

Critical Analysis: How Mandatory Arbitration Agreements Perpetuate Racial Inequality in the NFL

Ryan A. Faulkner*

TABLE OF CONTENTS

I. INTRODUCTION	217
II. ANALYTICAL FRAMEWORK: CRT	219
A. <i>Color-Blindness</i>	220
B. <i>Material Determinism</i>	221
C. <i>Social-Construction Thesis</i>	223
D. <i>Differential Racialization</i>	224
E. <i>Intersectionality and Anti-Essentialism</i>	226
F. <i>Voice-of-Color Thesis</i>	228
III. MANDATORY ARBITRATION AND RACIAL INEQUITY	230
A. <i>Arbitration, Generally</i>	231
B. <i>NFL Employees and Unequal Bargaining Power</i>	234
C. <i>Lack of Impartiality and Independence in the League</i>	236
D. <i>Specific Concerns: Claims of Racial Discrimination</i>	238
E. <i>Reemergence of Essentialism in Professional Sports</i>	241
IV. AVENUES OF POTENTIAL REFORM	242
A. <i>Redress by Legislation</i>	243
B. <i>Redress by Advocacy</i>	245
C. <i>Redress by Transformation</i>	246
D. <i>NFL’s Incentive to Support Reform</i>	248
V. CONCLUSION	249

I. INTRODUCTION

Since its founding over a century ago, the National Football League (“NFL”) has implemented a handful of social justice programs across the country to “ensure that equal opportunity becomes a reality for all.”¹

* The University of Texas School of Law, J.D. expected 2025; Texas A&M University, B.A. 2021. Thank you, first, to Professor Angelique Gammon, for showing me the power of the written word in the pursuit of justice, and for teaching me that no story is complete without grit. Professor Shavonne Henderson also has my gratitude for encouraging me to look beyond the default normative analytical framework in solving modern legal issues. And the editorial staff at the Harvard Civil Rights-Civil Liberties Law Review have my appreciation for their hard work in preparing this Note for publication.

¹ *Social Justice*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/inside-football-ops/social-justice/social-justice> [https://perma.cc/GG8G-5LP8] (last visited Feb. 6, 2025) (“It’s never been more important for us to turn passion into action.”).

To the League's credit, many of these initiatives have benefitted the local communities that host and support its teams, and the NFL as a whole.² But behind this veil of activism lies an ugly truth: NFL leadership has a race problem. Three-time NBA MVP Magic Johnson recently became only the seventh Black minority team owner in the League's history,³ and in the NFL's 104 years of operation there has never been a Black *majority* team owner.⁴ This disparity is jarring for a professional sports league in which 53.5% of athletes identify as Black.⁵

Part II analyzes this inequality through the lens of Critical Race Theory ("CRT") and its core tenets, revealing the true depth of the issue. By emphasizing how racism is embedded in the League's systems and policies, CRT serves as a useful analytical framework, looking beyond one-off instances of prejudice or individual bias. This approach focuses on systemic power structures, intersectionality, and historical patterns of racial oppression, illustrating how the NFL's policies perpetuate racial disparities. CRT offers a framework for understanding the intersection of race, law, and institutional practices within the NFL, highlighting how racial dynamics influence policy and procedure in ways that encourage inequity and injustice.

Part III examines the NFL's use of mandatory arbitration agreements to resolve claims of racial injustice, highlighting how these agreements further entrench inequality. Despite numerous allegations that the NFL fosters a culture of racial discrimination,⁶ the League's reliance on these arbitration agreements often prevents NFL employees from obtaining an equitable resolution of their claims. This analysis, through the lens of CRT, reveals how these agreements both disproportionately harm people of color in adjudicating their legal claims and reinforce the existing power imbalances that keep Black individuals from advancing within the League's hierarchy. Framing arbitration issues through CRT reveals that the NFL's corporate structures

² See *id.* (identifying four "priority areas" of support: criminal justice reform, education, economic advancement, and community-police relations).

³ Jack Murray, *Commanders' Magic Johnson: 'It's Been Hard' for Black People to Become NFL Owners*, BLEACHER REP. (Sept. 7, 2023), <https://bleacherreport.com/articles/10088685-commanders-magic-johnson-its-been-hard-for-black-people-to-become-nfl-owners> [https://perma.cc/7Y3R-5F3P] (noting that the process for Black figures "to get a seat at the owners [sic] table" has been "more of a challenge than it has been with other leagues").

⁴ Merlisa Lawrence Corbett, *Why Are There So Few Black Team Owners in U.S. Professional Sports?*, THE GUARDIAN (Mar. 14, 2023), <https://www.theguardian.com/business/2023/mar/14/us-black-owners-professional-sports-teams> [https://perma.cc/32G4-MVNM].

⁵ Christina Gough, *Share of Players in the NFL in 2023, by Ethnicity*, STATISTA (Mar. 12, 2024), <https://www.statista.com/statistics/1167935/racial-diversity-nfl-players> [https://perma.cc/52RR-ULY6]. Throughout this Note, the term "Black" should be read to include people of African descent, as well as anyone else identifying as Afro-Caribbean, Indigenous Australian, or Melanesian.

⁶ See, e.g., *Flores v. NFL*, 658 F. Supp. 3d 198 (S.D.N.Y. 2023); *Jackson v. Nat'l Football League*, 92 Civ. 7012, 1994 U.S. Dist. LEXIS 8303 (S.D.N.Y. June 20, 1994); *Mitchell v. NFL*, No. 1:21-CV-02260, 2022 U.S. Dist. LEXIS 249653 (N.D. Ga. June 21, 2022); *Galette v. Goodell*, No. 22-CV-61565, 2022 U.S. Dist. LEXIS 233485 (S.D. Fla. Dec. 29, 2022); *Cox v. NFL*, 29 F. Supp. 2d 463 (N.D. Ill. 1998); *Henry v. New Orleans La. Saints L.L.C.*, No. 15-5971, 2016 U.S. Dist. LEXIS 65535 (E.D. La. May 18, 2016).

are designed to preserve the status quo, effectively creating a self-perpetuating cycle of racial inequality.

Part IV proposes three different courses of action to redress this racial inequity: legislation, advocacy, and transformation. Implementing any one of these solutions would provide the NFL with a multitude of corporate benefits, ranging from greater collective-bargaining efficiency to improved public perception. Though there is hope that some of these issues may be addressed legislatively in the near future, the League still has a long way to go before it can claim to truly protect the Black voices that made—and continue to make—the NFL the successful corporation that it is today.

II. ANALYTICAL FRAMEWORK: CRT

To understand the racial imbalance of power within the NFL, it is necessary to analyze the systemic features that have allowed historically privileged groups to leverage and maintain the League's racial caste system. This Part uses the core tenets of CRT as a framework to challenge this implicit racism,⁷ ultimately concluding that despite claims of meritocracy, the NFL is built upon principles that prevent Black voices from advancing in the League's corporate structure. It is true that Black athletes have become dominant figures in many professional sports and rank among the wealthiest and most recognizable celebrities, but this is a status achieved through exceptional athletic performance and that is often disconnected from meaningful power within league structures.⁸ As such, a "more sensitive look at the sports world reveals that this idyllic picture is misleading."⁹ Professional sports act as a "microcosm of society," and football will never be race-neutral so long as racism is present in society more broadly.¹⁰

⁷ As used throughout this Note, the term "implicit racism" refers to rules and procedures that are not facially discriminatory but nonetheless support or confirm society's general race-conscious biases and hierarchies on a subconscious level. See *Implicit Bias, Microaggressions, and Stereotypes Resources*, CTR. SOC. JUST., NAT'L EDUC. ASS'N (Jan. 2021), <https://www.nea.org/resource-library/implicit-bias-microaggressions-and-stereotypes-resources> [https://perma.cc/8AME-XWKJ].

⁸ See Kevin Hylton, *How a Turn to Critical Race Theory Can Contribute to Our Understanding of 'Race', Racism and Anti-Racism in Sport*, 45 INT'L REV. SOCIO. SPORT 335, 336 (2010) ("CRT is intrigued but suspicious of parts of any society that claim to be accessible and fair across racial and ethnic divides.").

⁹ Paul M. Anderson, *Racism in Sports: A Question of Ethics*, 6 MARQ. SPORTS L.J. 357, 357 (1996); see also Andrea DeHaan, *Research Identifies 'Paradox of Integration' in NFL*, UTAH STATE TODAY (July 18, 2023), <https://www.usu.edu/today/story/research-identifies-paradox-of-integration-in-nfl> [https://perma.cc/PL5Q-TRFX] (statement of Utah State University Sociology professor Guadalupe Marquez-Velarde) ("Just because an organization is highly diverse doesn't mean that it's equal. Even though the majority [of NFL athletes] are Black players, they're still getting the short end of the stick.").

¹⁰ See KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 16 (1996) ("The business of sports provides a useful paradigm for studying many of the problems of society at large."); see also Robert Washington & David Karen, *Sport and Society*, 27 ANN. REV. SOCIO. 187, 189 (2001) ("From our perspective, social class is a key component of our understanding of sports. It is important to understand what connects particular groups of

This is especially true in relation to the Black community, for whom professional sport remains a “pedagogical space that is instructive of how racial hierarchies in the United States reflect larger systems of domination.”¹¹ Thus, while on-the-field performance and physicality might be described as a realm of color-blind meritocracy, the sociological aspect is nonetheless a “contested terrain” that necessarily “requires a critical lens from which to view it.”¹² The six core tenets of CRT¹³—color-blindness; material determinism; the social-construction thesis; differential racialization; intersectionality and anti-essentialism; and the voice-of-color thesis—serve as this “critical lens” and are discussed and applied individually throughout the remainder of this Part.

A. *Color-Blindness*

Despite a public-facing emphasis on meritocracy, there is ample statistical evidence indicating race-conscious behavior within professional sports.¹⁴ Embracing a color-blind ideology within the NFL therefore encourages white figures of power to appear supportive of the Black community while simultaneously denying the existence of systemic oppression within the League. This opens the door for League owners to support “abstract liberalism,” which promotes the notion of equal opportunity while ignoring systemic inequalities and serves as the ideological base of “laissez-faire racism”—the belief that racial disparities persist due to the personal failures

people to particular sports activities and what role these play in the reproduction of inequality in a given society.”); Kenneth J. Macri, *Not Just a Game: Sport and Society in the United States*, 4 INQUIRIES J. ONLINE (2012), <http://www.inquiriesjournal.com/articles/1664/not-just-a-game-sport-and-society-in-the-united-states> [<https://perma.cc/4FB7-F3DD>] (“Sport coincides with community values and political agencies, as it attempts to define the morals and ethics attributed not only to athletes, but the totality of society as a whole.”); Ashley Crossman, *What’s the Relationship Between Sports and Society?*, THOUGHTCO. (Nov. 23, 2020), <https://www.thoughtco.com/sports-sociology-3026288> [<https://perma.cc/Y4KU-446U>] (“Sports reinforce binary, heterosexist, gender-specific roles beginning at a young age.”).

¹¹ Rachel Alicia Griffin & Bernadette Maria Calafell, *Control, Discipline, and Punish: Black Masculinity and (In)visible Whiteness in the NBA*, in CRITICAL RHETORICS OF RACE 117, 117 (Michael G. Lacy & Kent A. Ono eds., 2011); see also John C. Gaston, *The Destruction of the Young Black Male: The Impact of Popular Culture and Organized Sports*, 16 J. BLACK STUD. 369, 377 (1986) (discussing the relationship between Black men and professional sports, as influenced by American media).

¹² Hylton, *supra* note 8, at 336.

¹³ This Note follows the six CRT core tenets proposed by scholars Richard Delgado and Jean Stefancic, though it is important to recognize that different critical race theorists often subscribe to different propositions of CRT as an analytical framework. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 8-11 (4th ed. 2023).

¹⁴ See, e.g., Jesse L. Schroffel & Christopher S. P. Magree, *Own-Race Bias Among NBA Coaches*, 13 J. SPORTS ECON. 130, 132 (2012) (finding that NBA coaches give greater playing time to players of their own race); Christopher A. Parsons, Johan Sulaeman, Michael C. Yates & Daniel S. Hamermesh, *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1411-12 (2011) (finding that MLB umpires are more likely to call strikes for a pitcher that belongs to the same racial group as the umpire, and that pitchers anticipate this bias and allow it to affect in-game decision-making).

of ill-intentioned actors, as opposed to the structural factors of an organization.¹⁵ By allowing individuals in power to adopt a hands-off approach, the NFL is free to portray instances of overt racism as being one-off incidents, rather than the result of an institutional scheme that nonetheless profits off Black identity and success.¹⁶

The prevalence of these color-blind ideals is exacerbated by society's unwillingness to acknowledge that many issues in professional sports are rooted in race. For example, San Francisco 49ers quarterback Colin Kaepernick protested during the National Anthem in 2016 by kneeling because he did not want to "show pride in a flag for a country that oppresses Black people."¹⁷ But then-Presidential candidate Donald J. Trump disregarded the racial component of Kaepernick's protest, instead reframing the entire issue as one of patriotism. Following Trump's call for NFL owners to "[g]et that son of a bitch off the field," the NFL introduced a new policy prohibiting on-field protests during the National Anthem, with League commissioner Roger Goodell claiming that Kaepernick had "created a false perception among many that thousands of NFL players were unpatriotic."¹⁸ By portraying the protests as an issue of patriotism rather than addressing the underlying racial concerns, the NFL reinforced its color-blind stance, diverting attention away from the systemic issues forming the basis of Kaepernick's initial protest. This reframing not only reinforced the League's dismissal of racial grievances but also allowed these color-blind ideals to influence broader public opinion, further entrenching the League's marginalization of Black players and minimizing their demands for justice.

B. Material Determinism

Racism within the NFL's corporate structure not only advances the material interests of the League's white elites but also reinforces certain social dynamics that can appeal to working-class whites who might find a sense of identity or belonging in these structures, leaving "large segments of society" with "little incentive to eradicate" racism in the NFL.¹⁹ As posited by philosophers and civil rights activists alike, "the master's tools will never

¹⁵ EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 30 (2d ed. 2006).

¹⁶ With 53.5% of NFL athletes identifying as Black, it is undeniable that the NFL would be neither as successful nor as influential as it is today without Black voices. *See* Gough, *supra* note 5.

¹⁷ Tadd Haislop, *Colin Kaepernick Kneeling Timeline: How Protests During the National Anthem Started a Movement in the NFL*, SPORTING NEWS (Sept. 13, 2020), <https://www.sportingnews.com/us/nfl/news/colin-kaepernick-kneeling-protest-timeline/xktu6ka4diva1s5jxaylrcsse> [<https://perma.cc/5A56-EAYF>].

¹⁸ P.R. Lockhart, *Trump Praises NFL Anthem Rule, Says Kneeling Players "Maybe Shouldn't Be in the Country"*, VOX (May 24, 2018), <https://www.vox.com/2018/5/24/17389288/donald-trump-nfl-kneeling-protest-national-anthem> [<https://perma.cc/3L6E-5Z6X>].

¹⁹ *See* DELGADO & STEFANCIC, *supra* note 13, at 9.

dismantle the master's house."²⁰ The League is no stranger to white majority owners preserving the racism from which they derive their privilege. Shortly after the first Black man played in the NFL in 1920, the teams' owners entered into an unwritten "gentleman's agreement" to prevent the signing of Black players.²¹ This agreement lasted more than a decade. The League did not reintegrate until 1946, when the Los Angeles Coliseum threatened to evict the L.A. Rams if they did not sign a Black player to their roster.²² In this context, the support that Black athletes receive from white elites is not rooted in "acts of altruism," but rather in actions that ultimately sustain the power and privilege of those at the top.²³

The practice of using Black athletes to sustain existing power structures extends into leadership styles within professional athletics, providing further insight into how systemic issues persist. Leadership in sports organizations is often analyzed through frameworks that categorize leaders as either "transformational" or "transactional";²⁴ this distinction is valuable insofar as it helps professionals understand how different leadership styles impact not just immediate goals but also the broader organizational culture. A transformational leader is one who "transcends short-term goals and recognizes the higher order needs of followers."²⁵ By contrast, transactional leadership is success-oriented and prioritizes individualistic interests, including profit or the achievement of data-driven metrics of success. Assuming racial equity and the overall elimination of racial discrimination are "needs" of Black employees in the NFL, it follows that transformational leaders would be more receptive than transactional leaders to racial disparities in the League and would therefore use their power and influence to proactively pursue systemic change. Yet even with this consideration in mind, transactional leadership still prevails as the preferred style in sports organizations.²⁶ Viewing the NFL's white majority owners as transactional leaders focused on their own immediate returns, it follows that team owners

²⁰ Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *FEMINIST POSTCOLONIAL THEORY: A READER* 25, 27 (2003); see also Gaston, *supra* note 11, at 371 ("People will not change without sacrifice, and education is necessary to change the racist perceptions that people still hold.").

²¹ Louis Moore, *The NFL and a History of Black Protest*, *AFR. AM. INTELL. HIST. SOC'Y* (Sept. 12, 2018), <https://www.aaihs.org/the-nfl-and-a-history-of-black-protest> [<https://perma.cc/S85P-Q4S2>].

²² *Meet Four Men Who Broke the NFL's Color Line*, *NAT'L FOOTBALL LEAGUE PLAYERS ASS'N*, <https://nflpa.com/posts/meet-the-four-men-who-broke-the-nfl-s-color-line> [<https://perma.cc/8HJF-MRAN>] (last visited Feb. 6, 2025).

²³ Hylton, *supra* note 8, at 345 (arguing that anti-racism in sport governing bodies is not driven by a desire to address the harm inflicted on those affected by racism, but rather by other concerns, such as the perceptions of sponsors).

²⁴ See generally Laura J. Burton & Jon Welty Peachey, *Transactional or Transformational? Leadership Preferences of Division III Athletic Administrators*, 2 *J. INTERCOLLEGIATE SPORTS* 245 (2009).

²⁵ *Id.* at 246.

²⁶ See *id.*

would have no problem using Black voices to serve the team's basic objective of winning, without seeking to transform the team's culture or address systemic issues that do not implicate the owners' own needs.

C. *Social-Construction Thesis*

The social-construction thesis recognizes that “race is a social construction without biological meaning.”²⁷ Yet despite lacking a biological basis, socially constructed stereotypes about Black figures' inherent strengths and weaknesses prevent them from advancing within the organizational hierarchy of the NFL. A recent study found racial segregation between certain positions on an NFL roster, with Black athletes slotted into specific roles due to their perceived “athleticism” (for example, cornerbacks positioned in the secondary are generally expected to be the fastest players on defense), while white athletes typically occupy leadership-oriented roles (such as the play-calling quarterback) due to their perceived “intellectual decision-making abilit[ies].”²⁸ This practice, known as “racial stacking,” perpetuates racial stereotypes and “common misconception[s]” about Black players.²⁹ Another study revealed that while white Americans often credit white NFL players' achievements to hard work, they tend to minimize the success of Black players as the mere consequence of genetics.³⁰ This racial distinction, sometimes echoed on national television,³¹ may also influence hiring decisions when choosing between a Black candidate and a white candidate for an organizational leadership role.

The idea that Black players are cognitively inferior to white players was medically endorsed by the League until just three years ago.³² In the 1990s, the NFL introduced two different standards for analyzing Black and white NFL players' cognitive impairment in brain injury-related lawsuits,

²⁷ Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), <https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue> [<https://perma.cc/6U5F-SG89>] (“Assumptions about genetic differences between people of different races have had obvious social and historical repercussions, and they still threaten to fuel racist beliefs.”); see also DELGADO & STEFANCIC, *supra* note 13, at 9.

²⁸ Charles A. Coleman & Jason Scott, *Sports Are Not Colorblind: The Role of Race and Segregation in NFL Positions*, J. EMERGING INVESTIGATORS 1, 1 (2018).

²⁹ *Id.* at 2.

³⁰ Jane P. Sheldon, Toby Epstein Jayaratne & Elizabeth M. Petty, *White Americans' Genetic Explanations for a Perceived Race Difference in Athleticism: The Relation to Prejudice Toward and Stereotyping of Blacks*, ATHLETIC INSIGHT: ONLINE J. SPORT PSYCH. 31, 32-34 (2007).

³¹ See, e.g., George Solomon, *'Jimmy the Greek' Fired by CBS for His Remarks*, WASH. POST (Jan. 16, 1988), <https://www.washingtonpost.com/archive/politics/1988/01/17/jimmy-the-greek-fired-by-cbs-for-his-remarks/27536e46-3031-40c2-bb2b-f912ec518f80> (“Blacks were . . . bred to be the better athlete.”).

³² *NFL Pledges to Stop 'Race-Norming,' Review Past Scores for Potential Race Bias*, ASSOCIATED PRESS (June 2, 2021), <https://www.nfl.com/news/nfl-pledges-to-stop-race-norming-review-past-scores-for-potential-race-bias> [<https://perma.cc/DP68-GMD9>].

with the former assumed to have started at a lower cognitive function.³³ This distinction, now referred to as “race-norming,” made it harder for Black retirees to prove diminished brain function and, as a result, qualify for damages awards.³⁴ In adopting race-norming standards, the League participated in a “long history of racial science used to justify the belief in inferior racial groups.”³⁵ When the NFL embraces a false presumption that Black people are cognitively inferior, Black figures cannot realistically be said to have legitimate advancement opportunities. This is particularly the case when competing against white candidates whom society has associated with hard work and perseverance.

D. Differential Racialization

Differential racialization refers to the varying ways racial groups are perceived and valued based on societal needs and structures.³⁶ This concept highlights that the societal perceptions of racial groups are fluid and can be shaped by prevailing economic, political, and social conditions.³⁷ For instance, a group that is deemed valuable or positive in one context may be devalued or negatively portrayed in another depending on the dominant group’s needs or objectives. This variability in perception underscores how racial identities are not merely individual attributes but are instead constructed and manipulated through societal frameworks and power dynamics. As applied to the NFL, differential racialization suggests that the ways in which Black athletes are valued and portrayed can shift depending on what is advantageous for the League’s interests or societal trends. Consequently, the shifting dynamics of racial perception within professional sports are not isolated but are part of a broader network of societal structures.

Accordingly, it has been argued that the various realms of organized labor, antitrust law, the federal court system, and the modern sports economic framework all share “interconnected fates.”³⁸ Each collectively

³³ *Id.*

³⁴ *Id.*

³⁵ Chelsey R. Carter & Tracie Canada, *The NFL’s Racist ‘Race Norming’ Is an Afterlife of Slavery*, *SCI. AM.* (July 8, 2021), <https://www.scientificamerican.com/article/the-nfls-racist-race-norming-is-an-afterlife-of-slavery> [<https://perma.cc/TM49-AYK7>]; see also Lucia Trimbur & Lundy Braun, *The NFL’s Reversal on ‘Race Norming’ Reveals How Pervasive Medical Racism Remains*, *NBC NEWS* (June 8, 2021), <https://www.nbcnews.com/think/opinion/nfl-s-reversal-race-norming-reveals-how-pervasive-medical-racism-ncna1269992> [<https://perma.cc/KX8W-2QHA>] (“But racial disparities and racial differences are not immutable facts. Rather they are the consequences of histories and experiences of profound racial injustice.”).

³⁶ DELGADO & STEFANCIC, *supra* note 13, at 9.

³⁷ *Id.*

³⁸ ABRAHAM IQBAL KHAN, *CURT FLOOD IN THE MEDIA: BASEBALL, RACE, AND THE DEMISE OF THE ACTIVIST-ATHLETE 169-70* (Davis W. Houck ed., 2012). For example, when the Supreme Court issues a decision impacting the scope of one industry’s antitrust violations, it necessarily impacts the employees working in that industry and their ability to unionize or advocate for greater rights within that monopoly moving forward. Sports once again act as a

shapes and influences the others, creating a web of social and economic relationships. For instance, antitrust laws that govern economic competition can impact how sports leagues operate and manage their players. When racial biases are entrenched in one realm, they inevitably extend to others due to their interconnected nature. This interconnectedness means that systemic racial issues in one area cannot be fully understood without considering their impact on related domains, including the professional sports industry. Thus, the racialization experienced by Black individuals in broader society necessarily shapes their experiences and treatment within professional sports.

As civil rights activist Floyd McKissick stated in 1969, “The white public has no problem loving the docile, semi-literate Black athlete who through his strength and coordination can outrun, out-hit, and outshine his white competitor.”³⁹ Yet, McKissick noted, Black athletes were not meant to “stand toe-to-toe and eyeball-to-eyeball to a white racist and tell him to go to hell.”⁴⁰ In other words, society had an entirely different view of a Black athlete on the field than a Black athlete off the field; the latter was often dehumanized in discussions of integration or the remnants of slavery. Today, this duality persists: a Black athlete may gain significant social media attention for a remarkable performance one week but face severe racial slurs and personal threats following a poor performance the next.⁴¹ Minnesota Vikings running back Alexander Mattison faced this reality just last year, when some viewers blamed his first-quarter fumble for the Vikings’ one-possession loss to the Philadelphia Eagles.⁴² Many of the messages Mattison received from self-proclaimed Vikings “fans” went as far as encouraging him to commit suicide.⁴³ Such ongoing contrast underscores the broader issue of how Black athletes are valued when serving dominant societal interests but face harsh scrutiny when they step outside those roles.

pedagogical example of this interconnectivity, as demonstrated by the *Alston* case in which the Supreme Court’s antitrust analysis led to new labor rights for collegiate athletes around the country. *NCAA v. Alston*, 594 U.S. 69 (2021).

³⁹ Floyd McKissick, *Dilemma of the Black Athlete*, N.Y. AMSTERDAM NEWS, Dec. 6, 1969, at 17.

⁴⁰ *Id.*

⁴¹ See, e.g., Jacob Lev, *Minnesota Vikings Player Shares Racist Messages Received Following Thursday Night Football Loss*, CNN (Sept. 16, 2023), <https://www.cnn.com/2023/09/16/sport/alexander-mattison-minnesota-vikings-racist-messages> [<https://perma.cc/HQN2-KJFC>].

⁴² *Id.*

⁴³ *Id.* New England Patriots tight end Ben Watson claims that this racism extends even into NFL locker rooms, alleging after retirement that he had “plenty of racist teammates.” Richie Whitt, *Patriots Fans: Racist or Rabid?*, SPORTS ILLUSTRATED (July 21, 2022), <https://www.si.com/nfl/patriots/news/new-england-boston-sports-fans-racist-lebron-james-kendrick-perkins-ben-watson> [<https://perma.cc/2NEX-SFA7>]. For further survey-based data on the “racial divide among NFL fans,” see Jason Reid, *NFL Fans and the Racial Divide*, ANDSCAPE (Feb. 1, 2019), <https://andscape.com/features/state-of-the-black-nfl-fan-the-racial-divide-fracturing-the-league> [<https://perma.cc/T4AL-KKQT>].

E. Intersectionality and Anti-Essentialism

Prominent Black figures in professional sports are often forced to choose between their on-the-field success and their Black identity.⁴⁴ A Black athlete in the NFL is inevitably “torn between two [distinct] loyalties”: that to his team, which acts as a source of monetary income and societal prestige, and that to his “Black sisters and brothers[,] who sometimes demand that he . . . use his influence” to fight for greater Black representation and equality within professional sports.⁴⁵ Take Kaepernick’s story, for example. After his protests in 2016, Kaepernick’s contract was not renewed heading into the 2017 season.⁴⁶ All 32 NFL teams declined to make a run at him during free agency, and he has not played in the NFL since.⁴⁷ As such, Black athletes “acting on their consciences” as advocates for racial equality “must often do so at the expense of their teams.”⁴⁸ As another example, players on the Milwaukee Bucks boycotted their own NBA playoff game in 2020 to protest the police shooting of Jacob Blake, a local Black man.⁴⁹ As a result, the NBA was forced to reschedule *all* playoff games slated for that evening.⁵⁰ In this way, the Bucks players leveraged their elevated status to push for systemic change, but it delayed the team’s playoff aspirations and likely had a significant financial impact on the NBA.

The precarious balancing act that Black figures must undertake has drawn great criticism, with NBA.com senior writer Shaun Powell going as far as saying that most Black athletes are “too busy hiding behind their precious public profiles and endorsement deals to lend a voice to activism.”⁵¹

⁴⁴ As used throughout this Note, intersectionality refers to the “inter-connectedness of race, class, gender, disability, and so on,” acknowledging that NFL athletes—and all people in general—experience biases and social expectations differently. See David Gillborn, *Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender, and Disability in Education*, 21 *QUAL. INQUIRY* 277, 278 (2015). Understanding this nuanced complexity, anti-essentialism rejects the notion that any person’s “experience . . . can be described independently from other aspects of [that] person.” See Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 *BERKELEY WOMEN’S L.J.* 16, 19 (1995). Put differently, anti-essentialism posits that no person should be reduced to just one aspect of their identity when analyzing the systemic issues that person faces.

⁴⁵ McKissick, *supra* note 39.

⁴⁶ *The Door Is Closed for Colin Kaepernick*, NBC SPORTS (Mar. 10, 2022), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/the-door-is-closed-for-colin-kaepernick> [<https://perma.cc/LGF6-HHFA>] (noting that NFL teams were likely disincentivized to sign Kaepernick “in light of the inevitably hostile reaction” his signing would provoke from fans who disagreed with his political beliefs).

⁴⁷ *Id.*

⁴⁸ KHAN, *supra* note 38, at 131.

⁴⁹ See Tom Lutz & Kari Paul, *NBA Joined by MLB Teams in Boycott to Protest Police Shooting of Jacob Blake*, THE GUARDIAN (Aug. 26, 2020), <https://www.theguardian.com/sport/2020/aug/26/milwaukee-bucks-boycott-nba-playoff-game-orlando-magic-jacob-blake> [<https://perma.cc/Z6PJ-CM7U>].

⁵⁰ *Id.*

⁵¹ SHAUN POWELL, SOULED OUT? HOW BLACKS ARE WINNING AND LOSING IN SPORTS *xix* (2007).

ESPN's Stephen A. Smith echoed a similar sentiment less than a year later, arguing that, "[w]hen it comes to political activism, American sports has lacked a [Black] spokesman for years."⁵² Kaepernick proved that when a Black athlete seeks to fill that gap, they will receive no support from the NFL or its teams.⁵³

When someone argues that an athlete should or should not be an activist based on their race, they necessarily overlook the athlete's intersectional identities by prioritizing either their role as a professional player or their identity as a Black individual. NBA superstar LeBron James, for example, has been criticized for his social and political activism, particularly his outspoken support for racial justice.⁵⁴ In 2018, Fox News host Laura Ingraham told James to "shut up and dribble," dismissing his comments as those of "someone who gets paid \$100 million a year to bounce a ball."⁵⁵ In essence, Ingraham suggested that James' role as an activist detracted from his primary role as an athlete.⁵⁶ Black athletes in the NFL face the same essentialism today, often

⁵² Stephen A. Smith, *Up Front: Remembering When Olympians Had the Guts to Speak Up*, ESPN (July 15, 2008, 9:08 AM), <https://www.espn.com/espnmag/story?id=3487980> [<https://perma.cc/Z6ZZ-6CRS>].

⁵³ See also David Leonhardt, *The N.F.L.'s Race Problem*, N.Y. TIMES (Feb. 3, 2022), <https://nytimes.com/2022/02/03/briefing/nfl-head-coach-brian-flores-racism.html> (statement of Brian Flores) ("It's hard to speak out. . . . But this is bigger than football. This is bigger than coaching.").

⁵⁴ Due to his significant social influence, James is often seen as "more than just a basketball player," with some going as far as calling him the NBA's "most impactful voice." Dave McMenamin, *LeBron James Calls Black Lives Matter 'A Walk of Life,' Advocates for Breonna Taylor*, ESPN (July 24, 2020), https://www.espn.com/nba/story/_/id/29528067/lebron-james-calls-black-lives-matter-walk-life-advocates-breonna-taylor [<https://perma.cc/3WF5-S2K7>]. In advocating for racial justice, James famously said, "When you're Black, it's not a movement. It's a lifestyle." *Id.*

⁵⁵ Emily Sullivan, *Laura Ingraham Told LeBron James to Shut Up and Dribble; He Went to the Hoop*, NPR (Feb. 19, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/19/587097707/laura-ingraham-told-lebron-james-to-shutup-and-dribble-he-went-to-the-hoop> [<https://perma.cc/E8A3-MSMM>].

⁵⁶ Race is not the only identity that society expects athletes to cast off before occupying the public spotlight. In the 1990s, NBA player Mahmoud Abdul-Rauf was forced to choose between his Islamic faith and his status as a professional athlete. See Jim Hodges, *NBA Sits Abdul-Rauf for Stance on Anthem*, L.A. TIMES (Mar. 13, 1996), <https://www.latimes.com/archives/la-xpm-1996-03-13-sp-46409-story.html> [<https://perma.cc/F6G6-XQHD>]. Although he believed the American National Anthem to be a "symbol of oppression" due to anti-Islam sentiment in the United States, the NBA informed Abdul-Rauf that he would be fined \$31,707 every time he protested by remaining seated during the Anthem's playing. *Id.* This fine was the per-game portion of Abdul-Rauf's \$2.6 million annual salary. *Id.* In other words, if Abdul-Rauf had played an entire NBA season without missing a single game but opted to first protest the National Anthem before stepping onto the court, he would have finished the season without earning a single cent despite having competed in 82 games. See *id.* When Abdul-Rauf chose to continue his protest, he was immediately blacklisted from the NBA. Manas Malik, *Discussions of Intersectionality Are Lacking in Sports*, WASH. SQUARE NEWS (Sept. 14, 2016), <https://nyunews.com/2016/09/14/discussions-of-intersectionality-are-lacking-in-sports/> [<https://perma.cc/EC93-SC3X>]. Although Abdul-Rauf faced religious discrimination, rather than racial discrimination, his story is nonetheless illustrative of anti-essentialism in professional sports, as religion "is neither practiced nor studied in a vacuum" and instead "has a long, complicated, and interconnected relationship with the legacy of racism." Brock Bahler, *Religion, Race, and Racism:*

forced to disregard the intricacies of their own personal identities.⁵⁷ As ESPN analyst Robert Griffin III put it, a person must effectively “end his chances” at advancing within the NFL corporate structure merely to “point out what we already know about discrimination” in professional sports.⁵⁸ At present, the NFL does not allow a Black man to be both a social activist and a successful athlete; he must choose just one aspect to represent his identity.

F. *Voice-of-Color Thesis*

The voice-of-color thesis argues that individuals from marginalized racial backgrounds offer distinct perspectives and insights shaped by their lived experiences of oppression.⁵⁹ This theory proposes that those who have experienced racism firsthand are particularly well-equipped to identify, and bring attention to, issues of race and discrimination that others may not recognize.⁶⁰ In the context of professional sports, this thesis supports the idea that Black athletes “may be able to communicate to their white counterparts matters that the whites are unlikely to know.”⁶¹ That is, Black players in the NFL have a “presumed competence to speak about race and racism.”⁶² Under this view, the lack of a single Black majority team owner implies that NFL leadership is unaware of racial issues faced by Black athletes and coaches on its teams. Yet it is these majority team owners that “establish the mission and identity of the franchise,” “select the organizational leaders . . . to implement their vision,” and “are positioned to provide resources to enable those people to perform at their best.”⁶³ Based on a 2023 survey of the League’s

A (Very) Brief Introduction, U. PITT. DEP’T RELIGIOUS STUDS. (June 1, 2020), <https://www.religiousstudies.pitt.edu/resources-social-action/religion-race-and-racism-very-brief-introduction> [<https://perma.cc/S853-BV9A>].

⁵⁷ See Emma Calow, *Activism for Intersectional Justice in Sport Sociology: Using Intersectionality in Research and in the Classroom*, FRONTIERS SPORTS & ACTIVE LIVING 1, 3 (Oct. 18, 2022) (“Intersectionality’s relevance in the study of sport thus lies in its ability to reflect the complexities of living within systems of power.”).

⁵⁸ See Robert Griffin III (@RGIII), TWITTER (Feb. 1, 2022), <https://twitter.com/RGIII/status/1488626519664644097> [<https://perma.cc/6CWD-KL9V>].

⁵⁹ See Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2258 (2017).

⁶⁰ The voice-of-color thesis first originated within the realm of critical legal studies but has since gained significant traction in academic discussions and is often used to emphasize the importance of including marginalized voices in conversations about systemic inequities. Since emerging as part of the CRT framework, the voice-of-color thesis has established itself as a mainstay in other areas of academic study, such as the development of counternarratives to combat white-centered revisionist storytelling among historians. See Neal Hardin, *What Is Critical Race Theory?*, ALL. DEFENDING FREEDOM (June 7, 2024), <https://adfflegal.org/article/what-critical-race-theory> [<https://perma.cc/2BLT-V6WV>].

⁶¹ DELGADO & STEFANCIC, *supra* note 13, at 11.

⁶² *Id.*

⁶³ Boris Groysberg, Evan M.S. Hecht & Abhijit Naik, *Who’s the Most Important Member of an NFL Franchise?*, HARV. BUS. REV. (Apr. 25, 2019), <https://hbr.org/2019/04/whos-the-most-important-member-of-an-nfl-franchise> [<https://perma.cc/33CY-CRS6>].

majority owners, the New York Times concluded that team owners “wield outsized power over their organizations and in their communities.”⁶⁴ A similar survey analyzing recent NFL policy changes determined that majority owners’ power and influence is still growing, often at the expense of the League’s coaches and players.⁶⁵

The exclusion of Black voices within these high-stakes decisions is not merely coincidental; the League’s privilege-oriented ownership requirements—which functionally restrict ownership to billionaires—is intentionally structured.⁶⁶ Most professional sports leagues in America employ “relaxed ownership requirements” through rules that, for example, allow private equity groups to own up to 20% of a franchise, thereby widening the pool of Black bidders with the requisite financial means. The NFL, by contrast, “currently requires the principal franchise owner to have a 30% stake in the team, and the entire ownership group can be no more than 24 people in total.”⁶⁷ The League also places restrictions on how much debt can be used to acquire a team.⁶⁸ Black figures simply do not have the same potential as their white counterparts in the realm of team ownership.⁶⁹ Although there were 3,194 billionaires worldwide in 2022,⁷⁰ only 16 of them are Black—less than 1% across the entire globe.⁷¹ After Kaepernick’s protest and the public fallout that followed,⁷² he compared the League’s racial imbalance to the “power dynamic” between Black enslaved people and their “owners”

⁶⁴ Mike Sando, *All 32 NFL Owners from Worst to First: The Good, the Bad and a Few Surprises*, N.Y. TIMES (Dec. 8, 2023), <https://www.nytimes.com/athletic/5115078/2023/12/08/nfl-owners-ranking-32-teams/> [https://perma.cc/7TCD-NDM7].

⁶⁵ See Andrew Brandt, *NFL Owners Are Succeeding in Taking More Power Back from the Players*, SPORTS ILLUSTRATED (Aug. 15, 2023), <https://www.si.com/nfl/2023/08/15/nfl-business-owners-taking-power-from-players> [https://perma.cc/M8YB-PVX4].

⁶⁶ See Brett Pulley, *NFL Financing Rules Are Holding Back Black Ownership of Teams*, BLOOMBERG L. (Feb. 11, 2022), <https://news.bloomberglaw.com/banking-law/nfl-financing-rules-are-holding-back-black-ownership-of-teams>; see also Mark Patricof, *The Average NFL Owner Is 75—And Not Rich Enough to Hang Onto Their Team*, FORTUNE (Mar. 31, 2023), <https://fortune.com/2023/03/31/nfl-owners-age-net-worth-teams-deals-franchises-sport-football-mark-patricof> [https://perma.cc/J47Z-FT4Y] (analyzing the potential for a Black person to own an NFL team in a world with “less than 20 global Black billionaires”).

⁶⁷ Pulley, *supra* note 66.

⁶⁸ See *id.*

⁶⁹ Between 2016 and 2023, the average value of an NFL franchise doubled, with the current value sitting at \$5.11 billion. Christina Gough, *National Football League Average Franchise Value from 2000 to 2023*, STATISTA (Sept. 5, 2023), <https://www.statista.com/statistics/193435/average-franchise-value-in-the-nfl-since-2000/> [https://perma.cc/Y4Y4-7EK8]. A 30% stake of the franchise, as required by the NFL, would necessitate more than \$1.5 billion to acquire a majority ownership.

⁷⁰ Einar H. Dyvik, *Billionaires Around the World – Statistics & Facts*, STATISTA (July 3, 2024), <https://www.statista.com/topics/2229/billionaires-around-the-world/> [https://perma.cc/S6NR-B296].

⁷¹ Ebony Williams, *Forbes: These Are the World’s 16 Black Billionaires*, ATLANTA J.-CONST. (Feb. 1, 2024), <https://www.ajc.com/news/atlanta-black-history/who-are-the-black-billionaires/> [https://perma.cc/SN3T-UCPA].

⁷² See Haislop, *supra* note 17.

in the 1800s.⁷³ The NFL has therefore “profited from and reinforced white dominance,” which necessarily involves the repression of voices of color.⁷⁴

This exclusion of Black identity does not stop with the League’s coaches or players, either. Former NFL reporter Jim Trotter, who is Black, repeatedly faced racial animus from white majority owners.⁷⁵ Trotter pressed League commissioner Roger Goodell about the issue in a press conference last year, and he was unceremoniously released by the League soon after, despite allegedly having been given “every indication that his contract would be renewed.”⁷⁶ Notwithstanding marginal gains among minority owners,⁷⁷ the voices of NFL majority owners still skew in the opposite direction,⁷⁸ leaving Black employees and figures without representation at the League’s highest level. Thus, analyzing the NFL’s racial inequities through the lens of CRT confirms that the League’s corporate structure reinforces racial hierarchies, ensuring that Black voices remain underrepresented and excluded from meaningful positions of power.

III. MANDATORY ARBITRATION AND RACIAL INEQUITY

Even though the NFL has been at the center of many race-related controversies over the years, Black claimants rarely achieve equitable resolution. This is in large part because the NFL Constitution and Bylaws, as incorporated by reference into players’ and coaches’ employment agreements, give the League the power to compel arbitration to resolve most disputes arising out of athletes’ employment.⁷⁹ This system disproportionately impacts Black employees subjected to racial discrimination, effectively

⁷³ *Colin in Black and White: Cornrows* (Netflix 2021) (“Before they put you on the field, teams poke, prod, and examine you, searching for any defect that might affect your performance. No boundary respected. No dignity left intact.”).

⁷⁴ Victor Ray, *Why So Many Organizations Stay White*, HARV. BUS. REV. (Nov. 19, 2019), <https://hbr.org/2019/11/why-so-many-organizations-stay-white> [<https://perma.cc/TV6P-77VN>] (“Understanding this context is vital to seeing organizations for what they really are: not meritocracies, but long-standing social structures built and managed to prioritize whiteness.”).

⁷⁵ Dallas Cowboys owner Jerry Jones allegedly told Trotter that, “[i]f Blacks feel some kind of way, they should buy their own team and hire who they want to hire.” Ben Strauss, *NFL Reporter Jim Trotter Sues League for Racial Discrimination*, WASH. POST (Sept. 12, 2023), <https://www.washingtonpost.com/sports/2023/09/12/jim-trotter-nfl-lawsuit/>. Terry Pegula, majority owner of the Buffalo Bills, allegedly stated that Black players should “go back to Africa and see how bad it is,” rather than protest racial inequality in America. *Id.* The NFL took action against neither owner.

⁷⁶ *Id.*

⁷⁷ See John Keim, *Magic Johnson on NFL Ownership: ‘A Lot of Minorities Standing on My Shoulders’*, ABC NEWS (Sept. 7, 2023), <https://abcnews.go.com/Sports/magic-johnson-nfl-ownership-lot-minorities-standing-shoulders/story?id=103014401> [<https://perma.cc/HXT6-75QG>] (“[T]he NFL is better because I’m standing here.”).

⁷⁸ Eliana Miller, *NFL Owners Give Nearly 9-1 to Republicans, Including Trump*, OPEN SECRETS (Sept. 25, 2020), <https://www.opensecrets.org/news/2020/09/nfl-owners-2020> [<https://perma.cc/RW96-MHY6>].

⁷⁹ CONST. AND BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. VIII, § 8.3.

shielding the League from accountability for fostering a culture that allows racial inequity in the first place. And these agreements are assumed to be facially “valid, irrevocable, and enforceable,” leaving claimants with little room for additional recourse in the event that the private adjudication system proves inadequate.⁸⁰

Viewed through the lens of CRT, this dynamic highlights how the legal framework surrounding compelled arbitration strengthens existing power imbalances in the NFL. The mandatory arbitration process not only limits the ability of Black claimants to challenge racial discrimination but also deepens the racial inequities that are entrenched within the League’s institutional structure. The implicit bias and limited recourse afforded by these arbitration agreements reflect broader systemic issues, where mechanisms designed to prioritize corporate interests over individual rights obstruct the quest for justice. In the context of the NFL, the League’s use of compelled arbitration reveals deeper concerns about its commitment to addressing racial harms and ensuring fair treatment for its employees.

A. Arbitration, Generally

The NFL relies heavily on arbitration agreements as a mechanism for resolving disputes between the League, its teams, and its employees. Arbitration is an alternative dispute resolution mechanism in which disputing parties submit their claims and grievances to a neutral third party—the arbitrator—who resolves the dispute.⁸¹ The arbitrator, who is generally an expert in the subject matter at issue, hears the parties’ arguments, evaluates evidence, and renders a binding decision on those involved.⁸² The NFL applies different processes for selecting an arbitrator depending on whether the dispute is brought by a player or another employee of the League.⁸³

Today, arbitration in the NFL is governed by the Federal Arbitration Act (“FAA”), a statute enacted in 1925 with the original intent of facilitating efficient dispute resolution between commercial entities of relatively comparable bargaining power.⁸⁴ At the time of its passage, the FAA was viewed as a straightforward procedural law that allowed courts to enforce arbitration agreements when both parties had voluntarily chosen arbitration as their preferred method of dispute resolution ahead of time.⁸⁵ The drafters

⁸⁰ See 9 U.S.C. § 2; see also *infra* Part III.A.

⁸¹ *Arbitration*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/wex/arbitration> [<https://perma.cc/289N-Z6QS>] (last visited Feb. 6, 2025).

⁸² Caroline Hansen, *What Is Arbitration and Who Does It Favor?*, U.S. NEWS (Oct. 26, 2023), <https://law.firms/advice/articles/what-is-arbitration> [<https://perma.cc/P96J-HHLA>].

⁸³ See *infra* Part III.C.

⁸⁴ 9 U.S.C. §§ 1-16.

⁸⁵ See, e.g., Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1185 (2021) (“Historical context suggests, and most scholars agree, that Congress intended the law to be purely procedural.”); Ronald G. Aronovsky, *Starting Over: Letting States*

of the FAA primarily envisioned it as a tool to address disputes between businesses, rather than between employers and individual employees.⁸⁶

Over time, however, the Supreme Court has dramatically expanded the scope of the FAA far beyond its original intent. Beginning in the 1980s, the Court interpreted the FAA as establishing a “national policy favoring arbitration,”⁸⁷ quickly opening the door for arbitration clauses to cover statutory claims, including those related to civil rights.⁸⁸ The Court entrenched this expansive approach by ruling that the FAA preempts state laws designed to regulate arbitration and protect consumers or workers.⁸⁹ Later cases upheld the enforceability of arbitration agreements even when they appear in contracts of adhesion⁹⁰ (standardized contracts offered on a take-it-or-leave-it basis by parties with greater bargaining power).⁹¹ Contracts of adhesion did not become “relatively standard” until the early 20th century⁹² but were quickly criticized as “problematic” for failing to “reflect sound public policy.”⁹³

Regulate Adhesion Arbitration Agreements, 71 SYRACUSE L. REV. 1019, 1026 (2021) (“[T]he FAA was enacted in an economic environment that is quite different than the modern economy that provides the context for today’s far-flung use of adhesion arbitration.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 108 (2006) (citing 65 Cong. Rec. 1931 (1924)) (“This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts . . . when voluntarily placed in the document by the parties to it.”).

⁸⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (“[T]he primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.”).

⁸⁷ Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 386 (2007).

⁸⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 646-47 (1985) (Stevens, J., dissenting) (“Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims. But this is the first time the Court has considered the question whether a standard arbitration clause referring to claims arising out of or relating to a contract should be construed to cover statutory claims that have only an indirect relationship to the contract.”); see also Priyanka Kasnavia, Comment, *When Courts Turn Arbitration Into Arbitrary: How FAA Precedent Inhibits Federal and State Prohibitions on Employment Discrimination*, 58 HOUS. L. REV. 1173, 1175, 1186-87 (2021) (arguing that the “enforcement of arbitration agreements began impacting the rights guaranteed to labor workers”).

⁸⁹ See *Southland Corp. v. Keating*, 465 U.S. 1, 3 (1984) (holding that the FAA preempted the California Franchise Investment Law, which otherwise “invalidate[d] certain arbitration agreements covered by” the FAA).

⁹⁰ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (preempting a California state law that disallowed mandatory arbitration agreements found in contracts of adhesion); see also *id.* at 352-53 (Thomas, J., concurring) (arguing that it would be “absurd” to read the FAA in a way that allows courts to “refuse to enforce arbitration agreements because of a state public policy against arbitration”).

⁹¹ *Adhesion Contract (Contract of Adhesion)*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract [<https://perma.cc/2QT5-AC85>] (last visited Feb. 6, 2025).

⁹² *Adhesion Contract: To Accept or Not Accept*, THOMSON REUTERS (Mar. 25, 2024), <https://legal.thomsonreuters.com/blog/contract-of-adhesion> [<https://perma.cc/5XF3-YT52>] (last visited Feb. 6, 2025).

⁹³ Aronovsky, *supra* note 85, at 1021. For more information on the concerns of contracts of adhesion immediately following the *Gilmer* decision, see COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF LABOR & U.S. DEP’T OF COMMERCE, FACT FINDING REPORT 118 (1994).

Proponents of adhesion contracts—typically large corporations and other powerful entities—can wield the FAA to compel arbitration even when a contract containing an arbitration clause is alleged to be illegal⁹⁴ or to defeat class-action litigation.⁹⁵ The Supreme Court’s interpretations of the FAA have had profound consequences, shifting the Act from a neutral procedural statute into a tool that disproportionately benefits corporate defendants at the expense of workers and consumers.

To the Supreme Court’s credit, many potential benefits often justify arbitration, and the Court has used these advantages to rationalize its expansive interpretation of the FAA. The efficiency of arbitration compared to traditional litigation, for example, can be valuable in disputes where time and resources are critical, aligning with the FAA’s original goal to streamline dispute resolution.⁹⁶ Arbitration can also be said to provide autonomy to the parties involved, allowing them to customize dispute resolution procedures.⁹⁷ Unlike court proceedings, which are generally public, arbitration also offers the potential advantage of privacy, shielding sensitive information from public exposure.⁹⁸ Proponents also point to the final and binding nature of arbitration as yet another justification for its use, and the Supreme Court has affirmed that the FAA restricts judicial review of arbitration awards to very narrow grounds, thereby ensuring that arbitration delivers swift and definitive resolutions.⁹⁹

However, many of these stated benefits presuppose that both parties possessed relatively equal bargaining power and freely agreed to arbitration as an alternative to litigation. Arbitration was originally designed to address disputes between commercial entities on relatively equal footing, not to govern agreements between powerful corporations and individual employees and consumers who lack similar bargaining power.¹⁰⁰

⁹⁴ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

⁹⁵ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013).

⁹⁶ *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 27 (1983) (emphasizing that arbitration offers “supposedly summary and speedy procedures” as an alternative to the often lengthy and costly court processes), *superseded on other grounds by statute*, 9 U.S.C. § 16(b).

⁹⁷ This flexibility often allows for tailored procedures that can better suit the specific needs of the disputing parties, including adaptable hearing schedules and evidentiary rules. *See Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (“[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”).

⁹⁸ This feature is advantageous for parties seeking to maintain reputational integrity, though it may also encourage settlement by skirting public scrutiny. *See Nobumichi Teramura & Leon Trakman, Confidentiality and Privacy of Arbitration in the Digital Era: Pies in the Sky?*, 2024 *ARB. INT’L L.* 1, 24 (discussing the “formidable threat” of “reputational damage” that can be mitigated by confidentiality in dispute resolution).

⁹⁹ *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (noting that the FAA’s “provision for judicial confirmation carries no hint of flexibility”).

¹⁰⁰ Christopher R. Leslie, *The Arbitration Bootstrap*, 94 *TEX. L. REV.* 265, 309 (2015) (“Consumer contracts are different than the arbitration agreements that the 1925 Congress considered.”).

By contrast, arbitration-compelling employment contracts in the NFL reflect a stark power imbalance, allowing the League and its teams to force arbitration even when the employee would prefer to have their claims—including those of racial discrimination—heard before a judge or jury.¹⁰¹ The disproportionate bargaining power between the NFL and its employees during the contract-negotiation process essentially turns these mandatory arbitration agreements into adhesion contracts.¹⁰² Indeed, compelled arbitration in this context has become “a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”¹⁰³

B. *NFL Employees and Unequal Bargaining Power*

While mandatory arbitration agreements rest on the assumption that the two parties are equally sophisticated, and that they each enjoy the ability to bargain during the negotiation process, this is often not the case.¹⁰⁴ Prospective employers, including the NFL and its individual teams, can condition their offer of employment to a player or coach on that person’s agreement to the arbitration clause.¹⁰⁵ There are few employment alternatives for professional football players beyond the NFL, all of which come with less prestige, a decrease in salary, and organizational instability.¹⁰⁶ In light of this, it is clear that the NFL holds far more bargaining power than the Black athletes who are consequently often taken advantage of. As discussed above, mandatory arbitration agreements in this context function as contracts of adhesion against the League’s Black employees.¹⁰⁷ Even the current NFL collective bargaining agreement (“CBA”), which provides some additional protections for claimant-athletes in the arbitration process, is adhesive against all players drafted after the CBA was negotiated and went into

¹⁰¹ While NFL players typically have agents who can explain the ramifications of these mandatory arbitration clauses to them before they sign the employment contract, other League employees—and the average employee outside the League who is subject to similar mandatory arbitration clauses—may not understand that they have waived their right to litigation prior to a dispute arising. *See id.* at 318 (“Even when consumers are aware that their contracts include an arbitration clause, they do not comprehend the details.”).

¹⁰² *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 364 (2011) (Breyer, J., dissenting) (arguing that states should be free to disallow mandatory arbitration clauses within adhesion contracts based on principles of unconscionability or duress).

¹⁰³ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 253 (2013) (Kagan, J., dissenting) (“[T]he FAA was never meant to produce this outcome.”).

¹⁰⁴ *See* Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap “Sophisticated Parties” Too*, 2010 J. DISP. RESOL. 235, 236.

¹⁰⁵ *See* Mara Kent, *Forced vs. Compulsory Arbitration of Civil Rights Claims*, 23 MINN. J. L. & INEQ. 95, 95 (2005).

¹⁰⁶ *See* Thomas Barrabi, *XFL, USFL, Other Pro Football Leagues That Took On the NFL*, FOX BUS. (Feb. 6, 2020), <https://www.foxbusiness.com/sports/xfl-usfl-aaf-nfl-pro-football-startups> [<https://perma.cc/28UD-PEU8>].

¹⁰⁷ *See supra* notes 90-93 and accompanying text.

effect.¹⁰⁸ The rookie classes that have joined the League since 2020 had no say in the negotiation of that agreement. But under current Supreme Court precedent, “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable.”¹⁰⁹ This doctrine has prevented “more than sixty million American workers from adjudicating their employment rights in a public forum.”¹¹⁰

The “three-decade-long expansion of the use of private arbitration” by the Court has even been said to “undermine[] the substantive law itself.”¹¹¹ Under this line of reasoning, the privatization of dispute-resolution gives the NFL “quasi-lawmaking power to . . . severely impede[] the assertion of various civil claims.”¹¹² Thus, the Supreme Court’s insistence that courts “rigorously enforce” adhesion contracts under the FAA¹¹³ has “effectively reduced federal substantive causes of action to mere formalities.”¹¹⁴ And as discussed above, white figures of authority within the NFL have little incentive to change the privatized structure of these arbitration agreements because doing so would necessarily jeopardize the privilege that the current structure provides to the League’s majority owners.¹¹⁵

American jurisprudence treats “arbitration and civil rights” as two “broad, important statutory priorities” that must be balanced against each other.¹¹⁶ However, the unequal bargaining power between the NFL and its Black employees plays a significant role in how arbitration agreements are used to “split” claims. Because the League can impose arbitration agreements as a condition of employment, Black athletes are forced to accept terms that prevent collective action and isolate individual disputes, leaving the NFL free to fragment systemic issues into individual claims. Thus, despite proclaiming a desire to see more Black leadership figures in the NFL, the League nonetheless “uses every legal maneuver available to split

¹⁰⁸ See NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT xvi (2020), <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf> [<https://perma.cc/JGV5-9K5V>] (recognizing “[a]ll rookie players once they are selected in the current year’s NFL College Draft” as part of the NFLPA’s “bargaining unit”). For more in-depth discussion of the “lack of player involvement” in the CBA-negotiation process, see Zachary Okun, *Fixing the Dent: How NFL Owners Closed the Door to Civil Common Law Liability*, 22 PEPP. DISP. RESOL. L.J. 377, 406-08 (2022).

¹⁰⁹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); see also Kasnavia, *supra* note 88, at 1188 (discussing the Supreme Court’s prohibition against federal courts “considering arbitration challenges based on . . . claims associated with parties who have unequal bargaining power”).

¹¹⁰ Kasnavia, *supra* note 88, at 1188.

¹¹¹ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015).

¹¹² *Id.* at 3057.

¹¹³ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013).

¹¹⁴ Glover, *supra* note 111, at 3073.

¹¹⁵ See *supra* Part II.B.

¹¹⁶ *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 252 (S.D.N.Y. 1998).

up [racial discrimination] claims in a way that makes finding a long-term solution much more difficult because of these divide-and-conquer tactics.”¹¹⁷

C. *Lack of Impartiality and Independence in the League*

The NFL Constitution and Bylaws give the NFL Commissioner “full, complete, and final jurisdiction and authority to arbitrate” any dispute “between or among players, coaches, and/or other employees of any member club or clubs of the League.”¹¹⁸ The Commissioner’s authority extends even to disputes in which the NFL itself is not a party, as all arbitration agreements between a team and an athlete or coach are entered into under the jurisdiction of the Commissioner.¹¹⁹ Racial discrimination suits similarly fall within the Commissioner’s scope because such claims are “dependent upon the plaintiffs’ employment[] status” and “could not be brought in the absence of the employment relationship governed by the agreement[].”¹²⁰

Recent changes to the CBA have attempted to minimize this power imbalance when the grievance is brought by an athlete. The CBA now requires that the NFL and the NFL Players Association (“NFLPA”) jointly select a panel of four qualified arbitrators, one of whom will ultimately oversee the athlete’s grievance.¹²¹ But no such requirement applies to non-athlete claimants making similar allegations of racial discrimination. This discrepancy has since been described as “unconscionable and an egregious violation of fundamental fairness” by law professors and practitioners alike.¹²² The Commissioner’s power over non-athletes’ claims seems to cut directly against the American Arbitration Association’s requirement that an arbitrator be “impartial and independent.”¹²³ Yet courts have held that arbitrations

¹¹⁷ Alan B. Morrison, *If the NFL Is Serious About Ending Racial Bias in Coach Hiring, It Should Stop Hiding Behind Arbitration*, NAT’L L.J. ONLINE (Mar. 21, 2023), <https://www.law.com/nationallawjournal/2023/03/21/if-the-nfl-is-serious-about-ending-racial-bias-in-coach-hiring-it-should-stop-hiding-behind-arbitration/> [<https://perma.cc/83HP-LDRW>].

¹¹⁸ CONST. AND BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. VIII, § 8.3(A).

¹¹⁹ *Flores v. NFL*, 658 F. Supp. 3d 198, 205 (S.D.N.Y. 2023).

¹²⁰ *Id.* at 210 (internal quotations and citations omitted).

¹²¹ NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. 43, § 6 (2020), <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf> [<https://perma.cc/JGV5-9K5V>].

¹²² Michael McCann, *Goodell’s Role in Flores Case Sets ‘Egregious’ Precedent*, *Law Profs Warn*, SPORTICO (Mar. 22, 2023), <https://www.sportico.com/law/analysis/2023/brian-flores-nfl-lawsuit-roger-goodell-arbitrator-1234716971/> [<https://perma.cc/5B6B-LLF7>] (quoting Brief of Gilat Juli Bachar et al. as Amici Curiae Supporting Plaintiff-Appellee, *Flores v. NFL*, No. 23-1185 (2d Cir.), ECF No. 134).

¹²³ *Review Standards*, AM. ARB. ASS’N 1, https://www.adr.org/sites/default/files/document_repository/AAA_AdminReviewCounsel_Standards.pdf; see also Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL’Y INST. (Briefing Paper No. 414, Dec. 7, 2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/QNA8-7C9D>] (arguing that parties seeking to vindicate civil rights “rely[] much more on the neutrality, expertise, and fairness of

overseen by the NFL Commissioner will not “inevitably be biased” because the employee and the League technically jointly selected him as arbitrator by agreeing to the NFL Constitution and Bylaws.¹²⁴ This procedural technicality once again rests upon the incorrect assumption that the NFL and its Black coaches and employees enjoy equal bargaining power and sophistication in the contract-negotiation process.¹²⁵

Further, NFL coaches and employees cannot “avoid arbitration altogether because they fear the arbitrator is biased.”¹²⁶ This is because courts “decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious[,] and impartial arbitrators.”¹²⁷ Instead, parties who believe they faced bias in the arbitration process must wait until after the arbitrator has reached a final determination, then ask a court to “overturn arbitration decisions ‘where there was evident partiality or corruption in the arbitrator.’”¹²⁸ But judicial review of prior arbitration is “among the most deferential in the law,” and even “mistakes of fact or law” by the arbitrator are not enough to displace the earlier decision.¹²⁹ This extraordinary deference reinforces racism’s institutionalization within the NFL, making bias (or outright corruption) difficult to address or cure.

The judicial deference given to arbitral proceedings also disregards the possibility that an arbitrator overseeing a suit might be influenced by external factors, such as the priorities of NFL sponsors. For example, John Schnatter—founder of Papa John’s, the official pizza sponsor of the NFL—criticized Goodell for failing to “‘nip[] in the bud’ activism among NFL players who knelt during the National Anthem to protest police brutality

the arbitrator in reaching a just outcome”); James Madison, THE FEDERALIST NO. 10 (“No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.”); 2 MARTIN DOMKE, GABRIEL WILNER & LARRY E. EDMONSON, 2 DOMKE ON COM. ARB. § 24:1 (Dec. 2023 update) (“The arbitrator is the decisive element in any arbitration.”).

¹²⁴ See, e.g., *Flores v. NFL*, 658 F. Supp. 3d 198, 212 (S.D.N.Y. 2023) (“Because arbitration is a matter of contract, Plaintiffs cannot ask the Court to provide them with an arbitrator who is more neutral than the one to whom they agreed.”).

¹²⁵ See Mike Florio, *Arbitration Issue from Brian Flores Case Lands in Federal Appeals Process*, NBC SPORTS (July 22, 2024), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/arbitration-issue-from-brian-flores-case-lands-in-federal-appeals-process> [https://perma.cc/8FVF-GC5S] (arguing that this power imbalance has essentially led to “the NFL’s secret, rigged, kangaroo court”).

¹²⁶ *Flores v. NFL*, No. 22-CV-0871, 2022 U.S. Dist. LEXIS 139132, at *10 (S.D.N.Y. Aug. 4, 2022).

¹²⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). *Contra* Florio, *supra* note 125 (quoting Brief of Appellee, *Flores v. NFL*, No. 23-1185 (2d Cir.) (ECF No. 127)) (“To say Mr. Goodell is biased would be an understatement.”).

¹²⁸ *Id.* at 30-31 (quoting 9 U.S.C. § 10(b)).

¹²⁹ *NFL Mgmt. Council v. NFL Players Ass’n*, 820 F.3d 527, 532 (2d Cir. 2016) (“These standards do not require perfection in arbitration awards.”).

and racism.”¹³⁰ This is just one example of a corporate sponsor’s priorities standing at odds with Black employees’ quests for racial vindication. With the NFL’s recent return to its status as a taxable entity and for-profit corporation,¹³¹ the influence of external economic forces on the alleged impartiality of the NFL’s go-to arbitrator for non-athlete claimants cannot be understated.¹³² Black coaches and other employees are therefore left to argue their case to a white man of extreme privilege who, according to the voice-of-color thesis,¹³³ is unlikely to be sensitive to the litigants’ racial struggles.

D. Specific Concerns: Claims of Racial Discrimination

Mandatory arbitration is especially problematic when used to resolve claims of racial discrimination. Many procedural rules that specifically disadvantage Black claimants have arisen within the realm of compelled arbitration. First, the presence of a mandatory arbitration agreement usually precludes a court from compelling a party to engage in discovery.¹³⁴ This is an important point within the NFL, where the arbitrator may limit the amount of discovery that a claimant can conduct.¹³⁵ When an athlete files a complaint, the CBA between the NFL and the NFLPA establishes certain discovery procedures that must be followed, but the League and its teams are not required to submit “all documents, reports, and records relevant to the dispute” until fourteen days prior to the hearing due to the arbitration process’s expedited timeline.¹³⁶ This leaves little time for claimants to review documents or create litigation strategies—or to identify documents that were outright withheld. Even worse, non-athlete claimants like coaches and other employees have no procedures guaranteeing their access to document production at all.

Yet in its continued quest to liberalize the scope of arbitration agreements, the Supreme Court has held that limited discovery opportunities do not necessarily render an arbitration agreement unconscionable or

¹³⁰ According to Schnatter, Goodell’s handling of the situation demonstrated “poor leadership.” Okla. L. Enf’t Ret. Sys. v. Papa John’s Int’l, Inc., 444 F. Supp. 3d 550, 555-56 (S.D.N.Y. 2020).

¹³¹ Jared Dubin, *NFL Ends Tax Exempt Status After 73 Years: 3 Things to Know*, CBS SPORTS (Apr. 28, 2015), <https://www.cbssports.com/nfl/news/nfl-ends-tax-exempt-status-after-73-years-3-things-to-know/> [<https://perma.cc/H243-8TZ6>].

¹³² See Vincent S.J. Buccola, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1, 27-30 (2023).

¹³³ See *supra* Part II.F.

¹³⁴ Flores v. NFL, 658 F. Supp. 3d 198, 218 (S.D.N.Y. 2023).

¹³⁵ *Id.*

¹³⁶ See NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT art. 43, § 5 (2020), <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf> [<https://perma.cc/JGV5-9K5V>].

unenforceable.¹³⁷ By contrast, lawsuits brought in federal court allow litigants to “extract extensive discovery from the NFL, its teams, and third parties,” which is often crucial for supporting their claims.¹³⁸ Discrimination claims are inherently difficult to prove, as they typically require evidence of intent or systemic practices that are not readily apparent or openly acknowledged.¹³⁹ Discovery provides a vital mechanism for uncovering documents, communications, and other materials that may reveal intent or patterns of discrimination within an organization. Arbitrators selected by the arbitration agreement itself also receive the benefit of the doubt in assuming that the arbitration agreement has been properly interpreted and enforced.¹⁴⁰ Because white elites in power have little incentive to fight for institutional change when doing so does not also benefit themselves,¹⁴¹ it follows that the NFL itself likely has little incentive to allow Black claimants to engage in full and thorough discovery when doing so would force the League to acknowledge systemic racism within its corporate structure.

The judicial construction of arbitration law further makes it difficult for a claimant to argue that a powerful corporate defendant (like the NFL) has waived its “right” to arbitrate. For example, a delay by the corporation to enforce an arbitration clause is “insufficient to constitute a waiver, so long as the parties had not yet engaged in substantive litigation.”¹⁴² So while Black employees are forced to act immediately, and with little time to formulate a legal strategy (only eight states allow a plaintiff to file a claim for racial discrimination more than 300 days after the alleged discrimination took place),¹⁴³ the NFL is able to weigh its legal options before deciding which course of action is most likely to defeat the employee’s claim of racial discrimination.

Mandatory arbitration also impacts future claimants’ substantive rights, particularly in the context of racial discrimination claims against the NFL. One major shortcoming is arbitration’s inability to establish legal precedent, a crucial aspect of the judicial process that drives the evolution of law and societal norms. In traditional litigation, court decisions do more than simply

¹³⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991). *Contra Stone & Colvin*, *supra* note 123, at 4 (“In certain types of cases, such as employment discrimination claims, it is practically impossible to win without the right to use extensive discovery to find out how others have been treated.”).

¹³⁸ J. Philip Calabrese & Dante Marinucci, *Far-Reaching Consequences of NFL Concussion Litigation*, LAW360 (May 3, 2013), <https://www.law360.com/articles/436512/far-reaching-consequences-of-nfl-concussion-litigation> [<https://perma.cc/7L8K-SCSW>].

¹³⁹ *See Leonhardt*, *supra* note 53 (“Finding ironclad proof of racial discrimination is rarely easy, especially in an individual case.”).

¹⁴⁰ *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003).

¹⁴¹ DELGADO & STEFANCIC, *supra* note 13, at 9; *see also supra* Part II.B.

¹⁴² *Flores v. NFL*, 658 F. Supp. 3d 198, 211 (S.D.N.Y. 2023); *see also, e.g., Nicosia v. Amazon.com, Inc.*, 815 F. App’x 612, 614 (2d Cir. 2020) (holding that a delay of nearly three years did not constitute a waiver by the corporate defendant).

¹⁴³ *Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/time-limits-filing-charge> [<https://perma.cc/R8XJ-V9G5>] (last visited Feb. 6, 2025).

settle individual disputes; they also contribute to a body of case law that guides future rulings. Developing precedent in this way ensures that future cases are treated consistently while also allowing legal standards to adapt alongside evolving social values.¹⁴⁴ By contrast, arbitration decisions are typically confined to the specific parties involved in the proceeding.¹⁴⁵ As a result, even if a Black claimant successfully proves racial discrimination in an arbitration proceeding against the NFL, the decision does not create a binding precedent for future cases.¹⁴⁶ In areas like racial discrimination, a lack of guiding precedent is especially detrimental. Combatting systemic issues like racism requires legal standards that build upon each other and expand with time.¹⁴⁷

The secrecy surrounding many NFL arbitrations further undermines employees' abilities to challenge systemic discrimination. By compelling arbitration, the NFL circumvents the public forum provided by traditional litigation, where cases can attract media attention and public discourse, effectively shielding itself from public scrutiny. Most NFL arbitrations are "private and potentially confidential,"¹⁴⁸ insofar as their outcomes are subject to confidentiality agreements.¹⁴⁹ Even if the claimant disputes the validity of the relevant confidentiality agreement, the arbitrator retains the power to determine its enforceability.¹⁵⁰ Confidentiality means that prior claimants' allegations of racial discrimination may not be accessible as evidence to later Black employees subject to the same discriminatory conduct. The resultant lack of information makes it exceedingly difficult for Black claimants to demonstrate systemic issues or patterns of racial discrimination within the NFL. Each claim is treated in isolation, effectively erasing the context that could reveal widespread issues within the NFL's corporate structure.

¹⁴⁴ For further discussion on the importance of statistical evidence, prior discriminatory behavior, and evidence of discriminatory attitudes in the workplace, see generally Aziz H. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1217 (2019).

¹⁴⁵ Despite growing scholarship calling for a precedent-setting arbitral system, the traditional view remains that arbitration is a form of "particularized, ad hoc decision making." W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1903-04 (2010).

¹⁴⁶ See *id.* at 1900 (noting that "past awards" of arbitration do not "determine the outcome of future disputes").

¹⁴⁷ Jon L. Mills, *The Meaning of "Equal": Evolution of Racial Equality in the United States*, 29 FLA. J. INT'L L. 285, 285 (2017) (arguing that since the drafting of the Declaration of Independence, the word "equal" "had to be translated time and again, each time getting us closer to its true meaning").

¹⁴⁸ Christopher Deubert, *NFL's Arbitration Fumbles Provide Lessons on Drafting Pacts*, LAW360 (July 26, 2022), <https://www.law360.com/articles/1514028/nfl-s-arbitration-fumbles-provide-lessons-on-drafting-pacts> [<https://perma.cc/3NUU-WC6N>].

¹⁴⁹ According to the National Labor Relations Board, "mandatory arbitration agreements requiring employment-related disputes to be arbitrated on a confidential basis are valid and enforceable under the FAA." *Confidentiality in U.S. Arbitration*, AM. BAR ASS'N (Mar. 23, 2023), <https://www.americanbar.org/groups/gpsolo/resources/ereport/archive/confidentiality-us-arbitration/> [<https://perma.cc/4KNE-6QBN>].

¹⁵⁰ *Id.*

The ability to keep disputes out of the public eye reinforces the NFL's culture of secrecy and non-accountability, which allows their discriminatory practices to continue undetected.

Perhaps most importantly, the Supreme Court has held that “any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration.”¹⁵¹ Put differently, if there is ambiguity about whether a dispute should be arbitrated, courts are directed to favor arbitration over litigation. This in turn reduces the damages claimants can recover, as common-law claims that could be brought in court “have no damages cap” and often “expose the NFL to the imposition of punitive damages.”¹⁵² In sum, mandatory arbitration both substantively and procedurally stacks the deck against Black employees and favors the NFL in racial discrimination disputes.

E. Reemergence of Essentialism in Professional Sports

Black employees challenging arbitration agreements within their contracts face significant economic and reputational risk. In addition to the possibility that their voices will be minimized or outright silenced, Black players challenging the implicit racism of mandatory arbitration also risk the stability of the League itself. NFL athletes are unionized under the NFLPA, which has negotiated multiple CBAs with the League on behalf of its member-athletes.¹⁵³ The current CBA runs through the 2030 football season¹⁵⁴ and fully incorporates the NFL Constitution & Bylaws into the “Scope of Agreement.”¹⁵⁵ In other words, the NFLPA, in approving the final CBA, explicitly agreed to the inclusion of the mandatory arbitration clause within the NFL Constitution & Bylaws.¹⁵⁶ Accordingly, the NFLPA challenging the enforcement of a player's arbitration agreement would “undermine[] labor peace” by fighting a clause that had already been agreed upon, contradicting the goals that a labor union is meant to serve under the National Labor

¹⁵¹ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), *super-seded on other grounds by statute*, 9 U.S.C. § 16(b).

¹⁵² Zachary Okun, *Fixing the Dent: How NFL Owners Closed the Door to Civil Common Law Liability*, 22 PEPP. DISP. RESOL. L.J. 377, 385 (2022).

¹⁵³ See NAT'L FOOTBALL LEAGUE & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT xvi (2020), <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf> [<https://perma.cc/JGV5-9K5V>] (recognizing the NFLPA as “the sole and exclusive bargaining representative of present and future employee players in the NFL”).

¹⁵⁴ *How the NFLPA Works*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, <https://nflpa.com/about> [<https://perma.cc/4NJQ-J2JL>].

¹⁵⁵ See *supra* note 153, art. 2, § 4(a).

¹⁵⁶ See Chris Deubert, *NFLPA Takes Legal Positions in Favor of NFL System and Key Defense*, FORBES (Aug. 9, 2024), <https://www.forbes.com/sites/chrisdeubert/2024/08/09/nflpa-takes-legal-positions-in-favor-of-nfl-system-and-key-defense/> [<https://perma.cc/9UBW-R8UN>] (“[T]he NFLPA has seemingly made the decision to take legal positions which protect that system, even if those positions support the NFL and are adverse to players from time-to-time.”).

Relations Act.¹⁵⁷ The issue of intersectionality thus reemerges as the Black athlete is forced to choose between his personal quest for racial equality and the average union worker's access to justice more broadly in determining whether he should challenge an arbitration agreement that his union has already endorsed.¹⁵⁸

A Black athlete seeking to invalidate an arbitration agreement also jeopardizes his public perception among NFL fans. After all, the athlete must convince “the average working person, who can barely afford to take her family to a single game,” that the issue is “more than just a battle involving millionaires versus billionaires.”¹⁵⁹ This could lead an athlete to decide that the potential blowback is not worth the vindication of his race-related claims. Because the general public “suffers directly from harms occurring during a labor dispute,” any “economic pressures” placed on the NFL by the NFLPA can “lead to unpopular public sentiment” against the union and the players it represents.¹⁶⁰ Thus, if an athlete must choose between his legal claims and his status as a popular professional athlete (assuming the relevant statute of limitations would run before his career would otherwise be over), it becomes clear that the risk often outweighs the possible benefits.

IV. AVENUES OF POTENTIAL REFORM

Recognizing the vast influence that the NFL wields not only within the sporting industry but across the United States more broadly, it is essential to spotlight the League's use of mandatory arbitration agreements to spur progress in addressing similar injustices faced by ordinary people around the nation.¹⁶¹ This Part proposes three different avenues of reform through which systemic racial discrimination and inequitable employment practices can be addressed: legislation, advocacy, and transformation. It then analyzes the benefits that the NFL would experience as a result of these reforms.

¹⁵⁷ Michael Z. Green & Kyle T. Carney, *Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits when a Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 403, 408 (2017) (discussing the negative impact of any NFLPA “challenge[] to enforcement of arbitration discipline in federal court”). Although the NFLPA is obligated to bargain for the players' best interests, the push-and-pull of CBA negotiations means that some initiatives must take priority over others. Accordingly, while the NFLPA could advocate for the abolition of the mandatory arbitration clause beginning in the 2030 CBA, it is bound by the terms of the current CBA until then. *See id.* (“[T]he NFLPA should seek changes to the arbitration process at the collective bargaining table, not in federal courts.”).

¹⁵⁸ *See supra* Part II.E.

¹⁵⁹ Green & Carney, *supra* note 157, at 407.

¹⁶⁰ *See id.* (“For government workers, the public becomes impatient and unhappy when a labor dispute disrupts its services. For professional athletes, any disruption of games risks a similar negative response from fans.”).

¹⁶¹ *See* David Steele, *Forced Arbitration Bill in Congress Shines Harsh Light on NFL*, LAW360 (May 22, 2023, 3:39 PM), <https://www-law360-com.eu1.proxy.openathens.net/articles/1679403/forced-arbitration-bill-in-congress-shines-harsh-light-on-nfl> [<https://perma.cc/W5DJ-KPNF>] (noting that “80 of the top 100 businesses and corporations” in America use arbitration clauses that deny “some 60 million employees . . . the right to take their cases to court”).

A. Redress by Legislation

The most direct way to address the racial harms perpetuated by mandatory arbitration agreements is to legislatively prohibit the use of such agreements outright. Legislation could amend the language of the FAA to limit its scope to arbitration agreements that were voluntary and consensual. The proposed Forced Arbitration Injustice Repeal Act (“FAIR Act”), for example, would amend the FAA to “prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes.”¹⁶² If enacted, this would explicitly clarify that mandatory arbitration agreements are neither “valid” nor “enforceable,” at least when adjudicating the specific types of claims covered by the Act.¹⁶³ But enactment does not appear to be imminent. The FAIR Act, in some form, has been introduced in each of the last three legislative sessions, and though it has passed in the House twice, the Senate has never successfully voted to enact it.¹⁶⁴ Each iteration of the Act—sponsored almost exclusively by Democrats—has failed to garner necessary bipartisan support.¹⁶⁵

A narrower legislative approach, though it would not resolve the broader issue of forced arbitration nationwide, could still resolve the issues specifically involving claims of racial inequity. A bill similar to the FAIR Act was introduced early last year with this specific goal in mind: the Ending Forced Arbitration of Race Discrimination Act of 2023. This proposal would amend the FAA to allow an alleged victim of racial discrimination to unilaterally invalidate a mandatory arbitration agreement and instead have their claim adjudicated in court.¹⁶⁶ The introduction of this Act garnered much attention within the sports industry, with some claiming that the NFL was a “prominent target” of the Act because the League “is complicit in the practices the bill wants to prohibit.”¹⁶⁷

Despite this spotlight, the League has made no indication that it would support the bill’s passage, thanks in large part to the “larger self-interest that businesses like the NFL would want to protect when trying to preserve compelled arbitration.”¹⁶⁸ And like the FAIR Act, the racial discrimination-specific legislation was not bipartisan and instead relied solely on Democrats

¹⁶² Forced Arbitration Injustice Repeal Act, S.1376, 118th Cong. § 2(1) (2024).

¹⁶³ *Id.*

¹⁶⁴ See H.R. 1423, 116th Cong. (2019) (passed the House but died in the Senate Judiciary Committee); H.R. 963, 117th Cong. (2021) (passed the House but died in the Senate Judiciary Committee); H.R. 2953, 118th Cong. (2023) (died in House Judiciary Committee).

¹⁶⁵ H.R. 1423 and H.R. 963 each had only one Republican co-sponsor. H.R. 2953 (along with all the Senate companion bills, S. 610, 116th Cong. (2019), S. 505, 117th Cong. (2021), and S. 1376, 118th Cong. (2023)) was sponsored exclusively by Democrats or independents caucusing with Democrats.

¹⁶⁶ Ending Forced Arbitration of Race Discrimination Act of 2023, S.1408, 118th Cong. (2023).

¹⁶⁷ Steele, *supra* note 161.

¹⁶⁸ *Id.*

for introduction and sponsorship.¹⁶⁹ Since being introduced in the Senate over a year ago, it has never made it out of committee.¹⁷⁰

Legislative reform of this character, however, has been successfully enacted in other contexts. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (“EFASASHA”) was enacted in March 2022 to “preclude[] employers from requiring employees to arbitrate disputes related to sexual assault and harassment.”¹⁷¹ EFASASHA was ratified just under eight months after it was first introduced, and it received bipartisan support in both the House and Senate.¹⁷² But this legislation benefited from the rise of the #MeToo movement, which generated significant public pressure on Congress to make it easier to bring claims of sexual assault and harassment.¹⁷³ More recently, Republicans and Democrats on the Senate Judiciary Committee moved to advance the Protecting Older Americans Act of 2023 out of committee. This bill would end mandatory arbitration of age-discrimination-in-the-workplace claims.¹⁷⁴

Thus, even if the FAIR Act’s total bar on mandatory arbitration agreements is too broad to garner consensus in Congress, the passage of the EFASASHA—and the increasing momentum of the Protecting Older Americans Act—suggests issue-specific legislation like the Ending Forced Arbitration of Race Discrimination Act may have a bright future.¹⁷⁵ Recent

¹⁶⁹ *Cosponsors: S.1408 - 118th Congress (2023-2024)*, U.S. CONG., <https://www.congress.gov/bill/118th-congress/senate-bill/1408/cosponsors> [<https://perma.cc/G6W9-3ESU>] (last visited Feb. 6, 2025).

¹⁷⁰ *All Actions: S.1408 - 118th Congress (2023-2024)*, U.S. CONG., <https://www.congress.gov/bill/118th-congress/senate-bill/1408/all-actions> [<https://perma.cc/A4LJ-UQBM>] (last visited Feb. 6, 2025).

¹⁷¹ Deborah A. Widiss, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, AM. BAR ASS’N (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/new-law-limits-mandatory-arbitration-in-cases-involving-sexual-assault-or-harassment/.

¹⁷² *Cosponsors: H.R. 4445 - 117th Congress (2021-2022)*, U.S. CONG., <https://www.congress.gov/bill/117th-congress/house-bill/4445> [<https://perma.cc/29Q7-Y5V3>] (last visited Feb. 6, 2025).

¹⁷³ David Horton, Forum, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. (June 23, 2022), <https://www.yalelawjournal.org/forum/the-limits-of-the-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act> [<https://perma.cc/NQL7-KMPA>].

¹⁷⁴ Sheila Callahan, *Senate Judiciary Committee Advances ‘Protecting Older Americans Act’ to Eradicate Forced Arbitration*, FORBES (May 9, 2024), <https://www.forbes.com/sites/sheilacallaham/2024/05/09/senate-judiciary-committee-advances-protecting-older-americans-act-to-eradicate-forced-arbitration/> [<https://perma.cc/VBH3-XYZU>].

¹⁷⁵ The core tenets of CRT provide several plausible explanations as to why racial discrimination-specific legislation has failed to garner Republican support. For example, the theory of material determinism suggests that, because Black voices are underrepresented within the GOP’s congressional representatives, there is little incentive within this group to enact change that would not personally benefit them. Compare *supra* Part II.B (“Material Determinism”), with Lisa Mascaró, *GOP More Diverse, but Congress Still Doesn’t Reflect America’s Demographics*, PBS NEWS (Feb. 7, 2023), <https://www.pbs.org/newshour/politics/gop-more-diverse-but-congress-still-doesnt-reflect-americas-demographics> [<https://perma.cc/Q3XD-ZTU8>] (emphasizing that “mostly white, male lawmakers” continue to represent the Republican Party in Congress). Alternatively, these same lawmakers may simply fail to understand the importance

trends reveal that “Republican support [is] growing” in these narrower contexts.¹⁷⁶ Just as Congress has decided that compelled arbitration is not suitable to adjudicate claims of sexual harassment or age discrimination, it could come to the same conclusion regarding racial discrimination. The eventual passage of the Ending Forced Arbitration of Race Discrimination Act, or of any similar legislation, would protect the NFL’s Black employees moving forward.

B. *Redress by Advocacy*

Collective advocacy has the potential to become an increasingly important tool in the fight against mandatory arbitration clauses, especially in the struggle for minority employment rights. By raising public awareness, organizing at the grassroots level, or pursuing strategic litigation, advocates can expose the unfairness of compelled arbitration and rally support for changes in corporate policies. Collective advocacy can pressure businesses to eradicate arbitration clauses entirely, even without legislative reform that might otherwise be politically stalemated.¹⁷⁷ Coordinated efforts such as social media campaigns, petitions, and public demonstrations amplify advocates’ voices as they gain traction and continue challenging the status quo.

For example, processed food manufacturer General Mills came under fire in 2014 after it was discovered that consumers who engaged with the company’s website by joining online communities or downloading coupons had subjected themselves to mandatory arbitration agreements as to all future legal disputes.¹⁷⁸

Less than a week after reports informed the public of General Mills’ practice, the company reversed course and removed the mandatory arbitration policy from its website.¹⁷⁹ A company spokeswoman even apologized for the arbitration clause’s inclusion in the first place.¹⁸⁰ Although the General Mills fiasco involved a mandatory arbitration clause against *consumers*

of this issue because of the privilege many experience. *See supra* Part II.F. More broadly, these lawmakers may incorrectly believe that other factors, rather than an employee’s race, contribute to higher rates of discrimination in the workplace, therefore failing to acknowledge the root of the problem itself. *See supra* Part II.A.

¹⁷⁶ Diego Areas Munhoz, *Lawmakers Pursue Gradual Path to Tackling Mandatory Arbitration*, BLOOMBERG L. (May 3, 2024), <https://news.bloomberglaw.com/daily-labor-report/lawmakers-pursue-gradual-path-to-tackling-mandatory-arbitration>.

¹⁷⁷ Admittedly, this type of reform may require advocacy on a company-by-company basis and does not solve the issue of mandatory arbitration agreements at the national level, but this is still a better alternative than a lack of progress entirely.

¹⁷⁸ Daniel Fisher, *General Mills Consumers Give Up Rights to What, Exactly?*, FORBES (Apr. 18, 2014), <https://www.forbes.com/sites/danielfisher/2014/04/18/general-mills-consumers-give-up-rights-to-what-exactly/>.

¹⁷⁹ Stephanie Storm, *General Mills Reverses Itsself on Consumers’ Right to Sue*, N.Y. TIMES (Apr. 20, 2014), <https://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html>.

¹⁸⁰ Gregory Wallace, *General Mills Reverses Course on Right to Sue After Backlash*, CNN BUS. (Apr. 20, 2014), <https://money.cnn.com/2014/04/20/news/companies/general-mills-backlash/> [<https://perma.cc/Q3NX-GXFV>].

(as opposed to employees, as seen in the NFL), it is proof that public pressure alone has the potential to compel powerful entities to voluntarily amend their arbitration policies.

The NFL would be particularly vulnerable to this type of advocacy. With millions of fans around the world and year-round media coverage, the League commands a vast audience that cares deeply about the sport and its players, giving advocates a powerful platform on a global scale. By engaging this fanbase, advocacy groups and stakeholders could push the NFL to reconsider its use of mandatory arbitration clauses. The League's most prominent figures—players, coaches, and on-air talent—wield even more influence than fans. High-profile statements and endorsements from these figures would lend legitimacy to the campaign and amplify its visibility.

In addition to putting pressure directly on the NFL, an advocacy campaign involving prominent NFL voices would also provide the NFLPA with additional leverage in negotiating the next CBA starting in 2030. Under the dual theories of interest convergence and material determinism, the NFL's white elites are more likely to support its Black voices when doing so would “just as much benefit those in power.”¹⁸¹ From this perspective, the possibility of negative publicity and fan backlash would incentivize the NFL to engage in good-faith negotiations with the NFLPA, potentially leading to reforms that protect the rights and interests of Black figures and others who would otherwise be disproportionately impacted by the continued use of mandatory arbitration agreements.¹⁸²

C. *Redress by Transformation*

It may also be possible to address or mitigate many of the adverse effects of mandatory arbitration agreements without eliminating them entirely by instead “transforming” the nature of compelled-arbitration law. This would require striking a balance between preserving the benefits of arbitration and safeguarding the rights and interests of parties subject to arbitration agreements, a feat which would be feasible only with careful consideration during the reform process.

For example, additional mechanisms for judicial review could provide Black claimants with recourse in cases of biased or unethical arbitration proceedings.¹⁸³ By making an arbitrator's “mistakes of fact or law” a reversible error,¹⁸⁴ employers could still rely on mandatory arbitration to resolve

¹⁸¹ Hylton, *supra* note 8, at 345.

¹⁸² See Florio, *supra* note 125 (describing the current compelled arbitration procedures in the NFL as a “horrible look” that “should be a P.R. disaster for the league”).

¹⁸³ See Stone & Colvin, *supra* note 123, at 4 (describing mandatory arbitration's “narrowed . . . possibility of obtaining judicial review” as a threat which “undermine[s] decades of achievements in worker and consumer rights”).

¹⁸⁴ NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016).

disputes, so long as that arbitration proceeding is conducted properly. In a league where arbitration is often conducted by individuals with close ties to the NFL, the ability for Black employees to seek judicial intervention would act as a safeguard against entrenched biases. Similarly, empowering courts to intervene in ongoing arbitration proceedings to address misconduct or ensure compliance with legal standards would enhance the integrity and legitimacy of the arbitration process.¹⁸⁵

Enhanced transparency and disclosure requirements could similarly protect Black claimants seeking to vindicate claims of racial discrimination. Confidentiality agreements and the lack of binding precedent can perpetuate a culture of secrecy while also resulting in inconsistent or unpredictable outcomes.¹⁸⁶ However, if the NFL were forced to disclose certain information after the conclusion of arbitration proceedings (such as the allegedly discriminatory conduct suffered by the claimant, or the steps that the League will take moving forward to prevent similar harm), future claimants could better identify patterns of misconduct or abuse and subsequently hold the NFL accountable for having failed to correct these issues.

Moreover, introducing reforms that limit the scope of arbitration agreements by allowing for expanded discovery would provide Black employees with access to vital evidence needed to successfully prove claims of racial discrimination. In addition to better equipping Black employees with institutional insights as they prepare for mandatory arbitration against the NFL, the resulting transparency would also build public trust in the integrity of the arbitration process as a legitimate alternative to litigation.¹⁸⁷

Other proposed reforms, though less commonly advanced, are also worthy of consideration. For example, some scholars have argued that arbitration results should be binding only against the party that drafted the arbitration agreement or selected the mediator that oversaw the dispute, while the non-drafting party could “reject the arbitrator’s decision” and instead adjudicate their claim in court.¹⁸⁸ Since the NFL controls the contract-negotiation process that includes the mandatory arbitration clauses in the first place, providing this opt-out tool to employees would level the playing field.

Another type of proposed reform would create a regulatory “enforcement scheme” that would allow government attorneys to bring affirmative

¹⁸⁵ See Roger I. Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 261 (1977) (“[T]he federal courts must remain open to challenges to arbitral awards based on alleged impairment of the process’ integrity, especially when the job rights of individual employees are at stake.”) (internal citations omitted).

¹⁸⁶ See *supra* notes 134-39 and accompanying text.

¹⁸⁷ See Brittany Munn & Colin Rule, *If We Can’t End Mandatory Arbitration, Let’s Improve It*, ARBITRATE (June 6, 2022), <https://arbitrate.com/if-we-cant-end-mandatory-arbitration-lets-improve-it/> [<https://perma.cc/QU79-RWG2>].

¹⁸⁸ See, e.g., Suzette M. Malveaux, *Is It the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 78 (describing “one-way binding arbitration” as a “promising and unique alternative” to ordinary mandatory arbitration agreements).

civil cases against employers engaging in “systematically biased adjudications” as a result of mandatory arbitration agreements.¹⁸⁹ The risk of facing legal action from government entities would likely incentivize the NFL to proactively improve its arbitration processes and take steps to prevent biased arbitration proceedings. Perhaps even a limitation on corporate defendants’ repeated use of the same arbitrator over time could help mitigate the “prodefendant bias” that arises from the “‘repeat player’ effect.”¹⁹⁰ The NFL’s consistent reliance on a small group of arbitrators—especially with non-athlete claimants who do not have additional CBA protections in the arbitrator-selection process—can lead to decisions that are more favorable to the League’s interests. Requiring greater rotation of arbitrators or imposing restrictions on how frequently the same arbitrators can be appointed would ensure more impartiality and reduce the potential for conflicts of interest.

With reforms like these, Black employees’ civil rights interests could be better protected even without the outright abolition of mandatory arbitration agreements. Individually, each of the aforementioned reforms addresses a distinct aspect of the arbitration process that currently disadvantages Black NFL employees. Collectively, they offer a comprehensive strategy for balancing the benefits of arbitration with the need to safeguard the rights and interests of those subject to it.

D. *NFL’s Incentive to Support Reform*

Eliminating mandatory arbitration agreements from its employment contracts also carries benefits for the NFL itself. As discussed above, Black players in the NFL hold considerable influence and visibility, both on and off the field. By ending the League’s history of compelled arbitration, the NFL would signal a willingness to listen to employees’ concerns and address them through fair and open processes. This move would strengthen the League’s relationship with its employees, fostering a more collaborative and respectful environment in the workplace.

Moreover, disallowing mandatory arbitration to resolve racial-discrimination claims would provide the NFLPA—which has historically advocated for greater transparency and fairness in the League’s employment practices—with a tangible collective-bargaining victory. This success would build goodwill among players and potentially pave the way for more productive CBA negotiations, resulting in agreements that better serve the interests of both players and the League. This shift by the NFL would also

¹⁸⁹ See Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 *YALE L.J.* 2346, 2348–49 (2012).

¹⁹⁰ David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 *N.D. L. REV.* 1247, 1309–12 (2009) (discussing concerns arising from defendants’ ability to “select and pay for the decision-making forum”).

affirmatively protect its employees in the process—an ideal the League outwardly claims to prioritize—by contributing to greater accountability in protecting Black figures from racial discrimination.

Given that the NFL's use of mandatory arbitration agreements has drawn criticism and public scrutiny in the past,¹⁹¹ voluntarily eliminating these agreements—rather than waiting for future legislation to force the issue—would improve public perception and trust in the League. In doing so, the NFL would position itself as a forward-thinking organization that values fairness, accountability, and respect for individual rights. As new legislation like the EFASASHA and the Protecting Older Americans Act is signed into law, ending compelled arbitration would ensure that the NFL stays in step with social and political changes in real time while also inspiring other corporations to follow suit.

V. CONCLUSION

While overt acts of racism in the NFL are steadily declining, Black players and coaches remain subject to racial inequality. They continue to encounter structural barriers upheld by the NFL's corporate organization despite contributing to the majority of on-field operations and driving much of the League's profits. Analysis of the League's employment practices through the lens of CRT reveals that inequality is institutionalized within the League itself. The NFL's use of mandatory arbitration to resolve claims of racial discrimination shields it from accountability by embedding racial bias into the dispute-resolution process.

As Congress considers the Ending Forced Arbitration of Race Discrimination Act and similar legislation, it is essential to raise awareness of how mandatory arbitration agreements perpetuate systemic injustice through a CRT-informed perspective. Other means of reform beyond legislation, such as advocacy campaigns targeting specific corporations or the development of federal arbitration law more generally, could also protect Black voices seeking to redress racial injuries in the future.

The NFL, arguably the most influential professional sports organization in the modern world,¹⁹² has both the platform and the responsibility to stand as a source of change within American athletics. While the NFL's duty to confront its own racial injustices is paramount, its influence also stretches beyond sports. The League's reforms could serve as a model for addressing

¹⁹¹ See Steele, *supra* note 161 (noting that the introduction of the Ending Forced Arbitration of Race Discrimination Act “put[] the country’s most powerful sports league on notice”).

¹⁹² Thanks to guaranteed television deals worth upwards of \$126 billion, the NFL remains the “most valuable sports league in the world,” with the Dallas Cowboys standing as the most valuable professional sports team across any league. Mike Ozanian & Justin Teitelbaum, *The World’s 50 Most Valuable Sports Teams 2023*, FORBES (Sept. 8, 2023), <https://www.forbes.com/sites/mikeozanian/2023/09/08/the-worlds-50-most-valuable-sports-teams-2023> [https://perma.cc/8X2T-TE4T].

racial inequality in institutions, demonstrating how a powerful entity can lead the way in dismantling structures that perpetuate systemic racism. For over a century, the League has profited immensely from Black talent and labor. Now, the time has come for the NFL to empower those voices—not just on the field, but also in confronting and dismantling the structures that perpetuate racial inequality.