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## FEDERAL ARBITRATION LAW AND THE PRESERVATION OF LEGAL REMEDIES

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### ABSTRACT

*The Supreme Court has crafted unprecedented rules to govern contracts to arbitrate under the Federal Arbitration Act (FAA). Although Congress in enacting the FAA prescribed a rule of contract enforcement, it preserved state law defenses to enforcement, state regulation of contract formation, and interpretation issues that did not frustrate the enforcement mandate. This Article shows how the Court has created separate federal rules of formation, interpretation, and defense under the enforcement umbrella. It argues that because states have statutorily embraced the FAA's enforcement mandate, there is no need for separate federal rules of formation, interpretation, or defense. This Article also demonstrates that the new federal rules for arbitration contracts fail to accomplish their legal mandate of guaranteeing substantive remedies in the arbitral forum. This failure occurs in many cases because of the merger of commercial contract precedents with disharmonious labor arbitration precedents. Using the Court's rules for vacatur of arbitration awards, and its rules governing labor contract enforcement, this Article provides concrete examples of lost substantive rights attributable to arbitration contract enforcement. To avoid substantive waivers, this Article proposes an interpretive model drawing from Title VII's disparate impact jurisprudence that prevents substantive waivers, and defers to state laws that are practically consistent with the FAA's prescription of enforcement.*

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#### INTRODUCTION

In recent years, the Supreme Court has issued many transformative decisions interpreting the Federal Arbitration Act (FAA).<sup>1</sup> These decisions, which forcefully support enforcement of contracts to arbitrate as an effective alternative to court adjudication, are grounded in the premise that no substantive right is lost when disputes are resolved in the arbitral forum.<sup>2</sup>

Arbitral adjudication is now governed by a growing body of federal law regulating contract formation, interpretation, and defense that eclipses the

1. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (holding that the FAA only prohibits the elimination of the right to pursue statutory remedies so class action bans are enforceable even if they make it practically impossible to vindicate legal rights); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–40 (2011) (rejecting the proposition that class action bans that effectively insulate businesses from small-sum consumer claims in arbitration are unconscionable); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255–56 (2009) (holding that the FAA principles of enforcement apply with equal force to collective bargaining contracts, and confirming that unions have exclusive control of their members' grievances); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (holding that legal errors of arbitrators do not provide sufficient grounds for vacating an award); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that the FAA applies to virtually all employment contracts except those of transportation workers); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that statutory antidiscrimination rights can be kept out of a judicial forum by a contract to arbitrate if the implicated statute does not preclude waiver of the judicial forum).

2. See *Gilmer*, 500 U.S. at 26–28 (holding that no substantive right is lost in contract to arbitrate disputes); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that contracts to arbitrate are mere forum changes that do not impair substantive rights).

FAA's narrow prescription to equally *enforce* arbitration contracts as any other contract would be enforced.<sup>3</sup> Under the FAA, state laws that do not deny enforcement but regulate contract formation, interpretation, and defense have been ruled preempted by the new federal rules.<sup>4</sup> More significantly, the federal rules dramatically differ from state contract laws that do not frustrate the general FAA rule of enforcement.<sup>5</sup>

Enacted in 1925 as the United States Arbitration Act,<sup>6</sup> the rules of enforcement for the FAA had a limited reach.<sup>7</sup> Congress provided no

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3. See Federal Arbitration Act, Pub. L. No. 68-401, § 2, 43 Stat. 883, 883 (1925) (codified at 9 U.S.C. § 2). Section 2 of the Act provides that:

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 a 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.

*Id.*

The Supreme Court has held that another objective of the FAA Congress was to “streamline[]” proceedings. See *Concepcion*, 563 U.S. at 344; see also *Southland Corp. v. Keating*, 465 U.S. 1, 10-12 (1984) (concluding that the FAA originated in the Commerce Clause and therefore implicitly displaces state rules). But the overwhelming consensus is that the FAA is a mere procedural device for federal courts. See David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1227 (2013) (noting that “[f]ew modern opinions have weathered as much criticism as *Southland*”). And criticism of the preemptive breadth the Court has given the FAA is not limited to academics. See Stephen A. Plass, *Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak Parties*, 65 CATH. U. L. REV. 79, 119-22 (2015) (discussing the objections of state and federal judges to the Court’s expansive view of the FAA’s narrow provision for enforcement of arbitration contracts).

4. See *Concepcion*, 563 U.S. at 344-52 (holding that a state law that treats class arbitration waivers as unconscionable is preempted by the FAA because it interferes with the statute’s objectives); *Perry v. Thomas*, 482 U.S. 483, 491-92 (1987) (holding that a state law that guaranteed a judicial forum for wage claims was preempted by the FAA because it conflicted with the statute’s enforcement mandate); *Southland Corp.*, 465 U.S. at 10-16 (holding that the FAA originated in the Commerce Clause and therefore preempts a California franchise law which prohibited waivers of the right to sue in court because this conflicted with the rule of enforcement).

5. The narrow federal interest that the FAA expresses is in the *enforcement* of contracts to arbitrate. See Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012). To the extent that state laws endorse this principle of enforcement, they arguably do not conflict with the FAA. See *Southland Corp.*, 465 U.S. at 17 (Stevens, J., concurring in part and dissenting in part) (arguing that the FAA’s general preemption of state laws that deny enforcement of arbitration agreements does not apply to cases where states refuse enforcement to protect the interests or welfare of their citizens). Nonetheless, state laws that adopt the FAA’s enforcement rule but add provisions to prevent contractual overreaching that is facilitated solely because a contract to arbitrate was made, also are preempted as obstacles to FAA objectives. See *Concepcion*, 563 U.S. at 343-44.

6. When first passed, the Act was known as the United States Arbitration Act. See Bernard D. Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 COLUM. L. REV. 269, 273, 273 n.205 (1959) (calling the Act “the United States Arbitration Act” and citing 9 U.S.C. §§ 1-14 (1959), an earlier codification of the Act).

7. See Federal Arbitration Act § 2. The language of Section 2 of the FAA, as passed in 1925, is identical to its codified version; their texts are effectively interchangeable. Compare *id.*, with 9 U.S.C. § 2.

substantive rules to govern the enforcement of contracts to arbitrate, and expressly preserved state law contract defenses in Section 2 of the FAA.<sup>8</sup> It was not until 1967 that the Court interpreted the FAA as a substantive device that authorized federal courts to make federal law.<sup>9</sup> And another generation passed before the Court began formulating the content of that law.<sup>10</sup> Since the 1980s, the federal law governing arbitration contracts has grown dramatically under the umbrella of contract enforcement.<sup>11</sup> For example, the Court has crafted federal rules to govern issues such as adhesive contracting, the requirement of consideration, questions of interpretation, and the validity of equitable defenses such as unconscionability.<sup>12</sup>

Outside of the rule of enforcement, the FAA claims no federal interest in nor does it provide any guidance on contract formation, interpretation, or defense.<sup>13</sup> In fact, the FAA textually endorses state rules of formation and defense by providing that enforcement may be denied “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>14</sup> As a result, the

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8. See Federal Arbitration Act § 2 (making contracts to arbitrate enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”); *Concepcion*, 563 U.S. at 339 (“The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ This saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability’ . . .” (first quoting Federal Arbitration Act § 2; then quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996))). The Court initially interpreted the FAA as a narrow procedural federal jurisdictional device but later concluded that it is a source of federal substantive law. See Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305–08, 1315–22 (1985).

9. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404–05 (1967) (holding that the FAA was enacted pursuant to Congress’s power under the Commerce Clause thereby creating substantive law binding on state courts).

10. See, e.g., *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983).

11. Because Section 2 of the FAA regulates arbitration contracts “evidencing a transaction involving commerce,” the Court has inferred a broad grant of congressional power to make substantive laws for the FAA, that binds state courts. Federal Arbitration Act § 2; see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006), *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24.

12. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (rejecting a state court’s interpretation of contract language); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (holding that class action bans that force a party to give up their legal remedies are not unconscionable); *Buckeye Check Cashing*, 546 U.S. at 446 (rejecting a state court conclusion that arbitration agreements in void contracts are not severable); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (holding that the absence of bargaining input by an employee does not impair an arbitration contract); *Prima Paint*, 388 U.S. at 403–06 (creating a per se rule of severability for arbitration terms in a contract).

13. See Federal Arbitration Act § 2.

14. *Id.* Further, the Court’s conclusion that the FAA represents a national arbitration policy that trumps the traditional prerogative of states to regulate contracts is not supported by the legislative history or historical record of the statute. See H.R. REP. NO. 68-96, at 1 (1924) (stating “[w]hether an agreement for arbitration shall be enforced or not is a question of procedure”). For an extensive discussion of the legislative record that demonstrates that the FAA was a purely procedural statute, see *Southland Corp.*, 465 U.S. at 21–33 (O’Connor, J., dissenting). See also David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal*

states' regulatory interest in choosing contractual rules of decision was undisturbed by the passage of the FAA.<sup>15</sup> Further, states have embraced the FAA by codifying its rule of enforcement.<sup>16</sup> Nonetheless, the Court has crafted separate contract rules for the FAA on the premise that they promote statutory goals such as contractual liberty,<sup>17</sup> or the enforcement mandate,<sup>18</sup> or virtues such as speed, informality, or reduced costs.<sup>19</sup> In reality, however, the federal common law rules take an impermissibly broad view of the enforcement mandate and the broader legislative goal of adjudicative efficiency. For example, the rules treat parties with no bargaining liberty as having freedom to contract,<sup>20</sup> require

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*Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 7–9 (2004).

15. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (noting that whether parties agreed to arbitrate is a matter of state law); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (noting that contract interpretation is a matter of state law).

16. States have long ceased being hostile to arbitration contract enforcement and have enacted arbitration laws that mimic the FAA. Since the 1950s, many states have codified laws that mimic the FAA's rule of enforcement. See, e.g., ARIZ. REV. STAT. ANN. § 12-1501 (2017); ARK. CODE ANN. § 16-108-206 (West 2017); COLO. REV. STAT. ANN. § 13-22-206 (West 2017); DEL. CODE ANN. tit. 10, § 5701 (West 2017); IDAHO CODE ANN. § 7-901 (West 2017); LA. STAT. ANN. § 9:4201 (2017); N.C. GEN. STAT. ANN. § 1-569.6 (West 2017); 42 PA. CONS. STAT. AND CONS. STAT. ANN. § 7303 (West 2017); S.D. CODIFIED LAWS § 21-25A-1 (2017); TENN. CODE ANN. § 29-5-302 (West 2017). These states, among others, include in their arbitration statutes the same language as the FAA. See Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 1. The fact that states have used the FAA as a model for their arbitration laws removes the need for special federal rules. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728–29 (1979) (holding that the creation of federal common law should be guided by whether a uniform law is needed to further a federal purpose, whether state rules frustrate federal objectives, and whether a uniform rule would disrupt existing relationships grounded in state law). In fact, even when federal interests are implicated, the Court has cautioned against overly protective federal common law. See *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (holding that courts should defer to state law if the federal interest is not unique and state law does not pose a significant conflict with federal policy); see also *United States v. Bestfoods*, 524 U.S. 51, 62–63 (1998) (noting that when federal law does not directly provide a rule, state law is the proper starting point); *United States v. Texas*, 507 U.S. 529, 534–35 (1993) (noting that congressional silence is not a sufficient basis by itself to abrogate state rules of decision).

17. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–46 (2011) (emphasizing the parties' freedom to design the adjudication process to suit their needs as justification for approving class action bans of small sum claims); *Volt*, 489 U.S. at 478 (finding that enforcement of private bargains is the core purpose of the FAA); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (finding that the primary goal of the FAA was enforcement of the private deal to arbitrate).

18. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (construing broadly the FAA's enforcement mandate as applying to at-will employees despite a statutory exclusion for seamen, railroad workers, and all other workers engaged in foreign and interstate commerce).

19. See *Concepcion*, 563 U.S. at 344–46 (stating that the efficiency benefits of informality justify class action bans in arbitration); *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008) (stating that speedy resolution is a prime objective of the FAA); *Circuit City*, 532 U.S. at 123 (concluding that FAA arbitration promotes cost savings in adjudicating claims).

20. Arbitration is now a mandatory nonbargained transaction for consumers, workers, and others, and is therefore distinct from the bargains the FAA contemplated for arm's-length parties. See *infra* notes 103–10 and accompanying text.

enforcement even when it produces absurd results,<sup>21</sup> and promote arbitral efficiency that benefits one party and harms the other.<sup>22</sup> These realities unhinge the federal rules from the FAA.

This Article argues that because many of the Court's formation, interpretation, and defense rules cannot be justified solely by the FAA's enforcement mandate, state rules deserve more deference.<sup>23</sup> State rules designed to prevent arbitration contracts from operating as obstacles to the vindication prospects of consumers and workers should be viewed as consonant with the FAA as long as they reasonably honor the enforcement principle.<sup>24</sup> The Article also considers whether the federal judge-made rules accomplish their stated purpose of placing arbitration contracts on equal legal footing as all other contracts. An evaluation of the case law shows that the federal rules make arbitration contracts a superior bargain because such agreements can be drafted to prevent or discourage legitimate claims by the nondrafting party.<sup>25</sup> In many cases, the result has been a loss of substantive rights by one party merely because a contract to arbitrate was made.<sup>26</sup> The Article provides specific examples showing how substantive remedies were lost because federal rules approve contract terms that make vindication impossible for the nondrafter, and federal rules of vacatur require enforcement of arbitral awards that are the products of legal errors.<sup>27</sup>

Section I of the Article provides the context in which the FAA was enacted, and shows that the FAA is an exceptional piece of legislation that sought to confirm narrow bargaining liberties.<sup>28</sup> The statute had no detractors, mainly

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21. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (upholding a class action ban in arbitration even though this made it practically impossible to pursue antitrust claims); *Concepcion*, 563 U.S. at 348–51 (enforcing a class action ban in arbitration although it would be economically infeasible for consumers to proceed bilaterally).

22. See *Am. Express*, 133 S. Ct. at 2309; see also *Concepcion*, 563 U.S. at 350–51 (rejecting class arbitration that benefits consumers because it multiplies the costs to businesses and increases the pressure on them to settle claims).

23. Cf. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1247–48 (1996) (defining federal common law as positive judge-made law that cannot be traced to a federal statutory or constitutional command); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 888 (1986) (noting that federal common law is reserved for circumstances where there is a real federal need and the rule does not infringe on core state interests). The Court's latest FAA decision also prohibits state formation rules for arbitration contracts. See *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017) (concluding that the FAA regulates not only state rules that deny enforcement but also rules that affect formation).

24. See *infra* Section II for an analysis of state rules designed to prevent arbitration contracts from operating as obstacles to the vindication prospects of consumers, workers, and others.

25. See, e.g., *Am. Express*, 133 S. Ct. at 2310–12 (discussing a contractual ban on any class collaboration that made it impractical to pursue antitrust claims because the costs to prepare a case greatly exceeded any potential individual recovery).

26. See *infra* Section III for examples of substantive waivers attributable to contracts to arbitrate.

27. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (holding that the FAA prioritizes speedy resolution over legally correct decisions).

28. See *infra* notes 95–101 and accompanying text.

because its enforcement mandate was limited to arm's-length merchants that voluntarily consented to form contracts to arbitrate.<sup>29</sup> However, a federal common law rule providing that adhesive arbitration contracts are also enforceable under the FAA reversed the requirement of voluntary consent.<sup>30</sup> Section I shows that the Court's departure from the principle of voluntary consent was a necessary prerequisite to its conclusion that arbitration contracts can be forced on unwilling consumers and workers.<sup>31</sup> Courts must now enforce mandated arbitration of consumer and employment claims even when contractual overreaching is detected at the formation stage.<sup>32</sup> Section I also evaluates whether the enforcement of adhesive arbitration contracts is justified by the FAA's goals of speedier, less costly, and more expert adjudication.<sup>33</sup> It

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29. This issue of forced consent was raised once when the drafter of the bill was asked whether railroad companies were forcing shippers to consent to arbitration as a condition of shipping, and he responded "[t]here is nothing to that contention." See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 15 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce). Mr. Cohen then elaborated that there were several federal laws that protected railway shippers and parties. See *id.* Lawmakers considered this reason when exempting employment and insurance contracts. See *id.* at 21 (statement of Herbert Hoover, Secretary of Commerce). In urging passage of the FAA bill, Secretary Hoover stated that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Id.* See Federal Arbitration Act § 1, 9 U.S.C. § 1 (2012); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42–43 (1991) (Stevens, J., dissenting) (stating the FAA Congress did not envision its application to adhesion contracts); *Wilko v. Swan*, 346 U.S. 427, 435 (1953) (finding that Congress gave securities purchasers the court forum to protect them from contractual overreaching by securities dealers), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 228 (1918) (observing that arbitration is for parties on "equal footing" (quoting *President of Del. & Hudson Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258 (N.Y. 1872))).

30. See *Gilmer*, 500 U.S. at 33 (holding that inequality in bargaining power, by itself, is not enough to make arbitration contracts unenforceable); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that Section 1 of the FAA only exempts transportation workers from coverage). For a discussion of the emergence of adhesive contracting as efficient private regulation that should be enforced in arbitration contracts, see David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 461–62 (2014) [hereinafter Horton, *Mass Arbitration*].

31. For example, the Fair Labor Standards Act, which removed the contractual liberty of employers to pay market wages and gave workers the right to court adjudication of their wage disputes, can now be privatized and tailored for arbitration by an employer as an FAA-preempted transaction. See *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334 (11th Cir. 2014); see also 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, 129–40 (2004) [hereinafter Schwartz, *State Judges*] (arguing that the Court's FAA preemption jurisprudence ignores the principle of federalism by improperly invalidating state laws, and by limiting the interpretive prerogatives of state judges).

32. See *Walthour*, 745 F.3d at 1335–36; see also *Compucredit Corp. v. Greenwood*, 565 U.S. 95, 104 (2012) (holding that businesses can mandate arbitration of claims under the Credit Repair Organization Act although Congress expressly provided consumers with the right to sue and bring class claims under that statute).

33. The Court has been consistent in confirming certain legislative attributes of arbitration. Specifically, the Court has endorsed arbitration's virtues of speed, reduced costs, informality, and

argues that Congress endorsed arbitral procedural flexibility because the parties viewed it as a way to reduce the costs and delays associated with court adjudication.<sup>34</sup> As a consequence, formation practices that drive up adjudication costs, promote delay or otherwise impinge on substantive rights are inconsonant with the FAA.<sup>35</sup> But the FAA's virtues of speedy and low-cost arbitral adjudication have not been incorporated into the federal common law rules of enforcement that treat all contract procedures except those that explicitly restrict legal remedies as presumptively valid, irrespective of their practical impact.<sup>36</sup> The result is that contract drafters can impose class action bans on and allocate high forum costs to nondrafters, while simultaneously avoiding state law defenses to enforcement such as unconscionability that the FAA expressly preserved.<sup>37</sup>

Section II discusses the constitutional prerogative of states to set contract formation, interpretation, and defense rules, provided they honor the FAA's mandate of enforcement. This Section also makes the critical distinction between state rules that deny enforcement, state rules of interpretation, and state rules that regulate formation practices and contract defenses.

Section III demonstrates how the federal rules fail to achieve their goal of making arbitration contracts equal with all others. This Section shows how the

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expert neutrals. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"); *Wilko*, 346 U.S. at 431-32 ("The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation . . .").

34. *See Joint Hearings, supra* note 29. *But see AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339-40 (2011) (evaluating informality which promotes the goals of speed and reduced costs solely from the perspective of the powerful drafting party).

35. For example, the *Concepcion* Court proceeded on the assumption that redundant bilateral arbitration of consumer fraud claims is more expeditious than one class action. *See Concepcion*, 563 U.S. at 339-40. But as Justice Breyer noted, class arbitration is speedier and "surely more efficient than thousands of separate proceedings for identical claims." *Id.* at 363 (Breyer, J., dissenting). And, in some cases, the Court has also ruled that producing expeditious results is not the overriding goal of the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996) (holding that speed is not the overriding concern of the FAA); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985) (noting that liberty of contract is arbitration's primary virtue).

36. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

37. Section 2 of the FAA requires courts to enforce contracts to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (noting that contract interpretation is a matter of state law). *But see Am. Express*, 133 S. Ct. at 2310 (holding that a class claim ban is valid even if it has the practical effect of precluding claims); *Compucredit*, 565 U.S. at 102-03 (holding that a statutory provision that gives consumers the right to *sue* does not confer on them the right to *go to court*). The view that forum selection clauses in form contracts are merely procedural devices that benefit the contracting parties represents a judicial turnaround. *See Horton, Mass Arbitration, supra* note 30, at 461-62. *But see* Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1958 (1996) (contending that the Court's assessment that the arbitration forum does not affect substantive rights is "incredible and preposterous").



FAA has been extended to labor arbitration contracts that endorse the unilateral bargaining discretion of unions to make arbitration the exclusive forum, yet permit unions to sacrifice workers' legal remedies by refusing to proceed in arbitration.<sup>38</sup> It also shows that judges must confirm arbitration awards even when substantive remedies are denied, because the federal rules of enforcement and vacatur for the FAA have been merged with disharmonious rules of enforcement for labor and employment contracts.<sup>39</sup>

Section IV shows how the Court historically honored the FAA's limited enforcement mandate with its nonarbitrability or nonenforcement decisions, which were later replaced by an "effective vindication" principle.<sup>40</sup> However, the Court has determined that the efficiency benefits of arbitration<sup>41</sup> outweigh the states' interest in regulating arbitration contracts that may deny state citizens their legal remedies.<sup>42</sup> Contract drafters now have a greater incentive to impose class action bans, distant venue provisions, and forum cost-allocation provisions that make it unattractive for nondrafters to pursue legal claims.<sup>43</sup> Section IV

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38. See *infra* text accompanying notes 197–250 for a discussion of how the FAA has been extended to labor arbitration contracts.

39. See *infra* text accompanying notes 251–68 for a discussion of the disharmony between the federal rules of enforcement for the FAA and the rules of enforcement for labor and employment contracts.

40. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (holding that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function").

41. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (holding that arbitration of typically small sum employment disputes has the advantage of lowering litigation costs, and advancing the interests of the nation's employers in alternative dispute resolution); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349–51 (2011) (stating that "class arbitration greatly increases risks to defendants"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283–84 (1995) (O'Connor, J., concurring) (stating that the business community's reliance on arbitration justifies approval of the Court's preemption of state law rules for the FAA); Carbonneau, *supra* note 37, at 1957 (stating that the Court's ongoing embrace of arbitration serves "as a means of alleviating the congestion in the federal court docket"); Lee Epstein, William M. Landes & Richard A. Posner, *How Big Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1471 (2013) (discussing the extraordinary embrace of business interests by Chief Justice Roberts's Supreme Court); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 178 (2002) (noting that the Court's expansive and revisionist view of the FAA reflects an "eagerness to unclog the federal judiciary's civil dockets"). For a discussion of how caseload burdens have broadened judicial reliance on alternative dispute resolution generally, and arbitration specifically, see Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2843 (2015).

42. See *Am. Express*, 133 S. Ct. at 2310 (holding that the effective vindication doctrine previously announced in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000), is dictum). This judicial doctrine gave judges the discretion to invalidate contract provisions that made it impracticable for a party to pursue its claim or legal remedies in arbitration, and served as a complement to the doctrine of unconscionability, in policing drafter oppression. See Horton, *Mass Arbitration*, *supra* note 30, at 492, 500–02.

43. See Cara Van Dorn, Comment, *When Joining Means Enforcing: Giving Consumer Protection Agencies Authority to Ban the Use of Class Action Waivers*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 245, 269 (2017) (discussing the impact of class action bans in the context of the Employment Retirement Income Security Act of 1974 (ERISA), and noting that this is considered a

concludes that the federal common law rule of effective vindication needs to be reinvigorated because it is consistent with the FAA's preservation of equitable defenses to enforcement.

Section V argues for a reformulation of the federal law of enforcement and vacatur. This Section proposes an interpretive model that harmonizes the rules of enforcement and vacatur to guarantee substantive remedies. Specifically, it suggests a limit on the discretion of unions to file or drop legal claims in arbitration. And in the context of vacatur, it argues for a modified federal rule that denies enforcement of arbitral awards containing legal errors that result in the loss of legal remedies. Section V proposes an evolutive interpretive approach for the FAA that can respond to new and creative contractual provisions that do not expressly eliminate legal remedies, but practically deny them. This Section analogizes to the federal common law that was crafted for Title VII of the Civil Rights Act of 1964 to police emergent employment discrimination practices—the types of practices Title VII was enacted to prohibit.<sup>44</sup> Such a dynamic approach is necessary to prevent the FAA from operating as a vehicle for prospective waivers of substantive rights.<sup>45</sup>

#### I. THE FAA AS A SOURCE OF FEDERAL COMMON LAW FOR ARBITRATION CONTRACTS

The Supreme Court's sweeping body of federal common law interpreting the FAA<sup>46</sup> has been broadly grounded in the need to prevent continuing judicial hostility to the enforcement of arbitration contracts.<sup>47</sup> The hostility rationale was cited for rejecting longstanding state contract law and for expanding the FAA's reach beyond commercial contracts to individual statutory rights.<sup>48</sup> Hostility

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“top defense strategy” for thwarting claims).

44. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (interpreting Title VII as prohibiting nonintentional employment discrimination in order to bar arbitrary employer practices that could circumvent vindication of the law's equal opportunity mandate). While there was no evidence Congress contemplated the application of Title VII to practices that were not intentional, the crafting of a disparate impact model for Title VII furthered the statute's goal of opening more job opportunities to minorities. See Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 69 (1972) (arguing that despite the absence of a legislative mandate, disparate impact theory was a necessary response to a national problem of workplace bias).

45. See *Am. Express*, 133 S. Ct. at 2310 (holding that a contractual term prohibiting the assertion of statutory rights would constitute an impermissible prospective waiver).

46. The Federal Arbitration Act, originally titled the United States Arbitration Act, was enacted to make agreements to arbitrate enforceable as any other contract. See Federal Arbitration Act, 9 U.S.C. §§ 1–14 (2012).

47. Prior to the enactment of the FAA, courts often permitted contracting parties to revoke their promise to arbitrate disputes as an alternative to court litigation. See *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1008–11 (S.D.N.Y. 1915) (discussing the policies that drove judicial refusal to specifically enforce contracts to resolve disputes in a private arbitral forum); see also H.R. REP. NO. 68-96, at 1–2 (1924) (noting that the refusal to enforce agreements to arbitrate originated in English courts that were jealous of being ousted from jurisdiction, and American courts felt duty bound to follow these precedents).

48. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (holding that the FAA's

claims, or the need to remove judicial opposition to arbitration, also provided the foundation for extending the FAA's reach to employment contracting.<sup>49</sup> State laws specifically crafted to prevent contractual overreaching at the formation stage or to provide defenses when arbitral results are oppressive should be distinguished from laws that outright deny enforcement of all or some contracts to arbitrate.<sup>50</sup> As such, state laws that ensure arbitration agreements were knowingly made or permit public policy defenses to enforcement (such as unconscionability) should be viewed as consistent with the enforcement principle.<sup>51</sup> Unfortunately, the loss of states' sovereignty to regulate contract formation, interpretation, and defense has been viewed as a small price to pay

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mandate to enforce contracts to arbitrate applies to statutory age discrimination claims because its "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts").

49. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) (stating that the FAA should be interpreted broadly to apply to all employees, exempting only transportation workers, because "the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice").

50. For example, when interpreting the FAA, the Court could distinguish between state laws that refuse enforcement of some or all arbitration contracts, and therefore constitute FAA-type hostility, and laws that impose formation requirements or constitute a public policy defense to enforcement. For examples of state laws that reflect the hostility the FAA targeted, see *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (preempting state law that gave a state agency exclusive jurisdiction to resolve talent agent disputes); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (preempting state law that made all predispute arbitration contracts unenforceable); *Perry v. Thomas*, 482 U.S. 483, 488–92 (1987) (preempting state law that made contracts to arbitrate wage collection claims unenforceable); and *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (preempting state law that made contracts by franchisees to arbitrate unenforceable). For examples of state laws that merely prescribe formation or defense requirements and therefore do not violate the FAA's enforcement mandate, see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–44 (2011) (evaluating a state law that provides the defense of unconscionability when a consumer contract to arbitrate contains a class action ban, the contract is adhesive, the claim is for a small sum, and the adhering party is alleging fraud) and *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687–88 (1996) (evaluating a state law that requires conspicuous notice that an agreement to arbitrate was made).

51. See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 66–68 (2010) (holding that the doctrine of unconscionability qualifies as a legitimate FAA defense to enforcement). *But see Concepcion*, 563 U.S. at 341–44 (concluding that even the doctrine of unconscionability may operate as an obstacle to the FAA's goals, and can be preempted). Some commentators have viewed unconscionability as a threat to the FAA rather than a general contract defense to enforcement. See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1421 (2008) (observing that the unconscionability doctrine gives trial courts great flexibility to target arbitration agreements for voiding); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 490–94 (arguing that courts are still hostile to arbitration and are using the doctrine of unconscionability as a broad principle of fairness to circumvent arbitration contracts); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186, 196 (2004) (citing the increased judicial application of unconscionability doctrine to arbitration contracts as evidence of judicial hostility); Thomas J. Riske, Note, *No Exceptions: How the Legitimate Business Justifications for Unconscionability Only Further Demonstrates California Courts' Disdain for Arbitration Agreements*, 2008 J. DISP. RESOL. 591, 601; see also Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1249–50 (2011) (characterizing the Court's FAA jurisprudence as one of antidiscrimination because it seeks to ferret out intentional judicial conduct that is motivated by improper considerations such as hostility or mistrust of arbitration).

for the “benefits” of arbitration.<sup>52</sup>

The FAA provides a clear mandate of enforcement for arbitration contracts, and the Act’s proponents envisioned arbitration as a quicker, cheaper, less formal, and expert way to resolve disputes.<sup>53</sup> Under the arm’s-length bargaining regime contemplated by Congress in the FAA, enforcement of arbitration contracts ratifies the parties’ contractual liberties, circumvents the burdens of litigation and jury trials, and provides an efficient forum for the final resolution of disputes.<sup>54</sup> But arbitration practice today is not limited to a narrow group of commercial parties such as merchants. Approximately three hundred million Americans are now bound by arbitration provisions, and most of them had no input in crafting the terms of the agreement, quite unlike the process the FAA Congress originally envisioned.<sup>55</sup>

The absence of bargaining has placed consumers and at-will workers at a tremendous disadvantage because they are usually unaware that they have lost their court forum, and they are incapable of filing individual claims in arbitration.<sup>56</sup> By making arbitration a term of sale or employment, businesses are able to design the forum to their advantage.<sup>57</sup> Legitimate claims for wrongdoing can be deterred or eliminated simply by banning class actions, which are often the only viable mechanism for vindicating small-sum claims.<sup>58</sup> As such, FAA

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52. See *Dobson*, 513 U.S. at 280–81 (stating that arbitration is advantageous and beneficial to big businesses and small claimants alike); see also Burton, *supra* note 51, at 475, 482 (arguing that arbitration promotes the parties’ contractual liberty in dispensing with the troubling features of litigation, in favor of the speed and finality of arbitration). Although hostility advocates concede that the virtues of arbitration are its speed, lower costs, and informality or truncated procedures, they view the prospect of abusive contracts as a small price for these benefits. See Burton, *supra* note 51, at 475–82; see also Peter B. Rutledge, *The Case Against the Arbitration Fairness Act*, DISP. RESOL. MAG., Fall 2009, at 4, 4 (arguing that contract abuse practices are not widespread).

53. See *Joint Hearings*, *supra* note 29, at 26–27 (statement of Alexander Rose, Arbitration Society of America).

54. See *Concepcion*, 563 U.S. at 344–46 (holding that the informality of arbitration helps to reduce costs and increase the speed of dispute resolution); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (holding that the primary purpose of the FAA “was to ensure judicial enforcement of privately made agreements to arbitrate”).

55. See Resnik, *supra* note 41, at 2812–13 (discussing arbitration clauses in cell phone, credit card, and employment contracts).

56. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [perma: <http://perma.cc/3GQ3-N3SZ>] (noting that no one reads contractual terms given to them, arbitration terms are complex, and almost no one files in the arbitral forum).

57. See *id.*

58. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.”); *Deposit Guar. Nat’l Bank of Jackson v. Roper*, 445 U.S. 326, 338 (1980) (“The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.”); see also *Arbitration Agreements*, 82 Fed. Reg. 33,210, 33,290–95 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040) (finding that almost no one

contracts can practically leave consumers and workers without any forum for vindicating their claims.

A. *Getting to Enforcement Through Interpretation*

Outside of its textual statement that contracts to arbitrate are legally enforceable, and that all contract defenses to enforcement are preserved, the FAA provides no statutory guidance on the governing rules of enforceability.<sup>59</sup> This limited expression by Congress indicated that the statute was merely a federal procedural device that did not empower federal courts to create common law.<sup>60</sup> The view that state substantive law governed contract enforcement changed in 1967 when the Court ruled in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>61</sup> that the FAA was the product of Congress's Article I powers and, therefore, federal common law could be made for the FAA without violating the *Erie* doctrine.<sup>62</sup> In *Prima Paint* the Court was faced with a question of contract interpretation—whether the arbitration clause covered an allegation that the entire contract was fraudulently obtained.<sup>63</sup> The Court concluded that the FAA provided a ready answer, holding that arbitration clauses are enforceable contracts that, if not specifically challenged, remain effective even if the contracts that house them are void.<sup>64</sup>

The federal rule that arbitration promises are severable from their

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files arbitration claims because bilateral arbitration contracts keep consumers in the dark about violation of their legal rights, negative value claims deter filings, and class action bans insulate firms from accountability for wrongdoing).

59. See Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012) (providing only that “such a contract . . . shall be . . . enforceable”); see also *Southland Corp. v. Keating*, 465 U.S. 1, 19 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that the FAA “does not define what grounds for revocation may be permissible, and hence it would appear that the judiciary must fashion the limitations as a matter of federal common law”).

60. See Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1006–08 (1996) [hereinafter Ware, *Arbitration and Unconscionability*] (noting the universal consensus prior to the 1967 *Prima Paint* decision was that the FAA was a procedural device that had no effect on state court proceedings); see also Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 103–07 (2002) (summarizing the extensive critique that the FAA did not apply to state courts, but arguing that the statute's legislative history is not as unambiguous as critics claim).

61. 388 U.S. 395 (1967).

62. *Prima Paint*, 388 U.S. at 404–05. Over a decade after the FAA was enacted, the Court ruled in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938), that federal judges could not make and apply their own rules of decision in diversity cases. In effect a federal jurisdictional grant was not enough to support the creation of federal common law. *Id.* at 78. The *Erie* principle was extended to federal procedural rules that determined substantive outcomes in *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). Because it was generally presumed that the FAA did not provide federal question jurisdiction, and most FAA cases were in diversity, state laws retained their vitality as the rules of decision in FAA cases. See *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202–04 (1956) (holding that contract enforcement is governed by state substantive law which cannot be circumvented simply because a suit was in diversity).

63. See *Prima Paint*, 388 U.S. at 403–06.

64. *Id.*

underlying contracts is grounded in the premise that Congress enacted a default rule that applies where litigants seek to avoid arbitral resolution of the dispute; the rule requires specific challenges to the validity of arbitration terms themselves.<sup>65</sup> This federal severability rule rejected state contract law that treats severability as a question of intent,<sup>66</sup> although discerning and enforcing contractual intent are fundamental goals of the FAA and contract law.<sup>67</sup> Failure to express contractual intent is often fatal at the formation stage because the parties' intent is not an abstract legal question, and what they intended is generally guided by their words and actions.<sup>68</sup> Contracting parties must factually express their desire to break a deal into independent agreements.<sup>69</sup> Although the FAA Congress never addressed the concept of severability, the *Prima Paint* Court ruled as a matter of federal law that arbitration promises are separate contracts independent of the parties' underlying agreement.<sup>70</sup>

Not only does the federal severability rule rob judges of the flexibility to

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65. See *id.* Section 4 of the FAA provides that a court shall order arbitration if after hearing the parties it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." Federal Arbitration Act § 4, 9 U.S.C. § 4 (2012). The Court narrowly interpreted this language as referring exclusively to the arbitration clause in the contract. *Prima Paint*, 388 U.S. at 403–06.

66. See *Waddell v. White*, 78 P.2d 490, 496 (Ariz. 1938) (stating that "the question of whether a contract is entire or severable is one of intent[.]"); *Venture Partners, Ltd. v. Synapse Techs., Inc.*, 679 A.2d 372, 377 (Conn. App. Ct. 1996) (stating that in determining if a contract is severable the test is to ascertain the intentions of the parties from the language in light of the surrounding circumstances); *Dozier v. Shirley*, 239 S.E.2d 343, 344 (Ga. 1977) (stating that severability of a contract is determined by the intent of the parties by looking at the terms of the contract); *Keenan v. Larkin*, 168 A.2d 640, 642 (Pa. Super. Ct. 1961) ("The intention of the parties controls in determining whether or not a contract is severable."); see also JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 11.23 (6th ed. 2009) ("It is often said that whether a contract is divisible is a question of interpretation or one of the intention of the parties.").

67. See Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1025 (2009) ("Honoring the contractual intent of the parties is the central objective of contract law."). And intent is normally determined by looking at objective considerations, such as what the parties said and did. See PERILLO, *supra* note 66, § 2.2.

68. See PERILLO, *supra* note 66, § 2.9. "The traditional rule is that if the agreement is not reasonably certain as to its material terms there is a fatal indefiniteness and the agreement is void." *Id.* (footnote omitted).

69. See *Waddell*, 78 P.2d at 496 (stating that when determining if a contract is severable, the question of intent is to be determined by the language that the parties have used and the subject matter of the agreement); *Greater Okla. City Amusements, Inc. v. Moyer*, 477 P.2d 73, 75–76 (Okla. 1970) (stating that a severable contract is one that can be divided and has two or more parts not dependent on each other); *Mgmt. Servs. Corp. v. Dev. Assocs.*, 617 P.2d 406, 408 (Utah 1980) (stating that the determination of whether a contract is severable shall be made based on the intentions of the parties at the time they entered into the contract). The determination of whether a contract is severable is primarily a question of the intention of the parties to be resolved by looking at the language of the parties and the subject matter of the contract. *Moyer*, 477 P.2d at 75–76. Intent should be determined by looking at the contract, at other writings regarding the same subject matter, and extrinsic parol evidence of the intentions of the parties. *Mgmt. Servs. Corp.*, 617 P.2d at 408.

70. See *Prima Paint*, 388 U.S. at 403–04 (holding that the FAA only authorized federal courts to evaluate the validity of arbitration clauses and not the broader contract, so if the arbitration promises are not challenged as defective, courts must enforce them as independent contracts).

interpret contracts with arbitration provisions, but it also defies reality.<sup>71</sup> Contracts to arbitrate do not exist in a vacuum and therefore do not survive as stand-alone deals. An arbitration contract relates back or forward to some other transaction or relationship the parties have. Today, arbitration contracts are generally made predispute so they apply prospectively to disputes parties may have because of an existing relationship.<sup>72</sup> The Court's severability conclusions are therefore not supported by the FAA's enforcement rule.<sup>73</sup> And even when arbitration contracts are made postdispute, they will relate back to a past or continuing relationship.<sup>74</sup> In any event, a federal severability rule is unnecessary because the parties have the contractual liberty at formation to structure the arbitration agreement as a separate transaction. This contractual liberty allows the parties to dictate—together or alone—how the arbitration clause will function, which disputes will be resolved by an arbitrator, and which disputes, if any, will be subject to judicial resolution. These realities negate the necessity for a federal law of severability as an adjunct to enforcement rather than as a formation liberty of the parties.

*B. The FAA's Response to Adhesive Contracting and the New Formation Powers of Businesses*

The FAA implicitly legislated about the identity of contracting parties, and provided some bargaining limitations at the contract formation stage.<sup>75</sup> It was an unusual statute to the extent that it was not the product of compromises between interest groups.<sup>76</sup> Only a narrow selection of parties lobbied Congress for the FAA, and they wanted a law to regulate their own affairs.<sup>77</sup> The dominant group

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71. See Ware, *Arbitration and Unconscionability*, *supra* note 60, at 1001 (characterizing the Court's severability doctrine as fictional).

72. See Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 18 (2003).

73. See Ware, *Arbitration and Unconscionability*, *supra* note 60, at 1010–11 (noting that the severability doctrine is a fiction of two contracts). The Court also has been criticized for making common law severability rules for state statutes without constitutional authorization or a federal interest. See Ryan Scoville, *The New General Common Law of Severability*, 91 TEX. L. REV. 543, 574–93 (2013).

74. This was quite common around the time the FAA was enacted. See *Killgore v. Dudney*, 271 S.W. 966, 966 (Ark. 1925) (providing example of postdispute agreement to arbitrate real estate controversies); *Forguson v. Newton*, 278 S.W. 602, 602–03 (Ky. 1925) (same); *Morgan v. Teel*, 234 P. 200, 200–01 (Okla. 1925) (same).

75. See Aragaki, *supra* note 51, at 1254 (noting that the FAA was intended for arm's-length bargainers, not for adhesion or insurance contracts, or contracts of employment).

76. See Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 167–241 (1993) (discussing the diverse interests of civil rights advocates, the business community, congressional leaders, and the President that had to be accommodated in creating the Civil Rights Act of 1991); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 562–60 (1988) (discussing the private interest compromise and public deliberation perspectives of statutory creation).

77. See *infra* notes 78–81 and accompanying text for a discussion of the groups that lobbied for passage of the FAA.

included commercial interests such as importers, exporters, wholesalers, shippers, bankers, chambers of commerce, farmers, and boards of trade, among others.<sup>78</sup> Their concerns were economic, and they feared that the cost and delays of court litigation would impact profits, and litigation acrimony would destroy business relationships.<sup>79</sup> Another proponent of the FAA was the American Bar Association (ABA). The ABA advocated for the FAA as the legal preference of the business community, and noted that arbitration promoted settlements and reduced court congestion.<sup>80</sup> A third proponent was the Arbitration Society of America, an arbitration forum provider, and their interest was also economic. To gain business, they emphasized that arbitration was a voluntary process that was fast, cheap, and yielded fair results through the use of expert neutrals.<sup>81</sup>

Each party repeatedly told Congress that there was no opposition to the arbitration legislation.<sup>82</sup> This absence of opposition was understandable because the FAA bill sought to overrule the common law tradition of refusing specific performance of certain arbitration contracts.<sup>83</sup> The general presumption was that judges were refusing enforcement in order to guard against loss of jurisdiction; this was regarded as irrational and hostile.<sup>84</sup> But a key proponent and drafter of the FAA, Julius Cohen, provided Congress with another insight into the basis for the revocability of arbitration contracts and ouster of jurisdiction doctrines.<sup>85</sup> He noted “that at the time this rule was made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them.”<sup>86</sup> When asked about a contention that, at the time, railroads were imposing arbitration contracts on shippers, Mr. Cohen replied that there was no merit to that claim.<sup>87</sup>

Because the interests of consumers and employees were not immediately implicated by the FAA bill, representatives of these groups were noticeably

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78. See *Joint Hearings*, *supra* note 29, at 1–41.

79. See *id.* at 6–9 (statement of Charles L. Bernheimer, Chairman of the Comm. on Arbitration, Chamber of Commerce of the State of New York).

80. See *id.* at 10 (statement of W.H.H. Piatt, Chairman of the Comm. on Commerce, Trade, and Commercial Law, American Bar Association).

81. See *id.* at 26–27 (statement of Alexander Rose, Arbitration Society of America) (noting a three-year backlog in court cases while large numbers of qualified arbitrators are available for fast, inexpensive, and fair resolution through arbitration).

82. See, e.g., *id.* at 11 (statement of Piatt); *id.* at 13 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce); *id.* at 24 (statement of Sen. Thomas Sterling, Chairman of the Subcomm. of the Comm. on the Judiciary).

83. See S. REP. NO. 68-536, at 2–3 (1924); H.R. REP. NO. 68-96, at 1–2 (1924); see also Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN. L. REV. 819, 831–44 (1962) (discussing the historical reasons for why common law agreements were not accorded specific enforcement by courts of equity).

84. See S. REP. NO. 68-536, at 2–3 (surmising that judges refused enforcement because they doubted that the arbitral forum could provide “full or proper redress,” feared being ousted from their jurisdiction, and felt bound by precedents they recognized were outmoded).

85. See *Joint Hearings*, *supra* note 29, at 13–18 (statement of Cohen).

86. *Id.* at 15.

87. *Id.*



absent from the committee hearings.<sup>88</sup> Nonetheless, the bill's supporters emphasized that voluntariness and fairness were touchstones of their proposal to overturn the common law rule.<sup>89</sup> The consistent and uncontradicted statements of the FAA sponsors constitute the core legislative record of the FAA and therefore deserve great weight because the statute's text merely states a rule of enforcement.<sup>90</sup> The Senate and House reports simply summarized what was said in committee,<sup>91</sup> and floor debates were almost nonexistent except for technical drafting edits.<sup>92</sup> This is the context in which the narrow prescription of enforcement was enacted.<sup>93</sup>

*C. Forced Consent at the Formation Stage and Its Implications for Enforcing Oppressive Contract Terms*

The core provision of the FAA is Section 2. This Section of the Act provides that a written agreement to settle by arbitration a dispute arising out of a contract involving commerce or an existing controversy related to such a contract is valid and enforceable as any other contract at law or in equity, and subject to the same defenses.<sup>94</sup> Section 2 does not address who can make contracts to arbitrate. But by 1925, only a limited group of individuals desired and sought arbitral resolution of disputes.<sup>95</sup> They were informed commercial parties or merchants who were not pleased with the delays and costs of court adjudication or the assignment of judges who did not understand their business practices.<sup>96</sup>

These commercially informed individuals and their legislative supporters saw no reason why intelligent individuals could not consciously and voluntarily consent to private adjudication.<sup>97</sup> But the Congress that enacted the FAA

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88. *See id.* at 5–33 (various statements).

89. *See id.* at 26–27 (statement of Alexander Rose, Arbitration Society of America).

90. To justify the expansive reach the Court has given to the FAA's narrow text, the Court has avoided the legislative record of the FAA, calling it "quite sparse." *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

91. *See S. REP. NO. 68-536*, at 1–3 (1924); *H.R. REP. NO. 68-96*, at 1–2 (1924).

92. *See 66 CONG. REC.* 2,759–62 (1925). It is very easy to introduce a bill, but very hard to enact it. *See ROWLAND EGGER & JOSEPH P. HARRIS, THE PRESIDENT AND CONGRESS 82–83* (1963). Many compromises and revisions are made during the process, and a proposed piece of legislation is almost always opposed and will either be defeated or greatly revised by Congress. *See id.* at 91–99. Due to the compromises, often an entirely new bill is drafted. *See id.* at 83.

93. *See, e.g., Circuit City*, 532 U.S. at 114–21 (relying exclusively on the FAA's text and canons of construction to conclude that employees are generally covered by the FAA, while treating uncontroverted Senate subcommittee testimony as unreliable).

94. Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012).

95. *See supra* notes 78–81 and accompanying text for examples of groups who supported the use of arbitration.

96. *See, e.g., Joint Hearings, supra* note 29, at 24–35. The general counsel for the New York State Chamber of Commerce, Julius Henry Cohen, testified that arbitration provides the parties "the benefit of the judgment of persons familiar with the peculiarities of the given controversy." *Id.* at 35 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce).

97. *See id.* at 13–18 (condemning the common law ouster and revocability doctrines). Mr. Cohen

recognized that arbitration contracts could serve as a vehicle for abuse of weak contracting parties.<sup>98</sup> In fact, the primary drafter of the legislation surmised that the real reason for judicial hostility to arbitration was not judicial jealousy about jurisdiction but a judicial concern about contractual oppression.<sup>99</sup>

Employees, vulnerable as a class to contractual overreaching or oppressive terms, were therefore exempted in Section 1 of the FAA, which excludes from coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>100</sup> Legislative history and Court precedent confirm that those who lack bargaining power cannot be coerced into agreeing to the arbitral forum.<sup>101</sup> As late as 1981, even the Justices of the Supreme Court—who were ardent supporters of arbitration for wage disputes—did not consider the FAA an authority for adhesive arbitration contracting.<sup>102</sup>

After honoring the FAA’s arm’s-length structure for more than seventy-five years, the Supreme Court, in the 2001 case of *Circuit City Stores, Inc. v. Adams*,<sup>103</sup> expanded the FAA’s reach by interpreting Section 1 as excluding only “transportation workers.”<sup>104</sup> The term “transportation workers” does not appear anywhere in the FAA’s text or legislative history. This interpretation placed most of the nation’s workforce under the auspices of the FAA, even though it comprises at-will employees, who have no bargaining input, and were specifically exempted by Congress.<sup>105</sup> Less than a decade after the *Circuit City* decision, the

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stated, “[E]verybody to-day feels very strongly that the right of freedom of contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion.” *Id.* at 14.

98. See, e.g., *id.* at 15 (addressing briefly the potential for abuse of arbitration agreements).

99. See *supra* notes 82–87 and accompanying text discussing Julius Cohen’s views on the basis for the revocability of arbitration contracts. Contract law has always manifested an interest in preventing one party from imposing oppressive terms on another by embracing the doctrine of unconscionability. See PERILLO, *supra* note 66, § 9.38.

100. Federal Arbitration Act § 1, 9 U.S.C. § 1 (2012).

101. Cf. *Wilko v. Swan*, 346 U.S. 427, 435–37 (1953) (holding that FAA arbitration was intended for arm’s-length parties), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). Even the dissenting justices who embraced the same broad view of arbitrability as the current Court agreed that it would be “unconscionable and unenforceable” if arbitration were imposed against the will of a commercial business person. See *id.* at 440 (Frankfurter, J., dissenting); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–33 (2001) (Stevens, J., dissenting) (noting that the FAA’s legislative history demonstrates that employees with reduced bargaining power were meant to be excluded from FAA coverage).

102. See *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 746–47 (1981) (Burger, C.J., dissenting) (opining that labor policy that promotes arbitration under the Fair Labor Standards Act (FLSA), not the FAA, supported arbitral resolution of workers’ minimum wage and overtime compensation claims).

103. 532 U.S. 105 (2001).

104. *Circuit City*, 532 U.S. at 119 (interpreting the FAA Section 1 exemption as limited to transportation workers).

105. See Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 78–82 (2014) (stating that a number of factors result in employees having relatively less bargaining power than employers).

Court expanded FAA coverage to unionized workers who have no right to bargain directly with their employers or unions.<sup>106</sup> These decisions have left the prerogative to switch to arbitral adjudication of workplace disputes exclusively in the hands of employers and unions.<sup>107</sup>

Expanding the federal common law to include the FAA's coverage of at-will and unionized employees has made it possible for courts to enforce contracts imposing arbitration against the wishes or without the input of workers.<sup>108</sup> The prerogative to act unilaterally has been defended as not interfering with the free will of contracting workers and consumers because they are theoretically free to go elsewhere when confronted with the requirement of arbitration.<sup>109</sup> But as more employers and businesses adopt arbitration policies, it has become difficult to find alternative contracting parties without such rules.<sup>110</sup> The Court's decision to endorse mandatory arbitration has significantly broadened the enforcement mandate. While adhesion contracts are generally enforceable under state law as a necessity of modern commercial life,<sup>111</sup> state law provides checks on the content and impact of such contracts.<sup>112</sup>

The new federal prerogative to unilaterally impose the arbitration forum,

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106. See *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 199–200 (1944) (stating that represented employees are permitted to act through their bargaining representative and cannot bargain individually on behalf of themselves regarding matters that are subjects of the collective bargaining process); see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009) (holding that Congress placed no prohibition on a union's authority to bargain and contract about the legal rights of their members). But see *Barrentine*, 450 U.S. at 750 (Burger, C.J., dissenting) (analogizing a policy that allows companies and unions to contract for arbitral resolution of workers' antidiscrimination claims to "foxes [serving as] guardians of the chickens").

107. See *supra* note 102 and accompanying text for a brief discussion of the power of employers and unions.

108. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (holding that unequal bargaining power is not enough to make an arbitration contract unenforceable).

109. See, e.g., Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 201 (1998).

110. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005) (noting that consumers often do not have the resources to find alternative contracting partners, and there is a good probability they will encounter similar arbitration rules wherever they go).

111. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011) (noting that "the times in which consumer contracts were anything other than adhesive are long past"); see also W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–32 (1971) (noting that the speedy pace of modern life combines with frequent and complex contracting to make bargained transactions an unnecessarily costly proposition, and a historical relic).

112. See PERILLO, *supra* note 66, § 9.43 (noting that judges have policed overreaching in adhesion contracts by finding there was no real assent to certain terms, or by striking terms that are viewed as unconscionable or contrary to public policy). Perillo explains that the RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW. INST. 1981) subjects adhesion contracts to even more critical review by asking "whether a reasonable person would have expected to find such a clause in the contract" and by "plac[ing] the duty on the courts to consider the essential fairness of the printed terms, both from the viewpoint of surprise and inherent one-sidedness." PERILLO, *supra* note 66, § 9.45.

however, comes with few checks and at no cost to the contract drafter.<sup>113</sup> Courts must enforce lopsided arbitration contracts even when no consideration is given for them.<sup>114</sup> At-will employment, which is illusory and generally does not constitute consideration, is sufficient to bind workers who lose their judicial forum in order to obtain or retain their jobs.<sup>115</sup> Sellers of goods and services can also give consumers a detriment (arbitration) in exchange for a benefit (their valuable right to go to court).<sup>116</sup> This makes the federal rule inconsonant with the FAA's contract formation policy of voluntary consent, and it avoids state laws that police the reasonableness of adhesion contracts.<sup>117</sup> As such, adhesive and oppressive contracts can be formed and bootstrapped to the FAA's enforcement mandate.

The federal decisions to permit the imposition of the arbitral forum at no cost to the drafter and the restriction limiting the power of states to target arbitral abuse have made arbitration contracts immune to state law defenses such as coercion, duress, failure of consideration, and lack of mutuality.<sup>118</sup> Further, the equitable principle of unconscionability, which serves as a defense to contractual overreaching, has been blunted by a federal rule that limits this defense to cases where the contract *eliminates* legal remedies.<sup>119</sup> The Supreme Court's decision that the FAA's command for enforcement displaces any state law to the contrary has nullified attempts by state legislatures to protect the

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113. The right to impose arbitration is in the nature of a default property right of businesses for which they do not have to pay. *See Gilmer*, 500 U.S. at 26 (holding that absent a legitimate statutory imposition of the judicial forum, arbitration contracts are legally enforceable).

114. *See Green Tree Fin. Corp. of Ala. v. Vintson*, 753 So. 2d 497, 502 n.3 (Ala. 1999) (noting that consideration distinct and separate from the consideration that supports the contract as a whole is not required to enforce an arbitration provision); *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 552 (W.Va. 2012) (holding that arbitration clauses do not require separate consideration and only require that the contract as a whole be supported by adequate consideration).

115. *See Alejandro v. L.S. Holding Inc.*, 130 F. App'x 544, 547 (3d Cir. 2005).

116. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–50 (7th Cir. 1997) (holding that businesses can include an arbitration provision in their offer for sale which is binding on consumers who proceed with the transaction). Contract law generally requires that each party exchange something of legal value which qualifies as a loss to them and a benefit to the other in order to provide consideration. *See PERILLO*, *supra* note 66, § 4.11–12.

117. *See PERILLO*, *supra* note 66, § 9.43.

118. *See supra* notes 113–16 and accompanying text discussing the drafter's legal prerogative to impose arbitration terms on adherents.

119. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–44 (2011) (holding that unconscionability cannot operate as an obstacle to FAA objectives); *see also* Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 162–65 (2012) (arguing that economists co-opted the judiciary by overstating the benefits of adhesive contracts without accounting for their harms, and this resulted in a decline in the application of the doctrine of unconscionability to form contracts); Jeffery W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 761–65 (2004) (noting that the use of unconscionability to police arbitration contracts is a relatively new development that coincides with the rise of arbitration, but even this equitable principle has been timidly applied because of negative critiques).

nondrafter from lopsided contractual terms.<sup>120</sup> State laws that promote voluntary consent by requiring conspicuous notice of arbitration have been rejected by the federal rule as inconsonant with the goals and policies of the FAA.<sup>121</sup> In effect, the federal rules governing formation promote enforcement at the expense of state defenses to enforcement.

These new enforcement rules cannot be traced to the text of the FAA.<sup>122</sup> What the contract can contain or leave out in terms of procedural and substantive rules was left to the parties because the FAA contemplated arm's-length bargainers.<sup>123</sup> Proponents of the FAA persuaded Congress that arbitral resolution was superior to court adjudication because it was quick, inexpensive, expert, and fair.<sup>124</sup> And the Court has confirmed these statutory goals by ruling that the parties give up the benefit of court procedures and the certainty of court resolution for these benefits.<sup>125</sup> It is therefore expectable that the parties will adjust judicial rules of procedure in their arbitration contract.<sup>126</sup> Contracting parties, operating at arm's length, can tailor the arbitration forum to suit their needs. They can modify rules of evidence, reduce statutes of limitations, place

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120. See *Perry v. Thomas*, 482 U.S. 483, 490–91 (1987) (holding that state law requiring court resolution of wage claims is preempted by the FAA).

121. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that the Montana notice requirement for arbitration clauses was preempted by federal law because it “places arbitration agreements in a class apart from ‘any contract,’ and singularly limits their validity” (quoting Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012))).

122. See, e.g., *Concepcion*, 563 U.S. at 357–60 (Breyer, J., dissenting) (noting that the FAA Congress did not express a preference about class versus individualized or bilateral arbitration); see also *Hayford & Palmiter*, *supra* note 41, at 200–01 (providing a list of adjudication issues the FAA does not address, and arguing that states can fill these gaps consistent with the FAA's goals).

123. See *supra* notes 78–81 and accompanying text for a discussion of the dominant groups that lobbied Congress for the FAA.

124. See H.R. REP. NO. 68-96, at 2 (1924) (proposing approval of the FAA House bill because of the “costliness and delays of litigation”); see also S. REP. NO. 68-536, at 3 (1924) (reporting that the Senate bill for the FAA was proposed because of a “desire to avoid the delay and expense of litigation”). All of the business interests that dominated the legislative process, such as chambers of commerce and trade associations, echoed the same sentiment. See *Joint Hearings*, *supra* note 29, at 24 (statement of Samuel M. Forbes, Secretary, Converter's Association) (“Our members have found arbitration to be expeditious, economical, and equitable, conserving business friendships and energy.”). A resolution by the American Bankers Association stated that merchants wanted a speedy, economical, and equitable dispute resolution process, and “arbitration offers the best means yet devised for an efficient, expeditious, and inexpensive adjustment of such disputes.” *Id.* at 31 (statement of Thomas B. Paton, American Bankers Association). And the proposed text of the Federal arbitration statute, introduced during the legislative process, stated that arbitration would combat the evils of delay and expense caused by lengthy court processes, and give the parties “the benefit of the judgment of persons familiar with the peculiarities of the given controversy.” *Id.* at 32–35 (introduction by Julius Henry Cohen, General Counsel, New York State Chamber of Commerce, of the proposed Federal arbitration statute). Many of the organizations appearing before Congress made the same claim. See, e.g., *id.* at 25–31.

125. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that the parties trade court “procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”).

126. See *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.”).

limits on discovery, restrict appellate review, and select “neutrals” who are acceptable to them.<sup>127</sup> Such adjustments promote the efficiency virtues of arbitration that do not exist in court adjudication.<sup>128</sup>

But arbitration contracts are now enforced even when they are not anchored in the FAA’s virtues of speed, lower cost, or efficient resolution. Despite the federal common law creating a procedure-versus-substance dichotomy for FAA contract terms,<sup>129</sup> it does not regulate many procedural terms with substantive effects.<sup>130</sup> Under the federal model, only an exclusion of legal remedies appears to qualify as a waiver of substantive rights.<sup>131</sup> As long as legal remedies are not eliminated in the arbitration contract, the FAA requires courts to enforce contract terms as procedural adjustments that do not impair vindication prospects.<sup>132</sup>

The federal rule insulates only legal remedies from the parties’ drafting discretion, and this has been a recipe for abuse because most arbitration contracts are nonbargained.<sup>133</sup> Using the broad contractual freedoms the Court

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127. *See id.*

128. *See id.* at 348 (stating that bilateral arbitration is speedier, cheaper, and more efficient than court adjudication).

129. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that parties do not lose substantive rights with a change to the arbitral forum); *Mitsubishi Motors*, 473 U.S. at 628 (holding that the agreement to arbitrate only changes court “procedures” for arbitration rules). But this represents a turnaround from the Court’s earlier precedents that had rejected the contention that arbitration was merely a procedural change. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202–03 (1956) (rejecting the argument that arbitration is merely a change in forum); *Wilko v. Swan*, 346 U.S. 427, 433 (1953) (disagreeing with the contention that arbitration is “merely a form of trial”), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

130. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013) (upholding a class action ban that practically precluded small merchants from filing their antitrust claims). *But see Mitsubishi Motors*, 473 U.S. at 637 n.19 (noting that the Court would have little hesitation in condemning an arbitration agreement where the choice-of-forum and choice-of-law clauses acted as prospective waivers of a party’s right to pursue statutory remedies).

131. For example, class action bans, forum cost allocation rules, and venue provisions are all treated as presumptively valid for inclusion as arbitration terms, although they can significantly affect substantive outcomes. *See, e.g., Am. Express*, 133 S. Ct. at 2310–11 (upholding class action ban in an arbitration contract unless the complaining party can prove that it eliminates the right to pursue statutory remedies); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (holding that the complaining party must show that a fee-sharing provision is prohibitive, and acts as a deterrent to the pursuit of statutory rights). The procedural/substantive divide has been identified as a conservative judicial strategy “to erect barriers to filing and maintaining lawsuits and to lower the cost of lawsuits for the (mostly) business entities defending them.” *See Patricia W. Hatamyar Moore, The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1153, 1157 (2015) (arguing that proposed amendments to the rules of discovery, although labeled as procedural reforms, will significantly limit plaintiffs’ prospects at vindicating their rights, particularly for civil rights claims).

132. *See Am. Express*, 133 S. Ct. at 2310–11 (holding that contract rules that do not eliminate a party’s legal remedies are permissible even if they make pursuit of legal rights impracticable); *see also Mitsubishi Motors*, 473 U.S. at 637 (finding that a switch to arbitration does not interfere with the remedial and deterrent aspects of statutory protection). *But see Schwartz, State Judges*, *supra* note 31, at 143–46 (noting that many procedural terms have substantive effects).

133. *See Aragaki, supra* note 51, at 1260–62 (noting that claims of corporate abuse through

has crafted for FAA contract drafters, powerful bargainers have crafted “procedural” terms that evade the Court’s prohibition of substantive waivers.<sup>134</sup> Further, federal law limits the prospect of judicial oversight of drafting abuses by holding that judges can only review challenges to the arbitration provision itself, not to the contract generally.<sup>135</sup>

The federal rule that insulates only legal remedies from the parties’ bargaining discretion has created a conflict with the federal rule that substantive rights cannot be waived. Drafters now use their contractual freedoms to insert rules that do not expressly deny substantive rights, but nonetheless have the same practical effect.<sup>136</sup> For example, drafters have prescribed claim-filing deadlines of a few days or weeks,<sup>137</sup> eliminated discovery except for a few depositions,<sup>138</sup> prohibited compensatory or punitive damages,<sup>139</sup> provided for distant or inconvenient venues,<sup>140</sup> allocated expensive forum costs on the nondrafter,<sup>141</sup> and banned class claims,<sup>142</sup> all considered procedural matters. All of this is permissible under federal common law unless the complaining party can demonstrate that a provision eliminates the right to pursue a legal remedy.<sup>143</sup> Outcome-determinative procedural devices are further protected by the federal rule that the FAA does not permit judges to refuse enforcement on a finding

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arbitration contracts are supported by empirical data); *see also* *Am. Express*, 131 S. Ct. at 2320 (Kagan, J., dissenting) (noting that the Court is converting arbitration into a device that can effectively insulate wrongdoers from liability); *Casarotto v. Lombardi*, 886 P.2d 931, 939–40 (Mont. 1994) (observing that powerful bargainers are using the arbitration contract to avoid state regulations intended to protect citizens), *rev’d sub nom* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

134. *See Am. Express*, 133 S. Ct. at 2309–11 (majority opinion).

135. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (holding that the FAA only permits courts to address issues related to the formation and enforcement of the arbitration clause, not the general contract in which the arbitration provision is housed).

136. *See infra* notes 137–44 and accompanying text for a discussion of procedural terms that can affect substantive rights.

137. *See, e.g., Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 197 (3d Cir. 2010) (contract limited the time to file a claim to five days); *Plaskett v. Bechtel Int’l, Inc.*, 243 F. Supp. 2d 334, 341–42 (D.V.I. 2003) (arbitration contract had thirty-day statute of limitations).

138. *See, e.g., McDaniels v. Hospice of Napa Valley*, No. C 06-2558 CW, 2006 U.S. Dist. LEXIS 52752, at \*5 (N.D. Cal. July 19, 2006) (contract prohibited discovery prior to arbitration); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 91–92 (Cal. Ct. App. 2004) (contract limited discovery to two depositions).

139. *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 682–83 (Cal. 2000).

140. *See, e.g., Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 604 (E.D. Pa. 2007) (contract required all claimants nationwide to arbitrate in San Francisco); *Whataburger Rests. LLC v. Cardwell*, 446 S.W.3d 897, 911–12 (Tex. App. 2014) (contract required worker employed in El Paso, Texas to arbitrate in Dallas), *rev’d*, 484 S.W.3d 426 (Tex. 2016).

141. *See, e.g., Hall v. Treasure Bay V.I. Corp.*, 371 F. App’x 311, 313 (3d Cir. 2010) (requiring a low-wage worker to pay the entire cost of arbitration if she loses); *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 428 (Cal. Ct. App. 2004) (contract required employee to pay half the cost of arbitration).

142. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337–38 (2011).

143. *See Am. Express*, 133 S. Ct. at 2308.

that contract terms deter claims.<sup>144</sup> Such judicial involvement is viewed as interfering with the informality, speed, and lower costs of arbitration.<sup>145</sup>

## II. STATE RESPONSES TO OPPRESSIVE ARBITRATION CONTRACTING

States have recognized defects in and limitations of the federal law in addressing abusive formation practices.<sup>146</sup> But the Supreme Court's preemption rules and its assumption that effective prosecution of claims is not an FAA interest have made it difficult to police contractual overreaching at the formation stage.<sup>147</sup> For example, Montana legislated a conspicuous notice requirement for arbitration provisions.<sup>148</sup> California prohibited class action bans and out-of-state venue clauses in arbitration contracts.<sup>149</sup> But these laws have been ruled preempted on the grounds that they target arbitration for discriminatory treatment and violate broad FAA goals.<sup>150</sup> The federal rules were not crafted in the context of the FAA's prohibition of substantive waivers, nor did they consider or accommodate the states' vital interest in preventing contractual

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144. See *id.* at 2311–12.

145. See *id.* at 2312.

146. See, e.g., MONT. CODE ANN. § 27-5-114(4) (West 1989), *invalidated by* *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); CAL. BUS. & PROF. CODE § 20040.5 (West 2017), *invalidated by* *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001).

147. In *American Express*, the party alleging violation of the antitrust laws needed as much as one million dollars to prepare an antitrust claim that would provide less than a forty thousand dollar recovery if it won. *Am. Express*, 133 S. Ct. at 2316. Nonetheless, the Court ruled that “the antitrust laws do not guarantee an affordable procedural path to . . . vindication” even though the only procedural hurdle to vindication was the arbitration contract's class action ban. *Id.* at 2309.

148. See MONT. CODE ANN. § 27-5-114(4) (West 1989), *invalidated by* *Doctor's Assocs., Inc.*, 517 U.S. 681. This law was ruled preempted by the FAA for targeting arbitration contracts specifically for regulation. See *Doctor's Assocs., Inc.*, 517 U.S. at 685–87. A similar Nebraska law that required conspicuous notice of the arbitration provision to the nondrafter was also voided by the FAA. See *Affiliated Foods Midwest Coop., Inc. v. Integrated Distribution Sols.*, 460 F. Supp. 2d 1068, 1073 (D. Neb. 2006). Based on the Court's endorsement of broad preemptive powers in the FAA, states are barred from responding to new abuses that are unique to arbitration contracting unless they make the rules applicable to all contracts. See *Perry v. Thomas*, 482 U.S. 483, 489–91 (1987) (holding that defenses to enforcement of arbitration contracts must be applicable to contracts generally). *But see* Margaret L. Moses, *Privatized “Justice”*, 36 LOY. U. CHI. L.J. 535, 540–41 (2005) (noting that conspicuousness is a requirement for some goods contracts, yet the Court has concluded this cannot be required for arbitration contracts, thereby making arbitration contracts more enforceable than others).

149. See CAL. BUS. & PROF. CODE § 20040.5 (West 2017), *invalidated by* *Bradley*, 275 F.3d 884. This and similar laws tailored to address vindication barriers being enacted by powerful bargainers are also preempted. See *Ting v. AT&T*, 319 F.3d 1126, 1143 (9th Cir. 2003); *Bradley*, 275 F.3d at 890. In effect, states cannot legislate specific protection for consumers and employees whose arbitration contracts require that they travel to distant fora or prevent them from pooling resources that are indispensable to the prosecution of their claims. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337 (2011) (upholding a class action ban in an arbitration contract although the practical effect would be to deter consumer fraud claims of \$30.22 each).

150. See, e.g., *Concepcion*, 563 U.S. at 337 (holding that state law prohibiting certain class ban in arbitration contracts stands as an obstacle to the FAA goal of efficiency); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335–36 (11th Cir. 2014) (holding that class action bans for minimum wage and overtime compensation claims are enforceable).



oppression that deprives citizens of their individual or civil rights.<sup>151</sup>

The new federal rules of preemption have nullified state laws that enforce arbitration contracts but provide contract defenses designed to limit oppression and unfair surprise embedded at the formation stage.<sup>152</sup> Although the FAA did not limit the power of state judges to exercise their traditional prerogative to interpret contract terms or apply contract defenses, states are now deprived of equitable contract defenses to enforcement.<sup>153</sup> Yet there is strong legislative evidence that contracting for arbitral resolution was made binding on the premise that the parties would be able to vindicate their rights more effectively.<sup>154</sup> State laws that generally enforce arbitration contracts but regulate contract terms to accommodate the vindication prospects of weak parties should therefore be viewed as consistent with the FAA.<sup>155</sup>

Since the 1950s, many states have enacted arbitration laws that mimic the FAA.<sup>156</sup> Most of these laws are modeled on the Uniform Arbitration Act (UAA),<sup>157</sup> which contains language that is practically identical to the

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151. See *Joint Hearings*, *supra* note 29, at 37–38 (statement of Julius Henry Cohen, General Counsel, New York State Chamber of Commerce). The FAA bill is not an “infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made.” *Id.* The Attorneys General of twenty-one states reminded the Court of the importance of state sovereignty in regulating arbitration contracts, particularly in the context of creating and enforcing employment discrimination laws. See Brief of the States of California, Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Vermont, Washington and West Virginia, as Amici Curiae in Support of Respondent at 105–24, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379) (discussing the constitutional requirements and importance of federal deference to state public policy designed to protect workers from arbitration contracts that deprive them of their procedural and substantive rights).

152. See *Ting*, 319 F.3d at 1147–52; *Bradley*, 275 F.3d at 889–90.

153. See *Knepp v. Credit Acceptance Corp. (In re Knepp)*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (emphasizing the important role state courts play in combatting contractual oppression by powerful parties, and commenting that “[w]hen it comes to arbitration, we appear to have lost our sense of history”); *Casarotto v. Lombardi*, 886 P.2d 931, 939–40 (Mont. 1994) (Triewiler, J., concurring) (condemning the Court’s FAA jurisprudence for making state laws enacted to protect citizens from oppression by the powerful “either inapplicable or unenforceable in the process we refer to as arbitration”), *rev’d sub nom Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Lytle v. Citifinancial Servs.*, 810 A.2d 643, 660–61 (Pa. Super. Ct. 2002) (emphasizing the importance of a Pennsylvania law that protects weak parties from contractual overreaching in arbitration, and lamenting the delay in passing national legislation to combat “relentless attempts by corporate entities to thwart . . . every state consumer statute enacted to balance the economic disparity of the parties”).

154. See *Joint Hearings*, *supra* note 29, at 36 (statement of Cohen) (stating that arbitral resolution will require some formality to “assure that a full and fair consideration of the controversy may be had”).

155. Cf. *Lytle*, 810 A.2d at 660–61. Addressing a class ban and other one-sided provisions in a home buyer’s loan contract, the judge expressed concern about the delay in enacting federal legislation to reverse the Court’s FAA precedents which facilitate abuse by corporate or “pinstriped exploiters” under the guise of arbitration. *Id.*

156. See *Heinsz*, *supra* note 16, at 1.

157. See *id.*; see also ARIZ. REV. STAT. ANN. § 12-1501 (West 2017); ARK. CODE ANN. § 16-108-206 (West 2017); COLO. REV. STAT. ANN. § 13-22-206 (West 2017); DEL. CODE ANN. tit. 10, § 5701

FAA.<sup>158</sup> The UAA provides that a “written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>159</sup> By codifying the UAA or a version thereof, states have embraced the FAA’s enforcement mandate and have strayed from it only in limited cases.

States have, for example, found it necessary to tweak their formation rules or deploy contract defenses that promote state public policies in response to the increased practice of arbitration under contracts of adhesion.<sup>160</sup> Because arbitration contracting today is generally adhesive or offered on a take-it-or-leave-it basis, and powerful parties often determine all terms, states have found it necessary to impose formation requirements and deploy public policy defenses to prevent oppression of nondrafters such as workers, consumers, and small businesses.<sup>161</sup> These limitations on enforceability were tailored to ensure that legal rights and remedies were not lost solely because a contract to arbitrate was made. Regulation of formation practices was grounded in concerns about the adhesive nature of arbitration contracting, the absence of information about the legal implications of arbitration,<sup>162</sup> and the structuring of the arbitration process to make pursuing claims impractical.<sup>163</sup>

For example, the Montana legislature was concerned about the abusive arbitration clauses appearing in contracts of adhesion and that Montanans were

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(West 2017); IDAHO CODE ANN. § 7-901 (West 2017); LA. STAT. ANN. § 9:4201 (2017); N.C. GEN. STAT. ANN. § 1-569.6 (West 2017); 42 PA. CONS. STAT. AND CONS. STAT. ANN. § 7303 (West 2017); S.D. CODIFIED LAWS § 21-25A-1 (2017); TENN. CODE ANN. § 29-5-302 (West 2017). These statutes, among others, adopted the same language found in the FAA which states that arbitration agreements are valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

158. Compare UNIF. ARBITRATION ACT § 1 (UNIF. LAW COMM’N 1955), with Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012).

159. UNIF. ARBITRATION ACT § 1.

160. Cf. MONT. CODE ANN. § 27-5-114(4) (West 1989) (amending the Montana Code to include a provision stating that “[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration”), *invalidated by Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

161. See *Casarotto v. Lombardi*, 886 P.2d 931, 935 (Mont. 1994) (observing that Montana’s conspicuous notice requirement for arbitration contracts reflects fundamental state policy to protect Montanans from the oppression made possible by arbitration contracts), *rev’d sub nom Doctor’s Assocs., Inc.*, 517 U.S. 681; see also Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 168 (2005) (discussing the state legislature’s interest in protecting the citizens’ legal rights by placing restrictions on arbitration contracting).

162. See *id.*

163. See *Lombardi*, 886 P.2d at 935; *Franchise Agreements—Contractual Venue Provisions: Hearing on A.B. 1920 Before the S. Comm. on Judiciary*, 1994 Leg., 1993–1994 Reg. Sess. 1–4 (Cal. 1994) (discussing the oppression made possible by out-of-state venue clauses that are unilaterally implemented by the powerful drafting party); CAL. BUS. & PROF. CODE § 20040.5 (West 2017), *invalidated by Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001).

not fully aware of the effect of these clauses.<sup>164</sup> As a result, the state imposed a formation requirement of conspicuous notice on the first page of any contract that requires arbitral dispute resolution.<sup>165</sup> Similarly, the California legislature was concerned about adhesive arbitration contracts that contained out-of-state venue provisions that exposed California franchisees to considerable expense, inconvenience, and potential prejudice when asserting claims.<sup>166</sup> To address these concerns, the legislature banned out-of-state venue clauses.<sup>167</sup>

Although the Montana and California statutes complied with the FAA's general textual requirement to enforce arbitration contracts, they were ruled preempted.<sup>168</sup> Both laws complied with the FAA's express enforcement mandate because arbitration contracts remain fully enforceable in both states.<sup>169</sup> Further, the notice requirement in Montana and the out-of-state venue ban in California both advance a fundamental purpose of the FAA—to give the parties an alternative forum to courts.<sup>170</sup> The FAA Congress noted that the switch to arbitration was a *choice* the parties had, that was intelligently made for their benefit.<sup>171</sup> In effect, the parties can knowingly choose arbitration because they understand its pros and cons. The lower cost, convenience, and informality of arbitration also strongly influenced the FAA Congress.<sup>172</sup> In this regard, California's out-of-state venue ban dovetailed nicely with the FAA because it helped to make the arbitral forum practical and accessible. These realities militate strongly against preemption of these and similar state laws.

Further, state laws that prevent arbitral overreaching qualify as an FAA defense to enforcement. The FAA provides that enforcement can be denied on “such grounds as exist at law or in equity for the revocation of any contract.”<sup>173</sup> And deciding on the grounds for revocation or nonenforcement of contracts has

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164. See *supra* note 148; see also CAL. BUS. & PROF. CODE § 20040.5 (West 2017), *invalidated by Bradley*, 275 F.3d 884.

165. See MONT. CODE ANN. § 27-5-114(4) (West 1989), *invalidated by Doctor's Assocs., Inc.*, 517 U.S. 681.

166. See *Franchise Agreements—Contractual Venue Provisions: Hearing on A.B. 1920 Before the S. Comm. on Judiciary*, *supra* note 163, at 1–4.

167. See CAL. BUS. & PROF. CODE § 20040.5 (West 2017), *invalidated by Bradley*, 275 F.3d 884.

168. See *Doctor's Assocs., Inc.*, 517 U.S. at 688 (preempting Montana's conspicuous notice requirement for contracts providing for arbitration of disputes); *Bradley*, 275 F.3d at 890 (stating that the California statute applied only to forum selection clauses and to franchise agreements and therefore did not apply to “any contract” and was preempted by the FAA (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987))).

169. See CAL. CIV. PROC. CODE §§ 1280–1294.2 (West 2017); MONT. CODE ANN. § 27-5-101 to -324 (West 2017).

170. See *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010) (noting that the FAA derives its legitimacy from the contract to arbitrate); see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (holding that the FAA's primary purpose is to promote freedom of contract).

171. See *supra* notes 53–54 and accompanying text.

172. See *supra* notes 53–54 and accompanying text.

173. Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012).

always been a fundamental state prerogative.<sup>174</sup> For example, states have adopted special contract formation rules for goods transactions in recognition that business practices evolve.<sup>175</sup> State court judges routinely adopt Restatement (Second) of Contracts rules that reject traditional contract formulations that are detached from modern realities.<sup>176</sup> Contract law has also evolved in response to broad public sentiment,<sup>177</sup> specific contractual practices,<sup>178</sup> certain contract terms,<sup>179</sup> or the status of particular contracting parties.<sup>180</sup> In formulating contract rules of decision, state interests generally take priority over uniformity.<sup>181</sup>

Since the FAA's goal is enforcement and not uniformity,<sup>182</sup> states are

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174. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Volt*, 489 U.S. at 474.

175. For example, the Uniform Commercial Code (U.C.C.), which all the states have adopted, contains special rules for goods transactions that give the parties more flexibility when forming or modifying a contract, and the U.C.C. imposes special obligations on them with respect to warranties. See U.C.C. §§ 2-207, 2-209, 2-313, 2-314, 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2017); see also Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L.J. 1383, 1402 (2014) (discussing the failure of commercial law to keep pace with the growth of form contracting, resulting in the drafting and adoption of the Uniform Commercial Code).

176. See, e.g., *Hampton Roads Bankshares, Inc. v. Harvard*, 781 S.E.2d 172, 177–78 (Va. 2016) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 264 (AM. LAW. INST. 1981) as support for Virginia's doctrine of impossibility); *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 93 (Fla. 2013) ("Some courts have agreed with the Second Restatement's view that promissory estoppel may be applied to enforce oral promises that would otherwise be unenforceable under the Statute of Frauds."); see also Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 510–13 (1998) (discussing the American Law Institute's goal of crafting the best rules for adoption by courts and concluding that embracing new principles has been good for the development of contract law).

177. See John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 934–36 (1969) (discussing veiled devices courts used to effectuate consumer's contractual expectations, and the eventual emergence of the doctrine of unconscionability).

178. See Fleming, *supra* note 175, at 1429 (discussing statutory bans on certain installment sales practices).

179. See Hirshman, *supra* note 8, at 1308 (discussing state laws that targeted punitive damages, and the addition of an arbitration term in the context of a U.C.C. § 2-207 battle of the forms transaction); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 540 (1967) (observing that consumer laws have historically targeted specific contract clauses for regulation).

180. See 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, 1142 (1985) (noting that the UCC singles out merchants for special treatment).

181. For example, although the U.C.C. was recently modified to reflect new commercial realities, no state adopted it, resulting in the American Law Institute withdrawing the proposed amendments. See JOHN E. MURRAY, JR. & HARRY M. FLECHTNER, *SALES, LEASES AND ELECTRONIC COMMERCE: PROBLEMS AND MATERIALS ON NATIONAL AND INTERNATIONAL TRANSACTIONS* 4 (4th ed. 2013). And the Uniform Computer Information Transactions Act has been adopted by only two states and was criticized for favoring the computer information industry. *Id.* at 20.

182. See *supra* note 5 and accompanying text. The Court has confirmed that states can regulate arbitration contracts on terms different from the FAA. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (noting that "the Federal Arbitration Act allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions, including the law governing enforceability of a class-arbitration waiver"); see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). And the parties can contract for arbitration

incentivized to formulate arbitration contract rules; thus, very little justification exists for a federal rule that limits FAA defenses to grounds that apply to *all* contracts versus *any* contract.<sup>183</sup> Further, states have a longstanding practice of policing adhesive or oppressive contracts.<sup>184</sup> By preempting state laws that enforce arbitration contracts but target contractual overreaching, the Court has promoted practices that conflict with the FAA's text and its goals of speedy, low-cost arbitral resolution.<sup>185</sup>

Arbitration contracts are now ruled enforceable even though they prescribe or facilitate lengthy, redundant, or costly dispute resolution that is contrary to arbitration's core virtues of speed, lower costs, and fair resolution.<sup>186</sup> For example, in *AT&T Mobility LLC v. Concepcion*,<sup>187</sup> the Court held that expeditious results of bilateral arbitration is the forum's principal advantage, even though class arbitration would be more expedient for consumers and workers.<sup>188</sup> Similarly, in *American Express v. Italian Colors Restaurant*,<sup>189</sup> the Court endorsed lengthy and costly bilateral arbitration of antitrust claims even though this made it impractical for small merchants to pursue their individual

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under state law that diverges from the FAA. See *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 303 (2010).

183. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that states cannot pass laws that are applicable solely to arbitration agreements).

184. See Hillinger, *supra* note 180, at 1147–48 (noting that the U.C.C. prescribes different rules for laypersons and businesspersons in order to prevent contractual oppression). And Section 2-302 of the U.C.C. codified the doctrine of unconscionability. See U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2017); see also 5 JOHN E. MURRAY, JR. & TIMOTHY MURRAY, CORBIN ON CONTRACTS § 24.27B (rev. ed. Supp. 2008) (stating that courts have often avoided the enforcement of unconscionable provisions in adhesion contracts); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633 (1943) (stating that courts have made great effort to protect the weaker party and keep the rules of contract law intact); J.W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 DRAKE J. AGRIC. L. 177, 178 (1999) (stating that courts have used various methods in dealing with adhesion contracts such as favoring the nondrafting party, holding that certain terms are not part of the contract, refusing to include terms incorporated by reference, using the doctrine of unconscionability, and the good faith doctrine).

185. The Court's preemption rules are not limited to state laws. See *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334–36 (11th Cir.), *cert. denied*, 134 S. Ct. 1456 (2014) (holding that the Fair Labor Standards Act's express provisions for court adjudication and class claims do not prohibit arbitral adjudication or class action bans).

186. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (rejecting cost savings associated with class actions, and fair opportunity to vindicate low-value claims as FAA's interests); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (approving redundant bilateral arbitration for potentially tens of thousands of identical consumer fraud claims); *Doctor's Assocs.*, 517 U.S. at 688 (rejecting speedy resolution as a core FAA goal).

187. 563 U.S. 333 (2011).

188. See *supra* note 186; see also *Concepcion*, 563 U.S. at 345 (holding that the informality of bilateral arbitration will deliver speedy resolution and lower costs). *But see* *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220–21 (1985) (rejecting Fifth, Ninth, and Eleventh Circuit doctrine that permits district courts to join arbitrable and nonarbitrable claims for court resolution when they arise out of the same transaction).

189. 133 S. Ct. 2304 (2013).

claims.<sup>190</sup> Further, the Court has backtracked from its oft-repeated claim that arbitrators can handle complex legal matters by declaring that they are unqualified to handle class actions.<sup>191</sup> This support for class action bans in arbitration circumvents the equitable defense of unconscionability that states have adopted to protect their citizens from oppressive bargains.<sup>192</sup> In effect, the enforcement principle now swallows both contract formation rules and traditional defenses to enforcement.

### III. THE FEDERAL COMMON LAW'S ACCOMMODATION OF SUBSTANTIVE WAIVERS

The federal rules for the FAA would not be controversial if their foundation were sound and the assumptions upon which they were crafted proved real. The Court formulated rules for arbitration contracts as if they were bargained-for exchanges<sup>193</sup> that preserved substantive remedies.<sup>194</sup> But experience has shown that if arbitration is mandated, it is structured by only one party to the contract, and the federal law of arbitration insulates arbitral awards that deny substantive remedies.<sup>195</sup> The Court's merger of its FAA precedents with its labor arbitration precedents has facilitated the loss of substantive rights when the switch to arbitration is made.<sup>196</sup>

The Court has ruled that the FAA mandate of enforcement applies with equal force to collective bargaining contracts.<sup>197</sup> But the federal law for labor contracts, attributed to the Labor Management Relations Act (LMRA), was crafted to promote the national policy of labor peace,<sup>198</sup> while the federal rules for the FAA were crafted to reverse judicial hostility to commercial arbitration

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190. *Am. Express*, 133 S. Ct. at 2311. Ironically, in *Circuit City*, the Court ruled that avoiding litigation costs is a key benefit of arbitration. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

191. *See Concepcion*, 563 U.S. at 347–48.

192. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that the class certification rules of Federal Rule 23 were intended to benefit primarily “groups of people who individually would be without effective strength to bring their opponents into court at all” (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969))).

193. *See Concepcion*, 563 U.S. at 348–49 (discussing the structuring of arbitration processes as the *parties'* prerogative although one party has no input).

194. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

195. *See infra* notes 222–68 and accompanying text.

196. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 256, 271 (2009) (holding that the FAA's principles are equally applicable in the collective bargaining context).

197. *See id.*

198. *See Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) (stating that Section 301 of the LMRA “expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way”). But the declared federal interest in promoting labor peace as an interpretation of Section 301 has been questioned both within the Court and by academics. *See Meltzer, supra* note 6, at 269 n.188 (reporting the critique of the *Lincoln Mills* holding and concluding that it cannot be justified as an interpretation of the LMRA).

contracts.<sup>199</sup> Disharmonious federal labor arbitration rules and FAA arbitration commercial rules produce prospective waivers of substantive rights.<sup>200</sup>

A. *The Federal Common Law for Labor Contract Enforcement*

The Court's ever-expanding rules for FAA arbitration, since the *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>201</sup> decision in 1985, supplement an existing and parallel body of federal common law crafted for collective bargaining contracts. In 1957 the Court ruled that Section 301 of the LMRA gave federal courts the power to make substantive law to govern labor contracts.<sup>202</sup> Although Section 301 only provided for federal court jurisdiction to decide claims alleging the breach of a labor contract,<sup>203</sup> the Court ruled that Congress intended to prioritize private dispute resolution in the LMRA, and implicitly authorized federal courts to craft a uniform body of law to enforce labor contracts.<sup>204</sup> Because labor contracts typically contain arbitration agreements, the Court decided that uniform federal rules of labor arbitration were needed to displace any conflicting state rule that impeded Congress's goal of privately resolving labor conflicts.<sup>205</sup>

Under the LMRA, the Court developed broad rules of deference to the labor contract's arbitration clause,<sup>206</sup> the labor arbitrator's authority to interpret the contract,<sup>207</sup> and the labor arbitrator's award.<sup>208</sup> But the transfer of labor arbitration rules to at-will workers and consumers has proved incongruent with the arbitration rules recently crafted for the FAA.<sup>209</sup>

When unions represent workers, the federal law of labor arbitration

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199. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

200. See *infra* notes 222–56 and accompanying text.

201. 473 U.S. 614 (1985).

202. See *Lincoln Mills*, 353 U.S. at 455–56.

203. See Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (2012). Section 301(a) provides:

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 having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

*Id.* § 301(a).

204. See *Lincoln Mills*, 353 U.S. at 455.

205. *Id.*

206. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960) (holding that arbitration clauses should be read broadly and courts should order arbitration even if there is some doubt about the breadth of the provision).

207. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 586 (1960) (holding that the arbitrator is permitted to broadly read the contract by considering shop and industry practices).

208. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (holding that the arbitrator's award should be enforced as long as it draws its essence from the contract thereby giving the arbitrator broad interpretive discretion).

209. See *infra* notes 251–74 and accompanying text.

provides that unions have exclusive control over the grievance arbitration process.<sup>210</sup> All claims covered by a collective bargaining agreement are subject to the union's broad authority, and union-represented employees cannot independently file grievances or arbitrate disputes without union approval.<sup>211</sup> Unions and companies have begun incorporating statutory rights into the grievance arbitration provisions of collective bargaining contracts, while making arbitration the exclusive forum for the resolution of all contractual and legal disputes.<sup>212</sup> This development has revealed defects in the federal law.

The federal law of labor arbitration not only gives unions exclusive authority to file and advance employee grievances, but also grants unions broad discretion in determining whether to file a claim, advance it to arbitration, or drop it prior to arbitration.<sup>213</sup> Labor arbitration law also grants unions the discretion to drop claims for reasons unrelated to the merits of the claim.<sup>214</sup> Labor laws prioritize the interests of the collective or broader represented group over individual interests.<sup>215</sup> As a result, unions can choose to sacrifice individual rights in order to promote group desires, and still meet their representation obligations.<sup>216</sup> This federal law was crafted for collective bargaining contracts that regulated purely private promises and did not incorporate public laws that protect individual rights.<sup>217</sup>

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210. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 69–70 (1975) (holding that unionized workers cannot circumvent their union and deal directly with their employer regarding race discrimination allegations, and the employer has no obligation to meet or discuss the grievances with the employees directly). The Supreme Court has never wavered from this principle. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255–56 (2009).

211. See *Emporium Capwell Co.*, 420 U.S. at 69–70; see also *Pyett*, 556 U.S. at 273 (noting that as masters of grievances, unions can relinquish their power and permit employees to process claims individually).

212. See, e.g., *Pyett*, 556 U.S. at 247. The collective bargaining contract included a provision against discrimination that provided in part: “All such claims shall be subject to the grievance and arbitration procedures (Article V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination.” *Id.* at 252 (quoting Appendix to Petition for Writ of Certiorari at 48a, *Pyett*, 556 U.S. 247 (No. 07-581)).

213. Unions' discretion to file or advance a claim to arbitration is only limited by a light duty of fair representation, which requires that the union not ignore a meritorious grievance or process it in a perfunctory fashion. See *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (holding that unionized workers are not guaranteed the right to the arbitral forum).

214. See *Drake v. Hyundai Rotem USA, Corp.*, No. 13–0868, 2013 WL 4551228, at \*5 (E.D. Pa. Aug. 28, 2013).

215. See *Emporium Capwell Co.*, 420 U.S. at 62 (holding that even the national policy against race discrimination does not justify permitting minority employees to circumvent their majority representative union and deal directly with their employer when they are dissatisfied with the union's representation).

216. See *id.*

217. See *id.* at 61–62. The desire to give unions administrative flexibility to allocate their resources as they see fit, and to have a united front when dealing with companies, was developed when unions did not wrap legal rights into collective bargaining agreements. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180–81 (1967) (noting that Congress subordinated individual rights to the discretion of unions to promote collective bargaining). Deference to unions' contractual decisions and arbitrators' interpretations of collective bargaining contracts was intended to promote peaceful



In 1991, the Court ruled in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>218</sup> that employees who sign contracts containing compulsory arbitration clauses must honor those clauses unless the implicated statute precludes arbitration.<sup>219</sup> This ruling, which makes statutory workplace protections arbitrable, meant that unions were free to incorporate their employees' statutory rights into the arbitration clauses of their collective bargaining contracts.<sup>220</sup> As a result, unions and companies have begun to make arbitration the exclusive dispute resolution process for all union members' legal claims.<sup>221</sup> This development has created a conflict between the federal rule that provides unions with the sole prerogative to file or drop claims, and the FAA requirement that substantive rights must be preserved by the arbitration contract. This conflict is demonstrated in many cases where employees lost their substantive rights because the union did not advocate for them in the arbitral forum after waiving their right to go to court.

For example, in *Drake v. Hyundai Rotem USA, Corp.*,<sup>222</sup> the collective bargaining contract made the pursuit of all employees' grievances the exclusive domain of their union.<sup>223</sup> The employees claimed that this provision operated as a substantive waiver of their statutory minimum wage and overtime compensation rights because the union could chose to never file their claims, thereby denying them the right to vindicate their statutory claims in any forum.<sup>224</sup> The U.S. District Court for the Eastern District of Pennsylvania agreed that such a contract provision operated as a substantive waiver because the contract prohibited the employees from filing grievances individually.<sup>225</sup> The court noted that the considerable discretion granted to unions allows them to not file claims for legitimate reasons unrelated to the merits of the claim.<sup>226</sup> Other

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relations between parties with an ongoing relationship. See FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* 1–2 (Kenneth May et al. eds., 7th ed. Supp. 2014). The *Pyett* Court's endorsement of union control of their members' legal rights expanded union discretion to statutory guarantees, and expanded the role of arbitrators to interpreting the laws of the land and not solely the laws of the shop. See *id.* at 1–3.

218. 500 U.S. 20 (1991).

219. See *Gilmer*, 500 U.S. at 26.

220. See Stephen A. Plass, *Using Pyett to Counter the Fall of Contract-Based Unionism in a Global Economy*, 34 BERKELEY J. EMP. & LAB. L. 219, 227 (2013) (discussing the emerging practice of unions' incorporating their members' statutory rights into the labor contract's arbitration provision); see also James W. Hubbell, *Arbitrating Employment Claims After Gilmer*, 27 COLO. LAW. 41, 41 (1998) (stating that *Gilmer* has been widely interpreted to uphold agreements to arbitrate Title VII claims and age discrimination claims).

221. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009). In this case, the Court ruled that a labor contract's provision that provides arbitration as the exclusive forum constitutes a bargained-for exchange that courts may not interfere with. *Id.*

222. No. 13-0868, 2013 WL 4551228 (E.D. Pa. Aug. 28, 2013).

223. See *Drake*, 2013 WL 4551228, at \*11.

224. *Id.* at \*11–12.

225. *Id.* at \*14. The court ruled that it did not need evidence that the union actually blocked attempts by the workers to proceed in arbitration in order conclude that contractually they were being denied any forum to vindicate their claims. *Id.* at \*15–16.

226. *Id.* at \*15.

courts have reached the same conclusion.<sup>227</sup>

In addition to situations in which the contract does not guarantee that the union will advance the claim in arbitration, unions have initiated and dropped employees' grievances short of arbitration, which also result in substantive waivers. For example, in *Brown v. Services for the Underserved*,<sup>228</sup> the contract made arbitration the exclusive dispute resolution mechanism, and it also provided that only the union could advance claims to arbitration.<sup>229</sup> The union decided to drop the employee's gender and retaliatory discrimination claims based on its assessment that the claims were weak.<sup>230</sup> The court concluded that the contract "effectively deprived Brown of any remedy for his statutory discrimination claims" and therefore operated as an impermissible prospective waiver of substantive rights.<sup>231</sup>

*Morris v. Temco Services Industries, Inc.*<sup>232</sup> also demonstrates how unions can abuse the discretion granted by federal common law to drop grievances to produce substantive waivers of statutory rights in violation of FAA principles.<sup>233</sup> In *Morris*, the employee repeatedly complained to her union representative and union counsel about race discrimination and retaliation by her employer.<sup>234</sup> She also provided the union with a list of witnesses to corroborate her claims.<sup>235</sup> The union filed two grievances but did not speak to the witnesses provided, nor did the union investigate the claims beyond speaking to the company.<sup>236</sup> The union dropped one grievance without the employee's knowledge or consent, and it arbitrated the second grievance without asserting the claims of discrimination.<sup>237</sup> Union counsel simply argued that the employer lacked just cause to terminate the employee.<sup>238</sup> Because the collective bargaining contract covered the employee's discrimination claims, and provided that only the union could file or

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227. See *de Souza Silva v. Pioneer Janitorial Servs., Inc.*, 777 F. Supp. 2d 198, 200 (D. Mass. 2011) (holding that a substantive waiver occurred because the contract provided that only the union can take a case to arbitration and the union did not pursue the employee's sexual harassment and retaliation claims in arbitration); *Morris v. Temco Serv. Indus., Inc.*, No. 09 Civ. 6194(WHP), 2010 WL 3291810, at \*12-13 (S.D.N.Y. Aug. 12, 2010) (holding that the union deprived an employee of any forum to vindicate her antidiscrimination claims by contractually waiving her judicial forum, by making claim filing the exclusive prerogative of the union, and by failing to assert her claims of discrimination in arbitration); *Kravar v. Triangle Servs. Inc.*, No. 1:06-cv-07858-RJH, 2009 WL 1392595, at \*9 (S.D.N.Y. May 19, 2009) (holding that there was a substantive waiver because the arbitration contract did not permit the employee to file claims individually and the union did not advance to arbitration the employee's disability, national origin, and retaliation claims).

228. 12-CV-317, 2012 WL 3111903 (E.D.N.Y. July 31, 2012).

229. *Brown*, 2012 WL 3111903, at \*3.

230. See *id.*

231. *Id.*

232. No. 09 Civ. 6194(WHP), 2010 WL 3291810 (S.D.N.Y. Aug. 12, 2010).

233. See *Morris*, 2010 WL 3291810, at \*5.

234. *Id.* at \*2-4.

235. *Id.* at \*3-4.

236. *Id.* at \*5.

237. *Id.* at \*2-3.

238. *Id.* at \*3.

permit the filing of claims, the union's failure to assert claims of discrimination denied the employee both the judicial and arbitral forum for vindicating her statutory rights.<sup>239</sup>

The substantive waiver of legal rights caused by disharmony in federal law needs to be addressed. In *14 Penn Plaza LLC v. Pyett*,<sup>240</sup> the Supreme Court expressly left open the question of whether union control of the grievance process can result in substantive waivers.<sup>241</sup> And lower courts have not been consistent in evaluating contracts that give unions complete control over all legal claims, including the decision to drop claims. For example, in *Gildea v. Building Management*,<sup>242</sup> the U.S. District Court for the Southern District of New York interpreted a contract that stated only the union can bring or settle claims; the Southern District found the contract silent on the question of whether an employee can proceed alone if the claim was dropped by her union.<sup>243</sup> Further the *Gildea* court held that the union's blocking power does not extend to its members' statutory rights but only to their contractual rights.<sup>244</sup> So as long as the employer is willing to proceed to arbitration with the employee individually after the union failed to file the employee's claim of discrimination, there is no prospective waiver of substantive rights.<sup>245</sup>

By contrast, the court in *Kravar v. Triangle Services, Inc.*,<sup>246</sup> also in the Southern District of New York, found that an identical forum waiver provision constituted an impermissible prospective waiver.<sup>247</sup> The court held that a contractual provision that gave the union exclusive control of grievances, coupled with the union's decision to drop the employee's discrimination claims prior to arbitration, denied the employee the two available fora for vindicating her rights.<sup>248</sup> The fact that the union permitted the employee to proceed alone and the employer was willing to arbitrate directly with the employee did not change the court's analysis or conclusion.<sup>249</sup> Although the Supreme Court has concluded that the FAA rules of enforcement apply with equal force to collective bargaining contracts,<sup>250</sup> the *Gildea* and *Kravar* decisions show that

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239. *Id.* at \*5.

240. 556 U.S. 247 (2009).

241. *See Pyett*, 556 U.S. at 273–74 (deciding that this issue was not before the Court nor was it properly briefed); *see also* *Jenkins v. Collins Bldg. Servs.*, 500 F. App'x 54, 55 (2d Cir. 2012) (noting that the *Pyett* Court left open the question of whether a contract that waives the court forum and allows the union to block arbitration constitutes a substantive waiver).

242. No. 10 Civ. 3347(DAB), 2011 WL 4343464 (S.D.N.Y. Aug. 16, 2011).

243. *Gildea*, 2011 WL 4343464, at \*5. According to the court, the possibility of the employee proceeding to arbitration alone still existed. *Id.* at \*5–6.

244. *Id.*

245. *See id.*

246. No. 1:06-cv-07858-RJH, 2009 WL 1392595 (S.D.N.Y. May 19, 2009).

247. *See Kravar*, 2009 WL 1392595, at \*3.

248. *Id.* at \*3–4

249. *See id.* at \*4. The court ruled that later modifications to the contract to make the arbitral forum available for the employee to proceed directly with the employer were irrelevant to its analysis. *Id.*

250. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 256, 271 (2009) (noting that incorporating

there is disagreement about whether a union's contractual control of statutory rights, or its decision to drop a claim short of arbitration, constitutes a substantive waiver. These conflicting approaches to the FAA principle disallowing substantive waiver of legal rights in arbitration contracts requires a harmonizing of the federal law of arbitration.

*B. The Federal Law of Vacatur*

1. The Case of Annette Peyovich and the Substantive Waiver of Rights

Currently, the federal rules of enforcement are complemented by federal rules of vacatur that permit the denial of substantive remedies. Take, for example, the case of Annette Peyovich, who sued her employer for unpaid overtime in violation of the Fair Labor Standards Act (FLSA) and state labor laws.<sup>251</sup> Ms. Peyovich prevailed on part of her wage violation claim, which the arbitrator ruled was willful, and was awarded \$8,700.<sup>252</sup> The arbitrator did not award attorney's fees although the arbitration agreement provided that "the arbitrator shall apply substantive law and law with respect to remedies."<sup>253</sup> Further, the arbitrator saddled Ms. Peyovich with \$2,050 in administrative fees, and \$9,186.48 in fees and expenses of the arbitrator.<sup>254</sup> The denial of attorney's fees and the allocation of half the cost of the arbitrator to Ms. Peyovich was upheld in a court challenge, on the premise that she failed to alert the arbitrator that an award of fees was mandatory under the FLSA, and because the arbitrator's error did not fall within the narrow grounds specified by the FAA for vacating an award.<sup>255</sup>

The *Peyovich* case is not unusual. Other courts have refused to modify or vacate arbitral awards that deny prevailing parties their legal fees simply because they did not use the magic word *mandatory* when requesting statutorily prescribed fees.<sup>256</sup> But the parties' litigation over this issue in Ms. Peyovich's arbitration demonstrates the ease with which public policy considerations designed to protect weak litigants can be undermined.<sup>257</sup> In court, Ms. Peyovich

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employment discrimination claims into a union grievance arbitration process is no different than contractual claims, and the benefits of union representation outweigh any concerns about unions sacrificing individual rights in the interest of the collective).

251. See *Peyovich v. World Mortg. Co.*, No. 6:08-cv-404-Orl-28KRS, 2010 WL 3516721, at \*1 (M.D. Fla. July 29, 2010), *adopted by* 6:08-CV-404, 2010 WL 3516707 (M.D. Fla. Sept. 3, 2010).

252. *Id.* at \*1.

253. *Id.* at \*5.

254. *Id.* at \*1. After Ms. Peyovich requested that the arbitrator correct errors in her award, the arbitrator amended the award to require the defendants to pay the \$2,050 in administrative fees. *Id.* at \*2.

255. *Id.* at \*3.

256. See, e.g., *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 822-23 (2d Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998) (confirming an arbitral award that denied attorney's fees to a prevailing worker in an age discrimination case because plaintiff argued he was *entitled* to fees instead of saying fees were *mandated* by statute).

257. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 270-71 (1975) (discussing the origin of the American rule that each litigant pays its litigation costs, and holding that

had challenged the arbitration contract as unconscionable because it made the award of fees to a prevailing party discretionary even though it was a statutory entitlement.<sup>258</sup> The judge was persuaded to rule that the arbitration contract was not unconscionable<sup>259</sup> after counsel for the employer repeatedly told the judge that if she prevailed she would get attorney's fees.<sup>260</sup> Nonetheless, Ms. Peyovich prevailed in the wage claim, was not awarded attorney fees, and could not persuade a judge to reverse the legal error denying fees.<sup>261</sup>

Even in cases where the arbitrators are aware they made a legal error with respect to fees and costs, plaintiffs have difficulty securing their legally prescribed remedy. For example, in one employment discrimination case, the arbitrators ruled that the employer engaged in age discrimination and awarded compensatory and punitive damages.<sup>262</sup> The arbitrators did not award the employee attorney's fees and costs as required by statute, and in fact assessed the employee \$13,840.75 in forum, filing, and arbitrators' fees.<sup>263</sup> Although the arbitrators were made aware that the law *required* an award of fees, they simply ignored it.<sup>264</sup> The employee thus sued to modify the award to grant him attorney's fees and to allocate forum costs to his employer.<sup>265</sup> When the reviewing court ordered a determination of the plaintiff's reasonable attorney's fees and costs, the arbitrators awarded \$83,500 in fees and costs instead of the \$249,996.95 in fees and \$12,050.09 in costs that the plaintiff's lawyer requested.<sup>266</sup>

The failure of the arbitrators to properly calculate the plaintiff's fees and costs triggered further litigation to modify the award. The reviewing court found that the arbitrators' \$83,500 fees and costs award was remarkably similar to the \$82,437.81 contingency fee arrangement the plaintiff's lawyer had with the client, and likely the product of the arbitrators' reliance on defendants' misstatement of the law with respect to contingency fees.<sup>267</sup> The court ruled that law extant at the time made clear that a contingency fee arrangement may not operate as a cap on an attorney's fee award, although it may be relevant in determining the

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only Congress can authorize exceptions to the rule); *see also* FREDERICK T. GOLDER & DAVID R. GOLDER, LABOR AND EMPLOYMENT LAW: COMPLIANCE AND LITIGATION § 5:36.50 (3d ed.), Westlaw (database updated Nov. 2017) (reporting that the FLSA's fee provision "is to insure effective access to the judicial process by providing attorney's fees for prevailing plaintiffs with wage and hour claims"); Frederick L. Sullivan, *Accepting Evolution in Workplace Justice: The Need for Congress to Mandate Arbitration*, 26 W. NEW ENG. L. REV. 281, 283 (2004) (advocating for legally mandated arbitration of employment disputes, in part because it is not unusual for attorney's fees to exceed the recovery in court litigation).

258. *Peyovich*, 2010 WL 3516721, at \*5.

259. *Id.* at \*1.

260. *Id.* at \*5.

261. *Id.* at \*5-6.

262. *See Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 136 (2d Cir. 2007).

263. *Id.*

264. *Id.* When the fee denial was first challenged in court, the judge ruled that the arbitrators were informed of the governing law and "either refused to apply it or ignored it altogether." *Id.*

265. *Id.* at 136-37.

266. *Id.* at 137-38.

267. *Id.* at 143.

reasonableness of fees, and that time spent litigating the fee claim was also compensable, contrary to the employer's assertions.<sup>268</sup> Further, the court rejected the employer's argument that awarding attorney's fees may be unnecessary to achieve the fee-shifting goals of antidiscrimination law.<sup>269</sup>

The preceding cases demonstrate the power of arbitration contracts to circumvent substantive laws. They also demonstrate the chilling effect arbitration contracts can have on weak parties confronted with the prospect of high forum costs, arbitrators' fees, and legal expenses that dwarf their claims. Clauses banning class actions and requiring each party to pay its own attorney's fees and forum costs can terrorize small claimants into giving up their rights.<sup>270</sup> And for the valiant employees and consumers who challenge them, it can be an odyssey marked by hostile arbitrators and federal common law that ignores the public policies designed to protect them.<sup>271</sup>

Courts cite the narrow grounds articulated by the Supreme Court for vacating or modifying arbitral awards as the basis for confirming awards that deny workers and consumers their substantive remedies.<sup>272</sup> But Supreme Court precedents also note that arbitration contracts cannot operate as prospective

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268. *Id.* at 142. Citing to *Gagne v. Maher*, 594 F.2d 336, 344 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980), the *Porzig* court noted that such fee awards are necessary to ensure that indigent litigants can vindicate their legal rights. *Porzig*, 497 F.3d at 143.

269. *Porzig*, 497 F.3d at 142. The court found that this argument "flies in the face of the district court's determination that the Panel had already manifestly disregarded the law when it first refused to award attorney's fees." *Id.*

270. Cost-allocation and class ban provisions can be classified as *in terrorem* clauses because they often force consumers and workers to forfeit their legal rights as a condition of employment or doing business. See *In Terrorem Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014) (citing to *No Contest Clause*, which is defined as a "provision designed to threaten one into action or inaction"); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 400.

271. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (noting that the Court's FAA jurisprudence is undermining the public policies that other federal statutes reflect); *Casarotto v. Lombardi*, 886 P.2d 931, 941 (Mont. 1994) (Trieweiler, J., concurring) (observing that corporations can trump state public policies with arbitration contracts because of the Court's recent FAA jurisprudence), *rev'd sub nom Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

272. See *Peyovich v. World Mortg. Co.*, No. 6:08-cv-404-Orl-28KRS, 2010 WL 3516721, at \*4-6 (M.D. Fla. July 29, 2010), *adopted by* 6:08-CV-404, 2010 WL 3516707 (M.D. Fla. Sept. 3, 2010); *DiRussa v. Dean Witter Reynolds, Inc.*, 936 F. Supp. 104, 106 (S.D.N.Y. 1996), *aff'd*, *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818 (2d Cir. 1997). The Supreme Court has reinforced the principle that for FAA cases, the FAA provides narrow and exclusive grounds for vacating an arbitral award. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 584-86 (2008). In *Hall Street*, the Court ruled that private contracting parties cannot expand the FAA-provided bases for vacating an arbitral award. *Id.* at 584. This prioritization of the FAA's preference for finality over the FAA's core interest in enforcing the parties' agreement placed in doubt judicial doctrines that permit vacatur when the arbitrator makes legal errors. *Id.* at 581-83. See also Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 938-43 (2010) (noting that even the "manifest disregard of the law" standard that some courts use is reserved for those rare, egregious cases of arbitrator impropriety).

waivers or deny substantive remedies.<sup>273</sup> The narrow federal rules for vacating arbitration awards do not encourage judges to consider the countervailing rule that there can be no prospective waiver of substantive remedies, or the requirement that judicial review must be sufficient to ensure compliance with the law.<sup>274</sup> Further, despite having opportunities to do so, the Court has not answered the question of whether judges have flexibility to read the rules of vacatur broadly in order to protect arbitrating parties from arbitrators who ignore or violate the law.<sup>275</sup> As a result, there is no unified theory of arbitration, but rather a hotchpotch of common law rules that are employed independent of each other to accommodate arbitral denial of substantive rights with impunity.

## 2. The FAA's Provisions for Vacatur and Their Context

The FAA provides specific grounds for vacating an arbitrator's award.<sup>276</sup> Because the FAA's grounds for vacatur were crafted for private commercial agreements, the Court interpreted the FAA as evincing a principle of finality for arbitrators' decisions.<sup>277</sup> The Court ruled that judges have little discretion to vacate awards because predictability should govern—the parties cannot agree to arbitrate their contractual dispute and, when dissatisfied with the results, treat it as a prelude to court adjudication.<sup>278</sup> A similar emphasis on finality was developed under the LMRA for arbitrations under collective bargaining contracts.<sup>279</sup> These extant rules of vacatur were designed to ensure that

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273. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that a contract to arbitrate is not an agreement to forego substantive rights but only an agreement to forego a court forum); *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (holding that no substantive right is lost with a contract to arbitrate).

274. See *Gilmer*, 500 U.S. at 26–28 (holding that the contract to arbitrate does not impair substantive rights); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (concluding that “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute”); *Mitsubishi Motors*, 473 U.S. at 628 (holding that no substantive right is lost with a contract to arbitrate).

275. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671–72 (2010) (declining to decide whether an arbitrator's manifest disregard of the law was grounds to review an arbitrator's award since the standard was not enumerated in the FAA); *Hall St.*, 552 U.S. at 585 (refusing to decide whether the manifest disregard of the law standard is an impermissible judicial expansion of the statutory grounds for vacating an arbitral award).

276. See 9 U.S.C. § 10(a)–(d) (2012). Section 10(a) provides for judicial review

- (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 the 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 party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

*Id.* § 10(a).

277. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45, 350–51 (2011).

278. See *Hall St.*, 552 U.S. at 588.

279. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987).

contracting parties honored their private bargains.<sup>280</sup> They were not designed to further the public policies that minimum wage and other statutory laws reflect.<sup>281</sup> Further, courts use the federal rules of vacatur developed under the LMRA and the FAA interchangeably, despite their dissonant policy goals.

The statutory and judicial grounds for vacating arbitration awards have always been narrow.<sup>282</sup> Whether the challenged award is from a labor case or a commercial contract dispute, the Court has generally emphasized the importance of finality in confirming awards.<sup>283</sup> The Supreme Court developed two lines of precedents to deal with the vacatur issue, and those precedents have been merged and applied to consumer and employment arbitrations even when they operate to deny legal remedies.

The FAA expressly instructs courts to focus on misconduct rather than mistakes of the arbitrator.<sup>284</sup> The Court has interpreted the enumerated FAA grounds as exclusive, to promote arbitration's core virtue—speed.<sup>285</sup> To this end, judicial review is limited to instances of extreme or outrageous arbitral conduct, not mere legal errors.<sup>286</sup> The Court reasoned that arbitration should not serve as

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280. *See id.* at 36 (stating that courts play a limited role when asked to review the decision of an arbitrator and are not authorized to reconsider the merits of an award); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (stating that a reviewing court should not deprive the parties of the arbitrator's judgment when it was his judgment that was bargained for in the contract to arbitrate); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (Jackson, J., concurring) (stating that Congress has afforded individuals with the opportunity to obtain "prompt, economical and adequate solution" of disputes through arbitration), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

281. *See* *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 737 (1981) ("While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.").

282. *See* William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Shifting Attorney's Fees in Litigation Attacking Commercial Arbitration Awards: A Disincentive for Meritless Motions for Correction, Modification or Vacatur*, 35 AM. BUS. L.J. 515, 517 (1998) (noting that the grounds for judicial review of an arbitrator's award are "exceedingly narrow and rarely successful"); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1104–16 (2009) (discussing the stringent requirements for vacatur).

283. *See, e.g.,* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350–51 (2011) (holding that judicial review is grounded in misconduct, not mistake by the arbitrator); *Hall St.*, 552 U.S. at 588 (holding that the narrow grounds specified in the FAA are exclusive); *Misco*, 484 U.S. at 38 (holding that the grounds for judicial review are narrow such as fraud by a party or dishonesty by the arbitrator); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (noting that resort to courts should not be permitted when parties agree to arbitrate because it injects the risk of prolonged litigation which arbitration seeks to avoid); *see also* Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137, 182 (2011) (reporting that the Court's *Hall Street* decision has promoted more confirmations of arbitrator's decisions).

284. *See* *Concepcion*, 563 U.S. at 350–51.

285. *See* *Hall St.*, 552 U.S. at 588 (holding that the FAA's grounds for vacatur reflect "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway").

286. *See id.* at 586.



a prelude to time-consuming court adjudication.<sup>287</sup> As such, even the contracting parties cannot expand the FAA's grounds for judicial review in order to secure more legal certainty in their arbitration awards.<sup>288</sup>

Despite the Supreme Court's pronouncement that the textual FAA grounds to vacate are exclusive, it has failed to address the many other nontextual grounds courts have used to review and vacate arbitration awards. For example, lower federal courts have reviewed awards for irrationality,<sup>289</sup> public policy violations,<sup>290</sup> manifest disregard of the law,<sup>291</sup> or arbitrariness and capriciousness.<sup>292</sup> It is not always apparent whether these nontextual grounds are expansions of the federal rule or judicial shorthand for express FAA grounds to vacate, such as arbitrators' misconduct or arbitrators exceeding their authority. However, some courts treat the "manifest disregard of the law" test as a judicial gloss on the FAA's requirement that arbitrators not exceed their authority.<sup>293</sup> And federal courts have embraced the manifest disregard of the law standard after the Supreme Court suggested that this was a permissible ground in *Wilko v. Swan*.<sup>294</sup> Courts employ nontextual grounds both as judicial glosses and as

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287. See *id.* at 588.

288. See *id.*

289. See, e.g., *Ario v. Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account*, 618 F.3d 277, 295 (3d Cir. 2010); *Mastec N. Am., Inc. v. MSE Power Sys., Inc.*, 581 F. Supp. 2d 321, 331 (N.D.N.Y. 2008). The irrationality requirement demands that there "be no proof whatever to justify the award." *Mastec N. Am.*, 581 F. Supp. 2d at 329 (quoting *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 210 (S.D.N.Y. 2002)).

290. See, e.g., *Campbell Harrison & Dagley, LLP v. Hill*, 782 F.3d 240, 245 (5th Cir. 2015); *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011). The public policy grounds are only available in extraordinary cases where the arbitral award clearly violates "carefully articulated" or "well defined and dominant" public policy. *Campbell Harrison*, 782 F.3d at 245 (quoting *CVN Grp., Inc. v. Delgado*, 95 S.W.3d 234, 238–39 (Tex. 2002)); see also *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987).

291. See, e.g., *Schwartz*, 665 F.3d at 451; *Coffee Beanery, Ltd. v. WW LLC*, 300 F. App'x 415, 419 (6th Cir. 2008). The manifest disregard of the law standard requires proof of a well-defined explicit applicable law that the arbitrator was aware of but ignored. See *Schwartz*, 665 F. 3d at 452. This test can be distinguished from the public policy test that requires an award to *contravene* an explicit law. See *E. Associated Coal v. United Mine Workers*, 531 U.S. 57, 59 (2000).

292. See, e.g., *Timegate Studios, Inc. v. Southpeak Interactive, LLC*, 713 F.3d 797, 806 (5th Cir. 2013); *Aviles v. Charles Schwab & Co.*, No. 09–80794–CIV, 2010 WL 1433369, at \*7 (S.D. Fla. Apr. 9, 2010), *aff'd*, 435 F. App'x 824 (11th Cir. 2011). The arbitrary and capricious ground requires proof that "the arbitrator's decision can[not] be inferred from the facts of the case." *Aviles*, 2010 WL 143369, at \*7 (alteration in original) (quoting *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998)).

293. See, e.g., *Schwartz*, 665 F.3d at 451 (holding that manifest disregard of the law is a judicial gloss on the specific grounds provided in the FAA); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1289–90 (9th Cir. 2009) (holding that manifest disregard of the law is just shorthand for arbitrators exceeding their powers); *Mastec N. Am.*, 581 F. Supp. 2d at 325 (holding that the manifest disregard of the law standard is limited to the grounds enumerated in the FAA). *But see Frazier v. Citifinancial Corp.*, 604 F.3d 1313 (11th Cir. 2010) (holding that the manifest disregard of the law standard is not available after the *Hall Street* decision). The same position was taken by the Fifth Circuit. See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 357 (5th Cir. 2009).

294. See *Coffee Beanery, Ltd.*, 300 F. App'x at 419 (stating that "[i]t is worth noting that since *Wilko*, every federal appellate court has allowed for the vacatur of an award based on an arbitrator's manifest disregard of the law").

independent justifications for vacatur.<sup>295</sup> But in some cases, the nontextual grounds are applied interchangeably.<sup>296</sup>

Some nontextual grounds consider the soundness of arbitrators' awards while others evaluate whether the award ignored or contravened explicit laws.<sup>297</sup> Court precedents support all of these approaches. For example, vacating awards that do not draw their essence from the contract is a permissible nonstatutory ground as articulated by the Court in its *Steelworkers Trilogy* cases.<sup>298</sup> The Court also created a nonstatutory public policy ground in *W.R. Grace & Co. v. Local Union 759*<sup>299</sup> by ruling that awards that contravene an explicit and dominant public policy, evidenced by law and legal precedents, may be vacated.<sup>300</sup> Courts use these nonstatutory grounds that emanated from labor arbitration cases as a complement to the express grounds provided in the FAA.<sup>301</sup> This supplanting of the FAA seems justified because some nonstatutory grounds are created by federal common law that the Court itself crafted, and the Court has concluded that the FAA also applies to labor contracts.<sup>302</sup> And although the Court has made clear that contracting parties cannot expand the FAA's grounds for

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295. See, e.g., *Timegate Studios*, 713 F.3d at 806 (evaluating whether the arbitrator exceeded his authority using an essence standard derived from the common law); *Comedy Club, Inc.*, 553 F.3d at 1288 (treating the irrationality test the same as the judicially created essence standard developed for labor arbitration awards); *Aviles*, 2010 WL 1433369, at \*7–8 (treating the public policy, arbitrary and capricious, irrationality, and manifest disregard of the law tests as nonstatutory grounds for vacating arbitral awards); *Mastec N. Am.*, 581 F. Supp. 2d at 328 (stating that the irrationality test is the same as the FAA's requirement that arbitrators exceed their powers).

296. See, e.g., *Timegate Studios*, 713 F.3d at 806–07 (evaluating whether an award draws its essence from the contract in order to determine whether it is irrational); *Schwartz*, 665 F.3d at 452 (evaluating whether an award ignored or contravened explicit public policy); *Comedy Club, Inc.*, 553 F.3d at 1288 (using the essence test to determine whether an award is irrational).

297. See *supra* notes 279–91 and accompanying text.

298. See *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (holding that evidence suggesting that an arbitrator exceeded his authority is not sufficient grounds for vacating an award if it can be said that the award draws its essence from the contract). The other two steelworker cases are *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In these two cases, the Court held that a court's function is to read arbitration clauses broadly to cover the dispute in question, in order to avoid judicial determination on the merits. *Am. Mfg.*, 363 U.S. at 564; *Warrior & Gulf Navigation*, 363 U.S. at 574.

299. 461 U.S. 757, 766 (1983).

300. See *W.R. Grace & Co.*, 461 U.S. at 766; see also Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 807 (2000) (discussing the Court's affirmation of the essence standard and its addition of the public policy ground for vacating awards after the steelworkers trilogy).

301. See *Campbell Harrison & Dagley, LLP v. Hill*, 782 F.3d 240, 245 (5th Cir. 2015) (applying a public policy test that mirrors the rules enunciated by the Court in the *W.R. Grace* case); *Timegate Studios*, 713 F.3d at 806 (using the essence test from a labor case to decide whether an arbitrator's decision is rational).

302. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009); see also David L. Gregory et al., *The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions—Will Gold Turn to Rust?*, 60 CATH. U. L. REV. 47, 71 (2010) (noting that interpreting the FAA as applying to labor disputes raises questions about the standards to confirm or vacate an arbitration award).

vacatur, it has declined to decide whether judges other than those on the Supreme Court can do so.<sup>303</sup>

But even if judges have expanded the FAA with common law grounds for vacating arbitral awards, this expansion does not effectively protect litigants when arbitrators make legal errors or deny substantive rights. Common law grounds for vacating awards are extremely narrow and result in the confirmation of most awards.<sup>304</sup> Even when court-created grounds are applied, arbitration awards are generally confirmed.<sup>305</sup> For example, to satisfy the manifest disregard of the law standard, a party must prove that the arbitrator knew the applicable law and intentionally ignored it.<sup>306</sup> This makes it possible to confirm awards in FAA cases even if they deny substantive remedies.<sup>307</sup> The rules of vacatur crafted for labor arbitrators' decisions are also incapable of guaranteeing legal remedies.

### 3. Vacatur in Labor Arbitration Cases

Rules of finality and vacatur for labor arbitration awards were crafted to further different public policies from those advanced by the FAA. The public policy that conceivably supports the finality of labor arbitration awards is traceable to Section 203(d) of the LMRA, not the FAA.<sup>308</sup> Section 203(d) provides: "Final 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."<sup>309</sup> Unlike the FAA, the LMRA does not provide express grounds

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303. See, e.g., *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010) (declining to decide the validity of the manifest disregard standard); *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 579 (2008) (avoiding a decision about whether judges can expand FAA Section 10 grounds for review).

304. See *Campbell Harrison*, 782 F.3d at 244–45 (noting that the state's common law public policy grounds for vacating an award are only available in extraordinary cases where a specific public policy is violated); *Aviles v. Charles Schwab & Co.*, No. 09–80794–CIV, 2010 WL 1433369, at \*7–8 (S.D. Fla. Apr. 9, 2010) (noting that the FAA presumes that arbitral awards will be confirmed, judicial review will be severely limited, and parties asserting non statutory grounds bear a heavy burden), *aff'd*, 435 F. App'x 824 (11th Cir. 2011); *Mastec N. Am., Inc. v. MSE Power Sys., Inc.*, 581 F. Supp. 2d 321, 324 (N.D.N.Y. 2008) (holding that a party seeking to vacate an arbitral award has a heavy burden because statutory and case law set very narrow grounds for vacatur).

305. See, e.g., *Campbell Harrison*, 782 F.3d at 244–45; *Aviles*, 2010 WL 1433369, at \*7–8; *Mastec N. Am.*, 581 F. Supp. 2d at 324.

306. See *Comedy Club, Inc. v. Improv W. Assocs.*, 533 F.3d 1277, 1290 (9th Cir. 2009) (providing subjective standard with high evidentiary burden); see also *Weston*, *supra* note 272, at 938–39.

307. See *DiRussa v. Dean Witter Reynolds Inc.*, 121 F. 3d 818, 821–24 (2d Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998); *Peyovich v. World Mortg. Co.*, No. 6:08–cv–404–Orl–28KRS, 2010 WL 3516721, at \*5–7 (M.D. Fla. July 29, 2010), *adopted by* 6:08–CV–404, 2010 WL 3516707 (M.D. Fla. Sept. 3, 2010).

308. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987) (noting that labor arbitration awards are insulated from judicial review because federal labor laws reflect a preference for the "private settlement of labor disputes without the intervention of government").

309. *Id.* at 37 (quoting Labor Management Relations Act of 1947, Pub. L. No. 80–101, § 203(d),

for vacatur, but the Court interpreted Section 203(d) as evincing a policy of finality.<sup>310</sup> The Court distinguished labor from commercial arbitration by noting that while commercial arbitration is simply a substitute for litigation, labor arbitration is a substitute for industrial strife.<sup>311</sup> The finality of labor arbitration awards was therefore necessary to foster the peaceful settlement of disputes between sophisticated parties (union leaders and management representatives) locked in an ongoing contractual relationship.<sup>312</sup> The theory was that if unions or companies could easily seek judicial review of arbitration awards, they would lose the incentive to settle their disputes promptly, thereby increasing the risk of labor strife and disruptions to commerce.<sup>313</sup>

To ensure the finality of labor arbitration awards, the Court formulated an “essence” test. The essence test sought to determine whether there was *any contractual basis* for the arbitrator’s award.<sup>314</sup> Under the essence standard, arbitrators are allowed to misread the contract and commit serious errors—both with respect to interpretation and remedies—and still get their awards confirmed.<sup>315</sup> Mistakes of law or fact are not sufficient grounds for vacating a labor arbitration award, but arbitrator dishonesty may be sufficient.<sup>316</sup> The Court also adopted a public policy exception to the enforcement of labor arbitration awards, but this exception is extremely narrow. It only applies where the award contravenes a well-defined, explicit, and dominant public policy, grounded in law and legal precedents.<sup>317</sup>

Unlike the Court-created rules for labor arbitration, Congress provided specific, narrow statutory grounds for vacatur in FAA cases. Because of the context in which the FAA was drafted, these grounds were not motivated by

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61 Stat. 136, 154 (codified as amended at 29 U.S.C. § 173(d)).

310. *See id.* at 37–38 (providing narrow grounds for vacating labor arbitration awards).

311. *See* *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *see also* Hayford, *supra* note 300, at 781–83 (noting that commercial arbitration is grounded in contract law and serves no higher purpose while labor arbitration has its origin in the NLRA, which requires employers to bargain with unions in order to promote labor peace and avoid industrial strife).

312. *See* Stephen L. Hayford, *The Federal Arbitration Act: Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 *BERKELEY J. EMP. & LAB. L.* 521, 531 (2000) (noting that Congress viewed collective bargaining as a binding process to promote industrial peace between employers and unions); Joan Parker, *Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception*, 4 *LAB. LAW.* 683, 711 (1988) (noting the need for finality for workplace disputes to eliminate work stoppages and promote labor relations stability).

313. *See Misco*, 484 U.S. at 38; *see also* Douglas E. Ray, *Court Review of Labor Arbitration Awards Under the Federal Arbitration Act*, 32 *VILL. L. REV.* 57, 94–98 (1987) (reporting the consensus that finality is an overriding concern in labor arbitration, and noting the need for a judicial review model that is different from the FAA).

314. *See* *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

315. *See Misco*, 484 U.S. at 38.

316. *See id.*

317. In *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983), the Court confirmed the existence of a public policy exception to enforcing arbitration awards. *See id.* at 766 (“As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy.”). In *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), the Court noted that the public policy exception is narrow. *Id.* at 63.

concerns that broader rules would negatively impact legal remedies or the public interest.<sup>318</sup> The Court has noted that Congress provided narrow grounds in the FAA to facilitate speedy private resolution of disputes.<sup>319</sup> With the expansion of FAA coverage to workers and consumers came preexisting narrow rules of vacatur that were not tailored to prevent the denial of statutory remedies.<sup>320</sup> And the FAA and LMRA rules for vacatur were not reframed to prevent arbitrators' legal errors from denying substantive remedies.

#### 4. Operation of the Rules for Vacatur

The extant rules for vacating arbitration awards cannot protect the legal rights of consumers and workers because they were crafted to further public policies that are not in harmony with the FAA. Congress made the FAA rules for vacatur in 1925 to provide finality in contractual disputes between merchants who did not want the delays and expense of court litigation in settling their private disagreements.<sup>321</sup> Congress crafted the labor arbitration rules of finality under the LMRA in 1960 and later refined them to promote speedy, cost-effective, and peaceful settlement of private contractual disagreements between unions and companies.<sup>322</sup> In both cases, the rights being arbitrated were private rights emanating from personal promises, not from statutes providing for individualized remedies.<sup>323</sup> Because all rules of vacatur (statutory and nonstatutory) are narrow, they can operate to inhibit or deny statutory remedies. In order to avoid this conflict between the prohibition of substantive waivers and existing rules of vacatur, a broader formulation of the rules of vacatur is necessary to protect substantive rights.

#### IV. THE FEDERAL COMMON LAW OF VINDICATION AND THE SUPREME COURT'S RECENT RETREAT

Initially, the federal common law that developed under the FAA accounted

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318. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

319. See *id.*

320. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) (holding that FAA principles are equally applicable to labor contracts); see also *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 466–67 (1957) (Frankfurter, J., dissenting) (stating that the Court invented a mandate to enforce labor arbitration promises under the LMRA because it knew that the FAA did not apply to such contracts).

321. See *supra* notes 275–77 and accompanying text.

322. See Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1191–92 (1993) (noting that an arbitration provision in a labor contract is intended to eliminate strikes and promote efficient dispute resolution, and these goals will be impaired if judicial review of arbitral awards was not narrow).

323. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987) (discussing how arbitration under the LMRA is concerned with the rights created by private contractual promises); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967) (discussing how arbitration under the FAA is concerned with the rights created by private contractual promises).

for the vindication interests of the adhering party.<sup>324</sup> Checks were placed on the unilateral imposition of arbitration contract terms by powerful bargainers in order to guarantee that the FAA's principle of enforcement not trump other statutory policies and goals. These federal rules of nonenforcement or nonfinality ensured that vindication of substantive rights was possible. These cases are generally referred to as the nonarbitrability decisions, but they also reflect vindication concerns traceable to the FAA.

A. *Nonarbitrability as the Original Effective Vindication Rule*

The Court addressed the enforceability of an arbitration clause in a securities brokerage agreement in *Wilko v. Swan*.<sup>325</sup> The agreement provided for arbitration of all future disputes, but it also included a provision that relieved the seller or broker from liability for misrepresentation.<sup>326</sup> This exculpatory provision contravened the securities law that required full disclosure about stocks being sold, so as to avoid fraud.<sup>327</sup> Although the Securities Act of 1933 does not prohibit arbitration, it provided for court adjudication of disputes and prohibited waiver of compliance with any of its provisions.<sup>328</sup> This raised the question whether compliance could be achieved through arbitration or whether some important benefit would be lost without court adjudication.

The *Wilko* Court focused on the reality that most customers or stock purchasers do not deal at arm's length with stockbrokers.<sup>329</sup> The Court noted that a statutory provision granted access to a court forum and this was a substantial right with many benefits that only the judiciary can deliver.<sup>330</sup> While the Court recognized that the arbitral forum's speed and lower costs may be adequate for arm's-length stock sales, it concluded that the forum could not guarantee the protections provided in the Securities Act.<sup>331</sup> The stockbroker's contractual disclaimer of liability eliminated a legal protection given to the stock purchaser, and an arbitrator could not second-guess the parties' contractual choices.<sup>332</sup> The Court concluded that such contractual maneuvering would result

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324. See *infra* Part IV.A for an analysis of the vindication rule.

325. 346 U.S. 427, 428 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

326. *Id.* at 434.

327. See *id.* at 430–34 (discussing Securities Act of 1933, Pub. L. No. 73–22, § 14, 48 Stat. 74, 84 (codified at 15 U.S.C. § 77n)).

328. See *id.* at 430.

329. See *id.* at 435. The Court found that “the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise” the value of stocks. *Id.*

330. *Id.* at 438. Further, the Securities Act's court forum provision gives the stock purchaser several advantages with respect to choice of court and venue, and these advantages are material to vindication, which courts can assure. *Id.* at 436–37.

331. *Id.* at 438. In reconciling the FAA and the Securities Act, the Court determined that Congress prohibited arbitration of securities claims as a waiver of a statutory benefit provided by the Securities Act. *Id.*

332. *Id.*

in the loss of substantive rights, and thus court adjudication was necessary to guarantee the benefits of the Act.<sup>333</sup>

The Court's concern about the weaker party's vindication prospects in the arbitral forum can also be seen in *Bernhardt v. Polygraphic Co. of America*.<sup>334</sup> There, the Court enforced a Vermont law that allowed an employee to opt out of his arbitration contract and pursue his wrongful discharge case in court.<sup>335</sup> The Court decided that the worker's state employment action could have very different outcomes depending on the adjudicatory forum.<sup>336</sup> Contrary to the more recent conclusion that forum processes or rules are a mere procedural change, the Court found that a "change from a court of law to an arbitration panel may make a radical difference in ultimate result."<sup>337</sup>

Whether the parties can effectively vindicate statutory rights in the arbitral forum was also discussed in *Alexander v. Gardner-Denver Co.*<sup>338</sup> *Alexander* addressed whether an arbitrator's decision authorized under a collective bargaining contract precluded a statutory court claim about the same issue.<sup>339</sup> Although an arbitrator had ruled that the employee (*Alexander*) was contractually discharged for just cause, and not for a discriminatory reason, *Alexander* sued alleging that he was fired because of racial bias.<sup>340</sup> The Court ruled that the contractual process for adjudicating *Alexander's* discharge was not an effective substitute for the judicial process for evaluating whether Title VII was violated.<sup>341</sup> Recognizing that Title VII was enacted to protect individual employees from discrimination by employers and unions, the Court questioned whether private procedures controlled by employers and unions were effective for vindicating the Title VII rights of workers.<sup>342</sup> The Court decided that the union and company could not be trusted to contractually construct forum processes that would be an effective conduit for the substantive rights to be

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333. *See id.* at 435–37. The Court decided that the statutory advantages of selecting a court and venue, judicial evaluation of the claim, and the opportunity for appellate review to ensure legally correct decisionmaking, could not be achieved in arbitration because that forum would not provide them. *Id.*

334. 350 U.S. 198 (1956).

335. *Bernhardt*, 350 U.S. at 199, 205.

336. *Id.* at 203.

337. *Id.* One of the Court's main concerns was that if an arbitrator incorrectly interpreted and applied the governing law, no judicial review was available to correct it, and legal rights would be sacrificed. *See id.*

338. 415 U.S. 36 (1974).

339. *Alexander*, 415 U.S. at 42. *Alexander* had testified in arbitration that his discharge was racially motivated, and he made the same claim in his statutory court case. *Id.* at 42–43.

340. *Id.* at 43. The arbitrator made no mention of discrimination in his findings, and only stated that the union failed to prove that transfer to another position was the company's normal response to the poor performance at issue. *Id.* There was no evidence that the arbitrator considered the requirements of Title VII in reaching his decision. Nonetheless, the district court concluded that the issue of race discrimination had been arbitrated and no discrimination was found. *See id.* at 43 n.4.

341. *See id.* at 56–59.

342. *See id.* at 49.

vindicated.<sup>343</sup> Although Title VII does not prohibit arbitration of its substantive protections, and arbitration awards can be given great weight,<sup>344</sup> the Court concluded that enforcement of Title VII's prescriptions could not be guaranteed by labor arbitrators.<sup>345</sup> After all, the Court noted, labor arbitrators have no fidelity to the public policy rationales underlying Title VII; instead, labor arbitrators focus on effectuating the parties' workplace contractual regulations.<sup>346</sup>

The reality that forum procedures may not guarantee the vindication of statutory rights also drove the Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.*<sup>347</sup> There, the Court addressed the preclusive effects of an arbitration decision that denied pay for work that was allegedly compensable under the FLSA.<sup>348</sup> The Court focused on the plight of weak and poor workers, and whether the FLSA's goal to compensate them could be realized by the collective bargaining and arbitration process to which they had consented.<sup>349</sup> Fearing that arbitration could not guarantee the FLSA's prohibition of substandard wages and oppressive working hours, the Court permitted the workers to file a court action.<sup>350</sup>

The Court decided that court resolution was the proper accommodation of the national labor policy favoring arbitral resolution and the national policy protecting low-wage workers from wage theft.<sup>351</sup> Critical to the Court's decision was the fact that contractually, the union could deem a meritorious FLSA claim meritless or timidly advocate for workers in arbitration, without breaking any law.<sup>352</sup> Further, the arbitrator could incorrectly interpret the FLSA and still fulfill his contractual obligations.<sup>353</sup> In both cases, the decisions would be binding on the worker.<sup>354</sup> In addition, the Court worried that even if the arbitration process complied with the FLSA's requirements, the arbitrator may not be

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343. See *id.* at 56. Important considerations for the Court were the fact that the arbitrator may not be familiar with or apply Title VII, and yet can render a legally valid ruling. *Id.* at 56–57. Further, the arbitrator is not required to advance the antidiscrimination principles of Title VII in evaluating the claim, and may even ignore the law and its general policy goals. *Id.*

344. *Id.* at 60 n.21. (“Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight.”).

345. *Id.* at 57.

346. *Id.* at 56–57.

347. 450 U.S. 728 (1981).

348. *Barrentine*, 450 U.S. at 730–33.

349. *Id.* at 730–31.

350. *Id.* at 745.

351. See *id.*

352. *Id.* at 742. (“[E]ven if the employee’s claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration.”).

353. See *id.* at 743–44.

354. *Id.* at 744. The Court noted that because the arbitrator is governed by the parties’ contract rather than the litigated statute, “he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.” *Id.*



contractually authorized to award statutory remedies.<sup>355</sup> The Court's emphasis on contractual failure to protect substantive rights demonstrates that the Court was concerned about more than just the competence of arbitrators to enforce statutory rights.<sup>356</sup>

It is important to note that the arbitration contracts in these nonenforcement cases *did not* require arbitrators to apply the relevant statutory law or grant statutory remedies.<sup>357</sup> In fact, the agreement in *Wilko* attempted to subvert the Securities Act by relieving the seller of liability for misrepresentation.<sup>358</sup> As a result, the arbitrators presiding over these cases had no duty to enforce statutory rights or advance statutory goals in their decisionmaking. Further, the Court pointed out in *Alexander* and *Barrentine* that the arbitrators were not required to prioritize the law because their fidelity ran exclusively to enforcing the contractual promises of the parties.<sup>359</sup> And in any event, these arbitrators were not picked because of their expertise in the relevant laws and might have been totally unfamiliar with them.<sup>360</sup> Not only did these arbitrators lack the contractual authority to apply the governing law, but the Court doubted that the parties would even grant them such powers.<sup>361</sup> In *Barrentine* the Court noted, for example, that “[i]t is most unlikely that [the arbitrator] will be authorized to award liquidated damages, costs, or attorney’s fees.”<sup>362</sup>

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355. *See id.* at 745.

356. *See* Aragaki, *supra* note 51, at 1256–58 (concluding that the Court’s nonarbitrability decisions were inconsistent and suspect because they were grounded in the view that certain public law issues were too important for arbitrators to decide); *see also* David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 728–30 (2012) (arguing that the Court’s reliance on the informality of arbitration and its decisionmaking process, along with arbitrators’ lack of legal training reflected an “initial kneejerk assumption that arbitration was incompatible with federal statutory rights”).

357. *See* *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (arbitration contract had “no requirement that the arbitrators follow the law,” *id.* at 434), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the parties had disputed the applicability of New York’s versus Vermont’s arbitration law, not the law governing arbitral decisionmaking. *Id.* at 199–200. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the contractual right to discharge for just cause was at issue, not the statutory prohibition against discharge for racial reasons. *Id.* at 42–43. And in *Barrentine*, 450 U.S. 728, the arbitrators were required to determine whether a contractual right to compensation existed, not whether the FLSA required compensation for time spent on vehicle safety inspections. *Id.* at 730–31.

358. *Wilko*, 346 U.S. at 434.

359. *See* *Barrantine*, 450 U.S. at 744 (stating that the arbitrator’s task is limited to construing the meaning of the agreement to effectuate the collective intent of the parties); *Alexander*, 415 U.S. at 56–57 (stating that the “special role of the arbitrator” is “to effectuate the intent of the parties rather than the requirements of enacted legislation”).

360. *See* *Barrentine*, 450 U.S. at 743 (“[M]any arbitrators may not be conversant with the public law considerations underlying the FLSA. . . . Although an arbitrator may be competent to resolve many preliminary factual questions . . . he may lack the competence to decide the ultimate legal issue . . . .” (footnote omitted)); *Alexander*, 415 U.S. at 57 (“[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.”).

361. *See* *Barrentine*, 450 U.S. at 745.

362. *Id.*

Arbitration contracting has changed dramatically since the nonarbitrability decisions were handed down in the 1970s. Since the *Gilmer* decision in 1991, arbitrators routinely have been authorized to apply the governing law, so there is no fear of substantive rights being expressly waived by the contract to arbitrate.<sup>363</sup> However, different and equally significant problems have emerged with the federal rule that leaves all procedural matters to the parties, while approving adhesive arbitration contracting as a commercial norm for workers and consumers.<sup>364</sup> Powerful parties can use arbitral forum procedures as a device for impeding the vindication of substantive rights.<sup>365</sup> When arbitration contract procedures are outcome determinative, their effects are the same as express disclaimers of substantive remedies.<sup>366</sup>

*B. Deferring to the Parties' Contractual Terms for Arbitration*

Since the primary goal of the FAA is to endorse the private adjudicative preferences of the parties, they are entitled to pick qualified arbitrators and adopt forum rules that suit their needs but that also comply with the law governing their dispute.<sup>367</sup> Under the FAA, courts must enforce such contractual preferences.<sup>368</sup> And, under the nonarbitrability regime, judges had the discretion to deny enforcement when they doubted that the arbitration contract guaranteed legal remedies.<sup>369</sup> But the federal common law shifted to a presumption that the

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363. See, e.g., Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 70 (2005) (noting that and citing cases in which the policy of enforcing arbitration agreements according to their terms includes the parties' choice of governing law).

364. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–47 (2011) (acknowledging that most consumer contracts are now adhesive).

365. See *Concepcion*, 563 U.S. at 358 (Breyer, J., dissenting) (discussing arbitration agreements that exempt a party with superior bargaining power “from responsibility for [its] own fraud, or willful injury to the person or property of another” (alteration in original) (quoting *Discover Bank v. Superior Court*, 113 P. 3d 1100, 1110 (Cal. 2005))).

366. See *supra* notes 324–61 and accompanying text for a discussion of how the Court held, in its nonarbitrability decisions, that when arbitration contract procedures are outcome determinative they are substantive. But see *infra* notes 369–82 and accompanying text for a discussion of the Court's creation of a distinction between forum as procedure and forum as substance.

367. See *Joint Hearings*, *supra* note 29, at 27 (statement of Alexander Rose, Arbitration Society of America) (reporting that arbitration allows the parties to freely choose a forum free of complex court processes or biases, in addition to the prerogative to “select judges satisfactory to the parties”). Mr. Rose also added that the association had thousands of bankers, merchants, and architects available to serve as arbitrators, and could even provide retired judges if the parties so desired. *Id.* Because the parties always controlled forum rules and arbitrator selection, it was not rational to conclude that the Court's nonarbitrability decisions were primarily grounded in forum-suitability concerns. See, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203–04 (1956) (noting that the arbitral forum was unsuitable for some disputes because arbitrators may not have legal training, they may not issue reasoned decisions, and the record of the proceedings may be incomplete).

368. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

369. See *supra* notes 324–61 and accompanying text for a discussion of the nonarbitrability decisions.

parties were contracting at arm's length and could craft forum procedures that protected their legal remedies.<sup>370</sup> With its premise of equal bargaining power, the Court even suggested that the parties were free to exclude statutory claims from their arbitration contract.<sup>371</sup> As of 1985, the Court's FAA jurisprudence continued to ratify the FAA goal of noninterference with legal remedies by requiring that the arbitration contract include all substantive remedies.<sup>372</sup> Procedural rules were left to the parties' contractual liberties under the FAA *because* they were arm's-length bargainers.<sup>373</sup> This model presented little opportunity for contractual oppression.

Having relinquished contract terms to arm's-length bargainers, the Court began to soften its rhetoric about the capacity of the arbitral forum to protect legal rights. For example, the Court created a distinction between forum as procedure and forum as substance that it had previously rejected.<sup>374</sup> The Court stated that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute. . . . It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”<sup>375</sup> This new perspective presumed that the forum switch was no longer a potential threat to vindicating statutory rights but rather is a neutral event that facilitates expeditious vindication. Prior statements in *Wilko*, *Bernhardt*, and *Alexander*—that the switch was a substantial, radical, or significant act that could affect the scope and outcome of substantive rights—were replaced by the assumption that substantive rights were protected in the arbitral forum.<sup>376</sup> Arbitral forum procedures were viewed as streamlining the process and their effects were viewed as inconsequential instead of outcome determinative.<sup>377</sup> These declarations marked the retreat from a federal effective vindication rule.

In addition to deciding that arbitration procedures need not present any danger to statutory rights, the Court found that the parties and arbitration tribunals may appoint experts qualified to handle complex legal matters and advance public policies, while serving the parties' need for expeditious results and lower costs.<sup>378</sup> This declared confidence in the parties and forum providers

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370. *Cf. Concepcion*, 563 U.S. at 348–49 (majority opinion) (discussing various procedure development processes expected of parties).

371. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

372. *See id.* at 637.

373. *See Joint Hearings, supra* note 29, at 27 (statement of Alexander Rose, Arbitration Society of America).

374. *See supra* notes 324–61 and accompanying text discussing the Court's pre-*Mitsubishi* conclusion that substantive rights could not be protected in the arbitral forum.

375. *Mitsubishi Motors*, 473 U.S. at 628.

376. *See Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (explaining that “we have concluded that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights” (citing *Mitsubishi Motors*, 473 U.S. at 628)); *Mitsubishi Motors*, 473 U.S. at 628 (holding that “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute”).

377. *See Shearson/Am. Express*, 482 U.S. at 232.

378. The Court declared that “adaptability and access to expertise are hallmarks of arbitration.”

was supplemented with declarations that arbitrators can follow the law, even if they are untrained in it,<sup>379</sup> and that there can be no presumption that arbitrators are biased.<sup>380</sup>

In place of judicial review to determine if the arbitration contract is capable of ensuring vindication, the Court defaulted to the parties and arbitration agencies to regulate drafting discretion.<sup>381</sup> By pronouncing no substantive right is lost in the arbitral adjudication, the federal rules implicitly required contract drafters to deliver all substantive remedies as they modified legal rights. This meant that statutory remedies could not be contractually disclaimed, and arbitrators must apply the law that governs the dispute.<sup>382</sup> While securing such contractual guarantees is possible for arm's-length bargainers, it is nearly impossible for consumers and workers who have no bargaining input when presented with arbitration policies.<sup>383</sup>

Businesses now have the freedom to engage in strategic "forum process" drafting because consumers and workers have no say in what the terms of arbitration will be.<sup>384</sup> State legislatures and judges need flexibility to address formation practices that practically deny legal remedies, but their efforts have

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*Mitsubishi Motors*, 473 U.S. at 633.

379. See *Shearson/Am. Express*, 482 U.S. at 231–32 (affirming that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" (citing *Mitsubishi Motors*, 473 U.S. at 633–34)).

380. See *Mitsubishi Motors*, 473 U.S. at 634; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30–31 (1991) (noting that tribunal rules and the FAA protect against arbitrator bias).

381. See *Mitsubishi Motors*, 473 U.S. at 637 (holding that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function"); see also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2317 (2013) (Kagan, J., dissenting) (arguing that the effective vindication principle was an "essential condition" to the Court's decision to allow the parties to make contracts to arbitrate statutory rights).

382. See *Am. Express*, 133 S. Ct. at 2310 (noting that "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" would constitute a prospective waiver).

383. See 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, 481–82 (1962) (stating that "the individual customer has no bargaining position" in an adhesion contract and an individual's decision is restricted to deciding "whether he wants to enter into a legal relationship to the big enterprise"); Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 58–59 (2016) (stating that the majority of recent arbitration disputes have stemmed from "contracts of adhesion where stronger parties have imposed terms on parties with little bargaining power"); Philip Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L.Q. 125, 129–30 (1962) (stating that when a consumer is presented with an adhesion contract the only choices he has are to sign and adhere to the agreement or reject the entire transaction because these contracts are used in situations where the bargaining power of the parties is unequal); Jeremy Senderowicz, Comment, *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 (1999) (stating that there has been a significant amount of focus on the utilization of arbitration clauses in employment contracts which are "offered to the employee on a 'take-it-or-leave-it basis'").

384. See Lenhoff, *supra* note 383, at 481–82; Senderowicz, *supra* note 383, at 275.

been viewed as the type of hostility prohibited by broad FAA goals.<sup>385</sup> The Court has decided that only rules that serve as defenses to enforcement of *all* contracts can be deployed to deny enforcement of arbitration contracts.<sup>386</sup> So, for example, California's attempt to protect against procedural devices such as class action bans that can impede the vindication of substantive rights of consumers was ruled preempted in *Concepcion*.<sup>387</sup> In effect, a class claim, which may be indispensable to the vindication prospects of weak parties or small-sum claimants, can be banned as a forum adjudication procedure.<sup>388</sup> Federal approval of such procedural rules departs from all prior rules crafted to enforce FAA contracts.<sup>389</sup>

Securing legal remedies is further impaired by the federal rule that prohibits judges from evaluating the deterrent effects of procedural contract terms and the Court's recent decision to disavow the existence of an effective vindication rule.<sup>390</sup> In *American Express*, the Court held that the effective vindication rule is dictum, and contract terms must be enforced unless they *eliminate* the right to pursue statutory remedies—not simply make their pursuit impractical.<sup>391</sup> The federal common law's departure from its earlier vindication model, without providing checks on strategic procedural drafting, now facilitates the denial of substantive rights. For consumers and workers, arbitration is now dramatically inferior to court adjudication, contrary to the FAA's goal of providing a substitute forum the parties regard as superior.<sup>392</sup> Now the arbitral forum is

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385. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347, 346–47, 357 (2011).

386. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

387. See *Concepcion*, 563 U.S. at 346–48, 352 (rejecting California's *Discover Bank* rule, which permitted class arbitration for small-sum consumer claims alleging fraud as held in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

388. See *supra* note 58 and accompanying text for a discussion of the incentives to bring a class action suit.

389. For example, in *Wilko*, both the majority and dissenting justices viewed adhesion or involuntary arbitration contracting as unconscionable. Compare *Wilko v. Swan*, 346 U.S. 427, 435 (1953) (noting the “disadvantages under which buyers labor” when they do not “deal at arm's length on equal terms”), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989), *with id.* at 440 (Frankfurter, J., dissenting) (characterizing a situation where a contracting party “had no choice but to accept the arbitration stipulation” as “unconscionable”). The fact is that the costs to adjudicate small claims in court are relatively small. See *Brady v. Williams Capital Grp.*, 878 N.Y.S.2d 693, 700 (N.Y. App. Div. 2009) (“It is common knowledge that an employee filing an employment discrimination claim in the federal courts must pay a minimal filing fee, generally only a few hundred dollars. Also, the costs of maintaining and operating the court system, including the salaries of judges and other court employees, are borne by the taxpayers, not the litigants themselves.”), *aff'd as modified*, 928 N.E.2d 383 (N.Y. 2010). However, recovery in consumer and wage cases is often so small that it does not make economic sense to prosecute them individually. See Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 Sw. L. REV. 87, 113–14 (2012) (noting that the problem of costs exceeding recovery is as prevalent in arbitration as it is in litigation, and this greatly affects whether legal rights will be pursued at all).

390. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013) (narrowing the effective vindication *principle* to a public policy *exception*).

391. *Id.*

392. See *Colvin*, *supra* note 105, at 75–76 (reporting study results which showed that bargaining

attractive primarily to businesses that can unilaterally draft forum terms that protect their interests or frustrate the legitimate claims of the adhering party.<sup>393</sup>

The federal common law of enforcement now permits manipulation of the arbitration contract to make the filing of claims impractical in the only forum available to many consumers and workers. To the extent that impeding legal rights via the arbitral forum advances the economic imperatives of powerful parties, they have no incentive to draft arbitration contracts that facilitate the realization of those rights. Further, the Court's failure to place constraints on a union's discretion to file claims or drop them prior to arbitration has left some employees without any forum for vindicating their rights. The net effect is that contracts to arbitrate must be enforced even when they deny a party their substantive remedies.

#### V. HARMONIZING THE RULES OF ENFORCEMENT AND VACATUR

The Court has acknowledged that, as a private contractual device, arbitration may not further the compensation and deterrence goals of statutory law. The nonenforcement decisions provide a rich discussion of some of the forum's drawbacks, traceable to the parties' contractual liberties. In these cases, the Court expressed reservations about the forum's incomplete record, relaxed rules of evidence, truncated discovery, absence of reasoned decisions, failure to apply governing law, unavailability of judicial review for legal errors, and use of neutrals untrained in the law.<sup>394</sup> But these limitations are not obstacles to

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input affect arbitration terms and increase workers' prospects at succeeding in arbitration).

393. See *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 127–29 (Pa. 2007) (reserving the powerful party's claims for court adjudication); *Walther v. Sovereign Bank*, 872 A.2d 735, 748 (Md. 2005) (same); see also *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). Although a few courts have rejected such provisions as unconscionable or lacking mutuality of obligation, they are upheld in most cases. See, e.g., *D.R. Horton, Inc. v. Brooks*, 207 S.W.3d 862, 868–70 (Tex. App. 2006) (holding that mutual promises to arbitrate provide sufficient consideration to make an arbitration contract valid). But see *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 105 (Cal. Ct. App. 2004) (holding that it was unconscionable to exempt covenant not to compete and trademark infringement claims from the arbitration forum); *Lytel v. Citifinancial Servs. Inc.*, 810 A.2d 643, 662 (Pa. Super. Ct. 2002) (holding that absent some business justification, such an exemption is presumptively unconscionable). The Court has not directly addressed this issue, but none of its FAA precedents suggest there is a lack of mutuality of obligation because some claims are carved out for court adjudication. See, e.g., *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70, 73–75 (2010) (refusing to consider whether a one-sided arbitration provision was substantively unconscionable because the plaintiff challenged the validity of the contract as a whole rather than the validity of the arbitration agreement as required by Court precedent).

394. See *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 744–45 (1981) (stating that arbitrators often are prevented contractually from giving a “broad . . . range” of statutory remedies); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1974) (noting that in arbitration, rules of evidence are relaxed, discovery is truncated, fact-finding is less rigorous, the record of the proceeding is incomplete, and arbitrators' specialized training is contractual not legal); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (listing shortcomings of arbitration, including the absence of a jury or judicial review, its incomplete record, no requirement for reasoned decisions, and the use of arbitrators untrained in the law); *Wilko*, 346 U.S. at 436 (majority opinion) (expressing concern about arbitrators determining violations of the Securities Act “without judicial instruction on the law”).

powerful parties who can use their bargaining liberty to contract around them.

Arbitration jurisprudence strayed from the FAA when the federal common law approved adhesion arbitration contracts with only the limited restriction on disclaiming legal remedies.<sup>395</sup> Because adjudication processes can affect substantive outcomes, rules protecting legal remedies provide necessary checks on drafting abuse and arbitrators' errors. Because the federal rules are stymying other FAA goals such as preserving state contract defenses, even as they promote enforcement, some reformulations are necessary to harmonize them. Faced with evidence that the labor arbitration precedents can facilitate substantive waivers in FAA contracts, the Court should modify the standard for vacatur and enforcement. The Court's Title VII jurisprudence offers a model for doing this.

A. *Disparate Impact Theory as a Model for FAA Contracts*

The ever-expanding federal common law for the FAA has provided businesses with broad adhesion contractual liberties that can be used to reduce and deter claims,<sup>396</sup> and lower their adjudication costs and the damage awards they face.<sup>397</sup> Shuttling more legal disputes to arbitration also reduces judicial caseload, which has been a longstanding problem for the judiciary and one reason Congress enacted the FAA.<sup>398</sup> The Court recognized that nearly all consumer and employment contracting is adhesive<sup>399</sup> but contemporaneously decided that states cannot step in to prevent oppression and unfair surprise.<sup>400</sup> The rules of vacatur compound the failure to account for the weak party's

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395. See *Southland Corp. v. Keating*, 465 U.S. 1, 35–36 (1984) (O'Connor, J., dissenting) (recounting the "FAA's already colorful history").

396. See *Am. Express*, 133 S. Ct. at 2320 (Kagan, J., dissenting) (noting that the Court's approval of class action bans in arbitration has converted the forum into a "mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability"); *Casarotto v. Lombardi*, 886 P.2d 931, 940–41 (Mont. 1994) (Trieweiler, J., concurring) (commenting that the Court's FAA jurisprudence has placed corporations above state laws), *rev'd sub nom* *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

397. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 47 (1998) (reporting that employers are increasingly choosing arbitration because it reduces their adjudication defense costs, and arbitrators typically award much lower damages than judges); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [perma: <http://perma.cc/7MN7-VFZ6>] (reporting that more than thirty arbitrators confessed that they felt beholden to companies, and providing other evidence that businesses benefit from arbitrator bias).

398. See *Joint Hearings*, *supra* note 29, at 10 (statement of W.H.H. Piatt, Chairman of the Comm. on Commerce, Trade, and Commercial Law, American Bar Association); Burton, *supra* note 51, at 475; Resnik, *supra* note 41, at 2843–45.

399. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346–48 (2011).

400. See *id.* at 341–44, 352 (rejecting a state law that found class action arbitration bans unconscionable where the bans made it practically impossible for consumers to assert violations of their legal rights).

vindication prospects; these rules also can impede legal remedies.<sup>401</sup> To prevent the loss of substantive remedies, the FAA rules should be recrafted in the same dynamic way as the rules that were crafted for Title VII.<sup>402</sup>

Originally enacted in 1964, Title VII was interpreted to prohibit only intentional discrimination.<sup>403</sup> This meant that a complaining employee had to show that an employer was motivated by a prohibited reason when taking an adverse employment action.<sup>404</sup> But the requirement that an employee prove an employer's intent has always been difficult because direct evidence of illegal motivation is often unavailable.<sup>405</sup> Employees therefore had to rely on circumstantial proof that demonstrated that the employers' explanation for a challenged decision was pretextual.<sup>406</sup>

Interpreting Title VII as requiring proof of invidious motivation left the law vulnerable to circumvention. Employers wishing to discriminate or those that were indifferent to whether their workplace practices produced discriminatory consequences could implement neutral job requirements such as aptitude tests or degree requirements that were unnecessary for the job but barred otherwise qualified workers from employment opportunities.<sup>407</sup> Employers' use of subjective and neutral job requirements that had no relationship to job performance but produced discriminatory effects thus exposed a key weakness of Title VII.<sup>408</sup> This created the prospect that the statute's goals could be blunted

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401. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (holding that the parties cannot contract for judicial review of an arbitrator's legal errors).

402. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1493 (1987) (discussing how the Court's interpretation of Title VII evolved to address the problem of unintentional discrimination which Congress had not contemplated when Title VII was enacted). To the extent that the Court has expanded the reach of the FAA to deal with the increased use of arbitration in the employment and consumer contexts, its rules for the FAA may be viewed as dynamic. However, the new rules have not accommodated the interests of nondrafters or state and federal laws that seek to prevent contractual oppression. See, e.g., *Concepcion*, 563 U.S. at 351–52 (holding that states cannot protect small-sum claimants from class action bans). But class actions may be indispensable to a small-sum claimant's vindication prospects. See *id.* at 365 (Breyer, J., dissenting) (“In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.”).

403. Textually, Title VII prohibits only employment decisions that are made because of an individual's race, sex, skin color, religion, or national origin. See Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2012). This had been interpreted to require proof of intent or motivation. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 428–29 (1971) (noting that both the trial and appellate courts had held that proof of invidious intent was necessary to prove a Title VII violation).

404. See *Griggs*, 401 U.S. at 429.

405. See Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2159–60 (2013) (noting that discrimination has become a subtle and unconscious phenomenon).

406. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256–58 (1981) (holding that plaintiffs can prove discrimination either with direct evidence, or circumstantially, by demonstrating that an employer's reason for its action is pretextual or false).

407. See *Griggs*, 401 U.S. at 430–33; see also Herbert N. Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEX. L. REV. 901, 902 (1972) (stating that some employers seem to have adopted objective personnel tests in an attempt to deliberately circumvent the law).

408. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 433 (1975) (adopting employment tests



by employers that simply adopted subjective or neutral standards for employment decisionmaking, so long as those standards were devoid of any taint of illegal motivation.<sup>409</sup>

To address this reality, the Supreme Court, through a broad interpretation of Title VII, created new doctrinal rules for employment practices that were facially neutral.<sup>410</sup> In *Griggs v. Duke Power Co.*,<sup>411</sup> the Court announced its “disparate impact” doctrine to address facially neutral workplace rules that produced discriminatory effects.<sup>412</sup> The Court held that Congress, in enacting Title VII, intended to prohibit not just intentional violations of statutory protections, but also practices fair in form but discriminatory in operation.<sup>413</sup> In creating the vindication rules for disparate impact theory, the Court carefully weighed the interests of both employers and employees.<sup>414</sup> In deference to managerial prerogatives and autonomy, the Court confirmed that employers can use any job criterion that furthers their business interests irrespective of its impact.<sup>415</sup> To ensure that minority workers were not targeted or arbitrarily excluded from job opportunities, the Court rejected the use of artificial requirements or procedures unrelated to job performance.<sup>416</sup>

The Court’s disparate impact doctrine was a necessary response to the vindication hurdles minorities and women faced from unilaterally implemented employment policies. The doctrine constituted a balanced judicial response to procedural barriers to vindication because it accommodated the interests of employers and employees.<sup>417</sup> Although there was no express statutory basis for the doctrine,<sup>418</sup> it advanced the equal employment opportunity goal of preventing “employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job

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and diploma requirements without any concern as to whether they impacted job performance or improved the workforce).

409. See *id.* at 427–29; see also Bernhardt, *supra* note 407, at 901–02.

410. See Blumrosen, *supra* note 44, at 70 (noting that the *Griggs* decision was a response to a major social problem).

411. 401 U.S. 424 (1971).

412. See *Griggs*, 401 U.S. at 424. Before Title VII was enacted, Duke Power employed black people only in its labor department, which paid the least. *Id.* at 427. After Title VII was enacted, the company instituted a high school diploma requirement for labor department jobs and two aptitude tests for incumbent black employees who wished to transfer to more lucrative jobs. *Id.* at 427–28. These requirements were unrelated to job performance and screened out ninety-four percent of the black workers. *Id.* at 430 n.6.

413. *Id.* at 429–30 (stating that the congressional objective in Title VII to remove artificial barriers to equal employment opportunity for all races is “plain”).

414. See *id.* at 430–31.

415. See *id.* at 436 (“[T]he EEOC’s construction of § 703 (h) [of Title VII] to require that employment tests be job related comports with congressional intent.”).

416. See *id.* at 431–36 (“If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”).

417. See *id.* at 429–31.

418. See Earl M. Maltz, *The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353, 1357, 1361 (noting a strong consensus that the 1964 Congress did not contemplate disparate impact doctrine for Title VII).

capability.”<sup>419</sup>

The subsequent congressional codification of the Court’s disparate impact doctrine confirmed Congress’s fidelity to the Court’s interpretation of Title VII’s goals.<sup>420</sup> When the Court retreated from the disparate impact rules almost twenty years after they were formulated in *Griggs*, it triggered instant attempts at legislative reversal.<sup>421</sup> In *Wards Cove Packing Co. v. Atonio*,<sup>422</sup> the Court watered down the *Griggs* principle that employers must prove business necessity to justify a challenged practice.<sup>423</sup> The *Wards Cove* Court also made it more difficult for workers to vindicate their Title VII rights by increasing their burden of proof.<sup>424</sup> However, just two years after the *Wards Cove* decision, Congress overrode the Court’s retreat from *Griggs* in *Wards Cove* and codified the *Griggs*’s disparate impact doctrine.<sup>425</sup> This codification confirmed that the

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419. See *Griggs*, 401 U.S. at 432.

420. See Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k) (2012).

421. Bills to restore *Griggs* passed both houses of Congress but were vetoed by the President. See Civil Rights Act of 1990, S. 2104, 101st Cong. (1990); Civil Rights Act of 1990, H.R. 4000, 101st Cong. (1990). The Senate bill passed by a vote of 65 to 34, see 136 CONG. REC. S9,966 (daily ed. July 18, 1990), and the House bill passed by a vote of 272 to 154, see 136 CONG. REC. H6,769 (daily ed. Aug. 3, 1990); see also 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990). In his veto message to the Senate, President George H.W. Bush wrote:

[T]he bill actually employs a maze of highly legalistic language to introduce the destructive force of quotas into our Nation’s employment system. Primarily through provisions governing cases in which employment practices are alleged to have *unintentionally* caused the disproportionate exclusion of members of certain groups, [the Civil Rights Act of 1990] creates powerful incentives for employers to adopt hiring and promotion quotas.

136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990). These concerns were brought to the next session of Congress, following the 1990 veto, and a 1991 bill to reverse *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), included a provision prohibiting quotas. See Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1981, 1988, 2000e-2, 2000e-5) (prohibiting, among other practices, employers from adjusting test scores to ensure that different groups are proportionally rewarded or represented in the workforce). Nonetheless, President Bush continued to label the bill “quota legislation,” and introduced his own proposal, House Bill 1375. See H.R. 1375, 102d Cong. (1991); see also Sheila A. Goodman, *Trying to Undo the Damage: The Civil Rights Act of 1990*, 14 HARV. WOMEN’S L.J. 185, 219–21 (1991) (noting that opponents to the 1991 bill also repeated the quota allegation).

422. 490 U.S. 643 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, § 105, 105 Stat. 1071, 1074.

423. *Wards Cove*, 490 U.S. at 659.

424. *Id.* at 656–61. Employees were required to identify each challenged practice, show how each practice caused a disparate impact, prove that the challenged practice was not justified by business needs, and show that there was a less discriminatory alternative selection device. See *id.* at 656. Prior to *Wards Cove*, plaintiffs could present employment practices as a group. See *Powers v. Ala. Dep’t of Educ.*, 854 F.2d 1285, 1293 (11th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989). The *Wards Cove* Court essentially adopted the plurality decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–98 (1988), which had announced the same rules a year earlier, thereby blurring the line between plaintiffs’ burdens of proof in intentional and nonintentional discrimination cases. See *id.* (holding that plaintiff could not simply rely on statistical disparities to establish an impact case, but must identify the particular practice challenged, retain the burden of proving discrimination, and prove the existence of less discriminatory alternative devices the employer could have used).

425. See Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2.

Court's disparate impact rule announced in *Griggs* was consonant with securing the legal remedies that Title VII provided.<sup>426</sup> Codification of the business necessity requirement<sup>427</sup> and other aspects of disparate impact theory has resulted in the continuing vitality of disparate impact suits and has protected the vindication prospects for employees filing Title VII claims.<sup>428</sup>

In effect, disparate impact theory was created to deal with procedural rules that are capable of erasing substantive rights.<sup>429</sup> Although its original pedigree was doubtful, the doctrine's legitimacy was confirmed when Congress voted to codify it.<sup>430</sup> And though it was created in the United States, its principle of limiting procedural rules that deny substantive remedies has been adopted by and expanded upon in all common law jurisdictions around the world, further proving its desirability.<sup>431</sup> Fears that impact theory will rob employers of their autonomy or produce employment quotas have not materialized;<sup>432</sup> instead, it

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426. See *id.* § 3 (confirming statutory authority for disparate impact suits in the Civil Rights Act of 1964).

427. See *id.* § 105.

428. See Rosenthal, *supra* note 405, at 2160 (stating that disparate impact liability offers considerable promise in combatting discrimination in the workplace).

429. See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 498–99 (2003) (noting that if disparate impact theory is viewed as a tool to remedy societal discrimination, this would offend equal protection jurisprudence that insists on proof of individualized harm to justify any racial preference). However, many others believe the doctrine is indispensable in fighting procedural devices that produce discriminatory results. See Rosenthal, *supra* note 405, at 2159, 2167, 2182 (arguing that disparate impact theory is needed as a government response to unconscious discrimination that harms minorities); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1157 (2010) (arguing that disparate impact theory is needed to combat the unconscious, subtle, and systemic discrimination practiced today).

430. See *supra* notes 417–19 and accompanying text.

431. See Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 124 (1998). Despite the international success of disparate impact theory, its constitutionality may still be an open question. See *Ricci v. DeStefano*, 557 U.S. 557, 593 (2009) (resolving case on statutory grounds and determining that it “need not decide the underlying constitutional question”); *id.* at 594 (Scalia, J., concurring) (“[The] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection? The question is not an easy one.”).

432. In fact, Title VII prohibits quotas. See 42 U.S.C. § 2000e-2(j) (2012) (prohibiting the granting of preferences because of racial imbalances in the workforce); *id.* § 2000e-2(l) (prohibiting the adjustment of test scores in order to racially balance the workforce); see also *Gratz v. Bollinger*, 539 U.S. 244, 299–300 (2003) (Ginsburg, J., dissenting) (stating that African-American and Hispanic workers continue to earn less than similarly educated white workers, and that race remains a key deciding factor for equally credentialed applicants seeking job opportunities); Kevin McGowan, *EEOC Cites Progress, Ponders Challenges at Public Meeting Marking 50th Anniversary*, BLOOMBERG BNA: DAILY LAB. REP. (July 1, 2015), [http://news.bna.com/dlln/display/batch\\_print\\_display.adp?searchid=30729192](http://news.bna.com/dlln/display/batch_print_display.adp?searchid=30729192) [perma: <http://perma.cc/4WZ5-X974>] (noting that although minorities and women have made gains in many employment sectors, they remain overrepresented in the less desirable jobs, and underrepresented in the most desirable positions). And in *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court ruled that employers cannot avoid Title VII liability by making the bottom line opportunities of racial groups proportional while maintaining selection devices that produce a

remains an important component of employment discrimination law.<sup>433</sup>

*B. Crafting Federal Common Law that Guarantees Substantive Remedies*

As the Court incrementally expanded the FAA's scope, its preemptive powers, and its rules of enforcement, the disharmony of these rules became apparent. In operation, conflicts surfaced, producing judicial disillusionment with the contractual flexibility to deny substantive remedies.<sup>434</sup> Conflicts between arbitration rules and arbitration realities have also triggered legislative efforts to reform the FAA.<sup>435</sup>

While there are disagreements about the FAA's scope and its preemptive reach, the principle that substantive remedies must be preserved is unchallenged. In the 1950s, when the FAA was still being narrowly construed by the Court, Justices Frankfurter and Minton complained that the Court was not honoring the parties' contractual decision to arbitrate securities claims, even though there was no evidence that one party forced the agreement on the other.<sup>436</sup> These Justices felt that the FAA and Securities Act required enforcement of the parties' arbitration agreement, as long as there was no evidence of contractual coercion.<sup>437</sup>

In the early 1980s, when the Court carved out certain claims as nonarbitrable, Chief Justice Burger and Justice Rehnquist argued that FLSA rights should be arbitrable as arm's-length transactions.<sup>438</sup> They noted that there is a strong national policy favoring *labor* arbitration, and a FLSA case is simply a

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disparate impact. *Id.* at 456. These realities confirm that employers have not been coerced into increasing job opportunities for minorities proportional with their representation in the workforce because of disparate impact theory.

433. See *Ricci*, 557 U.S. at 584 (holding that if an employer had "a strong basis in evidence" to believe that an employment test was defective and would expose it to disparate impact liability, the employer could then abandon that test).

434. See *Southland Corp. v. Keating*, 465 U.S. 1, 21–22 (1984) (O'Connor, J., dissenting) (arguing that the FAA does not apply to the states); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 279 (W. Va. 2011) (stating that the Court's FAA decisions are biased and created "from whole cloth"), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); see also Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 589–90 (1996) (noting that even the justices on the Court disagree on how statutes should be interpreted).

435. See Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Jamie Darin Prenkert, *Bizarro Statutory Stare Decisis*, 28 BERKELEY J. EMP. & LAB. L. 217, 237–38 (2007) (noting the importance of public prodding to gain congressional response to court interpretations that harm the common good).

436. See *Wilko v. Swan*, 346 U.S. 427, 439–40 (1953) (Frankfurter, J., dissenting), *overruled by Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

437. See *id.* at 440 (Frankfurter, J., dissenting) ("We have not before us a case in which the record shows that the plaintiff in opening an account had no choice but to accept the arbitration stipulation, thereby making the stipulation an unconscionable and unenforceable provision in a business transaction.").

438. See *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 746–47 (1981) (Burger, C.J., dissenting).

wage dispute.<sup>439</sup> Further, the Justices noted that collective bargaining arbitrations are arm's-length transactions that do not impede vindication of FLSA claims.<sup>440</sup> They also cited Congress's desire to see more claims moved to arbitration to help relieve the caseload burdens courts faced,<sup>441</sup> and they noted that the arbitral virtues of economy and efficiency make the forum attractive for small-sum claims.<sup>442</sup> Again, their embrace of arbitration was premised on its ability to serve as a fair adjudicatory alternative.<sup>443</sup>

By approving adhesion contracts, the federal common law rules do not advance the FAA's requirements of voluntary consent, nor does bilateral arbitration promote its virtues of speed and reduced adjudication costs if it is impractical to use the arbitral forum. They also do not preserve state law contract defenses. According to Justice Kagan, the federal rules have converted arbitration into "a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."<sup>444</sup> This sentiment is echoed by lower court judges who see the gap left by the Court's failure to regulate oppressive contract procedures.<sup>445</sup> This failure raises questions about the legitimacy, if not the constitutionality, of the FAA precedents that endorse contractual modification of legal rights regardless of the impact on legal remedies.<sup>446</sup>

### C. Proposed Modifications to Guarantee Substantive Remedies

#### 1. Narrowing Unions' Control of Legal Rights

The void left by the federal law's failure to address the effect of union control of labor arbitration must be filled to prevent substantive waivers. To harmonize the federal rules granting unions control of the arbitration process and the rule prohibiting substantive waivers, the Court should interpret the FAA as limiting the power of unions to contract about legal rights. When the legal rights of union members are wrapped into the arbitration clause and arbitration

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439. *Id.* at 749.

440. *See id.* Although the union argued that failure to pay for pretrip inspection time violated both the collective bargaining contract and the FLSA, there is no evidence that the arbitrators addressed the FLSA contention in denying the claim. *Id.* at 731 nn.3–4 (majority opinion).

441. *Id.* at 746 (Burger, C.J., dissenting).

442. *Id.* at 748.

443. *See id.* at 747–49.

444. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

445. *See Casarotto v. Lombardi*, 886 P.2d 931, 938–39 (Mont. 1994) (distinguishing the Court's FAA precedents to uphold a state law that required conspicuous notice of arbitration on the first page of contracts containing arbitration provisions), *rev'd sub nom Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Lytle v. Citifinancial Servs.*, 810 A.2d 643, 660–62 (Pa. Super. Ct. 2002) (calling for legislative reversal of the FAA precedents to account for the vindication prospects of weak parties); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 277–80 (W. Va. 2011) (criticizing the Court's FAA precedents as being contrary to Congressional intent), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

446. *See Resnik*, *supra* note 41, at 2808–13.

is made the exclusive forum, collective bargaining contracts must expressly provide that employees are free to individually advance their claims to arbitration in cases where their union either failed to file the claim or filed the claim but dropped it prior to arbitration. Such a rule guarantees unionized workers a forum to vindicate their individual legal rights when unions make arbitration the exclusive forum for all claims. Employees should not have to default to lawsuits alleging breach of the duty of fair representation when unions deny them a forum to vindicate their rights.<sup>447</sup> Nor should employees be required to obtain releases from their union or consent from their employer in order to proceed to arbitration when a union decides not to advance a claim to arbitration.<sup>448</sup>

## 2. A Broader Rule of Vacatur for Legal Rights

On the question of vacatur, the Court should interpret the FAA to require that substantive remedies be guaranteed in arbitration and, if they are not, to find that the arbitrator would have exceeded his powers. This rule would be consistent with the Court's pronouncement that judicial review must be sufficient to ensure that arbitrators comply with the law. Because substantive remedies cannot be denied via an arbitration contract, an award that fails to grant legal remedies should be viewed as exceeding the arbitrator's powers. Claimants should have an automatic right of judicial review when substantive remedies are not granted by the contract or the arbitrator. Instead of requiring prevailing parties to state magic words as a precondition to securing attorney's fees, for example,<sup>449</sup> the Court should craft a liberal standard that allows general requests for legal relief to encompass all legal remedies that a party is entitled to. This will help to protect consumers and workers from the risk of losing their legal rights by narrow rules of vacatur.

## 3. Restructuring the Effective Vindication Rule

To close another substantive waiver loophole, the Court should interpret the FAA to limit drafting abuse that results in the denial of substantive remedies. This can be done without impairing the interest of businesses in adhesive contracting.<sup>450</sup> By denying enforcement of contract terms that have

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447. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (refusing to find there was a substantive waiver because although the union had exclusive control of claims and dropped the claims prior to arbitration, it had permitted the employees to arbitrate individually).

448. To avoid the substantive waiver conclusion, some unions and employers have amended their contracts to permit employees to proceed unilaterally if the union declines to advance claims to arbitration. See *Germosen v. ABM Indus. Corp.*, No. 13-cv-1978(ER), 2014 WL 4211347, at \*7 (S.D.N.Y. Aug. 26, 2014); *Bouras v. Good Hope Mgmt. Corp.*, No. 11 Civ. 8708(WHP), 2012 WL 3055864, at \*4 (S.D.N.Y. July 24, 2010). In these cases courts consistently ruled that the modified contract gave the employees a forum for vindicating their claims so there was no substantive waiver. *Germosen*, 2014 WL 4211347, at \*7; *Bouras*, 2012 WL 3055864, at \*4.

449. See *supra* note 255 discussing Ms. Peyovich's denial of attorney's fees for her failure to state they were mandatory during the arbitration.

450. See *Slawson*, *supra* note 111, at 549 (arguing that form contracts gain legitimacy when they

substantive effects, the Court can limit terms that indirectly deny substantive rights.<sup>451</sup> For example, contractual provisions that cause arbitration costs to exceed court costs should be presumptively void on the premise that the FAA generally promotes a more cost-effective forum than the courts.<sup>452</sup> Any provision that drives up the adhering party's forum costs beyond those typically encountered in court should be presumptively unenforceable. This approach departs from the current rule that the party opposing arbitration must prove that arbitration costs are prohibitive.<sup>453</sup>

To deal with other contractual provisions that make it impractical for a party to vindicate legal rights, there should be a federal vindication rule. Instead of the vindication rule that requires a contract provision to eliminate substantive rights,<sup>454</sup> judges should be given the flexibility to weigh the deterrent effects of contractual terms such as class action bans.<sup>455</sup> Such judicial flexibility will help to limit terms designed to convert arbitration into an economically unwise undertaking.<sup>456</sup> This approach will give practical effect to the prohibition of substantive waivers.

These interpretations of the FAA accommodate the interests of both contracting parties. They will increase the vindication prospects of consumers and workers and incentivize businesses to comply with the law, thereby reducing the risks associated with adjudicating claims.<sup>457</sup> Even with the modifications of extant federal common law, businesses will reap significant benefits from

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fulfill the reasonable expectations of the weak party). For a summary discussion of the evolution of judicial attitude that adhesion contracting was beneficial to the contracting parties and not a substantive device of oppression, see Horton, *Mass Arbitration*, *supra* note 30, at 460–63.

451. See Preston & McCann, *supra* note 119, at 133 (observing that although adhesive contracting is “here to stay,” protective principles are needed to limit their potential to oppress); see also Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) (“Practical considerations support allowing vendors to enclose the full legal terms with their products. . . . Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation [of selling terms], and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.”). For an argument that reputational costs can deter powerful parties from fully enforcing the broad legal discretion secured in adhesion contracts, see Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–28 (2006).

452. See Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 925–27 (9th Cir. 2013) (reporting that the arbitration agreement required employees to pay half of the arbitration fees that could cost as much as \$14,000 per day); Whataburger Rests. LLC v. Cardwell, 446 S.W.3d 879, 907 (Tex. App. 2014) (reporting the trial judge's assessment that a three-day arbitration would cost about \$12,000 for the forum and about \$20,000 in fees for the arbitrator while a court trial of the same case would be free), *rev'd*, 484 S.W.3d 426 (Tex. 2016).

453. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000).

454. See Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309–11 (2013).

455. See *id.* at 2312 (stating that the FAA does not approve of such judicial evaluation).

456. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (commenting on the cost savings and efficiency of class arbitrations, and noting that “only a lunatic or fanatic sues for \$30” (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004))).

457. See Arbitration Agreements, 82 Fed. Reg. 33,210, 33,290–93 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040) (finding that because bilateral arbitration guarantees that only a few claims will be filed, firms are incentivized to take the risks associated with not complying with the law).

arbitration. Businesses will continue to obtain the secrecy and confidentiality of arbitration, and adhering parties will continue to lose the deterrence benefits that public adjudication provides.<sup>458</sup> In light of the contract drafter's liberty to make the arbitration proceedings and their results confidential, it is important that the Court make these modifications. The text of the FAA was not designed to handle the myriad parties and practices that have been thrust upon it. And experience has shown that arbitration practices have evolved in ways that circumvent the principle that substantive rights must be preserved in arbitration.

#### CONCLUSION

The Court has deployed the FAA's rule of enforcement to nullify longstanding contract rules of formation, interpretation, and defense. Further, piecemeal development of the law governing contracts to arbitrate has produced inconsistent and conflicting rules that inevitably deny parties their substantive rights. For example, the rules that govern enforcement of labor arbitration contracts were crafted to promote labor peace between arm's-length bargainers in a continuing relationship. This federal law, which regulates private promises between unions and companies, is now being applied to adhesion contracts made by consumers and at-will workers. The Court has advanced a uniform theory of enforcement for all cases, labor and commercial, and a single rule of deference to arbitrators' decisions, which lower courts must apply.<sup>459</sup> These disharmonious rules produce substantive waivers. The disparate impact model developed by the Court for Title VII provides a good example of how the Court could harmonize its arbitration jurisprudence.

Consumer and wage claims typically involve relatively small sums,<sup>460</sup> so

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458. See Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, VA. J.L. & TECH., Summer 2002, at 4, 47 (noting that businesses desire secret adjudication to protect their reputations and to deprive future claimants of information that may be harmful to their companies); see also Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI. KENT L. REV. 263, 266 (1998) (observing that publicly reported decisions inform society of legal norms and allow disputants to settle most controversies without burdening the courts); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1229-30 (2006) (noting the importance of public access to lawsuits and the development of public law particularly for consumers and workers).

459. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 256 (2009) (holding that the FAA principles of enforcement are equally applicable to collective bargaining contracts governed by the NLRA); see also *Borrero v. Ruppert Hous. Co., Inc.*, No. 08 CV 5869(HB), 2009 WL 1748060, at \*2 (S.D.N.Y. June 19, 2009) (holding that *Pyett* applies to Title VII with equal force).

460. See Max N. Helveston, *Judicial Deregulation of Consumer Markets*, 36 CARDOZO L. REV. 1739, 1753-54 (2015) (arguing that punitive damages awards are essential to incentivize consumers to vindicate their legal rights because "recoveries will be too small to justify bringing most consumer claims"); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 136 (1999) (discussing the importance of aggregating small and diffuse consumer claims as a complementary enforcement mechanism to government regulation and nongovernmental oversight); see also *Gentry v. Superior Court*, 165 P.3d 556, 564 (Cal. 2007) (citing reports from California that the average award in minimum wage violation cases from 2000 to 2005 was \$6,038, the average claim for minimum wage and overtime violations ranged from \$5,000 to \$7,000, and settlements ranged from \$400 to \$1,600), *overruled by Iskanian v. CLS Transp. L.A., LLC*,



federal and state public policies are necessary to ensure that small-sum claimants are not forced to relinquish their substantive rights because of a forum switch.<sup>461</sup> Statutory laws providing for class actions and the award of attorney's fees and litigation costs to prevailing parties reflect a national agenda to protect weak claimants from the deleterious costs of pursuing their legal claims.<sup>462</sup> This national agenda should not be frustrated by narrow rules of vacatur for legal errors. Similarly, the policies that justify union control of contractual claims in labor arbitration cannot support their enforcement when they result in the denial of legal rights of consumers and at-will workers. The FAA's endorsement of arbitral adjudication does not justify enforcement of procedural contractual terms that have harmful substantive effects.

In order for arbitration to operate as an attractive alternative to court adjudication, the enforcement principle must be tempered by the statutory preservation of contract defenses. Without limits on the contractual prerogatives of employers and unions, and without a more searching review of arbitrators' legal errors, arbitration will remain a lopsided process that violates its foundational principle of preservation of legal remedies. The FAA sailed through Congress on the premise that arbitration would be a less costly and informal alternative forum. That Congress, like all Congresses to date, did not approve contractual waiver of legal rights, and judicial glosses on the FAA should not indirectly accommodate this result. Through harmonizing

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327 P.3d 129 (Cal. 2014); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005) (noting that "damages in consumer cases are often small").

461. For example, fee-shifting statutes were enacted. See David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 588 (2005) (reporting that hundreds of state and federal fee-shifting statutes were enacted for civil rights, consumer, employment, and environmental suits so that successful litigants would not have to bear the expense of advancing "a higher public purpose"); see also Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 461 (1998) (noting that many claims are abandoned because litigation costs will greatly exceed any expected recovery).

462. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); *Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); *Discover Bank*, 113 P.3d at 1108-09 (concluding that a class action is often the only effective way to deal with business practices designed to unlawfully extract small sums of money from a large number of consumers). Even with a statutory provision for attorney's fees, workers have difficulty pursuing their claims because of their modest means, the small recoveries they seek, and the risk of not prevailing and being saddled with significant costs and fees. See *Gentry*, 165 P.3d at 565; see also Jesse Tiko Smallwood, Note, *Nationwide, State Law Class Actions and the Beauty of Federalism*, 53 DUKE L.J. 1137, 1146 (2003) (noting that class actions are indispensable to the vindication prospects of small-value claimants, because litigation cost will generally exceed any anticipated recovery).

interpretations, the Court can further the FAA's goals of inexpensive, speedy, and expert arbitral adjudication while enforcing the statutory mandate of no substantive waivers.