sup>16</sup> Additionally, the Department of Education prohibited colleges and universities from requiring students to sign a waiver of the right to proceed as a class action.<sup>17</sup> The Federal Communications Commission received

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court that many of her claims were not arbitrable). Ultimately, the jury did not believe Jones' allegations of rape and rendered a complete defense verdict. *Texas: Jury Rejects Assertion of Rape Against Military Contractor in Iraq*, N.Y. TIMES, July 9, 2011, at A13.

13. Jamie Leigh Jones testified before Congress in 2007 in support of this amendment. The amendment passed sixty-eight to thirty in 2009, the first year that the amendment was proposed. See Cynthia Dizikes, *Senate Passes Franken Amendment Aimed at Defense Contractors*, MINNPOST (Oct. 6, 2009), <https://www.minnpost.com/politics-policy/2009/10/senate-passes-franken-amendment-aimed-defense-contractors/> [<https://perma.cc/A6KR-B9Y5>]. As an amendment to an appropriations bill, this requirement must be re-enacted each year to remain in effect.

14. See Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 993 (2017) (noting that agencies' abilities to amass evidence and reflect on issues within their area of expertise make them a prime candidate for promulgating rules relating to arbitration within their field).

15. The Dodd-Frank Act established the Consumer Financial Protection Bureau and gave the agency the ability to study and create rules regarding arbitration. 12 U.S.C. § 5493(b)(1) (2012) (creating research unit); 12 U.S.C. § 5496(c) (requiring reports to Congress on the agency's rules and studies); 12 U.S.C. § 5518 ("The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.").

16. 34 C.F.R. § 685.300 (2017). These regulations went into effect and are discussed in more detail below in Section III.A.

17. *Id.*; see also Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education

pressure to promulgate regulations banning pre-dispute arbitration agreements in consumer contracts for cellular telephone services, although no specific proposal was ever made.<sup>18</sup> The Centers for Medicare and Medicaid Services (CMS) twice promulgated rules hostile to arbitration, which will be discussed in further detail below.

Since the election of President Donald Trump, many anti-arbitration rules have either been abandoned or reversed.<sup>19</sup> Perhaps the most visible political debate over agency regulation of arbitration was regarding the Consumer Financial Protection Bureau's (CFPB) rule that would prohibit class action waivers in pre-dispute arbitration agreements in consumer financial contracts. Although the rule was finalized, Congress exercised its ability to overturn the rule under the Congressional Review Act.<sup>20</sup> After the resolution passed the House, the Senate passed it fifty-one to fifty, with Vice President Mike Pence casting the deciding vote to overturn the CFPB rule.<sup>21</sup> Although the political climate can be more or less hostile to arbitration depending on the administration, the increased attention to arbitration by federal agencies will likely continue into the future.

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Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 7592675, (Nov. 1, 2016) (to be codified at scattered sections of 34 C.F.R.); Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Final Regulations to Protect Students and Taxpayers from Predatory Institutions (Oct. 28, 2016), <https://www.ed.gov/news/press-releases/us-department-education-announces-final-regulations-protect-students-and-taxpayers-predatory-institutions> [<https://perma.cc/5EHE-9GXX>].

18. Various news outlets and special interest groups have reported on these types of proposals. See, e.g., Bryan Koenig, *Privacy Groups Want FCC to Ban Mandatory Arbitration*, LAW360 (Jan. 12, 2017, 4:57 PM), <https://www.law360.com/articles/880361/privacy-groups-want-fcc-to-ban-mandatory-arbitration> [<https://perma.cc/L3WS-U6Y3>] (discussing the type of ban, as well as the political practicalities of such ban coming into effect); Letter from Lisa Gilbert, Dir., Cong. Watch Div., Pub. Citizen, to Mignon Clyburn, Comm'r, Fed. Commc'ns Comm'n (Jan. 11, 2017), <https://www.fcc.gov/file/11941/download> [<https://perma.cc/4R73-QVA8>] (discussing pre-dispute arbitration agreements in consumer contracts).

19. In some cases, the reversal of agency positions regarding arbitration has led to dismissals of litigation regarding the regulations or abandonment of claims in support of limitations on arbitration and class actions. See, e.g., *Chamber of Commerce of the U.S. v. U.S. Dep't of Labor*, 885 F.3d 360, 385 (5th Cir. 2018) (noting that the Department of Labor "disavowed" certain financial regulations that would limit class actions and implicate arbitration following the change in administration).

20. See Nicholas Denny, Angela Cipolla, Hilal Gulseven Cayirli & Russ Bleemer, *The Worker's View: Why the NLRB Was Correct in Declaring Mandatory Employment Arbitration Illegal*, 35 ALTERNATIVES TO HIGH COST LITIG. 165, 165 (2017).

21. *H.J. Res. 111—115th Congress: Roll Call Votes*, CONGRESS.GOV, <https://www.congress.gov/bills/115th-congress/house-joint-resolution/111/all-actions?overview=closed&q={%22roll-call-vote%22:%22all%22}&KWICView=false> [<https://perma.cc/W9PN-WT93>].

Ultimately, this article asks: What happens if an agency promulgates a law hostile to arbitration? How should the courts treat such an attempt? The law is relatively clear on dealing with conflicts between the FAA and statutes hostile to arbitration, but the law is only beginning to develop when a conflict exists between the FAA and a federal regulation. This article proposes a framework for dealing with this emerging issue, particularly given congressional inaction and increased political pressure to reform arbitration. This Article, however, makes no substantive judgments regarding the value of any particular regulation, and this opening narrative only intends to show why agencies are attempting to do what Congress politically cannot.

This article predicts the Supreme Court will extend the now well-established rule for a conflict between the FAA and a federal statute to the area of agency regulations. Instead of simply detecting a conflict between the FAA and the regulation, however, this article predicts that the Supreme Court, and thereafter lower courts, will apply this rule to the *enabling legislation* to determine if the FAA or the agency rule should apply. This rule has some significant benefits, such as preserving the policies underlying the FAA, reading federal statutes together, and preventing overreaching by agencies. This article also considers a competing model under which a court would compare the FAA and the regulation together, but only after considering whether the regulation was properly promulgated.

The question covered herein is similar to, but distinct from, the question presented in *Epic Systems v. Lewis*.<sup>22</sup> The *Epic Systems* Court considered whether companies could include class-action waivers in arbitration agreements with their employees.<sup>23</sup> At issue were both statutory language and regulatory authority hostile to arbitration. The *Epic Systems* Court, by dealing solely with the statutory question (i.e., enforcing arbitration agreements under the FAA and protecting “concerted activity”<sup>24</sup> in the labor context) left open the question of how courts should consider anti-arbitration regulatory law. Although the Court gives some guidance on this issue,<sup>25</sup> that guidance is arguably dicta. This article, by contrast, focuses squarely on the intersection of regulatory law and arbitration law.

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22. 138 S. Ct. 1612 (2018).

23. *Id.*

24. 29 U.S.C. § 157 (2012) (providing a right to engage in concerted labor activity).

25. *Epic Systems Corp.*, 138 S. Ct. at 1629-30 (discussing the role of agency deference).

Surprisingly few scholars have closely examined the relationship between the FAA and federal administrative regimes. Professor Maureen Weston noted many of these questions in her article, “The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse,” which was one of the first articles on the topic.<sup>26</sup> Professor Weston’s article focuses primarily on adjudicatory agency proceedings, while this article considers both rule-based and adjudicatory proceedings, also building on the lessons learned from *Epic Systems*. Other scholars have considered the propriety of agencies promulgating arbitration regulations, usually while assuming the authority to do so.<sup>27</sup> Further, a handful of articles have made some reference to the conflict between the FAA and anti-arbitration regulations,<sup>28</sup> but most of these articles consider the conflict in a very specific industry. More recently, Professor David Noll, in his article “Arbitration Conflicts,”<sup>29</sup> and Professor Daniel Deacon, in his essay, “Agencies and Arbitration,”<sup>30</sup> have begun a conversation on this issue, particularly in the wake of *Epic Systems* and Obama-era anti-arbitration regulations. This article seeks to build on these ideas, considering them from a new lens and setting forth a new rule for courts to consider.<sup>31</sup> While Professors Noll and Deacon approach these issues from the lens of administrative law, this article focuses on the lens of arbitration law.

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26. Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103 (2015). In addition, Professor Weston has written extensively on the topic of preemption of state administrative laws. See, e.g., Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 5 Y.B. ON ARB. & MEDIATION 59 (2013) (discussing expansive preemption by the FAA and urging Congress to amend the FAA to limit the preemptive power of the Act).

27. See Deacon, *supra* note 14.

28. See, e.g., Arpan A. Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 421-422, 477-85 (2013) (proving an overview of ways that *Concepcion* may implicate federal law hostile to arbitration); Clint Hale, Note, *The Great and Powerful FAA: Why Schwab’s Class Action Waiver Should Have Been Enforced Over FINRA’s Rules*, 42 PEPP. L. REV. 109 (2014) (discussing the intersection of the FAA and FINRA rules).

29. David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665 (2018).

30. Deacon, *supra* note 14. Professor Deacon more recently authored an essay giving an administrative law perspective on these issues. Daniel T. Deacon, *Federal Common Law Versus Agency Power: An Essay on Epic Systems Corporation v. Lewis*, 2019 J. DISP. RESOL. 141.

31. See generally Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1 (2012) (analyzing potential conflicts between the FAA and FINRA arbitration practice); Kenneth T. Lopatka, *A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws*, 63 S.C. L. REV. 45 (2011) (discussing the intersection of the FAA with the NLRB).

The renewed interest in federal agency regulation of arbitration makes this topic worth exploring in greater detail. Although the interest in anti-arbitration regulation ebbs and flows based on political control of those agencies, this article develops a framework for examining those regulations based on current arbitration law.

In Part I, this article traces the historical roots of how Supreme Court handles conflicts between FAA and contrary federal statutes, with the discussion divided between the *Wilko v. Swan* era and the contemporary era. Part II proposes two analytical models for determining whether an anti-arbitration regulation would survive court scrutiny. Part III gives examples on how future cases can be resolved under these frameworks, and the conclusion predicts that the courts will likely invalidate regulations hostile to arbitration without clear indication from Congress that the agency has permission to abridge the FAA.

#### I. FAA AND COMPETING FEDERAL STATUTES

Part I of this article considers the foundational question of conflict between the FAA and other federal statutes. Because agency regulations must ultimately trace back to enabling legislation, this analysis provides a legal backdrop to considering the role of agency regulations dealing with arbitration. This section highlights the role of agencies, as appropriate.

##### A. *The Wilko v. Swan Era*

Early U.S. courts consistently held that statutory claims could not be arbitrated, as evidenced by *Wilko v. Swan*.<sup>32</sup> *Wilko* involved a rather garden-variety claim of a violation of the Securities Act of 1933 based on misrepresentations made during the sale of securities.<sup>33</sup> The parties' agreement included an arbitration clause, which the broker/dealer sought to enforce.<sup>34</sup> The consumer argued that claims under the Securities Act could not be arbitrated for two reasons: first, because Congress created a statutory

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32. 346 U.S. 427 (1953).

33. *Id.* at 428-29. Specifically, the complaint alleged that the broker/dealer made positive statements about and encouraged the consumer to purchase stock in Air Associates all the while not disclosing that a director and legal counselor for Air Associates was selling his own stock (some of which the consumer purchased). *Id.*

34. *Id.* at 429.

cause of action, and second, because the Securities Act included an “anti-waiver” provision, so attempts to waive compliance with the right to litigate would be void.<sup>35</sup> The broker/dealer argued that arbitration was merely an alternative forum—not a waiver of rights.<sup>36</sup>

The Court expressed the “desirability of arbitration as an alternative to the complications of litigation” and as a means to avoid “delay and expense.”<sup>37</sup> The majority noted arbitration’s “usefulness” in resolving cases “based on statutes.”<sup>38</sup> Despite these broad generalizations regarding arbitration’s benefits and utility, the Court found the dispute not arbitrable, relying on textual and policy reasons.<sup>39</sup>

As to the consumer’s first argument, the Court found that the “anti-waiver” provision included the right to a judicial forum. The Court stated that if a buyer

waives his right to sue in courts, he gives up more than would a participant in other business transactions . . . He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.<sup>40</sup>

The Court, however, leaves this statement as a bare assertion and does not discuss or cite any legal principles on the conflict-of-laws issue.

As to the consumer’s second argument, the Court relied on policy considerations. The *Wilko* Court appears to hold that arbitrators are ill-equipped to deal with legal claims. The Court expressed concern that arbitrators would be “without judicial instruction on the law,” leading to bad

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35. *Id.* at 430 (“The question is whether an agreement to arbitrate a future controversy is a ‘condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision’ of the Securities Act which § 14 declares ‘void.’”).

36. *Id.* at 433 (“Respondent asserts that arbitration is merely a form of trial to be used in lieu of a trial at law, and therefore no conflict exists between the Securities Act and the United States Arbitration Act either in their language or in the congressional purposes in their enactment.”). This argument later wins the day when the Court overrules *Wilko*. See *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 228-29 (1987) (retreating from *Wilko*).

37. *Wilko*, 346 U.S. at 431.

38. *Id.* at 432 (citing circuit court cases).

39. *Id.* at 438.

40. *Id.* at 435. Justice Jackson concurred, noting that parties could freely choose to arbitrate after a dispute arose, but this contract involved a pre-dispute arbitration agreement. *Id.* at 438-39 (Jackson, J., concurring).

decisions.<sup>41</sup> Arbitrators may not understand “burden[s] of proof,” “reasonable care,” and “material fact[s].”<sup>42</sup> Because arbitrators need not issue reasoned awards, errors in legal reasoning may not be obvious.<sup>43</sup> Further, the “[p]ower to vacate an award is limited.”<sup>44</sup> These concerns are essentially paternalistic, based on the idea that consumers cannot be adequately protected by arbitrators who may or may not be lawyers. As a practical matter, following *Wilko*, statutory claims were generally not arbitrable.<sup>45</sup>

This case included some interesting agency dynamics. Although *Wilko* dealt with the Securities Act, as opposed to a Securities and Exchange Commission (SEC) regulation, the SEC appeared in *Wilko* as amicus curiae.<sup>46</sup> The SEC received special leave of Court to appear in the action and “share[ the consumer’s] burden” in the case.<sup>47</sup> The Court appeared to show interest in and deference to the agency’s interpretation of its enabling legislation through the SEC’s special role in the litigation. The SEC argued in its amicus filing that arbitration violated the anti-wavier provision of the statute and violated public policy for the reasons noted above.<sup>48</sup>

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41. *Id.* at 436.

42. *Id.* In the dissent, Justice Frankfurter noted that arbitrators would not be free to simply disregard the law when ruling on statutory claims. *Id.* at 440 (Frankfurter, J., dissenting) (“Arbitrators may not disregard the law.”).

43. *Id.* at 436 (“As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact,’ cannot be examined.”).

44. *Id.*

45. See, e.g., EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN E. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA* 129 (2006) (“The *Wilko* decision no doubt discouraged businesses from seeking to impose arbitration on consumers in other contexts as well [i.e., outside of securities].”). Professor Carbonneau describes *Wilko* as a “classic example” of the Court acting hostilely to arbitration, and he also focuses on the *Wilko* Court mistrusting of arbitrators to understand the law and rule accordingly. THOMAS E. CARBONNEAU, *TOWARD A NEW FEDERAL LAW ON ARBITRATION* 556-57 (2014).

46. *Wilko*, 346 U.S. at 428, at n.\*.

47. *Id.* The SEC appeared on behalf of the consumer starting at the district court. See *Wilko v. Swan*, 107 F. Supp. 75 (S.D.N.Y. 1952), *rev’d*, 201 F.2d 439 (2d Cir. 1953).

48. See generally Brief for the Securities & Exchange Commission as Amicus Curiae supporting Respondents, *Wilko v. Swan*, 201 F.2d 439 (2d Cir. 1953) (No. 39), 1953 WL 78482.

### *B. Modern View*

The *Wilko* era lasted roughly thirty-five years. By the late 1980s, the Supreme Court overruled its textual and policy justifications on the issue of arbitrability of statutory claims. Some of these cases involved federal agencies, although the amount of deference given to those agencies wanes over time with no discussion.

#### *1. The Mitsubishi-McMahon-Rodriguez-Gilmer Quartet*

The death knell for *Wilko* rang in mid-1980s. *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*,<sup>49</sup> and *Shearson/American Express Inc. v. McMahon*<sup>50</sup> put into motion a series of cases reversing *Wilko*'s textual and policy justifications. Reviewing *McMahon* in conjunction with *Rodriguez de Quijas v. Shearson/American Express Inc.*<sup>51</sup> and *Gilmer v. Interstate/Johnson Lane Corp.*<sup>52</sup> gives the most robust picture of the change in tide. Other than *Mitsubishi*, all of these cases arose in the securities industry—an industry that widely adopted arbitration practice despite *Wilko*'s holding.

The *Mitsubishi* case enforced the parties' pre-dispute arbitration agreement although the underlying dispute concerned claims under the Sherman Act.<sup>53</sup> Although the *Mitsubishi* case concerned two business entities, the Court mandated arbitration despite the complex statutory scheme regarding anticompetitive behavior. *McMahon* involved alleged violations of the Exchange Act between consumers and broker/dealers in the context of contracts including arbitration clauses.<sup>54</sup> Unlike *Wilko*, the *McMahon* Court stated: "The Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims,"<sup>55</sup> and explained:

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49. 473 U.S. 614 (1985).

50. 482 U.S. 220 (1987).

51. 490 U.S. 477 (1989).

52. 500 U.S. 20 (1991).

53. 473 U.S. at 628-29; *see also* Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 349-50 (2010) (tracing the effects of *Southland Corp. v. Keating* on claims involving federal statutes).

54. 482 U.S. at 223.

55. *Id.* at 226.

Like any statutory directive, the Arbitration Act's mandate may be overridden by a *contrary congressional command*. The burden is on the *party opposing arbitration*, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "*will be deducible from [the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.*"<sup>56</sup>

This holding is notable for two reasons.<sup>57</sup> First, the Court places a very high burden of proof on the party opposing arbitration. Second, the Court requires that party to point to something in the statute's text, legislative history, or purpose showing that Congress did not intend for claims under that statute to be arbitrated. As a practical matter, Congress may be presumed to rely on *Wilko* and the historical view that statutory claims were not appropriate for arbitration up to that point in time, so the Court's new rule would result in arbitration of all (or nearly all) of claims falling under a statute because Congress would not have considered adding such language to its statutes.<sup>58</sup>

In *McMahon*, the Court easily found that the consumers did not meet this heavy burden.<sup>59</sup> In applying this new rule, the Court took aim at the twin justifications set forth by the *Wilko* Court. The *McMahon* Court did not construe the right-to-sue provision as being strictly subject to the "anti-

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56. *Id.* at 226-27 (alteration in original) (emphasis added) (citations omitted) (quoting *Mitsubishi*, 473 U.S. at 628).

57. In addition to creating these two important structural changes to arbitration law, the Supreme Court also created a new label for the rule—the "contrary congressional command" rule. Although the Court does not use this language again for almost two decades, more recent Supreme Court—and lower court—cases rely on this language in trying to read other federal statutes with the FAA. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citing language); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1330 (11th Cir. 2014) (analyzing the "contrary congressional command inquiry").

58. Over time, of course, this argument diminishes. Once Congress is on notice of the need to include language relating to arbitration, Congress' lack of arbitration language can be argued to be intentional.

59. 482 U.S. at 238 ("We conclude, therefore, that Congress did not intend for § 29(a) to bar enforcement of all predispute arbitration agreements. In this case, where the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, enforcement" of arbitration agreements does not constitute a "waiver . . . of the Exchange Act.").

waiver” provision.<sup>60</sup> Instead, the Court indicated that the parties will still maintain their statutory rights, only those rights would be enforced by an arbitrator—not a judge.<sup>61</sup> Further, the Court also rejected the idea that arbitrators are incapable of determining statutory claims:

Indeed, most of the reasons given in *Wilko* have been rejected subsequently by the Court as a basis for holding claims to be nonarbitrable. In *Mitsubishi*, for example, we recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision. Likewise, we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights. Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.<sup>62</sup>

As in *Wilko*, the SEC appeared as *amicus curiae*, but in *McMahon*, the SEC supported the side of the broker/dealers—not the consumer.<sup>63</sup> The Court positively cited the SEC’s “expansive power to ensure the adequacy of the arbitration procedures” initiated by the stock exchanges administering the arbitrations.<sup>64</sup> The Supreme Court did not cite any provision of the Securities Act that gives the SEC the power to regulate *arbitration*, but it does cite to the SEC’s general oversight over the self-regulatory organizations (SROs).<sup>65</sup>

Five years after *McMahon*, the Supreme Court expressly overruled *Wilko* in *Rodriguez*.<sup>66</sup> The *Rodriguez* Court unsurprisingly found that the

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60. *Id.* at 228-29 (discussing the effect of *Wilko*).

61. *Id.* at 229 (holding that “where arbitration does provide an adequate means of enforcing the provisions of the Exchange Act, § 29(a) does not void a predispute waiver of § 27). The Court relies on *Mitsubishi*, holding that, “[o]rdinarily, ‘by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’” *Id.* at 228-29 (quoting *Mitsubishi*, 473 U.S. at 628).

62. *Id.* at 232.

63. *Id.* at 233-34.

64. *Id.* at 233.

65. *Id.* (citing 15 U.S.C. § 78s).

66. *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 485 (1989).

*Wilko* holding interpreting the Securities Act could not stand side-by-side with the *McMahon* ruling interpreting the Exchange Act.<sup>67</sup>

The *Gilmer* case reiterates the *McMahon* holding, but the language goes farther to support arbitration, dismissing the notion that arbitrators are inept or provide inferior dispute resolution. Robert Gilmer asserted an Age Discrimination in Employment Act<sup>68</sup> violation against his employer, a securities firm.<sup>69</sup> He claimed his Age Discrimination in Employment Act (ADEA) claim was not arbitrable under his contract.<sup>70</sup>

Finding nothing in the text or legislative history of the ADEA relating to arbitration, Gilmer unsuccessfully argued that the purposes of the ADEA were “inconsistent” with the FAA.<sup>71</sup> Gilmer recited a litany of reasons why arbitration was inadequate, but the Court rejected each one—in stark contrast with the policy arguments articulated in *Wilko*. Specifically, the Court determined that the New York Stock Exchange (NYSE) rules “provide protection against biased panels,”<sup>72</sup> that “NYSE discovery provisions”<sup>73</sup> adequately give the parties the ability to develop and present their cases, that “arbitration awards [would] be in writing”<sup>74</sup> under the NYSE rules, that arbitrators “have the power to fashion equitable relief,”<sup>75</sup> and that class remedies might still be available to Gilmer.<sup>76</sup> The Court further rejected any argument that arbitration was inappropriate given the disparity in bargaining power between employer and employee.<sup>77</sup> In other words, the Court validated arbitrators’ abilities to manage complex cases fairly.

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67. *Id.* at 484 (“It also would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side. Their inconsistency is at odds with the principle that the 1933 and 1934 Acts should be construed harmoniously.”).

68. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-629, 634 (2012).

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

70. Technically, the arbitration agreement at issue was between Gilmer and the New York Stock Exchange, which had a rule that required arbitration of all claims between “any member or member organization arising out of the employment or termination of employment of such registered representative.” *Id.*

71. *Id.* at 27.

72. *Id.* at 30.

73. *Id.* at 31.

74. *Id.*

75. *Id.* at 32.

76. *Id.*

77. *Id.* at 33.

In many ways, *Gilmer* was an easy case. Arguably, Congress, in passing the ADEA in 1967, would not have considered any need to address arbitration because *Wilko* was current law at the time.<sup>78</sup> In addition, by the 1990s, securities arbitration was well developed. The Court repeatedly endorsed the specific NYSE rules as adequate and fair. Although the SEC did not participate in *Gilmer*, the SEC had significant regulatory authority over the NYSE and its dispute resolution process. Despite taking an easy case, the Court did not limit the holding to securities cases or other cases involving relatively sophisticated employees. These three cases set the legal landscape for widespread arbitration to resolve statutory claims in contracts between businesses, between businesses and employees, and between businesses and consumers. Although these holdings remain largely unchanged, they are still controversial.<sup>79</sup>

## 2. Modern Application of the New Rule

The last two decades have seen widespread arbitrability of statutory claims, and many of the leading Supreme Court cases have agency implications. Between 2012 and 2019, the Court decided three cases regarding the arbitrability of federal claims. Although most arbitration scholars would characterize these as “class action arbitration” cases, the Court clarified and expanded the “contrary congressional command” rule first articulated in *McMahon*.

First, in *CompuCredit Corp. v. Greenwood*,<sup>80</sup> the Supreme Court elaborated on the meaning of a “contrary congressional command.” *CompuCredit* considered whether cases involving alleged violations of the Credit Repair Organizations Act (CROA)<sup>81</sup> could be arbitrated. Plaintiff credit cardholders filed a class action lawsuit against CompuCredit under the CROA for allegedly making false statements regarding the card’s ability

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78. In addition, an open question existed until 2001 as to whether employment-related disputes could be arbitrated at all. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (interpreting an exclusion of “any other class of workers engaged in foreign or interstate commerce” in 9 U.S.C. § 1 as applying only to transportation workers).

79. Dunham, *supra* note 53, at 354 (noting that “*Gilmer* thus expanded the scope of the FAA into employee-employer claims and civil rights claims, two areas of the law where arbitration had been an unwelcome guest”).

80. 565 U.S. 95 (2012).

81. 15 U.S.C. § 1679 (2012).

to repair credit.<sup>82</sup> The card agreement included an arbitration clause,<sup>83</sup> but the parties disputed whether the CROA claim could be arbitrated.

Citing *McMahon*, the Court articulated the “contrary congressional command” rule,<sup>84</sup> and rejected the cardholders’ argument (similar to the argument made by Gilmer) that the CROA gave them an unwaivable right to sue.<sup>85</sup> Instead, the Court limited the right under the CROA to “the right to receive” a certain disclosure statement, “which is meant to describe the consumer protections that the law elsewhere provides.”<sup>86</sup> The Court again rejected the argument that the statutory language creating a cause of action, and even contemplating class actions, was a “contrary congressional command” under *McMahon* and *Gilmer*.<sup>87</sup> The Court further stated that it had “repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court,”<sup>88</sup> noting that if Congress had wanted to prohibit the arbitration of these disputes, it could have done so in the text of the statute.<sup>89</sup>

Second, in the 2013 case of *American Express Co. v. Italian Colors Restaurant*,<sup>90</sup> the Supreme Court considered whether a class-action waiver provision in a contract between American Express and certain franchisees was permissible. The franchisees argued that the antitrust laws provided a contrary congressional command to allow them to proceed as a class in court. The Court, favorably citing *CompuCredit*, rejected the franchisees’ argument.<sup>91</sup> Because the Sherman and Clayton Acts “make no mention of

82. *CompuCredit*, 565 U.S. at 97.

83. *Id.* (The credit card application form stated that “any claim, dispute or controversy (whether in contract, tort, or otherwise) at any time arising from or relating to your Account, any transferred balances or this Agreement (collectively, ‘Claims’), upon the election of you or us, will be resolved by binding arbitration.”).

84. *Id.* at 98 (citing *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

85. *Id.* at 99 (noting that a violation of the non-waiver provision would be “void.”).

86. *Id.*

87. *Id.* at 101-02 (citing *McMahon*, 482 U.S. at 226; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

88. *Id.* at 101 (emphasis added).

89. *Id.* at 103. The dissent relied highly on the combination of the “right to sue” and anti-waiver language. *Id.* at 113 (Ginsburg, J., dissenting). The dissent argued that the non-waiver language of the CROA was sufficiently different from the language in the other cases, such as *McMahon*, to be able to distinguish this case from the others. *Id.* at 115.

90. 570 U.S. 228 (2013).

91. *Id.* at 233 (quoting *CompuCredit*, 565 U.S. at 98).

class actions,”<sup>92</sup> they did not evidence such a contrary congressional command. The Court further rejected the franchisees’ argument that the advent of Rule 23 five decades later created such a congressional command.<sup>93</sup>

Most recently, the Court addressed this issue in *Epic Systems Corp. v. Lewis*.<sup>94</sup> *Epic Systems* considered the conflict between the FAA and the National Labor Relations Act (NLRA) regarding the ability for workers to proceed as a class action in court, as opposed to bilateral arbitration.<sup>95</sup> The Court appeared to modify the *McMahon* rule by holding that the employees must show a “clear and manifest congressional command” in the NLRA to displace the FAA.<sup>96</sup> The addition of “clear and manifest” arguably creates an even higher burden than existed before,<sup>97</sup> but the rule is too new to determine whether this burden is, in fact, higher than the previously articulated “contrary congressional command” rule.

The Court found that no such command existed. The court read the “concerted activity” language of the NLRA to protect workers’ rights to join unions and bargain collectively—but not to engage in class action lawsuits.<sup>98</sup> In addition, the Court rejected the argument that class action litigation falls within the “catchall” phrase at the end of Section 7.<sup>99</sup> *Epic*

92. *Id.* at 234.

93. *Id.* at 234-35. Although outside the scope of this article, the *Italian Colors* Court notably rejected the franchisees’ argument that they could not effectively vindicate their statutory rights due to the prohibitive costs of proceeding individually. *Id.* at 235-39.

94. 138 S. Ct. 1612 (2018).

95. *Id.* at 1623-24. The NLRA provides employees with the right to “form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” *Id.* at 1624 (quoting 29 U.S.C. § 157).

96. *Id.* (emphasis added). The use of the “clear and manifest” language is new to the arbitration cases. This language appears to come from the rule regarding the doctrine of implied repeal. The cases cited by the Court supporting the “clear and manifest” rule both involve the implied repeal of one statute by a later-enacted statute. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Fausto*, 484 U.S. 439 (1988)).

97. To date, one court cited the new test. In *California Ass’n of Private Postsecondary Schools v. DeVos*, No. 17-999, 2020 WL 516455, at \*13 (D.D.C. Jan. 31, 2020), the U.S. District Court for the District of Columbia, however, did not find a conflict between the regulation at issue and the FAA, so the court did not need to apply the test.

98. *Epic Systems*, 138 S.Ct. at 1628-29. The Court noted that this ruling should not “come as a surprise,” given that the right to proceed as a class action did not exist under the Federal Rules of Civil Procedure for approximately thirty years after the passage of the NLRA. *Id.* at 1627.

99. *Id.* at 1625-27.

*Systems* favorably cites *Gilmer*,<sup>100</sup> and noted that “this Court has rejected every such effort [to show a conflict between a federal statute and the FAA] to date . . . , with statutes ranging from the Sherman and Clayton Acts to the [ADEA], the [CROA], the Securities Act . . . , the . . . Exchange Act,” and the Racketeer Influenced and Corrupt Organizations Act.<sup>101</sup>

Unlike these other cases mentioned, *Epic Systems* is the first to discuss the relationship between the FAA and *Chevron* deference to agency rules, although that discussion is arguably dicta.<sup>102</sup> As discussed in more detail below, the Court rejected the notion that it should give deference to the National Labor Relation Board’s (NLRB) determination on the meaning of the NLRA.<sup>103</sup> The end result of this case is another instance of the Court reading two federal statutes together to enforce arbitration agreements in areas that implicate federal law.

These cases show a clear trend towards finding statutory causes of action arbitrable as a way to give effect to both the FAA and the statute creating the underlying cause of action. Understanding the analysis of conflicts between the FAA and other federal laws is fundamental to predicting the analysis that courts will use when construing agency regulations hostile to arbitration.

## II. ANALYZING AGENCY REGULATIONS IN LIGHT OF THE FAA

The Supreme Court has yet to explicitly rule on the question of how to deal with a conflict between the FAA and a federal agency regulation that is hostile to arbitration. The recent decision in *Epic Systems* suggests an answer, but *Epic*’s holding is more closely aligned with *Gilmer* and its progeny than forging new ground affecting administrative law.

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100. *Id.* at 1627-28 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

101. *Id.* at 1627 (citing, inter alia, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987)).

102. *Id.* at 1629-30.

103. *Id.*

Of course, the Supreme Court ruled that *state* agency regulations hostile to arbitration are preempted.<sup>104</sup> In 1984, in *Southland Corp. v. Keating*,<sup>105</sup> the Supreme Court first held that the FAA preempts conflicting state law. Most of the early cases involved *legislative* attempts to invalidate pre-dispute arbitration agreements.<sup>106</sup> In *Preston v. Ferrer*,<sup>107</sup> the Court extended the FAA's preemption to include state agency actions. Although *Preston* concerned an agency action that precluded enforcement of a pre-dispute arbitration agreement, it is inapplicable to this discussion because it concerned state-level regulations, which are clearly preempted. The remainder of this Article covers *federal*-level agency rules, which likely fall under the *McMahon* and *Gilmer* line of cases. How those cases apply is yet to be determined.

Scholarly discussion on this topic is only now emerging. Professor Daniel Deacon authored a lengthy essay on the role of agencies in arbitration, focusing primarily the role of agencies in regulating arbitration.<sup>108</sup> Professor Deacon rightfully notes that an agency regulation could regulate or eliminate arbitration provided that “[s]uch regulation may be grounded in either an express delegation from Congress to regulate

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104. *Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008) (“The instant petition presents the following question: Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency? We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”).

105. 465 U.S. 1 (1984).

106. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684–685 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

107. 552 U.S. at 353. Despite private arbitration agreements between parties, agencies still retain their own ability to enforce statutes in their own name. The Supreme Court recognized that agencies are not third-party beneficiaries to private arbitration agreements, and thus are not bound by those contracts. In *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court held that the FAA does not “require the agency to relinquish its statutory authority if it has not agreed to do so,” thus allowing the agency to proceed with its own investigation and adjudication alongside the arbitration between the employer and the employee. *Id.* at 294. Under *Waffle House*, agencies can use their own enforcement powers to remedy wrongs, usually committed by corporations, regardless of private agreements to arbitrate that may already be in existence. Those enforcement powers may be victim-specific, such as in *Waffle House*, or broader ranging. Professor Deacon suggests that agencies may use their own authority to secure large penalties against corporations that can be distributed to many consumers, employees, given the increasing use of class-action waivers in form contracts. In this way, the agency can proceed as an “agency class action,” even if the individual consumers, investors, or employees are otherwise contractually barred from doing so. Deacon, *supra* note 14, at 1008-09.

108. *Id.* at 1014.

arbitration specifically or an implied power that the agency holds.”<sup>109</sup> His essay classifies regulations into a number of different categories and gives examples of agencies regulating arbitration.<sup>110</sup>

Section II.A first considers a two-step approach of considering a conflict between the FAA and the enabling statute, followed by a *Chevron* analysis between the enabling legislation and the agency regulation. This approach would be consistent with the guidance from *Epic Systems* and harmonize potentially competing federal regulations with the FAA. This model is predictive of what the Supreme Court would do when faced with the question, because it is a natural extension of the “contrary congressional command” rule. Following recent Supreme Court precedent, this model would almost certainly invalidate any agency regulation hostile to arbitration unless the agency’s enabling legislation gives the agency specific powers to regulate arbitration in such a manner.

Section II.A then considers a competing model—that of comparing the FAA directly with the anti-arbitration regulation. This second model would reverse the two steps, starting with an analysis of the authority for the regulation under the enabling legislation followed by an analysis between the regulation and the FAA. This model would create a new rule, labeled the “contrary regulatory command” rule. This second model would give significantly more power and deference to agencies, but its chances of adoption at the Supreme Court level appear slim.

#### *A. Two Models of Determining Whether Arbitration Agreements Should Be Enforced*

Consistent with existing precedent, this article predicts that courts will adopt a two-step approach to determine whether a federal regulation invalidating arbitration agreements should be enforced. This section predicts that the “contrary congressional command” rule would be most consistent with current arbitration law. However, this article also considers a competing model that might be more consistent with general norms of administrative law, giving deference to agencies in areas of their expertise.

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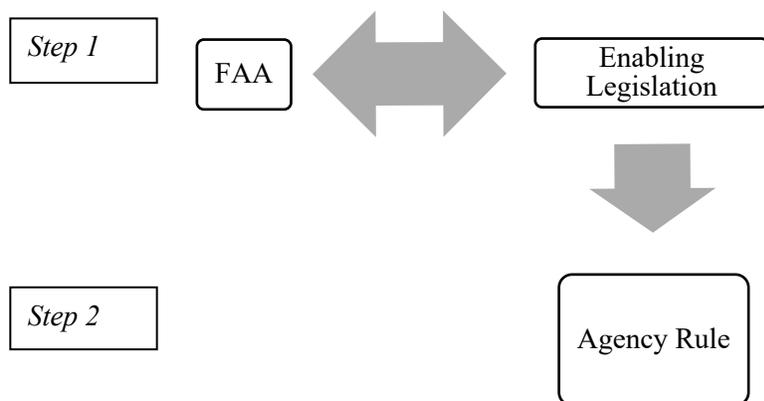
109. *Id.*

110. *Id.* at 1014-21 (placing regulations into the following categories: information gathering; information forcing; regulations pursuant to express delegation; regulations pursuant to implied power; and regulation as a condition of an agency request, such as a merger or a public offering).

Courts, to date, have not created a framework for considering the enforceability of regulations impacting arbitration. This article seeks to provide two frameworks, both of which have significant benefits and drawbacks. This section describes the two models, and then considers how norms of arbitration, administrative, and other law may shape a more robust answer to this problem.

*1. Extending the “Contrary Congressional Command”  
Rule for Agency Regulations of Arbitration*

Extending the “contrary congressional command” rule to agency regulations would require two steps. The first step would be to compare the FAA with applicable agency’s enabling legislation. The second step would be to conduct a more traditional agency analysis to determine whether the agency had the requisite authority to issue the regulation. Visually, this rule can be represented as follows:



The rule is consistent with both arbitration law and, to a lesser extent, administrative law. Comparing the FAA to the enabling language in step one would preserve the Court’s “contrary congressional command” rule, while also preserving important aspects of administrative law.

Although not explicit, the Supreme Court may have engaged in a similar analysis in *Epic Systems*. In *Epic Systems*, the Court primarily analyzed the question under what this article labels “step 1,” i.e., comparing the FAA with the NLRA.<sup>111</sup> As noted above, the Court rejected the employees’ contention that the “concerted activity” language in the NLRA was broad enough to encompass class-action arbitration activities.<sup>112</sup> Concluding that the NLRA and the FAA could be read together under the “contrary congressional command” rule, the Court secondarily found that the NLRB’s rulings invalidating class-action waivers could not be supported under the NLRA.<sup>113</sup> Because the FAA and the NLRA could be read consistently by allowing contractual freedom for parties regarding arbitration matter, the Court did not need to address whether the NLRB should be afforded deference under administrative law.

If the enabling legislation gives the agency the ability to decide arbitration matters, the second step would be to determine whether the agency properly promulgated the rule or decision under traditional administrative law principles. This article predicts that courts would be more likely to adopt this rule given today’s legal landscape favoring arbitration. Despite this advantage, competing policies demonstrate that this approach would forsake agency expertise in favor of pro-arbitration norms.

## 2. Creation of a “Contrary Regulatory Command” Rule

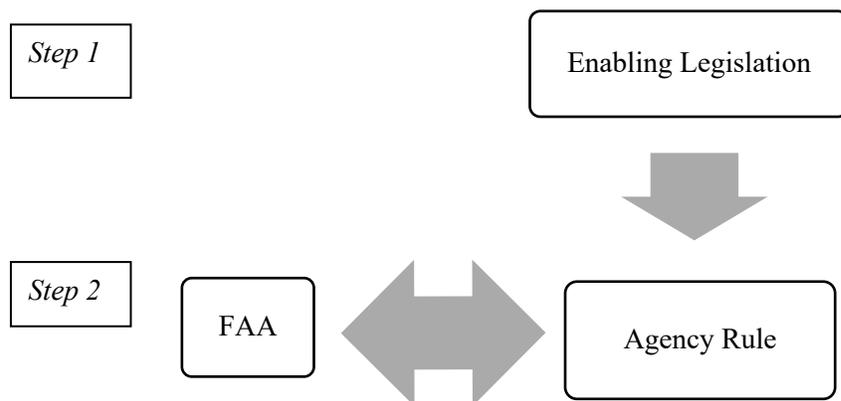
A second model for dealing with this question would be to first consider whether the agency has the proper authority to create the regulation, followed by an analysis of whether the regulation would be in conflict with the FAA. Rather than looking for a “contrary congressional command,” the courts would instead analyze the situation for a “contrary regulatory command.”

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111. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622-30 (2018) (discussing the text of the NLRA).

112. *Id.* at 1632.

113. *Id.*



Under this rule, even if the enabling legislation is silent on the issue of arbitration, a properly promulgated agency rule that undermines arbitration would stand. This model would treat agency regulations hostile to arbitration in the same manner as *statutes* that are hostile to arbitration. This model gives significantly more flexibility to agencies in regulating arbitration.

An example of a case that appeared to follow this model (albeit imprecisely) is *American Health Care Associates v. Burwell*.<sup>114</sup> This case, decided by the Northern District of Mississippi, concerned the validity of a rule promulgated by the Center for Medicare and Medicaid Services (CMS) that would bar nursing homes from receiving federal funds if they enter into pre-dispute arbitration agreements with their residents.<sup>115</sup>

The court began its arbitration analysis by considering whether a conflict existed between the FAA and the CMS regulation—not the

114. 217 F. Supp. 3d 921 (N.D. Miss. 2016).

115. *Id.* at 925. The case arose as a declaratory judgment action seeking to enjoin the regulation prior to its scheduled effective date. *Id.* at 926. Originally, the regulation was set to go into effect on November 28, 2016. *Id.* In the first part of the opinion, the court expressed considerable hostility to the use of arbitration agreements in nursing home contracts. *Id.* at 926-28. Two of the court's primary concerns were the possibility of nursing home residents lacking the capacity to enter into agreements to arbitrate, and the reality that litigation regarding arbitration issues significantly undermines the efficiency of the arbitral process. *Id.*

enabling legislation.<sup>116</sup> The court found that although the text of the rule deals with funding mechanisms, it “effectively amounts to a ban on pre-dispute nursing home arbitration contacts” and should be “treated as what it effectively is (i.e. a de facto ban), in *determining whether it conflicts with the FAA.*”<sup>117</sup> Although the court cited *CompuCredit* and gave lip service to the “contrary congressional command” rule, it did not decide whether this particular case called for an analysis under *CompuCredit* at the preliminary injunction stage.<sup>118</sup> The court also invoked the circuit court decision in *D.R. Horton v. NLRB* (later upheld under *Epic Systems*), which specifically considered the conflict between the FAA and the NLRA.<sup>119</sup> Despite the authority cited, the court ultimately ruled that the agency did not properly study arbitration or create its rule using proper process.<sup>120</sup>

After the court considered an analysis comparing the FAA and the agency regulation, it proceeded to also consider whether the agency had authority to promulgate the regulation. It cited examples of statutes that expressly give agencies the authority to regulate arbitration.<sup>121</sup> Although

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116. *Id.* at 929 (“In determining which party is likely to prevail in this action, this court first addresses the issue of whether the Rule enacted by CMS in this case is barred by the FAA.”). The court even began the discussion by titling that portion of the opinion: “Likelihood of Success (a) Is the Rule barred by the Federal Arbitration Act?” *Id.*

117. *Id.* (emphasis added).

118. *Id.* at 932. (“This motion for preliminary injunction is not the proper occasion for this court to make a definitive choice between these competing arguments, but it does seem clear that *CompuCredit* presents further significant difficulties for defendants.”). The court also cites *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), which technically *shouldn’t* apply in this case because federal statutes cannot *preempt* other federal statutes or regulations. *See id.* at 931. A clash between two federal authorities should be conducted through a conflicts analysis, as opposed to a preemption analysis. Despite not being authoritative on the question, the court appears to be relying on the policy statements and general pronouncements as potentially influential. *See id.*

119. *Id.* at 932 (discussing the application of *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)).

120. *Id.* at 933 (“In the court’s view, accumulating and reading from public comments is a questionable method of proving anything, and yet most of CMS’ rationalization for banning arbitration was based on such comments, often from interested parties. Even assuming this is how CMS ordinarily conducts its business, a rule banning nursing home arbitration is not ordinary CMS business (assuming it has the authority to take this action at all). In the court’s view, it would have been far preferable for an agency with the resources of CMS to conduct its own independent and reliable investigation of issues relating to nursing home arbitration, in order to justify a step which, it must have known, would raise serious concerns in light of the FAA.”).

121. *Id.* at 937 (“For example, Section 1028 of the Dodd–Frank Wall Street Reform and Consumer Protection Act provides that, if certain conditions are met, the Consumer Financial Protection Bureau ‘may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties . . . .’”); *see also id.* (citing 15 U.S.C. § 78o(o), which authorizes the

CMS argued that the rule would be permitted under the enabling legislation’s “health” and “safety” mandates, the court rejected this interpretation as overly broad and supporting nearly any type of regulation.<sup>122</sup> The Fifth Circuit Court of Appeals did not weigh in on this important case, given the change in administrations.<sup>123</sup> Although the district court suggested that the agency regulation should be analyzed directly against the FAA (as opposed to the enabling legislation), it considered whether the agency properly promulgated the regulation *after* considering the potential conflict with the FAA. This article suggests that those steps should occur in reverse, first considering the authority of the agency to promulgate the regulation and then comparing the regulation to the FAA. In 2019, CMS rereleased regulations regarding pre-dispute arbitration agreements in this area, and those new regulations are discussed below.<sup>124</sup>

The creation of a “contrary regulatory command” rule would preserve the expertise of agencies and give more flexibility for regulating arbitration within limited spheres. This rule would still require agencies to act within their permissible authority under administrative law, but a “competing regulatory command” rule could give agencies significantly more power to regulate arbitration.

### *B. Considerations for Assessing the Models*

This section considers numerous policy considerations to help determine the pros and cons of each proposal. The considerations are broken down into three categories: arbitration policies, legislative policies, and

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Securities and Exchange Commission to, “by rule, prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws”).

122. *Id.* at 937-38 (“This court thus recognizes the importance of the issues CMS raises, but they can only be regarded as ones involving resident ‘health, safety and welfare,’ under an exceedingly broad understanding of agency authority.”).

123. *GGNSC Chestnut Hill LLC v. Schrader*, No. CV 16-10525-DPW, 2018 WL 1582555, at \*2 (D. Mass. Mar. 31, 2018) (“While the government had appealed this decision to the United States Court of Appeals for the Fifth Circuit in the waning days of the Obama administration, *see . . . Am. Health Care Ass’n v. Burwell*, No. 17-600005 (5th Cir. Jan. 6, 2017), the new administration published a proposed revised rule reversing the 2016 Rule banning nursing home arbitration, 82 Fed. Reg. 26649 (June 8, 2017), 2017 WL 2462165, and coincidentally moved to dismiss its appeal of Judge Mills’s injunction.”).

124. *See infra* Section III.B

administrative policies. No one consideration is determinative, but this discussion hopes to give a robust examination of the competing proposals.

### *I. Arbitration Policies*

Over time, the Supreme Court has articulated numerous policies regarding arbitration. The origins of the policy pronouncements are not always clearly articulated, and Congress did not include a list of “findings” or “purposes” in the FAA, as it does in some other legislation.<sup>125</sup> In recent years, the Court articulated two policies impacting these proposals: the policy in favor of arbitration, and the policy favoring bilateral arbitration over class arbitration.

#### *a. Federal Policy Favoring Arbitration*

The Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>126</sup> famously stated that Congress declared a “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>127</sup> The Court has repeated this particular sentiment in a significant number of arbitration cases, notably in those involving preemption, conflicts of federal statutes, and arbitrability.<sup>128</sup> The discussion of the evolution of Supreme Court

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125. See, e.g., 29 U.S.C. § 621 (2012) (“Congressional statement of findings and purpose” for the Age Discrimination in Employment Act); 42 U.S.C. § 12501 (2012) (stating findings and purposes for the Public Health Services Act).

126. 460 U.S. 1 (1983).

127. *Id.* at 23 (citing 9 U.S.C. § 2). Although the *Moses H. Cone* case is most often credited for making this pronouncement, it was not the first case to issue such a statement. The Court had previously made similar statements regarding labor arbitration. See, e.g., *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 359 (1971) (Harlan, J., concurring) (discussing cases that “evince the fundamental role arbitration plays in implementing national labor relations policy”); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964) (noting the “federal policy of settling labor disputes by arbitration”); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); (same).

128. See, e.g., *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1621 (2018) (citing the policy in a case involving a conflict of two statutes); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 17 (2012) (unanimous decision of the Court in a case dealing with contract determination); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (noting that the FAA demonstrates “emphatic federal policy in favor of” arbitration); *CompuCredit Corp. v. Greenwood*, 565 U.S. 97, 97-98 (2012) (involving a conflict of federal statutes); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337-38 (2011) (involving preemption); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008) (“Congress

precedent regarding reading the FAA consistently with other legislation is based, in part, on giving effect to Congress’s policy in favor of arbitration.<sup>129</sup>

Although the policy in favor of arbitration is strong, its contours are amorphous. The Supreme Court invokes the policy in a number of different lines of arbitration case law,<sup>130</sup> but the policy itself does not have clear application or specific requirements. Similarly, no criteria exist as to when the policy applies, but in practice, this policy has appeared in the vast majority of arbitration jurisprudence over the last decade.

The federal policy in favor of arbitration would be preserved under the first model described above under in which a court would consider any “contrary congressional command” in the enabling legislation for the questioned regulation. Current arbitration law, culminating in *CompuCredit* and *Epic Systems*, demonstrates the lengths to which the Supreme Court will go to read federal statutes together to enforce pre-dispute agreements to arbitrate.<sup>131</sup> The “contrary congressional command” rule would permit agencies to issue regulations prohibiting enforcement of pre-dispute agreements to arbitrate only if Congress specifically gives agencies authority to enact such regulations. In this way, the “contrary congressional command” rule is consistent with current arbitration jurisprudence.

#### *b. Policy Favoring Bilateral Arbitration*

The second arbitration policy that may apply to this inquiry is the policy in favor of bilateral arbitration, as opposed to class or collective arbitration.<sup>132</sup> Although the history of class-action arbitration is outside of

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enacted the FAA to replace judicial indisposition to arbitration with a ‘national policy favoring [it] and plac[ing] arbitration agreements on equal footing.’”) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

129. See *supra* Part I. In a recent essay, Professor Deacon questions why the FAA is treated differently than other statutes regarding conflicts of law. See Deacon, *supra* note 14, at 145 (“So why should the FAA be any different [than other conflicts of law questions]?”). The Supreme Court’s policy statements regarding the preference for arbitration present a significant legal hurdle to overcome that may not occur with other federal statutes.

130. See *supra* note 128.

131. *Epic Systems*, 138 S. Ct. at 1627 (concluding that the language regarding “concerted activity” was not inconsistent with the FAA’s right for parties to proceed in bilateral arbitration); *CompuCredit*, 565 U.S. at 103 (finding no conflict between a statute requiring a notice—which discusses a right of litigation—and the right to arbitrate under the same statute)

132. The difference between *class* arbitration and *collective* arbitration is that class arbitration proceeds with representatives representing the whole class, including absent class members, while

the scope of this article,<sup>133</sup> the Court's current position on arbitration is clear: without an express agreement for class arbitration, arbitration must proceed solely between the parties to the contract (i.e., bilateral arbitration).<sup>134</sup>

The Court first articulated its resistance towards class arbitration proceedings in *Stolt-Nielsen v. AnimalFeeds*, when it stated: "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."<sup>135</sup> The Court came to this conclusion, in part, because the "relative benefits of class-action arbitration are much less assured" than bilateral arbitration.<sup>136</sup> In *AT&T v. Concepcion*, the Court expounded on the perceived differences between class arbitration and bilateral arbitration, focusing on reduced efficiencies, increased formality, questionable confidentiality, and higher-stakes proceedings for respondents.<sup>137</sup> In *Italian Colors*, the Court continued to endorse bilateral arbitration over class-arbitration, even in the face of evidence that the cost of bilateral arbitration would far dwarf any potential recovery by individual claimants.<sup>138</sup> The Court affirmed this policy in *Epic Systems* and other recent cases.<sup>139</sup>

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collective arbitration involves one proceeding with many claims consolidated into one action. See S.I. Strong, *Mass Procedures as a Form of "Regulatory Arbitration"*—*Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 282-85 (2013) (discussing class and collective arbitration, as well as mass arbitration).

133. For a brief discussion of the history of class action arbitration, see BLANKLEY & WESTON, *supra* note 2, at 218-19 (providing an overview of cases first permitting, and then prohibiting, class action arbitration under a general arbitration clause).

134. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019) (stating that parties are "free to authorize" class arbitration proceedings, but a court will not imply such authority based on a "silent" arbitration clause); *Epic Systems*, 138 S.Ct. at 1627 ("And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act.").

135. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

136. *Id.* at 686. The benefits of arbitration noted by the Court include cost efficiencies, time efficiencies, and the ability to choose "expert adjudicators." *Id.*

137. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347-51 (2011) (discussing in detail the differences between bilateral and class arbitration).

138. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (holding that the doctrine of "vindication of statutory rights" only includes the financial ability to enter the arbitration forum and not the additional costs of arbitration).

139. See *Epic Systems*, 138 S.Ct. at 1623 ("[C]ourts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."); see also *Lamps Plus*, 139 S.Ct. at 1415 (noting the differences between the two forms of

The policy favoring bilateral arbitration does not directly impact the choice of rule between the “contrary congressional command” rule and the “contrary regulatory command” rule.<sup>140</sup> Agencies, however, have watched these developments in arbitration law and some of the Obama-era arbitration regulations considered the issue of class actions.<sup>141</sup> Under the “contrary congressional command” rule, agency rules prohibiting class action waivers without specific authority from Congress to issue regulations on the topic of arbitration, or perhaps class arbitration in particular, could not stand. The more agency-friendly “contrary regulatory command” rule would permit these types of regulations, despite the Supreme Court’s current statements on class arbitration.

## 2. Legislative Policies

The second category of considerations are those involving the reading of legislation, particularly in cases of conflicts between federal statutes. This second area considers canons for reading legislation together, as well as the doctrine of implied repeal.

### a. Reading Statutes Harmoniously

At its core, the issues discussed in this Article involve how two federal authorities should be read together. When faced with two conflicting statutes, federal courts first try to read the statutes together so neither is rendered nugatory.<sup>142</sup> This canon of construction is a longstanding rule of

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arbitration); *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 471 (2015) (refusing to allow class arbitration under a general choice-of-law provision pointing to California law).

140. *Supra* note 56 and accompanying text.

141. The final rule of the CFPB would have permitted arbitration but prohibited the use of class action arbitration in financial products sold to consumers. That rule did not go into effect, after it was repealed by the Senate. Andrew Ackerman & Yuka Hayashi, *Congress Makes it Harder to Sue the Financial Industry*, WALL STREET J. (Oct. 24, 2017), <https://www.wsj.com/articles/congress-votes-to-overturn-cfpb-arbitration-rule-1508897968> [<https://perma.cc/ZUR7-V2PE>]. The Department of Education was successful in prohibiting pre-dispute arbitration agreements in contracts with Direct Loan Program borrowers and prohibited bans on class actions. 34 CFR § 865.300(e)-(f) (2018).

142. *See, e.g.*, *United States v. Ko*, 739 F.3d 558, 561 (10th Cir. 2014) (reading criminal statutes together); *United States v. Johnson*, 66 F. App’x 320, 322 (3d Cir. 2003) (reading statutes together to determine proper sentence for defendant); *Hatfield v. Bishop Clarkson Mem’l Hosp.*, 679 F.2d 1258, 1262 (8th Cir. 1982) (“However, if possible, related statutes should be read together so that neither will be rendered nugatory.”); *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979) (reading together Freedom

interpretation.<sup>143</sup> The reasoning for this interpretation is self-explanatory. Congress should be presumed to pass statutes that complement each other and not render other statutes meaningless.

In the area of arbitration, the Supreme Court has always tried to read statutes together so that effect can be given to both. In 2018, the *Epic Systems* Court relied on nearly four decades' worth of precedent of reading statutes together to give effect to the substance of a statute while still permitting arbitration. The Court reminded us that, in nearly every case involving a question of whether a statutory right may be arbitrated, the Court held that the statutes could be read together such that the substantive right of the statute is preserved whether the parties resolve their disputes through litigation or arbitration.<sup>144</sup> The "contrary congressional command" rule essentially creates a specialized canon of interpretation that appears to apply only in the arbitration context. The rule appears to combine two policies—the canon of interpretation that attempts to read statutes together, as well as the policy favoring arbitration.

Applying the "contrary congressional command" rule to federal agency regulations would best preserve both sets of statutes, and would notably preserve arbitration in the face of regulations that would limit parties' ability to enforce agreements to arbitrate. Allowing such regulations to stand would necessarily infringe on the general ability of parties to contract,<sup>145</sup> and the choice of rule would involve a balancing of the various competing policy interests.

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of Information Act and Privacy Act); *Nw. Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 373 F.2d 136, 142 (8th Cir. 1967) ("It is a familiar rule of statutory construction that statutes must be read together and that the legislative intent must be given effect if possible."); *United States v. Lehnerr*, No. CR-07-0008-S-BLW, 2007 WL 2071725, at \*1 (D. Idaho July 13, 2007) ("The statutes must be read together and reconciled if possible under standard statutory interpretation principals [sic]."); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 429 F. Supp. 139, 141 (N.D. Ill. 1977) (reading together general venue statutes and venue designations in antitrust statutes); *Sloand ex rel. Estate of Halby v. United States*, 1950 A.M.C. 1063, 1069 (W.D.N.Y. 1950) ("The pertinent statutes must be read together."); *In re Bowes*, 160 B.R. 290, 294 (Bnkr. N.D. Tex. 1993) ("The two statutes can be read together and the court can give effect to the legislative mandates in both statutes.").

143. As the cases cited above demonstrate, this rule of interpretation has been invoked by every level of federal courts over a long period of time, in many different situations: from criminal law, to antitrust, to labor law, and many other types of situations. *See supra* note 142.

144. *Epic Systems*, 138 S. Ct. at 1627 (citations omitted).

145. 9 U.S.C. §2 (making agreements to arbitrate enforceable save upon grounds that exist under state contract law).

*b. Presumption Against Implied Repeal*

A similar canon of construction preserving the integrity of two statutes is the presumption against implied repeal. Legislatures, of course, have the power to repeal past legislation.<sup>146</sup> Such repeal may be express or implied.<sup>147</sup> If Congress did not expressly repeal an earlier statute, the court’s role is to read both statutes “so as to give effect to both, unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier and simply failed to do so expressly.”<sup>148</sup> Implied repeal has been “strongly disfavored”<sup>149</sup> and occurs only when the two statutes are “irreconcilable.”<sup>150</sup>

The presumption against implied repeal has a long history,<sup>151</sup> and legislatures are presumed to act consistently.<sup>152</sup> Courts will only find repeal if there exists a “repugnancy between them” or that “they cannot mutually coexist.”<sup>153</sup> Recent Supreme Court precedent may have lessened the burden,

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146. 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION 448 (7th ed. 2009); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 327 (2012) (“The essence of the presumption against implied repeals is that if statutes are to be repealed, they should be repealed with some specificity.”).

147. SINGER §23:9, *supra* note 146, at 448-49. The courts may examine not only the act’s text but also the legislative history and other sources to determine if the legislature intended on repealing the earlier legislation. *Id.* at 465-67.

148. *United States v. Barrett*, 837 F.2d 933, 934 (10th Cir. 1988).

149. Jesse W. Markham, Jr., *The Supreme Court’s New Implied Repeal Doctrine: Expanding Judicial Powers to Rewrite Legislation Under the Ballooning Conception of “Plain Repugnancy,”* 45 GONZ. L. REV. 437, 438 (2010).

150. *United States v. Santee Sioux Tribe of Neb.*, 324 F.3d 607, 611 (8th Cir. 2003) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)) (“[I]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”); *see also* SCALIA & GARNER, *supra* note 146, at 328 (noting that where “provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one”).

151. Markham, *supra* note 149, at 439 (referring to the doctrine as one “of the oldest canons of statutory interpretation,” which “has been understood to be a very narrow doctrine that reconciles older and newer enactments by minimally paring back older law where there is no plausible understanding of the laws that can avoid the inconsistency.”).

152. SINGER §23:9, *supra* note 146, at 454.

153. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

only requiring the statutes to be “clearly incompatible” rather than “plain[ly] repugnan[t],”<sup>154</sup> but this rule may only apply in limited circumstances.<sup>155</sup>

Because the FAA was enacted nearly one hundred years ago,<sup>156</sup> one might expect that the doctrine of implied repeal would be commonly invoked in arbitration. To the contrary, the doctrine has only recently been argued, despite many decades passing since *McMahon* and *Gilmer* paved the way for the arbitration of statutory claims.<sup>157</sup> When parties seeking to avoid arbitration raise the repeal argument, the courts reject this argument based on the presumption *against* repeal.<sup>158</sup> Occasionally, the argument for implied repeal is successful, but usually in the context of varying procedural mechanisms, not the enforceability of an arbitration agreement.<sup>159</sup> In *Epic Systems*, Justice Ginsburg, in dissent, was persuaded that the NLRA impliedly repealed the FAA in this instance because the NLRA was enacted “later in time.”<sup>160</sup> Perhaps more litigants will begin to rule the waters of

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154. Markham, *supra* note 146, at 443 (citing *Credit Suisse Sec. (USA) LLC v. Billings*, 551 U.S. 264, 275 (2007)). The Court also added a factor-based rule to help in its determination of implied repeal. *Credit Suisse*, 551 U.S. at 275-76.

155. The factor-based rule, on its face, only applies to cases involving antitrust and securities matters. *Credit Suisse*, 551 U.S. at 275-76 (articulating four factors explicitly referencing antitrust and securities concerns).

156. See Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925). Although the FAA was originally enacted in 1925, Congress re-enacted in 1947. Notably, Section 2, regarding the enforceability of arbitration agreements, remained unchanged in the 1925 and 1947 versions of the FAA. See Pub. L. No. 80-282, 61 Stat. 669 (1947).

157. *Supra* Subsection I.B.1.

158. Implied repeal became a common argument for workers seeking to avoid individual arbitration. The workers claimed that the NLRA’s “concerted activity” language impliedly repealed the FAA. See *NLRB v. Alt. Entm’t, Inc.*, 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part) (rejecting implied repeal); *Lewis v. Epic Sys.*, 823 F.3d 1147, 1157 (7th Cir. 2016) (rejecting implied repeal); *Delock v. Securitas Sec. Serv. USA, Inc.*, 883 F. Supp. 2d 784, 790-91 (E.D. Ark. 2012) (rejecting implied repeal in a class action case). Other types of implied repeal have also been difficult for proponents to secure. See, e.g., *Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC*, 789 F. Supp. 2d 716, 721-22 (S.D.W.V. 2011) (rejecting argument that implied repeal required service by U.S. Marshal to confirm an arbitration award).

159. See, e.g., *Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1125 (9th Cir. 2011) (impliedly repealing small amount of FAA in a conflict with the Carmack Amendment, based on the FAA’s and Carmack’s most recent reenactments); *Dist. No. 8 Int’l Ass’n of Machinists AFL-CIO v. Grindmaster Cathco Sys., Inc.*, No. 02-C-4346, 2002 WL 31115588, at \*2 (N.D. Ill. Sept. 23, 2002) (finding implied repeal applied by the Labor-Management Relations Act of the FAA regarding the enforcement of an arbitration award in the context of a union claim).

160. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1646 (2018) (Ginsburg, J., dissenting). Note that Justice Ginsburg did not argue that the FAA should be repealed entirely and in all situations. The argument for implied repeal was limited to cases arising under the NLRA.

implied repeal now that it was cited, albeit in dissent, by a Supreme Court justice.

The presumption against implied repeal supports the “contrary congressional command” rule, and not the “contrary regulatory command rule.” The “contrary congressional command” rule attempts to read together two sets of legislation to give them both effect, if possible—which is the same goal as the presumption against implied repeal. The “contrary regulatory command” rule, however, would allow regulations to displace the enforceability of arbitration agreements under the FAA, even if the enabling legislation was not as clear.<sup>161</sup>

### 3. Administrative Policies

A final set of considerations stems from administrative law. While the legislative policies predictably support a “contrary congressional command” rule, the administrative policies do not necessarily support the “contrary regulatory command” rule. This subsection considers implied repeal by regulation, deference due to agency action under *Chevron*, agencies acting under their authority, and separation of powers concerns.

#### a. Implied Repeal by Regulation

Under certain circumstances, implied repeal can involve regulations, because they have the force and effect of law.<sup>162</sup> As with the general doctrine of implied repeal by statute, a strong presumption exists against giving agency rules and actions the power to repeal statutes passed earlier in time.<sup>163</sup> Courts are most likely to find a statute impliedly repealed by agency

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161. See *supra* Subsection II.A.2.

162. See *Mogis v. Lyman-Richey Sand & Gravel Corp.*, 189 F.2d 130 (8th Cir. 1951); *Indus. Life Ins. Co. v. United States*, 344 F. Supp. 870, 875 (D.S.C. 1972) (“Treasury Regulations have the force and effect of law”).

163. SINGER §23:9, *supra* note 146, at 471 (“When there is a conflict between a statutory provision and a later provision which is included in a rule promulgated under special rule-making power, the statutory provision generally remains in effect.”). In some cases, the Supreme Court chooses to frame a case as a conflict between statutes, as opposed to a conflict between an agency action and a statute. See Nhan T. Vu & Jeff Schwartz, *Workplace Rights and Illegal Immigration: How Implied Repeal Analysis Cuts Through the Haze of Hoffman Plastic, Its Predecessors and Its Progeny*, 29 BERKELEY J. EMP. & LAB. L. 1, 16 (2008) (“Despite the fact that the case could have been viewed as one involving the conflict between the Board’s findings and the Bankruptcy Code, the majority, dissent, and

action when the enabling legislation specifically gives the agency the power to repeal earlier legislation.<sup>164</sup> The general principles of implied repeal by agency follow the same two steps outlined above under the “contrary congressional command” rule articulated for arbitration cases.

An example of a court using this framework can be found in a conflict between the FAA and a Federal Trade Commission (FTC) construction of the Magnuson-Moss Warranty Act (MMWA). The FTC “found that written warranties cannot require binding arbitration,”<sup>165</sup> creating a conflict with the FAA.<sup>166</sup> In the early 2000s, some courts considered the issue by using a framework of potential conflict between the FAA and the MMWA, followed by an examination of the MMWA and the FTC ruling.

For example, in 2002, the Fifth Circuit examined the FAA and the MMWA to determine if the MMWA contained a contrary congressional command to override the Arbitration Act.<sup>167</sup> After citing *McMahon*, the court concluded that the “MMWA does not specifically address binding arbitration, nor does it specifically allow the FTC to decide whether to permit or to ban binding arbitration.”<sup>168</sup> The MMWA, however, allowed the FTC to establish rules to create “informal dispute [resolution] procedures” for disputants to use prior to going to court.<sup>169</sup> The court reasoned that because arbitration is a *substitute* for court and not a *prerequisite* to court, the FTC did not, in fact, have the power to ban enforcement of pre-dispute arbitration agreements.<sup>170</sup> The court also held that arbitration was not an “informal” process as that term was used in the statute and discussed in the

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subsequent commentators all understood the case to be about a potential conflict between the NLRA and the Bankruptcy Code.”). Arguably, the *Epic Systems* Court engaged in a similar analysis, comparing the two statutes, rather than considering the conflict between the statute and the applicable agency regulation.

164. See, e.g., *United States v. Lahey Clinic Hosp. Inc.*, 399 F.3d 1, 13 (1st Cir. 2005) (“Congress could, perhaps (we need not decide), attempt to expressly provide for repeal of a statute or displacement of the common law through delegation of such power to an agency.”); see also SINGER & SINGER, *supra* note 146, at 520 (discussing the ability for a legislature to give an agency the ability to repeal prior statutory law in the enabling legislation).

165. *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 475 (5th Cir. 2002).

166. This regulation conflicts with 9 U.S.C. § 2, which requires that agreements to arbitrate be enforced in accordance with their terms.

167. *Rose Mobile Homes*, 298 F.3d at 473-76 (examining the applicable legislation and regulations).

168. *Id.* at 475.

169. *Id.*

170. *Id.* at 476.

MMWA’s legislative history.<sup>171</sup> Ultimately, the Fifth Circuit enforced the agreement to arbitrate.<sup>172</sup> The dissent, however, determined that the MMWA’s silence on the issue of arbitration was sufficient to move to a robust discussion of *Chevron* deference.<sup>173</sup> A more detailed analysis on the conflict between the FAA and MMWA is discussed below.<sup>174</sup> The *Walton* case is discussed here as an example of a case considering whether an agency rule could repeal a previously enacted statute.

To the extent that the presumption against implied repeal is even stronger in cases involving regulatory action, this policy favors using the “contrary congressional command” approach, as opposed to a “contrary regulatory command” approach. Also, because this doctrine specifically involves a consideration of the enabling legislation and an examination as to whether Congress intended the agency to have the power to impliedly repeal other law, this further supports a “contrary congressional command” rule.

#### *b. Chevron Deference*

Courts afford agencies deference to interpret their own enabling legislation.<sup>175</sup> Under the *Chevron* analysis, a court must make the following determinations prior to deferring to the agency:

First, always, is the question [of] whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however,

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171. *Id.* at 476-78 (examining text and legislative history and comparing the text and legislative history of the MMWA to other statutes that the Supreme Court had already examined, such as the ADEA).

172. *Id.*

173. *Id.* at 483-85 (discussing the statutes at issue, as well as commenting that the MMWA’s silence on this exact issue gives the FTC flexibility on the question of “informal” dispute resolution). For additional commentary on the *Rose Mobile Homes* case as one involving the reluctance of an agency rule to repeal a previously enacted statute, see Case Note, *Arbitration—Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitral Despite Agency Interpretation*, 116 HARV. L. REV. 1201 (2003).

174. See *infra* Section III.B.

175. See, e.g., Caitlin Miller, *The Balancing Act Between Chevron Deference and the Rule of Lenity*, 18 TEX. TECH. ADMIN. L.J. 193, 194 (2017) (“When a case involves an ambiguous agency statute, courts can look to the agency’s interpretation of that statute and decide whether to use the interpretation.”).

the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>176</sup>

The deference owed to agency interpretations is, of course, not limitless. Agency interpretations that are “arbitrary” or “against the intent of the statute” must still be rejected.<sup>177</sup> If an agency has authority to interpret the statute, though, *Chevron* deference is generous.<sup>178</sup> More recent developments in *Chevron* deference first ask if the agency determination has the “force of law,” such as by utilizing notice-and-comment procedures, before applying deference.<sup>179</sup> Agency actions that do not have the “force of law” may still be provided deference under the older *Skidmore v. Swift* standard.<sup>180</sup> The *King v. Burwell*<sup>181</sup> Court questioned the appropriateness of deference in questions of “deep economic and political significance.”<sup>182</sup> Although the question of the appropriate level of deference appears to be in

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176. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984); see also Rachel E. Holland, *Setting the Caged Bird Free: Restoring Judicial Power to Meaningfully Review Administrative Interpretations of the Law*, 49 TEX. TECH. L. REV., 927, 936 (2017) (“As long as an agency’s statutory interpretation is reasonable, it is entitled to deference under *Chevron*.”).

177. Miller, *supra* note 175, at 198-200 (discussing how a court will only consider the agency’s interpretation of a statute if Congress has not explicitly determined the meaning on its own).

178. Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from Chevron Principles in United States v. Mead*, 107 DICK. L. REV. 289, 298 (2002) (“Once a court reads a gap in a statute to constitute an implied delegation of decisionmaking authority by Congress to an agency, the court will rarely, if ever, reject the agency’s decision as impermissible or arbitrary and capricious.”).

179. *Id.* at 309-11 (discussing the changes to administrative law based on *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

180. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (differentiating between a rule arrived at after notice-and-comment procedures and opinion letters); Holland, *supra* note 176, at 936-37 (discussing post-*Chevron* developments limiting deference). Determining whether the agency action has “force of law” often referred to as “step zero.” See Paul Chaffin, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y. ANN. SURV. AM. L. 503, 567-68 (2013) (discussing use of *Chevron* step zero in the immigration context).

181. 135 S. Ct. 2480 (2015).

182. *Id.* at 2489.

flux, the principle of giving agencies deference is still highly recognized, albeit perhaps in different degrees.

The underlying policy reasons for deference include giving effect to the legislature's intent and recognizing agency expertise. For some commentators, recent Supreme Court decisions focus on the legislature's delegation of authority to the administrative body more than any other underlying value.<sup>183</sup> This policy interpretation is rooted in statutory analysis and deference to the *legislature*, the delegating body, more than deference to the agency.<sup>184</sup>

Earlier Supreme Court authority emphasized deference in the context of the agency's "specialized experience" or expertise.<sup>185</sup> Agency interpretations of their own rules are also subject to deference, because, having written the regulation, the agency presumably is in the best place to know what it intended.<sup>186</sup> Agencies are, by their nature, experts in their area—be it the environment, labor, education, health, telecommunications, energy, or any other area singled out for regulation. Agencies employ experts and also become experts as they engage in education, research, policy, outreach, and other types of activities. Agencies are also more flexible and sufficiently nimble to create the details that are necessary for a comprehensive system, particularly when the alternative would be creation through a legislative body.<sup>187</sup>

These policies relating to deference to agencies could support either the "contrary congressional command" rule or the "contrary regulatory

183. See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. J. 735, 746-47 (2002) ("[I]n *Mead* the Supreme Court squarely located the requirement of *Chevron* deference on a theory of an implied delegation of lawmaking power.).

184. See *id.* at 747 (noting that deference is tied to Congress's power in determining the scope of the agency's power).

185. *Skidmore*, 323 U.S. at 139; see also *City of Arlington v. FCC*, 569 U.S. 290, 311 (2013) (Breyer, J., concurring) (noting the helpfulness of the "agency's expertise" in resolving the issue); Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2116 (1990) (discussing agency expertise as a reason for deference).

186. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2407 (2019) (discussing *Auer* deference for agencies interpreting their own ambiguous rules). Under *Auer v. Robbins*, agencies are owed deference in interpreting ambiguous rules. 519 U.S. 452, 463 (1997) ("A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.").

187. Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2042 (2011) ("Congress is likely to delegate authority to agencies to avoid complex issues and capitalize on agency expertise.").

command” rule for analyzing agency regulations in light of the FAA. If the purpose of deference is respect for the legislature and the legislature’s intent for the agency, the “contrary congressional command” rule would more closely fit with that policy. Under this rule, enabling legislation that is silent on the issue of arbitration would preclude the agency from creating regulations that would bar enforcement of arbitration agreements, even within its area of expertise. If the purpose of deference is agency expertise, then the “contrary regulatory command” rule is the better option. Good policy reasons exist for allowing agencies to dictate the parameters of arbitration within their particular areas of expertise, even if their enabling legislation is ambiguous or silent on this point.

Professor Deacon argues that agencies should have more authority to regulate arbitration because of *Chevron* deference and agency expertise.<sup>188</sup> He argues that “agencies should have authority to reasonably interpret their statutes to regulate arbitration” and that the FAA should operate in the “background,” as a default.<sup>189</sup> *Chevron* deference applies when Congress has not spoken directly on a question,<sup>190</sup> allowing the agencies to fill in the gaps and make practical choices.<sup>191</sup> Professor Deacon’s reasoning illustrates the catch-22 in favor of arbitration under the “contrary congressional command rule.” *Chevron* deference applies when enabling legislation is ambiguous or silent on an issue, and yet the “contrary congressional command rule” would nearly always interpret ambiguity or silence in favor of the FAA, thus leaving almost no room for *Chevron* deference in matters of arbitration.

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188. Deacon, *supra* note 14, at 1034 (“In many cases [courts] have not seriously engaged with the interaction of *Chevron* and the FAA, instead reading the Supreme Court’s recent arbitration opinions broadly as expressing extreme reluctance to set aside arbitration agreements on any grounds.”).

189. *Id.* at 1035 (“But within their regulatory domains, agencies have the authority to depart from background law in order to regulate more stringently (within the reasonable bounds set by their statutes.)”).

190. *Id.* at 1036-37 (“In other words, if a court determines that Congress has not spoken directly to the question at issue and there is thus an ambiguity, the court must defer to the agency’s reasonable resolution of that ambiguity even if the court would have chosen a different interpretation on its own.”).

191. *Id.* at 1039-40 (“[W]hen Congress writes a flexible statute and delegates authority over that statute to an administrative agency, it is . . . delegate[ing] lawmaking authority to an agency is a decision to allow the agency to disrupt existing legal relationships [such as dispute resolution] (within the bounds set by the statute) in service of statutory purposes.”).

*c. Agencies Acting Within Their Statutory Authority*

Another consideration to consider is the general requirement that an agency only act within the scope of its authority.<sup>192</sup> The delegation of authority to agencies is unique and based on the statute establishing each agency.<sup>193</sup> The legislature can delegate to agencies not only rulemaking powers but also other authority, such as adjudicatory and enforcement authority.<sup>194</sup> The purpose of agencies is to implement “specific policy details from statutory guidance.”<sup>195</sup> The Administrative Procedure Act (APA) also requires agencies to act within the grant of power made by the legislature.<sup>196</sup> As a general manner, when Congress grants broad regulatory authority to an agency, it also delegates interpretive authority.<sup>197</sup> Agencies cannot act outside of their jurisdiction, and such actions may be invalidated by courts.<sup>198</sup>

This consideration should apply equally under both the “contrary congressional command” rule and the “contrary regulatory command” rule. This administrative law principle controls under either rule because the agency must have authority to regulate, no matter when that regulation is compared to the FAA. To date, few statutes have specifically given

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192. Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 401 (“[A]n agency is constitutionally empowered to act only under the authority delegated to it by the legislature.”).

193. William Weaver, Note, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275, 279 (2014) (“Each delegation specifies the various institutional designs and mechanisms through which Congress can check agency action in each unique context. Sometimes Congress delegates broadly. Sometimes Congress cabins agency authority.”).

194. *Id.* at 283 (“Sometimes, Congress plainly and explicitly delegates rulemaking authority to administrative agencies. Other times, Congress delegates authority to agencies, but not rulemaking authority.”).

195. *Id.* at 285; Bressman, *supra* note 187, at 2033-34 (discussing empirical research regarding congressional intent post-*Chevron* to give agencies authority to interpret ambiguities in legislation).

196. 5 U.S.C. §§ 551-59 (2012); *see also* Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 994-95 (1999) (discussing scope of agency authority under the APA).

197. Bressman, *supra* note 175, at 2037-38 (discussing the literature on the question of whether Congress intends to bestow interpretive power within an agency when it gives the agency broad regulatory power); Gellhorn & Verkuil, *supra* note 196, at 995 (“While agencies often interpret their regulatory authority expansively, such assertions generally are limited to situations where the agency clearly has jurisdiction over the practices involved.”).

198. Gellhorn & Verkuil, *supra* note 196, at 996-1004 (giving detailed analysis on instances in which agencies have overstepped their boundaries).

authority to agencies regarding arbitration. Given the silence on the issue, agencies have grappled with the questions of whether they have the authority to regulate arbitration as it relates to their more explicit authority. For example, the Department of Education recently issued regulations prohibiting banks offering direct loans from including arbitration agreements in their loan agreements.<sup>199</sup> Congress gave the Secretary of Education broad authority to develop and administer the Direct Loan Program,<sup>200</sup> but did not mention arbitration in the text of the statute. Although the Department of Education is not an expert on *arbitration*, it is an expert on educational loans. Given that lenders who participate in the program include arbitration agreements in their contracts with students, should the Department have the ability to regulate their use of arbitration for federal loans? This question is explored in more detail below.<sup>201</sup>

#### *d. Separation-of-Powers Concerns*

Finally, this subsection considers separation-of-powers concerns for agencies. Generally, agencies are considered part of the executive branch because they are tasked with the enforcement and administration of laws.<sup>202</sup> Congress, of course, creates the agencies and tasks them with a charge—both of which should include an “intelligible principle” to cabin their powers.<sup>203</sup> If an agency issues a regulation that conflicts with a federal statute, a separation-of-powers issue may arise from an executive branch entity attempting to nullify or otherwise change a congressional act. If such a separation-of-powers conflict occurs, the “contrary congressional

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199. 81 Fed. Reg. 75,926 (Nov. 1, 2016).

200. 20 U.S.C. § 1087b (2019) (“Funds for origination of direct student loans”).

201. See *infra* Section III.B. This section started by laying out the two potential rules for determining whether a contrary command to the FAA should be controlling. In the discussion of the “contrary regulatory command,” this article discussed the *AHCA v. Burwell* case involving the Medicare and Medicaid nursing home regulations prohibiting arbitration. The court engaged in a discussion about whether the agency had the proper authority under its own enabling legislation to issue the regulations at issue. See *supra* notes 121-123 and accompanying text.

202. Holland, *supra* note 165, at 927-32 (“Because they often assist with the enforcement of laws, administrative agencies are traditionally considered part of the Executive Branch.”).

203. See Gellhorn & Verkuil, *supra* note 184, at 989-90 (discussing how Congress limits the powers of delegation through its grant of authority in the first instance); see also *id.* at 991 (“Consistent with separation of powers principles, we believe that agencies should read their enabling authority restrictively.”).

command” approach would be the better model for ensuring that the action of one branch does not encroach on the other.

The *AHCA v. Burwell*<sup>204</sup> case involving the nursing home regulations addressed separation-of-powers concerns. The government contended that the Secretary of Health and Human Services had the power to ban pre-dispute arbitration agreements under the statutory language allowing the Secretary to impose “such other requirements relating to the health and safety” of nursing home residents.<sup>205</sup> The court rejected this argument, noting that the “language is broad, but also quite vague.”<sup>206</sup> Despite being sympathetic to the government’s substantive position, the court nonetheless expressed concern that if “health and safety” concerns included arbitration, then “other agencies would choose to broadly exert power in a variety of contexts.”<sup>207</sup> Such a broad reading of authority would constitute a separation-of-powers concern between the executive branch and the legislative branch,<sup>208</sup> particularly in situations in which Congress considered, but did not have enough votes to pass, legislation similar to the rules promulgated by the agency.<sup>209</sup> *AHCA* demonstrates how separation-of-powers concerns might arise when an agency broadly interprets its powers broadly to regulate arbitration when arbitration is not central to the statutory mandate for the agency.

#### 4. Weighing Policy Concerns

Nearly all the factors above weigh in favor of applying the “contrary congressional command” rule to agency actions or regulations dealing with arbitration. As characterized above, the “FAA” and “legislative” policies strongly support a rule that will preserve as much of two potentially inconsistent statutes as possible. Even the administrative law policies, such as agencies staying within their authority and not violating separation-of-

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204. *Am. Health Care Assocs. v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016).

205. *Id.* at 934.

206. *Id.*

207. *Id.* at 934-35.

208. *Id.* at 935.

209. *Id.* at 936; *see also id.* at 944 (“This court frankly believes that these issues are even more important than the arbitration issues, and the potential that the Rule might serve to violate the basic separation of powers principles in the U.S. Constitution seems a quite relevant factor in deciding whether to allow the federal courts to resolve any concerns in this regard before allowing it to go into effect.”).

powers concerns, weigh in favor of the “contrary congressional command” rule. On balance, the far greater weight of policy appears to favor finding a way to first read the statutes together, followed by considering whether the agency action is proper.

In application, this rule would largely prohibit agencies with enabling legislation silent on the issue of arbitration from promulgating rules or otherwise taking action to invalidate pre-dispute arbitration agreements, whether such action is regulatory, such as in the Medicare/Medicaid context, or adjudicatory, such as decisions made by the NLRB. This outcome aligns with Supreme Court precedent, including *Gilmer*<sup>210</sup> and, more recently, *Epic Systems*.<sup>211</sup>

The biggest downside of the “contrary congressional command” rule is the loss of agency expertise in a particular area as it relates to arbitration. The Department of Health and Human Services may have expertise in the area of nursing homes, making them uniquely qualified to issue regulations regarding the proper language that should be in nursing home contracts, including arbitration clauses. Similar arguments may be made for the Department of Labor, the Department of Education, and other agencies. Expertise, however, cannot be enough, as administrative law requires that agencies act within their areas of delegation. On the whole, the balance of policies and law weighs in favor of the “contrary congressional command” rule.

### III. CASE STUDIES DEMONSTRATING DIFFERENCES BETWEEN THE MODELS

Having considered the existing laws and relevant policies, this part provides concrete examples of how the “contrary congressional command” and “contrary regulatory command” rules would operate in practice. This part begins with the “easy” case of the authority granted to the CFPB regarding arbitration, but then discusses more complex problems regarding interpretation of arbitration regulations and actions in the contexts of the MMWA, the Direct Loan Program, and the newest iterations of regulations

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210. See *supra* notes 68-79 and accompanying text.

211. See *supra* notes 94-103 and accompanying text.

dealing with arbitration in contracts with long term care facilities under Medicare and Medicaid.

*A. An Easy Case—Regulations by the CFPB  
Following the Dodd-Frank Act*

The Dodd-Frank Act created the CFPB, including specific statutory language regarding the agency's ability to regulate arbitration. In accordance with the legislation, the CFPB promulgated amendments to Truth in Lending Act regulations, notably Regulation Z. The CFPB rule specifies:

(h) Prohibition on mandatory arbitration clauses and waivers of certain consumer rights—

(1) Arbitration. *A contract or other agreement for a consumer credit transaction secured by a dwelling (including a home equity line of credit secured by the consumer's principal dwelling) may not include terms that require arbitration or any other non-judicial procedure to resolve any controversy or settle any claims arising out of the transaction.* This prohibition does not limit a consumer and creditor or any assignee from agreeing, after a dispute or claim under the transaction arises, to settle or use arbitration or other non-judicial procedure to resolve that dispute or claim.<sup>212</sup>

Although this regulation clearly prohibits enforcement of certain arbitration agreements, it closely tracks language directly from the Dodd-Frank Act:

(e) Arbitration

(1) In general

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

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212. 12 C.F.R. §1026.36(h) (2013) (emphasis added).

## (2) Post-controversy agreements

Subject to paragraph (3), paragraph (1) shall not be construed as limiting the right of the consumer and the creditor or any assignee to agree to arbitration or any other nonjudicial procedure as the method for resolving any controversy at any time after a dispute or claim under the transaction arises.<sup>213</sup>

The CFPB received specific authority from Congress to implement the federal “consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions.”<sup>214</sup> Employing either the “contrary congressional command” rule or the “contrary regulatory command” rule, this particular regulation should stand as written, successfully prohibiting pre-dispute arbitration clauses in this particular context.

Under the “contrary congressional command” rule, a court would first consider whether the Dodd-Frank Act functions as a contrary congressional command. In this case, the Dodd-Frank Act contains clear language that would negate the “federal policy favoring arbitration agreements.”<sup>215</sup> After having concluded that the Dodd-Frank Act permits the agency to abrogate arbitration rights, the second step is to ensure that the CFPB properly promulgated its own rule. In this case, the CFPB has specific authority to implement consumer financial rules, and this particular rule closely follows the language of the Act.<sup>216</sup> Nothing suggests that the CFPB went outside of its authority, so this regulation should stand despite its limitations on the ability of parties to enter into arbitration agreements.

In addition, Congress authorized the CFPB to “conduct a study” of the use of arbitration in the context of consumer financial products.<sup>217</sup> Congress further gave the CFPB the authority to “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties” if such regulations are “in the public interest and for the protection of consumers.”<sup>218</sup> In response

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213. 15 U.S.C. §1639(c)-(e) (2018) (emphasis added).

214. 12 U.S.C. §5492 (2010).

215. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

216. This article assumes that the CFPB followed all proper procedures.

217. 12 U.S.C. § 5518(a) (2010).

218. *Id.*

to this authority, the CFPB conducted a study of arbitration and provided its 728-page report to Congress in 2015.<sup>219</sup> As noted above, following the issuance of the report, the CFPB promulgated rules that would have forbade financial institutions from including class action waivers in their dispute resolution clauses.<sup>220</sup> The rule was overturned in a dramatic Senate vote of fifty-one to fifty under the Congressional Review Act.<sup>221</sup> Had that rule gone into effect, the analysis of determining its enforceability would be identical to the regulation prohibiting the inclusion of pre-dispute arbitration agreements in the mortgage context.

### *B. Harder Cases*

The example of the CFPB shows analytically how this analysis can reach the same result with two different analytical frameworks. This section considers three cases that are much harder—issues arising under the MMWA, the Department of Education regulations prohibiting arbitration agreements in the Direct Loan Program, and the re-promulgated rules for long-term care facilities. The MMWA issue is not new, and despite early case law from the early 2000s, the issue remains unresolved. This discussion is included because of its longevity and the varying approaches taken throughout the country. The Direct Loan and long-term care facility regulations are new and have not generated case law yet. That discussion will predict how courts might address the validity of the regulations.

#### *1. MMWA*

Despite somewhat “unclear authority” to do so under the MMWA, the FTC has regulated arbitration issues in the past.<sup>222</sup> This subsection considers the statutory authority and regulations at issue and analyzes the regulations under the “contrary congressional command” rule and the “contrary regulatory command” rule. This subsection also considers the opinions of

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219. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY (2015), [https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/N386-6LQQ>]. The CFPB also issued a preliminary report in 2013. This earlier report is replicated in the 2015 report. *Id.*

220. *See supra* notes 20-21 and accompanying text.

221. *Id.*

222. Deacon, *supra* note 14, at 1020.

the federal courts that have ruled on this issue, focusing on the process used to analyze the regulations.

The MMWA legislation on dispute resolution begins by encouraging “informal dispute [resolution] mechanisms” between consumers and warrantors.<sup>223</sup> Despite this encouragement, Congress tasked the FTC with “setting forth minimum requirements for any such informal dispute [resolution]” incorporated into a warranty covered by the Act.<sup>224</sup> Warrantors seeking to take advantage of such dispute resolution must establish a procedure consistent with the rules that are incorporated into the language of the warranty itself.<sup>225</sup> If those requirements are met, the consumer may not “commence a civil action (other than a class action)” under the MMWA unless the consumer “initially resorts to such procedure.”<sup>226</sup>

Following enactment of the MMWA, the FTC issued rules prohibiting the enforcement of pre-dispute arbitration clauses in consumer warranty contracts.<sup>227</sup> The FTC reaffirmed these provisions in several more recent rulemakings,<sup>228</sup> the most recent in 2015. Although the applicable regulation does not use the word “arbitration,” the regulations state: “Decisions of the [Dispute Resolution] Mechanism shall not be legally binding on any person.”<sup>229</sup> The regulations contemplate a hearing before a neutral decision-maker, but the result of the hearing must be advisory, as opposed to “legally binding.”<sup>230</sup>

From an analytical standpoint, whether the FTC regulation prohibiting pre-dispute arbitration agreements is enforceable depends on whether a court would apply the “contrary congressional command” rule or the

223. 15 U.S.C. § 2310(a)(1) (2018) (“Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.”).

224. 15 U.S.C. § 2310(a)(2) (2018) (“The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.”); *see also* Deacon, *supra* note 14, at 1020 (describing MMWA requirements).

225. 15 U.S.C. §§ 2310(a)(3)(A)-(C) (2018).

226. *Id.* The MMWA further gave the FTC the ability to investigate a warrantor’s informal dispute resolution process upon a request by a consumer to do so or on its own initiative to determine whether the procedure is in accordance with the law. 15 U.S.C. § 2310(a)(4) (2018).

227. Deacon, *supra* note 14, at 1020 (“Shortly after Congress passed the Magnusson-Moss Act, the FTC invoked its powers to prohibit binding arbitration provisions in warranty contracts.”).

228. *Id.*

229. 16 C.F.R. § 703.5(j) (2015).

230. 16 C.F.R. §§ 703.4, 703.5 (2015).

“contrary regulatory demand” rule. If a court were to apply the “contrary congressional command” rule, the regulation would be unenforceable. Nothing in the MMWA explicitly mentions arbitration, much less specifically bans enforcement of arbitration agreements. When Congress tasked the FTC with creating regulations for dispute resolution, Congress did not give the FTC any specific powers relating to arbitration. Nor does the legislative history suggest that Congress intended to ban enforcement of pre-dispute arbitration agreements. A minority of legislators spoke positively of “binding arbitration,” in the House report,<sup>231</sup> but the Senate report noted an intent that consumer grievances be resolved “without the aid of litigation *or formal arbitration*.”<sup>232</sup> Without any specific language banning pre-dispute arbitration in either the text or the legislative history, the *CompuCredit* Court<sup>233</sup> would support reading the FAA and the MMWA together, allowing enforcement of binding, pre-dispute arbitration. The *CompuCredit* Court considered a statute that contained some discussion about a method of dispute resolution, and whether the discussion of one method of dispute resolution precluded the use of arbitration.<sup>234</sup> Under the “contrary congressional command” rule, arbitration would be permitted, and the FTC’s rule would be deemed unenforceable.

If a court employed the “contrary regulatory command” rule, the FTC’s rule would likely stand. Under this analysis, the first questions would be whether the FTC had the authority to promulgate the anti-arbitration rule under administrative law principles. A strong argument exists that the FTC’s ruling was proper and within the proper scope of its authority. Congress gave the FTC the authority to create informal dispute resolution mechanisms and designate the requirements for such a program.<sup>235</sup> Under this legislative charge, the FTC determined that the informal dispute resolution could not be “binding.”<sup>236</sup> Whether dispute resolution is binding is a natural discussion in dispute system design,<sup>237</sup> and the FTC would have

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231. H.R. REP. NO. 93-1107, at 83 (1974) (discussing binding arbitration as an alternative to class actions).

232. S. REP. NO. 91-876, at 22-23 (1970) (emphasis added).

233. *CompuCredit Corp v. Greenwood*, 565 U.S. 95 (2012).

234. *Id.* at 99-100 (noting that the discussion of the “right to sue” in the required disclosures does not prohibit a bank from including a binding arbitration agreement in its consumer contracts).

235. 15 U.S.C. § 2310(a) (2018).

236. 16 C.F.R. § 703.5(j).

237. *See, e.g.*, Lisa B. Bingham, *Why Suppose? Let’s Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 107-08 (arguing that whether a dispute

the flexibility to make this determination under the MMWA. Indeed, the MMWA discusses “informal” dispute resolution, and the FTC could have determined that binding arbitration was not informal.<sup>238</sup> Provided the FTC has the authority under the MMWA to prohibit binding arbitration, the regulation would stand as a “contrary regulatory authority” to the FAA.

Courts’ rulings on this very question have produced mixed results. Some courts are applying a version of the “contrary congressional command” rule. For example, in *Davis v. Southern Energy Homes*, the Eleventh Circuit framed the inquiry as “whether the Magnuson–Moss Warranty Act permits or precludes enforcement of binding arbitration agreements with respect to written warranty claims,”<sup>239</sup> and both parties framed their arguments to the court assuming that the court would first consider the conflict between the FAA and the MMWA.<sup>240</sup> In examining the MMWA, the Eleventh Circuit, relying on *Gilmer, Rodriguez*, and *McMahon*, considered the question in the context of a contrary congressional command.<sup>241</sup> The court found nothing in the text to prohibit arbitration and determined that the legislative history was “ambiguous at most.”<sup>242</sup> Although the Eleventh Circuit found no conflict between the FAA and the MMWA, it also considered the FTC’s authority to promulgate its rule regarding binding dispute resolution under *Chevron*.<sup>243</sup> The court determined that the FTC was “unreasonable” in prohibiting binding

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resolution process is “binding” is a critical factor in categorizing systems); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 886 (2002) (same). Dispute system design considers how courts, organizations, communities, and others can create the best process for resolving a particular dispute or type of dispute. See generally Andrea Kupfer Schneider, *How Does DSD Help Us Teach About Community Conflict (And How Can Community Conflict Help Illustrate DSD)?*, 13 U. ST. THOMAS L.J. 370, 371-73 (2017).

238. Whether binding arbitration is “formal” or “informal” can be debated among scholars and practitioners, and the assessment usually hinges on the perceived alternative. Compared to court, arbitration is informal. Compared to mediation and negotiation, arbitration’s rules and procedures make the process significantly more formal. For one analysis, Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute System Design*, 14 HARV. NEGOT. L. REV. 123, 127 (2009) (considering arbitration a formal process because a third party has the “power to render a binding decision”).

239. 305 F.3d 1268, 1270 (11th Cir. 2002). The *Davis* case involved a warranty issue in the sale of a mobile home, and the contract with the warrantor contained a binding pre-dispute arbitration clause. *Id.* at 1270.

240. *Id.* at 1271 (both parties made arguments regarding the text, legislative history, and underlying purposes of the MMWA).

241. *Id.* at 1273-74 (applying the *McMahon* test).

242. *Id.* at 1275-76.

243. *Id.* at 1277.

arbitration under the second prong of the *Chevron* analysis.<sup>244</sup> Because the court did not find a conflict between the FAA and the MMWA, the *Chevron* analysis is arguably dicta.

The Fifth Circuit in *Walton v. Rose Mobile Homes* arrived at a similar result.<sup>245</sup> Although the *Walton* court cited to *Chevron* before engaging in any additional analysis,<sup>246</sup> it also conducted an analysis under *McMahon*.<sup>247</sup> The court concluded “that the text, legislative history, and purpose of the MMWA do not evince a congressional intent to bar arbitration of MMWA written warranty claims.”<sup>248</sup> Unlike the Eleventh Circuit, the Fifth Circuit did not engage in a *Chevron* analysis before compelling arbitration. It even chastised district courts for relying solely on the FTC regulations because “it is improper to use the FTC regulations themselves to determine congressional intent here.”<sup>249</sup> Unlike the *Davis* case, the *Walton* court was not unanimous.<sup>250</sup> Without using the labels, Judge King, writing in dissent, would have preferred to use a “contrary regulatory command” approach, and her opinion begins by noting that *Walton* is a “classic *Chevron* case.”<sup>251</sup> The opinion is entirely focused on the *Chevron* two-part analysis, while addressing the conflict with the FAA within both prongs.<sup>252</sup> The dissent does not explicitly consider the analytical framework of a “contrary regulatory command,” but Judge King’s analysis is similar.<sup>253</sup>

The Ninth Circuit, in an opinion that was later withdrawn, held that a warrantor may not enforce a pre-dispute arbitration agreement against a consumer on a MMWA claim.<sup>254</sup> In *Kolev*, the Ninth Circuit began with a

244. *Id.* at 1279.

245. 298 F.3d 470, 471 (5th Cir. 2002).

246. *Id.* at 473-76 (first discussing the FAA, then the MMWA, and then *Chevron*).

247. *Id.* at 475-78 (conducting *McMahon* analysis).

248. *Id.* at 478.

249. *Id.* at 479.

250. *Id.*

251. *Id.* at 480 (King, J., dissenting).

252. *See generally id.* at 480-92 (King, J., dissenting).

253. The Fourth Circuit adopted an unusual analysis regarding the meaning of “pre-dispute” and “post-dispute” arbitration. It concluded that binding arbitration cannot *replace* a non-binding informal dispute resolution procedure, but it can be utilized after a non-binding process, such as mediation, is complete. *Seney v. Rent-A-Center*, 738 F.3d 631, 634 (4th Cir. 2013). “Pre-dispute” and “post-dispute” dispute arbitration generally refer to when the contract is signed—not on when in a sequence of procedures arbitration occurs. The court’s definitions are outside of how those terms are commonly used by courts, advocates, and scholars.

254. *Kolev v. Euromotors W./The Auto Gallery*, 658 F.3d 1024 (9th Cir. 2011), *opinion withdrawn* by 676 F.3d 867 (9th Cir. 2012).

*Chevron* analysis.<sup>255</sup> In the second step of the *Chevron* analysis, the court easily found multiple reasons “why the FTC’s interpretation of the MMWA as precluding pre-dispute mandatory binding arbitration is a reasonable construction of the statute.”<sup>256</sup> After examining the regulation under *Chevron*, the Ninth Circuit then addressed the conflict with the FAA.<sup>257</sup> The Ninth Circuit, rather than considering a “contrary regulatory command,” considered whether the FAA made the FTC’s interpretation unreasonable.<sup>258</sup> In dissent, Judge Smith agreed with the reasoning articulated by the Fifth and Eleventh Circuits.<sup>259</sup>

These cases demonstrate that this particular question has garnered different analyses in each circuit that has considered it. The district courts also evidence divided analyses on this question.<sup>260</sup> These cases demonstrate that the sequence of the analysis affects the outcome of the case.

## 2. Direct Loan Program

In 2016, the Department of Education promulgated regulations prohibiting the use of pre-dispute arbitration agreements (and class-action waivers) in loans with borrowers who receive direct loans. The enabling

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255. *Kolev*, 658 F.3d at 1025 (citing *Chevron*) (“We apply a two-step inquiry in reviewing agency constructions of statutes.”).

256. *Id.* at 1027-28 (citing reasons including congressional intent, consumer protection, and deference due to the agency’s interpretation).

257. *Id.* at 1029.

258. *See id.* at 1030 (discussing the “third and final reason that the FAA’s proarbitration presumption does not render unreasonable the FTC’s interpretation of the MMWA as barring pre-dispute mandatory binding arbitration”).

259. *Id.* at 1036 (“Even if the FTC had authority to address this question, . . . I agree with the Fifth and Eleventh Circuits—the only federal courts of appeals to consider this question—that such a view would be unreasonable in light of the presumption of arbitrability created” by the FAA.).

260. *Compare* *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 594 (M.D.N.C. 2014) (“After careful consideration, the court agrees with TAMKO that the MMWA does not prohibit enforcement of its provision for binding pre-dispute arbitration of Krusch’s written warranty claims.”) and *Seney v. Rent-a-Center, Inc.*, 909 F. Supp. 2d 444, 453 (D. Md. 2012) (“The Court further holds that the agreement to arbitrate in this case validly encompassed the Seney’s claim under the MMWA.”) with *Rickard v. Teynor’s Homes, Inc.*, 279 F. Supp. 910, 921 (N.D. Ohio 2003) (“I will, therefore, defer to the FTC’s expertise and interpretation of the statute. Thus, the MMWA precludes enforcement of binding arbitration agreements for claims under a written warranty.”) and *Browne v. Kline Tysons Imports, Inc.*, 190 F. Supp. 2d 827, 831 (E.D. Va. 2002) (“Agency interpretation supports the reasoning that written warranty claims under the MMWA are not subject to binding arbitration. Regulations, promulgated by the governmental body responsible for interpreting or administering a statute, are entitled to considerable respect.”).

legislation is that which established the William D. Ford Federal Direct Loan Program.<sup>261</sup> The program allows students and parents to access federal funds for education loans based on student need.<sup>262</sup> The statute provides significant detail on many loan provisions, including, but not limited to, interest rates, grade periods, repayment schedules, consolidation, public service loan forgiveness, and special terms for military students.<sup>263</sup> This particular section does not include any language regarding arbitration. In fact, the term “arbitration” does not occur in the statute. The legislative history does not clearly answer the question of whether arbitration should be permitted or prohibited in the case for student loan borrowers. Although not addressing this exact question, some portions of the legislative history demonstrate that Congress might be supportive of arbitration, not restrictive.<sup>264</sup>

The regulation at issue clearly prohibits lenders from using pre-dispute arbitration agreements in Direct Loan Program borrower agreements. The regulation states: “The school will not enter into a predispute agreement to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim.”<sup>265</sup> The regulation further requires schools to rescind earlier-made arbitration agreements.<sup>266</sup> To the extent that schools arbitrate with borrowers, information relating to any arbitration must be reported to the Secretary of Education.<sup>267</sup> The regulation cites the whole of the Direct Loan

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261. 20 U.S.C. § 1087a et seq. (2008).

262. 20 U.S.C. § 1087b(a) (2008) (“The Secretary shall provide, on the basis of the need and the eligibility of students at each participating institution, and parents of such students, for such loans, funds for student and parent loans under this part . . .”).

263. 20 U.S.C. § 1087e (2016).

264. For instance, in testimony before the House, one witness suggested that arbitration be instituted as a consumer protection measure. *Oversight Hearing on the Reauthorization of the Higher Education Act of 1965: Houston, Texas, Hearing Before the Subcomm. on Postsecondary Education of the House Committee on Education and Labor*, 102nd Cong. § 4 (1991) (“Those recommendations designed to provide consumer protection and enhanced program quality include . . . mandating implementation of grievance procedures and arbitration mechanisms.”).

265. 34 C.F.R. § 685.300(f)(1) (2016). The regulations do allow for the parties to agree to arbitration after a dispute arises. 34 C.F.R. § 685.300(f)(1)(ii) (2016) (“A student may enter into a voluntary post-dispute arbitration agreement with a school to arbitrate a borrower defense claim.”).

266. 34 C.F.R. § 685.300(f)(3) (2016) (specifying the specific language the school must use to notify the borrower about the unenforceability of the arbitration agreements).

267. 34 C.F.R. § 685.300(g) (2016) (setting forth requirements). Schools have similar reporting requirements for litigation involving borrowers. 34 C.F.R. § 685.300(h) (2016).

Program legislation as the authority for the arbitration ban,<sup>268</sup> even though other portions of the statutory scheme require arbitration.<sup>269</sup>

Under the “contrary congressional command” test, the Direct Loan Program’s prohibition on pre-dispute arbitration agreements most likely would not stand. The text of the statute establishing the Direct Loan program is silent on the issue of arbitration, although other portions of education law support the use, or even require arbitration.<sup>270</sup> Silence on the issue would prohibit the Department of Education from promulgating a rule prohibiting the use of arbitration agreements. Whether the rule would stand under the “contrary regulatory command” test is significantly less clear. The enabling legislation is broad,<sup>271</sup> and the powers given to the Department of Education are also broad.<sup>272</sup> Under a *Chevron* analysis, the legislation would likely be upheld. If so, under the “contrary regulatory command” test, the regulation could stand. Again, whether this regulation stands likely will depend on the order of analysis that a court considers.

In the only case decided under this regulation, the U.S. District Court for the District of Columbia read the statutes together in a way that did not invoke any conflict analysis.<sup>273</sup> In essence, it applied a “contrary regulatory command” analysis without using those terms. The court found no conflict because this regulation does not invalidate any agreements to arbitrate.<sup>274</sup> Instead, the new law would prohibit schools requiring such arbitration agreements from participating in the Direct Loan Program.<sup>275</sup> The district court characterized the case as “easy”<sup>276</sup> because the “FAA does not preclude federal agencies from declining to include arbitration clauses in

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268. *See generally* 34 C.F.R. § 685.300 (2016).

269. 20 U.S.C. § 1099b(e) (2008) (“The Secretary may not recognize the accreditation of any institution of higher education unless the institution of higher education agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action.”).

270. *See, e.g.*, Dementra Edwards, *New Amendments to Resolving Special Education Disputes: Any Good Ideas?*, 5 PEPP. DISP. RESOL. J. 137, 156-58 (2005) (discussing the use of arbitration in special-education law).

271. *See* 20 U.S.C. § 1087a (2008).

272. *Id.*

273. *Cal. Ass’n of Private Postsecondary Schs. v. DeVos*, No. 17-999, 2020 WL 516455, at \*9 (D.D.C. Jan. 31, 2020) (finding no conflict).

274. *Id.* at \*13.

275. *Id.* at \*11 (noting that the regulation “require[es] Direct Loan program participants to eschew predispute arbitration clauses and class action waivers in their enrollment agreements”).

276. *Id.*

government contracts and grant agreements.”<sup>277</sup> The court, then, easily dismissed arguments regarding the Department’s ability to create this rule.<sup>278</sup>

This reasoning is opposed to that of *AHCA v. Burwell*, discussed above.<sup>279</sup> The *AHCA v. Burwell* court found a conflict between the FAA and the regulation regarding Medicaid funding, even though the regulation did not outright invalidate agreement to arbitrate.<sup>280</sup> These cases present a fundamental disagreement on whether a funding mechanism contingent on the absence of an arbitration agreement runs afoul of the FAA’s command to enforce agreements to arbitrate.<sup>281</sup>

### 3. Medicare and Medicaid

Most recently, CMS issued a new rule regarding pre-dispute arbitration agreements in the area of long-term care (LTC) facilities.<sup>282</sup> For its statutory authority, CMS again points to its authority to “to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys” as its enabling legislation.<sup>283</sup> CMS additionally stated that the “rule does not purport to regulate the enforceability of any arbitration agreement, and, assuming that it limits the right of the Secretary to protect the rights of Medicaid beneficiaries, in our view, this rule does not pose any conflict with the language of the Federal Arbitration Act (FAA).”<sup>284</sup> Although CMS originally sought to remove a provision in the regulation that would prohibit a LTC facility from conditioning admission on the signing of an arbitration agreement, the agency decided to leave that provision in the final regulation based on comments received.<sup>285</sup> “Therefore, facilities will continue to be prohibited from requiring any resident or his or

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277. *Id.*

278. *Id.* at \*14-\*16.

279. *See supra* notes 114-122 and accompanying text.

280. *See supra* note 120.

281. 9 U.S.C. § 2 (making agreements to arbitrate specifically enforceable).

282. Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 84 Fed. Reg. 34,7183 (proposed July 18, 2019) (to be codified at 42 C.F.R. pt. 418). The rule was scheduled to go into effect on September 16, 2019. *Id.*

283. *Id.* (citing Sections 1819(f)(1) and 1919(f)(1) of the Act of the Nursing Home Reform Act, part of the Omnibus Budget Reconciliation Act of 1987).

284. *Id.*

285. *Id.* at 34,719.

her representative to sign an agreement for binding arbitration as a condition of admission to the facility.”<sup>286</sup> In addition, the regulations will insert a thirty-day opt-out provision into any arbitration agreement signed by or on behalf of a resident.<sup>287</sup>

CMS addressed commenters’ concerns about the enforceability of these regulations in light of the FAA. CMS stated:

After reexamining the issue and reviewing public comments we received, at this point we believe that a balance can be struck that accommodates the use of arbitration agreements while also protecting the rights of LTC facility residents. Thus, we are finalizing the removal of the prohibition on pre-dispute, binding arbitration agreements and the provisions regarding the content of the agreement and implementing requirements we believe will provide greater transparency in the arbitration process.<sup>288</sup>

The final rule would allow the use of pre-dispute arbitration agreements, provided that the patient gives informed consent to the provision and admission is not contingent on such signing.<sup>289</sup> Compared to the 2016 version of the rule, this rule is significantly more nuanced because it does not explicitly invalidate arbitration agreements.

As opposed to most other examples in this article, the CMS regulations do not prohibit enforcement of all agreements to arbitrate. Instead, LTC facilities may still ask their residents to sign arbitration agreements, provided that such agreements are not a condition of moving into the facility. If a court were to view the regulation as *consistent* with the FAA because the parties are still free to contract for arbitration, then the regulation and the statute are not in conflict and both can stand.

On the contrary, a court may draw lessons from the Supreme Court’s preemption doctrine, which has expanded considerably since *Concepcion* in 2011.<sup>290</sup> Although preemption applies in conflicts between the FAA and state authority, preemption analysis, like conflict analysis, must first

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286. *Id.*

287. *Id.* (“Finally, based on comments, we are adding a requirement that facilities grant to residents a 30 calendar day period during which they may rescind their agreement to an arbitration agreement.”).

288. *Id.* at 34,725.

289. *Id.*

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

determine if the two competing laws are consistent. In the preemption jurisprudence, the Supreme Court has invalidated laws that have a negative “impact” on arbitration, even if those competing laws do not necessarily invalidate the arbitration agreements.<sup>291</sup>

If a court finds no conflict between the agency rule and the FAA, then the analysis ends and the agency rule stands. If the court does find a conflict, then the resolution may depend on the order of analysis conducted. If the court looks first for a contrary congressional command, the court will not be able to find one. The *AHCA v. Burwell* court found nothing in the legislation that would support a finding of a contrary congressional command.<sup>292</sup> At that point, the analysis would end, and the regulation would be unenforceable. This particular regulation might have additional problems, even if the court is following the contrary regulatory command approach. Again, the *AHCA v. Burwell* court suggested that CMS did not have the authority to issue arbitration regulations under its broad and vague authority regarding the health, safety, welfare, and rights of its patients.<sup>293</sup> Although CMS changed the nature of the regulation from an absolute ban to a conditional permission, the underlying authority remains the same. A reviewing court may still find that regulating arbitration in any respect does not fall within the scope of the enabling legislation. If, however, a court does find that CMS has the authority to regulate arbitration, under a contrary regulatory command approach, the regulation would stand.

#### CONCLUSION

This article illustrates a growing area of arbitration law, i.e., federal regulatory arbitration law, so early in its infancy that the courts have yet to

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291. See *Taylor v. Extencicare Health Facilities, Inc.*, 147 A.3d 490, 509-10 (Pa. 2016) (finding preempted a bifurcation rule because “when a generally applicable contract defense is applied in a manner hostile to arbitration, or when the state rule stands as an obstacle to the accomplishment of the FAA’s objectives,” the state law is preempted); see also Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Preemption*, 67 FLA. L. REV. 711, 744 (2015) (explaining how the *Concepcion* Court was the first to invalidate a state law that did not invalidate arbitration agreements, but negatively impacted arbitration); see also Olga Bykov, *Vindication of Federal Statutory Rights: The Future of Cost-Based Challenges to Arbitration Clauses After American Express v. Italian Colors Restaurant and Green Tree v. Randolph*, 50 U.C. DAVIS L. REV. 1323, 1355 (2017) (discussing arbitration preemption as a form of “field/impact” preemption).

292. See *supra* notes 205-209 and accompanying text.

293. *Id.*

determine how to interpret this law in conjunction with the FAA. This article suggests two competing frameworks for conducting such analysis, through either a “contrary congressional command” approach or a “contrary regulatory command” approach.

Although the “contrary congressional command” approach follows more closely current Supreme Court arbitration law, the “contrary regulatory command” approach deserves consideration because of agency expertise and *Chevron* deference. These two rules will yield similar results when the enabling legislation speaks directly to the issue of arbitration, so the analytical framework will be most influential in cases in which the enabling legislation is “silent” or ambiguous on the issue of arbitration.

This article suggests that the “contrary congressional command” approach is sounder in both law and policy to the “contrary regulatory command” rule, but adopting courts at this point in the jurisprudence have flexibility and arguments to defend either approach. The primary purpose for this Article, then, is to lay the foundation and provide a framework to work through these legal issues as they are presented to the judiciary in the future.