FORCED ROBOT ARBITRATION

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Recently, advances in artificial intelligence ("AI") have sparked interest in a topic that sounds like science fiction: robot judges. Researchers have harnessed AI to build programs that can predict the outcome of legal disputes. Some countries have even begun allowing AI systems to resolve small claims. These developments are fueling a fascinating debate over whether AI courts will increase access to justice or undermine the rule of law.

However, this Article argues that AI adjudication is more likely to flourish in one of the most controversial areas of the American civil justice system: forced arbitration. For decades, corporations and arbitration providers have capitalized on the U.S. Supreme Court's muscular interpretation of the Federal Arbitration Act ("FAA") to create their own alternative procedural universes. These entities may soon take the next step and eliminate human decision makers in some contexts. First, most objections to AI judges do not apply to AI arbitrators. For example, because some AI systems suffer from the "black box problem"—they cannot explain the reasoning behind their conclusions—deploying them in the judicial system might violate procedural due process principles. But opacity is already the norm in arbitration, which is private, confidential, and often features awards that are unwritten. Second, although AI legal prediction tools are still embryonic, they work well in the simple debt collection and employment misclassification disputes that businesses routinely funnel into arbitration. Third, AI programs require little overhead and operate at lightning speed. The ability to streamline the process has become especially important in the last few years, as plaintiffs' lawyers have begun filing "mass arbitrations"—overloading the system with scores of individual claims in an effort to saddle defendants with millions of dollars in fees. For these reasons, companies and arbitration providers have powerful financial incentives to experiment with automating decision making in certain cases.

The Article then offers an insight that will have a profound impact on this futuristic form of dispute resolution. Drawing

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on the FAA's text, structure, and legislative history, the Article contends the statute only applies to adjudication conducted by a "person." Thus, there is no federal mandate that courts enforce agreements to resolve disputes by AI. In turn, because state law fills gaps in the FAA, individual jurisdictions will be able to decide for themselves whether to permit robot arbitration. Finally, the Article explains why this incremental approach is better than either barring AI dispute resolution or finding that it triggers the gale force of the FAA.

INTRODUCTION

In 2019, in Hangzhou, China, a judge named Xiaozhi resolved a lending dispute.[1] In just thirty minutes, Xiaozhi questioned the parties, analyzed their evidence, and issued a ruling.[2] However, this routine-seeming matter featured a twist that attracted international attention. Xiaozhi is not a person; rather, it is an Artificial Intelligence ("AI")[3] trial system, or a "robot judge."[4]

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1 *See* NYU WANG & MICHEAL YUAN TIAN, *"Intelligent Justice": AI Implementations in China's Legal Systems*, in ARTIFICIAL INTELLIGENCE AND ITS DISCONTENTS: CRITIQUES FROM THE SOCIAL SCIENCES AND HUMANITIES 197, 212 (2022).

2 *See* Nu Wang, *"Black Box Justice": Robot Judges and AI-based Judgment Processes in China's Court System*, 2020 IEEE INT'L SYMPOSIUM ON TECH. & SOC. 58, 62 (2020).

3 "AI" refers to technology that can "automate tasks that 'normally require human intelligence.'" Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. U. L. REV. 1305, 1307 (2019) (quoting *Artificial Intelligence*, ENG. OXFORD LIVING DICT., https://perma.cc/WF9V-YM7C (original site now defunct)).

4 *See* Wang, *supra* note 2, at 62.

Recently, programs like Xiaozhi have been a hot topic.[5] This surge of interest is easy to understand, as AI systems continue to "perform increasingly complex tasks much better than humans."[6] Those tasks include driving,[7] debating,[8] and performing surgery,[9] as well as playing games such as chess,[10] poker,[11] *Jeopardy*,[12]

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5 *See* Richard Susskind, *Online Courts and the Future of Justice* 277–92 (2019); Rebecca Crootof, *"Cyborg Justice" and the Risk of Technological-Legal Lock-in*, 119 COLUM. L. REV. F. 233 (2019); FLORENCE G'SELL, *AI Judges*, *in* THE CAMBRIDGE HANDBOOK OF ARTIFICIAL INTELLIGENCE, GLOBAL PERSPECTIVES ON LAW AND ETHICS (2022); Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligent Justice*, 22 STAN. TECH. L. REV. 242 (2019); John Morison & Adam Harkens, *Re-Engineering Justice? Robot Judges, Computerised Courts and (Semi) Automated Legal Decision-Making*, 39 L. STUD. 618 (2019); Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135 (2019); Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001 (2019); *cf.* Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1282 (2018) (discussing the use of AI for policing and national security); Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 54 (2019) (critiquing the movement to automate legal services).

6 Benjamin Alarie, Anthony Niblett & Albert H Yoon, *How Artificial Intelligence Will Affect the Practice of Law*, 68 U. TORONTO L.J. 106, 107 (2018).

7 *See* HOD LIPSON & MELBA KURMAN, DRIVERLESS: INTELLIGENT CARS AND THE ROAD AHEAD vii (2016) (explaining that AI gives driverless cars "human-level ability to safely guide themselves through unpredictable environments").

8 *See* Bret Stetka, *An IBM AI Debates Humans—But It's Not Yet the Deep Blue of Oratory*, SCIENTIFIC AMERICAN (Mar. 17, 2021), https://www.scientificamerican.com/article/an-ibm-ai-debates-humans-but-its-not-yet-the-deep-blue-of-oratory/ [https://perma.cc/Q7RM-CEAC] (describing an event at which Harish Natarajan, an accomplished debater, matched wits with IBM's Project Debater).

9 *See* Cade Metz, *The Robot Surgeon Will See You Now*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/30/technology/robot-surgery-surgeon.html [https://perma.cc/94DQ-9N55] (discussing how robot surgeons "can match or even exceed a human in dexterity, precision, and speed").

10 *See Defeated Chess Champ Gary Kasparov Has Made Peace With AI*, WIRED (Feb. 21, 2021), https://www.wired.com/story/defeated-chess-champ-garry-kasparov-made-peace-ai/ [https://perma.cc/YN5L-CE9G] (recounting how IBM's Deep Blue program famously defeated Garry Kasparov, "perhaps the greatest chess player in history," in 1997).

11 *See* Bernard Marr, *Artificial Intelligence Masters the Game of Poker—What Does that Mean for Humans?*, FORBES (Sept. 13, 2019), https://www.forbes.com/sites/bernardmarr/2019/09/13/artificial-intelligence-masters-the-game-of-poker—what-does-that-mean-for-humans/?sh=10d85b2a5f9e [https://perma.cc/8US4-5WV6]. Poker was an especially difficult game for AI to learn "because of its random nature, hidden cards and players' bluffs." *Id.*

12 *See* Jo Best, *IBM Watson: The Inside Story of how the Jeopardy-Winning Supercomputer Was Born and What it Wants to Do Next*, TECHREPUBLIC (Sept. 9, 2013), https://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/ [https://perma.cc/NP9M-PMLX] (summarizing a match in which IBM's Watson routed two of "the best players [*Jeopardy*] had produced over its decades-long lifetime").

and Go.[13] In addition, AI is "rapidly diffusing across both civil and criminal regulatory domains."[14] For example, police use AI to identify suspects[15] and spot drivers talking on cellphones.[16] The Social Security Administration entrusts AI to review for errors in the draft opinions of administrative law judges,[17] and courts consult algorithmic risk assessments to make bail, parole, and sentencing decisions.[18] Meanwhile, academics and companies in the booming legal technology industry have built systems that can predict the outcome of cases "with quite respectable results."[19] Finally, China has placed AI at the center of its billion-dollar, smart-courts initiative,[20] and Estonia announced that it would delegate some small complaints to an algorithm.[21] Accordingly, "[t]he literature that predicts or otherwise assumes a future populated by robojudges is growing fast."[22]

As one would expect, most commentators are deeply ambivalent about AI courts. On the one hand, automation is synonymous with efficiency, and there is little doubt that removing humans from the loop would make adjudication faster and cheaper.[23] But on the other hand, critics argue that robot decision making differs from its human counterpart in unsettling

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13 *See Go Master Quits Because AI 'Cannot Be Defeated*,' BBC NEWS (Nov. 27, 2019), https://www.bbc.com/news/technology-50573071 [https://perma.cc/6UC8-CF69] (reporting that Lee Se-dol, a Go world champion, retired after losing to Google's AlphaGo software).

14 Aziz Z. Huq, *Constitutional Rights in the Machine-Learning State*, 105 CORNELL L. REV. 1875, 1905 (2020).

15 *See* Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105, 1119-21 (2021).

16 *See Mobile Phone Detection Cameras*, NSW GOVERNMENT, https://www.transport.nsw.gov.au/roadsafety/topics-tips/mobile-phones#faq3 [https://perma.cc/T4Z9-4FUM].

17 *See, e.g.*, David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REG. 800, 811–12 (2020).

18 *See* State v. Loomis, 881 N.W.2d 749, 754 (Wis. 2016); Shaila Dewan, *Judges Replacing Conjecture with Formula for Bail*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html [https://perma.cc/89TZ-6TBW].

19 Kevin D. Ashley, *Prospects for Legal Analytics: Some Approaches to Extracting More Meaning from Legal Texts*, 90 U. CIN. L. REV. 1207, 1214 (2022).

20 *See* Rachel E. Stern, Benjamin L. Liebman, Margaret E. Roberts & Alice Z. Wang, *Automating Fairness? Artificial Intelligence in the Chinese Courts*, 59 COLUM. J. TRANSNAT'L L. 515, 532 (2021).

21 *See* Eric Niiler, *Can AI Be a Fair Judge in Court? Estonia Thinks So*, WIRED (Mar. 25, 2019), https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ [https://perma.cc/8RZK-W4BU].

22 David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1003 n.3 (2021).

23 *See,* G'SELL, *supra* note 5, at 362.

ways. One example is AI's notorious "black box" problem.[24] Many legal prediction algorithms use machine learning and incorporate feedback to improve their performance over time.[25] Others rely on natural language processing, which extracts meaning from speech and print.[26] Because these tools are so sophisticated, their reasoning process is incomprehensible.[27] Arguably, this lack of transparency makes AI programs unsuitable to serve as courts: after all, explanations legitimize state power, add nuance to precedent, and provide procedural due process.[28] Finally, writers disagree about whether robots or people would be "better"—however defined—at judging.[29] Some see the cool logic of algorithms as a cure for the prejudices that plague human decision making.[30] For others, the arrow points in the opposite direction: AI might be tainted by not only the biases of its programmers[31] but also—because it uses data from the past to prescribe the future—the recycling of previous injustices.[32] These dueling considerations make robot judges both fraught and fascinating.

However, this Article explores a different way that robot decision making might soon emerge in the American legal system. A hallmark of contemporary civil justice is the prevalence of forced arbitration clauses in consumer and employment contracts.[33] The seeds of this movement were sown a century ago,

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24 David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 U.C. DAVIS L. REV. 653, 706 (2017).

25 *See* Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 88 (2014).

26 *See* Peng Lai "Perry" Li, *Natural Language Processing*, 1 GEO. L. TECH. REV. 98, 98, 103 (2016).

27 *See* Berman, *supra* note 5, at 1315 n.156; Re & Solow-Niederman, *supra* note 5, at 263.

28 *See* Re & Solow-Niederman, *supra* note 5, at 263-65.

29 *Cf.* Volokh, *supra* note 5, at 1152–54 (arguing that the proper benchmark for comparing AI judges and their human analogues should be whether an opinion persuades a panel of experts).

30 *See* Joshua Park, *Your Honor, AI*, HARV. INT'L REV. (Apr. 3, 2020), https://hir.harvard.edu/your-honor-ai/ [https://perma.cc/PH8L-6UFA] ("AI judges also have the potential to be fairer than human judges.").

31 *See* Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 4 (2014).

32 *See* SUSSKIND, *supra* note 5, at 288 ("If past decisions are rooted in bias or prejudice, then the data that expresses these decisions is contaminated, and decisions . . . derived from that data will perpetuate the inequities.").

33 *See* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) (finding that 81% of Fortune 100 firms' consumer contracts contained forced arbitration clauses); Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*

when Congress passed the Federal Arbitration Act ("FAA") to abolish the ancient judicial hostility to arbitration.[34] The statute lurked in relative obscurity until the 1980s, when the U.S. Supreme Court began to expand its coverage, holding that it applies in state court, preempts state law, governs federal statutory claims, and embodies a vigorous pro-arbitration policy that requires lower courts "to enforce arbitration agreements according to their terms."[35] Since then, forced arbitration has become "a phenomenon that pervade[s] virtually every corner of the daily economy,"[36] sparking bitter disagreement about whether it is an elegant solution to the pathologies of litigation[37] or a rigged system that favors the repeat-playing companies that typically pay the arbitrators' fees.[38]

The Article identifies three reasons AI conflict resolution will likely surface in this parallel procedural universe. First, although AI courts face enormous obstacles, AI arbitrators do not. For instance, AI's inability to articulate its reasoning might be a fatal flaw with algorithmic courts, but it would hardly raise an eyebrow in arbitration. In fact, arbitration is *also* routinely characterized as a "black box" because it is private, frequently confidential, and culminates in awards that are unreasoned or unwritten.[39] Second, legal prediction tools are not even close to being able to handle complex cases.

1–2, ECON. POL'Y INST. (Sept. 27, 2017), https://www.epi.org/files/pdf/135056.pdf [https://perma.cc/8L8T-MACZ] (estimating that 60,000,000 non-unionized workers were covered by forced arbitration clauses).

34 *See* United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (later codified as "Federal Arbitration Act" at 9 U.S.C. §§ 1–16).

35 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018); Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 481 (1989) (referring to the Court's "current strong endorsement of the federal statute[] favoring [arbitration]").

36 Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008).

37 *See, e.g.*, Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 280 (1995) ("[A]rbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (praising arbitration's ability to provide relief for lower-value claims).

38 *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1997) (calling arbitration "a method for stripping people of their rights"); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 685 (1996) ("[A]rbitrators may be consciously or unconsciously influenced by the fact that the company, rather than the consumer, is a potential source of repeat business.").

39 Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409 (2016).

Yet they have achieved their best results when applied to the simple debt collection and employment misclassification matters that are often arbitrated.[40] Third, companies prefer arbitration to litigation in part because it lowers their dispute resolution budgets, and AI would slash these costs to the bone.[41] Indeed, computers do not need hearing rooms, support staff, or days to deliberate. And these virtues have never been more valuable. Since 2019, defendants have been struggling to handle "mass arbitrations": thousands of freestanding claims that seek to overwhelm them with arbitrators' fees.[42] Thus, it is not surprising that the Chairman of the International Court of Arbitration recently stated that "having robot arbitrators may [soon] be considered acceptable."[43]

The Article then presents a thesis that has important consequences for AI's role in the field. Section 2, the centerpiece of the FAA, only requires courts to enforce an agreement to resolve a claim "by arbitration."[44] Thus, if a process is not "arbitration" as Congress understood that word in 1925, it "is not enforceable under the FAA."[45] Drawing on the FAA's text, structure, and history, the Article reveals that the original public meaning of "arbitration" was dispute resolution conducted by a "person."[46] Thus, the FAA does not

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40 *See infra* Part II.B.2.

41 *See infra* text accompanying notes 100–104.

42 *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022); David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 672–74 (2020).

43 *The Future of Arbitration: New Technologies Are Making a Big Impact—and AI Robots May Take on "Human" Roles*, Hogan Lovells (Feb. 21, 2018), https://www.hoganlovells.com/publications/the-future-of-arbitration-ai-robots-may-take-on-human-roles [https://perma.cc/S2QZ-Z58D]. Likewise, in the past two years, a few articles—mainly by practitioners and students—have addressed AI arbitration. *See* Cole Dorsey, Comment, *Hypothetical AI Arbitrators: A Deficiency in Empathy and Intuitive Decision-Making*, 13 ARB. L. REV. (2021); Horst Eidenmüller & Faidon Varesis, *What Is an Arbitration? Artificial Intelligence and the Vanishing Human Arbitrator*, 17 N.Y.U. J.L. & BUS. 49 (2020); Dimitrios Ioannidis, *Will Artificial Intelligence Replace Arbitrators Under the Federal Arbitration Act?*, 28 RICH. J.L. & TECH. 505 (2022); Paul Bennett Marrow, Mansi Karol & Steven Kuyan, *Artificial Intelligence and Arbitration: The Computer as an Arbitrator—Are We There Yet?*, 74 DISP. RESOL. J. 35 (2020); Mahnoor Waqar, *The Use of AI in Arbitral Proceedings*, 37 OHIO ST. J. ON DISP. RESOL. 345 (2022). Although these pieces provide helpful overviews, they ignore the subjects I address here: the use of robot procedures in *forced* arbitration and the multi-million-dollar question of whether the FAA governs.

44 9 U.S.C. § 2.

45 Advanced Bodycare Sols., LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1238 (11th Cir. 2008).

46 *See infra* Part III.B.

compel judges to enforce contracts for AI dispute resolution. Instead, because state law fills gaps in the FAA, individual jurisdictions will be able to decide whether to permit robot procedures.[47]

Finally, the Article claims that this reading of the FAA is a good policy move. For decades, the Court's aggressive view of FAA preemption has "nullified any wisdom that state legislatures or courts might bring to bear on the increasing prevalence of arbitration clauses in contracts."[48] But given the uncertainty about how AI arbitration will operate, applying the FAA's one-size-fits-all rubric to the topic would be unwise. To be sure, robots could bolster arbitration's strengths as a fast-and-furious alternative to court. But then again, because the firms that arbitrate often could become adept at winning in this novel format, automation could exacerbate arbitration's repeat-player problem. Because we do not know how forced AI arbitration will play out on the ground, it makes more sense to let states experiment first, rather than creating a blanket federal rule.

A few points of clarification may be helpful. First, at the risk of oversimplification, I will use words like "AI," "robot," "algorithmic," and "automated" interchangeably.[49] I intend these terms to mean a computerized process that does not involve the exercise of human discretion.

Second, although I ultimately conclude that AI procedures are not "arbitration" under the FAA, I will nevertheless call them "arbitration" throughout the Article for ease of reference. Also, as I discuss later, this description is not necessarily inaccurate because robot conflict resolution may be "arbitration" under state statutes even if it is not "arbitration" as a matter of federal law.[50]

Third, to make the discussion concrete, here is how forced AI arbitration might work: Arbitration providers like the American Arbitration Association ("AAA") or JAMS[51]

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47 *See infra* text accompanying note 297.

48 Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1186 (2021).

49 For a thoughtful paper on how difficult it can be to define "robot," see Bryan Casey & Mark A. Lemley, *You Might Be a Robot*, 105 CORNELL L. REV. 287, 296 (2020) ("For better or worse, we live in a world where the term is used to describe all manner of entities—from superhumanly-intelligent software systems to simple pneumatic machines.").

50 *See infra* text accompanying note 322–23.

51 "JAMS" was originally an acronym for "Judicial Arbitration and Mediation Services, Inc." The JAMS Name, JAMS MEDIATION, ARBITRATION & ADR

would buy or license a decision-making program from a legal tech company[52] and create procedural and evidentiary rules for automated cases, just as they have for other types of disputes.[53] Businesses would opt into this form of conflict resolution by either expressly mandating it in their contracts or incorporating a provider's robot-arbitration principles by reference.[54] Either way, the case would progress like a "desk arbitration"—a commonly used mode in which the parties file written submissions but do not participate in an evidentiary hearing.[55] The only difference would be that the factual and legal arguments would be fed into an algorithm, which would analyze them and produce an award.

Fourth, I will largely not address the issue of large language models ("LLMs") like ChatGPT.[56] After this Article had been accepted for publication, there was a flurry of interest in the intersection of LLMs and the law. For example, researchers found that ChatGPT "achiev[ed] a low but passing grade" in four classes at the University of Minnesota Law School[57] and a Colombian judge included a colloquy with ChatGPT in an opinion.[58] Because it is unclear how LLMs will impact the robot judge debate, I will relegate discussion of them

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SERVICES, https://www.jamsadr.com/about-the-jams-name/ [https://perma.cc/FUN7-96UU].

52 In addition, corporations might create their own AI arbitration systems. Businesses like Amazon and eBay have long operated online dispute resolution forums that resolve complaints about products or disputes between third parties. *See* AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION 33–46 (2017); Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REGUL. 547, 551–52 (2016). However, because forced robot arbitration is likely to be greeted with suspicion, businesses will probably implement the process through a neutral third party like an arbitration provider to give it the maximum legitimacy.

53 *See infra* text accompanying notes 205–207.

54 *See* Horton, *supra* note 42, at 625–26 (listing many Fortune 500 companies that select a provider's rules by referring to them in their contracts).

55 *See, e.g.*, Thomas J. Stipanowich, *The Multi-Door Contract and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 344 n.151 (1998) (discussing desk arbitrations).

56 *See* Kevin Roose, *The Brilliance and Weirdness of ChatGPT*, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/2022/12/05/technology/chatgpt-ai-twitter.html [https://perma.cc/L3JQ-B9HJ].

57 Jonathan H. Choi, Kristin E. Hickman, Amy B. Monahan & Daniel Schwarcz, *ChatGPT Goes to Law School* *1 (2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335905 [https://perma.cc/K2AR-XRC5].

58 *See* Janus Rose, *A Judge Just Used ChatGPT to Make a Court Decision*, VICE (Feb. 3, 2023), https://www.vice.com/en/article/k7bdmv/judge-used-chatgpt-to-make-court-decision [https://perma.cc/D3MJ-WUY7] (noting that the dispute

to footnotes. Nevertheless, I should also mention that the ascent of LLMs makes robot arbitrators even more likely. Indeed, LLMs are "generative": unlike conventional legal prediction systems, they "can compose human-like text with surprising fidelity."[59] In turn, this ability to produce written and reasoned awards could eliminate any lingering black-box concerns.

The Article contains three Parts. Part I surveys the field of legal analytics—which uses AI to predict the outcome of cases—and the scholarship about the advantages and drawbacks of algorithmic judges. Part II argues that although this literature focuses on the court system, automation is much more likely to emerge in forced arbitration. Indeed, arbitration tolerates novel procedures, robots can capably resolve some of the claims that are staples of the forced arbitration docket, and arbitration providers and corporations have strong reasons to create a sleek alternative to conventional hearings. Part III then presents a thesis that is essential to the future of forced robot arbitration. It demonstrates that AI decision making is not "arbitration" under Section 2 of the FAA. It also shows that this reading of the statute—which gives each state the right to decide whether to allow robot arbitration—strikes an ideal compromise between prohibiting the process or allowing it to spread unchecked under the FAA.

I
Robot Decision Makers

Since the mid-twentieth century, scholars have imagined "a sort of 'slot-machine proof' whereby a situation is fed into a device and out rolls the correct adjudication."[60] This Part describes how the field of legal analytics is bringing this dream to fruition, kindling debate about the use of robot judges.

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involved the issue of whether an autistic minor was covered by a health insurance policy).

59 Choi, Hickman, Monahan & Schwarz, *supra* note 57 at *2.

60 Dillard S. Gardner, *Breath-Tests for Alcohol: A Sampling Study of Mechanical Evidence*, 31 Tex. L. Rev. 289, 289 (1953). The first law review article to grapple with computerized judges appeared in 1977. *See* Anthony D'Amato, *Can/Should Computers Replace Judges?*, 11 Ga. L. Rev. 1277 (1977). For other early work on robot judges, see Betsy Cooper, *Judges in Jeopardy!: Could IBM's Watson Beat Courts at Their Own Game?*, 121 Yale L.J. F. 87, 88 (2011) (considering whether a computer could assist judges with textualist interpretations of statutes).

A. Legal Analytics

Programmers have long tried to discover ways that AI can "contribute to law."[61] This section shows that these efforts are starting to gain momentum.

Interest in computerized legal prediction goes back decades. For example, in the 1980s, researchers built a variety of "expert systems," which answered legal questions by plugging scenarios into decision trees.[62] Each expert system covered a single, narrow topic, such as determining the tax consequences of a stock redemption,[63] the settlement value of a products liability claim,[64] or whether an applicant qualified for citizenship under the British Nationality Act.[65] Eventually, these projects became more ambitious and extended AI to case-based reasoning. Kevin D. Ashley's HYPO system, for instance, revolved around a dataset of trade secret opinions that had been coded for the presence of a magnitude of thirteen variables.[66] When users entered a set of facts, HYPO compared it to this body of annotated precedent and returned a likely outcome, a list of relevant opinions, and arguments on both sides.[67]

Expert systems proved to be both valuable and limited. One of their advantages is their transparency: it is possible to trace

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61 Bruce G. Buchanan & Thomas E. Headrick, *Some Speculation about Artificial Intelligence and Legal Reasoning*, 23 STAN. L. REV. 40, 60 (1970).

62 *See* Edwina L. Rissland, *Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning*, 99 YALE L.J. 1957, 1965 (1990) (noting that "[r]ule-based expert systems were the first type of AI system to become widely available and employed beyond the AI research community"); Shrutarshi Basu, Nate Foster, James Grimmelmann, Shan Parikh & Ryan Richardson, *A Programming Language for Future Interests*, 24 YALE J. L. & TECH. 75, 85 (2022) (calling expert systems "essentially hard-coded versions of a Choose Your Own Adventure, Mad Libs, or Excel spreadsheet"); G'SELL, *supra* note 5, at 347 ("Expert systems decompose legal rules by rewriting them in computer language, in order to establish a decision tree made up of successive ramifications associated with a conditional logic.").

63 *See* Robert Hellawell, *A Computer Program for Legal Planning and Analysis: Taxation of Stock Redemptions*, 80 COLUM. L. REV. 1363, 1363 (1980); *cf.* L. Thorne McCarty, *Reflections on Taxman: An Experiment in Artificial Intelligence and Legal Reasoning*, 90 HARV. L. REV. 837, 838 (1977) (describing TAXMAN, a program that could analyze the facts of corporate reorganization cases).

64 *See* D.A. WATERMAN & MARK A. PETERSON, MODELS OF LEGAL DECISIONMAKING 14–17 (1981). Even today, expert systems underlie some corporate compliance systems and efforts to assist *pro se* litigants. *See* KEVIN D. ASHLEY, ARTIFICIAL INTELLIGENCE AND LEGAL ANALYTICS 10–11 (2017).

65 *See* Marek J. Sergot et al., *The British Nationality Act as a Logic Program*, 29 COMMC'NS ACM 370, 371 (1986).

66 *See* ASHLEY, *supra* note 64 at 82.

67 *See id.* at 82–88.

an expert system's conclusions back through the branches of its decision trees.[68] As a result, an expert system "can explain [its] . . . predictions in terms of the rules [it] applied, a kind of logical proof that attorneys will recognize and understand."[69] However, creating an expert system is time consuming. These programs operate from the top down: designers must painstakingly annotate legal authorities and plug them into the model.[70] Thus, it would be hard to create an expert system that analyzes multiple areas of law or synthesizes complex precedent.[71]

Recently, though, two breakthroughs have taken legal analytics in a new direction. The first is machine learning ("ML"), which performs "statistical analysis on steroids."[72] ML algorithms use feedback to get better at discovering hidden correlations between variables over time.[73] Some of these models are "unsupervised," which means that they unearth connections on their own.[74] Conversely, in "supervised" ML, researchers divide their data into a "training" set and a "test" set, use the training set to teach the algorithm to predict an outcome, and then run the algorithm on the test set to check how well

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68 *See* Kevin D. Ashley, *A Brief History of the Changing Roles of Case Prediction in AI and Law*, 36 LAW IN CONTEXT 93, 94 (2019), https://doi.org/10.26826/law-in-context.v36i1.88 [https://perma.cc/6P5D-8JLU].

69 *Id.*

70 Ashley, *supra* note 19, at 1208 (explaining that the "glaring weakness" of expert systems is that "they require[] manually representing the cases and precedents").

71 *See id.* (calling "the need to manually represent the legal knowledge . . . a bottleneck that has long afflicted knowledge-based AI"); Ashley, *supra* note 68 at 94 ("Due to the difficulties of representing legal knowledge, [expert system] models generally cover relatively narrow domains such as trade secret law or landlord tenant law.").

72 Ryan Copus, Ryan Hilbert & Hannah Laqueur, *Big Data, Machine Learning, and the Credibility Revolution in Empirical Legal Studies*, *in* LAW AS DATA 21, 24 (MICHAEL A. LIVERMORE & DANIEL N. ROCKMORE, eds. 2019).

73 *See* KEVIN P. MURPHY, MACHINE LEARNING 1 (2012) (defining "machine learning as . . . methods that can automatically detect patterns in data, and then use the uncovered patterns to predict future data").

74 For example, Netflix's system revises its show recommendations based on a viewer's choices. *See* harkiran78, *How Does Netflix Use Machine Learning?*, GEEKSFORGEEKS (Nov. 10, 2021), https://www.geeksforgeeks.org/how-does-netflix-use-machine-learning/ [https://perma.cc/FL42-74WN]. Likewise, email filters recognize spam by finding common threads among the messages that a user deletes. *See* Surden, *supra* note 25, at 90–91 (noting that, with enough experience, "the algorithm may detect a pattern and infer a general 'rule'—for instance that emails with the phrase 'Earn Extra Cash' tend to be statistically more likely to be spam emails than wanted emails").

it performs.[75] Supervised ML is well suited to legal prediction. For example, scholars have used the technology to create a program that anticipates whether the U.S. Supreme Court will affirm or reverse the opinion of a lower court.[76] The algorithm bases its conclusions on variables such as the area of law, the reason for granting certiorari, and the ideology of the presiding Justices.[77] When applied to a large database of decisions, it correctly anticipated 70% of the results and 71% of the votes of individual Justices.[78]

In addition, ML has opened the door to a second promising technology: natural language processing (NLP). A common roadblock in applying AI to law is the fact that opinions, statutes, and other relevant documents are written in natural language rather than the code that computers can digest.[79] NLP uses ML to bridge this gap by evaluating a text's formal features—such as how often it features a word—to guess its meaning.[80] In turn, because language patterns in briefs and opinions are correlated with case outcomes, NLP can function as a potent legal prediction tool. For instance, scientists at Stanford collected 3,243 patent infringement disputes and coded their results.[81] They then used 2,270 of these lawsuits to train an ML algorithm to examine the link between the disposition of each matter and textual variables like the identity of the parties, law firms, and judges.[82] Even though the model did not consider any substantive issues, it correctly forecast the holdings of 64% of the remaining 973 cases.[83] As the project

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75 *See* JOHN D. KELLEHER, BRIAN MAC NAMEE & AOIFE D'ARCY, FUNDAMENTALS OF MACHINE LEARNING FOR PREDICTIVE DATA ANALYTICS 3 (2015).

76 *See* Daniel M. Katz, Michael J. Bommarito II & Josh Blackman, *A General Approach for Predicting the Behavior of the Supreme Court of the United States*, PLOS ONE, Apr. 12, 2017, at 2, https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0174698&type=printable [https://perma.cc/EB2R-FMCJ].

77 *See id.* at 5–6.

78 *See id.* at 8.

79 Harry Surden, *Computable Contracts*, 46 U.C. DAVIS L. REV. 629, 643 (2012).

80 *See* Noah A. Smith, *Contextual Word Representations: Putting Words into Computers*, COMMC'NS ACM, June 2020, at 66, https://cacm.acm.org/magazines/2020/6/245162-contextual-word-representations/fulltext. [https://perma.cc/94H9-MMMV]

81 *See* Mihai Surdeanu, Ramesh Nallapati, George Gregory, Joshua Walker & Christopher D. Manning, *Risk Analysis for Intellectual Property Litigation*, ICAIL '11, June 2011, at 116, 116 (2011).

82 *See id.* at 120.

83 *See id.*; Ilias Chalkidis, Ion Androutsopoulos & Nikolaos Aletras, *Neural Legal Judgment Prediction in English*, PROC. 57TH ANNUAL MEETING ASS'N

reveals, NLP models require less programming than expert systems because they work from the bottom up. Indeed, because they rely entirely on the vocabulary or sentence structure of a set of facts or judicial opinion, they can estimate outcomes without considering "rules, issues, factors, values, or other kinds of legal knowledge."[84]

The main disadvantage to ML and NLP is the black box problem. The technologies detect such subtle correlations that their logic is not comprehensible to humans.[85] Paradoxically, in fact, "the more complex and powerful an algorithm, the more opaque it is likely to be."[86] This lack of transparency is hard to square with the prime directive of legal analysis: "show your work."[87]

Despite this weakness, ML and NLP are starting to transform the practice of law. Driven in part by these innovations, a billion-dollar legal tech industry has emerged.[88] These companies sell AI software that automates rote lawyering tasks such as drafting contracts and reviewing documents during discovery.[89] Some also offer products that take legal research to the next level. For instance, Ross Intelligence, which is based on IBM's *Jeopardy*-winning Watson system, responds to legal queries with a short memo.[90] Likewise, Lex Machina and Ravel go

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FOR COMPUTATIONAL LINGUISTICS, 5 June 2019, at 4317, 4320–21, https://doi.org/10.48550/arXiv.1906.02059 [https://perma.cc/HL2Q-6V7X] (predicting results of decisions from the European Court of Human Rights based on the words that appear in their factual summaries of the case); Elizabeth C. Tippett et al., *Does Lawyering Matter? Predicting Judicial Decisions from Legal Briefs, and What That Means for Access to Justice*, 101 TEX. L. REV. 1157, 1159–60, 1174 (2022) (analyzing the text of summary judgment briefs in 444 employment cases and finding that citing certain cases increased the probability of prevailing).

84 Ashley, *supra* note 19, at 1208–09.

85 *See* Chalkidis, Androutsopoulos & Aletras, *supra* note 83, at 4321 (observing that ML and NLP "provide no justification for their predictions").

86 Berman, *supra* note 5, at 1282.

87 Donald J. Kochan, *The "Reason-Giving" Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEO. J. LEGAL ETHICS 261, 291 (2013). As mentioned *supra* notes 56–59, this objection does not apply to LLMs, which can answer essay questions on law school exams.

88 *See* Jason Tashea, *Business Is Booming*, A.B.A. J., May 2019, at 31, 33 (reporting that investors poured $1.6 billion into legal tech companies in 2018).

89 *See* Engstrom & Gelbach, *supra* note 22, at 1010–12 (surveying legal tech products).

90 *See* Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet*, N.Y. TIMES (Mar. 19, 2017), https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html?_r=0 [https://perma.cc/HJ9D-MVDA]; Robert Dale, *Law and Word Order: NLP in Legal Tech*, TOWARDS DATA SCI. (Dec. 15, 2018), https://towardsdatascience.com/law-and-word-order-nlp-in-legal-tech-bd14257ebd06

beyond merely finding relevant authority to help users predict how judges might rule.[91]

But perhaps the most revolutionary trend in legal analytics is occurring overseas, where foreign governments are giving AI tools increasingly judge-like responsibilities. For instance, the Netherlands' online private court system—a kind of state-sponsored arbitration—has automated the resolution of default judgments in lending matters.[92] Verdicts in these cases are thus "are no longer the product of any human reasoning."[93] Likewise, China's robot judge, Xiaozhi, resolves debt collection cases with the parties' consent and under human oversight.[94] Because Xiaozhi blends expert system programming with ML and NLP, it can analyze evidence, question the parties, and generate a judgment in a matter of minutes.[95] Finally, Estonia recently announced plans to submit some small claims to an algorithm.[96] Under this proposal, "[t]he trial would take place

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[https://perma.cc/VNF9-DN9Z] (discussing a law firm that offers a Watson-driven "chatbot for privacy law concerns").

91 *See* Robert F. Weber, *Will the "Legal Singularity" Hollow Out Law's Normative Core?*, 27 MICH. TECH. L. REV. 97, 113–14 (2020); *Legal Analytics Platform*, LEX MACHINA, https://lexmachina.com/legal-analytics/ [https://perma.cc/9JB3-22VS]; Patrick Flanagan & Michelle Hook Dewey, *Where Do We Go from Here? Transformation and Acceleration of Legal Analytics in Practice*, 35 GA. ST. U. L. REV. 1245, 1253 (2019) ("Predicting court behavior is arguably the fastest growing sector of the legal-analytic marketplace.").

92 *See* H.W.R. (Henriëtte) Nakad-Weststrate, A.W. (Ton)Jongbloed, H.J. (Jaap) van den Herik & Abdel-Badeeh M. Salem, *Digitally Produced Judgements in Modern Court Proceedings*, 6 INT'L J. DIGIT. SOC. 1102, 1102 (2015).

93 *See id.* at 1102, 1106-08.

94 *See* Wang, *supra* note 2, at 62; Park, *supra* note 30 (explaining that "[u]sers must mutually agree to take the case up to the AI judge"). Earlier versions of Xiaozhi performed non-adjudicatory tasks like "analyzing case filings, summarizing points of trial contention, transcribing hearings, calculating damages, finding related cases, and generating depositions." Benjamin Minhao Chen & Zhiyu Li, *How Will Technology Change the Face of Chinese Justice?*, 34 COLUM. J. ASIAN L. 1, 29 (2020).

95 *See* Bin Wei et al., *A Full-Process Intelligent Trial System for Smart Court*, 23 FRONTIERS OF INFO. TECH. & ELEC. ENG'G 186, 188–99 (2022) (describing how a Xiaozhi-style system can extract information from documents, asks "procedural" and "factual" questions, engages in "[l]egal judgment prediction," and then generates a judgment); Wang, *supra* note 2 at 62.

96 *See* Niiler, *supra* note 21; Tracey Shelton, *Estonia: From AI Judges to Robot Bartenders, Is The Post-Soviet State The Dark Horse of Digital Tech?*, ABC NEWS (Jun. 15, 2019), https://www.abc.net.au/news/2019-06-16/estonia-artificial-intelligence-technology-robots-automation/11167478 [https://perma.cc/SB3E-DEK3]. c/54B6-DFEG]. The Estonian government has since clarified that it intends only to automate one specific type of proceeding. See Estonia Does Not Develop AI Judge, Republic of Estonia (Feb. 16, 2022), https://www.just.ee/en/news/estonia-does-not-develop-ai-judge [https://perma.cc/T8FC-XLFC].

exclusively online, the parties would communicate . . . on a platform and the case would be decided by an AI tool."[97] Rather than merely allowing parties to agree to automated dispute resolution, Estonia will impose the process on litigants.[98] Thus, its blueprint represents "by far the world's biggest change when it comes to integrating AI with the judiciary."[99]

In sum, thanks to rapid progress in legal analytics, the first generation of robot judges has come online. And as I discuss next, this development has piqued the interest of scholars.

B. The Robot Judge Debate

Over the past few years, academics have started to analyze the benefits and costs of automated courts. This section offers an overview of this literature.

Some scholars are generally optimistic about robot judges. Members of this camp tend to focus on technology's ability to streamline dispute resolution. Consider Eugene Volokh's wryly titled article *Chief Justice Robots*.[100] Volokh asks readers to assume that an AI program becomes capable of writing opinions that are as "good" as the average human judge (measured by its ability to persuade a panel of experts).[101] In that scenario, Volokh contends that we *should* substitute machines for people:

> [The robot judge] doesn't need to be perfect[] because the humans it would replace aren't perfect. And because such a program is also likely to be much cheaper, [and] quicker, . . . it promises to make the legal system not only more efficient but also fairer and more accessible to poor and middle-class litigants.[102]

In the same vein, John Morison and Adam Harkens argue that algorithmic courts will be economical because they can

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97 G'SELL, *supra* note 5 at *2.

98 Park, *supra* note 30.

99 *Id.*

100 Volokh, *supra* note 5, at 1140.

101 *See id.* at 1139–40, 1153.

102 *Id.* at 1140; Park, *supra* note 30 ("A digital system allows individuals to access legal services for free and in their own time, meaning that the low and middle class can navigate any legal disputes for free."). *But see* Christopher Markou, *Are We Ready for Robot Judges?*, DISCOVER MAG. (May 16, 2017), https://www.discovermagazine.com/technology/are-we-ready-for-robot-judges [https://perma.cc/GZH9-GAXQ] (warning against "a justice system that encourages a race to the bottom for AI startups to deliver products as quickly, cheaply and exclusively as possible").

"deal with cases in parallel rather than in series."[103] Thus, as in many other contexts, automation will "sav[e] . . . time and money."[104]

Many proponents of robo-judges also tout their accuracy. Recall that some states use ML algorithms to inform bail, parole, and sentencing choices.[105] Although the topic is controversial (as I will discuss below), studies reveal that these systems outperform individuals when assessing how likely a defendant is to commit crimes in the future.[106] These results suggest that robots may render more precise rulings than human judges, just as they have proven to be superior to people at cards, board games, and trivia.[107]

Likewise, AI courts could standardize the administration of justice. Jurists vary in their intellectual dexterity, prior beliefs, and demeanor. Thus, the practice of assigning disputes randomly to different judges introduces a lottery-like element into litigation. Conversely, with AI, "a single program could clear an entire nation's caseload," which "would afford an otherwise impossible degree of uniformity."[108]

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103 Morison & Harkens, *supra* note 5, at 619; *see also* Re & Solow-Niederman, *supra* note 5, at 255 ("An algorithmic decision procedure that draws on ML could resolve an indefinite number of cases and would not be limited by time and space in the way that a human judge or team of human decision-makers would be.").

104 Morison & Harkens, *supra* note 5, at 621; G'SELL, *supra* note 5, at 362 ("AI tools make it possible to process cases quickly, efficiently and inexpensively.").

105 *See supra* text accompanying note 18.

106 *See, e.g.*, Zhiyuan "Jerry" Lin, Jongbin Jung, Sharad Goel & Jennifer Skeem, *The Limits of Human Predictions of Recidivism*, 6 SCI. ADVANCES 2–5 (2020) (determining that the COMPAS risk assessment system more accurately predicted recidivism than study participants and noting that this result is consistent with the fact that researchers have found that "statistical methods [a]re reliably superior to humans in predicting a range of outcomes"); *cf.* Richard Berk, *An Impact Assessment of Machine Learning Risk Forecasts on Parole Board Decisions and Recidivism*, 13 J. EXP. CRIMINOLOGY 193, 213 (2017) (determining that an ML algorithm in Pennsylvania helped courts make "smarter decisions . . . about nonviolent inmates").

107 *See supra* text accompanying notes 14–18. Conversely, LLMs are notorious for "hallucinating": responding to queries in ways that are "factually incorrect or nonsensical." Frank Neugebauer, *Understanding LLM Hallucinations*, TOWARDS DATA SCI. (May 8, 2023), https://towardsdatascience.com/llm-hallucinations-ec831dcd7786 [https://perma.cc/64SY-AN26]; *cf.* Choi, Hickman, Monahan & Schwarcz, *supra* note 57, at *5 (finding that ChatGPT did not invent facts but occasionally provided answers to essay questions that were "dramatically incorrect"). This suggests that LLMs may raise accuracy concerns that conventional legal prediction tools do not.

108 Re & Solow-Niederman, *supra* note 5, at 256; *see also* Park, *supra* note 30 (extolling the virtues of "[o]ne centralized, consistent judge").

But skepticism about automated courts runs deep. Perhaps the most common set of objections focus on AI's inability to articulate the rationale behind its conclusions. A rich literature has explored the virtues of reason-giving, which include legitimizing the state's exercise of authority, keeping public officials accountable, and adding depth and detail to precedent.[109] Arguably, the bare judgments that algorithms produce do not provide these benefits. For example, citizens may not find a robot determination to be authoritative, undermining respect for the judiciary.[110] Likewise, AI decisions would not be fodder for future courts and litigants, stunting the growth of the law.[111] In fact, the opacity of robot rulings could even be unconstitutional. Admittedly, courts do not always spell out their logic. Trial judges deny motions orally, appellate panels summarily uphold decisions below, and the Court simply grants or denies certiorari.[112] Yet some judges have expressed qualms about whether the government's reliance on black box algorithms to assess public employees' job performance or allocate benefits satisfies procedural due process principles.[113] In

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109 *See, e.g.*, Rachel Brown et al., *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 90–91 (2021) ("Coordinate and lower courts can only determine whether a prior holding applies to a new case if judges have explained the reasoning behind past decisions."); Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 504–13 (2015) (explaining how judicial reason-giving fosters democratic participation, maintains transparency, and enhances the accuracy of rulings); Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L.J. 612, 615 (2020) ("[R]eason-giving goes hand in hand with the publicity principle—the Kantian idea that political decisions must be able to withstand public debate.").

110 *See* Morison & Harkens, *supra* note 5, at 629–30 (observing that "transparency is . . . an important element of judging"). *But see* G'SELL, *supra* note 5, at 362 (noting that "human decisions themselves are opaque and difficult to explain").

111 *See* Markou, *supra* note 102 ("Legal systems depend on continuity of information, transparency and ability to review.").

112 *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633–34 (1995) (collecting examples of situations in which the legal system decides matters without explanation); Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 NOTRE DAME L. REV. 171, 183 n.51 (2020) (observing that "[t]he federal courts issue unreasoned decisions—typically affirmances—in thousands of cases every year").

113 *See, e.g.*, Hous. Fed'n of Tchrs., Loc. 2415 v. Hous. Indep. Sch. Dist., 251 F. Supp. 3d 1168, 1176 (S.D. Tex. 2017) (holding that teachers might be able to prevail at trial on their assertion that a model used to assess their job performance was unconstitutional "because they [were] denied access to the computer algorithms and data necessary to verify the accuracy of their scores"); T. v. Bowling, No. 2:15-CV-09655, 2016 WL 4870284, at *10 (S.D.W. Va. Sept. 13, 2016) (granting a preliminary injunction against the use of an algorithm to calculate a "budget" for recipients of Medicaid benefits), *modified sub nom.* Michael

these settings—as in judging—parties whose rights are at stake are arguably "entitled to at least some understanding of what is happening."[114] Thus, the black box problem hangs over AI judges like a storm cloud.

Compounding these problems, critics worry that AI will disfavor certain parties. Unfairness could creep in through three paths. First, algorithms are created by people. As David Lehr and Paul Ohm have emphasized, these systems "are the complicated outputs of intense human labor—labor from data scientists, statisticians, analysts, and computer programmers."[115] These individuals exercise discretion at every step in the model-creation process, from collecting data to deciding which variables to include.[116] Thus, a robot's seemingly objective and dispassionate rulings could suffer from the same biases as its developers. [117] Second, because AI uses the past to guess the future, it might endlessly recycle inequality. This issue reared its head in 2016, when a ProPublica investigation found that a Florida county's algorithmic risk assessment system wrongly predicted that black defendants would reoffend at twice the rate of whites.[118] Although the program did not use race as a variable, it included attributes that correlate with race, such as previous arrests.[119] Arguably, this perverse result reveals that legal prediction tools will "recreate the . . . mistakes and

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T. v. Crouch, No. 2:15-CV-09655, 2018 WL 1513295, at *13 (S.D.W. Va. Mar. 26, 2018).

114 Re & Solow-Niederman, *supra* note 5, at 264. Re and Solow-Niederman also fear that the widespread use of AI judges will gradually distort the legal system. They argue that robots will be blind to emotional or equitable factors and thus dispense a graceless form of "codified justice." *Id.* at 255–72. In turn, the authors claim, this will change the nature of regulation itself as policymakers increasingly rely on crystalline rules rather than "non-quantifiable values, like mercy." *Id.* at 247.

115 Lehr & Ohm, *supra* note 24, at 717.

116 *See id.* at 677–703.

117 Re & Solow-Niederman, *supra* note 5, at 273.

118 *See* Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [perma.cc/Y524-C84E]. *But see* Sam Corbett-Davies, Emma Pierson, Avi Feller & Sharad Goel, *A Computer Program Used for Bail and Sentencing Decisions Was Labeled Biased Against Blacks. It's Actually Not That Clear*, WASH. POST (Oct. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/17/can-an-algorithm-be-racist-our-analysis-is-more-cautious-than-propublicas/ [perma.cc/G8BC-DG3F] (explaining that the algorithm's result stems, in part, from the fact that "overall recidivism rate for black defendants is higher than for white defendants").

119 *See* Angwin, Larson, Mattu & Kirchner, *supra* note 118 ("[I]t is difficult to construct a score that doesn't include items that can be correlated with race—such as poverty, joblessness and social marginalization.").

implicit prejudices of past cases overseen by humans into perpetuity."[120] Third, robot courts might reward repeat players. Marc Galanter famously theorized that parties who routinely participate in the legal system use their familiarity with it to gain an advantage.[121] This raises the concern that serial litigants, who are likely to be wealthy and powerful, could quickly discover novel tactics that work especially well in the idiosyncratic format of AI court.[122]

In sum, scholars believe that robot judges "seem[] plausible—even imminent."[123] As a result, they have started to weigh the pros and cons of algorithmic courts. But as I argue next, automated dispute resolution is more likely to appear in a different forum.

II
Forced Robot Arbitration

This Part argues that AI decision making may soon emerge in forced arbitration. It first lays a foundation for this claim by showing how the Court's expansion of the FAA has made it hard to "apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration."[124] It then examines the legal, technological, and practical reasons why corporations and arbitration providers are likely to introduce automated procedures in some milieus.

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120 Park, *supra* note 30; *cf.* Sandra G. Mayson, *Bias in, Bias Out*, 128 Yale L.J. 2218, 2224 (2019) ("To predict the future . . . is simply to project history forward."). Of course, human judges suffer from biases. *See* Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1221 (2009). Yet human views also evolve, whereas "AI does not have the capacity to adapt flexibly with the social mores of the time or recalibrate based on past errors." Park, *supra* note 30.

121 *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 98–101 (1974).

122 *See* Re & Solow-Niederman, *supra* note 5, at 267 (expressing concern that AI courts "could asymmetrically allow sophisticated actors to adjust their conduct or litigation strategies in ways that would predictably achieve desired results").

123 *Id.* at 242 (alteration in original).

124 Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [perma.cc/KA3N-BJ4V].

A. The Arbitration Revolution

This section traces the evolution of forced arbitration. It describes how the Court transformed the FAA from a modest attempt to normalize arbitration into one of the most important statutes in the modern civil justice system. It also shows that the rise of mass arbitration has altered the balance of power between plaintiffs and defendants.

Congress passed the FAA in 1925 to eliminate judicial hostility to arbitration.[125] Courts had invented special rules known as the ouster and revocability doctrines that made it hard to obtain specific performance of a pre-dispute arbitration agreement.[126] The FAA abolishes those principles through Section 2, its centerpiece, which makes written provisions "to settle [claims] by arbitration . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[127] Therefore, Section 2 requires courts to assess the validity of arbitration clauses under generally applicable contract doctrines—not specialized anti-arbitration rules.[128]

For the first half-century of its existence, the FAA was limited in two critical ways. First, it was viewed as a procedural rule passed under Congress's Article III powers to control federal courts that neither governed in state court nor preempted state law.[129] Thus, about half of American jurisdictions tried to protect vulnerable individuals from being compelled to arbitrate by exempting employment, tort, or insurance cases from Section2's enforcement mandate.[130] Second, there was little

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125 Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2018)).

126 *See, e.g.*, Kill v. Hollister, [1746] 95 Eng. Rep. 532 (K.B.) 532; Vynior's Case, [1609] 77 Eng. Rep. 597 (K.B.) 599.

127 9 U.S.C. § 2 (2018).

128 *See* H.R. REP. NO. 68-96, at 1 (1924).

129 The FAA's legislative history states that the statute "relate[s] solely to procedure of the [f]ederal courts" and "is no infringement upon the right of each [s]tate." *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. 37 (1924) [hereinafter Joint Hearings] (brief of Julius Henry Cohen) (alteration in original); *see also* H.R. Rep. No. 68-96, at 1 (1924) ("The bill declares that [arbitration] agreements shall be recognized and enforced by the courts of the United States.") (alteration in original); Allied-Bruce Terminix Cos., Inc., v. Dobson, 513 U.S. 265, 286 (1995) (Thomas, J., dissenting) ("[N]ot until 1959—nearly 35 years after Congress enacted the FAA—did any court suggest that Section 2 applied in state courts.").

130 *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration As A Dispute Resolution Process*, 77 NEB. L. REV. 397, 438 n.280 (1998) (collecting examples).

doubt that arbitration's informal standards and lay decision makers produced different outcomes than the judiciary.[131] As the Court explained in 1956, arbitration was a pale substitute for litigation:

> The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury . . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial.[132]

Accordingly, judges excluded federal statutory claims from the FAA, reasoning that Congress could not have meant for plaintiffs to vindicate important rights in a tribunal that ignored "technical rules of law and procedure."[133]

But near the end of the twentieth century, the Justices reversed course. Declaring that the FAA embodies "a liberal federal policy favoring arbitration,"[134] the Court held that Section2 of the statute applies in state court and preempts any state law that "singl[es] out arbitration provisions for suspect status."[135] Soon it became clear that "front end" state arbitration laws—those that purport to invalidate certain arbitration clauses—were irrelevant.[136] For example, the Court found that Section2 eclipses a California statute that voided arbitration clauses in wage disputes,[137] a Montana law that required drafters to give conspicuous notice that a contract included an arbitration provision,[138] and West

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131 *See* Note, *Predictability of Result in Commercial Arbitration*, 61 HARV. L. REV. 1022, 1026 (1948) (documenting arbitrators' tendency to consider irrelevant factors when awarding damages); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 861 (1961) (reporting that nearly 90% of arbitrators in a survey "believed that they were free to ignore [legal] rules whenever they thought that more just decisions would be reached by so doing.").

132 Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956).

133 Wilko v. Swan, 107 F. Supp. 75, 78 (S.D.N.Y. 1952), *rev'd*, 201 F.2d 439 (2d Cir. 1953), *rev'd*, 346 U.S. 427 (1953) (quoting CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, THE HANDBOOK AND GUIDE TO ARBITRATION UNDER THE NEW YORK AND UNITED STATES ARBITRATION STATUTES (1932)).

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

135 Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

136 Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 205 (2002).

137 *See* Perry v. Thomas, 482 U.S. 483, 491 (1987).

138 *See Doctor's Assocs.*, 517 U.S. at 687–89.

Virginia's common law bar on the arbitration of wrongful death claims.[139] Likewise, judges tried to use contract law's public policy defense to exempt certain claims from arbitration only to have the Court chastise them that "the FAA forecloses precisely this type of 'judicial hostility.'"[140] Thus, in the realm of forced arbitration, "the nation's laboratories of democracy have been shut down."[141]

In addition, the Court repudiated its view that arbitration is inferior to litigation. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Justices announced that the shift from courtroom to conference room did not dilute substantive rights:

> 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. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[142]

This logic opened the door for judges to enforce pre-dispute agreements to arbitrate allegations under the Sherman Act,[143] Securities Act of 1933,[144] Securities Exchange Act of 1934,[145] Age Discrimination in Employment Act,[146] and Racketeer Influenced and Corrupt Organizations Act.[147]

As drafters placed arbitration clauses in their contracts, fine print became political. Conservatives and the U.S. Chamber of Commerce praised private dispute resolution for being quick, cheap, and accessible[148] and for "mak[ing] "it easier for

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139 *See* Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 534 (2012).

140 Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 21 (2012) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011)).

141 Note, *supra* note 48, at 1184.

142 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

143 *See id.* at 640.

144 Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989).

145 *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 229–30 (1987).

146 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991).

147 *See McMahon*, 482 U.S. at 220.

148 *See* David Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out the Bath Water, and Constructing A New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 105 (1999).

individuals to find an attorney willing to take their case or, alternatively, to represent themselves."[149] Conversely, public interest groups and progressives argued that the process's reduced discovery, narrow appellate review, and unreasoned awards tilt the scales of justice.[150] In addition, these critics speculated that arbitration is biased towards repeat players.[151] Seen through this prism, because arbitrators bill by the hour, they "have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a 'track record' of decisions that corporate repeat-users will view approvingly."[152] These concerns made arbitration seem like "the place where 'lawsuits go to die.'"[153]

In the mid-2000s, the forced arbitration controversy began to revolve around the relationship between the FAA and class actions. Business, which had long seen class liability as the bane of their existence, added language to their arbitration provisions requiring plaintiffs to proceed on an individual—rather than an aggregate—basis.[154] Most courts did not look kindly on this gambit. Flexing their muscles under Section 2 of the FAA to strike down arbitration clauses under traditional

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149 PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS 6 (2008); Estreicher, *supra* note 37, at 563 (asserting that arbitration "can do a better job of delivering accessible justice for average claimants than a litigation-based approach").

150 David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249 (2009) (calling arbitration "do-it-yourself tort reform"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1641 (2005) ("[C]ompanies are increasingly using their arbitration clause[s] not only to require arbitration but also to further limit consumers' procedural and even substantive rights.").

151 *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 33 (1998) (noting that an employer "is likely to be a repeat player, with the opportunity to reject arbitrators whose previous rulings displeased it"); Sternlight, *supra* note 38, at 685 ("[A]rbitrators may be consciously or unconsciously influenced by the fact that the company, rather than the consumer, is a potential source of repeat business.").

152 David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60-61 (1997).

153 Hawkins v. Region's, 944 F. Supp. 2d 528, 532 (N.D. Miss. 2013); *see also* McLellan v. Fitbit, Inc., No. 3:16-CV-00036-JD, 2018 WL 3549042, at *1 (N.D. Cal. July 24, 2018) (noting "the perception that arbitration is where consumer lawsuits go to die").

154 For pathbreaking early articles about class arbitration waivers, see Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

contract defenses, they held that class arbitration waivers were unconscionable when a plaintiff proved that their "only reasonable, cost-effective means of obtaining a complete remedy [was] as either the representative or a member of a class."[155]

These decisions spurred the Court's conservative majority into action. In a rash of cases, including 2011's blockbuster *AT&T Mobility LLC v. Concepcion*, the Justices essentially held that the FAA mandates individual—rather than class—proceedings.[156] The Court reasoned that the lower courts that had invalidated class arbitration waivers had violated the FAA's primary objective of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[157] This logic seemed to make arbitration clauses "corporations' 'get out of jail free' cards."[158] Indeed, as the adage goes, "[t]he realistic alternative

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155 Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 275 (Ill. 2006); *see also* Discover Bank v. Superior Ct., 113 P.3d 1100, 1108 (Cal. 2005) ("By imposing this clause on its customers, [the drafter] has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies.").

156 The Court's attack on the class action had two components. First, the Court held that judges cannot invalidate class arbitration waivers on fairness grounds. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (finding that the FAA preempts a California rule that deemed some class-arbitration waivers to be unconscionable); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013) (extending *Concepcion* to a similar federal common law doctrine); *cf.* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) ("In the F[AA], Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."); DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015) (holding that the FAA preempts a California appellate court's determination that a class arbitration waiver did not apply). Second, the Court announced that neither judges nor arbitrators could deem an arbitration provision that does not mention class actions to authorize such procedures. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.").

157 *Concepcion*, 563 U.S. at 344.

158 Thomas O. Main, *Arbitration, What Is It Good For?*, 18 NEV. L.J. 457, 467 n.54 (2018); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 627 (2012) ("Many—indeed, most—of the companies that touch consumers' day-to-day lives can and will now place themselves beyond the reach of aggregate litigation."). For more criticism of the Court's class arbitration jurisprudence, see J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217 (2013); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015); David L. Noll, *Rethinking Anti–Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649 (2012); Judith Resnik, Comment, *Fairness in*

to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[159]

Then, in the wake of *Concepcion* and its progeny, several empirical studies cast fresh light on forced arbitration. [160] A handful of jurisdictions have adopted laws that require arbitration providers to publish basic information about the outcomes of their cases.[161] Using this data, researchers discovered four points that are relevant for my purposes. First, the speed and expense of the process varies among providers and claim types. For example, consumer cases overseen by the AAA took an average of 255 days and incurred about $4,000 in fees, but employment disputes in JAMS took twice as long and cost nearly ten times as much.[162] Second, defendants footed almost all of the bill. Because courts and arbitration providers often refuse to enforce clauses that require plaintiffs to subsidize the process,[163] the median fee paid by individuals was $0 in

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Numbers: A Comment on AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 133 (2011).

159 Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (emphasis omitted).

160 *See* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 9 (2019) (analyzing 40,775 consumer, employment, and tort arbitrations from the AAA, JAMS, ADR Services, Inc., and Kaiser Hospital's arbitration system) [hereinafter Chandrasekher & Horton, *Arbitration Nation*]; Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 4 (2011) (examining 1,213 AAA employment awards); Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019, 102635 (2015) (reviewing 2,802 AAA employment awards); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L. J. 57, 63 (2015) (studying 4,839 AAA consumer cases); David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DEPAUL L. REV. 457, 461_62 (2016) (considering 5,883 AAA employment cases).

161 *See* CAL. CIV. PROC. CODE § 1281.96(a) (West 2023); D.C. CODE ANN. § 16-4430 (West 2023); ME. REV. STAT. tit. 10, § 1394 (West 2023); MD. CODE ANN., COM. LAW § 14-3903 (West 2023). Although these laws only apply to "consumer" arbitrations, CAL. CIV. PROC. CODE § 1281.96(a), they have been interpreted to include all forced arbitrations. *See* ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION, STANDARD 2(e)(4) (2003), http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf [https://perma.cc/L7E5-RHMY]. These statutes do not require providers to disclose the kind of case-specific information that would allow parties to use previous awards as precedent. *Cf. infra* text accompanying notes 197–201 (discussing the argument that arbitration is a "black box").

162 *See* Chandrasekher & Horton, *Arbitration Nation*, *supra* note 160, at 32, 40.

163 *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687 (Cal. 2000) (holding that the "arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to

some contexts.[164] Third, despite this largesse, arbitration almost certainly suppressed claims. For instance, Judith Resnik, Stephanie Garlock, and Annie Wang found that between 2010 and 2019, AT&T, which had as many as 165,000,000 customers, faced fewer than 100 arbitrations per year.[165] Similarly, Cynthia Estlund surveyed AAA employment matters and concluded that "the great bulk of disputes that are subject to mandatory arbitration agreements . . . simply evaporate before they are even filed."[166] Fourth, plaintiffs fare worse on the merits against corporations with arbitration experience than they do when facing novices. Indeed, the companies that arbitrate the most within a specific forum enjoy higher win rate probabilities than those that appear just once.[167] Thus, forced arbitration suffers from an "extreme-repeat-players" bias.[168]

Finally, starting about three years ago, plaintiffs' lawyers discovered a loophole in the defense bar's effort to kill the class action. Blocked from filing class arbitrations, they began initiating "mass arbitrations": hundreds, thousands, or tens of thousands of individual complaints against defendants

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bear if he or she were free to bring the action in court"); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 313, 324-35 (2012) (describing how the AAA's Due Process protocol limits consumers' responsibility for fees).

164 *See* Chandrasekher & Horton, *Arbitration Nation*, *supra* note 160, at 33, 40, 49 (reporting that plaintiffs paid a median of $0 in AAA consumer and employment cases, JAMS consumer, employment, and tort disputes, and Kaiser medical malpractice matters).

165 *See* Judith Resnik, Stephanie Garlock & Annie Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 615 (2020); *cf.* Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009), *rev'd and remanded*, 673 F.3d 1155 (9th Cir. 2012) (finding that AT&T's 70,000,000 customers filed fewer than 200 arbitrations over a five-year period).

166 Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018). Examining data from 2016, Estlund estimates that employees filed 5,126 arbitrations in the AAA and 31,000 complaints in federal court. *See id.* at 691.

167 *See* Chandrasekher & Horton, *Arbitration Nation*, *supra* note 160, at 58-59 (finding also that plaintiffs who were represented by law firms with experience within an arbitration forum outperformed those who were *pro se*); *cf.* Colvin, *supra* note 160, at 17–18 (discovering a repeat playing employer bias); Colvin & Gough, *supra* note 160, at 1032 (determining that for every additional arbitration that an employer has already experienced, the odds of an employee win decreased).

168 Chandrasekher & Horton, *Arbitration Nation*, *supra* note 160, at 9. Admittedly, this may not be an arbitration-specific phenomenon. Perhaps corporations that litigate repeatedly also perform better than their one-shot counterparts.

like Amazon,[169] Chipotle,[170] DoorDash,[171] Family Dollar,[172] FanDuel,[173] Intuit,[174] Lyft,[175] Peloton,[176] Postmates,[177] and Uber.[178] Their aim was not necessarily to win on the merits. Instead, they exploited the fact that arbitration providers often

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169 *See* Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (July 22, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html [https://perma.cc/R9QA-JKSN] (reporting that 75,000 plaintiffs filed individual arbitrations against Amazon alleging that its voice-operated assistants were recording them without their consent).

170 *See* Michael Hiltzik, *Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft*, L.A. TIMES (Jan. 4, 2019), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-chipotle-20190104-story.html [https://perma.cc/QZ33-7AST] (observing that after prevailing on a motion to compel arbitration against wage theft allegations, Chipotle "could be facing thousands of individual arbitration cases spread across the country").

171 *See* Petitioner's Petition to Compel Arbitration; Memorandum of Points and Authorities in Support ¶ 1, Boyd et al. v. DoorDash, Inc., No. CPF-19-516930 (Cal. Super. Ct. Nov. 19, 2019) (on file with author) ("3,997 DoorDash couriers . . . are attempting to arbitrate individual claims against DoorDash for misclassifying them as independent contractors instead of employees.").

172 *See* Jack Newsham & Peter Coutu, *Family Dollar Forced Employees to Sign Arbitration Agreements. Here's What Happened When They Tried to Sue the Company Over Unpaid Wages*, BUS. INSIDER (Dec. 21, 2021), https://www.businessinsider.com/family-dollar-unpaid-wages-mass-arbitration-keller-lenkner-2021-12 [https://perma.cc/L852-BQ89] (mentioning that about 2,000 workers filed free-standing arbitrations against Family Dollar for failing to pay them overtime).

173 *See* Alison Frankel, *FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration*, REUTERS (Jan. 14, 2020), https://www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK [https://perma.cc/6G48-4DB2] (noting that FanDuel was facing 1,000 individual consumer fraud arbitrations).

174 *See* Justin Elliot, *TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud*, PROPUBLICA (Feb. 23, 2022), https://www.propublica.org/article/turbotax-maker-intuit-faces-tens-of-millions-in-fees-in-a-groundbreaking-legal-battle-over-consumer-fraud [https://perma.cc/67RP-VM9L] (citing evidence that "more than 100,000 consumers had sought individual arbitration against Intuit").

175 *See* Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L. (Feb. 11, 2019), https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in [https://perma.cc/KBZ9-TEB5] (revealing that 3,420 Lyft workers had filed a mass arbitration).

176 *See* Class Action Complaint ¶ 30, Skillern v. Peloton Interactive, Inc., No. 1:21-cv-06808 (S.D.N.Y. Aug. 12, 2021) (describing a previous mass arbitration against Peloton).

177 *See* Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS (Dec. 2, 2019), https://www.reuters.com/article/legal-us-otc-massarb/after-postmates-again-balks-at-arbitration-fees-workers-seek-contempt-order-idUSKBN1Y62E8 [https://perma.cc/66L9-Y8AR].

178 *See* Wallender, *supra* note 175 (observing that 12,501 drivers had filed standalone arbitrations alleging that Uber had misclassified them as independent contractors).

require defendants to deposit around $1,500 for every claim.[179] These expenses may not seem like much in isolation, but they soar to epic proportions in mass filings. For instance, JAMS demanded $18,000,000 to handle the more than 12,500 misclassification cases that drivers brought against Uber.[180] Likewise, the AAA sent an invoice for more than $11,000,000 to Postmates when it faced its own wave of nearly 5,300 misclassification arbitrations.[181] By flooding the zone with arbitrations, plaintiffs present corporations with a Hobson's choice: either paying enormous up-front fees to a provider or settling just "to avoid the administrative costs."[182]

Companies have not yet discovered a workaround.[183] Some have refused to arbitrate on the grounds that the plaintiffs' complaints, which tend to be both threadbare and identical, are either procedurally deficient or forbidden class arbitrations in disguise.[184] Nevertheless, judges have rejected these arguments, reasoning that plaintiffs are merely doing what corporations have compelled them to do: arbitrate on an individual basis.[185] For instance, in the mass filing against Postmates, the court called it "poetic justice" that after foisting the process on consumers and employees for years, businesses are "wiggling around trying to figure some way to squirm out of

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179 *See* Glover, *supra* note 42, at 1288, 1345; Horton, *supra* note 42, at 673.

180 *See* Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, Reuters (Jan. 16, 2019), https://www.reuters.com/article/legal-us-otc-uber/uber-tells-its-side-of-the-story-in-mass-arbitration-fight-with-12500-drivers-idUSKCNlPA2PD [https://perma.cc/YHE6-L4YC].

181 *See* Frankel, *supra* note 177.

182 Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order at 3, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, (N.D. Cal. 2019) (No. 9-CV-07545) (emphasis omitted) [hereinafter DoorDash Opposition]; *see also* Michael Corkery & Jessica Silver-Greenberg, *"Scared to Death" by Arbitration: Companies Drowning in Their Own System*, N.Y. Times (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html [https://perma.cc/J8KE-GDMQ] (describing the mass arbitration strategy).

183 I discuss measures adopted by arbitration providers *infra* notes 236–240.

184 *See* Second Amended Complaint for Declaratory & Injunctive Relief ¶ 6, Postmates Inc. v. 10,356 Individuals, (No. 20-cv-02783), 2020 WL 8167433 (C.D. Cal. July 1, 2020) (describing "10,356 boilerplate arbitration demands"); DoorDash Opposition, *supra* note 182, at 4 (accusing plaintiffs' counsel of "filing thousands of facially deficient arbitration demands with [the] AAA").

185 Some mass arbitration defendants have also refused to pay the AAA or JAMS. *See Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019), *aff'd*, 823 F. App'x 535 (9th Cir. 2020); *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020). To try to eliminate this practice, California lawmakers recently passed a statute that allows plaintiffs to obtain sanctions from businesses that refuse to pony up. *See* Cal. Civ. Proc. Code §§ 1281.97-99 (West 2021).

[their] own agreement."[186] Alternatively, Verizon tried amending its contract to include a "batching provision" that prohibited the same counsel from filing more than ten related arbitrations against the company at once.[187] But a federal court held that the batching clause was unconscionable when applied to a group of 2,712 plaintiffs, reasoning that it would keep cases pending for over 150 years.[188] Given this inability to stop the torrent of arbitrations, Amazon announced in 2021 that it was dropping its consumer arbitration clause.[189]

In sum, plaintiffs and defendants have long been locked in an "arbitration war."[190] Traditionally, businesses hailed private dispute resolution's efficiency while consumers and employees decried it as a clandestine way of eroding substantive rights. Recently, though, the advent of mass arbitration has scrambled this dynamic. And as I discuss next, concern about conventional arbitration might drive corporations and arbitration providers to embrace the brave new world of AI decision making.

B. Robot Arbitrators

This section claims that despite the attention lavished on robot judges, automated procedures are likely to flourish in arbitration.[191] More specifically, it asserts that AI decision makers will emerge in *forced* arbitration. Indeed, although arbitration's

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186 Frankel, *supra* note 177 (quoting Hon. William Alsup).

187 *See* MacClelland v. Cellco P'ship, 609 Fed. Supp. 3d. 1024, 1040 (N.D. Cal. 2022).

188 *See id.*

189 *See* Amanda Robert, *Amazon Drops Arbitration Requirement After Facing over 75,000 Demands*, ABA J. (June 2, 2021, 11:45 AM), https://www.abajournal.com/news/article/amazon-drops-arbitration-requirement-after-facing-75000-demands[https://perma.cc/2UJ4-23C2].

190 Editorial, *The Arbitration War*, N.Y. TIMES, (Nov. 26, 2010), https://www.nytimes.com/2010/11/26/opinion/27sat1.html[https://perma.cc/6LT2-6J4X].

191 This may strike some readers as obvious. After all, unlike the judiciary, which follows rigid norms, "arbitration has a reputation as being a 'wild west' or 'no rules' type of forum." Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 U. KAN. L. REV. 925, 964 (2012). Yet, neither the robust literature on robot judges nor the meager scholarship on AI arbitrators compares the two forms of adjudication beyond mentioning in passing that automated arbitrators may serve as a waystation on the path towards robot courts. *See* Volokh, *supra* note 5, at 1160 ("[m]any businesses, naturally more concerned about time and money than about abstract legitimacy or human empathy, might prefer quicker and cheaper AI arbitration over human-run arbitration"); Ashley Deeks, *High-Tech International Law*, 88 GEO. WASH. L. REV. 574, 631 (2020) (focusing on international arbitration and predicting that "arbitrators may someday employ AI tools to propose settlement ranges and help draft awards").

empire is vast and includes everything from domestic commercial conflict to cases between investors and nations to international disputes,[192] consumer and employment cases are far and away the best candidates for automation.

Three factors support these conclusions. First, the norms that govern courts and arbitrators are starkly different. Robots would face stiff resistance in the judicial system but fit snugly within arbitration's loose traditions. Second, although AI decision makers cannot reliably resolve most claims, they can adjudicate two types of cases that frequently appear on the forced arbitration docket: debt collection and employment misclassification. Third, companies and arbitration providers could profit handsomely from automation.

1. *Law*

AI courts would violate bedrock doctrinal principles. For starters, Eugene Volokh has noted that the U.S. Constitution and some of its state counterparts require judges to swear oaths of office and receive salaries.[193] Because these sources "contemplat[e] human judges," they would need to be amended before robots could take the bench.[194] Similarly, as mentioned above, the black box problem would stunt the development of precedent, raise legitimacy concerns, and possibly violate procedural due process.[195] For reasons like these, even proponents

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192 *See, e.g.*, 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, 382 (2018) (discussing the many forms of arbitration).

193 *See* Volokh, *supra* note 5, at 1158; *see also* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."); *id.* at. VI cl. 3 ("judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"); MICH. CONST. art. 11, § 1 (West 2022) (specifying the oath that judges must take "before entering upon the[ir] duties"); Paul J. De Muniz, *The Invisible Branch: Funding Resilient Courts Through Public Relations, Institutional Identity, and A Place on the "Public Radar"*, 100 KY. L.J. 807, 814–15 n.56 (2012) (surveying state constitutional provisions that govern judicial salaries).

194 Volokh, *supra* note 5, at 1158. This is no small thing: revising constitutions is notoriously difficult. *See* ROGER C. HARTLEY, HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE 2–5 (2017) ("Like baseball, the constitutional amendment process is a game of repeated failure punctuated by occasional success.").

195 *See supra* text accompanying notes 110–114.

of AI courts admit that installing them would require "dramatic changes [to] our legal system."[196]

These objections do not apply to robot arbitrators. For one, the federal and state constitutions say nothing about whether arbitrators must be human. And it would be comical to oppose AI arbitrators on the basis that their awards would be inscrutable. Arbitration is already so synonymous with opacity that commentators refer to it as a "black box,"[197] a "black hole,"[198] or say that it takes place behind a "black curtain."[199] Because the process is private and often confidential,[200] it rarely produces precedent.[201] Likewise, arbitrators generally have no duty to produce written or reasoned awards.[202] Finally,

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196 Volokh, *supra* note 5, at 1158 n.72.

197 Charlotte S. Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695, 1701 (2021).

198 Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018).

199 Chandrasekher & Horton, *Arbitration Nation*, *supra* note 160, at 18.

200 *See* Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 366 (2003) ("[A]n arbitration decision is not public, is not publicized, and is not published."); Resnik et al., *supra* note 165, at 624 (describing recent corporate efforts to "limit[] access to the interactions among disputants and arbitrators"). *But see* Christopher R. Drahozal, *Arbitration and Rule Production*, 72 CASE W. RES. L. REV. 91, 98 (2021) (explaining that pressure from arbitration providers and parties provide "reason to believe that arbitrators will often issue reasoned awards and that at least some portion of those awards will be made public").

201 *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002) ("Past decisions in arbitration furnish no reliable guide to the present and present decisions serve as no reliable guide to the future."); *cf.* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979) (arguing that "private judges may have little incentive to produce precedents"). To be fair, studies show that arbitrators do sometimes cite each other. *See* W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1141 (2012) (observing that "arbitrators cite other arbitrators primarily when there is no judge-made law to cite").

202 *See, e.g.*, United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation . . . to give their reasons for an award."); Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 200 (2011) (explaining that "arbitrators do not always write opinions" because "[t]hey are not legally required to do so"). Although some providers require arbitrators in consumer and employment cases to briefly explain their reasoning, these are mere default rules that companies can override with a single line of fine print. *See* AM. ARB. ASS'N, CONSUMER ARBITRATION RULES R. 43(b) (2014), https://www.adr.org/sites/default/files/Consumer%20Rules.pdf [https://perma.cc/BD7Y-BD4V] ("The award shall provide the concise written reasons for the decision unless the parties all agree otherwise.") [hereinafter AAA CONSUMER RULES]; INT'L INST. FOR CONFLICT PREVENTION & RESOL., 2019 ADMINISTERED ARBITRATION RULES R. 15.2, https://static.cpradr.org/docs/2019%20Administered%20Arbitration%20Rules_Domestic_07.25.19_.pdf

any constitutional challenge to an AI arbitrator's decision on the grounds that it does not justify its conclusions would fail. Courts have repeatedly held that awards are immune from procedural due process defects because arbitration does not involve state action.[203] Accordingly, a steady diet of judicial rulings with no elaboration might be jarring in the courts, but business as usual in arbitration.

Moreover, the American legal system tolerates unconventional procedures in arbitration. The Court's infatuation with the process "is among the strongest and most clearly expressed public policies of this century."[204] In turn, because judges bend over backwards to enforce arbitration clauses and awards, drafters can freely experiment.[205] Indeed, as Judge Posner once

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[https://perma.cc/8RAE-U5WB] ("All awards shall be in writing and shall state the reasoning on which the award rests unless the parties agree otherwise."); JAMS, STREAMLINED ARBITRATION RULES R. 19(G) (2022), https://www.jamsadr.com/rules-streamlined-arbitration/ [https://perma.cc/G8Q5-4FBV] ("Unless all Parties agree otherwise, the Award shall . . . contain a concise written statement of the reasons for the Award.") [hereinafter JAMS STREAMLINED RULES]. Also, some institutions specify that "arbitrators are not required to provide written opinions or explanations with their awards." U.S. ARB. & MEDIATION, *USA&M RULES OF ARBITRATION* R. 21(b), https://usam1.wpengine.com/wp-content/uploads/2022/03/consolidated-arbitration-rules-3.30.22.pdf [https://perma.cc/S29T-94RB]; *NAT'L ARB. & MEDIATION*, *NAM STANDARD RULES AND PROCEDURES* R. 16(a) (mandating written but not reasoned awards).

203 *See, e.g.*, Roberts v. AT&T Mobility LLC, 877 F.3d 833, 844 (9th Cir. 2017) ("[T]here is no state action simply because the state enforces [a] private agreement."); Murillo v. A Better Way Wholesale Autos, Inc., No. 3:17-CV-1883 (VLB), 2019 WL 3081062, at *9 (D. Conn. July 15, 2019) ("[T]he state action element of a due process claim is absent in a private arbitration case.").

204 John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 231 (1986). Of course, that remark was made in the twentieth century. But if anything, America's pro-arbitration policy has only grown more robust in the 2000s. *See supra* Part II.A.

205 *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (instructing lower courts to "enforce arbitration agreements according to their terms"); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995) ("[W]here [a] party has agreed to arbitrate, he or she . . . still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances."). To be sure, this command to err on the side of upholding arbitration agreements and awards is generally associated with the FAA. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343–44 (2011) (describing the FAA's scope and goals). However, in Part III, I argue that robot dispute resolution is not "arbitration" under the statute. Technically, this means that the process should not be able to draw support from the "liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Nevertheless, as I will discuss, AI procedures may qualify as "arbitration" under state arbitration legislation. *See infra* Part III.C. Thus, even if robot conflict resolution does not fall within the FAA, it might enjoy a similar status under state law, which often recognizes "a strong public policy in favor of

quipped, "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes."[206] For example, as I mentioned, the AAA and JAMS have long allowed parties to conduct desk arbitrations, which "provide a lower cost and more expeditious alternative to a live arbitration."[207] Similarly, long before COVID-19 popularized remote procedures, providers held evidentiary hearings—arbitration's equivalent to a trial—by phone or videoconference.[208] Finally, JAMS offers "bracketed arbitration," where the parties stipulate to minimum and maximum damage awards,[209] and "baseball arbitration," where each side suggests a remedy and the arbitrator must choose one.[210] AI decision making would be at home in a forum that is "at bottom[,] little more than 'the parties' dream.'"[211]

2. *Technology*

AI is likely decades away from being able to take the reins from generalist judges. Even cutting-edge programs cannot evaluate the credibility of a witness, rule on a hearsay objection, or make fact-sensitive determinations about whether a party's conduct was reasonable.[212] To be sure, under an axiom known as Moore's law, computing power doubles about every

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arbitration." State v. Pub. Safety Emps. Ass'n, 235 P.3d 197, 201 (Alaska 2010) (quoting *Baseden v. State*, 174 P.3d 233, 237 (Alaska 2008)); Barna v. Darden Rests., Inc., No. 255006, 2005 WL 3076908, at *1 (Mich. Ct. App. Nov. 17, 2005) ("Michigan public policy, as expressed by both the common law and the Legislature, strongly favors the use of arbitration to resolve disputes.").

206 Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

207 Jill I. Gross, AT&T Mobility *and the Future of Small Claims Arbitration*, 42 SW. L. REV. 47, 48 (2012); AAA CONSUMER RULES, *supra* note 202, at R. 1(g) (making desk arbitrations the default option for cases with $25,000 or less in dispute); JAMS STREAMLINED RULES, *supra* note 202, at R. 18 (allowing parties to "agree to waive [an] oral [h]earing and submit the dispute to the [a]rbitrator for an [a]ward based on written submissions"); *see also supra* text accompanying note 54.

208 *See* David Horton, *Forced Remote Arbitration*, 108 CORNELL L. REV. 137, 157 (2022).

209 *See* JAMS STREAMLINED RULES, *supra* note 202, at R. 27.

210 *See id.* at R. 28.

211 Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 449 (2005) (quoting HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 336 (tent. ed. 1958)).

212 *See* G'SELL, *supra* note 5, at 360 (noting that although ML algorithms "can deal with routine legal problems (traffic violations, uncovered cheques), for which the analysis of past decisions may be sufficient, they cannot handle cases with a certain degree of complexity or singularity"); Morison & Harkens, *supra* note 5,

eighteen months.[213] But algorithms are not going to be capable of adjudicating slip-and-fall torts—let alone sprawling antitrust matters—for the foreseeable future.[214]

Nevertheless, even today, AI could replace human arbitrators in certain contexts. For instance, because forced arbitration provisions are common in financial services contracts,[215] arbitrators routinely preside over lending disputes.[216] Some such matters involve debt collection: a niche in which the rules are simple, the evidence is usually undisputed, and matters progress through predictable steps.[217] Thus, an arbitration provider could offer an automated track for some debt collection complaints—as China, Estonia, and the Netherlands have already done.[218]

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at 628 ("[S]ome conceptual inferences may never yield to textual analytic techniques, as a result of their complexity or rootedness in wider structures and beliefs.").

213 *See The Complete Guide to Moore's Law*, HIST.-COMPUT. (Nov. 14, 2021), https://history-computer.com/moores-law/ [https://perma.cc/XL55-RW8B].

214 *See* G'SELL, *supra* note 5, at 361.

215 *See, e.g.*, CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A), § 2.3 at 7 (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/F7JZ-VJNE] (reporting that roughly 50% of credit card debt, 80% of prepaid credit card balances, and almost all payday loan obligations arise out of contracts that contain forced arbitration agreements).

216 For example, the National Arbitration Forum ("NAF")—the leading administrator of debt collection arbitrations—handled 214,000 debt collection matters in 2006. *See* Press Release, MINN. OFF. OF THE ATT'Y GEN., NATIONAL ARBITRATION FORUM BARRED FROM CREDIT CARD AND CONSUMER ARBITRATIONS UNDER AGREEMENT WITH ATTORNEY GENERAL SWANSON at 1 (July 19, 2009), https://www2.greenvillecounty.org/scjd/PublicIndex/PIImageDisplay.aspx?ctagency=23002&doctype=D&docid=1545055299520238&HKey=70791111131184870121106735176524784981127210073477387521148911610384112836975471019947891021117576107&AspxAutoDetectCookieSupport=1 [https://perma.cc/P25B-WT7J]. Admittedly, this number has likely decreased since then because NAF agreed not to hear debt collection matters after regulators discovered that it had "extensive ties to the collection industry." *Id.* Likewise, the AAA also agreed not to hear these cases absent a consumer's consent. *See AAA Notice on Consumer Debt Collection*, AM. ARB. ASS'N,https://www.adr.org/sites/default/files/document_repository/Notice%20on%20Consumer%20Debt%20Collection%20Arbitrations%20(1).pdf [https://perma.cc/EXF7-UKCJ]. Nevertheless, the AAA continues to administer arbitrations that are filed by consumers and cause the lender to bring a debt collection counterclaim. *See* Daniel JT McKenna, *Leveraging the Uptick in Consumer Arbitration for Debt Collection*, 74 CONSUMER FIN. L.Q. REP. 171, 172 (2020) (suggesting that these types of disputes are on the rise).

217 *See* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 83 (2011) ("[D]ebt collection cases tend to present relatively simple legal issues—was the debt incurred and did the consumer pay?").

218 *See supra* text accompanying notes 92–99.

Likewise, companies routinely compel arbitration of misclassification claims: allegations that they wrongly labeled their workers independent contractors instead of full-fledged employees.[219] These complaints hinge on a multi-factor test that lends itself to predictive analysis.[220] For example, Benjamin Alarie, Anthony Niblett, and Albert Yoon used 600 Tax Court of Canada opinions to build an ML model that forecasts the results of misclassification cases.[221] Their algorithm, which they called "Blue J," asks users twenty-one questions and then provides a likely outcome, an estimate of how confident it is about this conclusion, and a list of previous decisions that are on point.[222] When applied to training data, Blue J "consistently [got] more than 90% of predictions correct,"[223] which means that it easily could be adapted to resolve misclassification arbitrations.[224] Accordingly, in these settings, forced arbitration asks AI to do what it does best: resolve "a relatively small number of oft-repeated issues in oft-repeated factual contexts."[225]

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219 *See* Richard Frankel, *The Federal Arbitration Act and Independent Contractors*, 2018 CARDOZO L. REV. DE NOVO 101, 105 (2018).

220 *See, e.g.*, Gray v. FedEx Ground Package Sys., Inc., 799 F.3d 995, 1000 (8th Cir. 2015) (listing eight factors, including the language of the parties' contract, the degree of control the company exerted over the worker, the length of the relationship, and the method of payment).

221 *See* Benjamin Alarie, Anthony Niblett & Albert H. Yoon, *Using Machine Learning to Predict Outcomes in Tax Law*, 58 CAN. BUS. L.J. 231, 241 (2016).

222 *See id.* at 242–45. Blue J also asks users for feedback and updates the algorithm in response. *See id.* at 246.

223 *Id.* at 242. Of course, one might object that Blue J's 10% inaccuracy rate is too high. But because arbitration involves "an inevitable tradeoff between cost and accuracy," mistakes are a regrettable byproduct of the process. Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945, 1960 (2014). Indeed, courts must confirm arbitral decisions that contain serious, improvident, or silly errors. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

224 Blue J would need to change in two ways. First, the algorithm predicts the tax classification of workers. *See* Alarie, Niblett & Yoon, *supra* note 221, at 238–41. However, programmers would need to recalibrate it to reflect the fact that misclassification claims in the forced arbitration milieu usually involve alleged violations of labor statutes, such as the Fair Labor Standards Act. *See* Frankel, *supra* note 219, at 114–15. Second, in the U.S., the test for distinguishing between independent contractors and workers tends to vary between jurisdictions. *See, e.g.*, Kerri Keohane & David Schap, *Employee Misclassification and Related Damages Claims*, 27 J. LEGAL ECON. 63, 65–69 (2021) (providing a 50-state survey). Thus, designers would need to replace Blue J's database of Canadian decisions with state-specific ones.

225 Ashley, *supra* note 19, at 1222.

3. *Incentives*

Finally, in the U.S., no party is likely to attempt to build a robot judge. One way to cultivate automated courts is for the government to sink resources into the project. This is the path that China has followed by digitizing 120,000,000 legal documents[226] and treating AI as "a national obsession."[227] But the American government has been far less proactive with respect to AI in general[228] and algorithmic judges in particular.[229] Indeed, stateside, "companies, rather than court systems, have been at the forefront of efforts to exploit AI."[230] In turn, the U.S.'s reliance on private enterprise—which one author likens to "hoping that the commercial airlines w[ill] take us to the moon"—diminishes the odds of self-driving courts appearing soon.[231]

But businesses and arbitration providers have powerful incentives to automate arbitration. Even before the rise of mass filings, there was evidence that corporations had grown increasingly disenchanted with arbitration's creeping length and expense.[232] As noted, minimizing time and cost is AI's greatest asset.[233] Recall that China's robot judge, Xiaozhi, can hold a debt collection hearing in about half an hour.[234] Likewise, Blue J, the employment classification predictor, takes about five minutes to operate.[235] This supersonic pace means that providers would likely be able to offer robot services at a fraction of the price of human-led procedures. And if nothing else, shortening the length of arbitrations would reduce lawyers' workloads and thus the parties' legal fees. For these reasons, there is probably a lucrative market for AI arbitration.

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226 *See* Stern, Liebman, Roberts & Wang, *supra* note 20, at 518.

227 Tim Wu, *America's Risky Approach to Artificial Intelligence*, N.Y. TIMES (Oct. 7, 2019), https://www.nytimes.com/2019/10/07/opinion/ai-research-funding.html [https://perma.cc/K2KE-PJ64].

228 *See id.*

229 *See* Stern, Liebman, Roberts & Wang, *supra* note 20, at 517.

230 *Id.*; *cf.* Volokh, *supra* note 5, at 1151 (noting that "governments might be reluctant to invest the massive amounts of money needed to develop AI staff attorneys (or, eventually, AI judges) from scratch" but arguing that it would be cost-effective in the long run).

231 Wu, *supra* note 227.

232 *See, e.g.*, Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 5 (2010) (describing "frequent complaints regarding delay and high cost" about arbitration).

233 *See supra* text accompanying notes 103–104.

234 *See* Wang, *supra* note 2, at 62.

235 *See* Alarie, Anthony Niblett & Albert H. Yoon, *supra* note 221, at 242.

Similarly, the mass arbitration dilemma could accelerate the turn to automation. Providers are competing to offer businesses ways to minimize the settlement pressure of mass filings. These measures include revised fee schedules that reduce defendants' upfront financial responsibility[236] and mass tort-like protocols in which arbitrators hear a handful of "Test Cases" and the parties then mediate in the shadow of the results.[237] These procedures share the goal of "ensur[ing] that claims are heard on their merits."[238] However, automation could provide a faster path to this destination. Indeed, because AI systems "have no schedules" and "can handle numerous tasks simultaneously,"[239] they can decide thousands of individual arbitrations without forcing defendants to pay for thousands of individual arbitrators.[240] Moreover, many mass arbitration filings have sought relief for employment misclassification[241]—a cause of action that robots have proven adept at resolving.[242] Thus, businesses and providers may decide that the time is ripe for cutting some human arbitrators out of the loop.

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236 *See* Mark Levin, *New AAA Consumer Fee Schedule Addresses Mass Arbitration Costs*, JD SUPRA (Mar. 2, 2021), https://www.jdsupra.com/legalnews/new-aaa-consumer-fee-schedule-addresses-4884743/ (mentioning that the AAA's new rules require defendants to pay $300 per case for the first 500 arbitrations, $225 per case for the next 1,000, $150 per case for the next 1,500, and $75 per case beyond that number).

237 For example, in 2019, the International Institute for Conflict Prevention and Resolution ("CPR"), an entity not known for administering forced arbitrations, released an Employment-Related Mass Claims Protocol. *See* Motion for a Temporary Restraining Order at 7-8, Abernathy v. DoorDash, Inc., No. 3:19-cv-07545 (N.D. Cal. Nov. 17, 2019). CPR developed the Protocol in consultation with lawyers who represented defendants in pending mass arbitrations. *See* Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067 (N.D. Cal. 2020). The current version of the Protocol "establish[es] a novel fee structure that does not require the [e]mployer to pay all filing fees up-front"). INT'L INST. FOR CONFLICT PREVENTION & RESOL., EMPLOYMENT-RELATED MASS CLAIMS PROTOCOL 2. 1 (Sept. 19 2022).

238 Caroline Boone, Abram Moore & Victoria Oguntoye, *Ligation Minute: The Changing Landscape of Mass Claims Procedures*, JD Supra (Sept. 13, 2022), https://www.jdsupra.com/legalnews/litigation-minute-the-changing-3600577/ [https://perma.cc/3PZZ-BCP7].

239 Marrow, Karol & Kuyan, *supra* note 43, at 36.

240 *Cf.* Peter N. Salib, *Artificially Intelligent Class Actions*, 100 TEX. L. REV. 519, 548 (2022) (proposing that court use ML to "facilitate class certification where it is currently considered impossible" by resolving topics "like medical causation, reliance, or intent[,] which presently require individual adjudications for every class member").

241 *See supra* text accompanying notes 169–182.

242 *See supra* text accompanying notes 221–223.

Signing a consumer or employment contract might soon require not only relinquishing one's ability to go to court, but also the right to a human decision maker. This raises a crucial question that no court or scholar has addressed: does the FAA apply to a clause that mandates AI arbitration? The next Part provides an answer.

III
Robot Arbitration and the FAA

As mentioned, Section 2 of the FAA only validates clauses in which the parties agree "to settle by *arbitration* a controversy."[243] This Part argues that AI dispute resolution is not "arbitration" within the meaning of the FAA and thus does not trigger the statute's enforcement mandate.

I develop this thesis in three stages. First, I consider, but reject, the idea that the FAA cannot apply to procedures that were unimaginable when it took effect in 1925. I show that courts honor the text of a statute even if doing so means that it covers a topic that "would have left people at the time [of its passage] scratching their heads."[244] Second, using conventional tools of statutory interpretation, I argue that "arbitration" under the FAA does not include automated procedures. The FAA's language and structure suggest that it only governs agreements for human-based dispute resolution. Third, I explain why this conclusion is normatively desirable. When the FAA does not apply, state law fills the gap.[245] Thus, under my reading, jurisdictions can experiment with permitting or prohibiting robot arbitration—a result that makes sense given the uncertainty that surrounds the process.

A. Old Statutes and New Developments

Although Congress passed the FAA nearly a century ago, AI, ML, and NLP have emerged recently. One thus might claim that the statute does not apply to innovations that would have seemed like a fever dream when lawmakers approved it. This section explores this theory and finds it to be unpersuasive.

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243 9 U.S.C. § 2 (emphasis added).

244 Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1772 (2020) (Alito, J., dissenting).

245 *See* Smith v. Allstate Power Vac, Inc., 482 F. Supp. 3d 40, 47 (E.D.N.Y. 2020) ("'The weight of authority shows that even if the FAA is inapplicable, state arbitration law governs.'") (quoting *Shanks v. Swift Transp. Co. Inc.*, 2008 WL 2513056, at *4 (S.D. Tex. June 19, 2008)).

The issue of whether the FAA excludes futuristic technology is one manifestation of larger tension in statutory interpretation. As is well known, textualism has become the leading method of construing legislation.[246] Courts therefore interpret "a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[247] This inquiry "focuses on how an average reader—the typical member of the public—would understand the relevant language . . . ."[248] However, mind-bending questions arise when judges must decide whether old legislation applies to contemporary concepts.[249] Indeed, taking the text literally often produces a result that deviates from what anyone would have expected when lawmakers put pen to paper.[250]

Most courts resolve this conundrum by privileging plain language over social and historical context. Consider the Court's opinion in *Bostock v. Clayton County, Georgia*.[251] *Bostock* held that Title VII's ban on discrimination "because

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246 *See* Note, *Textualism's Mistake*, 135 HARV. L. REV. 890, 891 (2022). As Justice Kagan famously remarked, "we're all textualists now." Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 08:28 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

247 *Bostock*, 140 S. Ct. at 1738; New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) ("[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'") (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation.").

248 William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1516–17 (2021); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 n.158 (2016) (book review) ("[T]he question is only how the words would be read by an ordinary user of the English language."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003) (explaining that textualist judges "ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context").

249 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 422-23 (1989) ("Textualism becomes even more problematic when time has affected the assumptions under which the statute was originally written. Changed circumstances may produce ambiguity or interpretive doubt in the text where neither existed before.").

250 *See* Eskridge Jr., Slocum & Gries *supra* note 248, at 1507–08 (explaining that this phenomenon can consist of "societal dynamism" ("[W]here applying the statute today has different outcomes than applying it when it was enacted, even when the original meaning of the statutory language is unchanged.") or "linguistic dynamism" ("[W]here the meanings of the statutory words themselves evolve over time.")).

251 140 S. Ct. 1731.

of . . . sex" protects gay and transgender individuals.[252] Writing for the majority, Justice Gorsuch reasoned that to penalize someone because they are attracted to members of their own gender or do not identify with their biological birth gender is to treat them worse "because of sex."[253] Because Justice Gorsuch found the statute's text to be clear, he dismissed the concern that it took effect during a time when few people would have believed that it outlawed discrimination on the basis of sexual orientation or gender identity:

> [W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration . . . . '[T]he fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command.[254]

Bostock thus illustrates that a law can evolve to mean something that "would not have crossed the[] minds" of "ordinary Americans" during the era of its passage.[255]

Similarly, judges generally read broad statutes to include cutting-edge inventions. Most hold that the fact "a technology did not exist at the time of a statute's enactment does not necessarily preclude the application of the statute to that technology."[256] As the Seventh Circuit once explained, if laws

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252 *See id.* at 1737.

253 *Id.* at 1741–43 (reasoning that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex").

254 *Id.* at 1749 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). In sharp contrast, Justice Alito's dissent emphasized how most people would have understood the phrase "because of sex" at the time Congress passed Title VII. *See id.* at 1755 (Alito, J., dissenting) ("If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."). Likewise, dissenting Justice Kavanaugh accused the majority of conflating textualism and literalism. *See id.* at 1824–26 (Kavanaugh, J., dissenting).

255 *Id.* at 1767 (Alito, J., dissenting).

256 Matera v. Google Inc., No. 15-CV-04062-LHK, 2016 WL 8200619, at *20 (N.D. Cal. Aug. 12, 2016); United States v. Durango & Silverton Narrow Gauge R.R. Co., No. 19-CV-01913-REB-NRN, 2020 WL 2832381, at *6 (D. Colo. June 1, 2020) (explaining that the legislature "is not required to reenact a statute whenever new technology or changed conditions . . . might affect the scope of the statute's coverage" (quoting Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 36 (Colo. 2000))); Apple Inc. v. Superior Ct., 292 P.3d 883, 887 (Cal. 2013) ("In construing

categorically excluded new devices, objects, or concepts, then "a 1925 statute dealing with "news media" could not apply to television, and a 1930 statute dealing with "motor cars" could not apply to Volkswag[e]ns."[257] Accordingly, the prevailing view is that "[d]rafters of every era know that technological advances will proceed apace and that the rules they create will one day apply to all sorts of circumstances they could not possibly envision."[258]

In sum, it does not matter that Congress passed the FAA before AI emerged.[259] However, as I discuss next, traditional rules of statutory interpretation demonstrate that robot procedures are not "arbitration" under Section 2.

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statutes that predate their possible applicability to new technology, courts have not relied on wooden construction of their terms. Fidelity to legislative intent does not 'make it impossible to apply a legal text to technologies that did not exist when the text was created . . . .'" (quoting SCALIA & GARNER, *supra* note 247, at 85–86)); TracFone Wireless, Inc. v. Comm'n on State Emergency Commc'ns, 397 S.W.3d 173, 178 (Tex. 2013) ("[C]ertainly an old statute can encompass new technologies if the statutory text is worded broadly enough."); *cf.* Keith A. Christiansen, *Technological Change and Statutory Interpretation*, 1968 WIS. L. REV. 556, 557 (1968) (arguing that some "expansive" statutes should cover "technological change[s]"). Admittedly, a handful of older decisions go the other way and hold that when a law's passage "preceded any possible legislative consideration of the public policy issues, the proper course of action is to await legislative judgment, not to engage in an uncertain attempt to anticipate it." People v. Gilbert, 324 N.W.2d 834, 840 (Mich. 1982); *see* It's In The Cards, Inc. v. Fuschetto, 535 N.W.2d 11, 14 (Wis. Ct. App. 1995) ("The magnitude of computer networks and the consequent communications possibilities were non-existent at the time this statute was enacted . . . . Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway."). However, if the Court were to follow this minority view, the result would be the same as the interpretation of the FAA that I develop *infra* Part III.B: states would enjoy exclusive authority over robot arbitration.

257 Squillacote v. United States, 739 F.2d 1208, 1213 (7th Cir. 1984) (quoting REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 129 (1975)).

258 SCALIA & GARNER, *supra* note 247, at 86.

259 One caveat is necessary. In a stray line in an FAA case, the Court seemed to imply that it was relevant that a procedure did not exist in 1925. Specifically, the Court opined that class arbitration is disfavored because it was "not even envisioned by Congress when it passed the FAA." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 349 (2011). Perhaps the Court would apply similar logic to robot arbitration. But this strikes me as unlikely. The Court's class arbitration cases stem from the conservative Justices' long-simmering desire to stamp out the class action. *See* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 583–99 (2020). As a result, judges tend not to extend teachings from class arbitration decisions to other FAA issues. *See* Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 809 F.3d 746, 764 (3rd Cir. 2016) (distinguishing between "'bilateral arbitration dispute case law'" and authority in "the class arbitrability context") (quoting Chesapeake Appalachia, L.L.C. v. Scout Petroleum, LLC, 73 F. Supp. 3d 488, 500 (M.D. Pa. 2014)).

B. Interpreting the FAA

There is a puzzle at the heart of the FAA: it "ma[kes] agreements to arbitrate enforceable without defining what they [a]re."[260] This section takes a close look at the meaning of "arbitration" at the time the FAA became law and concludes that it means a process with a human decision maker.

Statutory interpretation "begins with the text."[261] Courts hone their understanding of statutory words by consulting contemporaneous dictionaries and legal authorities.[262] In 1925, these sources described "arbitration" as a process overseen by an individual. For example, Black's Law Dictionary specified that "arbitration" is the "determination of a matter . . . by one or more unofficial *persons*, chosen by the parties, and called 'arbitrators.'"[263] Ballentine's Law Dictionary and Bouvier's Law Dictionary also stated that "arbitration" involved "[t]he submission of some disputed matter to selected *persons*."[264] In addition, Webster's Collegiate Dictionary defined "arbitration" as "the hearing and determining of a cause in controversy by a *person or persons* either chosen by the parties involved or appointed."[265] Finally, in the late nineteenth and early twentieth centuries, dictionaries, the Court and other judges referred to arbitrators as "*person*[*s*]."[266]

A "person" was not an inanimate object. Indeed, a "person" was a "human being . . . as distinguished from [a] thing[.]"[267] Conversely, "machine"—the word that best described AI in the

260 AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985).

261 Ross v. Blake, 578 U.S. 632, 638 (2016).

262 Keen v. Helson, 930 F.3d 799, 802 (6th Cir. 2019) ("[C]ontemporaneous dictionaries are the best place to start."); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 540 (2019) (interpreting the phrase "contract of employment" in the FAA by examining early twentieth-century dictionaries, judicial opinions, and statutes).

263 *Arbitration*, BLACK'S LAW DICTIONARY 83 (2d ed. 1910) (emphasis added).

264 *Arbitration*, BALLENTINE'S LAW DICTIONARY 99 (1930) (emphasis added); *see* 1 BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 225–30 (8th ed., 3d rev. ed. 1914) (emphasis added).

265 WEBSTER'S COLLEGIATE DICTIONARY 54 (3d ed. 1916) (emphasis added).

266 *See* Gordon v. United States, 74 U.S. 188, 194 (1868) (emphasis added); Deal v. Thompson, 151 P. 856, 857 (Okla. 1915) ("Arbitration is the submission of some disputed matter to selected *persons*, and the substitution of their decision or award for the judgment of the established tribunals of justice.") (emphasis added); John A. Donahue & Son v. Barclay White Co., 9 Pa. D. & C. 303, 304 (Ct. Com. Pl. 1927) ("'Arbitration' is defined by Webster as the 'act of arbitrating; especially the hearing and determination of a case between parties in controversy, by a *person or persons* chosen by the parties . . . .'") (emphasis added).

267 WEBSTER'S, *supra* note 265, at 719; *see also* BLACK'S, *supra* note 263, at 895 (defining a "person" as a "human being").

era before "robot" and "computer" entered the lexicon[268]—was a "mechanical contrivance."[269] Thus, in 1925, the ordinary meaning of "arbitration" was dispute resolution with a human at the helm. And in turn, an agreement for automated procedures falls outside the scope of Section 2 of the FAA and is not "valid, irrevocable, and enforceable" under federal law.[270]

The FAA's other sections reinforce this conclusion. Words that "seem ambiguous in isolation [are] often clarified by the remainder of the statutory scheme."[271] Two of the FAA's core components indicate that it only applies to determinations by humans. First, Section 5 states that if the parties do not select an arbitrator or choose one who cannot serve, the court must appoint a substitute or substitutes "who shall act under the . . . agreement with the same force and effect as if *he* or *they*

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268 "Robot" was coined in 1920 and was probably not a common word just half a decade later. *See Science Diction: The Origin Of The Word "Robot,"* NPR (Apr. 22, 2011), https://www.npr.org/2011/04/22/135634400/science-diction-the-origin-of-the-word-robot# [https://perma.cc/5HMZ-7MCP]; Louis Marx & Co. v. United States, 40 Cust. Ct. 610, 611 (Cust. Ct. 1958) (citing primitive-seeming definitions of "robot"). Similarly, "'computer' . . . first came to mean an electronic device used to store and communicate information (and all of its subsequent functions) only in the 1940s." Oliver Tearle, *The Curious Origin of the Word "Computer,"* INTERESTING LITERATURE (Feb. 2020), https://interestingliterature.com/2020/02/origin-word-computer-etymology/ [https://perma.cc/58L5-QJZE].

269 WEBSTER'S, *supra* note 265, at 589; Corning v. Burden, 56 U.S. 252, 267 (1853) ("The term machine includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result."); Simon, Buhler & Baumann v. United States, 8 U.S. Cust. App. 273, 277 (Ct. Cust. App. 1918) (explaining that a "machine" is "a mechanical contrivance for utilizing, applying, or modifying energy"); N.K. Fairbank & Co. v. Cincinnati, N.O. & T.P. Ry. Co., 66 F. 471, 475 (C.C.S.D. Ohio 1895), *rev'd sub nom.* N. K. Fairbank & Co. v. Cincinnati, N.O. & T.P. Ry., 81 F. 289 (6th Cir. 1897) (offering a similar definition). Today, the line between "person" and "machine" is even sharper due to a series of cases holding that data is not an out-of-court statement by a declarant and therefore not hearsay. *See* People v. Dinardo, 801 N.W.2d 73, 79 (Mich. Ct. App. 2010) ("A machine is not a person and therefore not a declarant capable of making a statement."); *see also* City of LaVergne v. Gure, 2022 WL 3709387, at *3 (Tenn. Ct. App. Aug. 29, 2022) ("Google Maps is not a person."); Davis v. State, 2013 WL 3294716, at *2 (Tex. App. June 26, 2013) ("[A] computer[is] not a person."); United States v. Lamons, 532 F.3d 1251, 1263 n. 23 (11th Cir. 2008) (contrasting machines and persons).

270 9 U.S.C.A. § 2 (West 2022).

271 Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014) (quoting United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988)); *see also* Whitman v. Am. Trucking Ass'ns., Inc, 531 U.S. 457, 466 (2001) ("Words that can have more than one meaning are given content . . . by their surroundings."); SCALIA & GARNER, *supra* note 247 at 167 ("[A] judicial interpreter [should] consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

had been specifically named therein."[272] The personal pronouns are telling. For example, the Patent Act requires an inventor to execute an oath that "such individual believes *himself* or *herself* to be the original inventor."[273] In 2022, the Federal Circuit relied on the italicized words to hold that an AI system cannot be an inventor.[274] Likewise, the FAA's use of "he" and "they" suggests that arbitrators "must be natural persons."[275]

Second, Section 10's grounds for overturning an award envision human arbitrators. That provision allows courts to vacate a ruling that was tainted by serious misconduct, such as "where there was evident partiality or corruption in the arbitrators."[276] In 1925, "partiality" referred to "biased"[277] and "corruption" meant conduct "done with a wrongful intent to acquire some improper advantage for one's self."[278] Machines are incapable of these forms of wrongdoing. Indeed, they do not harbor prejudice or feather their own nests. These "textual features" of the FAA undercut the idea that "arbitration" encompasses disputes submitted to algorithms.[279]

Finally, the statute's legislative history is unlikely to move the proverbial needle. Some judges refuse to look beyond the text,[280] and those that do will find a record that the Court has called "quite sparse."[281] Supporting the strongest argument that robot arbitration is consistent with the FAA are passages

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272 9 U.S.C.A. § 5 (West 2022).

273 35 U.S.C.A. § 115(b)(2) (West 2022).

274 Thaler v. Vidal, 43 F.4th 1207, 1211 (Fed. Cir. 2022) (reasoning that the Patent Act "does not also use 'itself,' which it would have done if Congress intended to permit non-human inventors."). Admittedly, the statute in *Thaler* also referred to inventors as "individual[s]," which made it even clearer that they needed to be humans. *See id.*

275 *Id.* at 1210.

276 9 U.S.C.A. § 10(a)(2) (West 2022).

277 WEBSTER'S, *supra* note 265, at 702 (defining "partiality" as "the state of being partial" and "partial" as "biased.")

278 Hamburg-Am. Steam Packet Co. v. United States, 250 F. 747, 758 (2d Cir. 1918); *cf.* BOUVIER'S, *supra* note 264, at 688 (stating that a corrupt act is "done with an intent to give some advantage inconsistent with official duty and the rights of others"); BLACK'S, *supra* note 263, at 277 ("[A] vicious and fraudulent intention to evade the prohibitions of the law.").

279 Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008) (holding that the FAA does not allow parties to expand judicial review of arbitral awards because that would "rub too much against the grain" of the plain language of Section 9 and Section 10).

280 *Compare* Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985) ("Because we find the statute ambiguous on its face, we seek guidance in the statutory structure, relevant legislative history, [and] congressional purpose.") *with* Azar v. Allina Health Servs., 139 S. Ct. 1804, 1814 (2019) ("'[L]egislative history is not the law.'") (quoting Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1631 (2018)).

281 Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).

in the House Report and hearing transcripts that show that Congress wished to streamline dispute resolution.[282] As noted, it is hard to imagine a faster and more efficient way of settling conflict than submitting it to AI.[283]

Yet the record also reveals the tension between "arbitration" and robot procedures. Some witnesses argued that arbitration was better than litigation because arbitrators—unlike judges—were free to ignore black-letter law and instead apply industry customs. For example, Julius Henry Cohen, who drafted the FAA, claimed that it ameliorated "[t]he failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world."[284] Likewise, Alexander Rose, who testified on behalf of the Arbitration Society of America, explained that arbitration entrusts cases "to a man who is familiar with the subject of the controversy" and "can hear it . . . free from technicality."[285] AI arbitration is the opposite of what Cohen and Rose described. Because algorithms generate awards based entirely on precedent, they cannot consider unwritten norms, "the law of the shop,"[286] or their own "sense of right and justice."[287] Accordingly, the legislative history is unlikely to be conclusive: it only vaguely relates to robot arbitration and, in any event, cuts both ways.

Three complications deserve mention. First, one might object that my reading of the FAA would preclude entities from

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282 *See* H.R. REP. NO. 68-96, at 2 (1924) ("It is practically appropriate that [passing the FAA] should be taken at this time when there is so much agitation against the costliness and delays of litigation."); Joint Hearings, *supra* note 129, at 10 (statement of W.H.H. Piatt, Chairman of the American Bar Association's Committee on Commerce, Trade, and Commercial Law) (explaining that arbitration "reliev[es] the burden [of the courts]" and "reduc[es] controversies"); *see also* Hiro N. Aragaki, *The Federal Arbitration Act As Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1963 (2014) (arguing that the FAA, like the Federal Rules of Civil Procedure, was an antidote to the formalistic judicial system of the time, in which "trivial yet unforgiving procedural requirements created unnecessary delay and expense").

283 *See supra* text accompanying notes 100–104.

284 Joint Hearings, *supra* note 129, at 35. Cohen predicted that parties would reject generalist judges for arbitrators who were experts in the field: "bankers, merchants, [and] architects." *Id.* at 27.

285 *Id.* at 27.

286 Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959) (describing how arbitrators evaluate "not judge-made principles of the common law but the practices, assumptions, understandings, and aspirations of the going industrial concern").

287 Joint Hearings, *supra* note 129–132, at 14 (statement of Julius Henry Cohen). Long after the FAA took effect, the conventional wisdom was that arbitrators did not always follow the law. *See supra* text accompanying notes 130–31.

being arbitrators. But that conclusion does not follow. "Person" has long been a capacious term that includes certain organizations.[288] For instance, the Dictionary Act of 1871, which governed when Congress passed the FAA, defined "person" to include corporations.[289] Thus, requiring arbitrators to be "person[s]" would not stop parties from selecting law firms, accounting companies, or other businesses to preside over their cases.[290]

Second, thorny questions may arise about the allocation of power between human arbitrators and AI. Suppose a provider offers a service in which an algorithm takes the first crack at resolving a case, but a person can veto the judgment. Or what if a human arbitrator uses an advanced legal analytics tool rather than conducting old-fashioned research on Westlaw or Lexis? Are these examples "arbitration" under Section 2 of the FAA?

These problems are tough but solvable. Indeed, courts have drawn similar lines before. Recall that some states use algorithmic risk assessments during sentencing.[291] In *State v. Loomis*, the Wisconsin Supreme Court allowed judges to consider this data so long as it is not "the determinative factor in deciding whether the offender can be supervised safely and effectively in the community."[292] Likewise, courts could permit arbitrators to use AI on the condition that they do not treat the output as conclusive. This would ensure that hybrid human/AI processes under the FAA have meaningful input from a "person."[293]

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288 *See* United States v. Amedy, 24 U.S. 392, 412 (1826) ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable."); Cadle v. Town of Baker, 149 P. 960, 961 (Mont. 1915) (describing a statute in which "persons" meant "any individual, male or female, and, where consistent with collective capacity, to any committee, firm, partnership, club, organization, association, corporation, or other combination of individuals"); BLACK'S, *supra* note 263, at 895 (distinguishing between "natural persons" and "artificial persons," which are "created and devised by law for the purposes of society and government, called 'corporations' or 'bodies politic'").

289 United States v. Havelock, 664 F.3d 1284, 1289 (9th Cir. 2012) (quoting Act of Feb. 25, 1871, Ch. 71, § 2, 16 Stat. 431).

290 And in any event, "virtually no publicly available cases of legal persons having been appointed as arbitrators are known." Joao Ilhao Moreira & Riccardo Vecellio Segate, *The "It" Arbitrator: Why Do Corporations Not Act as Arbitrators?*, 12 J. INT'L. DISP. SETTLEMENT 525, 526 n.5 (2021).

291 *See supra* text accompanying note 18.

292 State v. Loomis, 881 N.W.2d 749, 768 (Wis. 2016).

293 Proposals to use a "human in the loop" to defuse the dangers of AI are increasingly common. *See* Andrew Keane Woods, *Robophobia*, 93 U. COLO. L. REV. 51, 84 (2022); Wu, *supra* note 5, at 2003 ("In the future, the very fact of human decision—especially when the stakes are high—may become a mark of fairness."). *But cf.* Aziz Z. Huq, *A Right to A Human Decision*, 106 VA. L. REV. 611, 686 (2020)

Third, although I have assumed that the definition of "arbitration" under the FAA is a matter of federal law, circuits disagree on this topic. In the late 1980s and early 1990s, the Fifth and Ninth Circuits held that state law supplies the meaning.[294] Since then, however, several Ninth Circuit judges have sharply questioned this conclusion.[295] Also, the First, Second, and Tenth Circuits (as well as district courts) have reasoned that Congress wanted the uniformity that comes with a federal definition.[296] My analysis reflects the growing consensus that the subject is a matter of federal law.

Nevertheless, if I am wrong on this score, it would not undermine my conclusion. There is no practical difference between my theory—that automated procedures are not "arbitration" under Section 2 as a matter of federal law—and a rule that allows each state to decide whether automated procedures are "arbitration" under Section 2. Seen through my lens, the FAA does not make agreements for robot arbitration specifically enforceable. Yet because states can mandate arbitration for matters that the FAA excludes, nothing bars state lawmakers from authorizing AI procedures.[297] Alternatively, if the Court defies expectations and holds that jurisdictions can specify for themselves what counts as "arbitration" under Section 2, then we simply take a shorter path to the same destination. Either way, the future of robot arbitration will be up to states.

(arguing that stakeholders should be entitled to nothing more than the right to a decision by a "well-calibrated machine").

294 *See* Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058, 1062-63 (5th Cir. 1990); Wasyl, Inc. v. First Bos. Corp., 813 F.2d 1579, 1582 (9th Cir. 1987).

295 *See* Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n, 218 F.3d 1085, 1091 (9th Cir. 2000) (Tashima, J., concurring); *id.* at 1091-92 (McKeown, J., concurring).

296 *See* Fit Tech, Inc. v. Bally Total Fitness Holding Corp., 374 F.3d 1, 6 (1st Cir. 2004) ("Assuredly Congress intended a 'national' definition for a national policy."); Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, 707 F.3d 140, 144 (2d Cir. 2013) ("[A]pplying state law would create 'a patchwork in which the FAA will mean one thing in one state and something else in another.'") (quoting Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat. Ass'n as Tr. for Tr. No. 1, 218 F.3d 1085, 1091 (9th Cir. 2000)) (Tashima, J., concurring); Salt Lake Tribune Publ. Co. v. Mgmt. Planning, Inc., 390 F.3d 684, 688 (10th Cir. 2004) ("Because federal law applies nationally, we assume that Congress desires national uniformity in the application of its laws."); Martinique Properties, LLC v. Certain Underwriters at Lloyd's London, 567 F. Supp. 3d 1099, 1105 (D. Neb. 2021) ("In accordance with the FAA's intent to create a uniform national arbitration policy, this Court will apply federal common law to determine the meaning of 'arbitration.'"), *aff'd*, 60 F.4th 1206 (8th Cir. 2023).

297 *See* Arafa v. Health Express Corp., 233 A.3d 495, 509 (N.J. 2020) (holding that state arbitration law "may apply to arbitration agreements even if parties to the agreements are exempt under . . . the FAA").

Accordingly, because the FAA covers clauses that call for a "person" to resolve disputes, state policymakers will determine whether to permit automated arbitration. As I discuss next, allowing individual jurisdictions to regulate AI processes also makes sense on normative grounds.

C. The Case for Federalism

This section compares my thesis to the rival approaches of banning robot dispute resolution or determining that it is "arbitration" under the FAA. It shows that allowing states to experiment strikes an ideal compromise between these extremes.

Congress could respond to the emergence of robot arbitration by prohibiting it. For instance, England, Scotland, and France have declared that an arbitrator must be an "individual"[298] or a "natural person."[299] Because the U.S. has shown rising interest in regulating both arbitration[300] and AI,[301] it might follow suit.

However, a national ban on automated arbitration could be counterproductive. For one, as I have argued above, the process would likely facilitate access to justice by propelling

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298 Arbitration (Scotland) Act 2010 r. 3, https://www.legislation.gov.uk/asp/2010/1/schedule/1 [https://perma.cc/E6BY-PQS8] ("Only an individual may act as an arbitrator.").

299 Décret 2011-48 du 13 Janiver 2011 Portant Réforme de L'arbitrage, https://www.legifrance.gouv.fr/codes/id/LEGIARTI000023450931/2011-05-01; Crowther & Anor v. Rayment & Anor [2015] EWHC (Ch) 427, [30] https://www.casemine.com/judgement/uk/5a8ff74460d03e7f57eaa9f0 ("Only a natural person . . . can be an arbitrator.").

300 Until recently, arbitration reform in Washington was considered a lost cause. Since the 1990s, conservatives have torpedoed more than 130 proposals to dial back the FAA. *See* Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1332 (2011). But this streak ended in March 2022, when President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which amends the FAA, invalidating arbitration clauses in cases that relate to sexual misconduct. *See* S. 2342, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2342/text; *see also* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1, 1–2 (2022). Likewise, later that month, the House (but not the Senate) approved the Forced Arbitration Injustice Repeal Act, which would essentially exempt consumer and employment disputes from the FAA. *See* FAIR Act of 2022, H.R. 963, 117th Cong. (2022) https://www.congress.gov/bill/117th-congress/house-bill/963/all-actions?r=19&s=1&q=%7B%22action-by%22%3A%22Senate%22%7D.

301 *See, e.g.*, *Blueprint for an AI Bill of Rights*, THE WHITE HOUSE, https://www.whitehouse.gov/ostp/ai-bill-of-rights/ (outlining five broad principles "that should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence.").

disputes through the system and reducing costs.[302] Moreover, AI decision making might solve the mass arbitration quandary by providing class action-style relief to plaintiffs while sparing defendants from being bludgeoned by administrative fees.[303] Outlawing robot arbitration would prevent parties from reaping these benefits.

In addition, although I have focused on *forced* arbitration, a categorical embargo like the European statutes would extend to commercial disputes between businesses.[304] Unlike the consumer and employment context, where a prohibition might be justified by the need to protect individuals from corporate overreach, it is not clear why the law should prevent two equally powerful parties from submitting claims to an algorithm. Thus, barring AI arbitration would go too far.

But at the opposite pole, finding that the FAA controls would make it impossible for state lawmakers to limit the process. As noted, the FAA preempts state statutes that express hostility to arbitration.[305] Thus, a state law that tried to invalidate clauses mandating AI dispute resolution would be dead on arrival.[306]

Courts might be equally powerless. For years judges voided one-sided arbitration clauses under the unconscionability doctrine.[307] But in the 2010s the Supreme Court announced that the FAA preempts any application of state law that "interferes with fundamental attributes of arbitration,"[308] such as its "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[309]

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302 *See supra* text accompanying notes 232–234.

303 *See supra* text accompanying note 236–242.

304 *See supra* text accompanying note 298–299. Of course, Congress could chart a different course that England, Scotland, and France and only proscribe robot arbitration in certain contexts (including perhaps the consumer and employment settings).

305 *See* AT&T Mobility LLC. v. Concepcion, 563 U.S. 333, 341 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."); *see also supra* text accompanying notes 134–140.

306 *Cf.* Tantaros v. Fox News Network, LLC., No. 1:19-CV-7131 (ALC), 2022 WL 4614755, at *2 (S.D.N.Y. Sept. 30, 2022) ("[T]he FAA prevents state legislatures from passing laws that exempt certain claims from arbitration.").

307 *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 692 (Cal. 2000); David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012).

308 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

309 Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010); *cf.* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) (referring to arbitration's speed and simplicity and inexpensiveness).

Although lower courts have struggled to understand this language, some read it to preclude them from invalidating a term that shortens the arbitration or selects the decision maker.[310] Because a forced robot arbitration provision does both things, the FAA might preempt any judicial decision that found that such a clause is too unfair to enforce.

Granting robot arbitration this immunity would be dangerous given its potential to cause injustice. As noted, one of the strongest critiques of forced arbitration is that it deters claims.[311] Aside from the unique setting of mass filings "almost no consumers or employees 'do' arbitration at all."[312] Plaintiffs' lawyers have long been reluctant to pursue complaints in the private forum because they do not believe that it gives their clients a fair shake.[313] The prospect of having to submit claims

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310 *See* OTO LLC. v. Kho, 447 P.3d 680, 724 (Cal. 2019) (Chin, J. dissenting) (opining that any state rule that makes arbitration slower and more expensive should be preempted); *cf.* Lucas v. Hertz Corp., 875 F. Supp. 2d 991, 1007 (N.D. Cal. 2012) (employing the same logic); *cf.* Trout v. Organizacion Mundial de Boxeo, Inc., 965 F.3d 71, 79, 81 n.8 (1st Cir. 2020) (invalidating provision that gave one party "exclusive control over the appointment of the arbitrators who will decide his claims" taking pains to note that the other party did not argue that this use of the unconscionability doctrine thwarted a "fundamental attribute of arbitration"). To be fair, this appears to be an extreme minority view. *See* Brown v. MHN Gov't Servs., Inc., 306 P.3d 948, 953 (Wash. 2013) (rejecting the proposition "that courts cannot rely on general unconscionability principles if they interfere with the fundamental attributes of arbitration such as its informality and speed"). For example, courts continue to find that unreasonable discovery limitations and stringent filing deadlines are unconscionable even though both make the arbitration faster (and perhaps cheaper). *See, e.g.*, Narayan v. Ritz-Carlton Dev. Co., 400 P.3d 544, 554 (Haw. 2017) (refusing to enforce a "discovery provision [that] places severe limitations on the disclosure of relevant information"); Castillo v. CleanNet USA, Inc., 358 F. Supp. 3d 912, 940 (N.D. Cal. 2018) ("Courts have found that arbitration agreements that impose a shorter limitations period than is permitted by statute may be unconscionable . . . ."). Similarly, despite the Court's rhetoric about the sanctity of arbitration selection, judges do not hesitate before finding that "a provision in an arbitration agreement which allows one party to unilaterally select the presiding arbitrator (or arbitrators) is unconscionable." Jean v. Bucknell Univ., No. 4:20-CV-01722, 2021 WL 1521724, at *14 (M.D. Pa. Apr. 16, 2021); Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 728 (N.D. Cal. 2012), *aff'd*, 549 F. App'x 692 (9th Cir. 2013) (holding that "nonenforcement of [a clause providing for] . . . the unilateral selection of an arbitrator . . . do[es] not undermine the fundamental attributes of arbitration.").

311 *See supra* text accompanying notes 165–166.

312 Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2814-15 (2015).

313 *See* Schwartz, *supra* note 152, at 1329 ("[T]he majority of plaintiffs' lawyers prefer litigation because they believe arbitration to be unfair, relatively speaking."); *see also* Mark D. Gough, *Employment Lawyers and Mandatory Arbitration: Facilitating or Forestalling Access to Justice?*, *in* 22 MANAGING AND RESOLVING WORKPLACE CONFLICT 105, 119 (2016) (reporting that a survey of 1,256 plaintiffs'-side

to a robot would likely heighten this skepticism and aggravate the arbitration drought.

Whether AI decision making can be even-handed is another huge question mark. Indeed, as discussed, robots might embody the idiosyncrasies of their programmers.[314] Similarly, as the ProPublica audit of sentencing programs in Florida revealed, an ML decision maker could recycle the prejudices inherent in the legal authorities on which it trained, disadvantaging groups that have enjoyed less success in the court system.[315] In fact, even a neutral system might produce skewed outcomes. Recall that studies of forced arbitration find that "extreme repeat players"—the businesses that arbitrate the most—are more likely to win than one-shot entities.[316] One explanation for this disparity is experience: frequently arbitrating businesses discover how to succeed in this unique procedural and evidentiary format.[317] Because AI arbitration will be distinctive in its own way, extreme repeat players might capitalize on their familiarity with the process and expand their advantage. Thus, there may be good reasons for states to police forced robot arbitration clauses, which they could not do if the FAA applies.

Given this uncertainty, letting each jurisdiction decide whether to allow forced robot arbitration is superior to an all-or-nothing approach. Federalism famously allows states to serve as proving grounds for new ideas.[318] Permitting fifty flowers to

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employment attorneys accepted 19% of clients who were free to litigate but only 11% of those who needed to arbitrate); *cf.* Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 105, 112 (2014) (finding that employees who assert discrimination claims in the court system are 40% more likely to win and recover twice as much as their counterparts in arbitration).

314 *See supra* text accompanying notes 115–117.

315 *See supra* text accompanying notes 118–120. *But see* Eidenmüller & Varesis, *supra* note 43, at 51 (asserting that algorithms can render "more rational, consistent, and unbiased decisions when compared to human[s]"); Angela Chen, *How Artificial Intelligence Can Help Us Make Judges Less Biased*, THE VERGE (Jan. 17, 2019), https://www.theverge.com/2019/1/17/18186674/daniel-chen-machine-learning-rule-of-law-economics-psychology-judicial-system-policy [https://perma.cc/RGJ3-WBA7] (describing how human judges can be influenced by factors ranging from the weather to the outcome of football games).

316 *See supra* text accompanying notes 167–168.

317 *See* Colvin & Gough, *supra* note 160, at 1033 (finding that the odds of an employee win decreased each time an employer arbitrated).

318 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous [s]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.");

bloom is an ideal way to embrace unproven technology because it allows authorities to sample "a diversity of policies and evaluations of related outcomes before forming more lasting federal regulations."[319] Therefore, reading Section 2 to exclude robot arbitration would generate valuable information about how the process functions.

Admittedly, at least at first, my thesis may be the equivalent of a nationwide ban. Like the FAA, state statutes only validate contracts to settle claims by "arbitration."[320] Thus, they arguably only govern agreements to allow a "person" to resolve conflict.[321] Also, roughly twenty states have passed the Revised Uniform Arbitration Act ("RUAA"), which specifies that an "arbitrator" is "an *individual* appointed to render an award."[322]

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cf. Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (noting that states can conduct "social experiments"). Likewise, law and economics scholars have theorized that federalism creates a race to the top as stakeholders vote with their feet and move to states that have adopted ideal rules. *See* Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 420-22 (1956).

319 Jesse Woo, Jan Whittington & Ronald Arkin, *Urban Robotics: Achieving Autonomy in Design and Regulation of Robots and Cities*, 52 CONN. L. REV. 319, 353-54 (2020); *see also* Re & Solow-Niederman, *supra* note 5, at 279 (arguing in the context of robot judges that "[t]he most promising way to facilitate gradual, imperfectly foreseen legal adaptation is to embrace uncertainty through a policy of experimentation."); J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. CALIF. L. REV. 523, 525 (2001) (arguing that federalism fosters informed debate).

320 *See, e.g.*, CAL. CIV. PROC. CODE § 1281 (West 2022); N.Y. C.P.L.R. § 7501 (McKinney 2022); *see also infra* sources cited notes 322–323.

321 *See supra* text accompanying notes 263–266. There is one wild card. Several states have adopted or amended their arbitration statutes within the last two decades. *See, e.g.*, ALASKA STAT. ANN. § 09.43.300(a) (West 2023); ARIZ. REV. STAT. ANN. § 12-3003(A)(1) (West 2023); FLA. STAT. ANN. § 682.013(1) (West 2023); KAN. STAT. ANN. § 5-425(a) (West 2023); W. VA. CODE ANN. § 55-10-5(a) (West 2023). Near the end of the twentieth century, the definition of "arbitration" evolved from a dispute resolution process conducted by a "person" to one overseen by "a neutral third party." *Compare* BLACK'S LAW DICTIONARY 134 (4th ed. 1968) *with* BLACK'S LAW DICTIONARY 105 (6th ed. 1990). "Third party" is broader than "person." *See, e.g.*, Persaud v. Capewell Components Co., LLC, No. CV990590484, 2001 WL 808396, at *1 (Conn. Super. Ct. June 19, 2001) ("The dictionary definition of 'third party' is '[o]ne not a party . . . to . . . an action.'") (quoting BLACK'S LAW DICTIONARY (6th ed.1990)). Thus, these modern statutes' definitions of "arbitration" might sweep more broadly than the FAA's and include automated systems.

322 UNIF. ARB. ACT § 1(2) (UNIF. L. COMM'N 2000) (emphasis added); *see also* ARK. CODE. ANN. § 16-108-201(2) (West 2023); COLO. REV. STAT. ANN. § 13-22-201(2) (West 2023); CONN. GEN. STAT. ANN. § 52-407aa(2) (West 2023); D.C. CODE ANN. § 16-4401(2) (West 2023); FLA. STAT. ANN. § 682.011(2) (West 2023); HAW. REV. STAT. ANN. § 658A-1 (West 2023); KAN. STAT. ANN. § 5-423(b) (West 2023); MICH. COMP. LAWS ANN. § 691.1681(2)(b) (West 2023); MINN. STAT. ANN. § 572B.01(2) (West 2023); NEV. REV. STAT. ANN. § 38.209 (West 2023); N.J. STAT. ANN. § 2A:23B-1 (West 2023); N.M. STAT. ANN. § 44-7A-1(b)(2) (West 2023); N.C. GEN. STAT. ANN. § 1-569.1(2) (West 2023); N.D. CENT. CODE ANN. § 32-29.3-01(2) (West 2023); OKLA. STAT. ANN. tit. 12, § 1852(2) (West 2023); OR. REV. STAT. ANN. § 36.600(2) (West 2023); 42 PA. STAT.

Finally, as noted, about a dozen jurisdictions exempt certain parties, causes of action, or types of contracts from arbitration, such as employees, tort complaints, and loans.[323] Even if these states updated their definitions of "arbitration" or "arbitrator" to include robot-based processes, they would still preclude forced arbitration in some contexts. Thus, jurisdictions would need to affirmatively authorize forced AI arbitration.

Nevertheless, for two reasons, delegating this issue to the states still makes sense. First, the potential risks of forced robot arbitration recommend a cautious approach. Because corporations might weaponize the process, it is better to start with the valve closed but give jurisdictions the freedom to open it—as my reading of the FAA does. Second, on the other side of the ledger, state lawmakers can be trusted to adopt AI arbitration if the benefits outweigh the hazards. In sharp contrast to Congress—which has amended the FAA once in a century[324]—states actively revise their arbitration laws. Since 2000, several American states have passed new statues on the topic,[325] with some even importing arbitration into milieus that the FAA arguably does not reach.[326] This track record elucidates that states will not hesitate to embrace robot arbitration if it turns out to be socially valuable.

AND CONS. STAT. § 7321.2 (West 2023); UTAH CODE ANN. § 78B-11-102(2) (West 2023); WASH. REV. CODE ANN. § 7.04A.010(2) (West 2023); W. VA. CODE ANN. § 55-10-3 (West 2023).

323 *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-3003(B)(1)-(3) (2023) (invalidating arbitration clauses in the insurance, banking, and employment sectors); CAL. LAB. CODE § 229 (West 2023) (same for claims of lost wages); D.C. CODE ANN. § 16-4403(c)(1) (West 2023) (same for consumers and insurance); GA. CODE ANN. § 9-9-2(c)(1)-(6) (West 2023) (same for medical malpractice claims, small loans, insurance contracts, the purchase of consumer goods); IND. CODE ANN. § 34-57-2-1(b) (West 2023) (same for consumer contracts); IOWA CODE ANN. § 679A.1(2)(a)-(b) (West 2023) (same for contracts of adhesion and employment); *see also supra* text accompanying note 130.

324 *See supra* text accompanying note 300.

325 *See supra* text accompanying note 321.

326 For instance, it is anyone's guess whether the FAA applies to an arbitration clause in a will or a trust. *See* David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1030-32 (2012); E. Gary Spitko, *The Will As an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49, 62-63 (2016). But states have increasingly passed laws that validate these provisions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10205; COLO. REV. STAT. ANN. § 15-5-113(1); FLA. STAT. ANN. § 731.401(1) (West 2023); MO. ANN. STAT. § 456.2-205(1) (West 2023); N.H. REV. STAT. ANN. § 564-B:1-111A (West 2023); OHIO REV. CODE ANN. § 5802.05(A) (West 2023); S.D. CODIFIED LAWS § 55-1-54 (West 2023).

CONCLUSION

Companies and arbitration providers have exploited the Court's imperial view of the FAA to establish their own procedural fiefdoms: slashing statutes of limitations,[327] cherry-picking a forum,[328] capping discovery,[329] requiring confidentiality,[330] overriding the American Rule,[331] waiving class action rights,[332] mandating that evidentiary hearings occur over Zoom,[333] and selecting the arbitrator.[334] This Article has argued that these entities are on the cusp of requiring plaintiffs to resolve claims through AI systems. The signs are everywhere—in the government's increasing use of robots,[335] the recent strides in legal analytics,[336] the blooming debate about algorithmic courts,[337] and the efforts by defendants and providers to address

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327 *See, e.g.*, Barnett v. Concentrix Sols. Corp., No. CV-22-00266-PHX-DJH, 2022 WL 17486813, at *8 (D. Ariz. Dec. 7, 2022) (featuring an arbitration clause that reduced the statute of limitations under the Fair Labor Standards Act from two or three years to six months).

328 *See, e.g.*, Campbell v. Marshall Int'l, LLC, 623 F.Supp.3d 927, 933 (2022) (featuring a contract that "was executed and performed in Illinois" but called for arbitration in Colorado).

329 *See, e.g.*, Estate of Ruszala v. Brookdale Living Cmtys., Inc., 1 A.3d 806, 821 (N.J. Super. Ct. App. Div. 2010) (reasoning that the discovery restrictions in a nursing home agreement were "clearly intended to thwart plaintiffs' ability to prosecute a case"); *cf.* Beco v. Fast Auto Loans, Inc., 302 Cal. Rptr. 3d 168, 183 (Ct. App. 2022) (involving a contract that "put[] the issue of whether to allow discovery or not entirely in the arbitrator's hands").

330 *See, e.g.*, Kane v. Mednax Servs., Inc., No. 2:22-CV-0159-TOR, 2022 WL 16748784, at *6 (E.D. Wash. Nov. 7, 2022) (grappling with a provision stating that "[a]ny . . . arbitration shall be treated as confidential by all parties thereto" and that "[n]either party nor the arbitration panel may disclose the existence, content, or result of any arbitration hereunder without the prior written consent of both parties").

331 *See, e.g.,* Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1025 (9th Cir. 2016) (collecting cases in which a drafter has given itself the right to collect attorneys' fees if it prevails but denied that right to the other party).

332 *See supra* text accompanying note 157.

333 *See* Horton, *supra* note 208, at *22-23 (describing how some companies require arbitration through a fledgling provider called New Era ADR, which operates remotely).

334 *See, e.g.*, Cuenca-Vidarte v. Samuel, No. GJH-20-1885, 2021 WL 5742066, at *10 (D. Md. Nov. 30, 2021) (evaluating a clause that allowed the defendant to choose the arbitration provider); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) (invalidating "a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker").

335 *See supra* text accompanying note 15–18.

336 *See supra* Part I.A.

337 *See supra* text accompanying Part I.B.

the mass arbitration "[s]hakedown."[338] When this happens, the question of all questions will be whether robotic procedures qualify as "arbitration" under Section 2 of the FAA. This Article has shown that they do not. Finally, the Article has explained why empowering states is an ideal way to regulate an untested phenomenon that may someday transform the American civil justice system.

[338] DoorDash Opposition, *supra* note 182, at 2; *see also supra* text accompanying notes 236–240.