Trouble, Trouble, Trouble: Taylor Swift, Ticketmaster, and Arbitration[1]

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ABSTRACT

Through Ticketmaster's use of arbitration and the controversy surrounding Ticketmaster's botched sale of tickets for Taylor Swift's The Eras Tour, this Article explores problems with the broad use of arbitration in the United States. Arbitration, a private contractual method of resolving disputes in a binding manner, is a neutral process that can provide many benefits. However, under the current broad scope of arbitration law, virtually every type of claim can be arbitrated. A more limited arbitration law could provide more robust enforcement of laws, greater accountability and transparency, and stronger development of precedent within our legal system. Stronger parties (like large corporations) sometimes view arbitration as a means to suppress claims and limit liability. Thus, instead of trying to resolve disputes in good faith, stronger parties may try to disadvantage weaker parties (like individual consumers) through the drafting of unfair arbitration clauses with harsh, one-sided terms. Arbitration is supposed to be based on the consent of the parties, but in many consumer and worker transactions, meaningful, voluntary consent is often lacking. The live-ticketing industry's use of arbitration illustrates these broader concerns with arbitration, and this Article suggests reforms and solutions to alleviate the troubled use of arbitration in the United States.

1. TAYLOR SWIFT, *I Knew You Were Trouble (Taylor's Version)*, *on* RED (TAYLOR'S VERSION) (Republic Records 2021).

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I. INTRODUCTION

Taylor Swift has dominated popular culture recently, and her accomplishments provide lessons in several areas, such as business, literature, and intellectual property, to name a few.[2] This Article uses the sale of her concert tickets to explore the legal institution of arbitration, a widespread phenomenon that can profoundly shape the enforcement of one's rights.[3] Millions of Taylor Swift fans (Swifties) likely, and probably unknowingly, became subject to an arbitration clause when purchasing her concert tickets.[4] No other country legally approves of arbitration as expansively as the United States,[5] and the use of arbitration in connection with Swift concert tickets reveals several concerns about its widespread adoption.

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2. Bryan West, *Taylor Swift 101: From Poetry to Business, College Classes Offer Insights on 'Swiftology,'* USA TODAY, https://www.usatoday.com/story/entertainment/music/2024/01/02/taylor-swift-101-college-classes-about-singer/71976599007/ [https://perma.cc/9RGS-VYX8] (Jan. 17, 2024, 7:38 PM) (describing the variety of college courses related to Taylor Swift).

3. *See generally Arbitration*, CORNELL L. SCH., https://www.law.cornell.edu/wex/arbitration [https://perma.cc/3E25-2NNR] (last visited Oct. 9, 2024).

4. *See* Zack Sharf, *Ticketmaster Explains Taylor Swift Ticket Chaos Amid Outrage; 'Eras Tour' Broke Record With Over 2 Million Tickets Sold in One Day*, VARIETY (Nov. 17, 2022), https://variety.com/2022/music/news/ticketmaster-explains-taylor-swift-ticket-crisis-eras-tour-1235435673/ [https://perma.cc/RCY4-GFHB].

5. *See* Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 391 n.51 (2018) ("Mandatory pre-dispute arbitration in consumer and employment contexts is a uniquely American phenomenon, distinguishing U.S. arbitration from domestic arbitration in other countries.").

Swifties have filed claims against Ticketmaster and its parent company, Live Nation, in connection with the chaotic, flawed sale of tickets to Swift's Eras concert tour (Swift Ticketing Controversy).[6] These entertainment companies help produce and promote live events such as concerts, festivals, and sporting competitions; they also help with the marketing and managing of ticket sales to the events.[7] Unfortunately, with the high demand for Swift concert tickets, Ticketmaster's sale of these tickets in November 2022 was problematic, and millions of fans were turned away.[8] For example, customers whom Ticketmaster had pre-approved through a verification process had tickets disappear from their online baskets as they attempted a purchase.[9] Ticketmaster's website was overwhelmed with fans and bots from scalpers, which led to it crashing.[10] Many customers waited for hours in long, online queues without getting a ticket.[11] Some customers had previously bought Taylor Swift merchandise with the understanding that such a purchase would enable them to buy concert tickets through Ticketmaster, but they were still unable to do so.[12] This Swift Ticketing Controversy prompted fans to file a lawsuit challenging Ticketmaster's business practices with allegations and claims of fraud, breach of contract, unfair trade practices, and antitrust violations.[13] Unfortunately, Swifties may not have their day in court because of the arbitration clauses governing the Live Nation and Ticketmaster websites and mobile applications.[14]

Arbitration is a private, out-of-court process whereby parties agree to submit their dispute to a neutral decisionmaker who issues a

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6. *See, e.g.*, Complaint for Damages at 14, Barfuss v. Live Nation Ent., Inc., No. 22STCV37958 (Cal. Super. Ct. Dec. 5, 2022). Live Nation removed the case to federal court, and hundreds of plaintiffs joined the lawsuit. Second Amended [First Amended Federal] Complaint for Damages and Equitable Relief at 6, Barfuss v. Live Nation Ent., Inc., No. 2:23-CV-01114-GW-KK (C.D. Cal. Apr. 6, 2023) [hereinafter Second Amended Complaint].

7. Live Nation Ent., Inc., Annual Report (Form 10-K) 2 (Feb. 22, 2024).

8. Ben Sisario & Matt Stevens, *Ticketmaster Cast as a Powerful 'Monopoly' at Senate Hearing*, N.Y. TIMES (Jan. 24, 2023), https://www.nytimes.com/2023/01/24/arts/music/ticketmaster-taylor-swift-senate-hearing.html [https://perma.cc/X6ZZ-V8Z2].

9. *Id.*

10. Ben Sisario & Madison Malone Kircher, *Ticketmaster Cancels Sale of Taylor Swift Tickets After Snags*, N.Y. TIMES, https://www.nytimes.com/2022/11/17/arts/music/taylor-swift-tickets-ticketmaster.html [https://perma.cc/WBJ6-SKK9] (Jan. 24, 2023); *see also* Madison Malone Kircher, *Want Taylor Swift Tickets? You're on Your Own, Kid*, N.Y. TIMES (Nov. 16, 2022), https://www.nytimes.com/2022/11/16/style/taylor-swift-fans-ticketmaster.html [https://perma.cc/M3K8-EHUY].

11. Sisario & Kircher, *supra* note 10; Kircher, *supra* note 10.

12. Second Amended Complaint, *supra* note 6, para. 399.

13. *See generally id.*

14. *See Terms of Use*, TICKETMASTER [hereinafter Ticketmaster, *Terms of Use*], https://help.ticketmaster.com/hc/en-us/articles/10468830739345-Terms-of-Use [https://perma.cc/BNS3-JD8Q] (July 2, 2021).

binding decision.[15] Pursuant to the Federal Arbitration Act (FAA), the main federal law governing arbitration in the United States, agreements to arbitrate are fully binding,[16] and an arbitrator's decision can be entered in court as a final judgment.[17] When parties enter into valid arbitration agreements, courts may dismiss any attempted lawsuits and order the parties to engage in private arbitration.[18] Ticketmaster consumers are no strangers to this unfortunate truth, and their lawsuits against Ticketmaster have been dismissed in the past because of Ticketmaster's arbitration clause.[19]

Arbitration may provide benefits, such as simple, fast proceedings to resolve claims in a private forum with an expert decision-maker.[20] But when a consumer's claims are sent to arbitration, the consumer generally has fewer procedural rights than they would in court, such as a right to broad discovery or class action rights.[21] Moreover, unlike court decisions that are subject to appeal, the arbitrator's decision is generally final and binding.[22]

All major players in the online ticketing industry in the United States have included arbitration clauses in connection with their websites or apps. For example, event ticket sellers Eventbrite,[23] Stubhub,[24] SeatGeek,[25] and Ticketmaster block customers from filing claims in public court by including arbitration clauses in the fine print.[26] In addition to the online ticketing industry, there are hundreds of millions of arbitration clauses used in all types of transactions and

15. 1 MARTIN DOMKE, LARRY E. EDMONSON & GABRIEL WILNER, DOMKE ON COMMERCIAL ARBITRATION § 1:1 (3d ed. 2023).

16. 9 U.S.C. § 2.

17. *Id.* § 9.

18. *Id.* § 4.

19. *See, e.g.*, Oberstein v. Live Nation Ent., Inc., 60 F.4th 505, 517 (9th Cir. 2023).

20. Positive Software Sols., Inc. v. New Century Mortg. Corp., 476 F.3d 278, 292 (5th Cir. 2007) (Wiener, J., dissenting) ("The principal benefits usually ascribed to arbitration are speed, informality, cost-savings, confidentiality, and services of a decision-maker with expertise and familiarity with the subject matter of the dispute.").

21. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (explaining that "fundamental attributes of arbitration" include informal, "streamlined proceedings"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (discussing the limited procedures typically available in arbitration and holding that "[a]lthough those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").

22. *AT&T Mobility LLC*, 563 U.S. at 350. There is virtually no appeal of an arbitrator's decision, even if the arbitrator makes serious errors. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010).

23. *Eventbrite Terms of Service*, EVENTBRITE, https://www.eventbrite.com/help/en-us/articles/251210/eventbrite-terms-of-service/ [https://perma.cc/PQ3S-CYUK] (July 3, 2024).

24. *Global User Agreement*, STUBHUB, https://www.stubhub.com/legal?section=ua [https://perma.cc/JTC6-J88Z] (June 2024).

25. *Terms of Use*, SEATGEEK, https://seatgeek.com/terms [https://perma.cc/5R7Q-MHTS] (May 2, 2024).

26. Ticketmaster, *Terms of Use*, *supra* note 14.

relationships today.[27] Online sales,[28] banking transactions,[29] gym memberships,[30] social media,[31] credit card transactions,[32] cellular phone service,[33] and ride sharing services are just a few examples.[34] These clauses are generally binding pursuant to the FAA.[35]

With this year marking the FAA's centennial, it is an opportune time to examine the expansive use of arbitration in the United States.[36] The application of Ticketmaster's arbitration clause to the Swift Ticketing Controversy demonstrates several problems associated with modern uses of arbitration, and this Article explores some of these concerns.[37] First, this Article discusses problems with the broad scope of arbitration law. Second, the Article shows how some parties misuse arbitration to suppress claims. Third, this Article discusses problems with consent, the foundation for arbitration. Finally, this Article concludes with suggestions for reform to alleviate these concerns.

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27. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 246 (2019).

28. Adelstein v. Walmart Inc., No. 1:23-CV-00067, 2024 WL 1347043, at *1 (N.D. Ohio Mar. 30, 2024) (compelling arbitration of customer's fraud and consumer protection claims against Walmart).

29. Glavin v. JPMorgan Chase Bank, N.A., No. CV 23-1708, 2024 WL 1536739, at *1 (E.D. Pa. Apr. 9, 2024) (compelling arbitration of consumer's negligence and unfair trade practices claims against Chase).

30. Cheshire v. Fitness & Sports Clubs, LLC, 382 F. Supp. 3d 1329, 1331 (S.D. Fla. 2019) (compelling arbitration of consumer's ADA claims against LA Fitness gym).

31. Whalen v. Facebook, Inc., No. 20-CV-06361-JST, 2022 WL 19934419, at *1 (N.D. Cal. Apr. 11, 2022) (enforcing Instagram's arbitration clause in connection with consumer's claims under the Illinois Biometric Information Privacy Act).

32. Reading v. Home Depot, No. 23-CV-498 (JLS) (JJM), 2024 WL 2240120, at *1, *3 (W.D.N.Y. May 16, 2024) (enforcing arbitration clause in the terms governing the use of Citbank's Home Depot credit card).

33. Panchal v. T-Mobile USA, Inc., No. 8:24-CV-456-WFJ-TGW, 2024 WL 2293180, at *1 (M.D. Fla. May 21, 2024) (compelling arbitration of consumer's negligence and unfair trade practice claims against T-Mobile).

34. Wakeman v. Uber Techs., Inc., No. 23-CV-02092-TC-TJJ, 2024 WL 836985, at *1 (D. Kan. Feb. 28, 2024) (compelling arbitration of consumer's personal injury claims against Uber).

35. 9 U.S.C. § 2.

36. The FAA was enacted in 1925. JON O. SHIMAIUKURO, CONG. RSCH. SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2, 4, 5 (2003), https://www.everycrsreport.com/files/20030815_RL30934_680db43c9d98c1a821f8b20f1b0137df472ed217.pdf [https://perma.cc/2LDT-NSYQ].

37. However, to be clear, this critique is not applicable to arbitration as a general system or as a process. In the abstract, arbitration can be understood as a neutral process, and one should assume that arbitrators engage in good faith in fulfilling their duties. The critiques in this Article are instead leveled at certain uses of arbitration. When arbitration involves mutual, meaningful consent and fair procedures, arbitration of certain claims can be beneficial.

II. THE CURRENT BROAD SCOPE OF ARBITRATION LAW IS FLAWED AND CONTRARY TO THE FAA'S TEXT

Under governing interpretations of the FAA, virtually every type of substantive legal claim can be arbitrated pursuant to the FAA.[38] For example, courts routinely enforce arbitration clauses in the employment context and compel workers to submit various employment disputes to arbitration.[39] Likewise, courts enforce consumer arbitration clauses in connection with a variety of claims.[40]

The broad arbitration of substantive claims can be traced back to cases like *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, Inc.*[41] In *Mitsubishi*, the United States Supreme Court held that antitrust claims may be arbitrated under the FAA.[42] Addressing more generally the arbitration of noncontractual statutory claims, the Court reasoned that "we find no warrant in the [FAA] for implying in every contract within its ken a presumption against arbitration of statutory claims."[43] Instead, if a substantive claim is to be nonarbitrable as a matter of law, courts must rely on congressional intent as expressed in the substantive statute, not in the FAA.[44] In other words, when Congress enacts a substantive law or creates a new substantive claim, Congress could declare that the particular claim is not subject to arbitration, but the FAA itself generally and broadly allows for any claim to be arbitrated.[45] Pursuant to the holding in *Mitsubishi*, the antitrust claims, tort claims, and consumer protection claims alleged in the Swift Ticketing Controversy are generally arbitrable under the FAA.[46]

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38. Under the FAA, arbitration agreements are generally enforceable, except for state law grounds for the revocation of any contract, and "[t]he Supreme Court [has seen] nothing in the FAA indicating that the broad principle of enforceability is subject to any additional limitations under state law." DOMKE ET AL., *supra* note 15, § 7:6. However, a noteworthy, recently adopted exception from March 2022 involves sexual assault and harassment claims. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended at 9 U.S.C. §§ 401–401).

39. *See, e.g.*, McPherson v. Bloomingdale's, LLC, No. 23-CV-1084 (JMA) (ARL), 2023 WL 8527462, at *3, *7 (E.D.N.Y. Dec. 8, 2023) (compelling arbitration of worker's racial discrimination, wrongful discharge, and retaliation claims).

40. *See, e.g.*, Galgon v. Epson Am., Inc., No. CV 21-1794-CBM-(MRWx), 2021 WL 4513638, at *1, *5 (C.D. Cal. June 16, 2021) (compelling arbitration of consumer's false advertising, unfair trade practices, trespass to chattels, and competition claims); *see also supra* notes 31–34.

41. 473 U.S. 614 (1985).

42. *Id.* at 640.

43. *Id.* at 625.

44. *Id.* at 627.

45. S*ee* 9 U.S.C. § 2.

46. *Cf.* Maldonado v. Nat'l Football League, No. 1:22-CV-02289 (ALC), 2023 WL 4580417, at *4 (S.D.N.Y. July 18, 2023) (compelling arbitration of consumer's antitrust claims based on arbitration clause found in Terms of Use on NFL's website).

However, *Mitsubishi* is flawed. Under the FAA's original intent and text, the FAA does not cover statutory claims.[47] However, in proclaiming that nothing in the FAA prohibits the arbitration of statutory claims, the *Mitsubishi* Court selectively quoted Section 2 of the FAA, the statute's core provision, and treated certain language as "invisible" or to be ignored "like a crumpled up piece of paper":[48] The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[49]

But the *Mitsubishi* Court overlooked critical language that could have changed its ultimate conclusion regarding the arbitrability of statutory claims.[50] The FAA covers written provisions in a "contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising out of such contract*."[51] Thus, under the FAA's terms, the FAA was designed for contractual claims, not statutory or tort claims.[52]

The FAA was designed for merchants involved in interstate shipping in a growing national economy.[53] Accordingly, the FAA was carefully drafted to cover contractual disputes,[54] such as disputes about damaged goods or delays in interstate shipments.[55] However, the *Mitsubishi* Court's omission of the FAA's clear textual limitation enabled the Court to expand its coverage beyond contractual claims to noncontractual statutory claims, such as the antitrust claims asserted in *Mitsubishi*.[56]

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47. 9 U.S.C. § 2 (declaring that an arbitration provision in a contract is fully binding to resolve claims "thereafter arising out of such contract").

48. TAYLOR SWIFT, *Invisible*, *on* TAYLOR SWIFT (DELUXE EDITION) (Big Machine Records 2007); TAYLOR SWIFT, *All Too Well (Taylor's Version)*, *on* RED (TAYLOR'S VERSION) (Republic Records 2021).

49. *Mitsubishi*, 473 U.S. at 625 (quoting 9 U.S.C. § 2).

50. *See* 9 U.S.C. § 2.

51. *Id.* (emphasis added).

52. *Id.*

53. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924) [hereinafter *Arbitration Hearings*] (describing how the FAA would apply to a dispute involving "[t]he farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey").

54. *See* 9 U.S.C. § 2.

55. *See, e.g.*, *Arbitration Hearings*, *supra* note 53.

56. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624–25 (1985).

A. The Swift Ticketing Controversy Helps Illustrate the Flawed Broad Scope of Arbitration Law

Textually, the FAA is limited to the arbitration of claims that arise from a contract,[57] and there are many types of claims that do not depend on or arise out a contract and instead arise from another source, such as a statute. For example, the antitrust claims that are part of the Swift Ticketing Controversy are not dependent on a contract.[58]

The Swift Ticketing Controversy involves a party's right to sue for antitrust violations arising not from a contract but from Federal and State antitrust laws promoting competition.[59] Swifties allege Ticketmaster is monopolizing the resale ticket market.[60] According to the allegations in the complaint, Ticketmaster forecloses competition in the market for the resale of concert tickets by forcing its customers to use Ticketmaster as the exclusive service for resale.[61] Ticketmaster allegedly captures additional revenue in this secondary market because of its existing monopoly power.[62] Additionally, Swifties allege that Ticketmaster's dominant market power enables it to charge excessive, above-market fees, without providing a superior service.[63] Antitrust claims, which involve one's right to stop anticompetitive behavior, arise not from a contract, but from federal antitrust law.[64] In other words, the duties imposed on Ticketmaster to avoid anticompetitive behavior arise from statutes, not contracts. But the FAA was not designed to cover statutory claims.[65] Swifties should have the right to bring their antitrust claims in court under the text and original understanding of the FAA, but because of the flawed *Mitsubishi* ruling, they are blocked from doing so.[66]

To help further illustrate the flaw and impact of *Mitsubishi*, consider a stadium or concert venue that discriminates against or fails to provide accommodations for disabled customers. The customer's right to sue for such misconduct is not based on contract. Instead, one's right

57. *See* 9 U.S.C. § 2; *see also supra* notes 51–55 and accompanying text; *infra* notes 58–59 and accompanying text.

58. Second Amended Complaint, *supra* note 6, paras. 445, 454.

59. Walgreen Co. v. Johnson & Johnson, 950 F.3d 195, 199 (3d Cir. 2020) (recognizing that federal antitrust claims involve statutory rights "extrinsic to, and not rights under," a contract (internal quotations omitted)); *see* Terrebonne Homecare, Inc. v. SMA Health Plan, Inc., 271 F.3d 186, 189 (5th Cir. 2001).

60. Second Amended Complaint, *supra* note 6, para. 433.

61. *Id.* paras. 432–45.

62. *Id.* para. 436.

63. *Id.* paras. 446–54.

64. *Walgreen Co.*, 950 F.3d at 196.

65. *See supra* notes 51–59.

66. *See supra* Part I.

to be free from discrimination arises from civil rights laws.[67] As a result, the FAA should not apply to this claim. However, courts have allowed Ticketmaster to enforce an arbitration clause under the FAA with respect to disability claims filed by customers who alleged a stadium failed to provide proper accommodations.[68] If the Supreme Court would properly construe the FAA and abide by its textual limitations, civil rights claims and other statutory claims would not be subject to arbitration under the FAA.[69]

Another example showing the reach of the flawed *Mitsubishi* holding involves personal injury claims. There are tragic examples of fans injured at concerts or sporting events, and their personal injury claims are subject to arbitration clauses. For example, a baseball fan struck by a foul ball saw her lawsuit dismissed and moved to arbitration based on an arbitration clause referenced on the back of the ticket.[70] The back of her ticket stub had thirty lines of small, four-point font which incorporated by reference a longer arbitration clause found on the baseball league's website.[71] Similarly, at a Washington Commanders' game, part of the stadium's railing collapsed causing fans to fall several feet to the hard floor.[72] The fans filed a lawsuit against the football team, stadium, and others for their personal injuries.[73] Relying on an arbitration clause accessed from Ticketmaster's website, the defendants asked the court to compel arbitration and dismiss the lawsuit.[74] However, the court denied the defendants' motion and did not compel arbitration because the plaintiffs did not personally purchase the tickets.[75] Rather, it was the plaintiffs' cousin (who ultimately did not attend the game) who purchased the tickets.[76] Thus, presumably, it is the purchaser who is bound to the arbitration clause, not necessarily

67. *Cf.* Watts v. United Parcel Serv., Inc., 701 F.3d 188, 192 (6th Cir. 2012) (explaining that the right to sue for disability discrimination does not arise from a contract and instead arises from statute); Linehan v. Harvard Univ., No. 93-2311, 1994 U.S. App. LEXIS 13934, at *5–6 (1st Cir. June 9, 1994) (recognizing that personal injury claims do not arise from a contract).

68. *See, e.g.*, Nevarez v. Forty Niners Football Co., LLC, No. 16-CV-07013, 2017 WL 3492110, at *5–15 (N.D. Cal. Aug. 15, 2017).

69. *See* discussion *supra* Part II (critiquing the *Mitsubishi* Court's analysis of the FAA).

70. *See* Roberts v. Boyd Sports, LLC, 712 F. Supp. 3d 1062, 1064–65 (E.D. Tenn. 2024) (compelling baseball fan to arbitrate her claims arising from injuries from foul ball at a baseball game based on an arbitration clause referenced on the back of the ticket).

71. *Id.* at 1065.

72. Naimoli v. Pro-Football, Inc., 692 F. Supp. 3d 499, 503 (D. Md. 2023).

73. *See id.*

74. *Id.*

75. *Id.* at 516.

76. *Id.* at 504. The tickets at issue were purchased through a third-party website called TickPick, and the e-tickets were delivered via a link to the Washington Commander's webpage contained within Ticketmaster's website. *Id.* To collect the e-tickets, the purchaser would have to login to Ticketmaster's website. *Id.*

the attendees.[77] However, courts do not uniformly apply this principle. Some courts require injured attendees to arbitrate personal injury claims pursuant to a ticket's arbitration clause even if someone else purchased the ticket.[78] Indeed, courts routinely dismiss personal injury claims and order arbitration because of hidden arbitration clauses.[79]

The ticketing industry's use of arbitration for a wide variety of claims, such as the antitrust claims, discrimination claims, and personal injury claims, as mentioned in the above examples, illustrates the FAA's current, broad scope.[80] Although the FAA governs these claims under the flawed *Mitsubishi* ruling, statutory claims or tort claims generally do not arise from a contract.[81] Because the FAA's text only validates a written provision in a contract "to settle by arbitration a controversy thereafter arising out of such contract,"[82] the FAA's text does not justify or support today's broad uses of arbitration. The Supreme Court erred in *Mitsubishi*, and as explained below, there are good policy arguments to reverse or limit *Mitsubishi*.

B. Why the Scope of Arbitration Law Should Become More Limited

One could reasonably argue in favor of the current, broad scope of arbitration law whereby virtually every type of claim can be arbitrated: arbitration has potential benefits, such as efficiency, speed, confidentiality, low costs, and the use of expert decision makers.[83] However, there are good reasons to argue that arbitration law's scope should be more limited.

To provide stronger support for the policies in substantive law and promote more robust enforcement of substantive law in courts where greater procedural protections are available, Congress should declare that certain claims involving a public interest, such as civil

77. *See id.* at 514.

78. *See, e.g.*, Jackson v. World Wrestling Ent., Inc., No. 4:23-cv-0172-P, 2023 WL 3326115, at *1, *3 (N.D. Tex. May 9, 2023) (ordering Wrestlemania fan to arbitrate his personal injury claims resulting from pyrotechnic explosions at the event, even though fan's nephew purchased the tickets), *aff'd*, 95 F.4th 390 (5th Cir. 2024).

79. For example, tort claims are routinely filed against assisted living facilities, and courts dismiss such cases and compel arbitration if they find valid arbitration clauses. *See, e.g.*, Cambridge Place Grp., LLC v. Saint Martin, No. 5:22-cv-00112-GFVT, 2023 WL 6277248, at *1 (E.D. Ky. Sept. 26, 2023), *vacated in part*, No. 5:22-cv-00112-GFVT, 2024 WL 4201296 (E.D. Ky. Sept. 16, 2024).

80. *See supra* notes 57–82 and accompanying text.

81. *See* Osei v. Univ. of Md. Univ. Coll., 202 F. Supp. 3d 471, 489 (D. Md. 2016) (explaining that "the duty giving rise to a tort action must have some independent basis [from a contractual obligation]" (quoting Mitchell, Best & Visnic, Inc. v. Travelers Prop. Cas. Corp., 121 F. Supp. 2d 848, 853 (D. Md. 2000))), *vacated and remanded*, 710 F. App'x 593 (4th Cir. 2018).

82. 9 U.S.C. § 2.

83. Positive Software Sols., Inc. v. New Century Mortg. Corp., 476 F.3d 278, 292 (5th Cir. 2007).

rights claims, are nonarbitrable.[84] For example, civil rights laws embody certain values, such as respect for human dignity, and a core policy behind civil rights laws is the eradication of discrimination in society. Because of limited procedural protections typically available in arbitration,[85] a victim of discrimination who is stuck in arbitration may have a more challenging time proving their claims. With a judicial forum, however, parties would have broader procedural protections, such as discovery rights to uncover critical evidence.[86] For example, in court, one would have broad rights to uncover relevant evidence to help prove one's claims.[87] A civil rights victim suing their employer for discrimination could obtain copies of company emails relevant to the discrimination through discovery, and the victim could also depose managers and other workers with relevant information. But in arbitration, discovery rights would generally be more limited than in court.[88] If a victim of anticompetitive behavior, discrimination, or personal injury is trying to gather evidence from the other party to help prove their claims, the victim would have broader access to evidence in court because of the availability of stronger discovery rights in court. As a result, there can be more robust enforcement of laws in court.

If Congress desires to prioritize and promote more rigorous enforcement of certain rights, Congress could declare that disputes involving those rights are not arbitrable. For example, in the wake of the #MeToo movement, Congress prohibited forced arbitration of sexual assault and sexual harassment claims.[89] If Congress saw a strong public interest in a particular area of law, it could enact similar legal prohibitions to advance certain policies. Borrowing from the examples mentioned above involving the enforcement of Ticketmaster's arbitration clause in connection with antitrust claims, discrimination claims, or tort claims, Congress could decide there is a strong public interest or policy in promoting competition, prohibiting discrimination,

84. Such bills are regularly proposed in Congress. *See, e.g.*, Forced Arbitration Injustice Repeal Act of 2022, H.R. 963, 117th Cong. (2021).

85. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (explaining that by agreeing to arbitrate, one "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").

86. FED. R. CIV. P. 30, 33, 34.

87. *Id.*

88. *In re* Cotton Yarn Antitrust Litig., 505 F.3d 274, 286 (4th Cir. 2007) (observing that "limited discovery is a consequence of perhaps every agreement to arbitrate"); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011) (suggesting that a key feature of arbitration is limited discovery rights compared to broad discovery available in court).

89. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended at 9 U.S.C. §§ 401–402).

or protecting bodily integrity, and as a result, claims involving these rights should not be subject to predispute arbitration clauses.

Moreover, when widespread harm involving low dollar amounts exists, it would be a rational, reasonable policy for Congress to require that such claims are entitled to the procedural protections of court, with class action procedures and publicly accountable judges who monitor class settlements.[90] For example, if Ticketmaster imposes the same five-dollar fee on thousands of customers, and if such a fee is arguably illegal, it could be more efficient for these claims to be heard in a class action in court, where the cost of pursuing such claims can be spread out over the broad class using class action procedures.[91] Class action procedures are generally not available in arbitration.[92] Broader procedural rights available in court, such as class action procedures, can assist similarly situated injured victims in having their claims efficiently resolved.[93]

Additionally, the public nature of court proceedings can benefit broader society. Public court proceedings provide greater transparency and accountability, shed light on alleged wrongdoing, and create deterrent and punitive effects. For example, consider a stadium hosting a live sporting event or concert where the venue operators engage in discrimination against customers or the venue has dangerous physical conditions.[94] If a victim in these situations purchased tickets through Ticketmaster, a decision from an arbitrator and the arbitration proceeding regarding the victim's claims are likely to be private in nature. However, if such claims are heard in public court proceedings and are resolved through a published court decision, there would be greater transparency and more public accountability regarding the stadium's wrongdoing, and such public proceedings in court may have a stronger deterrent and punitive effect, as compared to a private arbitration award.[95] The open nature of court proceedings can inform the public of wrongdoing and allow legislators and regulators to take additional steps to address wrongdoing.[96]

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90. FED. R. CIV. P. 23.

91. Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

92. *Cf. AT&T Mobility LLC*, 563 U.S. at 350 (finding that the simplicity and informality of arbitration is inconsistent with class procedures, and "[a]rbitration is poorly suited to the higher stakes of class litigation").

93. *See* FED. R. CIV. P. 23.

94. *See supra* notes 70–83 and accompanying text.

95. *Cf. In re* Application of N.Y. Times Co. for Access to Certain Sealed Ct. Recs., 585 F. Supp. 2d 83, 89 (D.D.C. 2008) (recognizing that generally, the First Amendment guarantees "a general right of access to court proceedings and court documents").

96. *Cf. id.*

Limiting the broad arbitrability of claims can also enhance the development of law. With more judicial proceedings concerning civil rights or antitrust claims, for example, there would be more court rulings creating precedent. For every case that is sent to arbitration, there is one less case that could produce precedent through a published judicial decision. Such judicial precedent, in turn, can provide clearer guidance for society. For example, when a court interprets and applies a law to a particular fact pattern in a published judicial decision, such a public decision can serve as guidance to other parties regarding what the law means or requires in a particular scenario. That judicial guidance is lost for every case that is sent to arbitration. The current, broad use of arbitration may thus undermine public development of law.

For several reasons, an arbitration law of a more limited scope, such as one limited to contractual disputes as the FAA was originally intended, may be desirable. The Swift Ticketing Controversy and Ticketmaster's broad use of arbitration illustrate the current, flawed, and broad scope of arbitration law. This expansive use raises concerns about which claims, normatively, should be arbitrated.

III. THE SWIFT TICKETING CONTROVERSY DEMONSTRATES HOW ARBITRATION CAN BE MISUSED TO SUPPRESS CLAIMS

The Swift Ticketing Controversy was not the first time Ticketmaster faced pushback from fans, artists, and the government. Ticketmaster has a history of raising antitrust concerns across the last several decades.[97] Also, prior to the Swift Ticketing Controversy, Ticketmaster had been sued for antitrust violations in several cases, including a relatively recent case, *Heckman v. Live Nation Entertainment, Inc*.[98] The *Heckman* plaintiffs sued Ticketmaster for various anticompetitive practices in the primary and secondary ticket markets,[99] and the *Heckman* court addressed the enforceability of

97. *See* Eric Boehlert, *Pearl Jam: Taking on Ticketmaster*, ROLLING STONE (Dec. 28, 1995), https://www.rollingstone.com/music/music-news/pearl-jam-taking-on-ticketmaster-67440/ [https://perma.cc/H2Q3-X72E]; Ethan Smith & Jeffrey McCracken, *Justice Agency Resists Music Merger*, WALL ST. J. (Oct. 16, 2009, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704112904574475563303463526 [https://perma.cc/HG38-76N4] (discussing the United States government's concerns about anticompetitive conduct arising from the merger of Live Nation and Ticketmaster).

98. 686 F. Supp. 3d 939, 946 (C.D. Cal. 2023). There have been several class actions filed in court against Ticketmaster for anticompetitive conduct. *Id.* at 947; *see also* Oberstein v. Live Nation Ent., Inc., No. CV 20-3888-GW-GJSx, 2021 WL 4772885, at *1 (C.D. Cal. Sept. 20, 2021) (compelling arbitration of consumers' antitrust claims), *aff'd*, 60 F.4th 505 (9th Cir. 2023).

99. *Heckman*, 686 F. Supp. 3d at 946.

Ticketmaster's arbitration clause in connection with these antitrust claims.[100]

The arbitration rules addressed in *Heckman* attempt to regulate and limit collective actions.[101] In recent years, consumers or workers have engaged in a strategy or practice of mass filings of thousands of individual arbitration claims within a short period of time.[102] In response, some companies have modified their arbitration clauses or arbitration rules in an attempt to limit such mass filings.[103] The arbitration rules addressed in *Heckman* set forth a mass arbitration protocol or a special set of procedures, which applied if more than five similar arbitration cases were filed against Ticketmaster within a certain time period.[104] The *Heckman* court found that this mass arbitration protocol was problematic and unfair for consumers.[105]

The mass arbitration protocol involved the use of three bellwether cases that an arbitrator would resolve first, and the three cases would then serve as precedent to some degree for the other mass filings.[106] However, the court found there was "a substantial amount of ambiguity" regarding how precedent would operate.[107] The court recognized the possibility that the arbitrator has "unfettered discretion" in applying the precedent to the other mass filings, which could deny each claimant's right to be heard.[108] The court also found the protocol "lack[ed] other critical procedural safeguards," such as the provision of notice to interested parties, the right to opt out, and a process for ensuring adequate counsel.[109] The court ultimately held that the mass arbitration protocol was unfair or substantively unconscionable.[110]

The *Heckman* court also found issues with other terms of the arbitration rules. These rules set forth detailed limitations for presenting one's case: "complaints cannot exceed 10 pages,

100. *See id.* at 945 (noting that the decision is addressing Ticketmaster's motion to compel arbitration and enforce its arbitration clause).

101. *See id.* at 948.

102. Ian Millhiser, *DoorDash's Anti-Worker Tactics Just Backfired Spectacularly*, VOX (Feb. 20, 2020, 2:30 PM), https://www.vox.com/2020/2/12/21133486/doordash-workers-10-million-forced-arbitration-class-action-supreme-court-backfired [https://perma.cc/ADF3-UMMQ].

103. *See id.* For an example of how some companies are attempting to address the strategy of mass arbitration filings, see *Terms of Use*, WALMART, § 20, https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0 [https://perma.cc/CT3V-6MUK] (May 15, 2024) (addressing situations where more than 25 arbitration proceedings or more than 100 arbitration proceedings are filed within a short period of time).

104. *Heckman*, 686 F. Supp. 3d at 959.

105. *See id.* at 968.

106. *See id.* at 959.

107. *Id.* at 961.

108. *See id.*

109. *Id.* at 962.

110. *Id.* at 963, *aff'd*, 120 F.4th 670, 685 (9th Cir. 2024) (holding that the district court correctly found that the mass arbitration protocol was substantively unconscionable).

presentations of evidence are limited to 10 total references, and argument is limited to 15,000 characters (or approximately 5 pages)."[111] Furthermore, the rules did not provide the right to formal, broad discovery, which could assist claimants in collecting critical evidence to prove their claims.[112]

The *Heckman* court found these procedural limitations create "yet another hurdle for claimants to overcome and further exacerbate the level of unfairness to claimants."[113] In other words, the court found these procedures to be one-sided and unduly advantageous to Ticketmaster in connection with the alleged antitrust claims. These rules may be appropriate for simpler claims, but not the complex antitrust claims at issue in *Heckman*.[114]

Antitrust concerns have been asserted against Ticketmaster for decades.[115] Complexity is inherent in antitrust cases, particularly because of the volume of discovery and evidence required to prove antitrust violations,[116] and it would be virtually impossible for consumers to bring successful antitrust claims against Ticketmaster with only ten pieces of evidence, a five-page brief, and no discovery rights. Although such arbitration rules may be appropriate for resolving simpler cases, the *Heckman* court recognized such rules would undermine the enforcement of the complex antitrust claims at issue:

> [P]roving a violation [of federal antitrust law] generally requires extensive discovery and investigation into internal practices, pricing data, and the like which is in the exclusive possession of the defendant. Thus, in a case such as this one, the discovery limitations provided by the [r]ules (that is, essentially no discovery) are wholly inadequate for claimants to even begin to prove their case.[117]

The *Heckman* court ultimately concluded the arbitration procedures were substantively unconscionable, or unfairly one-sided in

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111. *Id.*

112. *Id.* at 963.

113. *Id.*, *aff'd*, 120 F.4th 670, 685-86 (9th Cir. 2024) (affirming district court's conclusion and describing the procedural limitations as "border[ing] on the absurd").

114. *See id.* at 948.

115. *See* Mike Konczal, *Before Taylor Swift, Pearl Jam Knew Ticketmaster's Monopoly Power All Too Well*, NATION (Dec. 9, 2022), https://www.thenation.com/article/economy/ticketmaster-live-nation-pearl-jam-taylor-swift/ [https://perma.cc/8DLG-3SJF]; *see also supra* notes 107–08 and accompanying text; *30 Years of Clashes Between Ticketmaster, Artists and Fans*, AP NEWS, https://apnews.com/article/justice-live-nation-ticketmaster-swift-cca2b9881881fb016d0862b945ccddee [https://perma.cc/N6K8-HSDL] (May 23, 2024, 11:37 AM).

116. *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775 (JG)(VVP), 2015 WL 5918273, at *3, *5 (E.D.N.Y. Oct. 9, 2015) (observing, in an antitrust case involving more than eighteen million pages of documents and eighty-three depositions, that "the complexity of federal antitrust cases is well known.").

117. *Heckman*, 686 F. Supp. 3d at 964 n.19. Ticketmaster has updated its terms so that the current rules are not the same as in *Heckman*. *Cf.* Ticketmaster, *Terms of Use*, *supra* note 14.

favor of Ticketmaster in connection with these antitrust claims, and the court found the arbitration agreement to be unenforceable.[118]

Given Ticketmaster's past antitrust troubles, it seems Ticketmaster deliberately chose an arbitration process that obstructs consumer antitrust actions. Instead of implementing an arbitration agreement to resolve disputes in good faith, Ticketmaster's arbitration agreement could be viewed as an attempt to immunize the company from more antitrust lawsuits.

The FAA was originally created to facilitate the use of arbitration to resolve disputes in good faith and preserve business relationships.[119] However, the complex antitrust claims arising from the Swift Ticketing Controversy and Ticketmaster's harsh arbitration clause addressed in *Heckman* demonstrate how stronger parties today may sometimes design arbitration clauses to suppress claims instead of resolving claims in good faith.[120] They may conceptualize or design arbitration clauses to disadvantage weaker parties through the use of one-sided terms or procedures.[121] To paraphrase Taylor Swift, stronger parties may draft arbitration clauses to include "words like knives and swords and weapons" to be used against vulnerable parties.[122]

Another example of how stronger parties may view arbitration or manipulate arbitration in a detrimental, insincere manner involves New York laws for the live-ticketing industry.

New York, a major entertainment center, updated and strengthened its laws in 2022 to regulate ticketing and protect consumers.[123] Because of the broad use of arbitration in the ticketing

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118. *See Heckman*, 686 F. Supp. 3d at 967–68, *aff'd*, 120 F.4th 670 (9th Cir. 2024).

119. *Arbitration Hearings*, *supra* note 53, at 7, 24 ("[Commercial arbitration] saves time, saves trouble, saves money. . . . It preserves business friendships. . . . [W]e do not permit any abuse by one side or the other. Friendliness is preserved in business. It raises business standards. It maintains business honor . . . . [Commercial arbitration is] expeditious, economical, and equitable, conserving business friendships and energy."). For a detailed exploration of the FAA's history, where one sees the drafters' intent to use arbitration in a sincere, good faith, balanced manner to resolve disputes, see IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

120. *Cf.* Moses v. CashCall, Inc., 781 F.3d 63, 67 (4th Cir. 2015) (recognizing that some arbitration clauses in consumer loan transactions are a "sham from stem to stern" (quoting Jackson v. Payday Fin., LLC, 764 F.3d 765, 779 (7th Cir. 2014))); Fisher v. MoneyGram Int'l, Inc., 281 Cal. Rptr. 3d 771, 791 (Cal. Ct. App. 2021) ("MoneyGram's Arbitration Provision shows every sign of having been designed to take unfair advantage of its customers."); Bragg v. Linden Rsch., Inc., 487 F. Supp. 2d 593, 611 (E.D. Pa. 2007) ("Taken together, the [harsh arbitration provisions] that Linden unilaterally imposes through the [Terms of Service] demonstrate that the arbitration clause is not designed to provide [consumers] an effective means of resolving disputes with Linden. Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden's favor.").

121. *See* Lamps Plus, Inc. v. Varela, 587 U.S. 176, 186 (2019).

122. *Cf.* TAYLOR SWIFT, *Mean (Taylor's Version)*, *on* SPEAK NOW (TAYLOR'S VERSION) (Republic Records 2023).

123. *See* Anthony J. Dreyer, Ryan P. Bisaillon & Michael C. Salik, *New York Ticketing Regime Amended to Enhance Consumer Protections*, N.Y. L.J. (Aug. 12, 2022, 11:00 AM),

industry, claims involving the updated New York regulations are unlikely to be heard in court. To deal with consumer claims under these New York ticketing regulations, corporate attorneys have touted arbitration as a "defense" for ticket sellers.[124] Arbitration is being conceptualized in an insincere way to disadvantage weaker parties, in a "bad blood" type of manner, not as a neutral method to resolve claims in good faith.[125] Instead, through the telling choice of the word "defense," corporate counsel are portraying arbitration as a protection against an undesirable outcome—as a potential countermeasure against the enforcement of new, stronger statutory obligations in the live-ticketing industry.[126]

In sum, arbitration is a neutral process. When meaningful mutual consent and balanced rules exist, arbitration is not the trouble (trouble, trouble . . .) it has been made out to be.[127] However, some parties view and misuse arbitration as a way to hinder the enforcement of claims.[128]

IV. THE SWIFT TICKETING CONTROVERSY DEMONSTRATES HOW CONSUMER ARBITRATION OFTEN INVOLVES A LACK OF CONSENT

The Swift Ticketing Controversy reveals another distinctive feature of consumer arbitration in the United States—a lack of meaningful consent. If a consumer purchases concert tickets through Ticketmaster, the consumer is likely bound by an arbitration clause.[129] Like virtually all other consumer transactions in the United States involving an arbitration clause, Ticketmaster's arbitration clause is presented on a non-negotiable, take-it-or-leave-it basis.[130] Despite the lack of voluntary, meaningful consent and awareness of arbitration

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https://www.law.com/newyorklawjournal/2022/08/12/new-york-ticketing-regime-amended-to-enhance-consumer-protections/ [https://perma.cc/7ANZ-TFUC]. These new protections include greater disclosures regarding fees as well as limits on fees for electronic delivery of tickets. *Id.*

124. *See* Archis A. Parasharami, Niketa K. Patel & Lauren M. Azeka, *That's the Ticket? Plaintiffs' Lawyers Target Ticketing Service Fees in New York*, MAYER BROWN (Feb. 15, 2024), https://www.mayerbrown.com/en/insights/publications/2024/02/thats-the-ticket-plaintiffs-lawyers-target-ticketing-service-fees-in-new-york?utm_source=vuture&utm_medium=email&utm_campaign=mailing-240215-chi-conslit-thats-the-ticket-update [https://perma.cc/VVL9-QFAK].

125. *See Lamps Plus, Inc.*, 587 U.S. at 186; TAYLOR SWIFT, *Bad Blood (Taylor's Version)*, *on* 1989 (TAYLOR'S VERSION) (Republic Records 2023).

126. *See* Parasharami et al., *supra* note 124.

127. SWIFT, *supra* note 1.

128. *See* also KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC (2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/Z8BJ-K6B5]; Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (finding that company drafted arbitration rules in bad faith, and these "rules when taken as a whole . . . are so one-sided that their only possible purpose is to undermine the neutrality of the [arbitration] proceeding").

129. Ticketmaster, *Terms of Use*, *supra* note 14.

130. *See id.*

clauses in consumer transactions,[131] courts routinely enforce consumer arbitration clauses.[132] The foundation of arbitration is consent,[133] and the FAA was not designed for take-it-or-leave-it transactions.

During Congressional hearings about the FAA, testimony regarding hidden arbitration clauses on customer tickets made it clear that the FAA was not designed to cover such clauses. A Senator asked one of the bill's supporters whether the FAA would apply to arbitration clauses presented by a railroad company on a take-it-or-leave-it basis to customers who wish to ship goods.[134] The Senator explained that a railroad company presents customers with standard, non-negotiable form contracts, and such contracts are "not really voluntary."[135] Just like with the Ticketmaster scenario, if a customer tells the railroad company that the customer does not want an arbitration clause, the railroad company would likely refuse to do business with the customer. The FAA's supporter testified the FAA was not designed to cover such transactions.[136] Instead, the FAA was designed to cover business relationships involving equals, such as "a contract between merchants one with another, buying and selling goods."[137] The FAA's supporter distinguished merchant-to-merchant contracts, which the FAA would cover, with the non-negotiable scenario where "we go and buy a railroad ticket. . . . [w]e do not have anything to say about it."[138]

This testimony demonstrates that the FAA is not supposed to cover ticketing or situations where a party is presented with a standard, non-negotiable contract with a "blank space" for your name.[139] The legislative history displays a concern for the lack of meaningful consent,

131. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 3.4.3 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/Y4RR-K7NF] (showing that most consumers are unaware of the existence of arbitration clauses in their transactions or do not understand that such clauses can block the filing of lawsuits in court).

132. *See id.*; *see also, e.g.*, Hughes v. Uber Techs., Inc., No. 23-1775, 2024 WL 707686 (E.D. La. Feb. 21, 2024), *appeal dismissed*, No. 24-30163, 2024 WL 4185920 (5th Cir. May 10, 2024).

133. Lamps Plus, Inc. v. Varela, 587 U.S. 176, 184 (2019) ("'[T]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" (quoting Granite Rock Co. v. Teamsters, 561 U.S. 287, 299 (2010))).

134. *Sale and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 9–10 (1923).

135. *Id.* at 10.

136. *Id.* at 9.

137. *Id.* at 10.

138. *Id.*

139. *See id.*; TAYLOR SWIFT, *Blank Space (Taylor's Version)*, *on* 1989 (TAYLOR'S VERSION) (Republic Records 2023).

and unfortunately, current application of the FAA largely ignores this concern.[140]

V. SOLUTIONS: SHAKE IT OFF[141]

The Swift Ticketing Controversy and Ticketmaster's use of arbitration illustrate concerns with the broad uses of arbitration, and there are different strategies and solutions to help shake off these troubles.

The current broad scope of arbitration law allows for the arbitration of virtually every area of law and type of claim. Limiting the scope of arbitration law for certain types of claims could provide more robust enforcement of laws, greater accountability and transparency, and a stronger development of precedent within our legal system.[142] To address these problems, and to paraphrase Taylor Swift, the "old [*Mitsubishi*] can't come to the phone right now."[143] The Supreme Court should overrule its flawed *Mitsubishi* decision and hold that the FAA is limited to claims arising out of a contract.[144] The current Justices have engaged in a more textual analysis in recent years,[145] and they could correct *Mitsubishi* and scale back the broad scope of arbitration law by focusing on the FAA's text. Alternatively, Congress could step in and amend the FAA so that pre-dispute arbitration agreements are no longer enforceable with respect to particular claims, as Congress did in 2022 for sexual assault and sexual harassment claims.[146] Bills have been proposed in Congress to prohibit pre-dispute arbitration agreements if they require arbitration of employment, consumer, antitrust, or civil rights disputes.[147] If such broad reforms are not politically possible, Congress could pass more limited reforms focusing on a narrower area of law, such as civil rights disputes.

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140. *Cf.* Lamps Plus, Inc. v. Varela, 587 U.S. 176, 191 (2019) (Ginsburg, J., dissenting, joined by Breyer & Sotomayor, JJ.) ("I write separately to emphasize once again how treacherously the Court has strayed from the principle that 'arbitration is a matter of consent, not coercion.'" (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010))).

141. TAYLOR SWIFT, *Shake It Off (Taylor's Version)*, *on* 1989 (TAYLOR'S VERSION) (Republic Records 2023).

142. *See* Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements,* 19 CARDOZO J. CONF. RESOL. 653, 703 (2018).

143. TAYLOR SWIFT, *Look What You Made Me Do (Taylor's Version)*, *on* REPUTATION (TAYLOR'S VERSION) (Republic Records 2023).

144. *See* 9 U.S.C. § 2.

145. Imre S. Szalai, *The Future of Arbitration in the United States: Textualism, a Tectonic Shift, and a Reshaping of the Civil Justice System*, 25 CARDOZO J. CONF. RESOL. 13, 14 (2023).

146. *See* 9 U.S.C. §§ 401–402; Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended at 9 U.S.C. §§ 401–402).

147. Forced Arbitration Injustice Repeal Act, S. 1376, 118th Cong. (2023).

Some parties misuse arbitration by drafting harsh terms to disadvantage weaker parties.[148] Courts can help by monitoring the fairness of arbitration terms and invalidating agreements with harsh terms, instead of merely severing one-sided terms.[149] As another way out of the woods,[150] there could also be private initiatives among businesses or arbitration providers to promote the fair drafting and implementation of arbitration agreements.[151]

Finally, arbitration often appears in agreements without the understanding, awareness, or meaningful consent of consumers or workers.[152] Greater public awareness regarding the use and impact of arbitration can assist with bringing about more appropriate use of arbitration and possibly legal reforms. For example, with greater awareness and public discourse about arbitration, some companies may change their arbitration practices.[153] There is also precedent for educational campaigns regarding arbitration. During the 1920s, when the FAA and similar state arbitration bills were being debated, arbitration supporters developed a national campaign to educate people about arbitration. For example, they hosted an "Arbitration Week," with presentations at movie theaters and places of worship, and they developed a slogan and a stamp with the phrase "Learn to Arbitrate."[154] Today, an educational campaign about arbitration can be easier to implement through the use of social media. Also, Taylor Swift and other artists have significant influence and ability to educate the broader public about arbitration, perhaps through short educational videos with calls to action, and major artists like Taylor Swift could probably persuade Ticketmaster to sell its tickets without using an arbitration clause.

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148. *See* Szalai, *supra* note 142.

149. *See id.* at 705 (proposing that under the FAA, courts should invalidate arbitration agreements containing a harsh term, instead of merely severing harsh terms and compelling arbitration minus such terms).

150. TAYLOR SWIFT, *Out of the Woods (Taylor's Version)*, *on* 1989 (TAYLOR'S VERSION) (Republic Records 2023).

151. As a private initiative, without the force of law, the arbitration community developed due process protocols to help promote fairness in arbitration, but the protocols could be strengthened and more widely adopted and implemented. *See generally* Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165 (2005); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004).

152. *See* Szalai, *supra* note 142, at 654.

153. *See also* Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html [https://perma.cc/ZLV3-EU3Z].

154. *Thirty Societies Back Arbitration Week*, N.Y. TIMES, Apr. 11, 1923, at 27, https://timesmachine.nytimes.com/timesmachine/1923/04/11/105991322.html?pageNumber=27 [https://perma.cc/BR9E-GR4L].

The FAA reached its one-hundredth anniversary in 2025; it could also approach a new era. With the FAA's centennial, it is time to reassess our society's broad, troubled use of arbitration, and hope that meaningful reforms and a new era of arbitration will occur.