
RECONCILING THE INTERSECTION OF A TREATY AND FEDERAL STATUTORY LAW: WHY REVERSE PREEMPTION SHOULD KEEP INSURANCE-RELATED ARBITRATION DECISIONS WITH THE STATES

ABSTRACT

The world is constantly globalizing. Markets, businesses, trade, and almost every facet of life has become increasingly interconnected with participating countries around the globe. As the United States continues to be more involved in this global market, the question inevitably arises as to what source of law governs these transactions—foreign or domestic.

Regarding arbitration agreements in international commercial disputes, the United States is currently a signatory nation to a treaty requiring the countries to recognize these agreements in domestic courts. In order to enforce the principles of this treaty, Congress passed enabling legislation to make enforcement mandatory. The United States also has federal legislation, however, that contradicts this principle in the realm of the business of insurance, and promotes the ideals of keeping the insurance industry state regulated. Thus, the conflict between foreign law and global ideals and domestic law and the power of federalism comes to a head.

The existence of two conflicting laws raises issues of the United States' policy concerns on the global playing field, and also whether insurance matters shall stay entirely state regulated. This is an issue that ultimately tests where the Supreme Court stands on globalism. Putting monumental policy arguments aside, this comes down to a question of statutory interpretation. This Note stands for the idea that whichever side the United States falls on this issue, the solution should come from a quick fix by Congress.

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I. INTRODUCTION

The insurance industry in the United States is primarily state regulated.¹ In passing the McCarran-Ferguson Act in 1945, Congress specifically placed the power to control the “business of insurance” with the states.² This Act clearly states: “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance”³ With this concise language, it is clear that Congress intends state law to govern when the legislation directly relates to the business of insurance—seemingly winning the state versus federal power struggle in insurance matters.⁴

1. See McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015 (2012); Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 664–65, 665 n.245 (1999) (observing the National Association of Insurance Commissioners’ position that insurance should be a state-regulated industry since “the states are closer to the consumers they are protecting and the industry they are regulating” and thus “states do a better job of regulating insurance than the federal government could” (quoting NAT’L ASS’N OF INS. COMM’RS, 1995 NAIC ANNUAL REPORT 15 (1996))).

2. 15 U.S.C. § 1012(a).

3. *Id.* § 1012(b).

4. See *id.* § 1012(a)–(b); see also Larry D. Carlson, *The Insurance Exemption from*

Regarding enforcing mandatory arbitration agreements, however, the winner of controlling source of law—state or federal—is not quite so clear. In the realm of arbitration agreements involving international commercial disputes, the legislature has taken a different approach.⁵ Arbitration has become an attractive choice for dispute resolution—especially in a constantly globalizing world.⁶ Congress has enacted federal regulations that obligate the states to recognize and enforce international arbitration agreements.⁷

In 1958, the United States became a signatory nation to The Convention on the Recognition and the Enforcement of Foreign Arbitral Awards (the Convention).⁸ As a party to the Convention, the United States along with “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them”⁹ Subsequent federal legislation—the Federal Arbitration Act (FAA)—further enforces the deal promulgated in the Convention.¹⁰ The FAA reiterates that the Convention “shall be enforced in United States courts.”¹¹

An issue, therefore, arises when a state has enacted a statute regulating enforcement of arbitration agreements in the business of insurance. The McCarran-Ferguson Act allows such a state statute specifically related to

the Antitrust Laws, 57 TEX. L. REV. 1127, 1159 (1979) (“[T]he McCarran Act represents a congressional policy decision that states should regulate the business of insurance . . .”).

5. See, e.g., *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 380 (4th Cir. 2012) (“While Congress acted to preserve the states’ dominance in insurance regulation, it moved to federalize policy regarding arbitration.”).

6. See Kimberley Chen Nobles, *Emerging Issues and Trends in International Arbitration*, 43 CAL. W. INT’L L.J. 77, 77 (2012) (“[I]nternational arbitration has grown to become one of the preferred dispute resolution mechanisms for international contracts and investments.”).

7. Mary Pennisi, Note, *Enforcing International Insurers’ Expectations: Can States Unilaterally Quash Commercial Arbitration Agreements Under the McCarran-Ferguson Act?*, 16 FORDHAM J. CORP. & FIN. L. 601, 621 (2011) (“Congress implemented the treaty in the Convention Act, which incorporates the FAA to the extent that it does not conflict with the New York Convention.”).

8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Sept. 1, 1970, 21 U.S.T. 2517 [hereinafter Convention].

9. *Id.* at art. II, ¶ 1.

10. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201–208 (2012) [hereinafter Federal Arbitration Act].

11. *Id.* § 201.

insurance to govern over federal acts under the principle of reverse preemption—the preemption of federal law by state statute.¹² The Convention and the subsequent FAA show, despite the McCarran-Ferguson Act, the arbitration agreement should be enforced in domestic courts.¹³ Thus, if a state-regulated insurance company involved in business with an international corporation finds themselves in a situation where arbitration is the contractual solution to a conflict, courts are left to question whether these agreements are in fact enforceable, and which source of law governs. Does the McCarran-Ferguson Act allow the state statute to reverse-preempt the FAA, or does the Convention and the subsequent FAA govern over the issue of arbitration agreements in the international realm? The circuit courts are currently split on how this question should be resolved.¹⁴

There is continuous debate over the broader question of whether the insurance industry should be under federal or state regulation, with meritorious arguments on both sides.¹⁵ This Note, however, will focus on the narrower issue of the conflict between domestic and foreign legislation regarding arbitration clauses in insurance contracts. Part II of this Note provides an introduction of the McCarran-Ferguson Act and discusses why the McCarran-Ferguson Act allows state statutes regulating “the business of insurance” to reverse-preempt certain federal acts.¹⁶ Part III provides an overview of the Convention and the subsequently amended FAA and will set the stage for why the power to enforce arbitration contracts in insurance should remain state regulated based on U.S. written law. A breakdown of the specific language of the McCarran-Ferguson Act, the FAA, and the Convention will expose the conflict between the legislation. Part IV analyzes

12. McCarran-Ferguson Act, 15 U.S.C. § 1012(a) (2012); *see* Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 511 n.1 (6th Cir. 2010) (“Reverse preemption is a form of inverse preemption that prevents a generally applicable federal law from inadvertently invalidating, impairing, or superseding state laws enacted to regulate the business of insurance.”).

13. *See* 9 U.S.C. § 201; Convention, *supra* note 8, at art. II, ¶ 1; *see also* Stephens v. Am. Int’l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995); Pennisi, *supra* note 7, at 602 (“The New York Convention mandates that United States federal courts enforce arbitration agreements among international parties.”).

14. *Compare* Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London, 587 F.3d 714, 717, 731 (5th Cir. 2009) (holding that “implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act”), *with* Stephens, 66 F.3d at 45 (holding that under the McCarran-Ferguson Act, the state statute regarding arbitration agreements in insurance reverse-preempted the FAA).

15. *See* Randall, *supra* note 1, at 626.

16. 15 U.S.C. §§ 1011–1015 (2012).

the Second Circuit opinion and supporting case law both of which argue in favor of McCarran-Ferguson preemption of the FAA. In addition, Part IV provides analysis of the Fourth and Fifth Circuit opinions as to why arbitration agreements should be enforced in domestic courts, as well as a look at the in-depth dissent from the Fifth Circuit refuting this notion. Part V of this Note provides a final analysis of non-self-executing treaties and reiterates the intent of Congress to allow for reverse preemption. This Note concludes with the argument that despite the broader policy disputes over conflicting domestic and foreign law in a globalized world as well as arguments over whether the insurance industry should be state regulated, the issue comes down to statutory interpretation regarding which federal act reigns. This Note stands for the idea that an amendment by Congress to the legislation is the solution necessary to rid any confusion.

II. THE MCCARRAN-FERGUSON ACT AND THE PREEMPTION DOCTRINE

Article VI of the U.S. Constitution—known as the Supremacy Clause—makes federal law “the supreme Law of the Land.”¹⁷ Under this clause, any federal law will preempt any state law in conflict with it.¹⁸ This is known as the preemption doctrine.¹⁹ If, for example, Congress had never passed the McCarran-Ferguson Act, it would be apparent that any federal law regarding the business of insurance would preempt any conflicting state law.²⁰

In the regulation of the business of insurance, however, Congress has

17. U.S. CONST. art. VI, cl. 2.

18. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824) (“In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”).

19. *See Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (“The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that ‘interfere with or are contrary to, the laws of [C]ongress . . .’” (quoting *Gibbons*, 22 U.S. at 211)); *see also* David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1126 (2012) (“The Supreme Court has long held that federal agencies may preempt state law in much the same way as Congress: either by issuing binding administrative rules that conflict with state law or by asserting exclusive federal control over a regulatory domain.”).

20. *See* U.S. CONST. art. VI, cl. 2. For an example of a pre-McCarran-Ferguson Act decision in which the Supreme Court allowed federal law to govern the traditionally state-regulated business of insurance, *see United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 552–53 (1944), *superseded by statute*, McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2012)), *as stated in* *Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 40–41 (1996).

enacted federal legislation that allows state regulations to reverse-preempt a conflicting federal law.²¹ This was the intent of Congress when passing the McCarran-Ferguson Act.²² Specific to the insurance industry, “Congress . . . conceded the right of ‘reverse preemption’ to the states, meaning that state laws regulating insurance would preempt conflicting federal law except where federal legislation was specifically aimed at regulating insurance.”²³ This Act of Congress seemingly put the power to regulate insurance back into the hands of the states.²⁴

Congress passed the McCarran-Ferguson Act in 1945 as a response to the Supreme Court case of *United States v. South-Eastern Underwriters Association*.²⁵ In *South-Eastern Underwriters*, decided in 1944, the Supreme

21. McCarran-Ferguson Act, 15 U.S.C. §§ 1011–1015; *see also* Riverview Health Inst. LLC v. Med. Mut. of Ohio, 601 F.3d 505, 513 (6th Cir. 2010) (holding that the McCarran-Ferguson Act “provides for ‘reverse preemption’ when regulation of the business of insurance is involved” (quoting *Genord v. Blue Cross & Blue Shield of Mich.*, 440 F.3d 802, 805 (6th Cir. 2006))); *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 688 (Ky. 2010) (“[T]he McCarran-Ferguson Act establishes a doctrine of ‘reverse preemption’ that expressly exempts from federal preemption state statutes enacted to regulate insurance, leaving the regulation of insurance to the individual state.” (citation omitted)). For a definition of reverse preemption, *see supra* note 12 and accompanying text.

22. *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217–18 (1979) (citing S. REP. NO. 20, 79th Cong., 1st Sess., 2 (1945); H.R. REP. NO. 143, 79th Cong., 1st Sess., 2–3 (1945)) (“The primary concern of Congress . . . was in enacting legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance.”); *see also* *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 380 (4th Cir. 2012). The court in *ESAB Group* noted, “The McCarran-Ferguson Act . . . ‘transformed the legal landscape by overturning the normal rules of pre-emption.’” *ESAB Grp., Inc.*, 685 F.3d at 380 (quoting *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 507 (1993)).

23. Zachary M. VanVactor, Note, *Three’s A Crowd: The Unhappy Interplay Among the New York Convention, FAA, and McCarran-Ferguson Act*, 36 TUL. MAR. L.J. 313, 318 (2011).

24. *See id.*

25. H. R. REP. NO. 79-143, at 2 (1945). The House Report states:

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association* case, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation. . . .

. . . Your committee believes there is urgent need for an immediate

Court held that the regulation of insurance was subject to the interstate commerce clause.²⁶ Worried about the repercussions of this decision, Congress quickly enacted the McCarran-Ferguson Act to “restore the states’ preeminent position in insurance regulation.”²⁷ The Act mandates that “[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”²⁸ In addition, the Act specifically states, regarding federal regulation, “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.”²⁹

In construing what constitutes an “Act of Congress” that would preempt a state regulation under the McCarran-Ferguson Act, the courts propounded the following analysis:

[T]he Act mandates the following inquiry in assessing the applicability of a federal statute in a case such as this: (1) whether the federal statute at issue specifically relates to the business of insurance; (2) whether the state statute at issue was enacted for the purpose of regulating the business of insurance; and (3) whether application of the federal statute would invalidate, impair or supersede the state statute.³⁰

Thus, in a situation where both the conflicting federal statute and state statute regulate the business of insurance, and applying the federal statute would directly conflict with and override the state statute, the McCarran-Ferguson Act allows for reverse preemption.³¹

expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States.

Id. (emphasis omitted).

26. *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 552–53 (1944) (“No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.”).

27. *ESAB Grp.*, 685 F.3d at 380 (citing *Fabe*, 508 U.S. at 500; *Life Partners, Inc. v. Morrison*, 484 F.3d 284, 292 (4th Cir. 2007)).

28. 15 U.S.C. § 1012(a) (2012).

29. 15 U.S.C. § 1012(b).

30. *Am. Chiropractic Ass’n v. Trigon Healthcare, Inc.*, 151 F. Supp. 2d 723, 732 (W.D. Va. 2001) (citing *Fabe*, 508 U.S. at 500–01 (1993)).

31. *See id.* at 732.

III. THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In 1958, the United States participated in the New York Convention held by the United Nations.³² The goal of this convention was the recognition and enforcement of arbitral awards in a foreign state.³³ As arbitration became an increasingly popular method of dispute resolution, the international community attempted to resolve the unknown of handling arbitral awards on the foreign stage.³⁴ Under the Convention, “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”³⁵

Understanding that becoming a signatory to the Convention would directly conflict with related domestic laws, the United States did not become a signatory until 1970.³⁶ The legislative history of the Convention shows that “this delay occurred because ‘the American delegation [to the drafting conference] felt certain provisions of the [C]onvention were in conflict with some of our domestic laws,’” though it did not elaborate specifically which laws.³⁷ The solution was to amend the Federal Arbitration Act that had initially been enacted in 1925 to “promote[] arbitration as an alternative means to resolving disputes.”³⁸ The FAA was amended in 1970—the same year the United States became a signatory to the Convention.³⁹

32. Convention, *supra* note 8.

33. *Id.* at art. I, ¶ 1; *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (“The goal of the Convention, and the principal purpose underlying American adoption . . . was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts . . .”).

34. See Pennisi, *supra* note 7, at 620 (citing J. Logan Murphy, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, The McCarran—Ferguson Act, and Antagonistic State Law*, 41 VAND. J. TRANSNAT’L L. 1535, 1540–41 (2008)) (“Acknowledging that arbitration is an integral aspect of international commercial comity, the Convention sets forth a framework creating global dispute resolution mechanisms for conflicts arising under international agreements.” (footnotes omitted)).

35. Convention, *supra* note 8, at art. III.

36. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 381–82 (4th Cir. 2012).

37. *Id.* (quoting S. EXEC. REP. NO. 90-10, at 1 (1968)).

38. Pennisi, *supra* note 7, at 625 (citing 9 U.S.C. § 3 (2006)).

39. See Pub. L. No. 91-368, § 201, 84 Stat. 692, 692 (1970) (amending the FAA and noting the purpose was “[t]o implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards”); see also *ESAB Grp.*, 685 F.3d at 381–82.

Under Chapter 2 of the amended FAA, Congress provides that “[t]he Convention . . . shall be enforced in United States courts in accordance with this chapter.”⁴⁰ Because the Convention—an international treaty—relies on the FAA for its enforcement, it is what is known as a non-self-executing treaty.⁴¹

A. Self-Executing vs. Non-Self-Executing Treaties

In the 1829 case of *Foster v. Neilson*, the Supreme Court distinguished between two different types of treaties: self-executing and non-self-executing.⁴² Regarding treaties, the Court noted, “Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”⁴³ Where “the legislature must execute the contract, before it can become a rule for the Court,” a treaty is viewed as non-self-executing.⁴⁴ Non-self-executing treaties that require implementing legislation by Congress are more prevalent than self-executing treaties.⁴⁵

The Supreme Court reiterated this notion of the distinction between self-executing and non-self-executing treaties in *Medellin v. Texas*.⁴⁶ The Court explained, “A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force.”⁴⁷ Instead, “a treaty is ‘equivalent to an act of the legislature,’ and hence self-executing, when it ‘operates of itself without the aid of any legislative provision.’”⁴⁸ Applying this principle to the Convention, it follows that since it relies on the subsequently amended FAA to be enforced, it is

40. 9 U.S.C. § 201 (2012).

41. See *ESAB Grp.*, 685 F.3d at 386–88 (“Chief Justice Marshall first delineated the distinction between a self-executing and non-self-executing treaty in *Foster v. Neilson*.”).

42. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds* by *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

43. *Id.*

44. *Id.*

45. See *ESAB Grp.*, 685 F.3d at 387 (noting “an emerging presumption against finding treaties to be self-executing” (citing *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 737 (5th Cir. 2009))).

46. *Medellin v. Texas*, 552 U.S. 491, 505, 505–06 n.2 (2008).

47. *Id.* at 527.

48. *Id.* at 505 (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds* by *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)).

therefore a non-self-executing treaty.⁴⁹ This supports the argument that it is the subsequent federal legislation, the FAA, and not the treaty that should be in question when determining what source of law governs whether mandatory arbitration clauses are enforceable.⁵⁰ The Supreme Court noted in *Medellin*, “The point of a non-self-executing treaty is that it ‘addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.’”⁵¹ This shows that the Convention is not enforceable alone—it requires the subsequently amended FAA to be enforced.⁵² Thus, regarding this specific issue of the business of insurance and arbitration enforcement issues, it is the FAA—and only the FAA—that must be focused on to ascertain whether there is reverse preemption by the McCarran-Ferguson Act.⁵³ The Convention on its own does not provide binding law that “can become a rule for the court.”⁵⁴

The importance of this distinction between a self-executing treaty and a non-self-executing treaty is developed further in Part IV regarding the circuit courts’ disagreement on the larger issue of the governing source of law. Applying this distinction to the Convention, holding it out as a non-self-executing treaty as defined by the Supreme Court supports the argument that the question should be whether the FAA preempts state law despite the McCarran-Ferguson Act, and not whether the Convention governs domestic law.⁵⁵

IV. THE CIRCUIT SPLIT

A. To Reverse-Preempt, or Not to Reverse-Preempt, that is the Question

Currently, three circuit courts have discussed this issue of whether the McCarran-Ferguson Act reverse-preempts the Convention and the

49. *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995) (citing 9 U.S.C. §§ 201–208 (1994) (“[T]he Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation.”)).

50. *See id.* at 43–44.

51. *Medellin*, 552 U.S. at 516 (quoting *Foster*, 27 U.S. (2 Pet.) at 314) (emphasis omitted).

52. *See id.*; *Stephens*, 66 F.3d at 45.

53. *See Stephens*, 66 F.3d at 43–45.

54. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 387 (4th Cir. 2012) (quoting *Foster*, 27 U.S. (2 Pet.) at 314); *Stephens*, 66 F.3d at 45 (citing *Foster*, 27 U.S. (2 Pet.) at 314).

55. *See Stephens*, 66 F.3d at 45–46.

subsequently amended FAA, which would allow state statutes with anti-arbitration provisions to govern the business of insurance.⁵⁶ The Fourth and Fifth Circuits have leaned in favor of the FAA, and thus, in favor of the Convention's terms applying to insurance companies in domestic courts.⁵⁷ The Second Circuit and an in-depth, scathing dissent from the Fifth Circuit decision both argue in favor of reverse preemption based on the McCarran-Ferguson Act's clear words that "[n]o Act of Congress shall be construed to . . . supersede any law enacted by any State for the purpose of regulating the business of insurance."⁵⁸ The following discussion will analyze each circuit court's opinion and the various arguments presented for both sides.

1. *The Second Circuit Decision: Stephens v. American International Insurance Co.*

The Second Circuit wasted no time in *Stephens v. American International Insurance Co.* reinforcing the principle that "Congress created an exception to the usual rules of preemption when it enacted the McCarran-Ferguson Act."⁵⁹ In this case, a Kentucky insurance corporation—Delta, a reinsurance company—was found to be insolvent and was ordered to be liquidated "pursuant to the Kentucky Insurers Rehabilitation and Liquidation Law."⁶⁰ The commissioner of insurance in charge of liquidating Delta filed suit in order to recover funds owed by several companies for premiums due.⁶¹ However, these companies who had ceded risk to Delta—the cedents—refused to pay due to the losses they had endured when Delta became insolvent.⁶² Since all of the contracts in this case included arbitration clauses, certain cedents moved to compel arbitration under the FAA.⁶³

56. See *ESAB Grp.*, 685 F.3d at 380; *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 717 (5th Cir. 2009); *Stephens*, 66 F.3d at 43–44.

57. See *ESAB Grp.*, 685 F.3d at 379, 390; *Safety Nat'l*, 587 F.3d at 717, 732.

58. 15 U.S.C. § 1012(b) (2012); *Safety Nat'l*, 587 F.3d at 740, 751–53 (Elrod, J., dissenting); *Stephens*, 66 F.3d at 45–46.

59. *Stephens*, 66 F.3d at 43.

60. *Id.* at 42. Reinsurance, as described by the court, is where "primary insurers who have assumed risk from their policy holders in exchange for premiums, cede portions of that risk to reinsurers, in exchange for premiums, pursuant to reinsurance agreements. . . . In this way, the risk associated with any one policyholder is spread among a variety of insurers." *Id.*

61. *Id.*

62. *Id.* at 42–43.

63. *Id.* at 43. Under section 3 of the FAA, "in any suit pending in federal court either party may move to compel arbitration," where there is an arbitration clause in the

While the majority of cedents moved to compel arbitration under Chapter 1 of the FAA, one of the cedent corporations, British Aviation Insurance Company, Ltd., “moved to compel arbitration abroad, pursuant to Chapter 2 of the FAA which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards”⁶⁴ Thus arises the debate over whether “the Kentucky Liquidation Act, . . . a statutory prohibition against compelling a liquidator to arbitrate,” nullifies the arbitration clauses in this case.⁶⁵

The Second Circuit accepted Stephen’s argument “that the Kentucky Liquidation Act is a ‘law enacted for the purpose of regulating the business of insurance.’”⁶⁶ The court reasoned that the law was “aimed at protecting or regulating [the] relationship [between the insurer and insured]” and thus, was “enacted for the purpose of regulation of the business of insurance” under the McCarran-Ferguson Act.⁶⁷ Following this reasoning, the state statute would reverse-preempt the FAA per the McCarran-Ferguson Act, and there would be no compelled arbitration in the matter.⁶⁸

Since the specific defendant, British Aviation, was a foreign corporation, they argued that despite reverse preemption of the FAA, “the Convention would still require arbitration of their claims,” and “that under the Supremacy Clause the Convention supersedes the Kentucky Liquidation Act.”⁶⁹ The court dismissed this argument, recognizing the difference between a self-executing and a non-self-executing treaty.⁷⁰ Using language from the previously discussed Supreme Court case of *Foster*, the Second Circuit reasoned “the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation.”⁷¹ Since the Convention does not “operate of itself, without the aid of any legislative provision” and

contract. Jack Wilson, “No-Class-Action Arbitration Clauses,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 744–45 (2004) (citing 9 U.S.C.A. § 3 (West 1999)).

64. *Stephens*, 66 F.3d at 43 (citation omitted).

65. *Id.*

66. *Id.* at 44–45 (quoting 15 U.S.C. § 1012(a) (1994)).

67. *Id.* at 44 (quoting *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 505 (1993) (alteration in original)) (internal quotation mark omitted).

68. *See id.* at 45.

69. *Id.*

70. *Id.*

71. *Id.* (citing 9 U.S.C. §§ 201–208 (1994)).

instead relies on the FAA for its enforcement, it is a non-self-executing treaty.⁷² Thus, the focus should be on whether the Kentucky Liquidation Act reverse-preempts the FAA, not whether “the Convention supersedes the Kentucky Liquidation Act,” as argued by British Aviation.⁷³ In analyzing the former, it is clear that “McCarran-Ferguson states ‘[n]o Act of Congress shall be construed to . . . supersede any law . . . regulating the business of insurance.’”⁷⁴ Thus, the FAA would not preempt the Kentucky Liquidation Act, and as the Second Circuit held, “[t]he Convention itself is simply inapplicable in this instance.”⁷⁵

2. Additional Case Law Supporting Reverse Preemption

Other courts have concurred with the Second Circuit’s holding that the FAA was reverse-preempted under the McCarran-Ferguson Act by a state statute regulating the business of insurance.⁷⁶ The Eighth Circuit touched on this issue briefly in *Standard Security Life Insurance Co. of New York v. West*, in which West, a college football player, held an insurance policy with Standard Security Life Insurance Company of New York covering permanent disability if an injury or sickness made him ineligible to play professional ball.⁷⁷ The contract included a provision in which either party could demand arbitration in the event that a conflict should arise.⁷⁸ When West filed a claim that Standard refused to pay, Standard subsequently requested arbitration to settle the dispute, arguing that the FAA mandated

72. *Id.* (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313–14 (1829)) (emphasis omitted).

73. *See id.*

74. *Id.* (quoting 15 U.S.C. § 1012(b) (1994)).

75. *Id.*; see also Claudia Lai, Note, *The McCarran Ferguson Act and the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards: To Reverse-Preempt or Not?*, 2011 U. CHI. LEGAL F. 349, 366–67 (2011) (citing 9 U.S.C. § 201 (2006)) (“[A] contracting state may limit the scope of applicability of the New York Convention, and the United States has done this through its implementing legislation.”).

76. *See, e.g.,* *Scott v. Louisville Bedding Co.*, 404 S.W.3d 870, 880 (Ky. Ct. App. 2013) (noting that “both federal and state courts have held that state statutes that invalidate arbitration clauses *specifically as to insurance contracts* are indeed ‘enacted for the purpose of regulating the business of insurance’ and thus not preempted by the FAA by virtue of the McCarran-Ferguson Act” (emphasis in original)); *see also, e.g.,* *Friday v. Trinity Universal of Kan.*, 939 P.2d 869, 872–73 (Kan. 1997) (holding that the FAA did not preempt the Kansas Arbitration Act based on the McCarran-Ferguson Act).

77. *Standard Sec. Life Ins. Co. of N.Y. v. West*, 267 F.3d 821, 822 (8th Cir. 2001).

78. *Id.*

enforcement of the mandatory arbitration clause.⁷⁹ The court, however, sided with West, holding that the Missouri Arbitration Act—which prohibited arbitration clauses in contracts regarding insurance—reverse-preempted the FAA under the McCarran-Ferguson Act.⁸⁰ Though this case did not involve a foreign party, it nonetheless portrays a case where the McCarran-Ferguson Act is found to allow state law to reverse-preempt the FAA—the legislation in question here.⁸¹

B. *The Fourth and Fifth Circuit Approach*

When similar issues were presented to the Fourth and Fifth Circuits, both courts held that the McCarran-Ferguson Act does not reverse-preempt the FAA and that international arbitration agreements regarding insurance are enforceable under the Convention.⁸² The courts reached their respective conclusions by finding that the Convention does not fall under the “Act of Congress” language used in the McCarran-Ferguson Act and therefore will preempt any state statute regarding enforcement of arbitral awards.⁸³ An analysis of the respective cases shows why this argument is misguided and how a legislative amendment by Congress is preferable to reading into legislative intent, which currently is unclear.

1. *The Fourth Circuit Decision: ESAB Group, Inc. v. Zurich Insurance PLC*

In *ESAB Group, Inc. v. Zurich Insurance PLC*, the Fourth Circuit analyzed the state law versus the FAA debate in the context of a foreign-owned South Carolina-based company, ESAB Group (the insured), and Zurich Insurance (the insurer).⁸⁴ Due to personal injuries resulting from ESAB’s manufactured products, the company faced costly products liability lawsuits.⁸⁵ When ESAB’s insurers refused to cover ESAB and defend them in these pricey lawsuits, ESAB took the matter to court.⁸⁶ The insurance policies contained clauses referring such claims under the policies to

79. *Id.* at 822–23.

80. *Id.* at 823–24.

81. *See id.*

82. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 390 (4th Cir. 2012); *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 717, 732 (5th Cir. 2009).

83. *See ESAB Grp.*, 685 F.3d at 390.

84. *Id.* at 383.

85. *Id.*

86. *Id.*

arbitration.⁸⁷ ESAB contended that South Carolina law, which invalidates such clauses enforcing arbitration, reverse-preempts the FAA and the Convention based on the McCarran-Ferguson Act.⁸⁸ Thus, the issue over governing law arose.

The court noted from the outset of its opinion how such a case “presents a complex question regarding the intersection of a treaty and federal and state statutory law.”⁸⁹ Because of this, the court analyzed the history of state-regulated insurance as well as the role of the Convention and the FAA on arbitration enforcement.⁹⁰ Regarding whether the Convention is a self-executing or non-self-executing treaty, the court sided with it being a non-self-executing treaty, though it never definitively answered the question.⁹¹ Instead, the court noted, “[T]he legislative history of the Convention Act [(the FAA)] indicates that Congress viewed the Act as implementing legislation”⁹² Without actually reaching a conclusion, the court conceded that the Convention is a non-self-executing treaty.⁹³ The court held that “even assuming Article II of the Convention is non-self-executing, the Convention Act, as implementing legislation of a treaty, does not fall within the scope of the McCarran-Ferguson Act.”⁹⁴

The court rested its argument on the basis that “Supreme Court precedent dictates that McCarran-Ferguson is limited to legislation within the domestic realm.”⁹⁵ Thus, the court held that the Convention was outside the scope of the McCarran-Ferguson Act.⁹⁶

The McCarran-Ferguson Act’s language clearly states, “No Act of Congress shall be construed to . . . supersede any law . . . regulating the

87. *Id.*

88. *Id.* at 385.

89. *Id.* at 380.

90. *Id.* at 380–82 (“While Congress acted to preserve the states’ dominance in insurance regulation, it moved to federalize policy regarding arbitration.”).

91. *See id.* at 387–88.

92. *Id.* at 387.

93. *Id.* at 388. Regarding what type of treaty the Convention is, the court noted, “[W]e need not wade into these murky waters to resolve the question before us.” *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 390 (“Nothing in McCarran-Ferguson suggests that, by enacting that statute, Congress intended to delegate to the states the authority to abrogate international agreements that this country has entered into and rendered judicially enforceable.”).

business of insurance.”⁹⁷ In conceding that the Convention is a non-self-executing treaty, the court in effect conceded that the only enforceable law in domestic courts is the subsequently enacted FAA⁹⁸—an Act of Congress—which is clearly what the McCarran-Ferguson Act says may not supersede any state law regulating the business of insurance.⁹⁹ The court’s argument that the Convention falls outside the scope of the McCarran-Ferguson Act and thus governs over arbitration disputes is moot, since the Convention relies on federal legislation to have any applicability.¹⁰⁰

2. *The Fifth Circuit Decision: Safety National Casualty Corporation v. Certain Underwriters at Lloyd’s, London*

The conflict presented to the Fifth Circuit arose out of a dispute between Safety National Casualty Corporation, a reinsurance company, and Certain Underwriters at Lloyd’s, London, an international reinsurance company.¹⁰¹ Lloyd’s was a reinsurer to Louisiana Safety Association of Timbermen, a company providing workers’ compensation insurance.¹⁰² Louisiana Safety Association attempted to assign the rights it had under the reinsurance agreements with Lloyd’s to Safety National.¹⁰³ When Lloyd’s refused to recognize the assignments, Safety National sued, and Lloyd’s moved to stay proceedings and compel arbitration.¹⁰⁴ An applicable Louisiana statute, however, prohibited arbitration agreements, and thus the question of the governing source of law came before the court.¹⁰⁵

In finding that the Convention governed, the court based its holding on two reasons.¹⁰⁶ First, the court held that “Congress did not intend to include a treaty within the scope of an ‘Act of Congress’ when it used those words in

97. 15 U.S.C. § 1012(b) (2012).

98. See *ESAB Grp.*, 685 F.3d at 387–88.

99. See 15 U.S.C. § 1012(b).

100. See *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995); see also *Lai*, *supra* note 75, at 365 (noting that the Convention’s operation depends on the FAA as enabling legislation).

101. *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 717 (5th Cir. 2009). For a description of reinsurance, see *supra* text accompanying note 60.

102. *Safety Nat’l*, 587 F.3d at 717.

103. *Id.*

104. *Id.* For a description of moving to compel arbitration, see *Wilson*, *supra* note 63.

105. *Safety Nat’l*, 587 F.3d at 717–18.

106. *Id.* at 718.

the McCarran-Ferguson Act.”¹⁰⁷ Second, the court held that “it is when we construe a treaty—specifically, the Convention, rather than the Convention Act—to determine the parties’ respective rights and obligations, that the state law at issue is superseded.”¹⁰⁸ Similar to the Fourth Circuit, this reasoning analyzes the improper source of law—the Convention, rather than the FAA—to dictate its answer.¹⁰⁹

In *Safety National*, the Fifth Circuit dodged the question of whether the Convention is a non-self-executing treaty, as did the Fourth Circuit.¹¹⁰ The court conceded that even if the Convention requires implementing legislation, “that does not mean that Congress intended an ‘Act of Congress,’ as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation.”¹¹¹ The court further expounded that, “A treaty remains an international agreement . . . negotiated by the Executive Branch and ratified by the Senate, not by Congress.”¹¹² Here, the words of the Supreme Court in its opinion in *Foster* clear the confusion.¹¹³ In *Foster*, Chief Justice Marshall wrote that there are times when treaties are “to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”¹¹⁴ On the other hand, there are times when “the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”¹¹⁵ The Supreme Court in *Foster* clearly laid out the circumstances in which subsequent legislative acts of Congress must take place before a treaty will be enforceable in domestic courts—in cases where a treaty is non-self-executing.¹¹⁶ Since the Convention falls under that category, any argument overlooking the issue of whether the Convention is non-self-executing is a misstep.¹¹⁷

107. *Id.*

108. *Id.*

109. Compare *id.*, with *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 387–88 (4th Cir. 2012).

110. See *Safety Nat’l*, 587 F.3d at 721 (“It is unclear to us whether the Convention is self-executing.”).

111. *Id.* at 722.

112. *Id.* at 723 (footnote omitted).

113. Compare *id.*, with *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

114. *Foster*, 27 U.S. at 314.

115. *Id.*

116. See *id.*

117. See *id.*

C. The Fifth Circuit Dissent: Providing A Logical Rationale

Penned by Judge Elrod, three judges in the Fifth Circuit case of *Safety National* wrote a dissent criticizing the majority's holding and reasoning.¹¹⁸ The dissent clearly lays out the faulty grounds on which the Fourth Circuit and the Fifth Circuit majority rest their holdings.¹¹⁹ The dissent explains:

Because a non-self-executing treaty cannot itself provide a rule of decision in U.S. courts, the only candidate for a source of federal law with preemptive force under the Supremacy Clause is the statute that implements the treaty. The McCarran-Ferguson Act requires that federal statutes that affect the business of insurance do so explicitly. The implementing statute does not do so, and it is therefore powerless to preempt state law.¹²⁰

The dissent clearly lays out that the true question in this issue is “whether the legislation implementing the Convention [the FAA] is an ‘Act of Congress’ within the meaning of the McCarran-Ferguson Act,”¹²¹ rather than the majority’s “approach as an inquiry into whether the Convention itself is an ‘Act of Congress.’”¹²² As the dissent notes, asking this correct question from the outset avoids what the dissent calls “a doctrinal novelty of our circuit’s own creation, as there is no precedent holding that a non-self-executing treaty, in and of itself, has the power to preempt state law.”¹²³

As the dissent notes, the Supremacy Clause and preemption doctrine show that the Convention is not capable of superseding state regulation.¹²⁴ The dissent notes that the majority opinion “endow[s] non-self-executing treaties with heretofore undiscovered preemptive powers.”¹²⁵ When analyzing the correct source of law to be questioned in this issue—the FAA—the dissent notes that “[o]nly a single statutory interpretation question remains: *is the Convention Act an ‘Act of Congress’ within the*

118. *Safety Nat’l*, 587 F.3d at 737–53 (Elrod, J., dissenting).

119. *See id.*

120. *Id.* at 737 (footnote omitted).

121. *Id.* at 738 (footnote omitted).

122. *Id.* at 738 n.7.

123. *Id.* at 738.

124. *Id.* at 740 (citing David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 149 (1999) (“[T]o the best of the author’s knowledge, no U.S. court has ever held a treaty provision to be non-self-executing and then applied it directly to decide a case.”)).

125. *Safety Nat’l*, 587 F.3d at 745.

meaning of the McCarran-Ferguson Act?”¹²⁶ Judge Elrod states that the answer is clear—it lies in “the opening words of the Act itself:

“UNITED STATES STATUTES AT LARGE

91ST CONGRESS—2ND SESSION

Convening January 19, 1970

An Act

To implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.”¹²⁷

This leaves little ambiguity as to whether the FAA is an “Act of Congress” subject to the McCarran-Ferguson Act—since it plainly states that it is.¹²⁸ Judge Elrod criticizes the majority for relying too heavily—and incorrectly—on the idea that policy favors arbitration in international disputes in basing its decision.¹²⁹ If “congressionally sanctioned national policy favor[s] arbitration of international commercial agreements,” then Congress must amend the FAA to specifically apply this principle to the business of insurance, so there is no possible conflict with the McCarran-Ferguson Act.¹³⁰

V. THE RESOLUTION

A. *Non-Self-Executing Treaties Implemented by Federal Legislation Do Not Preempt State Statutes Regarding Insurance*

Based on the treatment of non-self-executing treaties by the Supreme Court and analysis of the distinction by lower courts, it becomes clear that the treaty itself does not supersede any state regulations regarding the business of insurance.¹³¹ Once the initial analysis to determine that the Convention is a non-self-executing treaty is complete, the true question at

126. *Id.* at 748 (emphasis omitted).

127. *Id.* at 749 (quoting Pub. L. No. 91-368, 84 Stat. 692 (1970)).

128. *Id.*

129. *Id.* at 751 (“In addition to the court’s improper inquiry into what Congress intended when it wrote the unambiguous words ‘Act of Congress,’ the court expounds for some length—indeed for an entire section—upon the federal policies protected by its interpretation.” (citing *id.* at 730–31 (majority opinion))).

130. *Id.* at 751 (Elrod, J., dissenting) (quoting *id.* at 730 (majority opinion)).

131. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); see also *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 45 (2d Cir. 1995).

issue here—whether the FAA preempts state regulations of the business of insurance due to the McCarran-Ferguson Act—becomes easier to decipher.¹³² Though two circuit courts have held otherwise,¹³³ the arguments in favor of reverse preemption by the McCarran-Ferguson Act are more persuasive.¹³⁴ The following section analyzes the role of congressional silence in relation to the last-in-time rule and will show why the solution to this issue should come from an amendment by Congress—no matter which policy argument is more persuasive.

B. *The Intent of Congress*

In analyzing the McCarran-Ferguson Act versus the FAA it is important to understand the intent of Congress when enacting the legislation in question.¹³⁵ When Congress enacted the McCarran-Ferguson Act in 1945, it specifically stated, “[S]ilence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.”¹³⁶

When Congress amended the FAA in 1970, it knew or should have known of the existence and effect of the McCarran-Ferguson Act.¹³⁷ And yet, when Congress amended the FAA to include Chapter 2 regarding the Convention, it remained silent on the issue of whether the FAA applied to the business of insurance.¹³⁸

If it is assumed, however, that Congress was unaware of the ultimate conflict between McCarran-Ferguson and the FAA, then this issue comes down to the existence of two federal statutes in conflict with each other. The Fourth Circuit noted in *ESAB Group* that “to the extent the McCarran-Ferguson Act and [the FAA] are in irreconcilable conflict, the more recent

132. See *Safety Nat’l*, 587 F.3d at 745 (Elrod, J., dissenting).

133. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 390 (4th Cir. 2012); *Safety Nat’l*, 587 F.3d at 732.

134. See *Safety Nat’l*, 587 F.3d at 745 (Elrod, J., dissenting).

135. See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (“As in all statutory construction cases, we begin with the language of the statute.”); 73 AM. JUR. 2D *Statutes* § 60 (2015) (“The fundamental question in all cases of statutory interpretation is legislative intent, and the rules of statutory construction are designed to ascertain and enforce the intent of the legislature.” (citing *City of DeQuincy v. Henry*, 62 So.3d 43 (La. 2011))).

136. McCarran-Ferguson Act, 15 U.S.C. § 1011 (2012).

137. See Federal Arbitration Act, 9 U.S.C. § 201 (2012).

138. See *id.* §§ 201–08.

[FAA] would prevail.”¹³⁹ This is based on the notion of the last-in-time rule, an idea penned by Alexander Hamilton in *The Federalist* No. 78 that when “two statutes existing at one time, clashing in whole or in part with each other” are irreconcilable, “[t]he rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first.”¹⁴⁰ Applying the last-in-time rule, the FAA would reign since it was amended post-McCarran-Ferguson.¹⁴¹

This idea of implied repeal of one act by a subsequent act is a disfavored principle, however.¹⁴² Whenever possible, it is more favorable to reconcile the acts since there was no true express repeal.¹⁴³ There can be no reconciliation between the McCarran-Ferguson Act and the FAA, except to read that since the FAA does not expressly mention the business of insurance then the McCarran-Ferguson Act would reverse-preempt it.¹⁴⁴ Thus, an amendment by Congress is necessary to clear up the federalism conflict as well as solve the larger policy implications currently left murky due to lack of clear congressional intent in regard to insurance and international arbitration enforcement.

C. A Quick Fix by Congress as the Necessary Solution

There are those who would argue that it is in the United States’ interest to keep insurance-related decisions with the states.¹⁴⁵ An insurance contract

139. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 390 n.6 (4th Cir. 2012).

140. Vasan Kesavan, *The Three Tiers of Federal Law*, 100 NW. U. L. REV. 1479, 1492 (2006) (quoting *THE FEDERALIST* NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

141. *See ESAB Grp.*, 685 F.3d at 390 n.6.

142. *See* Karen Petroski, Note, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 488–89 (2004) (“The presumption against implied repeals, unlike the later-enacted-statute rule, embodies a policy of hostility to the notion of statutory updating unless the legislature makes that updating explicit.”); *see also* Jesse Markham, *The Supreme Court’s New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of “Plain Repugnancy”*, 45 GONZ. L. REV. 437, 438 (2009) (“As traditionally applied over hundreds of years, implied partial repeals were strongly disfavored, reflecting judicial deference to the legislature and the democratic system under which laws are enacted and repealed by elected and accountable officials.”).

143. *See* Petroski, *supra* note 142, at 488–89 (“[T]hese arguments fail in the face of another long-standing interpretive guideline, which advises courts to presume that such a repeal was not intended and to reconcile the statutes if at all possible.”).

144. *See* Lai, *supra* note 75, at 373–74.

145. *See id.* at 372–73.

by nature favors the insurer.¹⁴⁶ This is due to the fact that the insurer is the policyholder who drafts the provisions of a policy—leaving the insured little to zero room to negotiate in most cases.¹⁴⁷ In the previously mentioned case of *West*, for example, it is clear that the insured, *West*, did not have any negotiability as to whether or not he agreed to mandatory arbitration should a conflict arise.¹⁴⁸ In the foreign context, this places an even greater burden on an insured who may find themselves in a binding international arbitration agreement, in which they did not have the ability to negotiate the arbitration provision in the contract to begin with.¹⁴⁹ Proponents of McCarran-Ferguson reverse preemption argue that this Act carved out a subject matter exception for the business of insurance, and it is in the policy interests of the United States to read the Act broadly.¹⁵⁰

On the other hand, there are those who argue in favor of the foreign policy objective of adhering to the principles set forth in the Convention.¹⁵¹ Due to the prominence of the United States in the global arena, it is important to comply with commitments made with foreign nations in furtherance of global economic agreements.¹⁵² Not only does the Supremacy Clause allow self-executing treaties to be treated as “the law of the land,”

146. See Angela D. Krupar, Note, *The McCarran-Ferguson Act's Intersection with Foreign Insurance Companies*, 58 CLEV. ST. L. REV. 883, 904 (2010).

147. *Id.*

148. See *Standard Sec. Life Ins. v. West*, 267 F.3d 821, 823–24 (8th Cir. 2001).

149. See Krupar, *supra* note 146 (noting, “[t]he purpose of the McCarran-Ferguson Act is to protect policyholders, regardless of where the insurance company is domiciled” and that “[t]o construe the McCarran-Ferguson Act in a way that restricts its application to domestic insurers alone would produce unjust, far-reaching results that would, in effect, permit foreign insurance companies to have rights over domestic individuals that domestic companies do not have”).

150. See Lai, *supra* note 75, at 372 (“If the New York Convention were to prevail over the MFA, states would lose their ability to regulate insurance disputes within their jurisdiction. On the other hand, where states void arbitration agreements, parties maintain their freedom to contract in alternative forums to avoid regulatory schemes that they do not wish to be subject to.”).

151. *ESAB Grp., Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 390 (4th Cir. 2012) (“[T]he federal government must be permitted to ‘speak with one voice when regulating commercial relations with foreign governments.’”) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

152. Conor Colasurdo, Note, *Preventing Reverse-Preemption of the United States' Obligations Under the New York Convention*, 36 FORDHAM INT'L L.J. 941, 974 (2013) (“Given the increase in global trade and the increasingly integrated world economy, the United States' compliance with international legal and economic commitments is of paramount importance.”).

but also foreign policy interests favor placing great weight on agreements made with foreign nations.¹⁵³

There are meritorious arguments on both sides of the issue. To reconcile domestic legislation with legislation enabling a foreign agreement to bear weight on domestic courts, Congress must give clear, explicit intent in one direction through a legislative amendment.

VI. CONCLUSION

With the circuit courts split on this issue, the Supreme Court will likely take it under review. Though there are valid policy arguments pulling this convoluted issue in many directions, the answer comes down to the need for a legislative amendment by Congress to affirmatively express the intent of Congress regarding which act applies in the insurance realm.

It is clear that Congress passed the McCarran-Ferguson Act in order to give the power of regulating the business of insurance to the states—and the FAA and the goals of the Convention inevitably encroach on this power.¹⁵⁴ On the other hand, the United States must absolutely honor all treaties with foreign nations, and to read the McCarran-Ferguson Act so broadly would hinder the commitment made under the Convention. Despite the large policy implications at play, it inevitably comes down to a question of a plain reading of the acts and congressional intent. When Congress passed the McCarran-Ferguson Act and added those four words—“no Act of Congress”—it gave an inarguable power to the states to reverse-preempt conflicting federal law. If Congress intends the FAA to govern, it should be amended to expressly state this intention.

There are a multitude of policy arguments at odds in this issue—the ideals of globalization, state-regulated insurance, federalism, and statutory intent among them. Whether it is reverse preemption that will keep the business of insurance—including arbitration enforcement—with the states, or whether it is the principles of the Convention that will govern these disputes on a global stage, the solution should come from an amendment

153. Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 600 (2008) (“The Founders understood that treaties depended on interest and honor on the international plane . . .”). The Supremacy Clause, Article VI, Clause 2 of the Constitution, states: “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .” U.S. CONST. art. VI, cl. 2.

154. See VanVactor, *supra* note 23.

from Congress. Change is needed to resolve the conflict between the McCarran-Ferguson Act and the FAA, and it should come from the legislature, not the courts.

*Ellen M. Hames**

* B.A., University of Iowa, 2008; J.D., Drake University Law School, 2015.