FEDERALIZING CONTRACT LAW

by
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Contract law is generally understood as state common law, supplemented by the Second Restatement of Contracts and Article 2 of the Uniform Commercial Code. It is regarded as an expression of personal liberty, anchored in the bargain and consideration model of the 19th century or classical period. However, for some time now, non-bargained or adhesion contracts have been the norm, and increasingly, the adjudication of legal rights and contractual remedies is controlled by privately determined arbitration rules. The widespread adoption of arbitral adjudication by businesses has been enthusiastically endorsed by the Supreme Court as consonant with the Federal Arbitration Act ("FAA"). However, Court precedents have concluded that only bilateral or individualized arbitration promotes the goals of the FAA, while class arbitration is destructive. Businesses and the Court have theorized that bilateral arbitration is an efficient process that reduces the transaction costs of all parties thereby permitting firms to reduce prices, create jobs, and innovate or improve products. But empirical research tells a different story. This Article discusses the constitutional contours of crafting common law for the FAA and its impact on state and federal laws. It shows that federal common law rules crafted for the FAA can operate to deny consumers and workers the neoclassical contractual guarantee of a minimum adequate remedy and rob the federal and state governments of billions of dollars in tax revenue. From FAA precedents the Article distills new rules of contract formation, interpretation, and enforcement and shows how these new rules undermine neoclassical limits on private control of legal remedies. The Article shows that federal contract law now gives firms the ability to contractually control not only legitimate commercial risks but also whether they can be held accountable for breach. Using empirical data and arbitral precedents, the Article demonstrates how federal contract law endorses arbitration terms that facilitate market failure by making legal rights and remedies an illusion. Arbitration contracts also help firms avoid their state and federal tax obligations by making it unpalatable for workers to pursue wage claims. By giving firms the liberty to impose impermissible terms without any penalty, the federal rules undermine the legal promise of a minimum adequate

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remedy and incentivizes non-compliance with regulations in the public interest. The Article concludes that the federal contract rules do not provide sufficient incentive for contractual or regulatory compliance, and this justifies the historical preference for public law control of legal remedies.

INTRODUCTION

Federal arbitration law is likely the most transformative development in contract law since the Restatement Second and Article 2 of the Uniform Commercial Code ("UCC") were embraced by the states.[1] Common law rules crafted for the

[1] DEE PRIDGEN & GENE A. MARSH, CONSUMER PROTECTION LAW IN A NUTSHELL 45 (4th ed. 2016) ("The widespread use and enforcement of mandatory, pre-dispute arbitration agreements in consumer contracts is probably the most controversial and potentially the most detrimental development in 21st century consumer law."). The first and second Restatement of

Federal Arbitration Act ("FAA")[2] are now center stage not only because they preempt state law[3] but also because they serve as tools to evade a vast body of legal protections that are in the public interest.[4] This evasion of legal accountability is accomplished via arbitration clauses in consumer and employment contracts that are non-bargained or adhesive[5] in which drafters impose on adherents terms such as

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Contracts were 20th century attempts to analyze "the often conflicting maze of judicial decisions, . . . to cull the sound from the less sound and to state the sounder views in systematic form." JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 14 (6th ed. 2009). Article 2 of the UCC liberalized many of the common law rules that would otherwise be applicable to sale of goods transactions. *See id.* at 16. And the "Restatement (Second) has recast many of the provisions of the original Restatement to harmonize them with the UCC." *Id.* at 16–17. A twelve-year process to update Article 2 of the UCC collapsed in 2003, although the interests of all stakeholders were considered in drafting the revised rules. William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131, 132, 141 (2009). Software and other industry stakeholders opposed revised Article 2, primarily because of the protections it afforded consumers. *Id.* at 134–37. A Uniform Computer Information Transactions Act (UCITA) also failed to get state approval because of its emphasis on licensors' contractual liberty to control terms and avoid accountability for their products. Nim Razook, *The Politics and Promise of UCITA*, 36 CREIGHTON L. REV. 643, 652–53 (2003). Only Maryland and Virginia have adopted UCITA, with modifications. *Id.* at 644.

[2] United States Arbitration Act, 9 U.S.C. §§ 1–307 (2012).

[3] Although Congress expressly preserved state law in the FAA, the Court has ruled that a variety of state rules designed to limit arbitral oppression serve as obstacles to the FAA. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (invalidating a California law as inconsistent with the objectives of the FAA because it treated as unconscionable arbitral class action bans of small sum consumer claims). The Court's FAA jurisprudence is grounded in obstacle preemption, a very open-ended concept that puts any state regulation of arbitration at risk. Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Preemption*, 67 FLA. L. REV. 711, 711 (2015) (noting that this is the broadest form of preemption the Court has ever articulated).

[4] In addition to new commercial rules, consumer and employment laws were also enacted to protect individuals with no bargaining power from predatory or oppressive practices. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C §§ 201–219 (2012) (providing eligible workers with minimum wage and overtime entitlements); Consumer Credit Protection Act, 15 U.S.C. § 1679 (2012) (protecting consumers from deceptive practices); *see also* Zaborowski v. MHN Gov't Servs., 601 F. App'x 461, 463 (9th Cir. 2014) (an employment case in which the court found that the arbitration contract gave the employer control over the selection of arbitrators, unreasonably shortened the statute of limitations for filing claims, shifted costs and fees to the worker (contrary to prevailing law), imposed excessive filing fees on the worker, and waived statutorily prescribed punitive damages); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (involving a consumer transaction in which the arbitration contract designated "a financially prohibitive forum," thereby leaving consumers "with no forum at all in which to resolve a dispute").

[5] Adhesion contracts have a long history, but they became the dominant mode of contracting in the 20th century because of their efficiency in mass markets. Andrew Burgess, *Consumer Adhesion Contract and Unfair Terms: A Critique of Current Theory and a Suggestion*, 15 ANGLO-

forum cost provisions, class or collective action bans, or restrictions on remedies or judicial review of arbitral awards.[6]

When consumers buy cell phones or computers, apply for credit cards, or open bank accounts, they are usually not aware that their contracts include arbitration terms.[7] And even when they are aware, dispute resolution terms are usually not their focus at the contract-formation stage.[8] Further, information about arbitration is often presented in a manner that one is unlikely to read, understand, or reject.[9] The

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AM. L. REV. 225, 260 (1986). The take-it-or-leave-it nature of adhesion contracts reflect a shift from the bargained model of contracting that classical contract law was premised on. Arthur Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481, 481 (1962). And only the dominant party gets to decide and draft contract terms. Philip Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L.Q. 125, 128–29 (1962).

[6] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311 (2013) (holding that a class action ban and non-collaboration clause imposed by the dominant party is valid because it did not eliminate the right to pursue statutory remedies); *Concepcion*, 563 U.S. at 340–41 (holding that a class action ban on small sum consumer claims is valid even if as a practical matter, it would insulate businesses from legitimate claims); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (holding that unequal bargaining power is not a sufficient basis to refuse enforcement of an employment arbitration contract).

[7] Lauren E. Willis, *The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension*, 3 RUSSELL SAGE FOUND. J. SOC. SCI. 74, 78–79 (2017) (discussing how firms design the contract formation process to raise the cost of comprehension, and how consumers' backgrounds, beliefs, and failure to read limit their awareness of material contract terms).

[8] *Id.* at 78 (noting that even for large-sum transactions like home loans, consumers spend less than one minute reading disclosures and focus on "only the most immediate costs, risks, and benefits").

[9] *Id.* at 79 (discussing how AT&T "designed the envelope, cover letter, and amended contract . . . to ensure that most consumers would *not* open the envelope, or if they did open it, would not read beyond the cover letter" to discover an added mandatory arbitration provision). Common law rules governing contract formation have been modified to accommodate such practices. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996). In *ProCD* and *Hill*, the judge formulated a theory of rolling or layered contracts that permits sellers to add sale terms as part of their offer, even after the buyer has rendered acceptance and both parties have performed by exchanging consideration. Consumers have a duty to read and are bound to terms provided after performance is rendered, provided they are given an opportunity to reject them and undo the transaction. *Hill*, 105 F.3d at 1148. Notice of arbitration does not have to be prominent. *Id.* at 1148–50. Scholars have been highly critical of courts giving sellers the prerogative to add material terms to the offer after the goods have been delivered and paid for. William H. Lawrence, *Rolling Contracts Rolling over Contract Law*, 41 SAN DIEGO L. REV. 1099, 1110–11 (2004) (arguing that rolling contract theory is grounded in an implicit agreement that distorts formation rules because it fails to address the legal effects of the parties' exchange prior to delivery of the goods); Colin P. Marks, *Not What, but When Is an Offer: Rehabilitating the Rolling Contract*, 46 CONN. L. REV. 73, 96–98 (2013) (noting that rolling contract theory is flawed because it prioritizes economic efficiency over the intentions of the parties).

same is true for workers. Employees who sign arbitration agreements as a condition of employment are generally not aware that class action bans, forum costs, venue, restrictions on remedies, and other terms may prevent them from remediating claims they may have for discrimination, minimum wage, or overtime compensation.[10] Consumers and workers are also generally unaware that arbitration law enforces legally incorrect decisions that may deny them their substantive remedies.[11]

By endorsing class bans, cost-splitting, cost-shifting, and other material terms as the parties'—or more accurately, the drafter's—contractual liberty, the federal rules make the drafter a commercial sovereign who controls the contractual rights and remedies of his partner. These novel and recent rules for the FAA are radical departures from state and federal laws that guarantee baseline remedies in the event of breach.[12] The FAA commands courts to enforce contracts to arbitrate, "save upon such grounds as exist at law or in equity for the revocation of any contract."[13] Nonetheless, the federal rules prevent judges from applying state rules and interpretations that make the arbitral forum accessible, transparent, and fair.[14]

Until recently, it seemed implausible that the 1925 FAA Congress meant to prohibit states from regulating how arbitration contracts are formed.[15] And although the FAA does not place any restriction on a judge's use of equitable principles

[10] Minimum wage workers whose claims against their employers are typically small and must proceed individually in arbitration often discover that it is economically impractical to vindicate their claims. *See, e.g.*, Hall v. Treasure Bay V.I. Corp., 371 F. App'x 311, 312–13 (3d Cir. 2010) (arbitration contract required worker to pay all costs if she loses); Whataburger Rests. v. Cardwell, 446 S.W.3d 897, 903 (Tex. Ct. App. 2014) (arbitration contract provided for distant forum for low wage worker).

[11] *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (holding that mistake of fact or law by the arbitrator is not sufficient grounds for vacating an arbitral award); Wilko v. Swan, 346 U.S. 427, 436–47 (1953) (holding that arbitrators' errors of law are not subject to judicial review).

[12] For example, the UCC's provision on modifying or limiting contract remedies provides that "it is the very essence of a sales contract that at least minimum adequate remedies be available." U.C.C. § 2-719 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2010); *see also* Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2012) (entitling eligible workers to minimum levels of pay that cannot be contracted away).

[13] United States Arbitration Act, 9 U.S.C. § 2 (2012).

[14] *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 681–82 (1996) (holding that Montana cannot require the dominant party to provide conspicuous notice of arbitration at the formation stage because this undermines the FAA's goals).

[15] Nothing in the text, legislative history, or early Court precedents hinted that states could not make rules to govern arbitration contracts. Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 36–39 (2016) (noting that only recently did the Court adopt a policy of enforcement for arbitration clauses that have oppressive effects and are contrary to state law defenses to enforcement).

to deny enforcement of such contracts,[16] the federal rules prohibit states from treating as unconscionable arbitration contracts that make it practically impossible to vindicate claims.[17] Any state regulation that targets arbitration contracts specifically is considered hostile to the FAA even if the state rule was intended to prevent contractual oppression rather than deny the parties their arbitral forum.[18]

This new body of contract law is unlike anything in the past and it originates in case law from the Supreme Court, not state courts or state legislatures.[19] It is grounded in two assumptions: first, that no substantive right is lost in the switch from court to arbitral adjudication, and second, that bilateral or individualized arbitration is the most effective way of achieving the FAA's goal of providing an efficient alternative forum to courts.[20] The new federal rules did not undergo the lengthy, careful, deliberative, and balanced process that characterizes modern contract law such as the Restatement Second of Contracts or Article 2 of the UCC.[21] Further, the federal rules are categorical and indifferent to contractual outcomes, even in non-bargained-for transactions where alternative terms are unavailable.[22] As

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[16] 9 U.S.C. § 2 (preserving all state defenses to enforcement).

[17] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011).

[18] The Court's broad obstacle preemption doctrine for the FAA rejects any rule that is viewed as inconsistent with the goals of the statute. *See* Blankley, *supra* note 3 at 740–48.

[19] PRIDGEN & MARSH, *supra* note 1, at 47–48 (concluding that federal arbitration law is the most harmful and controversial development for consumers because it robs them of their substantive remedies).

[20] *See Concepcion*, 563 U.S. at 348–51 (rejecting class arbitration as too formal and risky for businesses and the FAA).

[21] The First Restatement of Contracts took nine years of careful drafting and revising before agreement on substantive rules could be reached. *See* Arthur L. Corbin, *The Restatement of the Law of Contracts*, 14 A.B.A. J. 602, 603–05 (1928). The Second Restatement was the subject of 19 years of drafting and editing to account for disagreements and criticism. *See* Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 598 (1969); E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 5 (1981). Article 2 of the UCC was the product of 12 years of careful, nonpartisan, and systematic work. Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1098–99 (2002).

[22] Consumers and workers not only lack bargaining input, they also lack alternative contracting partners because arbitration rules tend to be industry-wide. PRIDGEN & MARSH, *supra* note 1, at 47 (noting that in many transactions businesses will not deal with consumers unless the arbitration rules are accepted, and that consumers have no real choice, particularly in cases where "the arbitration provision has swept the industry"); *see also* Ting v. AT&T, 182 F. Supp. 2d 902, 914 (N.D. Cal. 2002) ("AT&T is not the only long distance provider who has attempted to include legal remedies provisions containing a mandatory arbitration clause in its agreement with customers. MCI, Sprint, Qwest and Working Assets Long Distance (among other companies) have also sought to impose similar provisions. The long distance providers who have imposed substantially similar legal remedies provisions have a combined market share of well over 65% of

such, they transcend modern contract law's incorporation of judicial discretion and equitable principles into the parties' bargain on the premise that the speed, lower cost, and informality of bilateral arbitration outweigh the risk that substantive rights may be lost.[23]

An evaluation of the special federal rules for arbitration contracts shows how they treat adhesive contracts as bargained-for exchanges, deny judicial discretion to interpret contract terms, freeze defenses to enforcement, and permit the loss of substantive rights.[24] This Article shows how the federal rules are sensitive to businesses' interest in cutting costs, yet insensitive to consumers' interest in realizing their contractual and legal remedies.[25] It shows that federal arbitration contract law creates market imbalance by allowing the drafting party to shift its contractually and legally-imposed risks to consumers, workers, and federal and state treasuries. However, reliable empirical data refutes the assumptions that undergird the federal rules. Comprehensive studies and the experience of arbitrators and arbitration forum providers show that mandatory arbitration contracts destroy the utility of the FAA by denying consumers and workers their arbitral forum and legal remedies. The data now shows that bilateral arbitration creates a phantom forum, thereby threatening the FAA's vitality and the effectiveness of state and federal laws that remediate unfair or deceptive practices and provide a minimum adequate remedy for breach of contract.

Part I begins with a description of the constitutional contours for making federal common law and highlights the restraint that is generally exercised by federal

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all California long distance customers."); Nicholas S. Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMP. L.Q. 172, 174 (1965).

[23] *See Concepcion*, 563 U.S. at 341 (holding that the FAA mandates enforcement of class action bans even if this results in small-dollar claims going unremedied).

[24] For example, the Court presumes that both parties have the power to design the arbitration process to suit their needs. *Id.* at 344. Yet parties are not permitted to contract for judicial review of an arbitrator's legal errors. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008). Further, judges do not have interpretive flexibility to decide whether the arbitration clause is severable from the underlying contract because such clauses are now per se independent contracts. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). Judges also are not allowed to evaluate the deterrence effects of restrictive procedural provisions in arbitration contracts and their ultimate impact on the vindication of legal rights. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311–12 (2013).

[25] The Court has been candid about protecting businesses from litigation risks and costs via its arbitration rules and safeguarding their reliance interests that are predicated on FAA precedents. *See Concepcion*, 563 U.S. at 350 (concluding that class arbitration, which is beneficial to consumers and workers, increases liability risks of corporations and may be unilaterally banned in arbitration contracts). Even Supreme Court Justices who believe the FAA does not apply in state courts have supported an ever-expanding view of the FAA on the premise that businesses have relied on the FAA precedents to adopt and broaden arbitration policies. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283–84 (1995) (O'Connor, J., concurring) (stating that increased reliance on arbitration persuaded her to support a wrongly decided FAA precedent).

courts in this regard. Part II distills the Court's FAA precedents into discrete rules of contractual liberty, consideration, interpretation, and defense, and shows how they depart from state rules that were ratified by the FAA. Part II also shows how the federal rules accommodate contractual oppression. Part III uses empirical and experiential data to show that mandatory arbitration contracts create a phantom forum, facilitate waiver of substantive rights, and deprive adherents of their remedies for breach. Part IV makes the case for crafting contract rules at the state level. It shows how states have struggled to craft acceptable contract rules in a world where bargaining is rare for consumers and workers. Part IV also argues that public law control of contract remedies is vitally important, particularly for adhesion contracts with material terms embedded as arbitration rules. It concludes that market forces do not incentivize the drafting of contracts that further the foundational principle that a minimum adequate remedy must be available for breach.[26]

I. CONSTITUTIONAL CONTOURS FOR FEDERAL CONTRACT LAW

Contract law is generally understood as common law rules developed by state courts and supplemented by state statutes designed to address particular types of transactions and contracting parties.[27] Although it has a state-based pedigree, contract law has evolved around national commercial developments that promote economic growth.[28] Nineteenth-century economic developments provided the impetus

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[26] *See infra* Part IV.

[27] For the general rule on controlling substantive law, see Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that unless preempted, state law establishes the rules of decision). In the specific case of contractual disputes, see First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (noting that state law principles are used to decide whether parties agreed to arbitrate); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (stating that state law controls the interpretation of private contracts). State laws are generally tailored to the types of parties contracting and the nature of the provisions they agree to. *See* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 537–40 (1967) (noting that consumer laws have always singled out certain contract clauses for regulation, and that the UCC's provision on unconscionability targeted for special regulation, merchants and mass sales, or non-bargained transactions); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1141–48 (1985) (noting that special rules were crafted for merchants in the UCC with recognition that laypersons needed greater protection than bargainers operating at arm's length).

[28] For example, the widely accepted and dominant principle that contracts are devices for effectuating the intention or will of the parties is traceable to the emergence of the free market economy. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 400–02 (1979) ("[T]he equation of general principles of contract law with the free market economy led to an emphasis on the framework within which individuals bargained with each other, and a retreat from interest in substantive justice or fairness."); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 201 (3d ed. 1979) (observing that national markets which

for emphasizing the parties' promises or "will," and deemphasizing the role of judges in fairly adjusting rights.[29] But by the mid-20th century, commercial developments facilitated the reintroduction of equitable principles and a substantive role for judges, although the parties remained free to narrowly express their will.[30] With the advent of the Restatement Second of Contracts[31] and Article 2 of the UCC,[32] the states embraced a new model of contract regulation. Unless specifically disclaimed by the parties, implied-in-law terms, trade usage, and principles of equity are also

required uniform and standardized rules led to legal formalism that disguised gross bargaining inequalities in order to promote commercial interests); Morris R. Cohen, *The Basis of Contract Law*, 46 HARV. L. REV. 553, 555–56 (1933) (noting that wider or national markets for goods led to greater reliance on promises). A more recent example of the law's response to commercial developments is the passage of a federal E-sign law to address the dramatic growth of electronic commerce. 15 U.S.C. § 7001 (2000). Although commercial law is typically the domain of the states, the rapid growth of electronic commerce made state laws outdated before they could act. States soon followed the federal lead with their own electronic records and signatures laws that were modeled after the federal version. JOHN E. MURRAY, JR. & HARRY M. FLECHTNER, SALES, LEASES AND ELECTRONIC COMMERCE 83–85 (4th ed. 2013).

[29] For example, the shift away from face-to-face contracting and the growth of executory contracts provided an impetus for the adoption of liberty of contract doctrine and a more limited application of equitable principles to the parties' agreement. HORWITZ, *supra* note 28, at 160–61; *see also* P.S. ATIYAH, *supra* note 28, at 408 ("The autonomy of the free choice of private parties to make their own contracts on their own terms was the central feature of classical contract law."). The promulgation of Restatement rules and the UCC, and their adoption by state courts, reflected the need for new rules tailored to parties' expectations and trade practices. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1403 (2014) (noting that the UCC, for example, was a response to the reality that business practices evolve); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766–68 (2002) (discussing the formalism of classical contract law and how the Restatements and UCC transcended rule-based doctrine by incorporating equitable principles); *see also* Hyundai Motors Am., Inc. v. Goodin, 822 N.E.2d 947, 948 (Ind. 2005) (holding that Indiana common law will no longer require vertical privity for breach of warranty claims because goods are typically now sold to buyers through intermediaries, and this has eroded the premise that risk allocation is best left to the contracting parties).

[30] *See* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 870 (1978) (noting that modern contract rules (also referred to as "neoclassical contract law") retain a structure similar to the classical period with its emphasis on individual contractual liberty). During the 19th century or classical period, rules of offer, acceptance, consideration, and canons of construction were designed primarily to enforce the parties' intent or "will," versus ensuring that the parties exchanged equivalent value. HORWITZ, *supra* note 28, at 160–61, 181. For a critique of will theory and a discussion of other perspectives, see generally Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94 (2000); *see also* Cohen, *supra* note 28, at 575–77, 584 (arguing that will theory is fictional because judges supplement the bargain to distribute gains and losses based on equitable principles).

[31] RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981).

[32] U.C.C. § 2 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

part of the agreement, thereby expanding the judicial role in policing "the bargain" and granting remedies.[33] The 20th century also saw a rise in consumer and workplace regulations designed to protect workers and consumers who have lost their bargaining liberties.[34] Neoclassical rules made a minimum adequate remedy the essence of contracting.[35]

At its core, neoclassical contract law is built upon the parties' contractual liberties. Although consumers and workers have few bargaining liberties, contract law gives the party determining the contract's terms significant control of both the risks associated with the deal and the remedies available to the adherent. For example, firms can structure the sale of their products and services to significantly limit remedies in the event of breach.[36] This broad liberty to shift risk gives firms tremendous control over the limited economic resources of most consumers and workers. New

[33] Modern contract law seeks to balance the virtues of contractual liberty with principles of trust, fairness, and cooperation and therefore incorporates rules to protect reliance interests and prevent unjust enrichment. Daniel P. O'Gorman, *The Restatement (Second) of Contracts' Reasonably Certain Terms Requirement: A Model of Neoclassical Contract Law and a Model of Confusion and Inconsistency*, 36 U. HAW. L. REV. 169, 254–55 (2014). For oppressive bargains, the doctrine of unconscionability serves as a defense under both the common law and the UCC. *See* Fleming, *supra* note 29, at 1386–90 (noting that the doctrine was obscure prior to World War II and is most commonly used now to police arbitration contracts); John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 931–36 (1969) (reporting that the doctrine of unconscionability was first used as a defense to contract abuse and arguing that it aids liberty of contract for non-bargained transactions in addition to protecting the public's interest in the integrity of the bargaining process). Furthermore, contract law does not allow powerful bargainers to exempt themselves from damages for breach. *See generally* Whitesell Corp. v. Whirlpool Corp., 496 F. App'x 551 (6th Cir. 2012) (holding that contractually agreed remedy limitations must be reasonable and minimum adequate remedies are the essence of contract law). Section 2-718 of the UCC voids contractually agreed upon liquidated damages that are unreasonably large and § 1-103 retains the equitable principle of promissory estoppel. U.C.C. §§ 2-718, 1-103.

[34] PRIDGEN & MARSH, *supra* note 1, at 3–9 (discussing the emergence of consumer protection laws in the 1960s and 1970s as a departure from the doctrine of caveat emptor to protect consumers from deceptive and unfair practices). Federal laws protecting vulnerable workers include the National Labor Relations Act, 29 U.S.C. §§ 151–169 (providing protection for workers who engage in union and concerted activities); the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (giving covered workers minimum wage and overtime protections); and the Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e (2012) (prohibiting employment discrimination based on race, sex, color, religion, or national origin).

[35] U.C.C. § 2-719 cmt. 1 ("[I]t is the very essence of a sales contract that at least minimum adequate remedies be available."). In the employment context, the Court has long held that contractual waiver of an employee's minimum wage remedy is not permitted. *See* Brooklyn Savs. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945).

[36] Contract law generally permits the parties to exclude consequential damages, disclaim warranties, provide for limited remedies, and liquidate damages. U.C.C. §§ 2-316, -718, -719.

federal rules now expand this contractual prerogative and serve as an effective barrier to the enforcement prospects of adherents.

A. The Exceptional Circumstances Requirement for Federal Common Law

Creating federal common law in any area is generally grounded in special national considerations.[37] The field of contracts is no exception. Outside of the specialized federal common law developed by government agencies, the Court of Claims, and federal courts to govern contracts made with the federal government,[38] contract law is essentially the domain of the states.[39] Invading this state right when no federal interest is clearly expressed in constitutional or statutory law has few precedents.[40]

Federal common law remains the exception, not the general rule. Since the Court's decision in *Erie Railroad Co. v. Tompkins*,[41] it is generally accepted that federal jurisdiction by itself is not enough to support federal common law.[42] The

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[37] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1247–50 (1996) (discussing the Court precedents that limit federal common law to certain enclaves and defining federal common law as judge-made rules that cannot be traced to a federal or constitutional command); Michael C. Harper, *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL L. REV. 1281, 1283 (2015) (noting that federal common law serves a gap-filling function); *see also* United States v. Kimbell Foods Inc., 440 U.S. 715, 717 (1979) (holding that a federal purpose that requires a uniform law generally drives the creation of federal common law).

[38] *See* Michael F. Saunders, Note, *Federal Contract Common Law and Article 2 of the Uniform Commercial Code: A Working Relationship*, 20 B.C. L. REV. 680, 685–95 (1979) (discussing the body of federal common law that was developed to protect the federal interests that are implicated in public contracting).

[39] Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, 136 S. Ct. 1562, 1568–69 (2016) (holding that there is no federal jurisdiction for a cause of action brought to enforce state contract law); Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (holding that state law governs the validity, revocability, and enforceability of FAA contracts); Patterson v. McLean Credit Union, 491 U.S. 164, 183 (1989) (holding that contract law is state law that federal courts should ordinarily not federalize).

[40] *See* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 473 (2015) (Ginsburg, J., dissenting) (noting that it is extremely rare for the Court to second guess a state court's application of state law to a contract).

[41] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[42] *See* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 659 (2013) (explaining that while the Court in *Erie* did not establish an explicit prohibition against federal common law, applying it becomes problematic for federal courts when there is no constitutional basis for its application); *see also* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421 (2011) (noting that in addition to federal jurisdiction, federal courts need authorization from Congress or the Constitution to fashion federal common law); Sosa v. Alvarez-Machain, 542 U.S. 692, 744 (2004) (Scalia, J., concurring) (explaining that federal courts are precluded from creating federal common law unless given explicit authorization);

Tenth Amendment provides the states with spheres of interest,[43] and *Erie* confirmed that the federal government is one of limited power that should not infringe on state interests unless there is a strong federal interest or policy at stake.[44] Prescribing contract rules has always been a core state interest,[45] and states have traditionally evolved

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Geoffrey C. Hazard, Jr., *Has the* Erie *Doctrine Been Repealed by Congress?*, 156 U. PA. L. REV. 1629, 1633 (2008) (noting that federal courts must apply state law in diversity cases as directed by *Erie*); Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 425–42 (2004) (discussing *Erie* and subsequent Court precedents establishing the contours of federal common law but noting that the Court does not always follow the rules it established for making federal common law); Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1161 (2016) (noting that the *Erie* Doctrine mandates that state law trumps federal interests unless those interests have been codified by Congress).

[43] Shelby County v. Holder, 133 S. Ct. 2612, 2616 (2013) (noting that all power not expressly given to the federal government is reserved for the states); Bond v. United States, 564 U.S. 211, 225 (2011) (explaining that the Tenth Amendment expressly limits the power of the national government and prohibits impermissible interference with state sovereignty); Printz v. United States, 521 U.S. 898, 923 (1997) (noting that the Tenth Amendment stands for the principle that unless expressly authorized, the national government may not intrude on state sovereignty); *see also* Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1566 (1994) (noting the Tenth Amendment serves as a shield protecting areas of governance that would otherwise fall under the Commerce Clause); Katherine A. Connolly, Note, *Who's Left Standing for State Sovereignty?: Private Party Standing to Raise Tenth Amendment Claims*, 51 B.C. L. REV. 1539, 1540 (2010) (noting that for nearly 200 years, the Tenth Amendment stood as a substantive barrier to protect states from federal overreach); Richard T. Cosgrove, Comment, Reno v. Condon: *The Supreme Court Takes a Right Turn in Its Tenth Amendment Jurisprudence by Upholding the Constitutionality of the Driver's Privacy Protection Act*, 68 FORDHAM L. REV. 2543, 2546 (2000) (noting that the principles of federalism embodied in the Tenth Amendment impose substantive limitations on federal laws to prevent upsetting the balance of power between the federal and state governments).

[44] Richard L. Barnes, Prima Paint *Pushed Compulsory Arbitration Under the* Erie *Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1, 24 (2007) (noting that cases such as *Buckeye Check Cashing, Inc. v. Cardegna* defy *Erie* and matters of state law will now turn on a federal court's interpretation of state contract law); Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 242 (2005/06) (explaining that under the *Erie* doctrine, federal courts are required to apply state substantive law unless a matter of federal law is at issue); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y, 129, 137–38 (2004) (noting the authority of Congress to restructure state dispute resolution exists in only a handful of cases where state procedures impair a federal substantive claim).

[45] *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, 136 S. Ct. 1562, 1568–69 (2016) (declining federal jurisdiction because plaintiff's cause of action was brought to enforce state contract law and not federal law); Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (noting that state contract law governs issues concerning the validity, revocability, and enforceability of contracts generally); Patterson v. McLean Credit Union, 491 U.S. 164, 183 (1989) (explaining that contract law is traditionally a state prerogative and federal courts should be "reluctant to federalize" state common law); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22,

their contract regulations to deal with emerging practices, or commercial developments,[46] and in particular, the problem of contractual overreaching.[47]

It is generally accepted that federal common law should be crafted in narrow circumstances.[48] Outside of cases where there is clear authorization to make federal

36 (1988) (Scalia, J., dissenting) (noting that contract law is almost always left for the states to develop); *see also* Traci L. Jones, *State Law of Contract Formation in the Shadow of the Federal Arbitration Act*, 46 DUKE L.J. 651, 663 (1996) (noting that contract law is generally the domain of the states and the proposition of federal contract law is amorphous).

[46] For example, Virginia legislated special formation rules for insurance contracts by specifying font size and requiring separate paragraphing for clauses that exclude verbal modifications. VA. CODE ANN. § 11-4 (2019). Similarly, West Virginia adopted the doctrine of impracticability into its common law to give judges more enforcement flexibility than the doctrines of impossibility or sanctity of contracts did. Waddy v. Riggleman, 606 S.E.2d 222, 228–30 (W. Va. 2004). During the 19th century, states embraced the rule of caveat emptor as more in tune with the principle of judicial non-interference with the substantive terms of the deal. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 945–46 (1974). Modern law has rejected the doctrine. *See* Trisler v. Carter, 996 N.E.2d 354, 357 (Ind. Ct. App. 2013); Vetor v. Shockey, 414 N.E.2d 575, 576 (Ind. Ct. App. 1980); *see also* Ronald J. Gilson et al., *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 171 (2013) (noting that contract law is a broad cohesive body of law that flexibly adapts to substantial variations and changes in commercial practices).

[47] The doctrine of unconscionability was part of the common law tradition and its importance was confirmed when the states statutorily embraced its incorporation into the UCC. *See* Wille v. Sw. Bell Tel. Co., 549 P.2d 903, 905–06 (Kan. 1976) (noting that the doctrine was utilized by common law equity courts and gained its "greatest impetus when it was enacted as part of the Uniform Commercial Code"). Earlier decisions that embraced the doctrine include the *Campbell Soup* case in which the court declined specific performance because the contract was "too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience." Campbell Soup Co. v. Wentz, 172 F.2d 80, 83 (3d Cir. 1948); *see also* Sanchez v. Valencia Holding Co., 353 P.3d 741, 748 (Cal. 2015); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86–87 (N.J. 1960) (finding a manufacturer's disclaimer of implied warranties unconscionable in a car sale transaction where the buyer had no bargaining input or alternative with respect to car warranties); Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 918 (N.J. Super. Ct. Ch. Div. 2002); Montgomery Ward & Co. v. Annuity Bd. of the S. Baptist Convention, 556 P.2d 552, 555 (Wash. Ct. App. 1976); Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen*,* Rent-A-Center*,* Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 367–80 (2011) (noting that the Court's FAA jurisprudence has greatly limited state courts' traditional role in policing overreaching in arbitration agreements, most notably their use of the doctrine of unconscionability).

[48] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 421 (2011) (explaining that federal courts can develop federal common law either when directed to do so by Congress through legislation or when the Constitution grants them that authority); Sosa v. Alvarez-Machain, 542 U.S. 692, 741 (2004) (Scalia, J., concurring) (noting that federal courts should apply federal common law only in "few and restricted" circumstances); Atherton v. Fed. Deposit Ins. Corp., 519 U.S. 213, 219 (1997) (noting that the instances in which federal courts may create federal common law are few and far between); Tex. Indus., Inc. v. Radcliff Materials Inc., 451 U.S. 630,

common law, there must be some federal policy that serves as the driving force for the adoption of a federal common law rule.[49] Such federal rules can be crafted from extant state law, Restatement principles, or other sources, to the extent that they are consistent with federal policy.[50] In any event, state rules are not to be displaced lightly,[51] particularly if there is no national interest in uniformity.[52]

1. The Labor Law Exception (Interpreting the LMRA)

Only once in the Court's history did it craft such broad rules of preemption in the field of contracts. In *Textile Workers v. Lincoln Mills*, the Court ruled that Congress wanted a uniform rule for labor contract enforcement under the Labor Management Relations Act ("LMRA")[53] because that statute prioritized the parties' dispute resolution mechanism.[54] Section 173(d) of the LMRA provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[55] Section 185 of the LMRA gives federal courts jurisdiction to decide suits alleging breaches of labor contracts but provides no substantive law to govern such suits.[56] The Court decided

640 (1981) (noting that the enclaves of federal common law "fall essentially into two categories: those in which a federal rules of decision is necessary to protect uniquely federal interests . . . and those in which Congress has given the courts the power to develop substantive law" (citations omitted)); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 2 (1985) (noting that the federal judiciary still has an important role to play in developing common law, but its attention is primarily focused on lawmaking through a non-interpretive approach).

[49] *See Am. Elec. Power Co.*, 564 U.S. at 21 (noting the limited circumstances in which federal courts are given the authority to fashion federal common law); *Atherton*, 519 U.S. at 219 (noting federal courts have the authority to fashion common law if there is a significant conflict between a strong federal interest and state law); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 585–86 (2006) (noting that notwithstanding the Court's holding in *Erie,* federal common law still exists in certain areas, such as cases affecting the rights and obligations of the United States, disputes between states, and cases affecting international relations).

[50] *See generally* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (utilizing various sections of the Restatement of Agency for guidance in formulating federal common law).

[51] For example, the Court articulated a national interest in promoting the peaceful settlement of labor disputes as justification for the creation of federal common law under the LMRA. *See* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S 448, 450–56 (1957).

[52] *See* O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 87 (1994) (cautioning that federal common law may not be necessary even if a federal interest is implicated).

[53] *Lincoln Mills*, 353 U.S. at 448.

[54] *Id.* at 455.

[55] Labor Management Relations Act, 29 U.S.C. § 173(d) (2012).

[56] *See id.* § 185(a) ("Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States

in *Lincoln Mills* that the purpose of the LMRA was to avoid strikes or labor strife, and a labor contract's arbitration provision is the quid pro quo for a union's promise not to strike.[57] As a consequence, a uniform rule enforcing the promise to arbitrate would better prevent disruptions in commerce than state laws that did not enforce executory contracts to arbitrate.[58]

The LMRA carves out a significant mediator role for the federal government when private labor disputes threaten to disrupt commerce.[59] The statute promotes collective bargaining and endorses labor arbitration by emphasizing the desirability of the parties' dispute resolution process.[60] Although the LMRA did not expressly state that federal substantive law governs labor contract enforcement, the Court rejected state common law formulations that did not promote the federal interest in voluntary peaceful resolution of disputes.[61] The Court concluded that there was no constitutional limitation on fashioning federal rules for labor contracts even in the absence of express Congressional authorization or a cloudy legislative record.[62] If no express federal statutory rules could be found, the Court decided that state law could be absorbed as federal law, to the extent it was compatible with the purpose of section 301.[63] Otherwise, federal courts must fashion federal rules.[64]

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having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."). In *Lincoln Mills* the Court ruled that section 185 (formally Section 301) not only gave federal courts jurisdiction, but it also authorized them to make federal common law for the enforcement of collective bargaining contracts. *Lincoln Mills*, 353 U.S. at 448. To avoid the Article III problem, the Court ruled that litigation under Section 185 is a federal question so the law governing section 185 suits is federal law. In an instant, the Court was able to create a federal law of specific performance for contracts to arbitrate labor disputes, thereby rejecting the common law rule that denied specific enforcement of executory contracts to arbitrate. *Id.*

[57] *Lincoln Mills*, 353 U.S. at 455.

[58] *Id.* This was a turnaround for the Court because only two years earlier, the Court ruled that Section 185 created no federal substantive right but only a federal forum to enforce state laws. *See generally* Ass'n of Westinghouse Salaried Emps. v. Westinghouse Elec. Corp., 348 U.S. 437 (1955).

[59] *See* 29 U.S.C. § 172(a) (creating a federal agency known as the Federal Mediation and Conciliation Service); *id.* § 173(a) (providing that the duty of that agency is "to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation").

[60] *Id.* §§ 172(a), 173(d).

[61] In *Lincoln Mills* the Court interpreted the federal jurisdictional grant in section 185 of the LMRA to resolve labor contract disputes as Congressional authorization to fashion federal law consistent with the national policy of reducing industrial strife. *Lincoln Mills*, 353 U.S. at 448.

[62] *Id.* at 455–57.

[63] *Id.* at 457.

[64] *Id.*

After the *Lincoln Mills* decision, a variety of federal common law rules were crafted to govern labor contract enforcement and specifically the arbitration provisions in such contracts.[65] For example, the Court ruled that labor arbitration clauses should be read broadly, and arbitral awards generally should be deferred to;[66] that labor contracts and their arbitration clauses can bind non-consenting successor firms;[67] that workers' contractual rights may survive after contract expiration;[68] and that arbitral awards that contain factual or legal errors are nonetheless enforceable.[69] This body of federal common law became the accepted basis for labor contract enforcement.[70]

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[65] Having surmounted the Article III hurdle, the Court subsequently crafted a body of federal law for labor arbitration agreements that modified or rejected common law rules of contract interpretation and enforcement. The Court declared that labor contracts are unlike commercial contracts because they are codes of industrial self-government, and this justified special federal rules. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960). To further the national policy of private resolution of labor disputes, the Court ruled that labor arbitration contracts should be read broadly to cover the dispute in question, and doubts should be resolved in favor of coverage. *Id.* at 583. Further, arbitrators must be given broad flexibility when they interpret labor contracts, and their findings should not be disturbed as long as they draw their essence from the contract. *See* United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960). Contractual rights could survive even after a contract expired. *Id.* at 594; John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555 (1964). The Court also crafted broad rules of enforcement even when an arbitrator misinterprets the contract or makes factual or legal errors. *Id.* at 546; *Enter. Wheel & Car Corp.*, 363 U.S. at 593. It has been argued that *Lincoln Mills* is a disingenuous legal fiction for inferring congressional intent to gap fill section 185 of the LMRA. *See* Rosenberg, *supra* note 42, at 436–37.

[66] United Steelworkers v. Am. Mfg. Co., 363 U.S. 564, 567 (1960) (holding contrary to state rules that arbitration should be ordered even if it is questionable that the arbitration clause covers the dispute); *Enter. Wheel & Car Corp.*, 363 U.S. at 599 (holding that an arbitral award is enforceable even if a reviewing court disagrees with the arbitrator's interpretation of the contract).

[67] *John Wiley & Sons*, 376 U.S. at 550 (concluding that a new federal common law grounded in policy considerations that favors arbitration bound a non-consenting successor to an arbitration contract).

[68] Nolde Bros. v. Bakery & Confectionary Workers Union, 430 U.S. 243, 255 (1977) (holding that a strong federal policy supporting a presumption of arbitrability supports requiring labor contract parties to arbitrate disputes arising under the contract even if the contract has expired); *see also* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 209 (1991) (refining the presumption of arbitrability and noting that the presumption is not absolute).

[69] The Court concluded that special federal rules for vacatur were necessary for labor arbitration awards because labor strife and disruptions of commerce were likely if unions and companies could readily challenge the award in court. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37–38 (1987).

[70] FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 1 (8th ed. 2016) (noting that unions, employers, and the public regard labor arbitration as an effective mechanism for avoiding work stoppages).

2. Analogizing the FAA to the NLRA

The Court's approach to the FAA is eerily similar to its LMRA precedents even though the FAA preserved state law. Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[71]

Although the FAA did not make arbitration contract enforcement a federal question, nor did it specify that federal law governs such contracts, the Court concluded that because the FAA originated in Congress's Article I powers, federal law could be made to govern the enforcement of commercial contracts to arbitrate.[72]

Tying the FAA to the Commerce Clause provided a constitutional basis for federal common law.[73] More recently, this federal common law expanded dramatically to preempt most state rules.[74] The importance of new federal contract laws for arbitration has been magnified by the rapid growth of arbitration and the practice of incorporating the legal rights of consumers and workers in arbitration contracts.[75]

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[71] United States Arbitration Act, 9 U.S.C. § 2 (2012).

[72] In *Prima Paint*, the Court interpreted the section 2 mandate of the FAA to enforce contracts to arbitrate as a congressional signal to craft federal law to govern arbitration contracts. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404–05 (1967); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (concluding that the FAA does not create federal question jurisdiction, but that section 2 of the statute in effect creates "a body of federal substantive law of arbitrability").

[73] Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1321–22 (1985).

[74] *See id.* at 1338–47 (discussing the Court's expansive view that the FAA is substantive contract law that is binding on the states, and that federal courts can craft federal common law for the FAA even if state law does not discriminate against arbitration contracts). FAA preemption has been explained in a variety of ways to account for the Court's expansive view of the statute. *See, e.g.*, Blankley, *supra* note 3, at 711 (labeling the Court's preemptive view of the FAA "impact preemption" that is broader than field preemption with the potential to destabilize the contract rights of consumers and others who are subject to arbitration contracts); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1240–50 (2013) (noting that because the FAA is silent on the issue of preemption, the Court has looked to the objectives and purposes of the statute to trump state laws that advance legitimate state interests).

[75] Malin, *supra* note 15, at 23 (reporting the prevalence of arbitration clauses in consumer and employment relationships).

Because arbitration contracts are generally non-bargained,[76] and the procedures for resolving legal claims are now routinely wrapped into arbitration agreements, the federal rules take on special importance as adhesive and layered or rolling arbitration terms modify legal rights and practically eliminate legal remedies.[77] At the same time, FAA precedents have barred judges from exercising their traditional prerogative to apply state rules of formation, enforcement, and defense.[78] The result is a new legal regime that not only preempts state laws but also denies adhering parties their contractual remedies.

II. THE FEDERAL COMMON LAW OF ARBITRATION CONTRACTS

Making federal common law for FAA contracts began in earnest in the 1980s, even in the absence of a clear constitutional or statutory directive to do so.[79] Authority for federal rules have been inferred from statutory text, statutory structure,

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[76] Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 275–76 (1999) (noting that arbitration is basically a take-it-or-leave-it proposition for consumers and workers); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346–47 (2011) (acknowledging that adhesive arbitration contracts are the norm).

[77] Form contracting has been the commercial norm for some time now, and non-bargained transactions are generally regarded as economically beneficial for all parties. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–32 (1971) (noting that bargained transactions are historical relics and form contracts are driven by cost concerns); *see also* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006) (noting that high transaction costs and modest returns support the use of form contracts); David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 COLO. L. REV. 459, 461–62 (2014) (noting that although adhesion contracts have more onerous terms, they are efficient and translate into lower prices for consumers and higher wages for workers). However, the overreaching and oppression associated with form contracting has also been a source of concern. *See* Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 132–33 (2012) (arguing that the economic benefits of form contracts do not justify the oppression they impose on weak parties). In the context of FAA contracts, it has been argued that the harmful effects of form contracts have been overlooked by the Court. Horton, *supra*, at 463–64. *But see* Bebchuk & Posner, *supra*, at 827–29 (arguing that reputational concerns might deter overreaching or opportunistic behavior by powerful parties and noting that the doctrine of unconscionability has been ineffective at policing adhesion contracts).

[78] Matthew J. Stanford, *Odd Man Out: A Comparative Critique of the Federal Arbitration Act's Article III Shortcomings*, 105 CALIF. L. REV. 929, 945 (2017).

[79] *See* Blankley, *supra* note 3, at 711 (noting that Congress intended the FAA to be a procedural statute applicable in federal courts); 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, 100 (2006) (discussing the FAA decisions and showing how the Court recast the FAA into a substantive statute, as opposed to the procedural one originally intended by Congress in 1925); Stanford, *supra* note 78, at 945 (noting that Congress did not provide any substantive

statutory ambiguity or congressional silence.[80] And, although federal common law can either serve a gap-filling function for incomplete or indeterminate statutes[81] or provide national uniformity that promotes the even administration of justice,[82]

guidance when the FAA was passed, but recently the Court has introduced substance into an otherwise jurisdictional statute); Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in* Void Ab Initio *Contracts*, 86 MARQ. L. REV. 581, 590 (2002) (noting that the Court created a body of substantive law under the FAA).

[80] *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006) (explaining that the FAA applies in state court based on "Congress' broad power to fashion substantive rules under the Commerce Clause" (citations omitted)); Southland Corp. v. Keating, 465 U.S. 1, 14–16 (1984) (explaining that the phrase "involving commerce" in section 2 of the FAA was meant as a qualification that the FAA applies in state court, rather than as a procedural statute applicable only in federal court); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (calling section 2 of the FAA a "congressional declaration of liberal federal policy"); *see also* Nicholas Q. Rosenkranz, *An Unnecessary Choice of Law:* Volt*,* Mastrobuono*, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2263 (2002) (noting that the Court's broad view of the FAA intrudes on state law and federalizes contract law).

[81] Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 421 (2011) (explaining that federal courts can create federal common law to fill "statutory interstices"); Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) (explaining that federal courts can fashion federal common law rules in "interstitial areas of particular federal interest"); *see also* Abner J. Mikva & James E. Pfander, *On the Meaning of Congressional Silence: Using Federal Common Law to Fill the Gap in Congress's Residual Statute of Limitations*, 107 YALE L.J. 393, 408 (1997) (noting that the Court has endorsed the creation and development of federal common law in cases where Congress has failed to expressly provide the governing law); Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447, 1449 (1988) (noting that federal courts create federal common law in response to gaps in congressional statutes).

[82] Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 690 (2006) (explaining that federal courts have the authority to fashion federal common law when deciding issues of "national concern"); Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (citing uniformity as the primary rationale for displacing state law); United States v. Kimbell Foods Inc., 440 U.S. 715, 729–33 (1979) (citing the need for uniformity as an important consideration in the decision to displace state law with federal common law); United States v. Standard Oil Co., 332 U.S. 301, 310 (1947) (identifying the need for uniformity as part of the calculus in determining whether state or federal law will apply); Clearfield Tr. Co. v. United States, 318 U.S. 363, 367 (1943) (citing the desirability of uniformity to justify the creation of federal common law); *see also* Wendy B. Davis, *De Facto Merger, Federal Common Law, and* Erie*: Constitutional Issues in Successor Liability*, 2008 COLUM. BUS. L. REV. 529, 546 (2008) (noting that federal courts have created and applied federal common law to gap-fill statutes when Congress is silent, and uniformity is often the reason for doing so); Nilay Vora, *Federal Common Law and Alien Tort Statute Litigation: Why Federal Common Law Can (and Should) Provide Aiding and Abetting Liability*, 50 HARV. INT'L L.J. 195, 209 (2009) (noting that *Erie* did not displace the power of federal courts to create federal common law in areas where states have no business operating and where uniformity is necessary).

those justifications have not been offered for FAA contracts.[83] With no guidance from the FAA, the Court has formulated a variety of objectives for the statute that are consistent with bilateral proceedings, viewing class arbitration as fundamentally inimical to Congress's goals.[84] The Court has crafted a significant body of contract law based on a theoretical model of arbitration that does not exist in practice. This detachment from reality has produced contract rules that defy the parties' expectations and the well-considered neoclassical contract rules.

The Court has rationalized special rules for arbitration contracts on the premise that the arbitral forum is the parties' choice, that no substantive right is lost when the judicial forum is waived, and that individualized arbitration provides the parties with an informal, speedy, and less costly alternative to courts.[85] Based on these assumptions, the Court has crafted formation and interpretation rules that guarantee enforcement of bilateral arbitration contracts at any cost.[86]

The federal common law that governs arbitration contracts is quite distinct from its state law counterpart or neoclassical contract law. The federal common law's core-defining characteristic is its accommodation of contractual overreach. Although the Court has acknowledged that arbitration contracts are generally adhesive, its rules for the FAA reflect the formality of classical contract law with its deference to the parties' bargaining liberties.[87] However, the absence of bargaining, the use of

[83] The FAA rules are grounded in obstacle preemption, the most tenuous expression of congressional intent to displace state law. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (noting that the FAA does not evidence express or field preemption but preempts state laws that operate as obstacles to achieving congressional objectives).

[84] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011) (holding that informality is the principal objective of the FAA and that class arbitration's complexity frustrates that objective). In other cases, the Court has concluded that protecting the parties' contractual liberties, rather than speedy resolution of disputes, is the primary goal of the FAA. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685 (1996); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985).

[85] Mitsubishi v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985).

[86] *See id.* at 638–39.

[87] The Court insists that no substantive right is lost by the imposition of arbitration. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); *Mitsubishi*, 473 U.S. at 628. But evidence of unilaterally imposed arbitration procedures that prevent the realization of legal rights abound. In *American Express*, the Court considered and upheld a class action ban that made it practically impossible for small merchants to pursue their antitrust claims. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013). In *Concepcion*, the Court upheld a class action ban that made it economically impractical for consumers to proceed in arbitration. *Concepcion*, 563 U.S. at 333.

rolling or layered terms, and intricate or deceptive contractual practices make it difficult for consumers and workers to know, understand, or resist unfavorable arbitration terms.[88]

In 1925 when the FAA was enacted, contractual relationships were structured around the principle of bargained-for exchanges,[89] and this regime was well suited for the arm's-length bargainers the FAA regulated.[90] Now, FAA arbitration contracts

[88] Willis, *supra* note 7, at 78–90. Personal experience also teaches how difficult it is to understand and resist arbitration terms. In the course of buying two cars in recent years, I was confronted with arbitration terms by the finance managers of the dealerships. During negotiations with the sales representatives, no mention was made of arbitration. After an agreement was reached on a specific vehicle at a definite price, I was passed along to the finance manager who prepared and printed all contract terms for signing. In one case, the arbitration provision was printed on the sales invoice and the general manager said he had no power to remove it because, except for financial terms, the document was prepared by corporate headquarters. In the second case, the arbitration agreement was provided as a separate form along with other administrative forms such as the odometer reading, lemon law, registration, title application, and vehicle inspection. When I refused to sign the arbitration form, I was told I had no choice because it was required by the state. When I pointed out that there was no evidence that arbitration was a state requirement, I was told that arbitration was better for me because it would save me the trouble of going to court if a problem arose. Such hard and deceptive bargaining compound the reading and comprehension problems consumers already have. The absence of choice, even for those who read, has also been a longstanding problem. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

[89] The classical principle of judicial deference to individual contractual liberties dominated the legal landscape when the FAA was enacted in 1925. *See* C.M.A. McCauliff, *A Historical Approach to the Contractual Ties that Bind Parties Together*, 71 FORDHAM L. REV. 841, 854–55 (2002) (discussing the classical vision of arm's-length contracting parties, voluntarily exchanging promises, and its 20th century erosion to deal with commercial realities). Radical departure from the exclusive focus on the parties' promises came years later when the Restatement (Second) of Contracts and Article 2 of the UCC were drafted and adopted by the states. *See* MURRAY & FLECHTNER, *supra* note 28, at 39–40 (describing how a variety of UCC Article 2 provisions expanded the judicial focus beyond the parties' promises to include trade usage and implied-in-law terms). Judges also expanded the classical conception of bargaining by adopting Restatement rules that incorporated equitable principles into the deal. For examples of cases adopting the principle of promissory estoppel, see Vigoda v. Denver Urban Renewal Auth., 646 P.2d 900, 905 (Colo. 1982); Thom v. Thom, 294 N.W. 461, 464 (Minn. 1940); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274 (Wis. 1965).

[90] Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap "Sophisticated Parties" Too*, 2010 J. DISP. RESOL. 235, 236 (2010) ("[T]he Federal Arbitration Act was passed to allow parties negotiating at arms' length and with roughly equal negotiating power to contractually agree to resolve disputes quickly, efficiently, and with an expert decision maker."); *see also Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. on the Judiciary*, 68 Cong. 16, 21 (1924) (reporting that the FAA was not intended to apply to classes of individuals who were susceptible to overreaching); Amy L. Ray, *When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements*, 51 SMU L. REV. 441, 444 (1998) (noting the FAA was passed in 1925 in response to courts' hesitancy in

bind consumers and workers, even those represented by unions, although they do not have any input into the arbitration contract terms that regulate their contractual rights and legal remedies.[91] And as arbitration grows industry-wide, non-drafters have few alternatives when they seek employment, goods, information, or services.[92]

The prevalence of arbitration has revealed that contractual overreach is possible and likely when the relationship is adhesive. Powerful parties have sprung arbitration terms on their contracting partners when it would be burdensome or impractical to walk away from the deal.[93] Firms have also mandated unreasonably short statutes of limitation;[94] reserved the unilateral right to pick the arbitrator;[95] required distant forums that are costly and inconvenient;[96] imposed oppressive forum costs;[97] and denied statutorily prescribed remedies.[98] Observed abuses have led to state rules

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enforcing arbitration agreements that were voluntary entered into after arm's-length bargaining). Consumers and workers not only lack bargaining input, they also lack alternative contracting partners because arbitration rules tend to be industry-wide. Wilson, *supra* note 22, at 174.

[91] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 256, 271 (2009) (endorsing the power of unions to incorporate their members' individual rights into the arbitration clause of collective bargaining contracts on the premise that the benefits of unionism outweigh concerns about the sacrifice of such rights).

[92] Shuchman, *supra* note 5, at 129; Wilson, *supra* note 22, at 174.

[93] Penilla v. Westmont Corp., 207 Cal. Rptr. 3d 473, 482 (Cal. Ct. App. 2016) (finding that mobile home purchasers had "no real practical choice" except to sign a land rental agreement with an arbitration clause because they had already purchased a home or made a significant commitment to do so); Tompkins v. 23andMe, Inc., No. 5:13-cv-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014) (discussing an internet seller's terms of service that included an arbitration provision that the buyer did not have to view or accept prior to paying).

[94] Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 267 (3d Cir. 2003) (finding that a 30-day time limit to file a claim was unconscionable).

[95] Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 724 (N.D. Cal. 2012) (finding that a debt settlement company's contractual right to unilaterally select an arbitrator was unconscionable); Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So. 2d 779, 781, 783 (Ala. 2002) (finding that it was unconscionable for the vendor to have exclusive authority to select the arbitrator).

[96] Willis v. Nationwide Debt Settlement Grp., 878 F. Supp. 2d 1208, 1221 (D. Or. 2012) (holding that requiring a distant forum that the consumer could not access or pay for was against public policy).

[97] Pokorny v. Quixtar, Inc., 601 F.3d 987, 1004 (9th Cir. 2010) (holding that a contract that provided for arbitration and attorneys' fees and expenses to the prevailing party exposed plaintiffs to costs not endorsed by their statutory claim); *In re* Checking Account Overdraft Litig., 485 Fed. App'x 403, 406 (11th Cir. 2002) (finding that it was unconscionable for a bank to require the customer to pay its arbitration costs regardless of who prevailed); Schwartz v. Alltell Corp., No. 86810, 2006 WL 2243649, at *4 (Ohio Ct. App. June 29, 2006) (holding that a contractual preclusion of attorneys' fees was unconscionable when consumer law specifically authorized the award of fees).

[98] Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 83 (D.C. Cir. 2005) (holding that an agreement barring punitive damages was unenforceable); Ingle v. Circuit City Stores, Inc., 328

designed to limit the oppression facilitated by unilaterally drafted arbitration provisions.[99] But the federal common law does not incorporate the neoclassical endorsement of judicial flexibility to deal with lopsided bargains.[100] In addition to prioritizing the drafter's contractual liberties, the federal rules also restrict judges' interpretive discretion and limit their ability to apply rules that guarantee adherents their arbitral forum or substantive remedies. The examples that follow demonstrate the federal departure from neoclassical contract rules.

A. The Federal Concept of Contractual Liberty

The FAA was enacted to prohibit judicial hostility towards arbitration by enforcing contracts to arbitrate according to the contract's terms. The statute was not intended to interfere with the contracting parties' reservations about arbitration, their resistance to or distaste for certain features of arbitration, or their preference for judicial procedures over arbitration.[101] To that end, the FAA did not prohibit the states from regulating arbitration contracts on terms different from the FAA, nor did it prohibit the parties from renouncing the FAA or any part of it.[102] As such, the FAA does not exist in the abstract, uniformly enforcing arbitration contracts contrary to the will of the parties. The statute is activated when the parties choose to contract under it or when state rules operate to *deny the parties* their contractual

F.3d 1165, 1179 (9th Cir. 2003) (holding that a contractual limitation on remedies was unconscionable because it denied statutory remedies); *In re* Poly-America, L.P., 262 S.W.3d 337, 360–61 (Tex. 2008) (finding that it was unconscionable for the arbitration contract to eliminate two types of remedies available under the state's workers' compensation law).

[99] *E.g.*, Casarotto v. Lombardi, 886 P.2d 931, 935–36 (Mont. 1994) (noting that Montana legislated a conspicuous notice requirement for arbitration contracts in order to protect its citizens from arbitral oppression).

[100] State judges have historically relied on public policy or interpretive discretion to limit contractual oppression. *See* U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2010) ("This section is intended to make it possible for the courts to police explicitly against the contracts or clauses they find to be unconscionable."); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965).

[101] Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 303 (2010) (noting the uniqueness of the FAA's enforcement mandate because it "derives its legitimacy" from a contract in which the parties expressed their intent to arbitrate a particular dispute). The Court had previously highlighted the special character of FAA preemption in *Mastrobouno v. Shearson Lehman Hutton, Inc.*, where it indicated that private parties can contract for arbitration under a state law that diverges from the FAA's broad enforcement mandate. Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57–59 (1995).

[102] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

choice to arbitrate.[103] The FAA does not enforce arbitration contracts simply for the sake of enforcement.

Although arbitration is often a mandatory feature of adhesive consumer and employment contracts, the federal rules are premised on the parties having bargaining liberties. For example, in *AT&T Mobility v. Concepcion*, the Court rejected California's attempt to protect consumers from class action bans on the premise that it impinged on the parties' choice of an informal bilateral process.[104] In addressing their contractual liberties, the Court stated that the parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit with whom a party will arbitrate its disputes.[105] According to the Court, the parties can also choose to appoint a specialist or make the proceedings confidential.[106] In *14 Penn Plaza LLC v. Pyett*, the fiction of a bargain was repeated when the Court ruled that judges cannot interfere with the bargained-for exchange of arbitration between companies and unions.[107] But the Court was fully aware that unionized workers who must arbitrate disputes under collective bargaining contracts had no input in those contracts.[108] Similarly, in *Hall Street Associates, L.L.C. v. Mattel*, the Court stated that the parties are free to tailor the arbitral forum to suit their needs, such as by prescribing adjudicative procedures and choice of substantive law.[109] This theme of a voluntary bargain can also be seen in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, where the Court stated that "[a]rbitration . . . is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."[110] Because they "made the bargain to arbitrate," they should be held to it.[111]

This theory of bargain ignores the facts that adhering parties do not have input in such contracts and arbitrators cannot construe contractual silence on material terms as conferring rights on them.[112] In effect, adherents only have the liberty to

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[103] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348–51 (2011) (holding that a state law that prohibits class arbitration bans violates the FAA mandate to enforce the parties' agreement).

[104] *Id.* at 351–52.

[105] *Id.* at 345.

[106] *Id.* at 344–45.

[107] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009).

[108] *Id.* at 255–56.

[109] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008). Nonetheless, the Court ruled that the parties are not free to contract for judicial reviews of arbitral errors of law.

[110] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 469 (1989).

[111] This language comes from Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[112] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32–33 (1991) (holding that the absence of employee bargaining power is not a bar to enforcement); *see also* Stolt-Nielsen S. A. v.

do what they are told, and they are not even permitted to place checks in their contracts should the arbitration process malfunction. For example, in *Hall Street*, the parties contracted for judicial review of the arbitrators' errors of law, but the Court ruled that such review is not permitted by the FAA.[113] While limiting judicial review arguably promotes the arbitral virtue of expeditious resolution, it also runs contrary to the FAA's primary goal of enforcing the parties' choices. Judicial review for errors of law is the parties' presumptive right,[114] and an arbitration contract accommodates their prerogative to tailor judicial procedures to suit their needs.[115] In general, parties contracting for arbitration truncate judicial procedures to get the benefits of speed, informality, and economy, but nothing in the FAA requires that they forfeit their right to a legally sound result.

The FAA provides grounds for reviewing arbitration awards, and the Court has decided that those grounds are exclusive, irrespective of the parties' choices, although the FAA did not expressly state that its grounds for judicial review are exclusive.[116] The FAA did not seek to regulate the degree of formality the parties prefer, so to the extent that the parties fear that the arbitration process might malfunction, or that the arbitrator's facility with the law may be weak, they are presumably free to insert or insist on a limited judicial review process in their contract. It is their prerogative to decide if the arbitration process should resemble or be distinctly different from the judicial process. The FAA expresses no interest in limiting parties' contractual liberties with respect to judicial review,[117] so there is no federal interest in interpreting the FAA as imposing such a limit.

The restriction on the parties' ability to contract for limited judicial review is also curious because other modifications or adoptions of judicial procedures are en-

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Animalfeeds Int'l Corp., 559 U.S. 662, 685 (2010) (holding that contractual silence on class arbitration cannot be interpreted as consent to a class process).

[113] *Hall St. Assocs.*, 552 U.S. at 578.

[114] The FAA was enacted for the narrow purpose of *enforcing* the parties' contract to arbitrate, not to set the contours of it. *See* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 303 (2010) (explaining that the legitimacy of the FAA is governed by the contract to arbitrate).

[115] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344–45 (2011).

[116] The grounds for *vacatur* are:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone a hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any parties have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definitive award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)–(4) (2012).

[117] *Concepcion*, 563 U.S. at 350–51.

forced under the FAA. For example, courts do not deny enforcement when a reduced statute of limitations or limited discovery process is reasonable.[118] In fact, in many arbitration contracts, businesses exempt some or all of their claims from the arbitral forum, and in others they permit either party to go to court, thereby providing for the full panoply of judicial procedures in lieu of arbitration.[119] The decision to eliminate the parties' liberty to contract for judicial review for legal error removes their freedom to tailor the arbitration process to suit their needs and may also limit their ability to get substantive remedies.[120] This non-reviewability doctrine emanated in the collective bargaining context where professional bargainers contracted about terms and conditions of employment, not in the context of legal rights of consumers and at-will workers.[121] The federal rules are therefore flawed to the extent that they are grounded in the premise that the contract reflects an expression of contractual liberty.

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[118] *See, e.g.*, Jean v. Stanley Works, No. 1:04CV1904, 2008 WL 2778849, at *10, (N.D. Ohio July 14, 2008) (holding that a statute of limitations shortened to one year was not unconscionable); Sanders v. Comcast Cable Holdings, LLC, No. 3:07-cv-918-J-33HTS, 2008 WL 150479, at *12 (M.D. Fla. Jan. 14, 2008) (holding that an agreement reducing the statute of limitations from four years to one year is enforceable); Letourneau v. FedEx Ground Package Sys., Inc., No. 03–530–B, 2004 WL 758231, at *1 (D.N.H. Apr. 7, 2004) (enforcing a contractual 90-day statute of limitations); Hicks v. EPI Printers, Inc., 702 N.W.2d 883, 890 (Mich. Ct. App. 2005) (enforcing a statute of limitations shortened from three years to one year). Such reductions in the time for filing a claim have long been approved by the Supreme Court. *See* Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 608 (1947) ("[I]n the absence of a controlling statute to the contrary, a provision in a contract may validly limit, between the parties, the time for bringing an action on such contract to a period less than that prescribed in the general statute of limitations, provided that the shorter period itself shall be a reasonable period."). Examples of limitations on discovery that have been enforced include Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 655 (6th Cir. 2003) (limiting discovery of each party to 20 interrogatories and three depositions); Maples v. Sterling, No. 01-1359, 2002 WL 1291239, at *5 (W.D. Tenn. Apr. 22, 2002) (limiting discovery to essential and relevant documents and witnesses).

[119] Chin v. Boehringer Ingelham Pharm. Inc., No. 17-cv-03703-JSC, 2017 WL 3977381, at *6 (N.D. Cal. Sept. 11, 2017) (holding that a judicial carve-out to secure injunctive relief to prevent irreparable harm does not destroy mutuality of obligation); Hale v. First USA Bank, No. 00CIV5406JGK, 2001 WL 687371, at *6 (S.D.N.Y. June 19, 2001) (holding that reasonable judicial carve-outs are not unconscionable); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1536 (Cal. Ct. App. 1997) (holding that judicial carve-outs for businesses are fine provided there is a legitimate commercial need); Fuqua v. SVOX AG, 13 N.E.3d 68, 81 (Ill. App. Ct. 2014) (enforcing a contractual judicial carve-out for non-compete and confidentiality violations).

[120] *See, e.g.*, Peyovich v. World Mortg. Co., No. 6:08–cv–404–Orl–28KRS, 2010 WL 3516721, at *4 (M.D. Fla. July 29, 2010) (upholding an arbitral award although it denied plaintiff statutorily prescribed attorneys' fees).

[121] *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987) (limiting the grounds for judicial review of a labor contract to fraud by a party or dishonesty of an arbitrator).

B. The Federal Common Law Rule for Adhesive Arbitration Contracts

Both classical and neoclassical contract law is premised on the liberty of each individual to choose his contracting partner and to allocate the risks associated with the bargain.[122] To the extent that a party has no such liberty and must accept the terms of another, state and federal laws have evolved to prevent oppression.[123] Adhesion contracting is the antithesis of bargain theory, but such contracts have long proved their capacity to reduce transaction costs, and they are now the predominant mode of contracting.[124] However, neoclassical contract rules provide checks by permitting judicial scrutiny of overreaching.[125]

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court ruled that the absence of bargaining input does not impair the validity of an arbitration contract.[126] And in *American Express v. Italian Colors Restaurant*, the Court approved the contract drafter's inclusion of *any* term except those that *eliminate* substantive remedies. Terms that deter or frustrate the vindication of legal rights were ruled acceptable.[127] Although the Court treats arbitration contracts as arm's-length bargains, in practice dominant drafters decide all terms and can structure the agreement to evade their promises and regulatory obligations.[128] Drafters can remove consumers and workers

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[122] *See* McCauliff, *supra* note 89, at 854 (noting that even with modern contract's incorporation of equitable principles, the bargain theory of contracts remains prominent); *see also* MacNeil, *supra* note 30, at 870 (noting that the general structure of contract law remained intact despite the advent of neoclassical rules). The UCC also preserved the parties' contracting liberties by providing that its rules may be varied by agreement. U.C.C. § 1-302(a) (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[123] State law considers the identity of the parties or disparity in bargaining power in addition to the subject matter of the contract instead of simply deferring to the parties' promises. Donal Nolan, *The Classical Legacy and Modern English Contract Law*, 59 MOD. L. REV. 603, 615 (1996); *see also* PRIDGEN & MARSH, *supra* note 1, at 3–8 (detailing the evolution of a large body of federal and state laws to protect consumers from unfair and deceptive trade practices).

[124] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011) (noting that adhesion contracts have been the norm for some time); Kessler, *supra* note 88, at 632 (noting that form contracts not only protect the drafter from commercial and litigation risks but also benefit society by lowering prices through reduced transaction costs).

[125] *See* U.C.C. § 2–302 (codifying the doctrine of unconscionability); *see also* Sze-Beng Tang, *A Neoclassical Analysis of the Equitable Doctrine of Unconscionable Dealing*, 27 ADELAIDE L. REV. 227, 230 (2006) (noting the neoclassical embrace of the doctrine of unconscionability).

[126] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991); *see also* E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 222–25 (1990) (discussing the ebb and flow of the unconscionability doctrine during the 1970s and 1980s and noting its continued viability in the commercial context).

[127] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234–35 (2013).

[128] *Concepcion*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.").

from their judicial forum and make the arbitral forum economically unattractive or unavailable. Such freedom to circumvent contractual obligations and profit from it essentially allows one party to disclaim the remedies of the other even in the event of breach.[129]

The quest to ascertain the parties' contract and prevent overreaching, particularly in the context of non-bargained transactions, has been an ongoing challenge for courts, legislatures, and uniform law commissions. States have traditionally crafted rules in response to agile commercial and employment practices. As one judge observed, a state could, for example, prohibit the use of standard forms for software contracts.[130] The UCC's Article 2 provisions specifically target goods transactions for regulation.[131] Article 2 also singles out merchants for special regulation and provides different rules for consumers.[132] The doctrine of unconscionability was codified[133] and extensive warranty rules were crafted to protect consumers who increasingly bought goods via form contracts.[134]

This power of states to target particular contractual practices or parties for regulation has seldom been challenged.[135] Now arbitration contracts can be used to stifle the development of state law tailored to new arbitration contracting realities. The new federal rules expand the law of adhesion contracting by making it lawful for powerful bargainers to constrict most of the legal rights of weak parties by label-

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[129] Non-compliance with contractual promises and other legally prescribed obligations reflect a market failure that contract law seeks to prevent by enforcing promises that are express and also those implied in law. Whitesell Corp. v. Whirlpool Corp., 496 F. App'x 551, 554 (6th Cir. 2012) (holding that a contract provision that exempted one party for any performance or breach was not enforceable because having minimum adequate remedies is the essence of a sales contract).

[130] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996).

[131] U.C.C. §§ 2-105(1)–(2), -107(1)–(2) (AM. LAW INST. & UNIF. LAW COMM'N 2010).

[132] *Id.* § 2-104 (defining merchants); *id.* § 2-207(2) (jettisoning additional terms in an acceptance if the parties are not merchants).

[133] *Id.* § 2-302(1).

[134] *E.g.*, *id.* § 2-314 (imposing an implied warranty of merchantability on merchants who deal in goods of that kind); *see also* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (1976).

[135] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 473 (2015) (Ginsburg, J., dissenting) (noting that it is unprecedented for the Supreme Court to disturb the interpretation of a contract given by a state court); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 364 (2011) (Breyer, J., dissenting) ("[E]ven though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States."); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[B]ecause the states are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action.").

ing them "procedural" rights, even when such modifications have substantive impacts.[136] The Court has not addressed why the unilateral privilege to draft and impose terms should be allowed to frustrate the FAA's objective of providing the parties with an alternative forum of *their* choice with no loss of substantive rights. The unilateral power to draft contract terms now allows many breaches to go unchecked by making the filing of claims impractical. With no penalty for impermissible terms and no judicial review for arbitral errors of law, drafters are essentially able to deny adherents their legal remedies.

C. The Federal Concept of Consideration

The federal common law of consideration also diverges from state rules of consideration and mutuality of obligation. Under state common law, consideration is generally a requirement for contract validity.[137] Some exceptions to the consideration requirement have been approved by modern contract law to accommodate commerce or promote public policies. For example, courts have enforced promises by workers not to compete with their employers, even though their employers gave only illusory at-will employment for such promises.[138] But businesses must prove that legitimate commercial interests will be harmed in order to benefit from this exception.[139] Charitable subscriptions have been enforced on public policy grounds even when the charity provided no consideration.[140] Article 2 of the UCC has also dispensed with the requirement of consideration in its provisions on firm offers and modifications.[141] And although neoclassical contract rules do not require a propor-

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[136] CompuCredit Corp. v. Greenwood, 565 U.S. 95, 102 (2012) (holding that a statutorily prescribed judicial forum may be contracted away in favor of arbitration provided that "the guarantee of the legal power to impose liability . . . is preserved"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991) (holding that employees may contractually waive their statutory judicial forum as long as their substantive protections are preserved); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (holding that a contract to arbitrate only reflects a change from court procedures to arbitration rules). In effect, the adjudicatory forum is a procedural vehicle for enforcing substantive remedies.

[137] PERILLO, *supra* note 1, at 150 ("[T]he common law usually requires that promises be made for a consideration if they are to be binding.").

[138] *Id.* at 187 (noting that retention of an at-will employee for a reasonable time has been approved by some courts). But non-compete covenants imposed on low-wage workers could have the effect of preventing their mobility and denying other businesses their talent. Erik Larson, *WeWork Scraps Strict Non-Compete Deals in N.Y. Settlement*, BLOOMBERG (Sept. 18, 2018), https://www.bloomberg.com/news/articles/2018-09-18/wework-scraps-strict-non-compete-deals-in-n-y-settlement.

[139] PERILLO, *supra* note 1, at 571.

[140] *Id.* at 225–26.

[141] U.C.C. § 2-205, -209 (AM. LAW INST. & UNIF. LAW COMM'N 2010).

tional economic exchange, they provide checks on substantive trades that are extremely disproportionate.[142]

By contrast, the federal common law of consideration does not ask whether benefit is given to workers for their promise to arbitrate or whether any business interest or public policy justifies denying a judicial forum or class process.[143] The federal common law approves illusory at-will employment as consideration for a worker's promise to arbitrate,[144] but does not ensure that workers get the arbitral forum or its benefits of speed, lower cost, and informality.[145] It gives businesses the valuable prerogative to contract for bilateral arbitration and reduce the cost and risk of litigation but does not guarantee the arbitral forum or compliance with contractual promises and regulatory obligations.[146] Instead, consumers and workers receive the burden while contract partners get the benefits.[147] This departs from state law that requires a business justification for an exception to the consideration requirement. Firms are free to impose arbitration burdens at any time during the relationship, and no FAA rationale is provided for releasing businesses from the legal requirement of consideration.

D. The Federal Rules for Contract Interpretation

Questions of contract interpretation have historically been reserved to the states,[148] and this principle has been confirmed by the Court.[149] It is unprecedented

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[142] *Id.* § 2-302; RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

[143] Mutual promises to arbitrate are binding irrespective of whether arbitration is imposed over the will of one party, and arbitral procedures make it impractical to pursue claims. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[144] Alejandro v. L.S. Holding Inc., 130 F. App'x 544, 547 (3d Cir. 2005).

[145] The Court has ruled that it is the adherents' duty to prove that the steep costs of arbitration will prevent vindication of their claims. Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 82 (2000). Proof that arbitration costs make a claim not worth pursuing is not enough to prove you have lost your right to pursue your claim. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013).

[146] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

[147] Chris Opfer, *Lawmakers Want Harassment Cases Made Public*, BLOOMBERG L. (Dec. 6, 2017), https://news.bloomberglaw.com/daily-labor-report/lawmakers-want-harassment-cases-made-public ("Businesses and others often use [arbitration] agreements to cut litigation costs and avoid public attention, but worker advocates say the deals shield harassers and make it harder for victims to get justice.").

[148] Glassman, *supra note* 44, at 242 (noting that the *Erie* doctrine, requires federal courts to apply state substantive law unless a federal question is at issue); *see also* Kenneth F. Dunham, *Sailing Around* Erie*: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 208 (2006) (explaining that for nearly 60 years the Court confirmed that state law applies to arbitration agreements).

[149] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (noting that when deciding whether parties agreed to arbitrate, courts generally apply state law principles); *see also*

for the Court to reverse state courts' interpretive judgements.[150] However, the Court's broad view of the FAA has provided a basis for controversial federal rules of contract interpretation.[151] Faced with express contract language and other evidence contextualizing the agreement, judges normally attempt to discern the parties' intent and give it effect to carry out their contractual expectations.[152] The intent expressed at the formation stage is emphasized, but post-formation conduct and implied-in-law terms also contextualize the bargain.[153] But, under the FAA, judges are constrained when utilizing constructive conditions to deny enforcement of arbitration contracts.

1. Deciphering the Parties' Intent

DIRECTV v. Imburgia provides an example of the Court's approach to interpretation. In *DIRECTV*, the parties made a contract to arbitrate but provided that if the state law made class action bans unenforceable, then the entire arbitration contract would be void.[154] This was a form contract used in various states by the drafter DIRECTV, and DIRECTV knew that California law prohibited such

Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (explaining that the interpretation of private contracts is generally a question of state law).

[150] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 473 (2015) (Ginsburg, J., dissenting) ("[I]n the more than 25 years between *Volt Information Sciences* and this case, not once has this Court reversed a state-court decision on the ground that the state court misapplied state contract law when it determined the meaning of a term in a particular arbitration agreement.").

[151] *Id.* (noting that the Court's interference with a state court's application of state law is a "dangerous" decision); *see also* Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1155 (2015) (noting that the FAA has been transformed into a "super statute" that preempts any state contract law that interferes with its purpose); Stipanowich, *supra* note 47, at 337 (noting that the Court's decision in *Stolt-Nielsen* was a clear signal of the Court's lack of receptiveness to concerns about class action waivers in arbitration agreements, especially since the question may not be decided on the basis of state law, but federal substantive law); *Federal Arbitration Act* — DirecTV, Inc. v. Imburgia, 130 HARV. L. REV. 457, 457 (2016) (highlighting how broad the Court's view of the FAA has become in light of *DIRECTV, Inc. v. Imburgia*).

[152] This is a general principle of contract law. Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 77 (2013) (noting that it is universally agreed that at the outset of contract interpretation, courts must consider the express language of the contract). This principle has been confirmed by the Supreme Court. *See* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (noting that contracts are to be read to effectuate the parties' intent).

[153] *See* U.C.C. § 1-103(a)(2), (b) (AM. LAW INST. & UNIF. LAW COMM'N 2010) (providing for liberal construction of the code and incorporation of the parties' bargain, customs, trade usage, and principles of equity, among other things).

[154] *DIRECTV, Inc.*, 136 S. Ct. at 466 (explaining that the contract between DIRECTV and Imburgia stated that if the "law of your state" makes the waiver of class arbitration unenforceable, then the arbitration provision as a whole is void).

bans.[155] In effect, DIRECTV knew at the time of contracting that it would have to litigate class claims if disputes arose with California customers. California customers signing DIRECTV's contracts were also on notice that they were free to litigate as a class if disputes arose. Nonetheless, the Court held that the parties intended to be bound by an unforeseen rule handed down four years after the contract was made, holding that the California law was invalid.[156]

The Court ruled that the term "law of your state" in the contract meant law of your state as later deemed preempted by the FAA.[157] The Court concluded that the contract language was clear and could have only one meaning—state law that is construed as valid at the time of litigation.[158] In reaching this conclusion and overruling the state courts' interpretation, the Court departed from the principle that state courts are the final authority on state law and that contract interpretation is a matter of state law.[159]

The state court judges in the *DIRECTV* case interpreted the language "law of your state" as a specific provision that the parties prioritized to govern their contract.[160] After all, the drafter, DIRECTV, had litigated the issue of class action bans in a similar contract and knew that such bans were unenforceable in California.[161] Based on its knowledge of California law, DIRECTV knew that its class action ban, implemented all over the country, was not effective in California. As such, the state court decided that another provision in the contract that referenced the FAA did not trump the specific choice of California law to govern the contract.[162] Further,

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[155] *Id.* at 472.

[156] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that a California law barring class action waiver in arbitration agreements was preempted by the FAA).

[157] *See DIRECTV, Inc.*, 136 S. Ct. at 471.

[158] *Id.* at 469. The Court decided that "law of your state" meant "valid state law[s]," because this is the meaning state courts usually assign to this term. *Id.*

[159] *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) (reversing the Florida Supreme Court's ruling that Florida public policy and state contract law do not permit an arbitration agreement in a void contract to be severable); *see also* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (noting that the interpretation of private contracts is a matter of state law).

[160] *DIRECTV, Inc.*, 136 S. Ct. at 467 (noting that despite the Court's holding in *Concepcion*, the law of California would find the class action waiver in the arbitration agreement unenforceable).

[161] *Id.* at 466 (explaining that a similar class action waiver was held unenforceable in previous litigation involving a contract drafted by DIRECTV); *see also Federal Arbitration Act*, *supra* note 151, at 458 (noting that at the outset of litigation, DIRECTV did not attempt to compel arbitration because it knew the agreement was unenforceable in light of the *Discover Bank* rule).

[162] *DIRECTV, Inc.*, 136 S. Ct. at 467 (noting that the law of California making class action waivers in arbitration agreements unenforceable trumped section nine of the contract, which stated that the FAA governed the agreement); *see also* David Friedman, *Arbitration Revisited: Preemption of California's Unconscionability Doctrine After* Concepcion, 11 DUKE J. CONST. L. &

the state court determined that, at best, the language was ambiguous. It then applied the canon of construction to construe the language against the drafter, DIRECTV.[163]

By rejecting the state court's interpretation, the dissent in *DIRECTV* noted that the federal rule of interpretation converted the words "law of your state" to mean "federal law."[164] This federal construction of the contract ignores the reality that the parties could not have foreseen the preemption of existing state law and therefore could not have intended to be bound by federal law. Had the customers known that they were barred from litigating as a class when the contract was being formed, they could have chosen not to contract with DIRECTV and to utilize another provider that did not require such a restriction.[165] Customers also could have chosen at the time of contracting not to have any TV service if they discovered that all providers had arbitration contracts with class action bans. However, the federal interpretive preference superimposed a contractual outcome that neither party nor the state judge discerned. In effect, the federal rules narrow the flexibility judges have in deciding that the parties *did not* contract for FAA arbitration.

Similarly, the Court has fashioned unique rules for arbitrators' interpretations of FAA contracts. In *Stolt-Nielsen S.A. v. Animalfeeds International Corporation*, the Court refused to apply state or federal common law rules of deference that supported an arbitration panel's determination that the parties contract permitted class arbitration.[166] In *Stolt-Nielsen*, the parties' agreement provided for arbitration of "[a]ny dispute arising from the making, performance or termination" of their contract.[167]

PUB. POL'Y SIDEBAR 21, 29 (2015) (noting that the contract's general adoption of the FAA was unenforceable due to the specific provision that California law would govern); *Federal Arbitration Act*, *supra* note 151, at 459 (noting that while the state court acknowledged the *Discover Bank* rule had been preempted by *Concepcion*, another California law, which established a non-waivable statutory right to pursue consumer protection claims, was not preempted).

[163] *DIRECTV, Inc.*, 136 S. Ct. at 470. The state court's resort to this canon of construction is the orthodox approach to contract interpretation. *See also* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 4 (2005) (noting that canons of construction are neutral reasoning techniques judges use).

[164] *DIRECTV, Inc.*, 136 S. Ct. at 474 (Ginsburg, J., dissenting) (explaining that the Court's interpretation of the "law of your state" converted that phrase into state law as preempted by federal law).

[165] Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995) (noting that the parties' expectations at the time of contracting governs interpretation).

[166] Stolt-Nielsen S. A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 673, 675 (2010) (holding that the arbitration panel ignored the FAA, maritime law, and New York law in favor of its own view of sound public policy).

[167] *Id.* at 667.

The contract said nothing about class arbitration, but after a dispute arose, the parties agreed to have a panel of three arbitrators decide whether the contract permitted class arbitration.[168]

The panel interpreted the contract and unanimously concluded that it permitted class arbitration.[169] The arbitrators considered the intent of the parties, New York law, maritime law, and other arbitration decisions,[170] then concluded that the arbitration clause was sufficiently broad to apply to class claims, even though it was silent on this issue.[171] However, the Court reversed the arbitrators' interpretation on the ground that the arbitrators exceeded their powers.[172] The Court concluded that the arbitrators' interpretation reflected their own brand of commercial justice or sound policy.[173]

The Court rejected the arbitrators' view that contractual silence is not conclusive proof that the parties intended to preclude class arbitration, noting that exclusive reliance on silence would result in universal class bans when contracts do not contain an express provision for class arbitration.[174] Further, the Court decided that once the arbitrators determined that the contract did not address class actions, they should have looked to the FAA, federal maritime law, or New York law to see if there was a default rule to guide their interpretation.[175] But as the dissent pointed out, the arbitrators concluded that nothing in the contract, maritime law, or New York law conflicted with their interpretation.[176] And had they consulted the FAA, they would have reached the same conclusion because the FAA is silent on the issue of class arbitration.

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[168] *Id.* at 668.

[169] *Id.* at 669; *see also id.* at 689 (Ginsburg, J., dissenting) (noting that the sole issue the arbitrators resolved was whether the contract permitted class arbitration).

[170] *See id.* at 669 (majority opinion); *see also id.* at 694 (Ginsburg, J., dissenting).

[171] *Id.* at 669 (majority opinion). Counsel for Animalfeeds argued that although the parties had not expressly contracted to engage in class arbitration, the arbitration clause was sufficiently broad to encompass class claims. *Id.* at 695 (Ginsburg, J., dissenting).

[172] *Id.* at 677 (majority opinion) (noting the arbitrator exceeded his powers when the arbitration panel imposed its own view of sound public policy regarding class arbitration).

[173] *Id.* The arbitrators' interpretation was challenged on the sole ground that the panel exceeded its authority. *Id.*

[174] *Id.* at 669 (noting that Stolt-Nielsen's interpretive approach would preclude class claims unless the contract expressly provided for such claims).

[175] *Id.* at 673 (noting that the arbitrator's proper task was to identify the rule of law that governs when the parties had not agreed on the issue of class arbitration).

[176] *Id.* at 694 (Ginsburg, J., dissenting) (noting that the arbitration panel tied its conclusion to New York law, maritime law, and decisions made by other panels).

In any event, even if the arbitrators misinterpreted or misapplied the law, that would not be grounds for reversal.[177] Arbitrators are permitted errors of fact and errors of law under the FAA.[178] In this case, there was no evidence that the arbitrators committed reversible error by engaging in misconduct or announcing a new public policy with respect to construing arbitration clauses.[179] The parties had a broad arbitration clause and the arbitrators construed it liberally to encompass class arbitration. This broad construction is consistent with the FAA's goal of enforcing arbitration agreements and also consonant with the rule that unless the parties specifically exclude an issue, doubts about the breadth of an agreement should be resolved in favor of coverage.[180] Further, the arbitrators did not violate any public policy because there is no rule or precedent that precludes class arbitration when the contract to arbitrate is silent on that issue.[181]

The Court's interpretive approach and its failure to remand as its precedents advise[182] operate to chill the interpretive discretion judges and arbitrators have been given to interpret arbitration contracts. The *Stolt-Nielsen* approach erects a legal presumption against class arbitration on the premise that the FAA contemplated only bilateral arbitration.[183] The Court is now advancing the view that class arbitration interferes with the efficiency or economic benefits that arbitration provides by increasing the number of litigants and issues in addition to the amount of damages, attorneys' fees, and costs.[184] And the Court has expanded *Stolt-Nielsen's* rejection of generally applicable state law in *Lamps Plus, Inc. v. Varela*, where it held that judges

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[177] *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987) (explaining that parties should not be deprived of an arbitrator's judgment when it was his judgment they bargained for).

[178] *Id.* at 36 (noting that courts are not authorized to review the merits of an arbitral award even when the arbitrator misinterprets the law).

[179] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350–51 (2011) (noting that the FAA clearly indicates that courts should focus on arbitral misconduct, not mistakes); *Stolt-Nielsen*, 559 U.S. at 694 (noting that no one claimed that the arbitrators engaged in misconduct).

[180] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

[181] *See* E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000) (reaffirming that the public policy exception for vacating arbitral decisions is very narrow and requires proof that the *award* violates a well-defined and explicit policy).

[182] *See* Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509–10 (2001) (holding that courts should not reverse arbitrators for interpretive errors, and in cases of dishonesty or affirmative misconduct, courts should simply vacate the award and leave the parties with their contractual mechanism for resolution).

[183] *Stolt-Nielsen*, 559 U.S. at 685 (2010) (holding that class arbitration cannot be inferred "solely from the fact of the parties' agreement to arbitrate").

[184] *Id.* at 685–86. *But see* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 567 (2013) (distinguishing the *Stolt-Nielsen* decision to conclude that an arbitration agreement that did not specifically provide for class arbitration can be construed as permitting class arbitration).

cannot construe an ambiguous contract against the drafter to order class arbitration.[185] But the FAA does not promote efficiency solely in the interest of the drafter, and it does not preempt judicial or arbitral determination that class resolution was contemplated by the parties. The Court has also concluded that the FAA contemplated different rules of severability than those used by state judges.

2. Creating a Per Se Rule of Severability

According to the federal common law, arbitration promises are to be constructed as separate contracts from the underlying agreements that gave birth to them.[186] As such, judges can only review challenges to the arbitration provision itself, not the contract that houses it.[187] So, unless the arbitration agreement itself is alleged to be defective, the validity of the overall contract must be determined by an arbitrator.[188] This federal rule of severability diverges from state law principles and also defies logic.

At common law, severability is a question of fact determined by the parties' words and actions.[189] Under the federal rules, severability is a rigid substantive rule that makes the arbitration terms per se severable as a separate contract with no requirement of separate consideration.[190] This conclusion permits the enforcement of arbitration agreements that generally do not exist on their own. Contracts are severable when independent terms or promises that support each other can be identified and separated.[191] This is usually not the case with promises to arbitrate.

The need for an arbitration contract does not exist unless the parties have some other personal or business relationship. The arbitration contract does not exist on its own because two or more parties do not generally have cause to make *only* a contract to arbitrate. The mutual promises to trade the judicial forum in favor of the arbitral forum do not have any value or operational effect if the parties do not have, or plan to have, another relationship. The contract to arbitrate is not like an

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[185] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1409 (2019) (holding that *contra proferentum*, a state public policy serves as an obstacle to the FAA's requirement of consent). But as the *Stolt-Nielsen* dissenters noted, interpreting the contract to permit class arbitration preserves the arbitral forum consistent with the FAA. *Stolt-Nielsen*, 559 U.S. at 696–99 (Ginsburg, J., dissenting) (noting that class arbitration only alters how claims are processed; it does not alter the parties' rights or remedies, and in the absence of class arbitration, potential claimants will likely have to sacrifice their legal rights).

[186] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 70–71 (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 409 (1967).

[187] *See Buckeye Check Cashing, Inc.*, 546 U.S. at 449.

[188] *Id.*

[189] *See* PERILLO, *supra* note 1, at 389.

[190] *See Prima Paint Corp.*, 388 U.S. at 402.

[191] *See* PERILLO, *supra* note 1, at 389.

option contract that could be tied to or severed from the underlying contract to purchase the subject matter of the option.[192]

Without the underlying contract of employment or an agreement to buy or sell products or services, the mutual promises to arbitrate are unnecessary. Even in the post-dispute context, a separate contract to arbitrate post-dispute refers back to a relationship of some kind.[193] Nonetheless, the federal common law treats mutual promises to arbitrate as independent contracts which can provide the basis for ordering arbitration of challenges to the underlying contract.[194] This severability rule makes the parties' intent irrelevant and rejects the foundational state law and FAA principle that courts must discern and enforce the *parties*' bargain.[195]

Whether the arbitration contract is pre- or post-dispute, the underlying relationship gives birth to the arbitration deal. Because no one will need an arbitration contract without an underlying relationship, it is up to the parties to say what role arbitration plays *vis-à-vis* the underlying transaction. It is illogical to permit federal common law to predetermine this. If they wish, the contracting parties can guarantee the independent operation of their arbitration promises by simply agreeing that the arbitration agreement covers all disputes, including challenges to the underlying contract, the arbitration clause itself, or even questions concerning arbitrability. The agreement to arbitrate, and that agreement's scope, are quintessentially matters of private consent.[196] This approach is consistent with the foundational thrust of contract law to determine and enforce the parties' intent as they expressed it and the FAA mandate to enforce the *parties*' contract.

Such categorical contract rules are generally reserved for broad public concerns. For example, constructive conditions such as good faith are legally imposed on all contracting parties, both to protect the parties' contractual liberties and to advance the state's interest in preventing abuse.[197] Because arbitration contracts are now generally the unilaterally imposed edicts of powerful parties, the federal common law

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[192] *See* Merritt-Campbell, Inc. v. RxP Prods., Inc., 164 F.3d 957, 963 (5th Cir. 1999); Plantation Key Developers, Inc. v. Colonial Mortg. Co. of Ind., Inc., 589 F.2d 164, 168 (5th Cir. 1979).

[193] *See* Neeraj Grover, *Dilemma of the Proper Law of the Arbitration Agreement: An Approach Towards Unification of Applicable Laws*, 32 SING. L. REV. 227, 236 (2014).

[194] *See* David A. Joffe, *Extending the Severability Rule:* Buckeye Check Cashing, Inc. v. Cardegna, 12 HARV. NEGOT. L. REV. 549, 569–72 (2007).

[195] *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) (noting that arbitration is a creature of contract); *Prima Paint Corp.*, 388 U.S. at 404 n.12 (noting that arbitration agreements are enforceable on the same legal basis as other contracts).

[196] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (noting that the FAA's primary purpose is to promote freedom of contract and to enforce the parties' contract).

[197] *See* Nw., Inc. v. Ginsberg, 134 S. Ct. 1422, 1431 (2014).

rule of severability only serves to shore up the prerogatives of powerful drafters seeking bilateral arbitration.[198] Under state law, judges are free to interpret the contract as indivisible, unless it is clear from all the facts and circumstances that the arbitration clause is severable.[199] Rigid legal rules that supplement the parties' silence or expressed intentions are generally crafted to promote clear public goals such as the prevention of oppression, not merely to advance unexpressed congressional desires.[200]

E. The Federal Rule of Unconscionability

The doctrine of unconscionability has also been severely undermined by the new federal common law of arbitration. This contractual defense evolved from state common law and was later codified in Article 2 of the UCC to provide judicial freedom to prevent oppressive contractual outcomes.[201] Unconscionability rules are circumstances-driven and non-punitive.[202] The Court has reformulated this doctrine for arbitration contracts, resulting in its reduced utility. The federal common law rule prohibits states from deploying the doctrine as a tailored response to oppressive arbitration practices specifically.[203] This conclusion contravenes the text of the FAA and the equitable pedigree of the doctrine. In effect, while states can deploy unconscionability rules to deal with any old or new contractual tool of oppression, they cannot deploy such rules as a specific response to oppression in arbitration

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[198] *See* CFPB Arbitration Agreements, 82 Fed. Reg. 33,294 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040) (noting that firms argue that they will lose incentive to arbitrate if their class action bans proved to be unenforceable and were severed).

[199] *See* Polk v. Cleveland Ry. Co., 151 N.E. 808, 810 (Ohio Ct. App. 1925).

[200] The constructive or implied-in-law requirement of good faith provides a good example. *See Nw., Inc.*, 134 S. Ct. at 1431 (noting that some states impose the good faith doctrine "to effectuate the intentions of the parties or to protect their reasonable expectations," while others employ it to protect "community standards of decency, fairness, or reasonableness" (citations omitted)).

[201] *See* U.C.C. § 2-302 cmt. 1 (AM. LAW INST. & UNIF. LAW COMM'N 2010) ("This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability."). The codification of the doctrine reflected a formal acknowledgement that judges had been using their interpretive discretion and public policy rationales to deny enforcement of oppressive contractual outcomes. *See* Leff, *supra* note 27, at 537 (noting that when the drafters of the UCC codified the doctrine of unconscionability, they focused on mass sales and non-bargained transactions versus the individualized overreach that equitable unconscionability targeted).

[202] *See* U.C.C. § 2-302 cmt. 1 (permitting the parties to "present evidence as to the commercial setting, purpose, and effect" of the contract). The doctrine is not intended to disturb risks allocated by powerful bargainers, nor was it intended to give the oppressed party damages. *Id.*; Arthur v. Microsoft Corp., 676 N.W.2d 29, 39 (Neb. 2004).

[203] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

contracts.[204] The federal rules insulate bilateral arbitration contracts that guarantee no claim will be filed and simultaneously condemn class actions that coerce legal accountability.[205]

Second, the federal common law of unconscionability heightens the requirements for proving this defense.[206] Under the federal regime, judges cannot evaluate the substantive impact of arbitration contract procedures, although procedural rules can be crafted to make vindication of claims impractical.[207] And the federal rules treat all contract terms except those dealing with legal remedies as procedural provisions. A party alleging unconscionability now has the daunting task of proving substantive unconscionability by showing that contract terms *eliminate* legal remedies rather than *deter* the prosecution of claims.[208] Proof that arbitration terms or procedures were non-bargained and making the filing of claims impractical is not enough to prove substantive unconscionability.[209] The federal law of unconscionability focuses solely on the contract's *textual or theoretical impact* on legal remedies rather than the practical operation of contract terms.[210] The federal law of unconscionability does not allocate great weight to the insurmountable barriers that individualized arbitration erects, nor does it consider public enforcement costs. The removal of such costs from unconscionability analysis is a departure from the inquiry into the equities that characterized the doctrine as a state law defense. The state law focus on oppressive results has been replaced by a rule of deference to terms that are facially reasonable.

The need for such categorical rules for the FAA is highly questionable in view of the empirical and experiential data that is now available about bilateral arbitration contracts. A large volume of litigated and arbitrated cases and studies done of arbitration practices provide a rich body of information that can guide courts and legislatures in the crafting of arbitration rules. Trial and appellate court judges, uniform law commissions, government agencies, and state and federal officials have all been

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[204] *See id.* at 340; Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996).

[205] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."); *Concepcion*, 563 U.S. at 351 (holding that states cannot regulate contractual class action bans, even if regulation is necessary to prevent claims from being abandoned).

[206] *See Am. Express Co.*, 570 U.S. at 237–38 (holding that courts are not required to tally the "costs and burdens" imposed on adherents relative to the size of their claims or their means to prosecute their claims).

[207] *Id.* at 238.

[208] *See id.* at 236–37.

[209] *See Concepcion*, 563 U.S. at 340.

[210] *See Am. Express Co.*, 570 U.S. at 238.

grappling with the issues that mandatory arbitration presents.[211] Research and experience demonstrate that many of the justifications for the federal rules are unfounded and that arbitration rules should be the product of a deliberative process that accommodates the interests of all stakeholders. Because the federally formulated common law arbitration rules are disharmonious and incapable of protecting contractual rights and guaranteeing legal remedies, they should not trump the state rules that were preserved in the FAA.

III. CHALLENGING THE BASES FOR FEDERAL RULES

The federal contract rules are anchored in the assumption that parties get their preferred adjudicative forum when bilateral arbitration contracts are enforced.[212] But empirical data shows most consumers and workers get no forum at all.[213] Drafters benefit from the fact that adherents do not read or understand many of their

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[211] *See* Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271, 275–76 (2013) (stating that the states' inability to regulate arbitration provisions and Congress's reluctance to amend the FAA in part led to the creation of the Consumer Financial Protection Bureau, which is authorized to impose conditions or limitations on the use of arbitration between consumers and financial service providers); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 268 (2015) (stating that many courts feel obligated to enforce otherwise illegal contract terms that are included in arbitration contracts because of the "so-called federal policy favoring arbitration"); *see also* U.S. Equal Emp. Opportunity Comm'n, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, 2 EEOC Compl. Man. (BNA) No. 915.002, at 7 (July 10, 1997), https://www.eeoc.gov/policy/docs/mandarb.html (noting the Equal Employment Opportunity Commission's view "that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in [the employment discrimination] laws").

[212] *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.").

[213] *See* ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 6 (2017), epi.org/135056 (noting that although 60.1 million American workers are now subject to mandatory arbitration, an average of only 940 mandatory employment arbitration cases per year are filed with the American Arbitration Association, which administers about 50% of mandatory employment arbitration cases); *see also* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET

material terms,[214] and bilateral arbitration terms augment hurdles for adherents by keeping them in the dark about violations of their legal rights. Arbitration contracts are stocked with terms that deter the filing of claims and limit remediation to individual claimants rather than the entire affected group.[215] Empirical data confirms that despite the widespread embrace of arbitration contracts[216] and the prevalence of consumer and workplace violations,[217] the arbitral forum is a relative ghost

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REFORM AND CONSUMER PROTECTION ACT § 1028(A) 11 (2015) (reporting finding that while tens of millions of consumers use financial products or services that are subject to pre-dispute arbitration clauses, from 2010 through 2011 there were only 411 consumer claims filed with the American Arbitration Association, "for six product markets combined: credit card; checking account/debit cards; payday loans; prepaid cards; private student loans; and auto loans").

[214] In *Ting v. AT&T*, the company went to great lengths to ensure that its customers did not read or understand its arbitration terms. After conducting a quantitative and qualitative study on how to notify customers about its dispute resolution rules, the company settled on a process designed to evade its customers' attention. Ting v. AT&T, 182 F. Supp. 2d 902, 911–15 (N.D. Cal. 2002). A cover letter accompanying the dispute resolution rules stated that the agreement was for "informational purposes only, . . . no action is required . . . [and] that the mailing is being sent to comply with a federal mandate." *Id*. at 910–11. AT&T also sent the arbitration contract as a bill-stuffer that would likely be ignored and discarded. *See id*. at 911. This treatment of material contractual changes as a non-event "made customers less alert to the fact that they were being asked to give up important legal rights and remedies." *Id*. at 912. AT&T's policy of evasion was enforced with a gag order on company representatives who were informed to direct customer inquiries about dispute resolution to the company's website or instruct them to write in for more information. *Id.* at 915.

[215] *See id*. at 920–21 (concluding that AT&T's arbitration rules were not designed to give consumers more dispute resolution options and deter frivolous lawsuits, but "to put sufficient obstacles in the path of litigants to effectively deter many claims from being pursued"); *see also* Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post-*Concepcion *Era*, 56 ST. LOUIS U. L.J. 1203, 1224 (2012) (stating that class action waivers essentially bar claims from being brought in any forum, and individual arbitration of consumer claims is economically unattractive); Leslie, *supra* note 211, at 325–26 (stating that anti-consumer terms that shorten statutes of limitations, override statutory fee-shifting provisions, limit remedies, and provide distant forums are designed to make the arbitration process economically impractical for consumers and their attorneys).

[216] *See* COLVIN, *supra* note 213, at 1 (noting that the number of workers subject to mandatory arbitration increased from just over 2% in 1992 to almost 25% in the early 2000s and now stands at over 55%); CONS. FIN. PROT. BUREAU, *supra* note 243, at 9 ("Tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.").

[217] *See* Press Release, Fed. Trade Comm'n, FTC Enforcement Actions Yield More than $2.3 Billion in Refunds to Consumers Between July 1, 2017 and June 30, 2018 (Feb. 13, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftc-enforcement-actions-yield-more-23-billion-refunds-consumers; KEITH B. ANDERSON, BUREAU OF ECON., FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES, 2011: THE THIRD FTC SURVEY, at i (2013) (reporting that in 2011 an estimated 25.6 million people were victims of one or more of the frauds included in the 2011 FTC Consumer Fraud Survey); *see also* U.S. EQUAL EMP'T OPPORTUNITY

town.[218]

A. The Consumer Financial Protection Bureau Study

The Consumer Financial Protection Bureau's ("CFPB") study of arbitration contracts utilized in the financial services sector provides a good example of how arbitration contracts deter claims or make their pursuit impractical.[219] Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress created the CFPB, directed it to study mandatory arbitration contracts, and authorized it to make rules limiting or prohibiting their use if this would be in the public interest.[220] The CFPB's lengthy and exhaustive rulemaking process triggered 110,000 comments that were carefully studied in the course of preparing a final rule.[221] After all the views of commenters were considered, the CFPB promulgated a final rule that prohibited bans on court class actions in arbitration contracts.[222] The rule also required the 50,000 affected firms to do some reporting about their arbitration cases.[223]

After considering the claims of consumer advocates, industry supporters, and the CFPB's own experience and research, the CFPB concluded that class action bans

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COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (2016) (finding that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace); Renae Merle, *Wells Fargo Finds an Additional 1.4 Million Potentially Fake Accounts*, WASH. POST (Aug. 31, 2017), https://www.washingtonpost.com/news/business/wp/2017/08/31/wells-fargo-finds-an-additional-1-4-million-fake-accounts/ (discussing allegations and findings that Wells Fargo Bank opened bank and credit card accounts for customers without their approval, charged auto loan customers for insurance they did not need, enrolled customers in their online bill pay programs, and charged them fees, all without their knowledge).

[218] *See* CFPB Arbitration Agreements, 82 Fed. Reg. 33,295 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

[219] *See id.* at 33,211.

[220] *See* 12 U.S.C. § 5518 (2012).

[221] *See* CFPB Arbitration Agreements, 82 Fed. Reg. at 33,246, 33,251. Commenters included:

> consumer advocates; consumer lawyers and law firms; public-interest consumer lawyers; national and regional trade associations; industry members including issuing banks and credit unions, and non-bank providers of consumer financial products and services; nonprofit research and advocacy organizations; members of Congress and State legislatures; Federal, State, local, and Tribal government entities and agencies; Tribal governments; academics; State attorneys general; and individual consumers.

Id. at 33,246. Even people who dislike the CFPB and the federal government wrote in to vent. *See id.* at 33,251, n.446.

[222] *See id.*

[223] *See id.* at 33,279. The collected information will be used to monitor court and arbitration proceedings to determine if new developments need to be addressed, and some of the information collected will be published on the CFPB's website to make the arbitration process more transparent. *Id.* at 33,211.

were not in the public interest.[224] The CFPB found that there was a significant market failure because, despite the fact that millions of consumers are bound by arbitration contracts, very few ever file a claim because, among other things, they are unaware that their legal rights were violated.[225] This amazingly low filing rate occurs even when arbitration contracts have carve-out provisions allowing consumers or firms to adjudicate in small claims court.[226] The CFPB found that the vanishingly few individual cases filed in arbitration has incentivized firms to underinvest in compliance with the law.[227] This places compliant firms at a competitive disadvantage, so "eliminating this type of arbitrage as a potential source of competition would be in the public interest."[228]

The CFPB further found that the freedom to file class claims will help to cure some information asymmetries in the market, reduce incentives to engage in risky or illegal conduct, and promote compliance with the law.[229] It concluded that the remediation and deterrence benefits of compliance generated by class claims were

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[224] *See id*. at 33,251, n.445 ("The [CFPB] uses its expertise to balance competing interests, including how much weight to assign each policy factor or outcome."). The CFPB did a cost/benefit analysis of class bans to determine how these bans affected firms, consumers, the market for consumer financial products and services, the broader economy, and compliance with the law. *Id.* at 33,251.

[225] *See id.* at 33,295. A five-year study showed about 400 individual filings per year compared to the 60 million customers who were eligible for class-wide relief. *Id*. In addition to consumers being in the dark about violations, there are further obstacles to filing such as claims having negative value because the cost to pursue them exceeds the expected return. *Id.* at 33,254, 33,393. The study showed that even for consumers with knowledge of violations, only 0.7% were likely to sue. *Id.* at 33,393, n.1126. Filings are even lower for poor and uneducated consumers. *Id.* at 33261.

[226] *See id.* at 33,232. A two-year study of six product markets showed that only firms were really benefitting from carve outs, filing over 40,000 cases against individuals. By contrast, only 870 suits were filed in 2012 against the ten largest credit card companies in jurisdictions containing about 87 million people. *Id.* at 33,232, 33,253.

[227] *See id.* at 33,392. Industry supporters suggested that the CFPB should study how much firms invested in compliance to determine if those investments were adequate. *Id.* However, firms failed to give the CFPB any data to conduct such an evaluation. *Id.* In any event, as the CFPB noted, quantifying compliance costs is a difficult proposition because such costs are diffuse. *Id.* Further, even if firms expended significant sums on compliance, that would not address consumers' lack of knowledge of violations, nor would it change the empirical reality that class litigation effectively furthers compliance. *Id.*

[228] *See id*. at 33,296–97. The CFPB concluded that class bans allowed some firms to insulate themselves from accountability for wrongdoing, and this windfall benefit gave them a competitive advantage over firms that met their legal obligations. *Id.* Amazingly, small-dollar lenders claimed that they cannot comply with their legal obligations because their profit margin is so thin, and class bans are their only competitive edge. *See id.* at 33,303.

[229] *See id.* at 33,290 (for firms willing to take the risks associated with non-compliance, class actions provide a tool for vindicating consumer rights).

great.[230] By contrast, compliance costs are small at roughly $1 per year, per consumer account.[231] It was uncontested that class actions have protected hundreds of millions of consumers, provided billions of dollars in remediation, and produced systemic changes in business practices.[232]

Before reaching these conclusions, the CFPB considered industry claims and consumer advocates' responses to those claims. Industry supporters argued that a class action rule was not necessary because the current system permitting only bilateral arbitration was working.[233] These supporters argued that few claims are filed in arbitration or court because few consumers are harmed, consumers are happy with their firms' informal dispute resolution processes (settlement schemes), and arbitration contracts provide an equally effective or superior forum as courts.[234]

Despite these arguments, the empirical data reviewed by the CFPB showed that few claims were filed because consumers were generally unaware that their legal rights had been violated.[235] Those who eventually became aware found that huge personal and structural barriers made it impractical or impossible to file claims. Further, the CFPB found, and industry supporters conceded, that informal settlements were not necessarily driven by the merits of claims and it was rational for settlements to be motivated by the profitability of the customer.[236] Individualized settlements also did not incentivize systemic changes in risky or wrongful behavior.[237]

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[230] *See id.* at 33,262–63 (one five-year study of 419 federal class settlements revealed that 160 million consumers were affected, and 2.7 billion dollars were spent on remediation). In addition to the uncontested evidence that class actions benefit tens of millions of consumers and produce systemic changes to wrongful business practices, they also deter violations by incentivizing compliance. *Id.* at 33,263.

[231] *See id.* at 33,408.

[232] *See id.* at 33,262, 33,291. One of the rare industry concessions was that "damage class action lawsuits have played a regulatory role by causing them to review their financial and employment practices." *Id.* at 33,291.

[233] *See id.* at 33,255 (arguing that few claims are filed because few consumers are hurt).

[234] *See id.* at 33,255, 33,288 (industry supporters argued that the arbitral forum is cheaper, faster, simpler, more convenient and produced better results than courts). No evidence was provided to support these claims. *Id.* at 33,289.

[235] *See id.* at 33,259–60 (in addition to consumers being unaware that their rights had been violated, they also have difficulty getting attorneys to represent them). Litigation risks may also serve as a deterrent. *Id.* The CFPB found that legal representation was particularly essential for discrimination and disclosure violations, and pro se advocacy was risky and intimidating. *Id.* at 33,254.

[236] *See id.* at 33,255, 33,261, 33,394. In effect, an unprofitable customer with a meritorious claim may be ignored or stonewalled, and a profitable customer may be appeased regardless of the merits of the complaint. *Id.* at 33,255. Firms admitted to this practice but argued that this is rational behavior. *See id.* at 33,394.

[237] *See id.* at 33,255, 33,260. From experience, the CFPB knows that "even if companies resolve some disputes in favor of customers who complain, companies do not generally volunteer

Industry advocates argued that the costs associated with class actions greatly exceed their benefits—specifically, that class claims give class victims insufficient damages,[238] provide relief to non-victims,[239] unreasonably tax the court system,[240] unreasonably increase costs to firms and consumers,[241] and stifle innovation.[242] But the study data has shown that while bilateral arbitrations only address the claims of a few hundred consumers, resulting in small sum resolutions, class settlements in one five-year period actually involved 160 million consumers and $2.7 billion dollars.[243]

In addition, prohibiting class bans would not overburden the courts because it would result in only one more case per year for each federal judge, and one more case every 20 years in state court.[244] To the extent that class claims would increase the operating costs of firms, that increase was justified by the compliance benefits associated with class actions. Should the increased costs of compliance get passed on to consumers, that cost would be modest at about one dollar per year, per customer.[245] No data was provided to support the claim that class actions stifle innovation, but the CFPB found that they were more likely to incentivize the creation of good products and services rather than risky or illegal ones.[246]

The CFPB also addressed the contention that there are better alternatives to prohibiting class bans such as disclosure rules, education programs, opt-out rules, or

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to provide relief to other affected customers who do not themselves complain." *Id.* at 33,255. The CFPB also noted that no evidence was provided to support a conclusion that informal settlements produced systemic remediation. *Id.* at 33,260. For example, there was no evidence of informal processes "resolving complaints of discrimination, systematic miscalculations of interest rates, certain types of deceptive advertising, improper furnishing of credit information about which the consumer was unaware, and other common harms that are largely imperceptible to the average consumer." *Id.* (footnote omitted).

[238] *See id.* at 33,394.

[239] *See id.* at 33,293. For this claim, industry supporters "cited many statutes that they believe create violations of law and large penalties without any corresponding harm to consumers." *Id.*

[240] *See id.* at 33,301.

[241] *Id.* at 33,290. One source of unnecessary cost would come from forced settlements of claims that lack merit. *Id.*

[242] *Id.* at 33,303.

[243] *See id.* at 33,262.

[244] *Id.* at 33,308.

[245] *See id.* The CFPB noted the absence of empirical data proving that firms will pass the costs associated with class actions on to consumers and argued that even if that occurs, those marginal costs would be modest and likely offset by the overall benefits of class claims. *Id.* at 33,301.

[246] *See id.* at 33,302, 33,297–98. The Bureau cited examples of novel innovations that imposed significant risks on consumers and the economy, such as mortgage-backed securities that triggered a financial crisis in 2008 and "universal default" rules in the credit card industry that deceived customers about interest rate hikes. *Id.*

reducing structural barriers or costs to make the arbitral forum more accessible.[247] These proposals did not respond to the market failures identified by the CFPB. For example, even when consumers were aware that their legal rights were violated, there was an extremely slim chance that they would ever file a claim.[248] In cases where firms provided contractual incentives such as bonuses for those who prevailed, consumers still did not file claims.

One study showed that of 150 million customers covered by a bonus clause, only 18 filed claims in a two-year period.[249] This occurs because in most cases, consumers are not aware that they were wronged or that the law provides a remedy.[250] In any event, more access to bilateral arbitration does not address systemic misconduct and firms do not have an economic incentive to make company or industry-wide changes when individual consumers demonstrate that they are in breach or are engaging in prohibited conduct.[251] Despite the existence of bilateral arbitration and public enforcement of consumer protection laws, thousands of complaints pour in every month and massive fraudulent activities endure even when firms are fully aware of them.[252]

This widespread evasion of legal accountability through collective action bans is not limited to consumer markets. Millions of at-will workers must contend with arbitration contracts with class action bans that make it impractical to pursue work-related claims.

B. Class Bans in the Labor and Employment Context

The hotly contested issue of class action bans in employment agreements was decided by the Court in May of 2018. In *Epic Systems Corp. v. Lewis*, employees argued that the National Labor Relations Act ("NLRA") and the Norris La Guardia Act gave them a substantive right to engage in protected concerted activities and

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[247] *Id.* at 33,296, 33416.

[248] *Id.* at 33,416.

[249] *Id.* at 33,262.

[250] *Id.* at 33,255.

[251] *Id.* at 33,293–94. The CFPB cited two extreme cases of abuse that continued even after thousands of consumers had complained and notice of its proposed class action rule had been given. In one case, Western Union ignored 550,928 complaints of fraudulent money transfers. *Id.* at 33,294, n.684. The company admitted to facilitating a massive wire fraud scheme and agreed to settle with government enforcement agencies for $586 million dollars. *Id.* at 33,294. The second case involved Wells Fargo, a bank that illegally opened thousands of accounts without customers' authorization. *Id.* The CFPB fined the bank $100 million dollars. *Id.* Since the CFPB's actions against Wells Fargo in September 2016, the bank has revealed that the illegal conduct affected millions of customers, as opposed to several thousand. *See* Stacy Cowley, *Wells Fargo Review Finds 1.4 Million More Suspect Accounts*, N.Y. TIMES (Aug. 31, 2017), https://www.nytimes.com/2017/08/31/business/dealbook/wells-fargo-accounts.html.

[252] *See* CFPB Arbitration Agreements, 82 Fed. Reg. at 33,293–94.

that class or collective action bans interfered with that right.[253] The National Labor Relations Board ("NLRB") and the Sixth, Seventh, and Ninth Circuits had endorsed the employees' interpretation of the two labor laws,[254] but the Fifth Circuit rejected it.[255] Amicus briefs from industry supporters of collective action bans revealed the same legal and economic arguments that were made to the CFPB. For example, the Chamber of Commerce, relying heavily on the Court's FAA precedents, argued that the FAA's prescription for enforcement of the parties' bargain trumps other federal laws, including the NLRA, unless Congress evinced a contrary rule in the NLRA.[256]

The Chamber added that the NLRA does not place limits on the enforceability of arbitration contracts, so the Board's interpretation is misplaced.[257] Although the Chamber of Commerce argued that this issue was strictly one of statutory interpretation,[258] it offered several economic policy arguments in support of class action bans. It contended that employers and employees benefit from class bans, and employees whose claims are typically small and unattractive to lawyers get an accessible forum that is fair and receive better remedies than in court.[259]

Other industry amici addressed the economic implications of class or collective actions. The Employers Group argued that class bans are a national economic issue because the NLRB is subverting employers' federal arbitration rights.[260] They too relied on the Court's precedents as legal authority for banning class claims.[261] They also argued that bilateral arbitration policies provide a quick, inexpensive, and fair forum for workers, and they echoed the Court's conclusion that the absence of appellate review of arbitration awards exposes employers to unacceptable risks in collective action cases.[262]

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[253] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1617 (2018).

[254] *See* D. R. Horton, Inc., 357 N.L.R.B. 2277, 2278, 2289 (2012); Nat'l Labor Relations Bd. v. Alt. Entm't, Inc., 858 F. 3d 393, 408 (6th Cir. 2017); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1161 (7th Cir. 2016); Morris v. Ernst & Young, LLP, 834 F.3d 975, 991 (9th Cir. 2016).

[255] *See* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013, 1015 (5th Cir. 2015).

[256] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioners, *Epic Sys. Corp.*, 138 S. Ct. 1612 (No. 16-285), at 2.

[257] *See id.* at 3.

[258] *See id.* at 9, 15 (arguing that the FAA alone provides a basis for class action bans).

[259] *See id.* at 32–34. The Chamber cited a 2003 study as empirical proof that arbitration is the only realistic option for "employees whose income or legal claim was less than $60,000." *Id.*

[260] Brief of Amicus Curiae the Employers Group in Support of Petitioners, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-285).

[261] *See id.* at 9–11 (arguing that Court precedents make clear that even if collective action is a statutory right, it is still waivable unless there is a clear congressional command to the contrary).

[262] *Id.* at 5. Ironically, in its Statement of Interest, the group wrote that it "seeks to enhance the stability, predictability, and fairness of the laws and decisions regulating employment relationships." *Id.* at 1.

The Mortgage Bankers Association went a bit further, noting that "ample business justifications for class and collective action waivers, particularly in conjunction with mandatory arbitration provisions . . . [had] been thoroughly and convincingly articulated" by the Court.[263] The Association argued that bilateral arbitration is essential to control costs and risks and to ensure competitiveness.[264] They also claimed that statutory damages for minimum wage and overtime violations, when pursued on a class basis, posed an "existential" threat to employers who would be forced to settle claims lacking merit.[265] Further, they contended that class actions would put firms out of business thereby hurting employees and consumers who would be forced to pay higher prices.[266]

The Business Roundtable added that class bans are high-stakes litigation for businesses because firms now have a reliance interest in the benefits of speed, low cost, and efficiency provided by bilateral arbitration.[267] For proof that bilateral arbitration provides these benefits, the organization relied on court precedents making that claim.[268] It concluded that bilateral arbitration is the *sole* vehicle for achieving the FAA's goals, while class proceedings will have a disruptive effect on the parties and harm consumers.[269]

But the most esteemed neutrals in labor and employment law informed the Court that the negative assumptions about collective actions are not supported by empirical data.[270] An amicus brief submitted by the National Academy of Arbitrators ("The Academy"), whose members have extensive experience hearing bilateral and class arbitrations, noted that the arbitral benefits of informality, speed, simplicity, and flexibility are also present in collective action cases.[271] The Academy noted that collective action arbitrations of labor and employment claims have been a longstanding reality, free from the procedural complexities that the Court assumes.[272] The Academy noted that claims by a discrete group of workers that some

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[263] Brief of Amici Curiae Mortgage Bankers Association and State Mortgage Lending Association Supporting Petitioners and Reversal, *Epic Sys. Corp.*, 138 S. Ct. 1612 (2018), at 4.

[264] *Id.* at 7–9.

[265] *Id.* at 8.

[266] *Id.* at 9.

[267] Brief for the Business Roundtable as Amicus Curiae Supporting Epic Systems Corp., *Epic Sys. Corp.*, 138 S. Ct. 1612 (2018), at 2.

[268] *Id.* at 17 (citing Circuit City Stores Inc. v. Adams, 532 U.S. 105, 123 (2001)).

[269] *Id.* at 17, 19.

[270] *See* Brief for National Academy of Arbitrators as Amicus Curiae Supporting Respondents, *Epic Sys. Corp.*, 138 S. Ct. 1612 (2018). The academy places special emphasis on the neutrality of arbitrators, and to that end "its members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and even from serving as expert witnesses on behalf of labor or management." *Id.* at 1.

[271] *Id.* at 6–20.

[272] *Id.* at 8–9.

contract or legal right was violated are particularly well suited for group resolution because forum processes are simple with discovery grounded in the production of relevant information.[273] And because employees are alleging a common harm, it is expeditious to provide a group-wide remedy.[274] The Academy further noted that experience teaches that it is bilateral arbitration that creates a procedural morass, because it requires employers to repeatedly expend resources to engage in discovery and other litigation obligations for each employee arbitrating the same claim, over and over again.[275]

The Academy also cited empirical data that refutes the Court's assumption that class arbitration is antagonistic to the FAA. It noted that bilateral arbitration's function is essentially to insulate employers who profit from violating labor and employment laws.[276] Like firms that provide financial products and services studied by the CFPB, employers know that when class bans are enforced, individual workers are unlikely to file claims, in part, because they fear retaliation.[277] Limited resources for public enforcement and weak penalties also embolden employers to openly ignore workplace laws.[278] Employers therefore evade legal accountability for practices that are often systemic, such as wage theft, simply by inserting a collective action ban in their arbitration contracts.[279]

Despite the data provided by amici demonstrating the impermissible effects of class action bans, the Court opted for a narrow interpretation of the NLRA and the Norris La Guardia Act. The Court decided that collective action protection in these statutes is limited to workers' union and collective bargaining activities, and neither the text nor the structure of the two statutes provide a general right to class actions.[280] The Court found that federal labor laws did not repeal or limit the predecessor FAA's command to enforce contracts to arbitrate.[281] And Congress has not demonstrated a resolve to limit individualized arbitration, which in the Court's view is a fundamental attribute of arbitration.[282]

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[273] *Id.* at 12.

[274] *Id.* at 5–11. The Academy noted that the Rule 23 class action procedures are not required or used for representative workplace claims. *Id.* at 5–7. There are simple, informal, and flexible procedures that are utilized when claims are similar. *Id.* at 7.

[275] *Id.* at 22.

[276] *Id.* at 24–26.

[277] *Id.* at 24–25.

[278] *Id.*

[279] *Id.* at 25 ("[A]bundant research shows that often wage violation is not a one-off act of exploitation, but a business model.").

[280] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–27 (2018).

[281] *See id.* The Court cited a few statutes in which restrictions on arbitration were placed as proof that "when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so." *Id.* at 1626.

[282] *Id.* at 1622.

The *Epic Systems* ruling by the Court effectively endorses the economic claims of employers under the rubric of statutory interpretation. While neither the NLRA nor the Norris La Guardia Act specifically addresses class action arbitration claims, neither does the FAA. But even when Congress has expressly granted a right to class procedures, the Court has cleverly interpreted those statutes to deny employees that right.[283] The idea that the FAA regards bilateral proceedings as fundamental to arbitration and class claims as inimical is an invention of the Court.[284] The *Epic Systems* decision therefore reinforces Court precedents that make it economically unattractive for workers to prosecute low-value claims.

The Court's conclusion that the parties are at liberty to make contracts to arbitrate on a class or representative basis is effectively an empty theory for workers and consumers who have no contractual input.[285] And the Court's acknowledgment that class proceedings are likely the only viable way to vindicate small-sum claims rings hollow with its endorsement of class bans as a firm's contractual liberty.[286]

The adverse effects of class or collective action bans are not limited to workers and consumers. States and the federal government also suffer significant economic losses when workers cannot enforce their legal rights. This reality is exemplified by California's experience with its Private Attorneys General Act ("PAGA").

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[283] *Id.* at 1628 (citing its *Gilmer* and *CompuCredit* precedents as proof that class action rights are waivable even when Congress has expressly granted them to employees).

[284] *See id.* at 1622 (citing its *Concepcion* precedent for this proposition).

[285] *See* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 573 (2013) (holding that an arbitrator can find agreement for class arbitration from a provision that does not expressly provide for class claims); Stolt-Nielsen S. A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 687 (2010) (holding that an arbitrator cannot construe contractual silence as permitting class arbitration on public policy grounds because class arbitration must be traceable to the parties' agreement); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) (holding that a union can contract with a company to make arbitration the exclusive forum for resolving antidiscrimination claims); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 445 (2003) (holding that it is the arbitrator's task to decide whether contractual silence on the availability of class arbitration reflected the parties' intent to ban such actions).

[286] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) ("It is undoubtedly true that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action."); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (noting that the class action scheme is essential in overcoming the barrier to representation that small sum claimants have); Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (noting that the Fair Labor Standards Act provides employees the advantages of pooling resources and lowering individual costs so that those with relatively small claims may pursue relief where individual litigation might otherwise be cost-prohibitive. It also yields efficiencies for the judicial system through resolution in one proceeding of common issues arising from the same allegedly wrongful activity affecting numerous individuals).

C. *Class Bans and Private Attorneys General Actions*

Class and collective action bans that prevent legitimate claims not only facilitate significant wage loss for affected workers, but they also rob the states of billions of dollars in tax revenue.[287] For example, when employers misclassify workers as independent contractors, they can run afoul of minimum wage or overtime compensation laws and also rob the government of tax revenue. Recognizing that public enforcement of its labor code was ineffective, California enacted PAGA in 2004 to permit affected employees to personally file a civil action.[288] That action can be brought personally and on behalf of other employees.[289] In a PAGA action, the employee functions as a representative of the state and, as a result, 75% of any recovery goes to the state.[290]

In *Iskanian v. CLS Transportation*, the employer argued that its bilateral arbitration agreement with Iskanian prohibited him from bringing a representative action for labor code violations.[291] But the California Supreme Court distinguished a PAGA claim from a typical class claim by noting the public character of a PAGA claim, whereas a class action vindicates only purely private interests.[292] The court noted that PAGA plaintiffs "directly enforce the state's interest in penalizing and deterring employers who violate California's labor laws,"[293] and individual or bilateral arbitration of PAGA claims will not further this public purpose.[294] The court

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[287] *See* Joyce E. Cutler, *Calif. Bill Targets Tax, Labor Crimes in Underground Economy*, BLOOMBERG L.: DAILY LAB. REP. (Feb. 22, 2019), https://news.bloomberglaw.com/daily-labor-report/calif-bill-targets-tax-labor-crimes-in-underground-economy-1 (noting that California's underground economy, which includes "[c]ash payments, misclassifying workers as independent contractors, failing to provide worker's compensation, and failing to withhold taxes," cost the state billions of dollars annually in lost taxes); *see also* NAT'L EMP'T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 5–6 (2015) (noting that both employees and the states lose billions of dollars annually when employers pay workers off-the-books or underreport their payroll). Misclassification denied the Federal Treasury about $2.72 billion in 2006 and robbed unemployment insurance trust funds of hundreds of millions of dollars. *Id.* at 2.

[288] Iskanian v. CLS Transp. L.A., LLC, 372 P.3d 129, 146–47 (Cal. 2014).

[289] *Id.* at 146.

[290] *Id.*; *see also* Zackaria v. Wal-Mart Stores, Inc., 142 F. Supp. 3d 949, 954 (C.D. Cal. 2015) (holding that a PAGA action does not need to be certified under Rule 23 because it is fundamentally different from a class action in that it protects a public interest rather than merely consolidating private parties for efficiency purposes).

[291] *Iskanian*, 372 P.3d at 134.

[292] *Id.* at 152 (noting that a PAGA judgment also binds the state and that statutory penalties are for the public's benefit, not private party plaintiffs).

[293] *Id.* (emphasis omitted).

[294] *Id.*

therefore concluded that the right to file a PAGA representative action is not waivable because it is not a purely private right that employers can exempt themselves from contractually.[295]

Employers continue to challenge the ruling in *Iskanian.* In *Sakkab v. Luxottica Retail North America, Inc.*, an employee filed a PAGA representative action alleging employer misclassification of employees as supervisors to avoid paying for overtime, meal, and rest breaks, and the employer moved to compel arbitration under a contractual provision that prohibits collective actions.[296] The federal court of appeals ruled that the representative action was not prohibited by court precedents upholding class action bans.[297] Like the California Supreme Court, the Ninth Circuit found that PAGA actions are different from class actions because the employee is not litigating for absent workers but rather for the state; PAGA claims are not procedurally complex, so Rule 23 class action procedures need not be followed; and to the extent that employers are concerned about the risks of statutory damages without appellate rights in arbitration, they are free to litigate these claims in court.[298] The court cited a study of the garment industry in one city that showed the existence of about 33,000 serious and continuing violations, yet there were "fewer than 100 wage citations per year for all industries throughout the state."[299] The court concluded that the state has a strong interest in representative actions that help to recover some of the billions of dollars lost each year from noncompliance with labor regulations.[300]

Employers have attempted to avoid the compliance goals furthered by California's PAGA by inserting a foreign choice of law provision in the arbitration contract. In *Lefevre v. Five Star Quality Care, Inc.*, the California employer's arbitration agreement stated that Maryland law governs the employee's overtime, meal breaks, and other work-related claims.[301] In addition to following the *Iskanian* and *Sakkab* decisions, the federal district court and the circuit court of appeals found that Maryland law could not govern the dispute because it contravened a fundamental California policy.[302]

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[295] *Id.* at 148–49.

[296] Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 427–28 (9th Cir. 2015).

[297] *Id.* at 432 (finding that the California rule that bans waiver of PAGA claims did not single out arbitration contracts for special treatment, as prohibited by the Court's FAA precedents).

[298] *Id.* at 435–36.

[299] *Id.* at 430.

[300] *Id.*

[301] Lefevre v. Five Star Quality Care, Inc., No. EDCV 15-1305-VAP, 2015 WL 13688460, at *1 (C.D. Cal. Dec. 11, 2015).

[302] Memorandum, Lefevre v. Five Star Quality Care, Inc., No. 16-55059, at 3 (9th Cir. Dec. 6, 2017), *cert. denied*, 139 S. Ct. 68 (2018).

The *Lefevre* district court noted that the contract was formed and performed in California, the plaintiff was domiciled in California, and the other represented employees worked for the employer defendant in California.[303] Because Maryland law would enforce the employer's ban on representative claims, the court concluded that conflicts of law rules require the application of California law.[304] Failure to apply the *Iskanian* decision or California law would deprive the state and its employees of the protections afforded by its PAGA.[305]

The litigated cases and government studies provide abundant empirical data that refutes the Court's assumption that no substantive right is lost because of contracts to arbitrate.[306] The CFPB study demonstrates that millions of claims are not filed every year because bilateral arbitration contracts ensure that consumers remain unaware that their legal rights were violated.[307] Many consumers and workers are also deterred from pursuing their substantive remedies because of arbitration provisions that terrorize them into staying silent. For example, distant and inaccessible forum provisions, limitation of liability clauses, cost-sharing rules for the arbitral forum, and unenforceable attorneys' fees provisions, among others, can deter many individuals who are *aware* that their legal rights were violated from filing claims.[308] The PAGA cases provide additional evidence that both workers and the states are robbed of their legal remedies when class bans are enforced. And a study done by the United States Government Accountability Office estimated that worker misclassification cheats the federal government out of billions of dollars in income, payroll, and unemployment taxes.[309]

Contract terms that foreclose remediation compound the contract enforcement problems that adherents already have. For example, the small or negative value of most consumer or employment claims makes it economically unattractive for victims of wrongdoing to file claims.[310] Those who fail to pursue their negative value

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[303] *Lefevre*, 2015 WL 13688460, at *4.

[304] *Id.*

[305] *See id.*

[306] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–28 (1991); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[307] *See* CFPB Arbitration Agreements, 82 Fed. Reg. 33,255 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

[308] *Id.* 33,222–30.

[309] U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 2 (2006).

[310] *See* Richard Abel, *Forecasting Civil Litigation*, 58 DEPAUL L. REV. 425, 446 (2009) (noting that litigation involves a cost benefit analysis and plaintiffs can be deterred by costs and the power of defendants to resist); Leon E. Trakman, *David Meets Goliath: Consumers United Against Big Business*, 25 SETON HALL L. REV. 617, 617 (1994) (noting that consumers generally do not pursue their legal remedies individually because the resources needed are great and their claims are small).

claims simply relinquish their substantive rights. A variety of structural factors may also contribute to the waiver of substantive remedies.[311] Having the status of an immigrant also comes with unique enforcement concerns.[312]

But even the intrepid individuals who file arbitration claims find the federal rules overwhelming because arbitral errors that deny substantive remedies are generally not reviewable by a court. The federal rules governing arbitral decision-making insulate arbitral errors through narrow rules of judicial review and vacatur of arbitral awards.[313] For example, an arbitral award that denies statutorily provided legal remedies may still be enforced by a reviewing court because errors of law are not sufficient grounds to vacate.[314] Unionized workers also face the prospect of substantive waivers when their bargaining representative contracts for arbitration as the exclusive forum and then decide that the worker's case is not worth pursuing in arbitration.[315] This prevalence of substantive waivers provides a compelling case for honoring the FAA's endorsement of state rules that are sensitive to the contractual guarantee of minimum substantive remedies.

IV. PRESERVING PUBLIC LAW CONTROL OF LEGAL REMEDIES

Available data has shown that without public law guarantees and enforcement, consumers and workers can be cheated by firms that control not only the nature of the product, service, or employment they provide, but also whether remedies can be vindicated. Consumers saddled with faulty products or warranty breaches, or cheated by financial institutions, and workers robbed of their basic wage guarantees

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311 *See* Stanley L. Brodsky et al., *Why People Don't Sue: A Conceptual and Applied Exploration of Decisions Not to Pursue Litigation*, 32 J. PSYCHIATRY & L. 273, 276–77 (2004) (discussing deterrence factors such as social pressure, stress, fear of personal consequences, uncertainty of outcome, time, and inertia, among others).

312 *See* Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 620–21 (2011) (discussing the difficulty of immigrants getting legal counsel and the deportation concerns of illegal immigrants).

313 The FAA provides narrow grounds for vacating an arbitral award, all tied to the parties' or arbitrators' misconduct. *See* 9 U.S.C. § 10 (2012). The Court has ruled that these statutory grounds are exclusive. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008).

314 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350–51 (2011) (finding that the FAA requires misconduct, not mistake, by the arbitrator in order to vacate an award); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37–38 (1987) (noting that arbitral awards can be reviewed only for fraud or dishonesty by the arbitrator).

315 *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273–74 (2009) (expanding the FAA's reach to collective bargaining contracts without resolving the effect of a union's failure to prosecute a claim after contracting for arbitration as the exclusive forum); Kravar v. Triangle Servs., Inc., No. 1:06-cv-07858-RJH, 2009 WL 1392595, at *3 (S.D.N.Y. May 19, 2009) (holding that a union's exclusive control of grievances coupled with its contract to make the arbitral forum exclusive amounted to a substantive waiver when the union failed to take the worker's discrimination case to arbitration).

can be forced to absorb these losses because they are unable to activate the individualized arbitration process that is imposed on them. The new federal contract rules do not provide penalties for impermissible arbitration terms. Since firms profit from such terms and adherents often cannot find alternative terms, there is little market incentive to draft within legally permissible boundaries.

A. Private Control Often Results in Imposition of Impermissible Terms

Under state law, adhesion contract drafters cannot use their broad drafting prerogatives to impose terms that disclaim all liability for breach.[316] State and federal laws also limit the extent to which drafters can exclude or limit adherents' legally prescribed remedies.[317] State law guarantees contracting parties minimum adequate remedies to prevent drafters from abusing their extensive discretion to allocate risks.[318] But the federal rules condone disclaimers for breach disguised as arbitration procedures.[319] In arbitration contracts that judges are unlikely to review, drafters now routinely preclude or limit adherents' remedies, despite statutory damages guarantees and court precedents rejecting such terms.[320]

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[316] *See* Whitesell Corp. v. Whirlpool Corp., 496 F. App'x 551, 555 (6th Cir. 2012).

[317] *See*, *e.g.*, U.C.C. § 2-718 (AM. LAW INST. & UNIF. LAW COMM'N 2010) (voiding unreasonably large liquidated damages); *id.* § 2-719 (placing limits on the exclusion of consequential damages); 15 U.S.C. § 2308 (2012) (prohibiting disclaimers of implied warranties when a written warranty is given with the sale of a consumer product).

[318] *See* U.C.C. § 2-719, cmt. 1 ("[A]ny clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly . . . where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article.").

[319] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 2287, 237–38 (2013) (noting that arbitration contracts cannot forbid the assertion of statutory rights while also approving a class action ban that made it economically impractical to access the arbitral forum).

[320] *See* Zaborowski v. MHN Gov't Servs., 601 F. App'x 461, 463 (9th Cir. 2014) (holding that a ban on punitive damages was unconscionable because it eliminated available statutory remedies); Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 725 (N.D. Cal. 2012) (holding that a contractual exclusion of special, incidental, consequential, exemplary, or punitive damages violated the Credit Repair Organizations Act); Estate of Deresh *ex rel.* Schneider v. FS Tenant Pool III Tr., 95 So. 3d 296, 301 (Fla. Dist. Ct. App. 2012) (holding that a nursing home arbitration contract prohibiting punitive damages violated express public policy of the state); Openshaw v. FedEx Ground Package Sys., Inc., 731 F. Supp. 2d 987, 996 (C.D. Cal. 2010) (holding that the company's damages formula was unconscionable because it gave the company the unilateral power to avoid paying almost any damages); SA-PG-Ocala, LLC v. Stokes, 935 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 2006) (holding that damages prohibitions in a nursing home contract violated public policy by dismantling legislative protections); Narayan v. Ritz-Carlton Dev. Co., Inc., 400 P.3d 544, 553–54 (Haw. 2017) (holding that a contract prohibiting punitive, exemplary, or consequential damages is unenforceable because it permitted the drafter to insulate

In addition to expressly denying remedies, arbitration contracts often limit recovery of attorneys' fees, which is often critical to adherents' vindication prospects. Arbitration contracts now deny attorneys' fees,[321] require the loser to pay fees,[322] require each party to pay his own attorney's fees,[323] provide for reimbursement of businesses' fees,[324] or provide that the adherent must pay the losing businesses' fees.[325] While contract drafters generally have the prerogative to contractually shift the risk of attorneys' fees to adherents,[326] consumer and civil rights statutes limit that prerogative in order to provide a path to vindication for adherents by granting

itself even for "aggravated or outrageous misconduct"); Pitts v. Watkins, 905 So. 2d 553, 557 (Miss. 2005) (holding that contractual damages restrictions denied plaintiff an adequate remedy); Lucier v. Williams, 841 A.2d 907, 913 (N.J. Super. Ct. App. Div. 2004) (holding that damages limited to $500 or 50% of fees paid exempted the drafter from almost all responsibility and were therefore unenforceable); Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 671 (S.C. 2007) (holding that an arbitration clause that prohibited punitive, exemplary, double or treble damages contradicted mandatory statutory requirements); *In re* Poly-Am., L.P., 262 S.W.3d 337, 345 (Tex. 2008) (holding that a prohibition of reinstatement or punitive damages violated the Workers' Compensation laws).

[321] *See* DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (holding that denial of fees to a Title VII plaintiff is void as against public policy).

[322] *See Zaborowski*, 601 F. App'x at 463 (holding that a contractual provision that loser pays fees violated state and federal law); *Newton*, 854 F. Supp. 2d at 725 (holding that a contractual term mandating fees to a prevailing party violated the state's Consumer Legal Remedies Act that provided for fees to a prevailing plaintiff); Gaither v. Wall & Assocs., Inc., 79 N.E.3d 620, 631–32 (Ohio Ct. App. 2017) (holding that a prevailing party fee provision that authorize fees only for prevailing plaintiffs violated the Consumer Sales Practices Act).

[323] Nino v. Jewelry Exch., Inc., 609 F.3d 191, 203 (3d Cir. 2010) (holding that imposing attorneys' fees on plaintiff in a Title VII action violated statutory remedies); Spinetti v. Serv. Corp. Int'l, 324 F.3d 212, 216 (3d Cir. 2003) (holding that imposition of fees on plaintiff violates federal fee shifting statute); Plaskett v. Bechtel Int'l, Inc., 243 F. Supp. 2d 334, 340 (D.V.I. 2003) (holding that a contract provision requiring that each party pays his own fees regardless of case outcome violated relief afforded by Title VII); Gambardella v. Pentec, Inc., 218 F. Supp. 2d 237, 247 (D. Conn. 2002) (holding that provision requiring each party pay their fees contravened Title VII).

[324] *See* McKee v. AT&T Corp., 191 P.3d 845, 859 (Wash. 2008) (holding that a contract requiring the consumer to reimburse to the company legal defense fees violated the state's Consumer Protection Act).

[325] *See In re* Checking Account Overdraft Litig., 485 Fed. App'x 403, 406 (11th Cir. 2002) (holding that a contractual provision shifting fees to the bank customer regardless of who prevailed was unconscionable).

[326] *See* Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1025 (9th Cir. 2016) (holding that as long as a fee-shifting provision is bilateral, *i.e.*, it allows either prevailing party to recover, it will be enforceable); Faber v. Menard, Inc., 367 F.3d 1048, 1055 (8th Cir. 2004) (finding that although an employee may be statutorily entitled to attorneys' fees, employer could still contract for the employee to pay his own fees).

prevailing plaintiffs their attorneys' fees.[327] Despite the existence of these laws and court precedents confirming them, drafters still include such terms in their arbitration contracts. Drafters benefit from the coercive effects of impermissible fee terms when they deter claims or arbitrators err in enforcing them. And even when adherents successfully challenge these provisions, drafters face no penalty.[328]

Businesses also benefit from adjudication rules that impede the vindication prospects of adherents, even when state law rejects such terms as violative of public policy. Prior to the Court's *Concepcion* decision in 2011, courts routinely rejected class action bans in arbitration contracts when consumer or small-sum claims were involved.[329] When class bans were challenged, courts compared the cost of arbitration with the potential recovery and emphasized the public interest in ensuring the vindication of statutory rights.[330] This analysis usually resulted in the conclusion that the class action ban was unenforceable.[331] The *Concepcion* and *American Express*

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[327] *See supra* notes 319–23.

[328] *See In re Checking Account Overdraft Litig.*, 485 Fed. App'x at 407 (severing an unconscionable cost and fee shifting provision and enforcing the arbitration contract nonetheless); *see also* Barras v. Branch Banking & Tr. Co., 685 F.3d 1269, 1283 (11th Cir. 2012) (noting that when a contract term is unconscionable, the usual remedy is to sever that term rather than void the entire agreement).

[329] *See* Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1096 (9th Cir. 2009) (holding that a class ban where consumer claimed less than $700 is unconscionable because it would prevent vindication of rights); Wigginton v. Dell, Inc., 890 N.E.2d 541, 547 (Ill. App. Ct. 2008) (holding that a class ban violated state public policy because it would prevent consumers from vindicating claims ranging from $200 to $500); Feeney v. Dell, Inc., 908 N.E.2d 753, 762–65 (Mass. 2009) (holding that a company cannot insulate itself from claims for $13.65 and $215.55, with a class action ban); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 371–72 (N.C. 2008) (holding that a class ban was unconscionable because it would deter plaintiff from filing and deter attorneys from taking claims that ranged from $2,000 to $4,000); Muhammad v. Cty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 100 (N.J. 2006) (holding that plaintiff's interest in vindicating a claim for less than $600, and the public interest, made a class ban unconscionable); Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1220 (N.M. 2008) (holding that a class ban violated state public policy to provide a forum for the resolution of plaintiffs $20 claim); W. Va. *ex rel.* Dunlap v. Berger, 567 S.E.2d 265, 278 (W. Va. 2002) (holding that a class ban violated a statutory purpose to provide relief to claimants of less than $10).

[330] *See* Dale v. Comcast Corp., 498 F.3d 1216, 1219–24 (11th Cir. 2007) (noting that a court can consider the cost to plaintiff compared to the possible recovery as well as the ability to recover fees and other costs in determining whether a class ban is unconscionable); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 984 (9th Cir. 2007) (holding that individual damages of small amounts less than $1,000, are relevant in deciding whether a class action waiver is enforceable); *Fiser*, 188 P.3d at 1220 (holding that state public policy requires that small value claimants have a dispute resolution forum); Thibodeau v. Comcast Corp., 912 A.2d 874, 885 (Pa. Super. Ct. 2006) (noting that when the cost of arbitration is high compared to a minimal damages claim, a class action is the only efficient remedy).

[331] *See Fiser*, 188 P.3d at 1220.

decisions made class bans presumptively valid even when they put legal remedies out of reach.

Other typical impermissible arbitration terms drafters use to impede the vindication prospects of adherents include limits on discovery that deny adherents the opportunity to prepare and present their claims,[332] venue selection clauses that impose unreasonable litigation or economic burdens on adherents,[333] and short statutes of limitations that impair the adherent's ability to learn about and respond to violations.[334] Such provisions can cause unwary adherents to believe their claims are

[332] *See* Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 387 (6th Cir. 2005) (contract provided for only one deposition with additional depositions at the discretion of an "arguably biased" arbitration panel); Openshaw v. FedEx Ground Package Sys., Inc., 731 F. Supp. 2d 987, 995 (C.D. Cal. 2010) (same); Hamrick v. Aqua Glass, Inc., No. 07-3089-CL, 2008 WL 2853992, at *6 (D. Or. Feb. 20, 2008) (arbitration contract limited discovery to one deposition unless arbitrator approved more); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 545 (E.D. Pa. 2006) (arbitration contract limited employee plaintiff to deposing only expert witnesses and gave defendant more time than plaintiff to designate such witnesses); LaSalle v. FedEx Ground Package Sys., Inc., No. CV 11-19-H-CCL, 2011 WL 13232533, at *2 (D. Mont. Oct. 7, 2001) (arbitration clause permitted discovery on damages but not on the issue of liability); Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001) (contract limited discovery to one deposition as of right); Penn v. Ryan's Family Steak Houses, Inc., 95 F. Supp. 2d 940, 948 (N.D. Ind. 2000) (same).

[333] *See* Jackson v. Payday Fin., LLC, 764 F.3d 765, 776 (7th Cir. 2014) (contract provided for arbitration conducted by the Cheyenne River Sioux Tribe on its reservation in South Dakota despite the tribe having no arbitral mechanism); Eisen v. Venulum Ltd., 244 F. Supp. 3d 324, 344–55 (W.D.N.Y. 2017) (British Virgin Islands forum was unconscionable because of its potential to insulate defendants from United States securities laws); Newton v. Am. Debt Servs., Inc., 854 F. Supp. 2d 712, 726 (N.D. Cal. 2012) (holding that a contract that provided that consumers must arbitrate in company's home city gave company an unfair advantage); Willis v. Nationwide Debt Settlement Grp., 878 F. Supp. 2d 1208, 1220 (D. Or. 2012) (contract provided that Oregon plaintiff must arbitrate in California even though plaintiff could not afford to access that forum); Dominguez v. Finish Line, Inc., 439 F. Supp. 2d 688, 690–91 (W.D. Tex. 2006) (contract required employee who worked in Austin, Texas to arbitrate in Indianapolis, Indiana even though all witnesses were in Austin and plaintiff could not afford to travel); Aral v. Earthlink, Inc., 36 Cal. Rptr. 3d 229, 242 (Cal Ct. App. 2005) (Georgia forum held unreasonable for California consumers with claims ranging from $40 to $50); Van Voorhies v. Land/Home Fin. Servs., No. CV095031713S, 2010 WL 3961297, at *8 (Conn. Super. Ct. Sept. 3, 2010) (holding that contract provision providing for California forum unfairly allocated risks given plaintiff's financial status).

[334] *See* Zaborowski v. MHN Gov't Servs., 601 F. App'x 461, 463 (9th Cir. 2014) (finding that six months was not sufficient time for plaintiff to recognize violation of law and investigate and file a claim); Nino v. Jewelry Exch., Inc., 609 F.3d 191, 203 (3d Cir. 2010) (holding that five days to file a claim was inflexible, one-sided, and unreasonable); Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269, 277–78 (3d Cir. 2004) (holding that 30 days was not sufficient time for an employee to marshal a claim and it prevented the employee from invoking the continuing violation and tolling doctrines); Garre v. Hooters-Toledo, 295 F. Supp. 2d 774, 781-82 (N.D. Ohio 2003) (holding that ten days is too short for employees to assess their rights and consult a

not feasible or impose on more knowledgeable and determined adherents the burden of challenging these terms as unconscionable. In any event, adherents end up the losers because successful challenges often result in the substitution of reasonable terms and not a voiding of the arbitration contract.[335]

Although state court precedents notify businesses of the permissible limits on contract remedies, powerful drafters still impermissibly exempt themselves from legal accountability or the regulatory guarantee of a minimum adequate remedy. The federal rules aggravate the problems adherents have by allowing the drafter to incorporate and benefit from legally prohibited terms by not providing any sanction for their use.

B. Market Forces Will Not Rectify Drafting Abuse

Deference to drafters' control of non-bargained terms has been driven by faith in supply-side economics. It is an article of faith that bilateral arbitration drafting liberty reduces the firm's operating costs and accrued savings are passed on to consumers and workers.[336] The financial benefits of arbitration to businesses have been tied to factors such as reduced discovery costs, the absence of class-wide liability, the avoidance of high jury awards, the deterrence of claims, and the avoidance of negative publicity.[337] But so far, no reliable data has proved that mandatory arbitration savings are shared with consumers and workers.[338] Nonetheless, the proposition that

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lawyer before filing a claim); Wherry v. Award, Inc., 192 Cal. App. 4th 1242, 1249–50 (Cal. Ct. App. 2011) (holding that 180 days is unconscionable when the statutory minimum is one year); Adler v. Fred Lind Manor, 103 P.3d 773, 786 (Wash. 2004) (finding that 180 days is unreasonable for an employment discrimination claim that plaintiff would normally have three years to file).

[335] *See* Barras v. Branch Banking & Tr. Co., 685 F.3d 1269, 1283 (11th Cir. 2012) (noting that the usual remedy for an unconscionable term is to deny giving it effect).

[336] *See* Christopher R. Drahozal, "*Unfair*" *Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 765 (2001) (citing an example where a finance company charged a borrower a lower interest rate because it agreed to arbitration); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y, 549, 579–80 (2008) (relying on anecdotal data to conclude that savings from arbitration contracts are passed through to consumers, employees, and investors); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) (arguing that some cost savings attributable to arbitration are necessarily passed onto consumers in the form of lower prices).

[337] *See* Ting v. AT&T, 182 F. Supp 2.d 902, 910 (N.D. Cal. 2002). AT&T argued to a Consumer Council it sponsors that costs associated with class action litigation justified its arbitration and class ban rules. *Id.* at 910–11 ("AT&T was asked to provide information regarding these costs and the burden they allegedly place on AT&T but did not do so.").

[338] *See* Adam J. Levitin, *Mandatory Arbitration Offers Bargain-Basement Justice*, 1 AM. BANKR., May 14, 2014, at 3, (noting that when several major banks dropped their arbitration clauses, prices did not go up); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST.

greater drafting liberty and arbitration terms benefit adherents has been advanced by the Supreme Court,[339] the drafters of the Restatement Second of Contracts,[340] and lower court judges.[341] Unilaterally crafted terms that impermissibly shift risk to adherents are treated as presumptively valid and fair on the premise that they are policed and made reasonable by the market forces of competition.[342]

J. ON DISP. RESOL. 757, 851–52 (2004) (noting that there is no evidentiary support that prices are lowered with the imposition of arbitration terms); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 92–95 (2004) (demonstrating that the market conditions necessary for the operation of pass-through theory do not exist).

[339] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (reaffirming the proposition that Congress enacted the FAA to secure the arbitral benefits of "quicker, more informal, and often cheaper resolutions for everyone involved"); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011) (noting that the informality of arbitration results in reduced dispute resolution costs); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (noting that in the context of an employment dispute, arbitration costs less than litigation); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) ("[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

[340] *See* RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. (a) (AM. LAW INST. 1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision. Forms can be tailored to office routines, the training of personnel, and the requirements of mechanical equipment. Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.").

[341] Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) ("Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device."); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996) (noting that allowing insurance companies to provide policy terms after payment is made "serves buyers' interest by accelerating effectiveness and reducing transactions costs"); Nw. Nat. Ins. Co. v. Donovan, 916 F.2d 372, 378 (7th Cir. 1990) (rationalizing the enforcement of a forum selection clause on the assumption that "cost savings that accrue to Northwestern from contractual terms that facilitate the enforcement of its bonds will be passed on, in part anyway, to the purchaser of those bonds—the enterprise in which the defendants invested—in the form of a lower premium"); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998) ("While returning the goods to avoid the formation of the contract entails affirmative action on the part of the consumer, and even some expense, this may be seen as a trade-off for the convenience and savings for which the consumer presumably opted when he or she chose to make a purchase of such consequence by phone or mail as an alternative to on-site retail shopping.").

[342] CFPB Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040). Academics disagree about whether arbitration reduces costs and benefits

But how much companies save through bilateral arbitration terms is unknown and will likely remain that way. Further, firms may not be able to accurately compute savings attributable to bilateral arbitration terms, and even if they could, they may not pass through such savings in the form of reduced prices or increased wages.[343] Firms may also be reluctant to disclose identified savings or the extent to which adherents benefit from bilateral arbitration, and the CFPB study offered a glimpse of this reality. For example, during the study, firms claimed that they subsidize the bilateral arbitration process but provided no accounting to that effect.[344] In addition, firms claimed that the CFPB should study how much they invest in compliance but failed to provide any data to evaluate this issue.[345]

Firms were similarly coy on the issue of costs attributable to class actions that would presumably be saved and passed on to consumers.[346] The CFPB found no data that supported such claims and concluded they were grounded only in "general economic principles and reasoning."[347] There was no empirical evidence that firms

consumers through lower prices, but the CFPB found "there is little empirical evidence to support either position." *Id.* at 33,238; *see also* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1230 (1983).

[343] *See* Sternlight & Jensen, *supra* note 338, at 92–95 (noting that pass-through theory requires market conditions characterized by perfect competition).

[344] CFPB Arbitration Agreements, 82 Fed. Reg. at 33,395.

[345] *See id.* at 33,392.

[346] *See id.* at 33,412 (arguing that class actions will force firms to remove arbitration terms, increase firms' costs that customers will have to absorb, and stifle innovation).

[347] *See id*. at 33,302 n.720. Recent tax legislation also revealed the weakness of the pass-through theory. For example, it was argued that tax savings attributable to a lower corporate tax rate would be passed through to workers in the form of higher pay, more business investments, and job creation. *See* Jim Tankersley, *Trump's Tax Cut One Year Later: What Happened?*, N.Y. TIMES (Dec. 27, 2018), https://www.nytimes.com/2018/12/27/us/politics/trump-tax-cuts-jobs-act.html (noting that Republicans and big corporations promised that wage increases and investment in large projects would directly flow from lowering the corporate tax rate). In reality, however, many companies used the savings in a variety of ways that did not benefit workers or expand their businesses. *Id.* Some companies increased charitable giving, and many repurchased shares of stock to increase shareholder value. *See* Steve Dickson, *JPMorgan Pledges $20 Billion for Loans, Jobs After Tax Cut*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 23, 2018), https://news.bloomberglaw.com/daily-labor-report/jpmorgan-pledges-20-billion-for-loans-jobs-after-tax-cut (reporting one bank's plan to "bolster its philanthropic investments by 40 percent" in addition to raising wages and hiring more workers); David Scheer, *Big U.S. Banks Slashed 8,000 More Jobs Before Tax-Cut Windfall*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 18, 2018), https://www.bloomberg.com/news/articles/2018-01-18/big-u-s-banks-slashed-8-000-more-jobs-before-tax-cut-windfall (noting that most big banks "emphasized that shareholders will be the main recipients of the windfall"); Charles Stein, *BNY Mellon Falls After Plowing Tax-Cut Back into Business*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 18, 2018), https://news.bloomberglaw.com/daily-labor-report/bny-mellon-falls-after-plowing-tax-cut-back-into-business (noting that Mellon bank intended to use tax savings to invest in technology and its employees).

will pass through cost savings attributable to class action bans.[348] In any event, the CFPB concluded that a pass-through rate cannot be determined,[349] and even if this marginal benefit was passed through, the CFPB found that its effect would be negligible in the financial sector, amounting to about $1 per customer account per year.[350] By contrast, the right to proceed as a class would benefit hundreds of millions of people.[351]

C. Public Law Control of Legal Remedies Is Preferable

The federal rules take adhesion contracting to an impermissible level by permitting drafters to evade contractual and legal obligations. The federal rules allow drafters to decide what remedies can be realized, irrespective of what public law provides. Drafters' self-interest incentivizes overreaching, so publicly determined adjudicatory procedures and remedies are preferred. Recognizing the potential for abuse when no bargaining occurs, neoclassical contract rules impose limits on the absolute drafting discretion powerful parties have.[352] The guarantee of minimum contract remedies extends to the employment context as well. Adhesion contract drafters cannot exempt themselves from statutory wage guarantees and other substantive remedies provided in labor and employment laws.[353]

The federal rules hamper these neoclassical checks on overzealous drafters by treating all arbitration contract terms as presumptively valid, except those that expressly eliminate legal remedies.[354] Drafters now know that their arbitration contracts will be upheld even if they prescribe terms that are legally forbidden and operate to deter claims or deny remedies.[355] While drafters cannot insert terms

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[348] CFPB Arbitration Agreements, 82 Fed. Reg. at 33,302.

[349] *See id.* at 33,409 ("Economic theory does not provide useful guidance about what the magnitude of the pass-through of this marginal cost is likely to be . . . .").

[350] *Id.* at 33,408.

[351] *Id.* at 33,297.

[352] *See* Garrity v. Lyle Stuart, Inc., 353 N.E. 2d 793, 794 (N.Y. 1976) (holding that the power to sanction with punitive damages is reserved to the state so an arbitrator cannot enforce a private agreement for punitive damages); Peevyhouse v. Garland Coal & Min. Co., 382 P.2d 109 (Okla. 1962) (noting that some state laws limit private agreements for damages to promote substantial justice and prevent windfalls); Wassenaar v. Panos, 331 N.W. 2d 357, 362 (Wis. 1983) (noting that public law normally determines contract remedies because private parties may stray from a compensatory regime); *see also* U.C.C. § 2-718 (AM. LAW INST. & UNIF. LAW COMM'N 2010) (voiding oppressive liquidated damages provisions); *id.* § 2-719 (guaranteeing minimum adequate remedies and voiding unconscionable exclusions of consequential damages).

[353] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (holding that substantive protections against age discrimination cannot be waived in a contract to arbitrate).

[354] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236–37 (2013).

[355] *See* Barras v. Branch Banking & Tr. Co., 685 F.3d 1269, 1283 (11th Cir. 2012).

explicitly exempting themselves from liability in the event of breach or give adherents no forum for relief, they accomplish the same result with neutral arbitration terms and procedures. And in cases where arbitrators enforce impermissible terms, drafters get a windfall from federal rules that enforce legally incorrect arbitral awards.[356]

The federal rules' toleration of such contractual oppression cannot be justified on FAA or efficiency grounds, and they nullify publicly crafted neoclassical rules that are already quite pro-drafter. Now drafters can further eliminate legitimate claims by prescribing arbitration terms that ordinarily would not survive a court challenge. This added contractual burden on adherents increases the likelihood that many contractual breaches will go unremedied, thereby expanding the losses for adherents and providing extralegal and extracontractual gains for drafters.[357]

D. The FAA and Regulatory Experience Support Public Control of Legal Remedies

The FAA does not express a federal interest in influencing adjudication outcomes.[358] The FAA expressly preserves state law as the governing rules of decision by mandating enforcement "save upon such grounds as exist at law or in equity for the revocation of any contract."[359] Notably, this preservation of state law is in the same sentence and modifies the FAA's core provision that arbitration contracts must be enforced. In general, state arbitration law is the same as the FAA,[360] but states

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[356] *See* Peyovich v. World Mortg. Co., No. 6:08–cv–404–Orl–28KRS, 2010 WL 3516721, at *4 (M.D. Fla. July 29, 2010) (upholding an arbitral award that improperly denied an employee attorneys' fees in a wage violation case).

[357] This shifting of costs that should have been internalized for a party's failed performance is the sort of practice that necessitated consumer protection laws designed to rid the market of dishonest dealers. *See* PRIDGEN & MARSH, *supra* note 1, at 289–90. Similar victimizing practices are also prevalent in the employment area. *See* FISCAL POL'Y INST., BUILDING UP NEW YORK, TEARING DOWN JOB QUALITY 2 (2007) ("As in the case of environmental pollution, markets on their own do not force businesses to 'internalize' all the costs they generate. Over the decades, government established a series of employment standards and social insurance systems to protect workers and responsible businesses from unchecked competition that degrades working conditions and the economic well-being of workers and that disadvantages responsible businesses.").

[358] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) (noting that in commercial agreements, arbitration is merely a substitute for litigation); *see also Gilmer*, 500 U.S. at 26 (holding that the switch to arbitration is only a change in process because no substantive right is lost); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (holding that arbitration contracts are merely forum-change agreements that trade court procedures for the informality and simplicity of arbitration).

[359] United States Arbitration Act, 9 U.S C. § 2 (2012).

[360] Fifteen states had already passed legislation modeled on the FAA when a uniform arbitration law was promulgated in 1956. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77

have increasingly found the need to address arbitration terms that deviate from their prescribed rules of adjudication and remediation. Because arbitration contracts are now generally non-bargained and drafters are including prohibited or oppressive terms, states need flexibility to adapt.[361] Tailored regulations to deal with drafting abuse and broad discretion to deploy the unconscionability doctrine further the neoclassical promise of an adequate legal remedy.

The FAA's endorsement of state law and the failure of the federal rules to guarantee legal remedies make a compelling case for defaulting to state rules and processes. What terms are permissible in arbitration agreements is not a uniquely federal concern. This is a private tug of war between commercial interests that draft adhesion contracts with beneficial arbitration rules and consumers and workers who have limited bargaining input but baseline legal protections. Federal rules for the FAA have converted adhesion contracting into a vehicle for avoiding regulatory limits intended to guarantee remedies.[362] The CFPB was created precisely because deference to contractual liberties in the financial sector led to risky products and services that produced massive market failure.[363]

E. Experience and Empirical Data Also Support State Regulations

The categorical and pro-business rules crafted for the FAA and their operation to deter or prevent legitimate legal claims militate in favor of state contract rules and

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NEB. L. REV. 397, 438 (1998). The Uniform Arbitration Act was modeled on the FAA. *See* Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 209 (2002); Knapp, *supra* note 29, at 772 (noting that by 1925, only pockets of judicial resistance to arbitration remained).

[361] *See* CAL. BUS. & PROF. CODE § 20040.5 (West 2019) (banning out-of-state venue clauses in franchise agreements because they were prejudicial to franchisees); *see also* Casarotto v. Lombardi, 886 P.2d 931, 936 (Mont. 1994) (upholding a conspicuous notice requirement for arbitration provisions as a necessary check on oppression of Montanans via the arbitral forum).

[362] Scholars have also grappled with the problem of drafters unreasonably passing risks to adherents who are not aware of and cannot resist form terms. Scholars recognize that form terms are both beneficial and dangerous and argue that they should be regulated by courts or legislatures when they are unreasonable, undercut the bargain, or deviate from judicially established default rules for missing terms. *See* Rakoff, *supra* note 342, at 1176, 1179 (discussing various proposals scholars have advanced for non-bargained terms).

[363] 12 U.S.C. § 5511(a) (2012) ("The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products . . . are fair . . . and competitive."); President Barack Obama, Remarks on Signing the Dodd-Frank Reform and Consumer Protection Act (July 21, 2010) https://www.govinfo.gov/content/pkg/DCPD-201000617/pdf/DCPD-201000617.pdf (noting that deceptive loan practices flourished because "our financial sector was governed by antiquated and poorly enforced rules that allowed some to game the system and take risks that endangered the entire economy").

contract-making processes. The CFPB's study has provided some important insights. For example, it shows how drafters' self-interest causes them to allocate significant risks and costs to adherents via the arbitration contract.[364] Drafters prescribe arbitration for all adherents' claims but preserve the court forum for their claims.[365] Drafters benefit from limited judicial review as an "efficient" feature of bilateral arbitration but argue that the absence of judicial review is a "Frankenstein's monster"[366] in the context of class actions.

The claim that the arbitral forum is fair to adhering parties does not fare well in the light of empirical evidence either. Available data shows firms rigging arbitration panels,[367] arbitrators confessing to bias or feeling pressured to rule for firms,[368]

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[364] *See* CFPB Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

[365] Some firms regularly include carve-out provisions in their arbitration contracts that permits them or the consumer to go to small claims court, but one study showed that such provisions operated only to benefit the firms because few consumers ever used them, while the firms regularly did. *See id.* at 33,231–32. Many firms carve out potential claims against consumers and workers for court enforcement. *See, e.g.*, Poublon v. C.H. Robinson Co., 846 F.3d 1251, 1263 (9th Cir. 2017); Chin v. Boehringer Ingelham Pharm. Inc., No. 17-cv-03703-JSC, 2017 WL 3977381, at *1 (N.D. Cal. Sept. 11, 2017); Mitchell v. HCL Am., Inc., 190 F. Supp. 3d 447, 485 (E.D.N.C. 2016); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 682–83 (Cal. 2000); Farrar v. Direct Commerce, Inc., 215 Cal. Rptr. 3d 785, 798 (Cal. Ct. App. 2017); Abramson v. Juniper Networks, Inc., 9 Cal. Rptr. 3d 422, 442–43 (Cal. Ct. App. 2004); O'Hare v. Mun. Res. Consultants, 132 Cal. Rptr. 2d 116, 125 (Cal. Ct. App. 2003); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1536 (Cal. Ct. App. 1997); Fuqua v. SVOX AG, 13 N.E.3d 68, 81 (Ill. App. Ct. 2014); Cordova v. World Fin. Corp. of N.M., 208 P.3d 901, 908 (N.M. 2009).

[366] *See* CFPB Arbitration Agreements, 82 Fed. Reg. at 33,362 n.1031 (noting that limited appeal rights is a standard feature of arbitration contracts and that the Chamber of Commerce's claim that class arbitration is a monster because "[i]t combines the enormous stakes, formality and expense of litigation that are inimical to bilateral arbitration with exceedingly limited judicial review of the arbitrators' decisions").

[367] *See* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System,"* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html ("Behind closed doors, proceedings can devolve into legal free-for-alls. Companies have paid employees to testify in their favors. A hearing that lasted six hours cost the plaintiff $150,000. Arbitrations have been conducted in the conference rooms of lawyers representing the companies accused of wrongdoing."); *see also* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (noting that the NFL Commissioner was initially assigned to preside over the claims of cheerleaders protesting working conditions).

[368] *See* Silver-Greenberg & Corkery, *supra* note 367 (noting that more than 30 arbitrators said in interviews that the pressure to rule for companies that give them business was real and that "more than three dozen arbitrators described how they felt beholden to the companies. Beneath

arbitrators' freedom to make legally unsound decisions,[369] and forum providers being sanctioned for violating promises of neutrality or admitting concerns about the absence of neutrality and due process.[370]

Although arm's-length arbitration contracting can be an attractive alternative to courts, adhesion arbitration contracts are the norm. This reality must affect the interpretive discretion of the court. Judicial discretion when interpreting the FAA is not unbounded, and assumptions about the benefits of bilateral arbitration must be tempered by empirical reality. Firms have not substantiated their claims that bilateral arbitration benefits adherents, and courts have not required firms to demonstrate that they actually pass through the economic gains attributable to mandatory arbitration rules.

Further, the Court has not wrestled with data that shows how bilateral arbitration destabilizes markets and insulates non-compliance with contractual and legal obligations. Moreover, the federal rules have not responded to the fact that arbitration contracts often deliver a phantom forum. Economic theory alone is not sufficient to justify expansive federal contract rules that delegate public law functions to private parties. The CFPB's comprehensive study and other empirical data undermine the Court's assumption that substantive remedies are preserved in bilateral arbitration contracts. Arbitral experience and other studies show that market forces alone are not enough to incentivize drafters to impose and honor only legally permissible terms.

CONCLUSION

There is growing awareness that mandatory arbitration contracts harm consumers and workers, which has spawned pushback initiatives. Some plaintiff lawyers have resorted to mass bilateral arbitration filings as a counterweight to class action

every decision, the arbitrators said, was the threat of losing business"); *see also* Genie Harrison, *Forced Arbitration Is Bad News for Employees, California Stats Show*, BLOOMBERG L. (Aug. 15, 2019), https://news.bloomberglaw.com/daily-labor-report/insight-forced-arbitration-is-bad-news-for-employees-california-stats-show ("From 2012-2017, AAA arbitrated 1,710 cases for Macy's, almost 47% of its employment arbitrations. The other 1,936 non-Macy's cases had a 7.5% dismissal rate; but *Macy's plaintiffs faced a 93% rate of dismissal*. This flip cannot be explained by chance.").

[369] *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

[370] *See* CFPB Arbitration Agreements, 82 Fed. Reg. at 33,216 (reporting the National Arbitration Forum's agreement to stop administering arbitrations in settlement of a lawsuit alleging conflict of interest and pro-firm bias). In addition, the American Arbitration Association (AAA) "announced a moratorium on administering company-filed debt collection arbitrations, articulating significant concerns about due process and fairness to consumers subject to such arbitrations." *Id.* The AAA also told Congress that it had independently discovered weaknesses in its debt collection arbitration program that related to arbitrator recruitment, training, and neutrality. *Id.*

bans.[371] Law students have refused to work for firms that impose such terms,[372] Google workers have protested arbitration contracts,[373] and the "Me Too" movement has fought to roll back the confidentiality that arbitration rules give sexual harassers.[374] But businesses are fighting back by refusing to pay their contractually required filing fees necessary to start bilateral arbitration proceedings[375] and calling

[371] *See* Erin Mulvaney, *JP Morgan, Facebook Fight Mass Arbitration Legal Strategy*, BLOOMBERG L. (July 3, 2019), https://news.bloomberglaw.com/daily-labor-report/jpmorgan-facebook-fight-mass-arbitration-legal-strategy (noting that the mass filing tactic used by plaintiffs could serve to convince employers to stop mandating arbitration despite the U.S. Supreme Court rulings in recent years that have protected this employer right); Andrew Wallender, *Corporate Arbitration Tactic Backfires as Claims Flood In*, BLOOMBERG L. (Feb. 11, 2019), https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in (noting that one mass arbitration filing against Uber would cost the company $18.7 million in filing fees alone, and such filings may deter companies from mandating arbitration and class action bans).

[372] *See* Stephanie Russell-Kraft, *Law Students Plan to #DumpKirkland over Arbitration Agreements*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 12, 2018), https://news.bloomberglaw.com/daily-labor-report/law-students-plan-to-dumpkirkland-over-arbitration-agreements; Stephanie Russell-Kraft, *Monger Tolles to Scrap Employee Arbitration Agreements*, BLOOMBERG L.: BIG. L. BUS. (Mar. 26, 2018), https://biglawbusiness.com/munger-tolles-orrick-to-scrap-employee-arbitration-agreements.

[373] *See* Gerrit De Vynck, *Google Moves to End Forced Arbitration for All Worker Complaints*, BLOOMBERG L.: DAILY LAB. REP. (Feb. 21, 2019), https://news.bloomberglaw.com/daily-labor-report/google-moves-to-end-forced-arbitration-for-all-worker-complaints; Krista Gmelich, *Google Workers Keep Up Fight on Forced Arbitration After Walkout*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 15, 2019), https://news.bloomberglaw.com/daily-labor-report/google-workers-keep-up-fight-on-forced-arbitration-after-walkout-1; *see also* Sarah Frier, *Facebook Ends Forced Arbitration for Sexual Harassment*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 9, 2018), https://www.bloomberg.com/news/articles/2018-11-09/facebook-ends-forced-arbitration-for-sexual-harassment-claims.

[374] *See* Laura Mahoney, *Ca. Governor Vetoes Bill to Limit Arbitration, Other #MeToo Bills*, BLOOMBERG L.: DAILY LAB. REP. (Oct. 1, 2018), https://news.bloomberglaw.com/daily-labor-report/ca-governor-vetoes-bill-to-limit-arbitration-other-metoo-bills; Aaron Nicodemus, *Mass. Bill Would Preserve Right to Sue for Workplace Misconduct*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 31, 2018), https://bnanews.bna.com/daily-labor-report/mass-bills-would-preserve-right-to-sue-for-workplace-misconduct; Opfer, *supra* note 147.

[375] *See* Erin Mulvaney, *Postmates Must Explain Why It Won't Arbitrate or Face Contempt*, BLOOMBERG L.: DAILY LAB. REP. (Dec. 3, 2019), https://news.bloomberglaw.com/daily-labor-report/postmates-must-explain-why-it-wont-arbitrate-or-face-contempt (reporting Postmates' refusal to pay filing-fees to start bilateral arbitrations even after it banned class claims); Erin Mulvaney & Kathleen Dailey, *DoorDash Must Arbitrate Misclassification Suit, Couriers Say*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 18, 2019), https://news.bloomberglaw.com/daily-labor-report/doordash-must-arbitrate-misclassfication-suit-couriers-say (reporting DoorDash's refusal to pay filing fees to start the bilateral arbitration process it imposed on workers).

for the expanded adoption of arbitration rules.[376] Further, government agencies charged with protecting consumers and workers are under attack as they attempt to guarantee legally provided remedies for both adherents and the public welfare.[377] Specifically, the CFPB's limit on class bans was disapproved via a partisan political process,[378] and employers no longer have to worry about their class bans violating the NLRA.[379] These developments highlight the importance of state rules that guarantee substantive remedies.

Terms that indirectly deny the arbitral forum or substantive legal remedies now serve as an obstacle to the FAA because they can often make the arbitral forum an illusion. The FAA is not a legal mandate to extend adhesion contract drafting discretion beyond the broad parameters established by neoclassical contract law. Regulating drafting freedom in arbitration contracts is a state law issue, not a federal one. No strong federal policy exists to justify the preemption of state contract rules and the promulgation of conflicting federal rules.

The FAA expresses no federal interest beyond removing judicial hostility to arbitration contract enforcement. It is not an endorsement of non-bargained arbitration contracts, nor does it express a preference for bilateral arbitration that guarantees the denial of the arbitral forum or substantive remedies. In the FAA, Congress made arbitration contracts equally as enforceable as any other contract and subject to the same defenses as other contracts should they stray from the public policies of the states. In effect, the FAA provides no express or implicit authorization to replace

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[376] *See* Jacklyn Wille, *Chamber Backs Mandatory Arbitration of Employee Benefit Issues*, BLOOMBERG L.: DAILY LAB. REP. (Nov. 7, 2017), https://news.bloomberglaw.com/employee-benefits/chamber-backs-mandatory-arbitration-of-employee-benefit-issues.

[377] Robert Iafolla, *California's Unique Worker Law Under Attack by Business Group*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 17, 2019), https://news.bloomberglaw.com/daily-labor-report/californias-unique-worker-law-under-attack-by-business-group (discussing businesses' constitutional challenge to California's Private Attorneys General Act); *see* PRIDGEN & MARSH, *supra* note 1, at 51 (noting that federal arbitration rules now trump the more consumer-protective Federal Trade Commission's dispute resolution process).

[378] Republicans in both houses of Congress disapproved of the CFPB's class action rule and President Trump, a Republican, concurred. *See* Joint Resolution, Pub. L. No. 115-74, 131 Stat. 1243 (2017) (making official Congress's disapproval of the CFPB's class action rule); Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html?auth=login-google&login=google ("Senate Republicans voted on Tuesday to strike down a sweeping new rule that would have allowed millions of Americans to band together in class-action lawsuits against financial institutions.").

[379] Porter Wells, *Northrop Grumman Wins Post-"Epic Systems" Labor Board Dispute*, BLOOMBERG L.: DAILY LAB. REP. (Aug. 3, 2018), https://news.bloomberglaw.com/daily-labor-report/northrop-grumman-wins-post-epic-systems-labor-board-dispute-1 ("The . . . Northrop Grumman case could be just the first in dozens more summary dismissals of worker complaints to come.").

state rules that guarantee consumers and workers both their arbitral forum and substantive remedies. Because state legislative and common law processes can flexibly respond to address evolving adhesive arbitration contracting practices, separate federal rules of arbitration are not justified.