A UNIFORM THEORY OF FEDERAL COURT JURISDICTION UNDER THE FEDERAL ARBITRATION ACT

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INTRODUCTION

> *[I]t is inconceivable that Congress intended the [arbitration] rule[s] to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court.*[1]

Justice Brennan described the Federal Arbitration Act[2] ("FAA") as an "anomaly" among federal statutes because its protections are substantive, but litigants cannot invoke the statute as the basis for federal court jurisdiction.[3] To seek the protections of the FAA, parties must *also* invoke diversity or federal question jurisdiction.[4] This interpretation stems from FAA Section 4, which states that jurisdiction lies in any district court which, "save for such agreement [to arbitrate], would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the

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[1] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

[2] 9 U.S.C. §§ 1-307 (2012).

[3] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." (citation omitted)); *see* Vaden v. Discover Bank, 556 U.S. 49, 59 (2009); Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 582 (2008) (noting that the FAA provides "no federal jurisdiction but rather requir[es] an independent jurisdictional basis"); *see also* Cmty. State Bank v. Strong, 651 F.3d 1241, 1252 (11th Cir. 2011) ("It is a long-accepted principle that the FAA is non-jurisdictional: The statute does not itself supply a basis for federal jurisdiction over FAA petitions."); Northport Health Servs. of Ark., LLC v. Rutherford, 605 F.3d 483, 486 (8th Cir. 2010). Certainly, other statutes exist that are anomalies in their own right. For example, Section 301 of the Taft-Hartley Act grants federal court jurisdiction for breach of contract suits for violations of labor management agreements in industries affecting interstate commerce. The Act itself, however, does not create federal substantive law. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456-57 (1957). The Declaratory Judgment Act, discussed below, is another similar statute.

[4] Parties could also invoke admiralty law, but this paper only considers federal question and diversity jurisdiction because they are the grounds most often used for jurisdiction.

controversy between the parties."[5] Determining the "controversy" between the parties has proved particularly problematic. In some instances, the "controversy" only entails litigation activities already instituted by the parties. In other instances, the "controversy" is the matter to be arbitrated.

In 2009, the Supreme Court's decision in *Vaden v. Discover Bank*[6] attempted to answer some of these questions, but the opinion lacks critical guidance and philosophical underpinnings necessary for a consistent rule interpreting the FAA. The limited nature of the decision has led to additional circuit splits. The complexities multiply as one considers the different intersections of arbitration law and federal court, primarily on the "front end" of arbitration (such as compelling a motion to arbitrate) and the "back end" of arbitration (such as challenging an arbitration award).[7]

A new, uniform standard for federal court jurisdiction under the FAA would better serve the text and goals of the statute, as well as the courts and parties to arbitration agreements. Specifically, the courts should apply a uniform rule to consider the arbitrable controversy for jurisdictional purposes. If the arbitral controversy would otherwise give rise to federal court jurisdiction, then the federal court should have jurisdiction. Since *Vaden*, no other article has considered these jurisdictional complexities,[8] and none of the existing scholarship has dealt with federal court jurisdiction on issues other than motions to compel arbitration. This Article fills these gaps in the scholarship.

Part I herein considers the jurisdictional default rules as well as the structure and history of the FAA. Part II details the *Vaden* decision and the myriad of post-*Vaden* complications. Part III sets forth and supports a new proposal, namely that the courts consider the arbitrable controversy for jurisdictional purposes. Part III also proposes that the courts or Congress adopt the proposal and simplify the current jurisdictional quagmire. Part IV then explores the implications of the proposal.

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5 9 U.S.C. § 4.

6 556 U.S. 49 (2009).

7 Additional issues may arise when the underlying dispute is international in nature and the controversy is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on June 10, 1958. 9 U.S.C. §§ 201-208 (2012). This Article deals exclusively with domestic arbitration and does not explore the additional complexities in international cases.

8 Professor Szalai wrote an important piece in this area prior to the *Vaden* decision. Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 325 (2007) (suggesting adherence to a broad jurisdictional view). Only a handful of notes discuss the issue post-*Vaden*. *See* Leda Moloff, Note, *On The Face of It? Establishing Jurisdiction on Claims to Compel Arbitration Under Section 4 of the FAA*, 77 FORDHAM L. REV. 181, 184 (2008) (arguing for the application of the well-pleaded complaint rule in Section 4 petition cases).

I. FEDERAL COURT JURISDICTION AND THE FAA

An understanding of federal jurisdiction and the FAA aids in the later discussion of *Vaden* and its progeny. Extraordinary complexities surrounding the jurisdictional limits of the federal courts exist, and this Article does not delve deeply into those nuances. Instead, this Part provides a backdrop to aid the discussion of how the courts have used these doctrines when considering the jurisdiction for the FAA.

A. *Constitutional Limitations on Jurisdiction*

The "[f]ederal courts are courts of limited jurisdiction."[9] Article III of the Constitution articulates these limitations.[10] Most relevant to this discussion are the bases of jurisdiction for "Cases, in Law and Equity, arising under . . . the Laws of the United States" and cases "between Citizens of different States."[11] Congress must also pass legislation effectively funneling the cases into the federal courts,[12] which it has done for federal question and diversity jurisdiction.[13]

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9 Gunn v. Minton, 133 S. Ct. 1059, 1064 (2013) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)) (internal quotation marks omitted).

10 U.S. CONST. art. III; *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 41 (5th ed. 2007) ("Article III of the Constitution defines the scope of federal court authority. . . . [including] subject matter jurisdiction.").

11 U.S. CONST. art. III, § 2, cl. 1; *see* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder,* 91 IOWA L. REV. 189, 196 (2005) ("Diversity jurisdiction was a topic of relatively little discussion during the Constitutional Convention. Although the framers amended Edmond Randolph's original resolution before agreeing on the final language authorizing diversity jurisdiction, the records of the Convention provide little evidence of the framers' intent. The provision extending 'Judicial Power' 'to controversies . . . between Citizens of different States' was unanimously accepted without any recorded debate." (footnotes omitted) (quoting U.S. CONST. art. III, § 2, cl. 1)).

12 *Gunn*, 133 S. Ct. at 1064 ("There is no dispute that the Constitution permits Congress to extend federal court jurisdiction to a case such as this one; the question is whether Congress has done so." (citation omitted)); CHEMERINSKY, *supra* note 10, at 41 ("Congress plays an important role in limiting federal court jurisdiction. The Supreme Court has held that a federal court may hear a matter only when there is *both* constitutional and statutory authorization."); Percy, *supra* note 11, at 203 ("Even though the Constitution clearly authorizes diversity jurisdiction, it does not actually confer such jurisdiction on the federal district courts. Federal district courts are courts of limited jurisdiction and can exercise only that jurisdiction that has been constitutionally authorized and actually conferred by statute.").

13 28 U.S.C. § 1331 (2012) (cases arising under federal law); 28 U.S.C. § 1332(a) (cases arising under diversity of citizenship); *see also* Percy, *supra* note 11, at 203 ("Section 1332 of the Judicial Code grants federal district courts original jurisdiction over cases between 'citizens of different states' in which the matter in controversy exceeds $75,000, exclusive of interest and costs.").

B. *Congressional Limitations on Jurisdiction*

1. Federal Questions Jurisdiction

Federal courts have jurisdiction under Article III for cases "arising under" the laws of the United States.[14] A case can arise under federal law in two ways. "Most directly, a case arises under federal law when federal law creates the cause of action asserted."[15] Second, in a "special and small" category of stated, related causes of action, federal jurisdiction may still lie under the "arising under" jurisdiction.[16] Federal jurisdiction will lie if the state law cause of action involves a federal issue that is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[17] When these requirements are met, "jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts."[18]

For cases originating in state court, under the well-pleaded complaint rule, the existence of the federal question must be evident on the face of the complaint, *and not based on an anticipated federal-law counterclaim* or *defense*.[19] This rule applies equally to plaintiffs who file in federal court as well as defendants *who remove* cases from state court to federal court.[20] In

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14 U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 1331. Although both the Constitution and 28 U.S.C. § 1331 use the terms "arising under" federal law, the Supreme Court has interpreted the statutory grant of jurisdiction in § 1331 significantly narrower than the potential grant of jurisdiction found in the Constitution. *See* CHEMERINSKY, *supra* note 10, at 282 ("28 U.S.C. §1331 provides that the 'district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.' As described earlier, the Supreme Court repeatedly has held that this provision has a much narrower meaning than does the corresponding language in Article III.").

15 *Gunn*, 133 S. Ct. at 1064 (citing Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)).

16 *Id.* ("In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first.").

17 *Id.* at 1065.

18 *Id.* (quoting Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313-14 (2005)).

19 Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); *see also* Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 10 (1983) ("For better or worse, under the present statutory scheme as it has existed since 1887, a defendant may not remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law."). This rule applies to compulsory counterclaims. *See* Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 830 (2002) ("Respondent argues that the well-pleaded-complaint rule, properly understood, allows a counterclaim to serve as the basis for a district court's 'arising under' jurisdiction. We disagree.").

20 *See, e.g.*, Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 947 (9th Cir. 2014) ("The well-pleaded complaint rule means that 'a case may *not* be removed to federal

addition, parties cannot circumvent the well-pleaded complaint rule by asserting a claim under the Declaratory Judgment Act[21] ("DJA") or under the FAA. This Article discusses procedural similarities between the DJA and the FAA in Section IV.B.

2. Diversity Jurisdiction

Statutory diversity jurisdiction involves two elements.[22] First, the parties must be completely diverse—*each* defendant is a citizen of a different State from *each* plaintiff.[23] The party seeking diversity jurisdiction has the burden of demonstrating diversity.[24] For class actions under the Class Action Fairness Act of 2005[25] ("CAFA"), only "minimal diversity" is required.[26] Under the CAFA, "a federal court may exercise jurisdiction over a class action if 'any member of a class of plaintiffs is a citizen of a State different from any defendant.'"[27] Plaintiffs must allege diversity on the face of a complaint or in a notice of removal,[28] and the parties may not resort to collusion to manufacture jurisdiction.[29]

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court on the basis of a federal defense.'" (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987))).

21 28 U.S.C. § 2201 (2012); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950) (noting that because the Declaratory Judgment Act is a procedural act only, it cannot serve as the basis of a federal court action). The well-pleaded complaint rule serves some legitimate policy ends. The rule ensures that federal jurisdiction is established at the onset, as opposed to hypothetical jurisdiction based on claims, actions, and defenses that might arise in the future. The well-pleaded complaint rule, then, establishes certainty for the limited federal judicial resources. In addition, the plaintiff is the "master of the complaint," and the well-pleaded complaint rule enables a plaintiff, "by eschewing claims based on federal law . . . to have the cause heard in state court." *Caterpillar Inc.*, 482 U.S. at 398-99. An alternate rule would erode the plaintiff's choice of forum.

22 The Constitution only requires minimal diversity, and it does not implement an amount-in-controversy requirement. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 584 (2005) (Ginsburg, J., dissenting). The additional requirements are found in 28 U.S.C. § 1332 (2012).

23 *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). In addition, the parties could be citizens of a different country, provided that the opposing parties are citizens of a state. *See* 28 U.S.C. § 1332(a)(2) (2012).

24 *See, e.g.*, Cameron v. Hodges, 127 U.S. 322, 326 (1888) (discussing burden of proof).

25 Pub. L. No. 109-2, 118 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715 (2012)).

26 Mississippi *ex rel.* Hood v. AU Optronics Corp., 134 S. Ct. 736, 740 (2014).

27 *Id.* (quoting 28 U.S.C. § 1332(d)(2)(A)).

28 The important time for diversity of citizenship is the time the complaint or notice of removal is filed. Diversity of citizenship at the time the cause of action arose or at the time of ultimate judgment does not matter for this inquiry. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 69 (1996); *see also* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 570 (2004).

29 *See* Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 827-28 (1969) (discussing the impropriety of assigning the cause of action to a different party for the purpose of establishing diversity jurisdiction).

The second requirement is the amount in controversy, which currently stands at $75,000.[30] Congress intended for the amount in controversy requirement to save the federal courts for "important," cases, but critics have rightly noted that a high dollar amount does not necessarily equate to the importance of a case.[31] The jurisdictional amount alleged by the party asserting jurisdiction controls unless the opposing party can show by a "legal certainty" that the claim is for less than the jurisdictional amount.[32] To determine the value of the claim, courts consider either monetary damages alleged or "the value of the object of the litigation."[33]

3. Removal Jurisdiction

The removal jurisdiction of the courts is based on the belief that both plaintiffs and defendants should be able to avail themselves of the federal forum.[34] Under 28 U.S.C. § 1441(a), a defendant may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction."[35] Thus, litigants may only remove a case to federal court if it could originally have been brought in federal court. For diversity cases, removal is not available if any of the defendants is a citizen of the state in which the action is brought because the forum is presumed "neutral" for the in-state defendant.[36] Ordinarily, plaintiffs in state court

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30 28 U.S.C. § 1332(a) (2012) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . .").

31 CHEMERINSKY, *supra* note 10, at 315 ("For an individual, $5,000 may represent a life's savings, but for a multibillion-dollar corporation, $75,000 is a mere pittance."). It is also worth noting that federal question cases contained an amount-in-controversy requirement from 1789 to 1980. *Id.* at 314-15.

32 St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) ("The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to be a legal certainty that the claim is really for less than the jurisdictional amount to justify the dismissal." (footnotes omitted)).

33 Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347-48 (1977).

34 *See* Perry Thomas Klauber, Article, *Reversing a Wayward Trend: Why Courts Using the Functional Test for Removal Are Right*, 46 ARIZ. ST. L.J. 1499, 1501 (2014) ("Section 1441 was partly designed to provide defendants with a federal forum for federal question claims, but also to protect a defendant's right of removal from state infringement." (footnote omitted) (citing 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.01 (3d ed. 2013))).

35 28 U.S.C. § 1441(a) (2012). The statute explicitly applies to "defendants," and plaintiffs cannot remove cases to federal courts.

36 *Id.* § 1441(b)(2); JoEllen Lind, *"Procedural* Swift*": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 741 (2004) ("[T]he defendant need not typically be concerned with achieving a more neutral forum, when the plaintiff has submitted to the very state court system from whence the defendant hails.").

litigation may not artificially manufacture a low amount in controversy to defeat federal court jurisdiction.[37]

Plaintiffs, as masters of their complaints, can take measures to try to defeat removal by adding non-diverse parties or by forgoing federal claims. Jurisdiction is determined at the time of removal.[38] Post-removal maneuvers, such as reducing the amount in controversy, may not defeat a notice of removal.[39]

4. Simplicity in Jurisdictional Rules

Recent Supreme Court rulings have stressed the policy of simplicity in the application of jurisdictional statutes. These rulings, which occurred post-*Vaden*, indicate a shift in policy priorities for the interpretation of jurisdictional statutes. In *Hertz Corp. v. Friend*,[40] decided one year after *Vaden*, the Court was confronted with how to determine a corporation's principle place of business.[41] The court recognized the historical difficulty in making this determination and the "growing complexity" of tests employed by the lower courts.[42]

The unanimous Court turned to simplicity as a guiding principle in the application of jurisdictional rules. It stated: "[W]e place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."[43] The virtues of simplicity include "a nationally uniform interpretation of federal law,"[44] ease of application,[45] and "greater predictability."[46] The Court noted that "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those

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37 *See* 28 U.S.C. § 1446(c)(2) (indicating that ordinarily the amount-in-controversy is set by the complaint, but that a court may determine a different amount-in-controversy); *see also* Morgan v. Gay, 471 F.3d 469, 477 (3d Cir. 2006); De Aguilar v. Boeing Co., 47 F.3d 1404, 1411 (5th Cir. 1995); Austwick v. Bd. of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983).

38 Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 570 (2004); Caterpillar Inc. v. Lewis, 519 U.S. 61, 69 (1996).

39 *See* Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1350 (2013) (holding that in the class action context, the stipulation of the named plaintiff does not bind unnamed class members); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293 (1938) (stating general rule). A plaintiff, however, may seek to remand the action on the ground that it seeks to join additional parties who will destroy diversity. *See* 28 U.S.C. § 1447(e).

40 559 U.S. 77 (2010).

41 *Id.* at 80.

42 *Id.* at 91.

43 *Id.* at 80.

44 *Id.* at 92.

45 *Id.* at 94 ("Second, administrative simplicity is a major virtue in a jurisdictional statute.").

46 *Hertz*, 559 U.S. at 94 ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

claims."[47] In addition, they can "produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits."[48]

The Court went so far as to value simplicity over perfection. In *Hertz*, the Court adopted the "nerve center" test, and described it as "imperfect," but "superior to other possibilities."[49] The benefits of a simple jurisdictional test for the courts and the parties outweighed the constant tinkering of the tests, resulting in varying tests across the country.

The *Hertz* case appears to set forth a new guiding principle in civil litigation jurisprudence. In the last few years, the Supreme Court has cited the case positively.[50] The Court, however, decided *Vaden* before this new dedication to jurisdictional simplicity. Revisiting *Vaden* with an eye towards simplicity and utility makes sense in light of *Hertz*.

C. *The FAA's Jurisdictional and Venue Language*

Congress enacted the FAA in 1925, and early cases interpreted it as a "procedural" statute applying in federal courts.[51] The FAA achieves two primary purposes: (1) to make agreements to arbitrate enforceable, and (2) to ensure that arbitral awards are enforced.[52] These next Subsections discuss the jurisdictional requirements of the FAA.

1. Jurisdiction to Enforce Arbitration Agreements

The heart of the FAA lies in Section 2, which makes arbitration agreements "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[53] Section 2 encompasses the "national

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47 *Id.*

48 *Id.*

49 *Id.* at 92-93.

50 *See* Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1131 (2015) ("Such a rule would be inconsistent . . . with our rule favoring clear boundaries in the interpretation of jurisdictional statutes." (citing *Hertz*, 559 U.S. at 94)); Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (quoting *Hertz* to support the proposition that simple jurisdictional rules "promote greater predictability").

51 Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 286-88 (1995) (Thomas, J., dissenting) (collecting cases).

52 Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 719-20 (2015) ("Congress passed the FAA to make arbitration agreements specifically enforceable . . . [and to ensure] that arbitration awards are enforceable as court judgments." (footnote omitted)).

53 9 U.S.C. § 2 (2012). In 1984, the Supreme Court interpreted § 2 to apply to state courts as substantive federal law. Southland Corp. v. Keating, 465 U.S. 1, 12 (1984). As to the rest of the FAA, the Court mentioned in a footnote: "[W]e do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure

policy favoring arbitration."[54] The procedural mechanism for enforcing these agreements lies in Sections 3 and 4. Under Section 3, a party can seek a stay of federal litigation if the parties have a valid agreement to arbitrate.[55] The jurisdiction under Section 3 is uncontroversial because the court has already established jurisdiction in the underlying federal case. Under Section 4, a party seeking to enforce an arbitration agreement

> may petition any United States district court which, *save for such agreement*, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the *controversy* between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.[56]

These two statutes do not contain any venue provisions, and the normal venue rules apply.[57] Parties may avail themselves of the remedy provided in Section 4 whether or not litigation has commenced.

The purpose of these Sections is to "move the parties to an arbitrable dispute out of court and into arbitration *as quickly and easily as possible*,"[58] and expedited motion practice accomplishes this purpose. The jurisdictional reach of Section 4 is controversial because the "save for such agreement" language is ambiguous and not defined. According to the legislative history, the FAA does not create jurisdiction.[59] Courts have yet to develop con-

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apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings." *Id.* at 16 n.10. The courts have affirmed the unusual dichotomy that part of the federal statute is substantive while the remainder is procedural in nature. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 (1983) ("[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act. It is less clear, however, whether the same is true of an order to compel arbitration under § 4 of the Act. We need not resolve that question here." (footnotes omitted)). While the question of the future applicability of Sections 3 and 4 to the state courts is a fascinating inquiry, it is beyond the scope of this paper. For more information on this issue, see David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541 (2004).

54 *See* Nitro-Life Techs., L.L.C. v. Howard, 133 S. Ct. 500, 501 (2012) (per curiam); Preston v. Ferrer, 552 U.S. 346, 349 (2008) ("[T]he Federal Arbitration Act . . . establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." (citation omitted)); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 n.5 (1989)); *Mitsubishi Motors Corp.*, 473 U.S. at 626; Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

55 9 U.S.C. § 3 (allowing a party to make an "application . . . [to] stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement" and stating that the court "shall" grant such application).

56 *Id.* § 4 (emphasis added).

57 *See* 28 U.S.C. § 1390 (2012).

58 *Moses H. Cone*, 460 U.S. at 22 (emphasis added).

59 *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or*

sistent jurisprudence interpreting this language, which has led to dozens of competing tests in this area.

2. Jurisdiction for Confirming and Vacating Arbitration Awards

Section 9 requires federal courts to confirm arbitral awards, giving them the same force and effect as court judgments, provided the awards are not modified or vacated.[60] Parties may specify the court to which applications for confirmation may be made.[61] If the parties do not designate a court, they may file the application in the United States federal district where the award was "made."[62] Section 10 allows federal courts to vacate an arbitration award under limited circumstances.[63] Parties must seek vacatur in the "district wherein the award was made."[64] Section 11, dealing with modification of an award, contains a similar venue provision.[65] Section 10 is silent as to whether parties may contract for additional appropriate court venues. The provisions specifying courts in Sections 9, 10, and 11 are venue provisions, not jurisdictional requirements.

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with Foreign Nations: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comm. on the Judiciary, 68th Cong. 34 (1924) [hereinafter 1924 *Hearings*] (brief of Julius H. Cohen, Gen. Counsel, New York State Chamber of Commerce) (noting that federal courts would be "given jurisdiction to enforce such agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties").

60 9 U.S.C. § 9 (requiring a court to confirm an arbitration award unless it is modified or vacated under Sections 10 or 11 of the FAA); *see also id.* § 13 ("The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.").

61 *Id.* § 9.

62 *Id.*

63 *Id.* § 10(a) (allowing for vacatur of an arbitration award when: 1) the award is procured by fraud, 2) there is "evident partiality" among the arbitrators, 3) the arbitrators are guilty of procedural misconduct, or 4) the arbitrators exceed the powers given to them by contract). The grounds for vacatur are extraordinarily narrow and require procedural irregularity. The courts have added additional grounds for vacatur via common law, such as vacatur for "manifest disregard" of the law, Wilko v. Swan, 346 U.S. 427, 436 (1953), violation of "public policy," W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983), and the like. The Supreme Court has since rejected these non-statutory grounds for vacatur. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 583-84 (2008). For more information on the grounds for vacatur and their limitations, see Kristen M. Blankley, *Lying, Stealing, and Cheating: The Role of Arbitrators as Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 459-62 (2014).

64 9 U.S.C. § 10(a).

65 9 U.S.C. § 11. The grounds for modification are also limited. The most common grounds for modification include correcting mathematical errors and misspellings. *See id.*

The legislative history does not touch on why Sections 3 and 4 deal with jurisdiction while sections 9, 10, and 11 are venue provisions.[66] Few Supreme Court cases discuss these requirements. In the 2000 case *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*,[67] the Supreme Court unanimously held that the venue provisions in Sections 9, 10, and 11 are permissive (as opposed to restrictive) and apply in addition to the general venue statutes.[68] The Court found textual ambiguity,[69] and relied on the policy that Congress intended the FAA to grant a *more permissive* venue than the general venue availability at the time.[70] Thus, the Court concluded that the drafters intended for broad federal court availability to enforce arbitral awards.[71] In addition, the Court wanted to promote consistency through the FAA and read the "back end" sections consistent with the "front end" sections.[72]

Two important policy considerations follow from *Cortez Byrd*. First, the *Cortez Byrd* Court noted that the FAA intended to allow a *broader* access to the courts compared to access available at the time.[73] This suggests that the drafters wanted parties to have a federal forum readily available in order to enforce arbitration rights. Second, the Court placed some emphasis on consistent application of the whole FAA.[74] Of course, the *Cortez Byrd* decision is a venue decision, and the courts have long supported broad interpretation of venue provisions.[75] These principles, in conjunction with the Supreme Court's recent rulings in *Hertz*,[76] support this Article's recommen-

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66 The scant legislative history for the FAA deals almost exclusively with the ability to enforce agreements to arbitrate and enforce awards. *See* Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 725-27 (2015). The logistics of the jurisdictional requirements was not discussed.

67 529 U.S. 193 (2000).

68 *Id.* at 195. The Supreme Court granted certiorari in the case in order to "resolve a split among the Courts of Appeals over the permissive or mandatory character of the FAA's venue provisions." *Id.* at 196. Despite the different language of the different provisions, the *Cortez Byrd* Court considered all three together. *Id.* at 198.

69 *See id.* at 199.

70 *See id.* at 199-200.

71 *Id.* at 200-01 (stating that "Congress simply cannot be tagged with such a taste for the bizarre" and rejecting restrictive arguments presented to the Court).

72 *Id.* at 201-02.

73 *Cortez Byrd*, 529 U.S. at 199 ("When the FAA was enacted in 1925, it appeared against the backdrop of a considerably more restrictive general venue statute than the one current today.").

74 *Id.* at 201 ("A restrictive interpretation would also place § 3 and §§ 9-11 of the FAA in needless tension, which could be resolved only by disrupting existing precedent of this Court.").

75 *See, e.g.*, Leroy v. Great W. United Corp., 443 U.S. 173, 185 (1979) (describing broad venue in multidistrict cases when the "locus of the claim" may be assigned with "approximately equal plausibility"); REA Express, Inc. v. United Parcel Serv. of Am., Inc., No. C-74-385-CBR, 1975 WL 840, at *1 (N.D. Cal. Jan. 9, 1975) (applying a broad interpretation to venue provisions in antitrust law).

76 Hertz v. Friend, 559 U.S. 77, 80-81 (2010); *see supra* Section I.B.4.

dation for revisiting *Vaden* in favor of a simple jurisdictional rule applicable in all cases.

3. The "Application" Process

FAA Section 6 requires that the interaction between parties to arbitration agreements and the courts be styled in the form of an "application," or a special proceeding.[77] The application "shall be made and heard in the manner provided by law for the making and *hearing of motions*, except as otherwise herein expressly provided."[78] The statutory language does not explicitly specify whether the action is original, but it does require that the application be made by *motion*, as opposed to a *complaint*.[79] The party taking advantage of these procedures is not "initiating an action"[80] and normal pleading requirements do not apply.[81] The drafters intended for court involvement to be minimal and quick and without resort to a hearing.[82] The expedited process supports the twin goals of enforcement of arbitration

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77 9 U.S.C. § 6 (2012).

78 *Id.* (emphasis added).

79 *See* Kruse v. Sands Bros. & Co., 226 F. Supp. 2d 484, 486 (S.D.N.Y. 2002) (noting that under Section 6, a party should file a motion to the court, not a complaint). On a rare occasion, a court will address a poorly worded pleading utilizing the wrong procedural mechanism. *See, e.g.*, ISC Holding AG v. Nobel Biocare Fin. AG, 688 F.3d 98, 112 (2d Cir. 2012) (holding that parties cannot file "answers" to the motion pleadings allowed under the FAA, but they can file responsive briefs); Caro v. Fidelity Brokerage Servs. LLC, No. 3:12–CV–01066 (CSH), 2014 WL 3907920, at *1 n.1 (D. Conn. Aug. 11, 2014) ("Petitioners have captioned their request for vacatur as a 'Complaint and Petition.' Although '[a] party seeking vacatur [of an arbitration award] must proceed by motion to the court,' rather than by filing a complaint, the Court will excuse this procedural deficiency." (citations omitted) (quoting *Kruse*, 226 F. Supp. 2d at 485-86)).

80 Baylor Health Care Sys. v. Equitable Plan Servs., Inc., 955 F. Supp. 2d 678, 688 n.1 (N.D. Tex. 2013) (comparing the FAA, which involves solely motion practice, with the Texas Arbitration Act, which requires the parties to initiate a civil action for relief).

81 *See* Productos Mercantiles E Industriales S.A. v. Faberge USA, Inc. 23 F.3d 41, 46 (2d Cir. 1994) (holding that the pleading requirements of the Federal Rules of Civil Procedure do not apply); Cessna Aircraft Co. v. Avcorp Indus., Inc., 943 F. Supp. 2d 1191, 1195 (D. Kan. 2013) ("Because the FAA provides this procedure, the requirements of Rule 8(a) and the protections of Rule 12(b)(6) have no impact on the court's resolution of the current issues.").

82 *See, e.g.*, D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (noting that relief under the FAA to confirm or vacate an award is a "summary proceeding that merely makes what is already a final arbitration award a judgment of the court" (quoting Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir.1984)) (internal quotation marks omitted)); U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd., 188 F. Supp 2d 358, 363 (S.D.N.Y. 2002) ("Under the FAA's motion procedure, the Court may consider an arbitration action by summary proceeding on the basis of the fully briefed motion papers and without the requirement of a hearing."), *aff'd*, 51 F. App'x 66 (2d Cir. 2002). *But see* Yearwood v. N.Y. & Presbyterian Hosp., No. 12 Civ. 6985(PKC), 2014 WL 1651942, at *7 (S.D.N.Y. Apr. 23, 2014) ("[I]f there is a material issue of fact in dispute as to 'the making of the agreement for arbitration or the failure to comply therewith,' a court must deny the motion and hold a trial on the issue." (quoting 9 U.S.C. § 4 (2012))).

agreements and speedy dispute resolution.[83] Treating both "front end" and "back end" motions as original motions meets the goals of efficiency and promotion of arbitration.

4. Unanswered Questions

Even after parsing the statutory language, considering history, and reflecting on policy considerations, significant questions remain regarding the jurisdiction of the federal courts to hear arbitration matters. Two of the broadest questions include: (1) How should a court determine if it has jurisdiction under the FAA? and (2) Should traditional litigation rules apply to applications filed under the FAA? Thus far, courts have established dozens of tests for answering these questions, which are discussed in greater detail below.[84] Often the test depends on two variables: (1) whether the case involves a federal question or diversity, and (2) whether the case deals with a "front end" or "back end" motion.[85] Variations on the themes and circuit splits exist even within these four categories of intersections with the courts.[86] No reason exists for having all of these different tests to deal with these different situations. In fact, one unified test could considerably simplify the inquiry for both the courts and the parties to the arbitration agreements.

II. *VADEN*'S IMPACT ON FEDERAL COURT JURISDICTION

The impetus for many of the divergent lower court interpretations began with the Supreme Court's decision in *Vaden v. Discover Bank*. This Part first analyzes the *Vaden* decision and discusses the majority and dissenting opinions. This Part then examines the divergent lower court tests developed post-*Vaden* and explains the need for a uniform, predictable jurisdictional test.

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83 Of course, a "party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995). "[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." *Id.* at 939 (quoting AT&T Techs., Inc. v. Commc'ns Workers, 475 U.S. 643, 649 (1986)). To this end, arbitration is a creature of contract.

84 *See infra* Part II.B.

85 *See infra* Part II.B.

86 *See infra* Part II.B.

A. *The* Vaden *Decision*

1. The Majority Opinion

The 2009 case of *Vaden v. Discover Bank* is the only Supreme Court case explicitly dealing with the jurisdictional requirements of the FAA.[87] The *Vaden* case began as a "garden-variety, state-law-based contract action."[88] Discover Bank sued Betty Vaden in Maryland state court seeking $10,610.74 in outstanding credit card debt, plus interest and attorney fees, despite the presence of a broad arbitration agreement in the contract between the parties.[89] In her answer, Vaden asserted usury as an affirmative defense, and she filed several class-action counterclaims under state law.[90] Discover Bank then moved to compel arbitration of the counterclaims under Section 4 in federal court.[91] Presumably, Discover Bank strategically filed its Section 4 motion at this time to avoid class action claims.[92] Why Discover Bank filed the motion in federal court, as opposed to in the underlying state-court action, is unclear.[93]

Discover Bank asserted federal court jurisdiction for its motion[94] because federal banking law completely preempted Vaden's counterclaims.[95] When the case reached the Supreme Court, the Court certified the following question: "May Discover invoke § 4, not on the basis of its own complaint,

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87 The *Cortez* case discussed above concerns venue, not jurisdiction. *See supra* notes 68-75 and accompanying text.

88 Vaden v. Discover Bank, 556 U.S. 49, 54 (2009). In the last decade, the Supreme Court has heard a relatively large number of arbitration cases. The cases garnering the most attention have been cases dealing with issues involving class actions, statutory rights, and the enforceability of state statutes. *See, e.g.*, Oxford Health Plans, LLC v. Sutter, 133 S. Ct. 2064, 2066 (2013) (dealing with class action issues); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345-49 (2011) (dealing with class action and preemption issues); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 666 (2010) (dealing with class action issues); *In re* Am. Express Merchs. Litig., 667 F.3d 204, 217-19 (2d Cir. 2012) (dealing with statutory rights and class action issues), *rev'd sub nom.* Am. Express Co. v. Italian Colors Rest. 133 S. Ct. 2304 (2013). Given these higher profile cases, the *Vaden* decision has received considerably less attention. This Article, then, fills the void in the scholarship on these important jurisdictional issues.

89 *Vaden*, 556 U.S. at 54. The outstanding balance was money that Vaden owed on a credit card issued by Discover Bank. Discover Bank v. Vaden, 489 F.3d 594, 597 (4th Cir. 2007), *rev'd*, 556 U.S. 49 (2009). Given that the underlying debt did not exceed $75,000, Discover Bank could not have invoked diversity jurisdiction, and the debt-collection action did not involve a federal question. 556 U.S. at 54 & n.1.

90 *Vaden*, 556 U.S. at 54.

91 *Id.* at 54-55.

92 *Id.* at 54 n.2 (noting that the agreement between the parties prohibited class actions).

93 This question was asked at oral argument, but the parties did not have a good answer for it. Transcript of Oral Argument at 35-37, *Vaden*, 556 U.S. 49 (No. 07-773).

94 *Vaden*, 556 U.S. at 55.

95 *Id.*

which had no federal element, but on the basis of counterclaims asserted by Vaden?"[96] This question breaks down into two issues—first, can a federal court "look though" the Section 4 petition and consider the underlying state-court action, and second, if so, what portions of the state-court action are permissible to consider?

In an opinion authored by Justice Ginsburg, the Court noted that although the substantive protections of Section 2 are "equally binding on state and federal courts," the federal courts must have independent jurisdiction.[97] The Court then applied the "well-pleaded complaint rule,"[98] and interpreted the word "controversy" in Section 4 to mean the underlying state court litigation.[99] Under this interpretation, courts can "look through" the four corners of the Section 4 petition to consider any underlying state court complaint.[100]

Applying this test, the Court found that federal jurisdiction did not lie because Discover Bank's original complaint did not invoke a federal claim.[101] The majority rejected a broader "look through" to the controversy subject to arbitration, which would have included the federal law counterclaims.[102] The majority, in particular, expressed concerns that *even if* the federal court could order arbitration of the federal law claims, it could not also order arbitration of the state-law claims.[103] The Court also considered how this rule would apply in cases with no state court complaint. If no state-court litigation existed (i.e., the Section 4 petition filing occurred prior to the state-court complaint filing), the federal court could "look through" the Section 4 petition to the arbitral controversy.[104]

2. The Dissenting Opinion

The dissenting opinion of Justice Roberts[105] agreed that courts should employ some type of "look through" but argued that the word "controver-

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96 *Id.* at 57-58.

97 *Id.* at 59 (citing Southland Corp. v. Keating, 465 U.S. 1, 12 (1984)).

98 *Id.* at 59-60 (quoting Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908)).

99 *Id.* at 62-63.

100 *Vaden*, 556 U.S. at 66 (quoting 9 U.S.C. § 4 (2012)).

101 *Id.*

102 *Id.* at 66-68.

103 *See id*. at 69-72 & n.19. Under the terms of the contract as presented, in the Court's opinion, the controversy appears to be arbitrable; however, the federal court cannot have partial jurisdiction. In dicta, the majority opinion questions why Discover Bank did not simply take advantage of the arbitration mechanisms available under state law. The Court states that the substantive law found in Section 2 of the FAA makes arbitration agreements valid and "enforceable" in state court, and that Maryland has a statute similar to Section 4 of the FAA. *Id.* at 71.

104 *Id.* at 65-66.

105 Roberts's opinion is joined by Justices Stevens, Breyer, and Alito. *Id.* at 72 (Roberts, C.J., concurring in part and dissenting in part).

sy" in FAA Section 4 encompassed the entire arbitral controversy.[106] The dissent noted that in other parts of the FAA, the word "controversy" meant the "'controversy' subject to arbitration."[107] This broader approach would be more resistant to party manipulation and a race to the courthouse.[108]

The dissent also made a second textual argument based on the use of the subjunctive "would have" language: "§ 4 does not speak of actual jurisdiction over pending suits; it speaks subjunctively of prospective jurisdiction over 'the subject matter of a suit arising out of the controversy between the parties'" and not of "a *particular* complaint."[109] The dissent then noted the discrepancy between the *Vaden* case and the multitude of cases where litigants file Section 4 petitions *before* any party has had the chance to file a lawsuit.[110] In those cases, the rule appears to be different, and courts may consider the entirety of the controversy, which would have made *Vaden* a different case had no complaint ever been filed.[111]

3. Analysis of the *Vaden* Decision

The majority and dissenting opinions in *Vaden* raise serious questions about the treatment of Section 4 petitions in the federal courts. Both opinions make implicit policy choices, many of which are inconsistent with articulated policy choices in other arbitration cases.

The Court assumes that rules regarding *complaints* and *removal* apply to the "look through" analysis. By invoking the well-pleaded complaint rule, the Court essentially treats the Section 4 petition as either a complaint (in an original action) or a notice of removal (in a state-court action).

Any number of reasons supports the Court's application of the well-pleaded complaint rule in this instance. The rule is established and familiar to courts, litigants, and parties. As the Court noted, lower courts utilize the rule to determine if federal question jurisdiction exists in every other situation. The test is also a familiar, bright-line test that is easy to administer.

The Court, however, did not cite or otherwise acknowledge that Section 4 applications should be treated as motions under Section 6—not *complaints* or *removal* actions. The omission of any reference to Section 6 is significant. Congress designed the application process to be a simplified procedure that would aid the parties in efficient resolution of their disputes

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106 *See Vaden*, 556 U.S. at 72-73. The dissent noted that Vaden could just have easily filed her claim first or sought a declaratory action, thus making the case a federal question case. *Id.* at 75. The likelihood that Vaden would have affirmatively brought a suit knowing that she owed money on the account is unclear.

107 *Id.* at 74.

108 *See id.* at 75-76.

109 *Id.* (quoting 9 U.S.C. § 4 (2012)).

110 *Id.* at 76-77.

111 *Id.* at 77.

with limited court involvement.[112] As the *Hertz* decision recognized, simple jurisdictional rules encourage the efficient resolution of these matters so that a decisionmaker can move on to the merits of the dispute.[113] The procedural mechanisms of the FAA, too, intend liberal access to the courts, as noted in the *Cortez Byrd* case, discussed above.[114]

By applying the well-pleaded complaint rule to Section 4 petitions, the Court is applying litigation rules to an arbitration system. The result is needless complication of the process and promotion of gamesmanship that would needlessly waste time, money, and judicial resources.

Reading the "controversy" language broadly would promote the goals of enforcing arbitration agreements, simplify the court intervention, and resolve disputes more efficiently. The dissent's broad reading of "controversy" to encompass the arbitral dispute better serves these goals than limiting a court's focus to the Section 4 petition and a state-court complaint.

The Court's ruling that a limited "look through" applies to incorporate the well-pleaded complaint serves none of these policy goals. First, a significant portion of arbitration agreements may not be enforced under the well-pleaded complaint rule. Parties in cases, such as *Vaden*, that begin in state court under state-court theories of recovery could never access the federal forum for the protection of rights under the FAA. Although parties in those cases could always petition the state courts, state courts are less predictable in ordering cases to arbitration, compared to federal courts.

Further, layering the well-pleaded complaint rule on top of the Section 4 analysis complicates the process when the FAA intended to streamline arbitration procedures. Complicating the process, then, impedes the third arbitration policy—speedy access to the arbitral forum.

In addition to these complications, the *Vaden* decision leaves open additional questions. Namely, how does the *Vaden* analysis apply to questions under diversity jurisdiction and cases involving enforcement of arbitration awards if at all? The next Section considers those issues in greater detail.

B. *The Jurisdictional Morass: Divergent Lower Court Tests Post-*Vaden

This Section considers post-*Vaden* jurisdiction in the following four scenarios: (1) motions to compel based on federal questions (i.e., *Vaden*), (2) motions to compel based on diversity, (3) motions to confirm or vacate an award based on federal questions, and (4) motions to confirm or vacate an award based on diversity. Given the complexity of jurisdictional legal

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112 *See supra* Part I.C.3.

113 Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.").

114 *See supra* notes 68-74 and accompanying text.

landscape in these cases, a uniform rule requiring that the courts consider the arbitral controversy in all situations would simplify the area of law, be easily administrable, and create predictable results for parties.

1. Motions to Compel Arbitration Based on Federal Questions

Most cases involving federal question jurisdiction on a motion to compel arbitration follow the *Vaden* holding. Cases involving state court complaints employ the limited "look through" and follow the well-pleaded complaint rule. For cases with no state-court action (the so-call "freestanding" motions), the courts generally employ a very broad "look through" to the arbitral controversy. *Vaden* supports the broad "look through" in these cases, but the cases illustrate the unnecessary dichotomy between cases involving a state court complaint and those that do not.

A recent Eleventh Circuit case is illustrative because it involves both freestanding and non-freestanding claims. *Community State Bank v. Strong*[115] involved a dispute between a payday loan company and borrowers.[116] The borrowers filed a class action lawsuit under Georgia's state usury laws in Georgia state court.[117] The lenders served a notice of intent to arbitrate on the borrowers, which the borrowers rejected.[118] The lenders later filed a Section 4 petition in federal court under the FAA to compel arbitration.[119] The lenders contended that the Federal Deposit Insurance Act fully preempted the state-court complaint, thus giving the federal court jurisdiction.[120]

The *Strong* case involved "freestanding" and "non-freestanding" claims because some of the petitioners were defendants in the state court action, while others were not.[121] For the "non-freestanding" parties (i.e., the parties to the state-court complaint), the *Vaden* analysis controlled.[122] As to the "freestanding" petitioners (those not part of the state-court litigation), the court recognized that it must still "look through" to "*something*," which the court determined to be the "full-bodied controversy" between the par-

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115 651 F.3d 1241 (11th Cir. 2011).

116 *Id.* at 1248-49 (stating that this type of loan is commonly called a "payday" loan).

117 *Id.* at 1249-50 ("Strong agreed that '[a]ny controversy or claim between me and the Lender, Cash America, or any employees . . . arising out of or in any way relating to this Note and my loan relationship with Lender (including this arbitration agreement) shall be settled by binding arbitration.'"). In addition, the plaintiffs alleged less than $75,000 in damages and did not include any non-diverse parties. *Id.* at 1250.

118 *Id.* at 1250.

119 *Id.*

120 *Id.*

121 *Strong*, 651 F.3d at 1251-52, 1254 ("[W]e have divided the Petitioners into two distinct groups, because our judgment differs as to each group.").

122 *Id.* at 1253, 1261.

ties, to determine "whether *any hypothetical claims* arising out of that controversy would support federal jurisdiction."[123] If so, then the district court "may entertain the petition and, if warranted, compel arbitration of the entire controversy."[124]

For the "freestanding" arbitration parties, the court considered the full-bodied controversy as described and the attachments to the application.[125] The court found proper jurisdiction because the Section 4 petition involved a federal banking claim.[126] The court, however, did not address the jurisdiction of the "non-freestanding" party because of the collateral estoppel effect of a different, previous lawsuit.[127] Were it not for the successful defense of collateral estoppel, the court might have required arbitration for the "non-freestanding" parties but not the "freestanding" parties, even though both sets of parties participated in the same transaction.

This case illustrates one of the biggest challenges with the *Vaden* rule, namely the unsupportable differences between "freestanding" and "non-freestanding" parties. If collateral estoppel did not apply and the court applied the well-pleaded complaint rule to the "non-freestanding" parties, the banks not part of the state-court lawsuit would arbitrate their claims while the parties to the state-court lawsuit would not (if the court determined that federal law did not preempt the Georgia complaint). And yet, no real difference exists in the underlying dispute, other than a race to the courthouse. These differing outcomes are the direct result of the *Vaden* rule, which requires different treatment of similar parties based on the presence, or lack thereof, of state-court litigation.[128] Numerous district court opinions demonstrate the different treatment between the "freestanders" and "non-freestanders."[129] *Vaden*, then, creates diverging tests for "freestanding" par-

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123 *Id.* at 1254-55 (second emphasis added).

124 *Id.* at 1255.

125 *Id.* at 1257.

126 *Id.* at 1259-61.

127 *Strong*, 651 F.3d at 1264-65. In the state court, the defendant bank engaged in various discovery abuses, resulting in the court's dismissal of the arbitration affirmative defense. The federal court applied preclusion principles to the Georgia court's determination with respect to the denial of arbitration. *Id.*

128 After the *Strong* decision, the Fourth Circuit addressed a similar issue in *Cmty. State Bank v. Knox*, 523 F. App'x. 925 (4th Cir. 2013). The *Knox* case similarly involved "freestanding" petitioners and "non-freestanding" petitioners. The Fourth Circuit found no jurisdiction on behalf of the "non-freestanders" because, under *Vaden*, the state-court complaint did not support federal jurisdiction. *Id.* at 929-30. With respect to the "freestanders," the court also found no jurisdiction, but under the reasoning that no controversy existed between the parties and that the parties did not assert federal question claims in their motion. *Id.* at 930-31.

129 *E.g.*, Grant-Fletcher v. Collecto, Inc., No. RDB-13-3505, 2014 WL 1877410, at *1 (D. Md. May 9, 2014) (finding jurisdiction in a federal question case regarding the Fair Debt Collection Act); Masoner v. Educ. Mgmt. Corp., 18 F. Supp. 3d 652, 656 (W.D. Pa. 2014) ("In this case, the court has federal claim jurisdiction, pursuant to 28 U.S.C. § 1331, because Masoner sued EDMC under Title VII of the Civil Rights Act of 1964, The Equal Pay Act of 1963, and The Fair Labor Standards Act." (citations omitted)).

ties and "non-freestanding" parties when the presence of a state-court complaint does not warrant such differing treatment.

2. Motions to Compel Arbitration Based on Diversity

The *Vaden* decision does not give any specific guidance on how courts should determine whether diversity jurisdiction exists in the federal courts for Section 4 motions. This Subsection considers the elements of diversity and amount in controversy separately.[130]

a. *Diversity of Citizenship*

Unlike federal question cases, courts do not "look through" to determine the diversity of citizenship.[131] This rule has roots in the 1983 Supreme Court case *Moses H. Cone Memorial Hospital v. Mercury Construction Co*.[132] *Moses H. Cone* involved a "non-freestanding" Section 4 petition involving diverse parties, while other non-diverse parties were not included in the petition.[133] The Supreme Court did not discuss whether jurisdiction was proper, but considered the petition on its merits.[134] Lower courts, then, interpreted the Court's silence as creating a "rule" that only the named parties to the petition determine complete diversity.[135]

In 2010, the Eighth Circuit case *Northport Health Services of Arkansas, LLC v. Rutherford*[136] considered whether *Vaden* changed this longstanding "rule." Northport filed a motion to compel and only included diverse parties in the motion, despite the presence of non-diverse parties in an underlying state-court action.[137] The court rejected the argument that *Vaden* required the court to "look through" to the state-court action to de-

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130 Of course, any number of courts (especially at the trial level) simply assert that jurisdiction exists without delving into any of these particulars. *See, e.g.*, Organizational Strategies, Inc. v. Feldman Law Firm LLP, No. 13-764-RGA, 2014 WL 2453350, at *2 (D. Del. May 29, 2014) ("I note that it was the Defendants who removed this case to federal court on the basis of diversity jurisdiction. Thus, 'save for such [arbitration] agreement,' this Court would have had jurisdiction over the merits of the underlying dispute." (citation omitted)); Alder Run Land, LP v. Nw. Natural Energy LLC, No. 3:13-222, 2014 WL 1758141, at *1 (W.D. Pa. Apr. 30, 2014) ("The Court exercises diversity jurisdiction under 28 U.S.C. § 1332(a) because the amount in controversy exceeds $75,000, exclusive of interests and costs, and the suit is between citizens of different states.").

131 Northport Health Servs. of Ark., LLC v. Rutherford, 605 F.3d 483, 486 (8th Cir. 2010) (citing Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 445 (2d Cir. 1995)).

132 460 U.S. 1 (1983).

133 *Id.* at 4-7.

134 *See id.* at 7 & n.4, 29.

135 *See e.g.*, *Rutherford*, 605 F.3d at 486.

136 605 F.3d 483 (8th Cir. 2010).

137 *Id.* at 485-86.

termine if the parties are diverse.[138] The court held that *Vaden* did not overrule the "rule" from *Moses H. Cone sub silentio*.[139] Thus, relying on *Moses H. Cone*, and not *Vaden*, the court held that diversity jurisdiction should be determined solely by the parties named in the Section 4 petition and any indispensible parties, not by the parties listed in the underlying state court complaint.[140] A recent Fourth Circuit case falls in line with *Northport*,[141] as do numerous district court cases.[142]

The lack of a "look through" for diversity purposes is in sharp contrast to the test developed in federal question cases. The courts' attempts at reading *Vaden* and *Moses H. Cone* together is understandable because the Supreme Court does not overrule itself *sub silentio*. The *Vaden* case, however, is distinguishable as a federal question case, rendering *Moses H. Cone* as simply inapplicable. Additional policy reasons support the failure to "look through," including simplicity of the test and the plaintiff's ability to control the litigation.

Despite these benefits, on balance, a uniform test would provide greater stability at this crossroads of arbitration and litigation. Courts should utilize the same "look through" analysis for both federal question and diversity cases. The text of the FAA does not distinguish between these bases of jurisdiction, and the policies of efficiency and consistency suggest that a uniform rule of considering the arbitral controversy in all cases would better serve the arbitration system.

b. *Amount in Controversy*

Courts have established diverging tests to determine the amount in controversy on a motion to compel. For example, the Eighth Circuit adopted a "look through" analysis for this requirement in *CMH Homes, Inc. v.*

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138 *Id.* at 490-91.

139 *Id.* at 490 ("Thus, the representatives' contention requires us to assume both that the Court overlooked a serious diversity jurisdiction issue in *Moses H. Cone* and then implicitly overruled *Cone*'s jurisdictional underpinnings in *Vaden*. This is contrary to well-established principles. The Supreme Court 'does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.'" (quoting Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000))).

140 *Id.* at 490-91.

141 Home Buyers Warranty Corp. v. Hanna, 750 F.3d 427, 434-35 (4th Cir. 2014). Prior to this case, the district courts in the Fourth Circuit came to differing conclusions on whether to "look through" to the state court action to determine whether diversity of citizenship exists. *See* THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-cv-02929-GRA, 2014 WL 1284837, at *3 (D.S.C. Apr. 1, 2014) (citing split within the district).

142 *See, e.g.*, Golden Gate Nat'l Senior Care, LLC v. Addison, No. 14–mc–0421, 2014 WL 4792386, at *6 (M.D. Pa. Sept. 24, 2014) (refusing to apply *Vaden*'s "look through" to diversity cases); GGNSC Vanceburg, LLC v. Hanley, No. 13-106-HRW, 2014 WL 1333204, at *4-5 (E.D. Ky. Mar. 28, 2014); Sun Healthcare Grp., Inc. v. Dowdy, No. 5:13-CV-00169-TBR, 2014 WL 790916, at *4 (W.D. Ky. Feb. 26, 2014) (following *Northport*).

Goodner.[143] The test, similar to the *Vaden* test, allows the court to consider the amount in controversy as framed in the state-court complaint.[144] The court held that *Vaden* promotes this rule to preserve the plaintiff's intent to be in state court.[145] The court recognized that this rule is in tension with the *Northport* holding that the "look through" doctrine does not apply to determine diversity.[146] The Eighth Circuit found that the diversity and amount in controversy requirements met different goals, so treating them differently was justified.[147] The court held that *Vaden* extended to the amount in controversy requirement while *Moses H. Cone* applied to the diversity requirement.[148] This reasoning, however, leaves much to be desired. The differences between the amount in controversy requirement and the diversity requirement do not justify two divergent tests. A unified "look through" test would provide needed efficiency and consistency for both requirements while preserving the benefits of "look through" for the amount in controversy requirement. Amount in controversy protects the jurisdiction of the federal courts by ensuring only high-dollar claims are heard in federal court. Applying a "look through" for the amount in controversy in arbitration cases would further this policy goal.

In contrast, the Ninth Circuit did not apply any type of "look through" test in *Geographic Expeditions, Inc. v. Estate of Lhotka*,[149] a wrongful death suit originally filed in California state court. After an unsuccessful motion to compel in state court, GeoEx filed a Section 4 motion in federal court.[150] The district court denied the motion because the case did not meet the

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143 729 F.3d 832 (8th Cir. 2013). The case involved a class action case brought in Arkansas state court alleging state law claims for consumer practices violations in connection with the purchase of motor homes. In an attempt to avoid federal jurisdiction, the plaintiffs stipulated that damages would not exceed $75,000 for any individual class member or more than $4,999,999 for the entire class. The home builders filed a Section 4 motion in federal court on diversity grounds. The district court held that jurisdiction under Section 4 was improper because the amount-in-controversy requirement was not met. *Id.* at 833-34.

144 *Id.* at 836 ("We think it follows from *Vaden* that the district court in this case properly 'looked through' to the underlying controversy between the parties to determine the amount in controversy.").

145 *See id.* (citing Vaden v. Discover Bank, 556 U.S. 49, 68 (2009)).

146 *Id.* ("There are sound reasons for limiting *Rutherford* and distinguishing between diversity of citizenship and amount in controversy when applying § 4.").

147 According to the court, the purpose of the diversity rule is to protect against bias towards out-of-state litigants. *Id.* at 837 (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553-54, 566 (2005)). The amount-in-controversy requirement, however, has its roots in determining if a claim is significant enough for the courts to consider. *Id.* (quoting *Exxon Mobile*, 545 U.S. at 562). The court does not explain how the dollar amount of a matter makes it significant or not. While I do take issue with the idea that a dispute is only as significant as the dollar amount attached to it, this issue is well beyond the scope of the Article and will not be discussed here.

148 *Id.* at 836-39.

149 599 F.3d 1102 (9th Cir. 2010).

150 *Id.* at 1105-06.

amount in controversy under the preponderance standard.[151] On appeal, the Ninth Circuit held that the preponderance standard did not apply because the motion was an original action, not the removal of a state court action.[152] Therefore, the Ninth Circuit applied the legal-certainty standard that normally applies to complaints.[153] The court instructed that the determination be made on the face of the Section 4 petition without "looking through" to the underlying action.[154] The Ninth Circuit relied on pre-*Vaden* case law from other circuits to reach this decision.[155]

Three years later, however, in an unpublished decision, the Ninth Circuit applied a "look through" analysis in a "freestanding" Section 4 petition to determine the amount in controversy. In *Greystone Nevada, LLC v. Anthem Highlands Community Ass'n*,[156] the court considered the value of the "underlying substantive claims"[157] and allowed for the aggregation of individual claims in this multi-party action.[158] The Ninth Circuit's two cases are diametrically opposed. Even if courts should treat "freestanding" and "non-freestanding" cases differently, the difference (under *Vaden*) concerns the extent of the look through. In *Greystone*, then, the "freestanding" claims receive "look through" treatment while "non-freestanding" claims do not. Neither *Vaden* nor other case law supports the inconsistent rulings.

The Eleventh Circuit took yet another approach. In *American General Financial Services of Alabama, Inc. v. Witherspoon*,[159] the court considered the burden of proof for determining the amount in controversy when a state-court action already exists.[160] Unlike the Ninth Circuit, the Eleventh Circuit utilized the *removal* standard requiring the movant to prove the amount in controversy "by a preponderance of the evidence."[161]

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151 *Id.* at 1106.

152 *Id.* at 1106-07.

153 *Id.* at 1107.

154 *See id.* at 1107-08.

155 *Geographic Expeditions*, 599 F.3d at 1107 (citing Woodmen of the World Life Ins. Soc'y v. Manganaro, 342 F.3d 1213 (10th Cir. 2003); Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157 (2d Cir. 1998)).

156 549 F. App'x 621 (9th Cir. 2013).

157 *Id.* at 624.

158 *Id.* ("The HOAs' potential lack of standing does not preclude aggregation of the homeowners' claims for purposes of calculating the amount in controversy. To repeat, standing is personal to the party. It does not affect the value of the object of the litigation or the value of the underlying substantive claims in diversity actions for injunctive relief, declaratory relief, or to compel arbitration." (citations omitted)).

159 426 F. App'x 781 (11th Cir. 2011) (per curiam).

160 *See id.* at 781-83. The *Witherspoon* case is interesting in that the parties subject to the Section 4 motion were actually the state-court defendant and a third-party defendant, and the claim subject to arbitration was the third-party complaint. *Id.* at 781-82. The court distinguished this case from *Vaden* on the basis of the third-party complaint.

161 *Id.* at 782.

Given the limited holding of *Vaden*, the courts have struggled to extend the holding in diversity cases. These diverging tests and differing burdens of proof illustrate the problem. A unified and simplified test will greatly ease the burden on the courts and the parties in these cases.

3. Motions to Confirm or Vacate an Award Based on Federal Questions

Because the *Vaden* decision involved a motion to compel, the Court was not given a chance to address jurisdictional standards for post-award issues. Few clear jurisdictional tests emerge in this area of the law. This Subsection and the one that follows consider the diverging tests the courts have used.

At this time, no precedential circuit court authority exists on federal question jurisdiction for motions to confirm or vacate. Given the lack of guidance, district courts have created three different approaches, each with its own flaws.

a. *Manifest Disregard of Federal Law as Grounds for Federal Court Review*

Prior to 2008, some courts found federal question jurisdiction when the petitioner claimed the arbitrator manifestly disregarded federal law.[162] The courts reasoned that if they were asked to determine if an arbitrator manifestly disregarded federal law, then the court would be engaging in an analysis of federal law.[163] In 2008, however, the Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*[164] cast doubt on the availability of review for manifest disregard. Many courts then held that federal court jurisdiction could not be predicated on manifest disregard of a federal law.[165]

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162 *See, e.g.*, Fox v. Faust, 239 F. App'x 715, 717 nn.2-3 (3d Cir. 2007) (finding that the subject matter of the dispute may not confer federal question jurisdiction, but suggesting the possibility that an arbitrator manifestly disregarding federal law would be a grounds for review conferring subject matter jurisdiction, without deciding the issue because it was inapplicable to the case); Greenberg v. Bear, Sterns & Co., 220 F.3d 22, 27 (2d Cir. 2000) (holding that review for manifestly disregarding federal law bestows federal court jurisdiction).

163 *See Greenberg*, 220 F.3d at 27.

164 552 U.S. 576 (2008).

165 *See, e.g.*, Royal Bank Am. v. Kirkpatrick, Nos. 11-1058, 11-1112, 2011 WL 4528349, at *3-4 (E.D. Pa. Sept. 30, 2011) (citing *Hall St. Assocs.*, 552 U.S. at 584-85). Other courts consider this to be an open question. *See, e.g.*, Northland Truss Sys., Inc. v. Henning Constr. Co., 808 F. Supp. 2d 1119, 1122 (S.D. Iowa 2011) (noting that pre-*Vaden* Eighth Circuit law was ambiguous on the availability for federal question review based on an arbitrator manifestly disregarding federal law).

These courts reasoned that if manifest disregard was not a proper grounds for review, then it could not possibly act as a jurisdictional grant.[166]

Using the manifest-disregard standard as a basis for jurisdiction is misguided. First, the Supreme Court does not recognize it as a ground for review, and if it is not a valid ground for review, it cannot bestow jurisdiction. And second, jurisdiction under manifest disregard would create independent jurisdiction under the FAA, and the Supreme Court has repeatedly held that the FAA does not bestow independent jurisdiction.[167]

b. *Federal Court Pleading Review*

Some courts refuse to extend *Vaden* to motions to vacate or confirm and simply consider the documents before the court.[168] In *Ball v. Stylecraft Homes*,[169] the Fourth Circuit held that *Vaden* does not extend to motions to vacate.[170] The court held that because the federal court documents did not establish a federal question on the face of the motion, jurisdiction did not lie.[171] An unpublished Second Circuit decision, *Bittner v. RBC Capital*

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166 *E.g.*, JDS Uniphase Corp. v. Finistar Corp., No. 11-1213, 2012 WL 707082, *3 (W.D. Pa. Mar. 5, 2012). Other courts still appear to allow manifest disregard as a grounds for jurisdiction. *See, e.g.*, Sonic Automotive, Inc. v. Price, No. 3:10-CV-382, 2011 WL 3564884, at *8 (W.D.N.C. Aug. 12, 2011) ("Petitioner seeks vacatur based on the Arbitrator's alleged disregard of . . . [federal law]. These grounds will require the Court to address and resolve substantial questions of federal law. Thus, the Petition provides the requisite independent basis for subject matter jurisdiction . . . ."); Sharlands Terrace, LLC v. 1930 Wright St., LLC, No. C-11-2503-EDL, 2011 WL 3566816, at *4 (N.D. Cal. Aug. 12, 2011) ("However, a federal court has subject matter jurisdiction over a petition to vacate an arbitration award where the basis for vacating an arbitration award is that the arbitrator manifestly disregarded federal law. An exception to this rule exists where the allegation that the arbitrator manifestly disregarded federal law is 'patently without merit.'" (citation omitted) (citing Carter v. Health Net of Ca., Inc., 374 F.3d 830, 836-37 (9th Cir. 2004))).

167 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." (citation omitted)); *see Hall St. Assocs.*, 552 U.S. at 582 (citing *Moses H. Cone*, 460 U.S. at 25 n.32) (noting that the FAA provides "no federal jurisdiction but rather requir[es] an independent jurisdictional basis); *see also* Cmty. State Bank v. Strong, 651 F.3d 1241, 1252 (11th Cir. 2011) ("It is a long-accepted principle that the FAA is non-jurisdictional: The statute does not itself supply a basis for federal jurisdiction over FAA petitions.").

168 *See* Ball v. Stylecraft Homes, LLC, 564 F. App'x 720, 721 (4th Cir. 2014) (per curiam).

169 564 F. App'x 720 (4th Cir. 2014) (per curiam).

170 *Id.* at 721 ("'Under the longstanding well-pleaded complaint rule . . . a suit arises under federal law only when the plaintiff's statement of his own cause of action shows that it is based upon federal law.'" (quoting Vaden v. Discover Bank, 556 U.S. 49, 60 (2009))).

171 *Id.* at 722-23 (finding the pleadings only established state law claims). This rule, at least, is consistent with the Fourth Circuit's decision in *Home Buyers Warranty Corp. v. Hanna*, which also rejects a "look through" analysis in diversity cases. *See* 750 F.3d 427, 434-35 (4th Cir. 2014).

Markets,[172] similarly held that *Vaden* only deals with motions to compel.[173] These cases nearly foreclose federal jurisdiction on motions to conform or vacate because the parties are not asking the court to determine a matter of federal law outside of the arbitration issue.

A number of district courts similarly refuse to apply a "look through" to motions to vacate.[174] In one case, *Crews v. S&S Service Center Inc.*,[175] the court expressly rejected the idea that the subject of the arbitration could serve as grounds for federal question jurisdiction.[176] The court stated that, unlike Section 4, Section 10 dealing with vacatur does not contain the "save for" language found so critical in *Vaden*.[177] The court acknowledged that this rule would virtually eliminate all jurisdiction on vacatur motions,[178] except (1) federal question cases previously stayed for arbitration, (2) diversity cases, and (3) maritime cases.[179] The *Crews* court further recognized that it was creating an artificial distinction between federal question and diversity cases.[180]

The result of not using a "look through" analysis on motions to vacate creates yet another inconsistency: cases that would have federal question jurisdiction on a motion to compel do not have jurisdiction on a motion to vacate. Neither scenario involves courts applying federal law—other than the FAA—so differing treatment is puzzling.

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172 331 F. App'x 869 (2d Cir. 2009).

173 The court, for argument's sake, also noted that even if it were to apply a "look through," the underlying dispute did not raise a federal question. *Id.* at 871 ("But even assuming, *arguendo*, that we may 'look through' the petition in this case and examine whether the parties' underlying dispute raises a federal question, federal jurisdiction would not lie. The underlying dispute is a contract question that raises only state law questions and therefore does not give rise to federal-question jurisdiction.").

174 *See* Royal Bank Am. v. Kirkpatrick, Nos. 11-1058, 11-1112, 2011 WL 4528349, at *3-4 (E.D. Pa. Sept. 30, 2011) (finding no federal question jurisdiction when the arbitration involved federal banking laws but the plaintiff's complaint only alleged state-law claims); Powerweb Energy, Inc. v. GE Lighting Sys., Inc., No. 10-2652, 2011 WL 3902761, at *3-4 (E.D. Pa. Sept. 2, 2011) (finding no federal question jurisdiction for an arbitration involving issues of trademark law); Diversified Emp. Solutions, Inc. v. Pawloski, 790 F. Supp. 2d 655, 657 (N.D. Ohio 2011) ("Furthermore, if the independent ground for subject matter jurisdiction is a federal question, it 'must be disclosed on the face of the complaint, unaided by the answer.'" (quoting Ford v. Hamilton Invs., Inc., 29 F.3d 255, 258 (6th Cir. 1994))).

175 848 F. Supp. 2d 595 (E.D. Va. 2012).

176 *Id.* at 599-600.

177 *Id.* at 599.

178 *See id.*

179 *Id.* at 600.

180 *Id.* ("Although, this Court recognizes that this approach 'creates a totally artificial distinction based on whether a dispute is subject to pending federal litigation,' the Court believes it is necessitated by the fact that § 10 does not have § 4's unique jurisdictional hook." (citation omitted) (quoting Vaden v. Discover Bank, 556 U.S. 49, 65 (2009))).

c. *"Look Through" to the Award or the Subject of the Dispute*

Only a minority of courts will consider information regarding the merits of the arbitration. If the parties attach the award as an exhibit to the motion, some courts will consider it,[181] and such review would be consistent with general motion practice.[182]

Instead, courts should be "looking through" to the merits of the underlying arbitration to determine if federal court jurisdiction exists. *Vaden* allows a "look through" to a state court action in a "non-freestanding" claim and a general "look through" to the arbitrable controversy in "freestanding" claims.[183] In one unreported case, the court explicitly "looked through" to the subject of the arbitration after citing *Vaden* in a case involving a "freestanding" motion.[184] While this reading of *Vaden* is consistent among FAA motions, a broader, more consistent test would better eliminate the confusion on jurisdictional questions.

4. Motions to Confirm or Vacate an Award Based on Diversity

Little case law exists on the issue of diversity jurisdiction for post-arbitration motions pre- or post-*Vaden*. With respect to party diversity, most courts simply determine whether the parties to the petition are diverse without any explanation.[185]

In contrast, three tests (pre- and post-*Vaden*) have emerged to determine the amount in controversy. The first approach is the award approach, in which courts determine the amount in controversy by the amount of the

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181 *See* Jackson v. Sleek Audio, LLC, No. 13-80725-CIV, 2014 WL 1018031, at *1-2 (S.D. Fla. Mar. 17, 2014) (considering the attached award but denying jurisdiction on the basis that the arbitration did not involve a federal question).

182 *See* GSW, Inc. v. Long Cty., Ga., 999 F.2d 1508, 1515 & n.11 (11th Cir. 1993) ("We rely on the facts alleged in the complaint and the exhibits attached thereto."); *Jackson*, 2014 WL 1018031, at *2 ("Ordinarily, the review on a motion to dismiss is limited to the complaint and the attached exhibits.").

183 *See supra* Section II.A.3.

184 BBVA Sec. of P.R. v. Cintron, No. 10-1927 (JAG), 2012 WL 2002304, at *3-4 (D.P.R. June 4, 2012) ("Even if we were to 'look through' BBVA's motion and assess whether Cintrón's petition to arbitrate presents a federal question, as the Supreme Court did in *Vaden* in the context of a § 4 motion to compel, the result would not change.").

185 *See, e.g.*, Caro v. Fid. Brokerage Servs., LLC, No. 3:12-CV-1066 (CSH), 2013 WL 3929708, at *2-7 (D. Conn. July 26, 2013) (examining citizenship of limited liability company and concluding that diversity jurisdiction did not exist); Intervest Int'l Equities Corp. v. Aberlich, No. 12-CV-13750, 2013 WL 1316997, at *2-4 (E.D. Mich. Mar. 29, 2013) (finding no diversity after joining an indispensable party who destroyed diversity); Stebbins v. Texas, No. 3:11-CV-2227-N (BK), 2011 WL 6130403, at *2 (N.D. Tex. Oct. 24, 2011) (finding no subject matter jurisdiction because the state of Texas is not a "citizen" for diversity purposes).

award.[186] When the award is more than $75,000, courts easily find jurisdiction.[187] The biggest criticism of the award approach is that cases involving a "defense award" (i.e., no money damages) would never satisfy the jurisdictional requirement.

Under the second approach—the demand approach—the court considers whether the claimant demanded an amount that meets the amount in controversy requirement.[188] The demand approach would still allow jurisdiction for cases involving defense awards. *Smith v. Tele-Town Hall, LLC*[189] illustrates a post-*Vaden* case utilizing the demand approach.[190] The case involved a business dispute in which Tele-Town Hall sought $500,000 in arbitration damages.[191] Ultimately, the arbitrator awarded Smith a defense award and $41,000 in forum fees and costs.[192] Smith moved to confirm the award by filing a Section 9 motion in federal court, and the court found jurisdiction proper under the demand approach.[193] The court reasoned that the demand approach is consistent with Section 4, and it protects jurisdiction in cases of low awards.[194] The court also rejected the "legal certainty" rule—usually applied in diversity cases[195]—in favor of the demand rule.[196]

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186 *See* Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997); Ford v. Hamilton Invs., Inc., 29 F.3d 255, 259-60 (6th Cir. 1994).

187 *See, e.g.*, Lakeshore Eng'g Servs., Inc. v. Target Constr., Inc., 2 F. Supp. 3d 1038, 1044 (E.D. Mich. 2014) ("However, upon review of Plaintiff's Application it is clear that diversity jurisdiction exists as Plaintiff is a Michigan corporation, Defendant is a Nevada corporation and the Arbitration Award provides for net damages against Target in amount of $2,525,666.30."); Bd. of Trs. of Mun. Elec. Util. v. Miron Constr. Co., No. 13-CV-2080-LRR, 2014 WL 789200, at *1, *6 (N.D. Iowa Feb. 26, 2014) (finding diversity jurisdiction in a case in which an arbitrator awarded damages of approximately $275,000); Pochat v. Merrill Lynch, Pierce, Fenner & Smith, Inc. No. 12-22397-CIV, 2013 WL 4496548, at *1, *5 (S.D. Fla. Aug. 22, 2013) (finding diversity jurisdiction in a case involving an arbitration award exceeding $800,000); Tucson Elec. Power Co. v. Daimler Capital Servs. LLC, No. CV-12-003230TUC-JGZ, 2013 WL 321877, at *3 (D. Ariz. Jan. 28, 2013) ("The amount in controversy exceeds $75,000.00 as TEP seeks to confirm an appraisal award of $184,700,000."); Trehel Corp. v. W.S. Agee Grading Contractor, Inc., No. 1:12-cv-0054-WSD, 2012 WL 1080586, at *3 (N.D. Ga. Mar. 30, 2012) ("The FAA does not supply a basis for jurisdiction. . . . This action involves the confirmation of a $370,551.29 arbitration award, which exceeds the jurisdictional minimum of $75,000. The Court has subject-matter jurisdiction over this action." (footnote omitted) (citations omitted)).

188 *See* Karsner v. Lothian, 532 F.3d 876, 883-84 (D.C. Cir. 2008); Theis Research, Inc. v. Brown & Bain, 400 F.3d 659, 664-65 (9th Cir. 2005); Thames v. Woodmen of World Life Ins. Soc'y, No. 13-0063-WS-N, 2013 WL 4162257, at *2 & n.6 (S.D. Ala. Aug. 13, 2013) (summarily finding jurisdiction on the basis of the amount in controversy demanded in the arbitration).

189 798 F. Supp. 2d 748 (E.D. Va. 2011).

190 *Id.* at 750.

191 *Id.* at 751.

192 *Id.*

193 *Id.* at 756.

194 *Id.* at 753-56.

195 The rule asks whether a "legal certainty" exists that the plaintiff will recover less than the jurisdictional threshold. Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1472 (11th Cir. 1997).

The third approach is a mixed approach.[197] Under the "mixed approach," if the parties do not seek to reopen arbitration, then the court will apply the award approach. If the parties do seek to reopen the arbitration, then the court will apply the demand approach.

An interesting twist arises in the area of class action arbitrations. Under the most popular set of class arbitration rules, namely the American Arbitration Association's Supplementary Rules for Class Arbitrations,[198] parties may seek interlocutory judicial review on two procedural rulings before the arbitrator issues any type of monetary award.[199] Under diversity jurisdiction, these procedural "awards"[200] do not contain any type of monetary award, so one might argue that the courts lack diversity jurisdiction for failure to meet the amount in controversy. Courts, however, appear to "look through" to the arbitration (although not using that language) to determine whether the amount in controversy is met.[201]

Thus, no consistent test emerges in this area of the law. The differing treatment of "defense awards" is particularly problematic. Under traditional litigation rules (which the courts *usually* apply in these arbitration inquiries), federal courts do not lose diversity jurisdiction simply because a defendant won. The "award" approach, however, would do just that. The "demand" approach is essentially a "look through" to the merits of the un-

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196 *Smith*, 798 F. Supp. 2d at 755-56 ("[C]ourts should not ignore the broader context of the FAA and the important relationship between arbitration and judicial resolution of disputes. . . . Ignoring the underlying claims . . . divorces the judicial process from the arbitration process in a manner inconsistent with the FAA.").

197 *See* Sirotzky v. N.Y. Stock Exch., 347 F.3d 985, 989 (7th Cir. 2003); *see also* Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1325-26 (11th Cir. 2005) (citing *Baltin*, 128 F.3d at 1472) (applying the demand approach after distinguishing *Baltin* as not having addressed a party seeking to reopen arbitration).

198 AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (2003) [hereinafter CLASS RULES], https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf.

199 The two procedural rulings include a ruling that the arbitration agreement allows a class proceeding to occur in the first instance (i.e., the "Clause Construction Award") and a ruling that a class may proceed under the facts before the arbitrator (i.e., the "Class Certification Award"). *Id.* rules 3, 5.

200 In a previous article, I argued that these types of interlocutory "awards" do not meet the definition of "award" under the FAA. Kristen M. Blankley, *Did the Arbitrator "Sneeze"?—Do Federal Courts Have Jurisdiction over "Interlocutory" Awards in Class Action Arbitrations?*, 34 VT. L. REV. 493, 494-95 (2010) [hereinafter Blankley, *Did the Arbitrator "Sneeze"?*]. The Supreme Court, however, in hearing a case involving a Clause Construction Award, demonstrates that these cases are ripe for district court adjudication. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682-84 (2010). Although the Court's majority opinion did not elaborate greatly on the appropriateness of jurisdiction, the majority opinion dismissed Justice Ginsburg's strong dissent on the basis of jurisdiction. *Id.* at 687.

201 *See, e.g.*, W.C. Motor Co. v. Talley, 63 F. Supp. 3d 843, 848-51 (N.D. Ill. 2014) (finding amount in controversy was not met because each individual plaintiff's claim was less than $75,000, even when factoring in the pro rata share of potential punitive damages and attorneys fees awards).

derlying dispute, which is a standard that courts have only otherwise employed in "freestanding" claims.

C. *Post*-Vaden *Analysis*

The clearest lesson to be drawn from the post-*Vaden* jurisprudence is that no uniform test has emerged in any of the areas of federal jurisdiction. Although not providing a jurisdictional test, the FAA contemplates some form of federal court jurisdiction. The wide array of unpredictable tests goes contrary to the policy reasons the Supreme Court discussed in the *Hertz* case regarding simplicity and predictability for jurisdictional statutes. Table 1 depicts the myriad tests developed in this area of law.

Table 1: Legal Tests for Determining Federal Court Jurisdiction in Arbitration Cases

	Federal Question Jurisdiction	**Diversity Jurisdiction**	
		Diversity	**Amount in Controversy**
Motions to Compel	• "Look through" to state court complaint in non-freestanding cases • "Look through" to the entire controversy in freestanding cases	Only consider the parties to the petition	• "Look through" to state court complaint in non-freestanding case • "Look through" to entire controversy in freestanding cases • Consider only the petition
Motions to Confirm or Vacate	• Jurisdiction in open federal cases • Jurisdiction in admiralty cases • Questionable jurisdiction if a court is reviewing for manifest disregard of a federal law • "Look through" to the award or subject of arbitration	Only consider the parties to the petition	• "Demand approach," a "look through" to the arbitration • "Award approach," a "look through" to the award • "Mixed approach"

Courts are drawing artificial jurisdictional lines on qualities that do not matter. Whether a claim is "freestanding" or "non-freestanding" can drastically alter whether a party has jurisdiction in the federal courts on a motion to compel or a motion to confirm or vacate. The presence of state court litigation, however, is not a salient fact. Whether parties have agreed to arbitrate is an altogether different question than the merits of the underlying

claims, and the fact of a state-court lawsuit should not substantively change the analysis.

While some courts "look through" to the underlying controversy to determine the amount in controversy, they universally refuse to do so to determine if the parties are diverse. No court has attempted to explain the inconsistencies in the "look through" doctrine for these two different parts of the same test. This lack of explanation likely results because in other *litigation* contexts, the courts only consider the parties to the lawsuit for diversity purposes. The courts, however, should consider more deeply whether following litigation rules is the right choice in the arbitration context. In particular, the courts should consider the policy of efficiency and that parties who agree to arbitrate should be able to arrive at the arbitral forum as quickly and seamlessly as possible.

Further, other areas of arbitration law do not support the artificial distinction between "freestanding" and "non-freestanding" motions on a motion to compel or a motion to confirm or vacate. For example, when courts make the substantive inquiry of determining whether parties to a contract have agreed to arbitrate (i.e., the merits of the Section 4 petition), courts must put aside the merits of the dispute and focus solely on the question of whether the parties agreed to arbitrate.[202] This concept, known as "arbitrability," is based on the reading of the text of Section 4.[203] Thus, in the arbitrability inquiry, only *arbitration* facts are considered; facts relating to the underlying merits are not considered. In contrast, the jurisdictional inquiry involves *litigation* facts, and not arbitration facts.

This distinction is yet another example of the lack of consistency across arbitration law. Although the inquiries are different, the arbitrability doctrine attempts to streamline the process and ensure that parties who agreed to arbitrate have the opportunity to arbitrate. The varying tests for jurisdiction, however, do not appear to be concerned with simplicity, efficiency, or enforcing agreements to arbitrate.

The differing tests in the area of post-arbitration review are perhaps the least defensible. A sizeable number of courts appear to rule that federal question jurisdiction does not, in all practicality, exist for motions to confirm, vacate, and modify.[204] Those courts hold that no federal jurisdiction exists because the court need not make a ruling on the underlying federal law, but instead must only apply a "jurisdiction neutral" statute.[205] This line of precedent, however, is contrary to the text of the FAA as well as the Court's decision in *Vaden*. *Vaden* specifically allows jurisdiction in federal question cases even though the court need not make any ruling on federal

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202 *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-46 (2006); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S 395, 403-04 (1967).

203 *Prima Paint Corp.*, 388 U.S at 403-04.

204 *See supra* Section II.B.3.b.

205 *See supra* Section II.B.3.b.

law, other than the FAA. Further, the text of those sections clearly contemplates jurisdiction, and this interpretation partially nullifies the statutes.

The underlying purposes of the FAA are to make arbitration agreements enforceable as regular contracts and to enforce arbitral awards. Underlying these goals is the policy of efficient and inexpensive private dispute resolution. The current disparate systems in place for determining federal court jurisdiction defeat all of these goals. The courts are creating artificial roadblocks for having arbitration matters heard. Inconsistent tests and unclear jurisdictional requirements increase time and expense litigating jurisdictional issues before a court can entertain arbitration questions. The current rules also encourage forum shopping and "racing to the courthouse," both of which are litigation maneuvers that undermine process efficiency and create procedural roadblocks. A new jurisdictional framework based on simplicity and predictability could eliminate all of these inconsistencies without requiring a statutory change to the FAA.

III. A NEW JURISDICTIONAL FRAMEWORK

Here is the new framework that this Article proposes: in all instances, the federal court should "look through" the motion filed in federal court and determine if the *underlying arbitral controversy* would be subject to federal court jurisdiction. The proposal contains three critical components. First, it would apply to *all instances* in which a party seeks jurisdiction in the federal courts under the FAA.[206] Second, it would employ a "look through" analysis. Third, the courts would "look through" to the entire controversy to be (or that was) arbitrated. Table 2 exemplifies how this proposal simplifies the current law.

Table 2: Proposed Test for Determining Federal Court Jurisdiction in Arbitration Cases

	Federal Question Jurisdiction	**Diversity Jurisdiction**	
		Diversity	**Amount in Controversy**
Motions To Compel	"Look through" to the subject matter of the arbitration		
Motions to Confirm or Vacate			

206 This proposal would also apply to some of the lesser-utilized motions in the FAA, such as a motion to appoint an arbitrator under FAA Section 5.

The judiciary can implement this proposal in two ways. First, the Supreme Court could modify the *Vaden* decision to require a "look through" for all arbitration jurisdiction matters. Second, Congress could amend the FAA to explicitly put this jurisdictional test into the statute.

The FAA's text and policy support this proposal. Furthermore, its benefits outweigh any potential negative consequences from a change in the jurisdictional jurisprudence. While this solution may be "imperfect" (as the Court described the "nerve center" test), a single, simplified rule would be "superior to" continuing down the road of using and creating diverging jurisdictional tests.[207]

A. *Textual Basis*

A strong textual basis exists for this Article's common law proposal. The textual basis stems from the language in Section 4 of the FAA. Under Section 4, a court has jurisdiction to hear a motion to compel arbitration when "save for such [arbitration] agreement, [the court] would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties."[208] The dissenting Justices in *Vaden* correctly interpreted this language to mean that the court should consider the whole controversy subject to arbitration, and not simply a limited number of documents based on a race to the courthouse.[209] The subjunctive tense use (i.e., "would have") indicates that Congress intended that if litigants "would have" been able to bring the controversy in federal court, then the court should have jurisdiction to hear the motion before it. Determining whether a court "would have" jurisdiction over "the subject matter of a suit arising out of the controversy" should be read to determine the complete controversy to be arbitrated, and not anything less.

"Controversy" is not a defined term in the statute. The *Vaden* majority viewed the "controversy" to mean the litigation based on the plaintiff's definition. The majority ignored the fact that Congress had also used the term "civil action" in Section 4 and read both words to essentially mean the same thing. "Controversy" and "civil action" should be defined differently because the use of different words should signal different meanings.[210] In

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207 Hertz Corp. v. Friend, 559 U.S. 77, 93 (2010).

208 9 U.S.C. § 4 (2012).

209 *See* Vaden v. Discover Bank, 556 U.S. 49, 72-74 (2009) (Roberts, C.J., concurring in part and dissenting in part).

210 *See* Lindsey v. Tacoma-Pierce Cty. Health Dep't, 195 F.3d 1065, 1074 (9th Cir. 1999) ("[It is a] basic principle of statutory construction that different words in the same statute must be given different meanings."); Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

this case, "civil action" should mean civil litigation while "controversy" should be consistently read to be the arbitrable controversy.

The FAA uses the term "controversy" multiple other times, and every other time, it refers to the entire subject matter of the arbitration.[211] Perhaps the clearest use of the word "controversy" is in Section 10 of the FAA. Under Section 10(a)(3), courts may vacate an arbitration award if an arbitrator "refus[ed] to hear evidence pertinent and material to the *controversy*."[212] In this context, "controversy" can *only* mean the subject matter of the arbitration. In addition, in Section 1, the definition of "maritime transaction" is a "controversy [that] would be embraced within admiralty jurisdiction."[213] Again, "controversy" appears to mean the underlying dispute because it refers to the underlying support for the admiralty jurisdiction. Also, Section 2 provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a *controversy* thereafter arising out of such contract or transaction" shall be enforceable as any other contract.[214] "Controversy" in this context can also be read to mean the subject matter of an arbitrable dispute. Further, under Section 5, a "party to the *controversy*" may petition the court for an appointment of an arbitrator.[215] The plain language of "controversy" in this context also indicates a party to the arbitrable dispute because Section 5 usually applies to parties who do not dispute their agreement to arbitrate but require the court's assistance in determining who will be the arbitrator.

Statutory construction also encourages the reading of the entire statute consistently, so the jurisdictional reading of Section 4 should apply equally to all other sections of the FAA.[216] The *Cortez Byrd* Court suggests that venue for motions to compel should be consistent with the venue for motions to confirm or vacate.[217] Further, the Court has previously ruled that the language of Section 4 applies to all arbitration cases because "it is inconceivable that Congress intended the rule[s] to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court."[218]

This Article's proposal goes farther than simply adopting *Vaden*'s dissent. It extends the reasoning of the dissent to all motions under the FAA. In doing so, federal court jurisdiction for arbitration matters would be sub-

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211 *See* Szalai, *supra* note 8, at 345.

212 9 U.S.C. § 10(a)(3) (emphasis added).

213 *Id.* § 1.

214 *Id.* § 2 (emphasis added).

215 *Id.* § 5 (emphasis added).

216 Of course, Sections 9, 10, and 11 contain venue provisions; however, those venue provisions do not impact the underlying jurisdiction of the courts. In addition, the *Cortez Byrd* Court indicated that these venue provisions created a greater scope of possible federal courts to hear the motions, not a more limited number. *See* Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 195 (2000).

217 *See Cortez Byrd*, 529 U.S. at 201.

218 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

ject to a different test than federal jurisdiction generally, especially in cases involving pending state-court litigation. The difference in the jurisdictional tests, however, is not a valid criticism of the proposal. Instead, differing jurisdictional tests would treat arbitration as a system outside of the litigation system that only requires minimal court intervention if the parties do not abide by their contractual arrangements.

B. *FAA Policy Basis*

1. Overarching Policy Goals

This proposed test would serve the underlying policy goals of the FAA, which include enforcing agreements to arbitrate, enforcing arbitrator awards, and efficiency in dispute resolution. The Supreme Court places a high priority on the efficiency of arbitration, noting that arbitration, "when selected by the parties to a contract, [should] be speedy and not subject to delay and obstruction in the courts."[219] A single, uniform test based on the arbitration facts would remove most of the jurisdictional gamesmanship and allow the courts to more easily determine the merits of the petitions. As a result, courts could better fulfill their purpose under the FAA, which is to provide limited but efficient assistance when parties resist their obligation to arbitrate or do not voluntarily comply with an arbitrator's award.

The FAA drafters did not intend for the traditional litigation rules to apply to this area of the law.[220] The FAA's application process[221] intended for courts to use the motion process, as opposed to the complaint process, for the purposes of efficiency. Having a simplified, inclusive test for jurisdictional purposes would better serve these policy goals.

2. Encourages Predictability and Efficiency

This proposal would also create predictability for litigants and ease for the courts. At present, the law regarding federal court jurisdiction involves too many different questions depending on the circumstances of the case and the rules of the court. With all of these jurisdictional questions, parties currently waste significant time and money litigating issues ancillary to the

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219 *Id.*; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

220 *See supra* notes 55, 74-80 and accompanying text.

221 *See supra* Section I.C.

actual arbitration. These issues arguably also waste the courts' time, and having a simple jurisdictional test would better serve the courts.[222]

Congress enacted the FAA to aid parties who want to take advantage of the benefits of arbitration.[223] Predictable jurisdictional rules would aid the parties because the process would be more efficient and cost effective. Courts could apply an easy and uniform test to a wide variety of circumstances, and parties would have a clearer sense of when jurisdiction will lie under the FAA. Utilizing a predictable and simple test will increase efficiency and prevent the costs of collateral litigation.

3. Promotes Parties' Freedom of Contract

This proposal also supports the strong arbitration policy goal of enforcing parties' private contracts.[224] Simplifying the court process would increase efficiency and the courts could more easily determine questions at the heart of the FAA, namely whether the parties agreed to arbitrate or whether an award should be enforced. This proposal would cut through the chaos that currently exists in the jurisdictional jurisprudence. Currently, questions about jurisdiction have the potential to be embroiled in litigation on the collateral issue of jurisdiction before reaching the important contract questions the FAA intended to protect. A simplified jurisdictional test would allow the courts to determine the important contract rights the FAA sought to protect.

As a practical matter, parties do not always understand and consciously agree to all of the terms in their contracts. This is especially true of consumers and individual employees. A recent study by the Consumer Financial Protection Bureau stated that consumers are "generally unaware" of arbitration clauses or the implications of those clauses in credit card agreements.[225] The issues of bargaining power and understanding are complex, and they will not be explored here. This Article relies on the assumption, however flawed, that parties to contracts understand or at least have the

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222 *See* Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

223 Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

224 Bowen v. Amoco Pipeline Co., 254 F.3d 925, 933 (10th Cir. 2001) (stating that the FAA's purpose is to "ensur[e] that private agreements to arbitrate are enforced according to their terms" (quoting LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884, 888 (9th Cir. 1997)) (internal quotation marks omitted)).

225 CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at 11 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

opportunity to understand, all of the terms therein, and that the contracts will be enforceable if they are not unconscionable.[226]

4. Discouraging Forum Shopping

The current system is flawed because either party can easily manipulate it. The *Vaden* case is a clear example of the way that the rules encourage forum shopping. If one party anticipates arbitration, the party resisting arbitration may race to the state courthouse to file an action based on state law. Under the current law, the federal forum is not available to hear a Section 4 motion because the claim would not satisfy the removal criteria. In the same case, if the cardholder in *Vaden* had not filed suit, but Discover Bank had simply filed a "freestanding" Section 4 motion, the federal court could have heard the claim. Jurisdictional rules that turn on non-salient facts (like the presence or absence of a state court complaint) encourage jurisdictional gamesmanship. While no rule can completely eliminate gamesmanship in forum shopping, rules that limit such games are beneficial. The Supreme Court has indicated that the application of the FAA should not depend on which party "first invokes the assistance of a federal court."[227] A clear, uniform rule would eliminate most, if not all, of these types of procedural games.

5. Federal Jurisdictional Policies

In addition to being consistent with arbitration policy, this test would also be consistent with general, federal jurisdictional law and policy because it still relies on the traditional tests for federal question and diversity jurisdiction. "Looking through" to the merits of the arbitral dispute would still meet the policy goals underlying these jurisdictional tests. For cases in which the arbitral dispute involves a federal question, federal courts should be able to hear all of the motions relating to that case. The presence, or lack thereof, of a federal claim in an original complaint in state court should not be relevant.

Federal question jurisdiction should support a broader grant of arbitration jurisdiction because the court is interpreting federal law when it interprets the FAA. Federal courts should have an opportunity to interpret the *Federal* Arbitration Act. They can only do so when they have jurisdiction.

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226 For more information on the treatment of arbitration agreements as unconscionable, see Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751 (2014).

227 Prima Paint Corp. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 404 (1967).

For diversity cases, considering the arbitrable controversy also meets the policies supporting diversity jurisdiction. Taking into account the amount in controversy of the arbitral matter would ensure the dispute meets the amount in controversy requirement. Looking at the citizenship of the arbitral parties will also ensure that the diversity requirement is met.

The Supreme Court has articulated a policy of fashioning simple jurisdictional rules.[228] Simplicity creates a uniform law across the country,[229] creates clear rules for litigants,[230] and encourages predictability.[231] The proposed universal rule would greatly simplify jurisdiction in arbitration matters.

C. *Statutory Versus Common Law Change*

Finally, this Section considers the form of the proposal, namely a statutory change versus a common law change. This Section considers three different proposals.

1. Proposal 1: Amend the FAA to "Look Through" in All Situations

Perhaps the ideal situation would be a congressional amendment to the FAA. If Congress amended the FAA, it could do so in a number of ways. This Article proposes that Congress could eliminate all of the jurisdictional language currently in the FAA,[232] and add a new section to the FAA that reads:

> The federal courts have jurisdiction under this Act when the controversy to be arbitrated would otherwise satisfy the requirements of jurisdiction under Title 28.

This type of statutory language would be a relatively minor change to the current statute. The purpose of this language would be to change the *Vaden* holding as well as apply this new test to the whole of the FAA.

This change is relatively minor, so it would likely not be particularly controversial to Congress. Further, if Congress amends the FAA, the courts would not have to continue to grapple with these complex jurisdictional issues. A legislative change would ease the lower courts' current burden of interpreting *Vaden* and *Moses H. Cone* consistently. Congress need not be

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228 Hertz Corp. v. Friend, 559 U.S. 77, 94-95 (2010).

229 *Id.* at 92.

230 *Id.* at 94 ("[A]dministrative simplicity is a major virtue in a jurisdictional statute.").

231 *Id.* ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions.").

232 For a discussion of the current jurisdictional language in the FAA, see Section I.C above.

concerned about existing case law and could enact a new statute, creating a clean slate.

Although the change may be minor, it faces a practical hurdle. Congress has not been particularly interested in amending the FAA. Over the last decade, numerous bills have been introduced to amend the FAA, but none of them were successful.[233] Many scholars have recommended changing the FAA, but often these recommendations fall on deaf Congressional ears.[234]

2. Proposal 2: Amend the FAA to Give an Express Jurisdictional Grant

Congress could also enact a jurisdictional grant. Congress could eliminate the jurisdictional language currently present in the FAA and enact the following language:

> **Jurisdiction.** The district courts of the United States shall have jurisdiction over motions arising under this chapter.

This type of proposal would also have the benefit of a certain and universal change. Because the FAA is a federal statute, it is natural for the federal courts to have increased jurisdiction to interpret it.

This proposal, while still consistent with the FAA, would create a different type of jurisdictional framework. The FAA would change from being "jurisdiction neutral" to a statute granting jurisdiction. In addition to the political difficulties of amending the FAA, additional concerns arise from this proposal. First, this proposal would significantly increase the jurisdiction of the federal courts.[235] Of greatest concern, however, is that an express jurisdictional grant would potentially eliminate the dual state and federal regulatory system envisioned by Congress when it originally passed the FAA.[236] Notably, the dual regulatory system preserves federalism and allows the states ground to create an arbitration system that best meets the needs of their citizens.[237] In addition, if the FAA contains an express jurisdictional grant, then the decision regarding which court to entertain an arbi-

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233 David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 116-17 & n.345 (2015) (describing attempts to amend the FAA and listing bills that failed to pass).

234 *Id.* at 116-17 & n.347 (citing scholarly support for change that has been consistently rejected).

235 *See infra* Section IV.A.

236 In a recent law review article, I argued the importance of a dual regulatory system for arbitration. Kristin M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 711 (2015).

237 *Id.* at 769-71.

tration motion becomes a purely strategic decision on the part of the litigants.

Overall, the drawbacks of an express jurisdictional grant outweigh the benefits of simplicity. In addition, this type of change would require action by Congress, which is unlikely. While this type of legislative change is appealing, the practical situation makes this avenue unlikely.

3. Proposal 3: Common Law Change

The third avenue for this proposal would be through common law change. This method would likely be the best avenue for jurisdictional change. The primary benefit of a common law change is that it does not rely on any action on the part of Congress.[238] Arbitration scholars have suggested legislative change for years,[239] and none of that scholarship has provoked Congressional action. Instead, the Supreme Courts and lower federal courts should take the lead and begin to read the statute in the manner described above. The courts could accomplish this task with full support of the statutory text and original intent of the 1925 Congress that enacted the FAA.

The primary drawback is that this proposal would require a reversal of the *Vaden* decision. The Supreme Court does not often reverse itself,[240] and the chances of reversing the *Vaden* decision are low. Further, a common law approach would necessarily be patchwork. Because *Vaden* only involved the jurisdictional question in a small fraction of cases, the resulting cases have spurned a wide variety of tests. Correcting these decisions

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238 Many scholars have all but given up on suggesting that Congress amend the FAA. *See* Janet Cooper Alexander, *To Skin A Cat:* Qui Tam *Actions as a State Legislative Response to* Concepcion, 46 U. MICH. J.L. REFORM 1203, 1203 (2013) ("Amending the Federal Arbitration Act to overturn *Concepcion* would be a relatively simple exercise in legislative drafting, but in the current political climate such efforts are unlikely to succeed."); *see also* William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1245 n.14 (2003). Congress has, however, made some small changes to arbitration law in the last decade. Notably, Congress has enacted laws that would completely remove pre-dispute arbitration clauses from a number of different types of disputes. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 1414(a), § 129C(e)(1), 124 Stat. 1376, 2151 (2010) (codified at 15 U.S.C. § 1639c(e)(1) (2012)) (prohibiting contract terms that require arbitration for any controversy arising out of a mortgage loan transaction for a primary residence); Department of Defense Appropriations Act, 2010, Pub. L. 111-118, § 8116, 123 Stat. 3409, 3454-55 (prohibiting arbitration clauses in employment agreements for military contractors regarding Civil Rights Act claims (Title VII) and certain tort claims).

239 *See, e.g.*, EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 94 (2006) (arguing for a change to Section 4 to clarify application to state courts). These proposed changes largely concern issues of federalism and the proper scope of federal authority in the area of arbitration.

240 *See generally* Christopher P. Banks, *The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends*, 75 JUDICATURE 262 (1992).

through the common law would require coordination between courts and perhaps the Supreme Court's willingness to take upwards of four arbitration jurisdictional cases in order to ensure that the rule is consistent across all types of jurisdictional settings. A common law change would also require the courts to read *Vaden* and *Moses H. Cone* consistently, which would likely require the courts to note that the jurisdictional "ruling" in *Moses H. Cone* was not a ruling at all. Further, a common law approach might have unintended consequences for other areas of federal court jurisdiction if the Court is not careful to limit its holdings to arbitration cases.

Despite the shortcomings, the common law approach may be the most realistic method for jurisdictional change. Although the first Congressional approach outlined above would be a significantly cleaner resolution, the likelihood of statutory change is extraordinarily small. Incremental common law change, at this point, may be the only realistic option.

IV. IMPLICATIONS OF THE PROPOSAL

A. *Changes in Current Jurisdiction*

The practical effect of Proposal 1 or 3 would be an increase in jurisdiction in some areas while decreasing jurisdiction in other areas. This rule would give jurisdiction in cases where, as in *Vaden*, a counterclaim raises an issue of federal law. This proposal would also ensure jurisdiction to confirm or modify awards if the underlying arbitration involved a federal question. Additionally, this rule would ensure that the amount in controversy would be calculated based on the amount in controversy in the arbitration, no matter what stage the parties seek court involvement. This "look through" would provide jurisdiction in federal question cases when an arbitrator issues a "defense award."

Utilizing this approach, however, would exclude one group of existing cases from federal court jurisdiction. That group consists of cases involving non-diverse arbitration parties where only a subset of diverse parties appears on the federal court petition. Because the federal court would not have jurisdiction in those matters anyway (other than the ability to manufacture jurisdiction), they already do not belong in federal court.

Overall, this test would likely result in a net gain of cases within the federal court system, although there are no reliable statistics on how many of each type of case exist. Critics may argue that this proposal would "open the floodgates" to the federal courts. Ordinarily, a net increase of judicial resources might cause concern. In this context, however, the judicial resources required are relatively minimal. Because the FAA utilizes only motion practice, the strain on judicial resources would likely be minimal.

The practical effect of Proposal 2 would be a substantial increase in the amount of cases eligible for federal court jurisdiction. Although the

amount of time per case is low, if the courts accept enough cases, taxing of judicial resources may occur. The jurisdictional grant under Proposal 2 has the potential to open the proverbial floodgates. The substantively more modest proposals set forth in Proposal 1 and 3 provide the better balance of federal and state regulation and would not have a significantly negative effect on the existing judicial resources.

B. *Departure from Similar Jurisdictional Treatment in Declaratory Judgments*

The FAA's jurisdictional questions are relatively similar to some of the jurisdictional questions surrounding the DJA.[241] Other arbitration scholars have compared the jurisdictional limits of the DJA to the FAA.[242] Both statutes ask a court to make a non-monetary determination affecting the rights of the parties, and both statutes deal with procedure.[243] Neither statute provides a jurisdictional grant.[244]

As with the FAA, to determine federal question jurisdiction under the DJA, courts utilize the well-pleaded complaint rule for purposes of federal court jurisdiction.[245] In diversity jurisdiction cases, the usual rules regarding complete diversity and amount in controversy apply.[246] In determining whether the parties are diverse, the court will consider the parties specified in the complaint, as well as all necessary parties under Rule 19 of the Federal Rules of Civil Procedure.[247] In these ways, the courts have interpreted both statutes in a similar manner.

Interpreting the FAA and the DJA consistently creates some judicial efficiency. Courts only need one test for both statutes. The proposal set forth here would require courts to apply two different rules to these statutes. The judicial efficiencies, however, do not overcome the textual and policy reasons for treating these differing areas of the law differently. The DJA contemplates full litigation, while the FAA intends to promote efficiency through expedited procedures. Further, the purpose of the DJA is for the

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241 *See* Szalai, *supra* note 8, at 365.

242 *See id.* at 366-67.

243 Declaratory Judgment Act of 1934, 28 U.S.C. §§ 2201-2202 (2012); *see supra* notes 2-3 and accompanying text.

244 28 U.S.C. § 2201 ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."); *see* sources cited *supra* note 3 (noting a similar lack of jurisdictional grant for the FAA).

245 Scott L. Schmookler & Brian Bornstein, *The Strategic Use of Declaratory Judgment Actions in Fidelity Litigation*, 8 FIDELITY L.J. 41, 49-50 (2002) (quoting Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 248 (1952)).

246 *Id.* at 51-53.

247 *Id.* at 55-57.

court to hear and decide the merits of an issue. The purpose of the FAA, by contrast, is to ensure that contracts to arbitrate and arbitration awards are enforced. Given the vast differences in the purposes of the statutes, courts should interpret them differently and according to their unique underlying policies, not whether they happen to have matching tests.

C. *Impact on Class Action Arbitrations*

The proposed tests could have an impact on class action arbitration practice.[248] In these cases, parties often appeal preliminary determinations, such as whether a contract supports a class procedure and class certification.[249] If the courts were to look through only to the facts and circumstances surrounding the interlocutory award, federal jurisdiction would rarely, if ever, lie because those matters do not typically fall under federal law. Diversity jurisdiction arguably would not lie either because these preliminary determinations do not involve an award of any damages. The Supreme Court's recent class action rulings appear to suggest that class action arbitration is fundamentally different than bilateral arbitration,[250] and perhaps a different jurisdictional rule is warranted.

The nature of class action arbitrations, however, is not sufficiently different to warrant a differing test for this one situation. The ease and predictability of a single jurisdictional test would benefit the court and the parties. Predictable access to the federal courts would aid the policy of efficient dispute resolution, especially in an area such as class action arbitration, which may be more likely to be a slower and more cumbersome process through its own process design. Additional jurisdictional questions for the courts would slow the system down even further. In other words, the same jurisdictional rule should apply to class actions as any other inquiry under the FAA. The issue of class action arbitration, however, is extraordinarily complex, and more thorough analysis of this issue is beyond the scope of this Article.[251]

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248 *See generally* Blankley, *Did the Arbitrator "Sneeze"?*, *supra* note 200. In that early 2010 Article, I advocated against a grant of federal court jurisdiction for non-final arbitration "awards" in class action cases. I also argued that the interlocutory arbitration awards did not constitute an "award" for the purposes of the FAA, a proposal that was later implicitly rejected by the Supreme Court in the 2010 case of *Stolt-Nielsen*. Although I continue to have doubts as to the jurisdiction of interlocutory arbitration awards, the law is settling on the issue that some interlocutory "awards" are immediately appealable, especially in the area of class actions.

249 *See* CLASS RULES, *supra* note 198, rule 3.

250 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

251 For more information on class action arbitrations, see Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes*

CONCLUSION

The current state of arbitration jurisdictional jurisprudence is complex, unduly confusing, and lacking an overarching organizing principle. These complexities stem from ambiguous language in the FAA and the courts' piecemeal rulings in the area. The differing jurisdictional tests turn on factors not relevant to arbitration. The increasing nuances in the jurisdictional tests often rely on litigation factors that do not support the policies underlying the FAA or the practice of arbitration.

Simple changes could eliminate all of these issues. A common law or statutory change that would require a simple "look through" to the subject matter of the arbitral controversy would greatly simplify this inquiry. The uniform "look through" would create a simpler, more efficient system and protect the virtues of arbitration—namely efficient dispute resolution designed by the parties through a contractual relationship. By simplifying the gatekeeping jurisdictional issues, courts will not need to spend months (and years, in some cases) on preliminary issues, long before ever considering the merits of the dispute. Despite changes to status quo, this Article proposes a workable solution that not only eases the burdens of courts and litigants but also supports the underlying policies of the FAA.

Access to Justice, 90 OR. L. REV. 703 (2012); Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767 (2012).