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Arbitration Overcorrection? Interpreting Arbitration Clauses After *Morgan v. Sundance*

Peter Constable Alter

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Arbitration Overcorrection? Interpreting Arbitration Clauses After *Morgan v. Sundance*

Peter Constable Alter∗

In 2022's Morgan v. Sundance, Inc.*, the Supreme Court ruled that the Federal Arbitration Act (FAA) does not allow courts to "devise novel rules to favor arbitration over litigation." Applying that principle, the Court held that the Eighth Circuit erred by grafting an arbitration-specific prejudice requirement onto the generally applicable waiver standard when deciding whether a defendant waived its right to arbitrate by proceeding in court. The Supreme Court traced this error to a misunderstanding of the FAA's core purpose. While courts, including the Supreme Court itself, routinely interpreted the FAA as establishing a liberal "policy favoring arbitration," the Court explained that this policy was "merely an acknowledgement" that the FAA was meant to place arbitration agreements "upon the same footing as other contracts." Thus, that purpose could not justify a rule favoring arbitration relative to other forums.*

Against the backdrop of decades of arbitration-friendly decisions from the Supreme Court, Morgan*—a unanimous decision striking down a rule making it easier to arbitrate—is a landmark. The waiver-prejudice rule it invalidated had been applied for decades and was precedent in all but two circuits. And the broader "policy favoring arbitration" was even more widely accepted, a mantra oft-recited in arbitration decisions addressing myriad issues under the FAA. But as explained in* Morgan*, arbitration is only "favored" relative to historic judicial hostility to arbitration, which the FAA sought to correct by ensuring equal treatment of arbitration agreements and other contracts. So, arbitration-favoring rules are just as suspect as arbitration-disfavoring rules, and represent an overcorrection out of step with the FAA.*

In this Article, I argue that Morgan *requires courts to reconsider another widely accepted doctrine: the "pro-arbitration canon," which directs courts to construe ambiguous arbitration agreements in favor of arbitra-*

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tion. The canon has been applied in every circuit and recited repeatedly by the Supreme Court (albeit usually in dicta). But it is rooted in the same misunderstanding of the "policy favoring arbitration" that led courts to the waiver-prejudice rule at issue in Morgan *and lacks any basis in the text or legislative history of the FAA. Thus, it is precisely the sort of "novel rule[]" favoring arbitration that* Morgan *forbade, and must be abandoned. Instead, consistent with the FAA's equal-treatment purpose, courts faced with an ambiguous arbitration agreement should rely on the generally applicable tools courts use to resolve ambiguity in other contracts.*

I. INTRODUCTION

For decades, the United States Supreme Court has been a hospitable forum for parties hoping to compel arbitration. A few examples tell the tale. Begin with the 1970s and 1980s, when the Court issued decisions affirming the arbitrability of statutory rights like those established by the Securities Act of 1933,[1] Sherman Act,[2] and Racketeer Influenced and Corrupt Organizations Act.[3] Continue into the 1990s, when the Court invalidated state laws imposing arbitration-specific notice requirements[4] and limiting the relief arbitrators could award.[5] Arrive, finally, in the 2000s and 2010s, when the Court issued landmark opinions enforcing arbitration agreements with class-action waivers[6] and confirming the breadth of issues arbitrators may decide.[7] These and other decisions interpreting the Federal Arbitration Act (FAA)[8] reflect a Supreme Court that has played a starring role in expanding arbitration's place on the American dispute-resolution stage.

This decidedly pro-arbitration bent is what makes the Court's 2022 decision in *Morgan v. Sundance, Inc.* so interesting—it is one of the few decisions in recent decades to make it *harder* for a party to compel arbitration.[9] The case addressed a discrete procedural question: What standard applies when analyzing whether a defendant has waived its right to compel arbitration by litigating a case brought in federal court?[10] Before *Morgan*, the answer was relatively uncontroversial. Relying on the FAA's "liberal national policy favoring arbitration,"[11] a supermajority of circuit courts required a showing that the proponent of arbitration acted inconsistently with a known right to ar-

1 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–85 (1989).

2 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).

3 Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987).

4 Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996).

5 Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63–64 (1995).

6 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502–03 (2018).

7 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442 (2006) (deciding that whether a contract containing an arbitration clause was void for illegality was an issue for arbitration, not the courts).

8 9 U.S.C. §§ 1–16.

9 *See* 596 U.S. 411, 413–14 (2022).

10 *Id.* at 413.

11 *Id.* at 418 (quoting Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam)).

bitrate, *plus* a showing of prejudice to the opposing party.[12] This widely accepted rule arose first in 1960s Second Circuit decisions, and had been adopted in every circuit save the Seventh and District of Columbia (both of which applied the standard rule for waiver, conventionally defined as the "intentional relinquishment or abandonment of a known right," a standard lacking any prejudice requirement).[13]

The petitioner in *Morgan* insisted that the supermajority had it wrong, connecting the purported error to a fundamental misunderstanding of the FAA's central purpose.[14] She maintained that the FAA does *not* favor arbitration over litigation, that the statute merely obliges courts to treat arbitration agreements the same as any other contract, and that court-made arbitration-favoring rules are therefore invalid.[15] Given the Court's penchant for enforcing arbitration agreements, even a seasoned observer would have been forgiven for thinking that it would reject the petitioner's argument and uphold the decidedly pro-arbitration prejudice requirement. But that's not what happened.

Instead, in a unanimous opinion, the Court held the arbitration-specific waiver rule invalid under the FAA.[16] The cornerstone of the Court's reasoning was its rejection of longstanding precedent interpreting the FAA as establishing a "policy *favoring* arbitration."[17] Tracing the prejudice requirement's roots to that reading, the Court concluded that courts had been overzealous in their interpretation and application of the FAA's fundamental purpose.[18] Acknowledging that the Court itself had, on occasion, used similar language in analyzing the FAA, it explained that the policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the *same footing* as other contracts."[19] Accordingly, the Court held that the FAA does not allow courts to "devise novel rules to favor arbitration over litigation."[20] Turning to the procedural question

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12 *Id.* at 416 n.1 (collecting cases).

13 *See id.* at 416 n.2 (collecting cases).

14 Brief for Petitioner at 34–35, *Morgan*, 546 U.S. 411 (No. 21-328).

15 *Id.*

16 *Morgan*, 596 U.S. at 419.

17 *See id.* at 418–19 (emphasis added).

18 *See id.*

19 *Id.* at 418 (emphasis added) (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).

20 *Id.*

at issue, the Court held that if courts found waiver at issue, they must simply ask whether there has been an "intentional relinquishment or abandonment of a known right," as they would in any other context, without assessing prejudice.[21]

In this Article, I argue that the implications of *Morgan* go well beyond the discrete waiver doctrine at issue, and undermine a fundamental assumption about how to interpret arbitration agreements.[22] My target is the so-called "pro-arbitration canon."[23] That canon—expressly grounded in the FAA's supposed "policy favoring arbitration," occasionally referenced by the pre-*Morgan* Supreme Court, and followed by every circuit court of appeals—posits that courts must resolve ambiguities in an arbitration provision *in favor of* arbitration.[24] My thesis is this: a literally pro-arbitration canon of construction is incompatible with the FAA as interpreted in *Morgan*, and must be rejected. Instead, courts must interpret ambiguous arbitration agreements using the myriad generally applicable tools used to interpret other ambiguous contracts.

I proceed in four further parts. First, in Part II, I explore the evolution of the "liberal policy favoring arbitration," tracing courts' shifting interpretations of the FAA and concluding with *Morgan*. I continue, in Part III, by examining the pro-arbitration canon's evolution, revealing the canon's inextricable connection to that "liberal policy favoring arbitration." In Part IV, I offer my argument that the pro-arbitration canon is incompatible with the FAA, and that the FAA compels courts to interpret ambiguous arbitration agreements the same as they would any other ambiguous contract. I conclude, in Part V, with the stakes. Courts have applied the canon to compel the arbitration of claims of discrimination, underpayment, and fraudulent inducement, to list just a few examples—even in the face of serious doubts as to whether the parties ever contemplated arbitrating such claims.[25] *Morgan* calls these conclusions into question, and rightly so.

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21 *See id.* at 417 (quoting United States v. Olano, 507 U.S. 725, 733 (1993)).

22 *See* Karla Gilbride, *In* Morgan v. Sundance*, the Supreme Court Strikes a Blow Against Arbitration Exceptionalism*, 26 J. CONSUMER & COM. L. 15, 16 (2022) (arguing that *Morgan*'s implications are broader than the waiver question addressed by the Court).

23 Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1212 (11th Cir. 2021).

24 *See infra* notes 125, 182–85 and accompanying text.

25 *See infra* Section IV.C.

II. THE "LIBERAL POLICY FAVORING ARBITRATION"

In this Part, I recount the birth, life, and rebirth of the FAA's "liberal policy favoring arbitration." I begin with the FAA's genesis, a reaction to and correction of judicial hostility to arbitration that existed in early American law. I then show how courts' understanding of the FAA evolved from one of a statute meant to place arbitration agreements on level footing with other contracts to one of a statute imposing a "liberal . . . policy *favoring* arbitration."[26] I conclude with *Morgan*, its rejection of that interpretation of the FAA, and its retelling of the "policy favoring arbitration" as a doctrine that merely compels courts to treat arbitration agreements the same as any other contract.

A. Judicial Hostility to Arbitration and the FAA's Origins

The FAA's origin story is oft-recited. It begins with the judicial hostility to arbitration that arrived in America with early colonists.[27] Across the Atlantic, pre-dispute arbitration agreements were nonbinding under English common law's "ouster" doctrine—parties could not "oust the power of the court through contract."[28] This common-law approach found footing early in American courts up to and including the United States Supreme Court.[29] Sometimes ruing arbitrators' competence or the absence

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26 *Morgan*, 596 U.S. at 418 (quoting Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam)).

27 Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RSRV. L. REV. 91, 98 (2012).

28 Kenneth F. Dunham, Southland Corp. v. Keating *Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 333–34 (2010) ("The British courts consistently held pre-dispute arbitration agreements to be non-binding."); *see also* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982–83 (2d Cir. 1942) (discussing "the history of the judicial attitude towards arbitration" in England); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 793–96 (2002) (providing an overview of the English common-law treatment of arbitration agreements).

29 *See, e.g.*, Riddlesbarger v. Hartford Ins. Co., 74 U.S. (7 Wall.) 386, 390–91 (1868) ("A stipulation in a policy to refer all disputes to arbitration stands upon a different footing. That is held invalid, because it is an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy."); Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451–52 (1874); *see also* Matteo Godi, Note, *Administrative Regulation of Arbitration*, 36 YALE J. ON REGUL. 853, 857 (2019) ("Courts generally saw arbitration agreements as either 'oust[ing] the courts of jurisdiction' or potentially 'becom[ing] the instrument of injustice.'" (alteration in original)); Wilson, *supra* note 27, at 99 ("Judicial refusal to enforce arbitration agreements was premised primarily on the theory that parties could not 'oust' the jurisdiction of the courts.").

In fact, some pre-FAA American courts refused to enforce arbitration agreements because they "could not guarantee fairness in arbitration and, therefore, needed to protect the rights of citizens by granting access to the courts." *Id.*; *Kulukundis Shipping Co.*, 126

of a full battery of procedural protections in arbitration, courts generally held that pre-dispute arbitration agreements were revocable.[30] Thus, arbitration occurred, but only if the parties agreed to arbitrate an existing dispute.[31]

The winds of change began to blow in the early 1900s. Scholars attribute the turnaround to a comprehensive lobbying effort on behalf of a collection of industries that saw arbitration as a cost-effective alternative to the courts.[32] The effort paid off with laws in several states making pre-dispute arbitration agreements enforceable. The Arbitration Law of New York, for example, "declare[d] that a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties 'shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[33] Illinois, New Jersey, Massachusetts, and Oregon enacted similar laws around the same time.[34]

The lobbying effort eventually reached Congress, where the United States Chamber of Commerce and the American Bar Association, on behalf of a slew of interested parties, pushed for a federal law resembling New York's.[35] The American Bar Association presented a draft, which Congress enacted with minimal edits as the United States Arbitration Act (USAA) in 1925.[36] As told by one scholar, the legislative history is relatively limited but does include a couple notable points.[37] First, the bill's House Report by the Committee on the Judiciary "identified the purpose of

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F.2d at 984 ("That English attitude was largely taken over in the 19th century by most courts in this country.").

30 *See, e.g.*, *Morse*, 87 U.S. at 451 ("Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.").

31 *See id.*

32 *See* Godi, *supra* note 29, at 858–59; Wilson, *supra* note 27, at 99.

33 Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 118 (1924).

34 *See* Godi, *supra* note 29, at 858.

35 Wilson, *supra* note 27, at 99 ("This [New York] state legislation ultimately provided the model for the United States Arbitration Act . . . .").

36 Godi, *supra* note 29, at 858–59 ("[T]he FAA was enacted in 1925—practically unchanged from the draft that the American Bar Association presented.").

37 *Id.*

the bill as making 'valid and enforcible [sic] agreements for arbitration.'"[38] Second, the Report "explained that 'arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.' In other words, through the Act, an 'arbitration agreement is placed upon the same footing as other contracts, where it belongs.'"[39] In short, the legislative history is early evidence that the law was not intended to favor arbitration over litigation; its purpose was merely to ensure that arbitration agreements received equal treatment under the law.

Since its enactment as the USAA in 1925 and subsequent codification as the FAA in 1947, the law's provisions—which impose substantive and procedural requirements[40]—have remained largely constant. Section 2 is the FAA's "substantive mandate"[41] and makes pre-dispute arbitration agreements enforceable:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.[42]

Section 4, in turn, sets forth the procedures applicable where a party wishes to bring a suit to compel arbitration, while section 3 provides a mechanism for the district court to stay proceedings pending the arbitration on application of the parties.[43] The balance of the statute focuses on procedural considerations such as the appointment of an arbitrator,[44] arbitrators' authority to compel testimony and record production,[45] and the vacation, modification, confirmation, and enforcement of arbitration awards.[46]

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38 *Id.* at 858 (alteration in original) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

39 *Id.* at 858–59 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

40 *But see* Dunham, *supra* note 28, at 332, 345 (arguing that the FAA was initially viewed as a procedural statute, not one establishing substantive rights); Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1960–62 (2014) (making a similar argument as Dunham's article).

41 Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 629 (2009).

42 9 U.S.C. § 2.

43 *See id.* §§ 3–4.

44 *See id.* § 5.

45 *See id.* § 7.

46 *See id.* §§ 9–13.

With notable exceptions for transportation workers' employment contracts,[47] the FAA covers all arbitration agreements in any "contract evidencing a transaction involving commerce" or "maritime transaction."[48] It thus represented a dramatic shift in the American dispute-resolution landscape, with eventual implications for all sorts of private agreements.[49] Unsurprisingly then, the FAA has been litigated heavily, offering courts countless opportunities to opine on its meaning and purpose.

B. Toward a "Liberal Policy Favoring Arbitration"

Early on, courts applying the USAA and then the FAA appreciated that the statute was a response to historic judicial hostility to arbitration and was intended to ensure the equal treatment of arbitration agreements and other contracts.[50] That began to change in the late 1940s and 1950s, with courts first describing the FAA as imposing a policy *favoring* arbitration in cases involving inter-merchant commercial disputes.[51] From there, this favoring-arbitration interpretation spread to every circuit, with help from Supreme Court dicta, in cases touching on not just commercial agreements but also consumer and employment contracts.[52]

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47 *See id.* § 1; New Prime Inc. v. Oliveira, 586 U.S. 105, 108 (2019).

48 9 U.S.C. § 2.

49 Although the FAA has since been applied widely to consumer and employment agreements, there are serious doubts as to whether Congress intended for the statute to apply beyond commercial disputes between merchants. *See* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 387–88 (2018) ("All of the congressional testimony, hearings, and reports demonstrate that the FAA applied only to commercial disputes between merchants."); *id.* at 388–89, 388 nn.17–18, 389 n.19 (providing a collection of authority to show how American dispute resolution has changed).

50 Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 910 (2015).

51 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 4 (1983). Some scholars have argued that the "liberal policy favoring arbitration" emerged from the Supreme Court's 1983 decision in *Moses H. Cone*, while recognizing earlier statements of policy in cases analyzing the Labor Management Relations Act. *See* Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 546–47 (2014) ("In fact, the [liberal policy favoring arbitration] appears to represent an entirely new development in arbitration law. For most of the period following the enactment of the FAA, the Court was 'at most, policy-neutral respecting the desirability of arbitration,' with the 'emphatic federal policy in favor of arbitral dispute resolution' emerging only in the wake of Moses H. Cone." (quoting Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 701, 703 (2001))).

This Article, with the benefit of the Supreme Court's decision in *Moses H. Cone*, offers a deeper history, illustrating how the "liberal policy favoring arbitration" developed in lower court FAA decisions for decades before it reached the Supreme Court.

52 Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 704–05 (2001).

The early cases involving the FAA (then the USAA) show courts implicitly or explicitly treating arbitration agreements the same as other contracts, despite some lingering reservations. In one eloquent example, Judge Noble Hand (in an opinion joined by his cousin, Judge Learned Hand) observed that "[a]rbitration sometimes involves perils that even surpass the 'perils of the seas.'"[53] Nevertheless, he continued, parties could not "expect the courts to relieve them from the effect of their deliberate choice" "if they consent to submit their rights to" arbitration.[54] In another early decision, the Southern District of New York explained that the Act merely made specific performance available and that its task was to give an arbitration agreement "'a fair and equitable interpretation,' in line with the dominant intent of the parties," the same as it would any other contract. [55]

The most comprehensive early analysis of the Act's purpose, came in the Second Circuit's 1942 decision *Kulukundis Shipping v. Amtorg Trading Corp.*, authored by Judge Jerome Frank and joined by Judge Learned Hand.[56] Beginning with the hostility shown to arbitration under English common law, the court described the ouster doctrine as a "rationalization" of preexisting prejudices that "became fashionable in the middle of the 18th century."[57] "Give a bad dogma a good name," the court explained of the ouster doctrine, "and its bite may become as bad as its bark."[58] Turning to early American decisions, the court offered what may have been revisionist history, noting that while the "English attitude was largely taken over in the 19th century by most courts in this country," federal courts "feeling bound to comply with the precedents, nevertheless became critical of this judicial hostility" to arbitration agreements.[59] Quoting the House Committee Report, which stated that the Act "placed [an arbitration agreement] upon the same footing as other contracts, where it belongs," the Second Circuit concluded that "[t]he purpose of [the USAA] was deliberately to alter the judicial atmosphere previously existing."[60]

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53 *In re* Canadian Gulf Line, Ltd., 98 F.2d 711, 714 (2d Cir. 1938).

54 *Id.*

55 *In re* Util. Oil Corp., 10 F. Supp. 678, 680 (S.D.N.Y. 1934).

56 *See generally* 126 F.2d 978 (2d Cir. 1942) (analyzing what is permitted under the Federal Arbitration Act).

57 *Id.* at 983.

58 *Id.* at 984.

59 *Id.*

60 *Id.* at 985 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

Nevertheless, lower courts slowly began to describe the FAA as establishing a policy "favoring" arbitration. One of the earliest examples is the 1947 case, *Tejas Development Co. v. McGough Bros.*, where the Fifth Circuit noted "that courts favor arbitrations."[61] Later in the same opinion, however, the court tempered that language, explaining that "the law favors *willing* arbitrations" but "does not favor *unwilling* arbitrations."[62] In another example from 1947, the Northern District of California charted a more aggressive course, writing, "[i]t is axiomatic that the law favors arbitration and that it will be afforded every presumption of validity."[63] A few years later, the Second Circuit in 1953's *Wilko v. Swan* similarly declared that the FAA "evidences a congressional policy to favor arbitration," in holding that the FAA made enforceable an arbitration agreement even if the parties' dispute concerned alleged violations of the federal Securities Act of 1933.[64] The Supreme Court, however, reversed the Second Circuit without invoking the same language, and held Securities Act claims to be nonarbitrable.[65]

Despite the setback of *Wilko*, lower courts through the 1960s and 1970s continued—with gaining momentum—to ascribe a "policy favoring arbitration" to the FAA. One of the most notable examples (given this Article's focus on the implications of *Morgan*) is *Carcich v. Rederi A/B Nordie*, where the Second Circuit cited the "overriding federal policy favoring arbitration" in holding that a party that delayed invocation of an arbitration agreement did not waive its right to arbitrate absent a showing of

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61 165 F.2d 276, 279–80 (5th Cir. 1947).

62 *Id.* at 280 (emphasis added).

63 Lundblade v. Cont'l Ins. Co., 74 F. Supp. 795, 797 (N.D. Cal. 1947).

64 201 F.2d 439, 445 (2d Cir.), *rev'd*, 346 U.S. 427 (1953), *overruled by*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

65 Wilko v. Swan, 346 U.S. 427, 434–35, 38 (1953), *overruled by*, *Rodriguez de Quijas*, 490 U.S. 477. The Court began by observing that the USAA "establishe[d] by statute the desirability of arbitration as an alternative to the complications of litigation"—a more tepid description than the Second Circuit's straightforward declaration. *Id.* at 431. The Court then concluded that courts' and legislatures' "hospitable attitude . . . toward arbitration" was not enough to save the agreement at issue. *Id.* at 432. Contrasting commercial arbitrations concerning simple questions like "the quality of a commodity or the amount of money due under a contract," the Court explained that arbitrators were ill-equipped to address Securities Act violations, which raised complex questions about, for example, the seller's "purpose and knowledge." *Id.* at 435–36. The Court also expressed concerns that such arbitrations did not require an explanation of the award, essentially frustrating the limited judicial review available under the USAA. *Id.* at 436. Thus, the Court reasoned that although the Securities Act would apply in the contemplated arbitration, the significant protections that the Securities Act offered securities purchasers could not be as effectively protected as they would be in courts. *Id.* at 434–38.

prejudice to their adversary.[66] But the Second Circuit was not the only culprit. For example, in 1966 the Seventh Circuit noted that "[w]e look with favor upon arbitration as a means of removing contentions from the area of litigation," in justifying the rule that arbitrators should determine the scope of arbitrability where the question was "fairly debatable" or "reasonably in doubt."[67] Other circuits joined, too.[68]

The Supreme Court was slower on the uptake. Through 1967 and its decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court recognized that "the purpose of Congress [passing the FAA] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."[69] And in 1974's *Scherk v. Alberto-Culver Co.*, the Court quoted legislative history for the proposition that the FAA was "designed to . . . place arbitration agreements 'upon the same footing as other contracts.'"[70] So while the circuits were embracing the "policy favoring arbitration," the Supreme Court held back.

That changed in the 1980s. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court for the first time noted that section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[71] This statement was dicta, however, because it came in the context of an analysis of *Colorado River* abstention where the issue was whether state or federal law applied—not the precise nature of the federal law in question.[72] Nevertheless, *Moses H. Cone* became widely cited for the proposition that the FAA reflects a "federal policy favoring arbitration," including in subsequent Supreme Court decisions like *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[73] where the Court

66 389 F.2d 692, 696 (2d Cir. 1968), *abrogated by*, Morgan v. Sundance, Inc., 596 U.S. 411 (2022).

67 Butler Prods. Co. v. Unistrut Corp., 367 F.2d 733, 736 (7th Cir. 1966) (quoting Sch. Dist. v. Del Bianco, 215 N.E.2d 25, 29–30 (Ill. App. Ct. 1966)).

68 *See, e.g.*, Kanazawa Ltd. v. Sound, Unlimited, 440 F.2d 1239, 1241 (9th Cir. 1971); Hart v. Orion Ins. Co., 453 F.2d 1358, 1360 (10th Cir. 1971); J.S. & H. Constr. Co. v. Richmond Cnty. Hosp. Auth., 473 F.2d 212, 214–15 (5th Cir. 1973); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 44 (3d Cir. 1978).

69 388 U.S. 395, 404 n.12 (1967).

70 417 U.S. 506, 510–11 (1974) (quoting H.R. REP. NO. 68-96, at 1–2 (1924)).

71 460 U.S. 1, 24 (1983).

72 *See id.* at 23.

73 490 U.S. 477, 480 (1989).

overruled its earlier decision in *Wilko* and held enforceable arbitration agreements that covered securities law violations.[74]

Notably, *Moses H. Cone* and *Rodriguez de Quijas* did not mark an absolute shift in conception. To be sure, after *Moses H. Cone*, references to the "liberal policy favoring arbitration" could be found in every circuit and it became the dominant interpretation of the FAA's core purpose.[75] But some courts resolved arbitration issues without reference to a policy "favoring" arbitration, noting only that the FAA required equal treatment of arbitration agreements.[76] Indeed, courts frequently blended these seemingly contradictory concepts—how can something be equal if it is favored?[77]—invoking the federal "policy favoring arbitration" while also acknowledging that the FAA's purpose was merely "placement of arbitration agreements on equal footing with all other contracts."[78]

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74 *See, e.g.*, Johnson Controls, Inc. v. City of Cedar Rapids, 713 F.2d 370, 373 (8th Cir. 1983) (citing *Moses H. Cone*, 460 U.S. at 24); Com. Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 339 (5th Cir. 1984) (citing *Moses H. Cone*, 460 U.S. at 24); Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc., 754 F.2d 457, 461 (2d Cir. 1985) (citing *Moses H. Cone*, 460 U.S. at 24); Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 776 F.2d 269, 270 (11th Cir. 1985) (citing *Moses H. Cone*, 460 U.S. at 24); Wasyl, Inc. v. First Bos. Corp., 813 F.2d 1579, 1581 (9th Cir. 1987) (citing *Moses H. Cone*, 460 U.S. at 24); Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 267 (7th Cir. 1988) (citing *Moses H. Cone*, 460 U.S. at 24); Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/Am. Express, Inc., 886 F.2d 1249, 1260 (10th Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1123 (1st Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1160 (3d Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24); Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989) (citing *Moses H. Cone*, 460 U.S. at 24).

75 *See infra* text accompanying notes 180–87.

76 Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 248 (2017) ("The Federal Arbitration Act . . . requires courts to place arbitration agreements 'on equal footing with all other contracts.'"); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989).

77 *See* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2038 (2011) ("There cannot be both equality and favoritism. The current status of arbitration provisions is probably akin to that of the pigs in George Orwell's Animal Farm—all contract provisions are equal, but some (like arbitration provisions) are more equal than others."); Wilson, *supra* note 27, at 102.

78 Zurich Am. Ins. Co. v. Watts Indus., 466 F.3d 577, 580 (7th Cir. 2006) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); *see, e.g.*, Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 221 (4th Cir. 2014) (citations omitted); *In re* Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515, 519 (3d Cir. 2019) (citations omitted); Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 6 (1st Cir. 2014) (quoting Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 640 F.3d 471, 474 (1st Cir. 2011)).

This trend was especially apparent in Supreme Court opinions from the 2000s and 2010s, where the Court continued to emphasize the FAA's equal-treatment principle even while acknowledging the "policy favoring arbitration." For example, in *Buckeye Check Cashing, Inc. v. Cardegna*, the Court opened its analysis by explaining that "[t]o overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA)" and that "[s]ection 2 embodies the *national policy favoring arbitration* and *places arbitration agreements on equal footing with all other contracts*."[79] In *Granite Rock Co. v. International Brotherhood of Teamsters*, the Court reiterated that "the federal policy favoring arbitration . . . is merely an acknowledgement of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'"[80] The Supreme Court's reluctance to wholeheartedly embrace the "liberal federal policy favoring arbitration" was an omen of things to come.

C. *Morgan* and the Rebirth of the "Policy Favoring Arbitration"

Leading up to the Supreme Court's decision in *Morgan*, the "liberal policy favoring arbitration" was relatively uncontroversial. Despite some academic criticism[81] and the Supreme Court's tepid embrace, the policy served as a substantive justification for several decidedly pro-arbitration doctrines.[82] Among them was the arbitration-specific waiver rule at issue in *Morgan*, which placed the "policy favoring arbitration" squarely at issue.

The petitioner in *Morgan* was a former Taco Bell employee who filed a collective action under the Fair Labor Standards Act in the Northern District of Iowa, alleging violations of the Act's overtime provisions.[83] Her employer initially litigated the suit without reference to the arbitration clause in its employment agreements.[84] It moved to dismiss the complaint on other grounds, and when that failed, it filed an answer that did not

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79 546 U.S. at 443 (emphasis added); *see also* EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (explaining that the FAA was enacted to overcome judicial hostility to arbitration); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (reaffirming that arbitration agreements are enforced according to their terms).

80 561 U.S. 287, 302 (2010) (quoting Volt Info. Scis., Inc., 489 U.S. at 478).

81 *See, e.g.*, Gilbride, *supra* note 22, at 16; Wilson, *supra* note 27, at 96; Frankel, *supra* note 51, at 546–47.

82 Morgan v. Sundance, Inc., 596 U.S. 411, 413–14 (2022).

83 *Id.*

84 *Id.*

mention arbitration.[85] Some eight months later, the employer moved to compel arbitration under section 4 of the FAA and to stay the case under section 3, citing the arbitration clause in its employment agreement.[86] The district court denied the motion, and the employer appealed.[87]

The Eighth Circuit reversed. In doing so, it invoked the rule—accepted by all but the Seventh and District of Columbia Circuits—that a party waives its right to arbitrate only "if it knew of the right; 'acted inconsistently with the right'; and 'prejudiced the other party by its inconsistent actions.'"[88] Concluding that the petitioner had not been prejudiced by the employer's delay, the court remanded the case to the district court.[89] Judge Steven M. Colloton dissented, maintaining that the petitioner had been prejudiced and that, in any case, prejudice was "a debatable prerequisite" for waiving the right to arbitrate, given that it would not be required when considering other contractual rights.[90]

The petitioner sought certiorari, arguing that arbitration-specific waiver rules, such as the Eighth Circuit's, violate the FAA's equal-treatment principle by favoring arbitration over other contractual rights.[91] Instead, she argued, courts should apply the ordinary rule that waiver is merely the "intentional relinquishment or abandonment of a known right," a rule with no prejudice requirement.[92] She maintained that courts had long erred in invoking the "liberal federal policy favoring arbitration" when analyzing the FAA, and that her position found support in the FAA's true purpose—equal treatment of arbitration agreements and other contracts.[93] Noting a circuit split, the Supreme Court accepted review.[94]

A unanimous Court held that "the Eighth Circuit was wrong to condition a waiver of the right to arbitrate on a showing of prejudice."[95] The Court's reasoning turned on a critical examina-

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85 *Id.*

86 *Id.*

87 *Id.* at 415.

88 *Id.* at 411 (quoting Erdman Co. v. Phx. Land & Acquisition, LLC, 650 F.3d 1115, 1117 (8th Cir. 2011)).

89 Morgan v. Sundance, Inc., 992 F.3d 711, 715 (8th Cir. 2021), *vacated*, 596 U.S. 411 (2022).

90 *Id.* at 716–17 (Colloton, J., dissenting).

91 *See Morgan*, 596 U.S. at 415–16.

92 Brief for Petitioner at 13–14, *Morgan*, 546 U.S. 411 (No. 21-328).

93 *Id.* at 29, 34–35.

94 *Morgan*, 596 U.S. at 416.

95 *Id.* at 417.

tion of the "policy favoring arbitration."[96] Noting that waiver in other contexts does not include a prejudice requirement, the Court traced the Eighth Circuit's rule to *Carcich* and the Second Circuit's invocation of the "overriding federal policy favoring arbitration."[97] From there, the Court found, "[c]ircuit after circuit (with just a couple of holdouts) justified adopting a prejudice requirement based on the 'liberal national policy favoring arbitration.'"[98] This, the Court held, was error.[99]

Acknowledging its own "frequent use" of the phrase "policy favoring arbitration," the Court explained that the policy "does not authorize federal courts to invent special, arbitration-preferring procedural rules."[100] Quoting *Granite Rock*, the Court explained that the "policy favoring arbitration" "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."[101] Putting a finer point on it, the Court concluded "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration."[102] Thus, the Court extended *Granite Rock* and explained that "a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation."[103]

With this fundamental misinterpretation of the FAA corrected, the Court rejected the waiver-prejudice requirement as an inappropriate "arbitration specific procedural rule[]," which is inconsistent with the FAA's equal-treatment requirement.[104] The Court also pointed to section 6 of the FAA, which provides that motions to compel arbitration and stay litigation "shall be made and heard in the manner provided by law for the making and hearing of motions."[105] The Court reasoned that this section was a textual "command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Or put con-

96 *Id.* at 415–19.
97 *Id.* at 417 (quoting Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968)).
98 *Id.* at 418.
99 *Id.* at 416.
100 *Id.*
101 *Id.* (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).
102 *Id.*
103 *Id.*
104 *Id.* at 419.
105 *Id.* (citing 9 U.S.C. § 6).

versely, it is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration."[106] The Court remanded the case to the Eighth Circuit, instructing it to apply generally applicable waiver rules to determine whether the petitioner's employer waived its right to arbitrate (if it concluded that waiver was the appropriate framework for the analysis—an issue the Supreme Court deferred).[107]

Morgan is significant for several reasons. For one, it is a continuation of the Court's effort to correct lower courts' understanding of the "policy favoring arbitration." Like in *Granite Rock*, the Court insisted that the policy is merely a shorthand for the FAA's directive that arbitration agreements be treated the same as other contracts.[108] There is obvious tension in that explanation. As Professor Stephen Friedman has observed in criticizing the Court's seemingly contradictory approach, "[t]here cannot be both equality and favoritism."[109] But that tension can be mitigated by reconsidering what arbitration is favored over. For years, courts have applied the "policy favoring arbitration" as though it directs them to favor arbitration relative to litigation. That's a reasonable reading of the language, certainly, but the Court's recent gloss on the phrase demonstrates that arbitration is favored only relative to its previously *dis*favored status under the historic judicial hostility to arbitration. So, while the FAA was designed to correct that judicial hostility by compelling equal treatment, courts *over*corrected when they began to favor arbitration relative to litigation.

Morgan is also significant because it goes a step further than *Granite Rock*. It is the first case in which the Court rejected an established judicial rule founded on the "policy favoring arbitration" that favored arbitration over litigation. Although the Court had previously expressed skepticism regarding courts' interpretation of the FAA's purpose, until *Morgan* this had not been the focal point of the Court's analysis. The case therefore calls into question other court-made rules prioritizing arbitration over litigation based on the same, now corrected, reading of the FAA's central purpose.[110] The pro-arbitration canon, which I turn to now, is one of those rules.

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106 *Id.*
107 *Id.*
108 *Id.* at 417–18.
109 Friedman, *supra* note 77, at 2038.
110 *See* Gilbride, *supra* note 22, at 16.

III. THE PRO-ARBITRATION CANON

Courts facing a motion to compel arbitration must determine whether there is a valid agreement to arbitrate and whether the dispute falls within the scope of that agreement.[111] In making the former determination, there is no presumption in favor of arbitration.[112] Courts merely "apply ordinary state-law principles that govern the formation of contracts" to determine whether the parties agreed to arbitrate.[113] The pro-arbitration canon comes into play only at the second step, when a court must determine whether the arbitration clause covers the parties' dispute.[114] State law still has its role because courts rely on "state-law principles of contract interpretation" to determine the scope of the agreement.[115] But if there is ambiguity as to the scope of the clause, courts today apply a handy rule, the pro-arbitration canon, positing that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[116] Sometimes, courts state the rule in even stronger terms: "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[117]

In this Part, I consider how the pro-arbitration canon came to be, and how it came to be so widely accepted. I begin with the canon's early adoption, showing that the "liberal policy favoring arbitration" is the canon's foundational substantive justification, and noting that many courts cited case law interpreting the Labor Management Relations Act (LMRA)[118]—not the FAA—for support of the canon. Next, I turn to the Supreme

111 *See* Noohi v. Toll Bros., 708 F.3d 599, 611 n.6 (4th Cir. 2013) ("Even if there were an ambiguity, however, the presumption in favor of arbitration does not apply to questions of an arbitration provision's validity, rather than its scope."); *see also* Banc One Acceptance Corp. v. Hill, 367 F.3d 426, 429 (5th Cir. 2004) ("While there is a strong federal policy favoring arbitration, the policy does not apply to the initial determination whether there is a valid agreement to arbitrate."); Druco Rests., Inc. v. Steak N Shake Enters., Inc., 765 F.3d 776, 781 (7th Cir. 2014) ("Both federal and state courts acknowledge that the FAA's policy in favor of arbitration applies when determining the *scope* of an agreement to arbitrate, but not when deciding whether there is an agreement to arbitrate in the first instance.").

112 *See, e.g.*, Jaludi v. Citigroup, 933 F.3d 246, 254–55 (3d Cir. 2019).

113 First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Fleetwood Enters. Inc. v. Gaskamp, 280 F.3d 1069, 1073 (5th Cir. 2002).

114 *See, e.g.*, *Jaludi*, 933 F.3d at 254–55.

115 Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1044 (9th Cir. 2009).

116 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

117 Waterford Inv. Servs., Inc. v. Bosco, 682 F.3d 348, 353 (4th Cir. 2012).

118 29 U.S.C. §§ 141–187.

Court's subsequent embrace of the canon in several decisions, though largely in dicta. I conclude with the present state of the canon, which confirms its inescapable connection with the "liberal policy favoring arbitration."

A. Early Adoption by the Circuits

The Second Circuit appears to be the first circuit to have adopted the pro-arbitration canon in the context of the FAA. That qualification—"in the context of the FAA"—is an important one. Just prior to the pro-arbitration canon's appearance in FAA cases before the courts of appeals, the Supreme Court adopted a similar rule under the LMRA. As discussed below, that case law bled into FAA cases without meaningful analysis of whether the statutory cross-pollination was warranted.

The Second Circuit first stated the FAA pro-arbitration canon in a relatively innocuous 1961 decision, *Metro Industrial Painting Corp. v. Terminal Construction Co.*[119] The case involved a commercial dispute between a general contractor and a subcontractor constructing a housing project at Homestead Air Force Base.[120] The parties' agreement included an arbitration provision, which the subcontractor invoked when it incurred expenses in excess of $200,000 due to the general contractor's delays and demands for extra work outside the scope of the original contract.[121] When the general contractor refused to arbitrate, the subcontractor brought suit in the Southern District of New York and moved to compel arbitration under the FAA.[122] The district court granted the motion and the general contractor appealed.[123]

On appeal, the Second Circuit faced several issues. After concluding that the parties were diverse, that the contract "evidenced a transaction involving commerce" within the meaning of the FAA, and that federal law controlled the question of arbitrability, the court then considered whether "disputes over delays and extras were arbitrable under the contract."[124] The extent of the court's reasoning is as follows, with the key sentence (for present purposes) being the last:

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119 287 F.2d 382, 385 (2d Cir. 1961).
120 *Id.* at 383.
121 *Id.* at 383–84.
122 *Id.* at 384.
123 *Id.* at 383–84.
124 *Id.* at 384.

> The arbitration clause therein requires the parties to submit 'any question with respect to performance, non-performance, default, compliance or non-compliance, whether on behalf of the Contractor or Subcontractor' to arbitration. The grievance asserted by petitioners is that respondents failed to meet time schedules, insisted upon performance of duties not required of petitioners under the contract and failed to supply materials for petitioners. *In view of the federal policy to construe liberally arbitration clauses, to find that they cover disputes reasonably contemplated by this language, and to resolve doubts in favor of arbitration, it is clear that these disputes can reasonably be said to fall within the category of compliance or non-compliance.*[125]

For support of the "federal policy to construe liberally arbitration clauses," the court cited two cases—*Robert Lawrence Co. v. Devonshire Fabrics, Inc.* and *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*[126] Although both cases generally affirmed the "liberal policy of promoting arbitration"[127] or Congress' "approval of arbitration"[128] in the FAA, neither concerned the interpretation of ambiguous arbitration provisions.[129] In other words, the rule was the Second Circuit's own concoction.

From this humble beginning, the pro-arbitration canon spread. Naturally, the Second Circuit recited the rule most frequently at first, as it had done with the "liberal policy favoring arbitration" more broadly.[130] But within about twenty years, at least eight other circuits—the Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and District of Columbia—had applied similar rules when considering the scope of arbitration agreements under the FAA.[131]

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125 *Id.* at 385 (emphasis added) (citation omitted).

126 *Id.* (first citing Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959); and then citing Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449, 453 (1935)).

127 *Robert Lawrence Co.*, 271 F.2d at 410.

128 *Shanferoke Coal & Supply Corp.*, 293 U.S. at 453.

129 Indeed, in *Robert Lawrence Co.*, the Second Circuit invoked the "liberal policy favoring arbitration" to resolve ambiguities in the FAA itself—a fundamentally different issue from ambiguities in an arbitration clause. 271 F.2d at 410 ("Finally, an [*sic*] doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars.").

130 *E.g.*, Fed. Com. & Navigation Co. v. Kanematsu-Gosho, Ltd., 457 F.2d 387, 389–90 (2d Cir. 1972); Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1212 (2d Cir. 1972); Bos. & Me. Corp. v. Ill. Cent. R.R. Co., 396 F.2d 425, 426 (2d Cir. 1968).

131 Lundgren v. Freeman, 307 F.2d 104, 110 (9th Cir. 1962) ("The policy of the Arbitration Act is that the agreement be liberally construed in favor of arbitration."); Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979) ("Furthermore, unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should

The early cases invoking the pro-arbitration canon teach three things. First, as shown by *Metro Industrial Painting*, the "policy favoring arbitration" was, from the very beginning, the canon's foundational substantive justification. Indeed, many of the cases invoking the canon expressly married those concepts. A good example is the Fifth Circuit's opinion in *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, where the court wrote, "We begin our analysis by noting the federal policy favoring arbitration over litigation. This federal policy requires that we construe arbitration clauses generously, resolving all doubts in favor of arbitration."[132] Similarly express couplings can be found in early cases from the Third,[133] Seventh,[134] and Eighth Circuits.[135]

Second, the pro-arbitration canon had real teeth from the outset. By its terms, the rule required the resolution of "any doubts in favor of arbitration"[136] or unless it could be said with "positive assurance" that the parties never agreed to arbitrate a particular dispute.[137] Thus, the rule compelled arbitration even

be granted."); Hanes Corp. v. Millard, 531 F.2d 585, 598 (D.C. Cir. 1976) ("As to the first inquiry, we begin with the accepted premise that, in construing arbitration agreements, every doubt is to be resolved in favor of arbitration."); Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 714 (7th Cir. 1967) ("The policy of the Federal Arbitration Act is to promote arbitration to accord with the intention of the parties and to ease court congestion. All doubts are to be resolved in favor of arbitration." (first citing *Robert Lawrence Co.*, 271 F.2d at 410; and then citing *Metro Indus. Painting Corp.*, 287 F.3d at 385)); Hussey Metal Div. of Copper Range Co. v. Lectromelt Furnace Div., McGraw-Edison Co., 471 F.2d 556, 558 (3d Cir. 1972) ("[D]oubts as to whether an arbitration clause may be interpreted to cover the asserted dispute should be resolved in favor of arbitration unless a court can state with 'positive assurance' that this dispute was not meant to be arbitrated." (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation. Co., 363 U.S. 574, 582 (1960))); Ga. Power Co. v. Cimarron Coal Corp., 526 F.2d 101, 106 (6th Cir. 1975) ("In the absence of language withdrawing this provision from the arbitration requirement it is the duty of the court to resolve any doubts in favor of arbitration." (citing Am. Radiator & Standard Sanitary Corp. v. Loc. 7, Int'l Bhd. of Operative Potters, 385 F.2d 455, 458 (6th Cir. 1966))); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1348 (11th Cir. 1982) ("This federal policy requires that we construe arbitration clauses generously, resolving all doubts in favor of arbitration." (citations omitted)); Mellon Bank, N.A. v. Pritchard-Keang Nam Corp., 651 F.2d 1244, 1249 (8th Cir. 1981) ("Whenever possible, the courts will use the Federal Arbitration Act to enforce agreements to arbitrate." (quoting *Galt*, 376 F.2d at 714)).

132 690 F.2d at 1348 (citations omitted).

133 *Hussey Metal Div. of Copper Range Co.*, 471 F.2d at 558.

134 *Galt*, 376 F.2d at 714.

135 *Mellon Bank, N.A.*, 651 F.2d at 1249.

136 *Ga. Power Co.*, 526 F.2d at 106.

137 Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979).

where other evidence or interpretive tools suggested that the parties never intended to arbitrate the dispute.[138]

Third, many of the early adopters of the FAA's pro-arbitration canon borrowed the concept from case law interpreting the LMRA. In this regard, the key case is *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, where the Supreme Court held:

> [T]o be consistent with congressional policy in favor of settlement of [labor] disputes by the parties through the machinery of arbitration, the judicial inquiry under [the LMRA] must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[139]

Despite the Court's insistence in *United Steelworkers* that the LMRA's treatment of arbitration agreements differed materially from the FAA's,[140] the courts of appeals were quick to apply the pro-arbitration canon in FAA cases, doing so without apparent reservation or analysis of why the rule should be the same under the FAA.[141]

B. The Supreme Court and the Pro-Arbitration Canon

Although the FAA's pro-arbitration canon had gained traction through the 1960s and 1970s, it had not reached universal acceptance. This changed in the 1980s, when the Supreme Court itself began to cite the rule. In doing so, the Court—like the courts of appeals before it—justified the rule in terms of the

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138 *See, e.g.*, Lundgren v. Freeman, 307 F.2d 104, 109–10 (9th Cir. 1962) (explaining that arbitrators properly addressed "points of law" despite evidence of the parties' intent to reserve such issues for the court); Hanes Corp. v. Millard, 531 F.2d 585, 598–99 (D.C. Cir. 1976) (noting that the statute of limitations was properly arbitrated under the "fundamental and powerful federal policy that favors arbitration of disputes" despite contrary arguments that were "not without force"); *see also* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1220 (11th Cir. 2021) (Newsom, J., concurring) (describing the pro-arbitration canon as "especially potent and especially made up").

139 United Steelworkers of Am. v. Warrior & Gulf Navigation. Co. (*United Steelworkers*), 363 U.S. 574, 582–83 (1960).

140 *Id.* at 577–79.

141 *See, e.g.*, *Wick*, 605 F.2d at 168 (citing United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960)); Fed. Com. & Navigation Co. v. Kanematsu-Gosho, Ltd., 457 F.2d 387, 390 (2d Cir. 1972) (citing *United Steelworkers*, 363 U.S. at 582–83); *Ga. Power Co.*, 526 F.2d at 106 (citing Am. Radiator & Standard Sanitary Corp. v. Loc. 7 of Int'l Bhd. of Operative Potters, 358 F.2d 455, 458 (6th Cir. 1966)).

FAA's "liberal policy favoring arbitration." Rarely, however, did the Court apply the canon directly. Instead, the Court's references to the pro-arbitration canon came largely in dicta and were tempered by an insistence that a party can be compelled to arbitrate only those disputes that it agreed to arbitrate.

Reinforcing the connection between the "liberal policy favoring arbitration" and the pro-arbitration canon is the fact that the first Supreme Court decision to recognize the canon was *Moses H. Cone*.[142] (Recall that it was in *Moses H. Cone* that the Court first stated that the FAA embodies a "liberal federal policy favoring arbitration.")[143] In holding that federal law governed the substantive question of arbitrability in the underlying suit, the Court remarked that "the Courts of Appeals have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."[144] The Court took the opportunity to pronounce its agreement:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[145]

Though unequivocal, this pronouncement was dicta.[146] Again, all that was necessary to the Court's abstention analysis was the fact that federal law controlled the question of arbitrability—the precise nature of the applicable rules was immaterial.[147]

Nevertheless, *Moses H. Cone* cemented the status of the pro-arbitration canon, with the Supreme Court invoking it in a series of subsequent decisions. The first was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, where the Court held that an international commercial agreement's arbitration clause cov-

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142 Frankel, *supra* note 51, at 545–46 (attributing the pro-arbitration canon to *Moses H. Cone*).

While that decision was certainly a key factor in the doctrine's wide adoption, this Article shows that the pro-arbitration canon arose decades before and spread through the lower courts prior to its articulation in *Moses H. Cone*.

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

144 *Id.*

145 *Id.* at 24–25.

146 Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 174 (2010) ("The first Supreme Court statement that there was a federal policy favoring arbitration came from dicta in the 1983 case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.").

147 *Id.*; *see* Frankel, *supra* note 51, at 542.

ered statutory antitrust claims.[148] In so holding, the Court rejected the cross-petitioner's argument for a presumption *against* the arbitrability of statutory claims.[149] For support, the Court invoked "[t]he 'liberal federal policy favoring arbitration,'" and pointed to the pro-arbitration canon, citing *Moses H. Cone* without further interrogating the principles it espoused in dicta.[150] The Court summarized the applicable framework as follows: "Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."[151] Again, however, the pro-arbitration canon was unnecessary to the Court's holding that the FAA "provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability."[152]

The Court next recited the pro-arbitration canon in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, a preemption decision.[153] The case involved a California procedural rule that "permit[ted] a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where 'there is a possibility of conflicting rulings on a common issue of law or fact.'"[154] Ultimately, the Court held that the FAA does not preempt the California rule, at least where the parties incorporated California law into their agreement.[155] In so holding, the Court rejected the appellant's argument that the parties had *not* incorporated the law into their agreement, which relied in part on *Moses H. Cone* and the pro-arbitration canon.[156] The Court reasoned that there is "no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."[157] Thus, it held, "Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration . . . simply does not offend the rule of liber-

148 473 U.S. 614, 629 (1985).
149 *Id.* at 625.
150 *Id.* at 625 (quoting *Moses H. Cone*, 460 U.S. at 24).
151 *Id.* at 626.
152 *Id.* at 627.
153 489 U.S. 468, 470 (1989).
154 *Id.* at 471.
155 *Id.* at 478–79.
156 *Id.* at 475.
157 *Id.* at 476.

al construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA."[158]

The pro-arbitration canon next arose in two 1995 decisions. The first was *Mastrobuono v. Shearson Lehman Hutton, Inc.*[159] At issue was whether the parties' contractual choice of New York law in an agreement providing that "any controversy" between the parties "shall be settled by arbitration," precluded an arbitrator from awarding punitive damages, because under New York law, only judges could award punitive damages.[160] The arbitration panel in the underlying dispute concluded that it was authorized to award punitive damages and did so.[161] The Second Circuit disagreed and before the Supreme Court, the petitioner largely argued that the FAA preempted New York's rule; the respondent argued that, regardless, the parties' choice of New York law evidenced their agreement that punitive damages would be unavailable.[162] And the Supreme Court granted certiorari, framing the issue thusly: "The question presented is whether the arbitrators' award is consistent with the central purpose of the Federal Arbitration Act to ensure 'that private agreements to arbitrate are enforced according to their terms.'"[163]

The Court rejected the respondent's argument, employing several interpretive tools, including the pro-arbitration canon.[164] First, the Court applied the accepted rule that "[a] writing is interpreted as a whole."[165] Thus, it reasoned, while the choice of New York law might alone suggest the intent to preclude punitive damages, the choice to send "any controversy" to arbitration in combination with the incorporation of procedural rules allowing punitive damages, suggested otherwise.[166] The Court concluded that, at most, juxtaposing these two features of the agreement rendered the availability of punitive damages ambiguous.[167] To resolve the ambiguity, the Court invoked the pro-arbitration canon, the canon of *contra proferentem* ("the common-law rule of contract interpretation that a court should construe

158 *Id.*
159 514 U.S. 52, 53 (1995).
160 *Id.* at 54, 59.
161 *Id.* at 54.
162 *Id.*
163 *Id.* at 53–54 (quoting *Volt Info. Scis., Inc.*, 489 U.S. at 479).
164 *Id.*
165 *Id.* at 59.
166 *Id.* at 59–60.
167 *Id.* at 62.

ambiguous language against the interest of the party that drafted it"), and the rule that a contract must be read to "give effect to all its provisions and to render them consistent with each other."[168] The pro-arbitration canon counseled in favor of the arbitrability of punitive damages, as did the *contra proferentem* rule because the agreement at issue was the respondent's form agreement.[169] Likewise, the Court concluded that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators."[170] Thus, each interpretive tool relied on by the Court supported the conclusion that the parties agreed to arbitrate claims for punitive damages.[171]

The other 1995 decision to deal with the pro-arbitration canon was *First Options of Chicago, Inc. v. Kaplan*, which dealt with the question of whether the court or the arbitrator should decide arbitrability.[172] Holding that the answer to that question depended on the parties' intent, the Court concluded that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."[173] Acknowledging that this approach was contrary to that used to determine whether a particular claim was within the scope of an arbitration agreement—where the pro-arbitration canon applies—the Court reasoned that the different treatment was warranted.[174] On the one hand, the Court explained, in resolving ambiguities regarding the scope of an arbitration agreement, "the parties likely gave at least some thought to the scope of arbitration" such that, "given the law's permissive policies in respect to arbitration . . . , one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter."[175] By contrast, the question of "who (primarily) should decide arbitrability" was "rather arcane," such that there was less reason to think that the parties considered the question at all, let alone agreed to submit it to the

168 *Id.* at 62–63.
169 *Id.*
170 *Id.* at 63–64.
171 *Id.*
172 514 U.S. 938, 942 (1995).
173 *Id.* at 944 (second and third alterations in original).
174 *Id.* at 944–45.
175 *Id.* at 945.

arbitrator.[176] Either way, the Court reiterated that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."[177]

The Court briefly repeated the pro-arbitration canon in several decisions[178] before returning to it more comprehensively in the 2010 *Granite Rock* decision.[179] The issue was whether the parties agreed to arbitrate a dispute regarding the date of ratification for a collective bargaining agreement.[180] The district court held that they had not, and the Ninth Circuit reversed, reasoning in part that "the 'national policy favoring arbitration' required that any ambiguity about the scope of the parties' arbitration clause be resolved in favor of arbitrability."[181]

The Supreme Court, holding that the parties had not agreed to arbitrate the dispute, rejected the Ninth Circuit's invocation of the pro-arbitration canon as an "overread[ing]" of the Court's precedents.[182] The pro-arbitration canon, the Court explained, "cannot be divorced from the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent,' and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.'"[183] Noting that the pro-arbitration canon has its "foundation in 'the federal policy favoring arbitration,'"[184] the Court reiterated that "this 'policy' is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'"[185] Thus, the Court explained:

> [W]e have never held that this policy overrides the principle that a court may submit to arbitration "only those disputes . . . that the parties have agreed to submit." Nor have we held that courts may use

176 *Id.*

177 *Id.* at 944 (collecting cases).

178 *E.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (plurality opinion).

179 Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 291 (2010).

180 *Id.* at 292.

181 *Id.* at 295–96.

182 *Id.* at 299.

183 *Id.* (first quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S 468, 479 (1989); and then quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).

184 *Id.* at 302.

185 *Id.*

> policy considerations as a substitute for party agreement. We have applied the presumption favoring arbitration, in FAA and in labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.[186]

Noting that the canon applies only to ambiguous arbitration agreements, the Court concluded that it was inapplicable because the ratification dispute was unambiguously outside of the scope of the arbitration agreement, which covered only those disputes "*arising under*" the collective bargaining agreement.[187]

Finally, the Court most recently discussed the pro-arbitration canon in *Lamps Plus, Inc. v. Varela*, where the issue was "whether the FAA . . . bars an order requiring class arbitration when an agreement is . . . 'ambiguous' about the availability of such arbitration."[188] The Ninth Circuit had applied the canon of *contra proferentem* to resolve that ambiguity in favor of class arbitration, which the drafter of the agreement had resisted.[189] Rejecting that reasoning, the Supreme Court held that the FAA preempted the rule of *contra proferentem* insofar as it would preclude the traditional bilateral arbitration that—according to the Court—Congress contemplated in passing the FAA.[190] The Court explained that its invocation of the rule to resolve ambiguity in *Mastrobuono* was inconsequential because it resolved the ambiguity at issue the same as did the pro-arbitration canon, and because its holding in that case was "primarily based on the FAA policy favoring arbitration."[191]

C. The Pro-Arbitration Canon Today

Today, courts routinely place the pro-arbitration canon and the "policy favoring arbitration" hand in hand. The Second Circuit, for example, posits that "[w]here the scope of an arbitration agreement is ambiguous, the Federal Arbitration Act's policy favoring arbitration requires that 'any doubts . . . be resolved in fa-

186 *Id.* at 302–03 (omission in original) (citations omitted).
187 *Id.* at 307.
188 587 U.S. 176, 179 (2019).
189 *Id.* at 180.
190 *Id.* at 183, 187–88.
191 *Id.* at 188 n.5.

vor of arbitration.'"[192] The Fifth Circuit similarly explains that "once a court determines that an agreement to arbitrate exists, the court must pay careful attention to the strong federal policy favoring arbitration and must resolve all ambiguities in favor of arbitration."[193] The Ninth Circuit agrees that in determining whether parties have agreed to arbitrate a dispute, we apply "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration."[194] These are just a few examples—similar ones can be found in every circuit.[195]

With three recent exceptions, the pro-arbitration canon has garnered limited critical attention.[196] Professor Richard Frankel, in his 2014 article *The Arbitration Clause as Super Contract*, identified the pro-arbitration canon as one of three doctrines that he argued were inconsistent with the FAA's purpose of ensuring equal treatment between arbitration agreements and other contracts.[197] He argued that, consistent with that purpose, courts should apply instead the generally applicable principle of *contra proferentem*, interpreting the contract against the drafter who, presumably, preferred arbitration—an argument that the Supreme Court implicitly rejected in *Lamps Plus*.[198]

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192 Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002) (omission in original) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

193 Banc One Acceptance Corp. v. Hill, 367 F.3d 426, 429 (5th Cir. 2004).

194 Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1018 (9th Cir. 2016).

195 *See, e.g.*, Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs., 59 F.4th 1090, 1097 (10th Cir. 2023); Lyons v. PNC Bank, Nat'l Ass'n, 26 F.4th 180, 185 (4th Cir. 2022); Reo v. Palmer Admin. Servs., 770 F. App'x 746, 747 (6th Cir. 2019); Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1165 (8th Cir. 1984); CardioNet, Inc. v. Cigna Health Corp., 751 F.3d 165, 172 (3d Cir. 2014); Dialysis Access Ctr., LLC v. RMS Lifeline, Inc., 638 F.3d 367, 376 (1st Cir. 2011); Druco Rests., Inc. v. Steak N Shake Enters., Inc., 765 F.3d 776, 781 (7th Cir. 2014); Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1353 (11th Cir. 2014); Promega Corp. v. Life Techs. Corp., 674 F.3d 1352, 1359 (Fed. Cir. 2012); Nat'l R.R. Passenger Corp. v. Consol. Rail Corp., 892 F.2d 1066, 1069 (D.C. Cir. 1990).

196 Although the pro-arbitration canon has rarely been the direct subject of analysis, it has been noted within broader criticisms of the "policy favoring arbitration." *See, e.g.*, Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. STATE U. L. REV. 99, 123–24 (2006); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. QUARTERLY 637, 704–05 (1996).

197 The other two doctrines were the waiver-privilege rule eventually discarded in *Morgan* and the rule for when non-signatories are bound by arbitration agreements. Frankel, *supra* note 51, at 534.

198 Lamps Plus, Inc. v. Varela, 587 U.S. 176, 178–79 (2019). While *Lamps Plus* strongly suggests that *contra proferentem* is no longer viable as an interpretive tool for

More recently, in 2021, Eleventh Circuit Judge Kevin Newsom criticized the canon in his concurrence in *Calderon v. Sixt Rent a Car, LLC*.[199] Arguing that the canon is unsupported as a textual matter, he concluded that "[s]o far as I can tell, the *Moses H. Cone* [pro-arbitration] canon is just made up."[200] In doing so, Judge Newsom noted that he was unaware of "a single straight-faced attempt to defend [the pro-arbitration canon,]" which "emerged decades after the Act became law and . . . as a result of the overextension of an unrelated labor statute and a bald appeal to policy considerations."[201]

Despite this, the pro-arbitration canon has its supporters. In 2022, Professor Tamar Meshel authored an article defending the pro-arbitration canon, *In Defense of Moses*.[202] Responding in part to Judge Newsom's concurrence and in part to broader criticisms of case law interpreting the FAA as establishing a "policy favoring arbitration[,]" Professor Meshel argued that textual support

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arbitration agreements, at least insofar as it would always be applied to avoid arbitration, the Court's holding was not so broad. Instead, the Court held that *contra proferentem* could not be used to resolve ambiguity in favor of class arbitration rather than traditional bilateral arbitration. *Id.* at 188. Thus, the canon may still have a role to play in some cases, though it is unlikely the Court would prioritize the rule to the extent Professor Frankel argues for.

This Article makes several contributions beyond Professor Frankel's article, which proved exceptionally prescient with regard to the validity of the waiver rule at issue in *Morgan*. First, I provide a deeper look at the history of the pro-arbitration canon. While Professor Frankel attributes the canon to *Moses H. Cone*, I show how the canon arose decades before in lower court decisions. In doing so, I strengthen the argument that the pro-arbitration canon is inseparable from the "liberal policy favoring arbitration." *See supra* Part III. Second, I offer an alternative to *contra proferentem* for interpreting ambiguous arbitration agreements, accepting that *Lamps Plus* likely closed that avenue. Specifically, I argue *infra* that there are numerous interpretive principles that courts can employ to resolve ambiguities regarding arbitrability even setting aside *contra proferentem*. Third, I offer textual arguments for an FAA that is agnostic as to ambiguities in arbitration agreements. *See infra* Section IV.A. In this respect, I go beyond Professor Frankel's arguments, which turn primarily on an analysis of legislative history and policy. *See* Frankel, *supra* note 51, at 555–62. Fourth, I account for key precedential developments from the decade since Professor Frankel published. Most notable is *Morgan*, which provides a template for overruling the pro-arbitration canon. Fifth, and finally, I consider the extent to which courts may abandon the pro-arbitration canon prior to a future decision by the Supreme Court rejecting the doctrine, concluding that while they may not, courts may freely relegate the doctrine to a principle of last resort. *See infra* Section IV.C.

199 Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215–21 (11th Cir. 2021) (Newsom, J., concurring).

200 *Id.* at 1215 (Newsom, J., concurring).

201 *Id.* at 1221 (Newsom, J., concurring); *see also* Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 297–98 (3d Cir. 2021) (Matey, J., concurring) (agreeing with Judge Newsom's concurrence and calling for a reexamination of the pro-arbitration canon).

202 Tamar Meshel, *In Defense of* Moses, 96 ST. JOHN'S L. REV. 395, 399 (2022).

for the canon could be found (primarily) in section 2's savings clause.[203] I discuss these divergent conclusions further below.

IV. THE PRO-ARBITRATION CANON IS CONTRARY TO THE FAA

In this Part, I argue that the pro-arbitration canon is incompatible with the FAA and should be abandoned. First, I show that the text, legislative history, and purpose of the FAA require courts to resolve ambiguous arbitration agreements the same as they would any other contract, without applying an arbitrarily pro-arbitration canon. Second, I address the possible counterarguments. None are persuasive. Third, I offer a path forward considering the pro-arbitration canon's ubiquity in FAA case law, concluding that until the Supreme Court invalidates the canon, lower courts should apply it only in the most limited circumstances.

A. Courts Must Interpret Arbitration Agreements the Same as Other Contracts

At bottom, the validity of the pro-arbitration canon is a question of statutory interpretation: In passing the FAA, did Congress intend for courts to construe ambiguous arbitration agreements in favor of arbitration? The FAA's text, legislative history, and purpose play complementary roles in answering that question in the negative.[204] Those sources reject the pro-arbitration canon and show instead that Congress expected courts to apply generally applicable tools to resolve ambiguities in arbitration agreements. *Morgan* confirms that conclusion.

To start with the obvious, the FAA's text nowhere mentions rules of contract interpretation, let alone a pro-arbitration canon of construction. While the FAA, in several places, calls upon courts to interpret arbitration agreements, it never mentions the rules courts should apply in doing so.

First, in section 2, the statute provides that "written provision[s] . . . to settle by arbitration a controversy thereafter arising" and "agreement[s] in writing to submit to arbitration an existing controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[205] Questions of validity, revocability, and enforceability thus come into play only after a threshold inquiry

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203 *Id.* at 398–401.

204 *See, e.g.*, Gundy v. United States, 538 U.S. 128, 141 (2019); McCreary Cnty. v. Am. C.L. Union, 545 U.S. 844, 861 (2005).

205 9 U.S.C. § 2.

into whether there is a "written provision . . . to settle by arbitration" or "an agreement in writing to submit to arbitration" a particular controversy.[206] That inquiry necessarily covers not only questions regarding formation—offer, acceptance, and consideration—but also interpretive questions regarding the scope of the agreement, like whether the contract covers an existing controversy or one "thereafter arising."[207] Yet section 2 is silent as to how courts should conduct the interpretive inquiry.

Something similar happens in sections 3 and 4. Section 3 requires the court to stay a pending action "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under . . . an agreement."[208] Section 4 likewise requires courts to order "the parties to proceed to arbitration in accordance with the terms of the agreement" upon "being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue" or after a jury finding that the parties agreed to arbitrate.[209] Both section 3 and section 4 call for interpretive inquiries into, respectively, whether the issues are "referable to arbitration" or arbitration would be "in accordance with the terms of the agreement."[210] But, again, both sections 3 and 4—like section 2—are silent as to the applicable interpretive rules.

These silences were not an invitation for courts to concoct and apply a pro-arbitration canon. Quite the opposite. The Supreme Court has repeatedly held that "Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'"[211] Applying this rule

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206 *Id.*; *see* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 297 (2010).

207 *See* 9 U.S.C. § 2; *Granite Rock Co.*, 561 U.S. at 297.

208 9 U.S.C. § 3.

209 *Id.* § 4.

210 *Id.* §§ 3–4; *see, e.g.*, Oberstein v. Live Nation Ent. Inc., 60 F.4th 505, 510 (9th Cir. 2023).

211 Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991) (citations omitted); *see also* Atl. Sounding Co. v. Townsend, 557 U.S. 404, 422 (2009) (holding punitive damages available under a maritime statute because they "were an established part of the maritime law" at the time of the statute's enactment); Bowen v. Massachusetts, 487 U.S. 879, 896 (1988) (noting "the well-settled presumption that Congress understands the state of existing law when it legislates"); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 889 (3d Cir. 1975) ("Since Congress has not enacted a federal law for interpreting antitrust releases nor has it indicated an intent to adopt state laws on the subject, this court must consider for itself whether the statutory policies embodied in the antitrust

demonstrates that Congress intended for courts to apply generally applicable rules of contract interpretation—not the pro-arbitration canon—to resolve ambiguities in arbitration agreements.[212]

And the available rules of construction are plenty. The intent of the parties is the north star for any question of contract interpretation.[213] Courts faced with an ambiguous agreement—one where the text reveals more than one reasonable reading—have a litany of longstanding common law tools to determine intent.[214] For instance, non-substantive canons can help identify the best

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laws will be better promoted by the absorption of state laws regarding release or the formulation of a federal rule.").

212 *See* Atlas Pallet, Inc. v. Gallagher, 725 F.2d 131, 135 (1st Cir. 1984) ("[I]n enacting the NFIP, Congress did not intend to abrogate standard insurance law principles" including "basic contract rules govern[ing] the interpretation of a policy's terms" (first citing Drewett v. Aetna Casualty & Surety Co., 539 F.2d 496 (5th Cir. 1976); and then citing Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982)).

213 *See, e.g.*, McIntosh v. Groomes, 198 N.W. 954, 955 (Mich. 1924) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties."); Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co., 141 F. 563, 566 (8th Cir. 1905) ("The purpose of a written contract is to express the concurring intention of the minds of the parties when it is made. Hence the object of its construction or interpretation is to ascertain the actual intent and meaning of the parties when they executed it."); Del., Lackawanna & W.R.R. Co. v. Bowns, 58 N.Y. 573, 581–82 (1874) ("This doctrine as to the interpretation of written agreements is elementary, and is born of the familiar principle of daily application in courts of justice, that all contracts must be so interpreted as to carry out the intent of the contracting parties."); Streeter v. Streeter, 43 Ill. 155, 161 (1867) ("And it is a well recognized rule, that contracts should receive a reasonable interpretation, according to the intention of the parties entering into them . . . ."); McMillin v. Titus, 72 A. 240, 241 (Pa. 1909) ("The words of a grant are to receive a reasonable construction, and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the grant was made."); Donohue v. Cuomo, 184 N.E.3d 860, 866 (N.Y. 2022) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent . . . ." (quoting Greenfield v. Philles Recs., 780 N.E.2d 166, 170 (N.Y. 2002)); CITGO Asphalt Refin. Co. v. Frescati Shipping Co., 589 U.S. 348, 355 (2020) ("Maritime contracts 'must be construed like any other contracts: by their terms and consistent with the intent of the parties.'"); Lamps Plus, Inc. v. Varela, 587 U.S. 176, 184 (2019) ("Consent is essential under the FAA because arbitrators wield only the authority they are given. . . . Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes. Whatever they settle on, the task for courts and arbitrators at bottom remains the same: 'to give effect to the intent of the parties.'" (citations omitted)).

214 *See* Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) ("A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot."). *See generally* RESTATEMENT (SECOND) OF CONTS. §§ 202–03 (A.L.I. 1981) (articulating general principles of contract interpretation and explaining interpretive tools courts apply to resolve ambiguity).

reading of a provision—even one subject to multiple reasonable interpretations.[215] The Supreme Court acknowledged as much in *Mastrobuono*, applying not only the pro-arbitration canon to determine whether the parties agreed to arbitrate claims for punitive damages but also a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other."[216] Courts can also look to extrinsic evidence to resolve doubts regarding an arbitration agreement's scope.[217] Perhaps the parties' negotiations inform the meaning of an arbitration clause.[218] Or maybe past performance reveals an unspoken understanding.[219]

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215 *See Perry*, 482 U.S. at 492 n.9; *see, e.g.*, O'Brien v. Miller, 168 U.S. 287, 297 (1897) (applying general canons of construction in an admiralty action); Shreffler v. Nadelhoffer, 25 N.E. 630, 633–34 (Ill. 1890) (concerning the interpretation of suretyship agreements); Tims v. LGE Cmty. Credit Union, 935 F.3d 1228, 1237 (11th Cir. 2019) (Georgia law); Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1018 (9th Cir. 2016) (Oregon law); Shelby Cnty. State Bank v. Van Diest Supply Co., 303 F.3d 832, 836 (7th Cir. 2002) (Iowa law).

216 Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62–64 (1995).

217 *See, e.g.*, Springsteen v. Samson, 32 N.Y. 703, 706 (1865) ("Where a literal performance is impossible or impracticable, or where the language is ambiguous or susceptible of more than one construction, or is vague, or general, or inappropriate to express the true intent, extraneous evidence is admissible to explain, and an antecedent parol agreement may be received to point to the intent of the parties."); Bank of N.Y. Tr. Co. v. Franklin Advisers, Inc., 726 F.3d 269, 275 (2d Cir. 2013); Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1015 (9th Cir. 2012); Pierce Cnty. Hotel Emps. & Rest. Emps. Health Tr. v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987).

218 *See, e.g.*, Miller v. Green, 112 S.E. 417, 417–18 (N.C. 1922) ("If the contract is ambiguous words cannot be supplied which import an intention not expressed when the contract is made, for then the intention of the parties is to be deduced from the language employed; but if there is a latent ambiguity—if the contract is not clear and unequivocal—preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended—*i. e.*, for the purpose of ascertaining in what sense they used the ambiguous language, but not for the purpose of contradicting the written contract or varying its terms."); McIntosh v. Groomes, 198 N.W. 954, 955–56 (Mich. 1924) ("If ambiguous terms are used, the preliminary negotiations may be considered, not to vary or contradict the plain terms of the instrument, but to aid the court in determining the intent with which such words were used."); Rhone-Poulenc Inc. v. Int'l Ins. Co., 71 F.3d 1299, 1305 (7th Cir. 1995); Cajun Elec. Power Coop., Inc. v. Fed. Energy Regul. Comm'n, 924 F.2d 1132, 1137 (D.C. Cir. 1991).

219 *See, e.g.*, McMillin v. Titus, 72 A. 240, 241 (Pa. 1909) ("'When a contract is capable of two different interpretations,' . . . 'that which the parties themselves have always put upon it, and acted upon, especially as here for a long series of years, a court will follow, because it is the true intent and meaning of the parties which are to be sought for in the language they use.'" (citation omitted)); Knotts v. Bartlett, 98 S.E. 590, 590 (W. Va. 1919) ("Conceding the language to be of doubtful import or ambiguous, though it seems clear enough as far as it goes to define the relation of the parties to each other, yet where the parties, by their acts and conduct concur in its construction and interpretation, courts regard and give effect to their exposition, when to do so does not violate the rules of law or infringe upon public policy."); Addicks Servs., Inc. v. GGP-Bridgeland, LP, 596 F.3d 286, 294 (5th Cir. 2010); Lanier Pro. Servs., Inc. v. Ricci, 192 F.3d 1, 4 (1st Cir. 1999).

Whatever the tool,[220] its object is the determination of the parties' intent in choosing a particular word or phrase.[221]

There is no indication in the FAA's purpose that Congress intended to displace these generally applicable rules in favor of the pro-arbitration canon. For decades, the "policy favoring arbitration" served as the purposive basis for the canon. Courts reasoned that by favoring arbitration over litigation, the FAA compelled them to resolve ambiguities in arbitration agreements in favor of arbitration.[222] But read faithfully, *Morgan* confirms that the FAA's "policy favoring arbitration" "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."[223] Thus, the FAA's purpose "is about treating arbitration contracts like all others, not about fostering arbitration."[224] This reading of the FAA stems from section 2's "substantive mandate" that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[225] and legislative history, which confirms that the original purpose of the FAA was that through the Act, an arbitration agreement is placed upon the same footing as other contracts.[226] Accordingly, the FAA's equal-treatment purpose reinforces why generally applicable rules of contract interpretation must prevail; only through the application of such principles is an arbitration agreement treated like other contracts.

A rule of construction that literally favors arbitration cannot be squared with the FAA. Indeed, the pro-arbitration canon is precisely the sort of "novel rule" favoring arbitration that the Court renounced in *Morgan*. Despite the availability of common

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220 As noted in *supra* note 198, it is possible that *contra proferentem* still has some role to play in the analysis despite *Lamps Plus*. To the extent that the doctrine even remains a viable tool for resolving ambiguities in arbitration agreements, it would arguably play a minor role, applicable only where "the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation." Lamps Plus, Inc. v. Varela, 587 U.S. 176, 186 (2019). Regardless, given the Court's strong suggestion that the *contra proferentem* would be preempted insofar as it was applied in a manner hostile to arbitration, litigants seeking to avoid arbitration would be wise to give it limited weight.

221 *See* cases cited *supra* note 213.

222 *See* cases cited *supra* notes 131, 195.

223 Morgan v. Sundance, Inc., 596 U.S. 411, 411 (2022) (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).

224 *Id.* at 412.

225 9 U.S.C. § 2.

226 *See Morgan*, 596 U.S. at 411.

law tools of interpretation, which resolve ambiguities in the manner most consistent with the parties' intentions, the pro-arbitration canon unabashedly "tip[s] the scale"[227] in favor of arbitration, against litigation, without regard to the parties' intent. Such a rule does not place arbitration "agreements upon the same footing as other contracts"[228]—it places arbitration agreements "on a pedestal."[229] And absent a policy truly favoring arbitration over litigation, the pro-arbitration canon lacks any principled basis in the FAA. Instead, as stated in *Morgan*, a court facing an ambiguous arbitration agreement "must hold a party to its arbitration contract just as the court would to any other kind."[230] In other words, courts must employ generally applicable rules of contract interpretation.[231]

In short, with *Morgan*'s correction of courts' misunderstanding of the "policy favoring arbitration," the pro-arbitration canon is a purposive rule without a purpose. The FAA supports instead a contrary rule requiring courts to avoid pro-arbitration favoritism and resolve ambiguous arbitration agreements the same way they would any other ambiguous contract. Not only would adopting that rule be workable—courts are well-versed in resolving ambiguous contracts—it would harmonize the analysis of ambiguous arbitration agreements with other questions regarding, for example, whether an agreement to arbitrate was formed or whether a generally applicable contract defense might apply.[232] In neither of those circumstances does the "policy favoring arbitration" tip the scales against litigation, and neither should it when interpreting arbitration agreements. More broadly, applying only generally applicable rules of contract interpretation to resolve ambiguities in arbitration agreements conforms to the Supreme Court's repeated insistence that "[a]rbitration is strictly 'a matter of consent,' and thus "is a way to resolve those dis-

227 Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 270 (2d Cir. 2015).

228 *Morgan*, 596 U.S. at 411.

229 Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1219 (11th Cir. 2021) (Newsom, J., concurring).

230 *Morgan*, 596 U.S. at 418.

231 Of course, for much the same reasons, courts may not apply generally applicable rules that necessarily favor litigation over arbitration. *See* Lamps Plus, Inc. v. Varela, 587 U.S. 176, 183 (2019).

232 *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944–45 (1995); Will-Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 214 (5th Cir. 2003); Noohi v. Toll Bros., Inc., 708 F.3d 599, 611 (4th Cir. 2013); Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir. 2002); MacDonald v. CashCall, Inc., 883 F.3d 220, 230 (3d Cir. 2018).

putes—*but only those disputes*—that the parties have agreed to submit to arbitration."[233]

The pro-arbitration canon, therefore, should be sent the way of the waiver-prejudice rule that the Court rejected in *Morgan*.[234] Both rules arose from Second Circuit decisions in the early 1960s, both rules are grounded in the "policy favoring arbitration," both rules gained widespread acceptance with minimal critical analysis, and both rules are contrary to the FAA. The Court rejected the waiver-prejudice rule; rejecting the pro-arbitration canon is the logical next step.

B. The Conceivable Counterarguments Are Unavailing

Proponents of the pro-arbitration canon might dispute my conclusion by pointing to Professor Meshel's textual defense of the pro-arbitration canon. They might also point out that *Morgan* dealt with a "procedural" rule and thus does not implicate the substantive pro-arbitration canon. Or they might point to the canon's roots in the LMRA as a basis for its continued application. Each of these arguments fails under scrutiny.

First, Professor Meshel's textual defense of the pro-arbitration canon is unpersuasive. She maintains that the savings clause of section 2 supports the pro-arbitration canon "by explicitly allowing courts to refuse . . . enforcement [of an arbitration agreement] only on the most narrow contract law defenses—those that would allow for the *revocation* of any contract."[235] From this premise, she reasons that the FAA favors the right to arbitration over other contractual rights and that the Act therefore sanctions a liberal reading of arbitration agreements in favor of arbitration.[236]

This reasoning is flawed. For one thing, case law rejects Professor Meshel's premise that only "the most narrow contract law defenses" apply to arbitration agreements. To the contrary, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2."[237] Indeed, any other approach

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233 Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010).

234 *Morgan*, 596 U.S. at 418–19.

235 Meshel, *supra* note 202, at 415–16.

236 *See id.* at 416.

237 Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 507 (2018) (explaining that the FAA's savings clause permits arbitration agreements to be invalidated by generally applicable contract defenses); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (interpreting the FAA's savings clause to preserve generally applicable contract defenses).

would be inconsistent with *Morgan* (a case that Professor Meshel acknowledges only briefly in a footnote), which confirms that the purpose of the FAA is to assure the equal treatment of arbitration agreements and other contracts.[238]

But even accepting Professor Meshel's premise, it would not support the pro-arbitration canon. As a textual matter, Professor Meshel's conclusion improperly grounds the pro-arbitration canon in section 2's invocation of the language of revocability, validity, and enforceability.[239] These principles cannot support the pro-arbitration canon—a tool of contract interpretation—because they have little, if any, bearing on the interpretive question of an agreement's scope. Revocation, for example, does not implicate the interpretive question of an agreement's scope because it concerns a party's ability to unilaterally terminate an existing agreement, for example on account of another party's breach.[240] Validity, likewise, goes to circumstances that would render a contract void or voidable.[241] And a contract may be void or voidable because of public policy, a defect in a party's capacity, a mistake regarding the subject matter, or because it was the product of fraud or duress.[242] But these are not interpretive issues. The same goes for questions of enforceability, which embrace substantive doctrines like the statute of frauds and statute of limitations, or questions of public policy.[243] So while an otherwise valid

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238 *See* Meshel, *supra* note 202, at 402 n.30.

239 *See id.* at 415–16.

240 *See, e.g.*, Fenix Cattle Co. v. Silver (*In re* Select-A-Seat Corp.), 625 F.2d 290, 292 (9th Cir. 1980) (material breach would justify revocation); *cf.* Uniloc 2017 LLC v. Google LLC, 52 F.4th 1352, 1357 (Fed. Cir. 2022) (discussing irrevocable terms under New York law). Professor Meshel characterizes revocability as a doctrine tethered to the existence or formation of a contract, but even accepting that premise, those are issues distinct from interpreting the scope of an agreement. *See* Meshel, *supra* note 202, at 412; *see also id.* at 416–17 (distinguishing questions of scope from questions of existence and formation of a contract).

241 *See Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an invalid contract as "[a]n agreement that is either void or voidable."); RESTATEMENT (SECOND) OF CONTS. § 7 (A.L.I. 1981) (defining "voidable Contracts").

242 *See* RESTATEMENT (SECOND) OF CONTS. § 7 (A.L.I. 1981); *see, e.g.*, First Nat'l Bank of Springfield v. Malpractice Rsch., Inc., 688 N.E.2d 1179, 1182 (Ill. 1997) (contract may be void as against public policy); N.Y. Life Ins. Co. v. Mitchell, 528 P.3d 1269, 1272 (Wash. 2023) (contract may be voidable for lack of capacity); *In re* Allegheny Int'l, Inc., 954 F.2d 167, 176 (3d Cir. 1992) (finding a contract voidable if induced by fraud under Pennsylvania law); Thor Properties., LLC v. Chetrit Grp. LLC, 936 N.Y.S.2d 196, 198 (App. Div. 2012) (contract may be voidable for mutual mistake); U.S. *ex rel.* Trane Co. v. Bond, 586 A.2d 734, 740 (Md. 1991) (contract may be void if induced by duress).

243 *See Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining an unenforceable contract as "[a]n otherwise valid contract that, because of some technical defect, cannot be fully enforced; a contract that has some legal consequences but that may not be enforced

and unrevoked agreement may nonetheless be unenforceable if the statute of limitations has run or the agreement falls within the statute of frauds but was not reduced to writing, the inquiry is distinct from that of interpreting the agreement's scope.[244]

Because revocability, validity, and enforceability cover substantive issues distinct from the antecedent interpretive question of an agreement's scope, they are scant support for the pro-arbitration canon. Far better textual evidence of Congress's intent is its omission of any reference to interpretive rules in the FAA despite raising interpretive questions in several sections of the Act. As explained above, under accepted rules of statutory interpretation, that omission evidences Congress's intent to have generally applicable rules of contract interpretation apply—not an atextual pro-arbitration canon.

Second, the purportedly procedural nature of the waiver rule at issue in *Morgan* does not detract from the case's applicability to the substantive pro-arbitration canon. To be sure, in *Morgan*, the Court was careful to couch its holding in terms of whether courts could craft "arbitration-preferring *procedural* rules."[245] Perhaps that tailoring was necessary to avoid splits from the unanimous opinion. But the principles the Court relied on and applied were almost exclusively substantive. Indeed, the bulk of the Court's analysis focused on the FAA's equal-treatment principle, which derives from the FAA's substantive provisions, primarily section 2, and applies to substantive issues—contract formation and available defenses—no less than procedural ones.

The only part of the Court's analysis that would be inapplicable to an analysis of the pro-arbitration canon would be the Court's brief reliance on section 6. That section provides that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions."[246] To be sure, section 6 supports the extension of the

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in an action for damages or specific performance in the face of certain defenses, such as the statute of frauds"); RESTATEMENT (SECOND) OF CONTS. § 8 (A.L.I. 1981) (defining "unenforceable contracts").

244 *See* Halcon Int'l, Inc. v. Monsanto Austl. Ltd., 446 F.2d 156, 159 (7th Cir. 1971) ("Thus the Restatement of Contracts distinguishes between voidable contracts (such as those induced by fraud, mistake or duress) and unenforceable contracts (such as those where enforcement is barred because of a statute of limitations, discharge in bankruptcy or statute of frauds)." (citing RESTATEMENT (SECOND) OF CONTS. §§ 13–14 (A.L.I. 1981))).

245 Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022) (emphasis added).

246 9 U.S.C. § 6.

equal treatment principle to procedural questions like waiver of the right to compel arbitration under section 4. But the presence of section 6 is only necessary because section 2—from which the equal treatment rule derives—is a substantive mandate. And section 2 prohibits novel substantive rules favoring arbitration just as much as section 6 prohibits procedural ones.

Third, LMRA case law does not support the pro-arbitration canon's continued application post-*Morgan*. As explained above, beyond the "liberal policy favoring arbitration," some courts cited case law from the LMRA as support for the canon.[247] But in *United Steelworkers*, where the Court held that ambiguities in a collective bargaining agreement's arbitration clause must be resolved in favor of arbitration, it was careful to explain that "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement."[248] The LMRA "promote[s] industrial stabilization through the collective bargaining agreement" and "[a] major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances."[249] So while "[i]n the commercial case, arbitration is the substitute for litigation," in the context of labor disputes, "arbitration is the substitute for industrial strife."[250] These policy aims, set forth in the LMRA itself,[251] have no application outside the context of a collective bargaining agreement.[252] And the FAA has no comparable statement of purpose. To the contrary, its fundamental purpose is the equal treatment of arbitration agreements and other contracts. And *that* policy cannot support the pro-arbitration canon.

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247 *United Steelworkers*, 363 U.S. 574, 578 (1960).

248 *Id.*

249 *Id.*

250 *Id.*; *see also* AT&T Technologies, Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986) ("This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, 'furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.'").

251 29 U.S.C. § 141.

252 *See* Moses, *supra* note 196, at 124 ("So the policy [favoring arbitration] with regard to the FAA was instead a policy pertaining to the labor law field. In that field, there are strong national policy justifications for favoring arbitration of collective bargaining agreements—to prevent strikes and worker violence, to preserve labor peace, and to promote industrial stabilization. These policy reasons do not pertain to the FAA, which simply provides that arbitration of commercial and maritime disputes can be a workable alternative to litigation." (footnotes omitted)).

C. A Path Forward Post-*Morgan*

If you are convinced that the pro-arbitration canon is incompatible with the FAA, the question follows: What next? After all, the canon is accepted in every circuit,[253] supported by decades of case law,[254] and has been repeatedly cited by the Supreme Court.[255] So even if a court were—in the abstract—inclined to abandon the rule, doing so implicates some practical constraints.

Theoretically, there are three paths forward. First, lower courts could immediately renounce the pro-arbitration canon and cease applying it, citing *Morgan* as an intervening change in the law warranting a departure from otherwise binding precedent. Second, courts could continue to apply the pro-arbitration canon without adjustment, waiting (hoping?) for the Supreme Court to correct course. Finally, lower courts could follow the Supreme Court's lead in *Morgan* and *Granite Rock*, and reorient the pro-arbitration canon as merely a restatement of the rule that arbitration is a matter of consent and it is the parties' intent that controls, making the canon a last resort where ambiguity is otherwise impossible to resolve. Whereas the first and second options are likely too aggressive and too meek, respectively, the last is "just right," because it best ensures that arbitration agreements are appropriately interpreted until the Supreme Court formally renounces the rule.

The most aggressive approach—immediately discarding the pro-arbitration canon—is untenable considering the Supreme Court's past invocations of the pro-arbitration canon. Although the courts of appeals may reconsider their own precedent when the reasoning is called into doubt by intervening Supreme Court decisions,[256] only the Supreme Court can overrule its own precedent.[257] That rule applies "regardless of whether subsequent cas-

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253 *See* cases cited *supra* notes 188–91.

254 *See* cases cited *supra* notes 127, 188–91.

255 *See supra* Section III.B.

256 *See, e.g.*, Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994) ("'We are bound by decisions of prior panels' unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions." (quoting United States v. Washington, 872 F.2d 874, 880 (9th Cir. 1989))).

257 *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents."); Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1252, 1263–64 (11th Cir. 2012) ("On the subject of lower courts predicting that the Supreme Court is going to overrule one of its own decisions, however, Judge Hand cautioned against 'embrac[ing] tthe [sic] exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'" (first alteration in

es have raised doubts about [earlier Supreme Court precedent's] continuing vitality."[258]

Here, the pro-arbitration canon is a part of Supreme Court precedent such that lower courts must continue to apply it until the Court says otherwise—which it should, with haste. To be sure, most of the Court's invocations of the canon have come in dicta lacking precedential force. *Moses H. Cone*'s pronouncement of the FAA's pro-arbitration canon, for example, is already recognized as dicta.[259] The same can be said of the Court's discussion of the canon in *Mitsubishi Motors*, *Volt*, *First Options*, and *Granite Rock*.[260] So none of these cases stand in the way of lower courts—bound as they are to follow the Supreme Court's holdings—abandoning the pro-arbitration canon on their own. But at least in *Mastrobuono*, the pro-arbitration canon was a part of the Court's holding. There, the Court actually applied the pro-arbitration canon to resolve ambiguities in an arbitration agreement.[261] True, the canon was but one of a number of interpretive tools the Court invoked—including the canon of *contra proferentem* and the rule that a contract should be read to give effect to all its provisions—such that the pro-arbitration canon was not strictly necessary to the Court's ruling.[262] But the Court's more recent readings of *Mastrobuono* limit lower courts' ability to

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original) (quoting Spector Motor Serv. Inc., v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Hand, J., dissenting))).

258 Hohn v. United States, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

259 Moses, *supra* note 146, at 174 ("The first Supreme Court statement that there was a federal policy favoring arbitration came from dicta in the 1983 case of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*").

260 In none of these cases was the pro-arbitration canon necessary to the Court's ruling. In *Granite Rock*, the Court concluded that the agreement at issue was unambiguous, such that it had no cause to apply the canon. *See* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 307 (2010). And in *Mitsubishi Motors* and *First Options*, the Court invoked the pro-arbitration canon merely as a point of contrast to reject arguments for similar rules when considering other threshold questions regarding arbitrability. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995). Similarly, in *Volt*, the pro-arbitration canon was invoked only to say that it would not favor arbitration "under a certain set of procedural rules." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470, 476 (1989).

261 *See* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

262 *See id.* at 62–64.

treat the case's application of the pro-arbitration canon as dicta. For example, in *Lamps Plus*, where the Court found California's *contra proferentem* rule preempted by the FAA, the majority noted that *Mastrobuono* "was primarily based on the FAA policy favoring arbitration," making it difficult to explain away the significance the pro-arbitration canon had on the outcome of the case.[263] Similarly, in *EEOC v. Waffle House, Inc.*, the Court explained that "[i]n *Mastrobuono,* we reiterated that clear contractual language governs our interpretation of arbitration agreements, but because the choice-of-law provision in that case was ambiguous, we read the agreement to favor arbitration under the FAA rules."[264] Thus, a faithful reading of *Mastrobuono*, *Lamps Plus*, and *Waffle House*, suggests that the pro-arbitration canon is a part of binding Supreme Court case law that lower courts must continue to apply it until the Court says otherwise.

But it does not follow that courts must sit back and wait for the Supreme Court to announce the canon's demise in some future decision.[265] The key lies in the Court's approach in *Morgan* and, earlier, *Granite Rock*. In those cases, the Court reoriented—without expressly overruling—the "policy favoring arbitration" and the pro-arbitration canon respectively. Despite seemingly contrary authority, the Court in *Morgan* explained that the "policy favoring arbitration" does not mean literally favoring arbitration over litigation, it means treating arbitration agreements the same as other contracts.[266] Similarly, in *Granite Rock* the Court recast the canon as applying only where the arbitration agreement is "legally enforceable and *best construed to encompass the dispute*."[267]

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263 Lamps Plus, Inc. v. Varela, 587 U.S. 176, 189 n.5 (2019).

264 534 U.S. 279, 294 n.9 (2002).

265 Though not strictly within the scope of this Article, I do not think that abandoning the pro-arbitration canon would raise significant stare decisis concerns. For one thing, all but one of the Court's mentions of the doctrine have come in dicta, and its conception of the rule has fluctuated over time. *See* Franchise Tax Bd. of Cal. v. Hyatt, 587 U.S. 230, 232 (2019) (explaining that stare decisis factors include "the quality of the decision's reasoning, its consistency with related decisions, [and] legal developments since the decision"); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 917 (2018) ("An important factor in determining whether a precedent should be overruled is the quality of its reasoning . . . ."). For another, doing so would likely not implicate private parties' reliance interests because rejecting the canon would mean that courts would be focused on giving effect to parties' actual intent in drafting an arbitration agreement. *See Hyatt*, 587 U.S. at 248–49 (reliance interests a factor in whether to overrule past precedent). In light of these considerations, the flaws in the canon's substantive basis would warrant a departure from past precedent. *See id.*

266 Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022).

267 Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 303 (2010) (emphasis added).

Together, these cases reveal a principled path forward until the Court overrules its pro-arbitration canon precedent: the pro-arbitration canon should be relegated to the status of a canon-of-last-resort, applied only after exhausting all other tools for resolving ambiguous agreements. In terms of *Morgan*, this rule makes sense. To treat arbitration agreements and other contracts equally, they should—as much as possible—be interpreted using the same tools. Prioritizing generally applicable state-law interpretive tools over the pro-arbitration canon ensures that occurs. And if those tools favor one of several reasonable readings of the agreement, then that reading must control. Otherwise, the court would be violating the broader principle that arbitration agreements must be treated the same as other agreements. And if—in what would likely be a very rare scenario—state-law interpretive tools cannot resolve an ambiguity, then perhaps the canon could apply, on the weak reasoning that if the parties agreed to arbitrate some disputes, they must have agreed to arbitrate others.[268] The canon-of-last-resort approach likewise comports with *Granite Rock*. Only if generally applicable interpretive tools suggest that an arbitration agreement covers a given dispute can it be said that the agreement is "best construed to encompass the dispute" such that the pro-arbitration canon would apply to resolve any ambiguity in favor of arbitration.[269]

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268 *See id.* at 289 ("The [pro-arbitration canon] should be applied only where it reflects, and derives its legitimacy from, a judicial conclusion (absent a provision validly committing the issue to an arbitrator) that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed, is legally enforceable, and is best construed to encompass the dispute."); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) ("The latter question [of an arbitration clause's scope] arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter." (citation omitted)).

Unburdened by the pro-arbitration canon, a court in this scenario could resolve the issue by holding that the moving party failed to carry its burden to establish a right to arbitrate the dispute at issue. *See, e.g.*, Air-Con, Inc. v. Daikin Applied Latin Am., LLC, 21 F.4th 168, 176 (1st Cir. 2021) ("[T]he substantive law on the enforceability of arbitration agreements puts the burden on the party moving to compel arbitration to show that it is entitled to that outcome."); Austin v. Experian Info. Sols., Inc., 148 F.4th 194, 201 (4th Cir. 2025).

269 This canon-of-last-resort approach finds an analogue in the application of *contra proferentem*, which today is generally applied only "when the meaning of a provision remains ambiguous after exhausting the ordinary methods of interpretation." Lamps Plus, Inc. v. Varela, 587 U.S. 176, 186 (2019); *see also* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1220 (11th Cir. 2021) (Newsom, J., concurring) (noting other instances where substantive canons are applied only where meaning cannot otherwise be determined).

Not only does this canon-of-last-resort approach flow naturally from *Morgan* and *Granite Rock*, it is also compatible with *Mastrobuono* and the Court's other pro-arbitration canon cases because the Court has never had the occasion to state precisely where in the hierarchy of interpretive tools the canon lies. Notably, some intermediate courts have already begun to read *Granite Rock* in this fashion.[270] *Morgan*'s rejection of a pro-arbitration rule crafted from the "policy favoring arbitration" should push more courts to do the same, until the Supreme Court ends the discussion for good.[271]

V. CONCLUSION

Over eighty years ago, Circuit Judge Frank offered an observation that resonates here: "Give a bad dogma a good name and its bite may become as bad as its bark."[272] His point was that rhetorical flourish can distract from a doctrine's questionable roots. Thus, he mused, the "hypnotic power of the phrase 'oust the jurisdiction'" could explain the widespread acceptance of the ouster doctrine as a justification for the common law's maltreatment of executory arbitration agreements, despite the doctrine's substantive flaws.[273]

The same can be said of the phrase "liberal national policy favoring arbitration" (and variations thereon).[274] Fundamentally, it represents a bad dogma, or at least a confusing one, because it suggests that the FAA favors arbitration over litigation when the

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270 *See, e.g.*, Loc. Union 97, Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power Corp., 67 F.4th 107, 113 (2d Cir. 2023) ("At bottom, *Granite Rock* stands for the proposition that courts may invoke a presumption of arbitrability only where the parties' dispute concerns a valid and enforceable agreement to arbitrate that is ambiguous as to its scope. In so holding, the Supreme Court abrogated some elements of this Court's previous arbitrability jurisprudence."); Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 270 (2d Cir. 2015) ("So if an arbitration clause is best construed to express the parties' intent *not* to arbitrate certain disputes, that intent controls and cannot be overridden by the presumption of arbitrability.").

271 *See, e.g.*, Largan Precision Co. v. Fisch Sigler LLP, 610 F. Supp. 3d 209, 215–16 (D.D.C. 2022) ("There are two reasons not to apply the presumption in favor of arbitrability here. For starters, [Respondent] overemphasizes the force of the presumption. The Supreme Court recently highlighted the presumption's limited reach when it clarified that the 'policy favoring arbitration . . . is about *treating arbitration contracts like all others, not about fostering arbitration*.'" (quoting Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022) (emphasis added))).

272 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942).

273 *Id.* at 983–84.

274 *See Morgan*, 596 U.S. at 418 (quoting Carolina Throwing Co. v. S & E Novelty Corp., 442 F.2d 329, 331 (4th Cir. 1971) (per curiam)).

statute's purpose is merely to ensure that arbitration agreements and other contracts are treated the same. Yet as courts began reciting the mantra of a "policy favoring arbitration," that bad dogma began to bite. Soon enough, a law addressing the judicial hostility to arbitration led to an overcorrection, serving as the substantive basis for questionable doctrines, such as the arbitration-specific waiver rule at issue in *Morgan*, and the pro-arbitration canon discussed here.[275]

Those bites have left real marks. The Tenth Circuit has applied the pro-arbitration canon to interpret employees' arbitration agreements in favor of arbitrating discrimination and wage claims, even where those claims were outside the scope of the parties' substantive agreement.[276] Several circuits have similarly applied the canon to favor the arbitrability of claims of fraudulent inducement and other torts beyond simple breaches of contract.[277] The Second Circuit has resolved ambiguity in favor of arbitrating questions regarding timeliness, and the Third Circuit has even used the canon to compel arbitration where the arbitral forum chosen by the parties was unavailable.[278] These are but a few recent examples; scholars have argued persuasively that the pro-arbitration canon and the "policy favoring arbitration" are responsible in large part for the Supreme Court's decisions holding statutory rights arbitrable.[279]

In this Article, I have argued that the pro-arbitration canon must be abandoned. *Morgan* is the hook. For one thing, it confirms that there is no "liberal [federal] policy favoring arbitration" *over litigation*.[280] Instead, as the Court had hinted at in earlier decisions, the "policy favoring arbitration" means only that

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275 *See* Frankel, *supra* note 51, at 553–54 ("Ironically, these special rules often have been crafted by courts that are seeking to rein in what they perceive as continued judicial hostility to arbitration, when, in reality, that purported hostility simply represents decisions placing arbitration clauses on equal footing with other contracts, as the FAA requires.").

276 *See, e.g.*, Sanchez v. Nitro-Lift Technologies, L.L.C., 762 F.3d 1139, 1148 (10th Cir. 2014); Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 798 (10th Cir. 1995).

277 *See* Highlands Wellmont Health Network, Inc. v. John Deere Health Plan, Inc., 350 F.3d 568, 576–77 (6th Cir. 2003); Gregory v. Electro-Mech. Corp., 83 F.3d 382, 385–86 (11th Cir. 1996); Battaglia v. McKendry, 233 F.3d 720, 727 (3d Cir. 2000).

278 *See Khan v. Dell Inc.*, 669 F.3d 350, 356 (3d Cir. 2012); Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda., 638 F.3d 150, 158 (2d Cir. 2011).

279 *See* Moses, *supra* note 146, at 176 (arguing that the "policy favoring arbitration" "was the Court's linchpin for determining that the FAA permitted antitrust claims to be arbitrated"); Moses, *supra* note 196, at 145 (arguing that the Supreme Court "relied heavily" on pro-arbitration canon to hold statutory claims arbitrable); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 307–08 (2015).

280 Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022).

courts must treat arbitration agreements the same as other contracts.[281] So the FAA favors arbitration only relative to its disfavored status under the law before the statute's enactment.[282] More important than that general clarification, though, the Court wielded that principle in a way that it had not before, rejecting a court-made rule that grafted an arbitration-favoring prejudice requirement onto the generally applicable standard for waiver.[283] In doing so, the Court was clear: "[A] court may not devise novel rules to favor arbitration over litigation."[284]

The pro-arbitration canon is such a novel rule. The text of the FAA lends it no support. To the contrary, the statute's text compels courts to resolve ambiguities in arbitration agreements the same as they would any other contract—using the myriad tools courts have developed for the task. Nor does the FAA's legislative history—which is relatively sparse, but confirms that the statute was intended to place arbitration agreements on the "same footing" as other contracts—support the canon's continued application. Indeed, the pro-arbitration canon was never said to arise from these typical substantive bases.[285] Instead, it is an explicit application of the "policy favoring arbitration." With *Morgan*'s clarification of that phrase's proper understanding, the canon now lacks any basis whatsoever. The Supreme Court, accordingly, should abandon it. And until it does, lower courts should relegate it to the status of a canon-of-last-resort.

281 *See id.*
282 *See id.*
283 *See id.* at 418–19.
284 *Id.* at 418.
285 *See* Frankel, *supra* note 51, at 539, 546.