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## Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak Parties

Stephen A. Plass

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# Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak Parties

Cover Page Footnote

Professor, St. Thomas University School of Law

# REFORMING THE FEDERAL ARBITRATION ACT TO EQUALIZE THE ADJUDICATION RIGHTS OF POWERFUL AND WEAK PARTIES

*Stephen A. Plass*<sup>+</sup>

I. THE TRANSFORMATION OF THE FAA.....	83
A. <i>The FAA’s Coverage: From Merchants to Workers</i> .....	86
B. <i>Looking Away from the Past: The FAA’s Historical Context</i> .....	89
II. THE ENFORCEABILITY OF ARBITRATION AGREEMENTS .....	95
A. <i>FAA Defenses</i> .....	103
B. <i>The FAA and Federal Laws</i> .....	106
C. <i>Fair Vindication Under the FAA</i> .....	113
III. CRAFTING A SUSTAINABLE ARBITRATION POLICY .....	116
A. <i>Judicial Defiance</i> .....	119
B. <i>Court Override</i> .....	122
C. <i>Congressional Override</i> .....	124
D. <i>A Legislative Proposal</i> .....	125
IV. CONCLUSION.....	128

The Supreme Court has no official role in designing or establishing national policy;<sup>1</sup> that is considered the domain of Congress.<sup>2</sup> However, congressional expression of policy can be incomplete or inartful, and this can provide the opportunity for extravagant interpretations of the nation’s laws. One example of this is the law of labor arbitration, which the Supreme Court has been crafting since 1957.<sup>3</sup> More recently, the Court has embarked on a revolutionary

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1. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). See also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (“[W]e possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.”). *But see* *Chisom v. Roemer*, 501 U.S. 380, 399 n.27 (1991) (“This Court has recently recognized that judges do engage in policymaking at some level.”).

2. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). See also *supra* note 1 and accompanying text (distinguishing the role of Congress and the courts with regard to policymaking).

3. For example, the Court relied on a narrow provision in the Labor Management Relations Act (LMRA) that gave federal courts jurisdiction to enforce labor contracts in order to conclude that federal courts can make substantive labor laws. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57 (1957). The LMRA 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

arbitration program for the nation using the Federal Arbitration Act (FAA) as its authority.<sup>4</sup> The core provision of the FAA states that arbitration agreements are just as enforceable as any other contract.<sup>5</sup>

Relying primarily on this rule of enforceability, the Court has restructured what arbitration is, what arbitration does, and who benefits from arbitration agreements.<sup>6</sup> Although arbitration is generally understood as an economical, speedy, fair, and informal alternative to court adjudication,<sup>7</sup> FAA precedents

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between 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.

Labor Management Relations Act of 1947 § 301(a), 29 U.S.C. § 185(a) (2012). Although the statute provides no substantive law to govern such suits, the Court interpreted Section 301 of the LMRA as instructing federal courts to make such laws. See *Lincoln Mills*, 353 U.S. at 456–57. This ruling set the foundation for a large body of Court-created laws that severely limited judicial resolution of labor disputes and promoted disposition via the arbitral forum. 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, 220–21 (2013) (discussing the seminal rules of deference to the arbitral forum as formulated by the Court starting in 1960). These new rules of deference to the arbitral forum were a dramatic change in national policy, as only two years earlier, in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, the Court ruled that Congress had created no substantive federal right in Section 301. See 348 U.S. 437, 452–53 (1955), *overruled in part* by *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). Coincidentally, this interpretation was rationalized by the need to avoid court congestion. *Id.* at 460. The Court noted that Congress did not intend Section 301 to be a vehicle to flood federal courts with grievances for breach of labor contracts. *Id.* The Court later circumvented the problem of flooding the courts with labor contract grievances with Court-created rules of deference to the arbitral forum. See Plass, *supra*, at 220–21.

4. See Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

5. See *id.* § 2. See also *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

6. See *infra* note 8 and accompanying text.

7. These attributes of arbitration have remained intact throughout history, serving as the driving force for a national arbitration policy in 1925. See KATHERINE V.W. STONE ET AL., *ARBITRATION LAW* 29–36 (discussing the benefits of arbitration in the context of the historical foundations of modern U.S. arbitration law) (3d ed. 2015). The traditionally-accepted benefits of arbitration continue to serve as a marketing tool for arbitration service providers. The websites of the American Arbitration Association (AAA), Judicial Arbitration and Mediation Services (JAMS), and the National Arbitration Forum (NAF), all declare that arbitration is a fast, fair, and economical alternative to court litigation. See *About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARBITRATION ASS'N, [https://www.adr.org/aaa/faces/s/about?\\_afzLoop=222264190865295&\\_afzWindowMode=0&\\_afzWindowId=43k4w8p2q\\_1#%40%3F\\_afzWindowId%3D43k4w8p2q\\_1%26\\_afzLoop%3D222264190865295%26\\_afzWindowMode%3D0%26\\_adf.ctrl-state%3D43k4w8p2q\\_55](https://www.adr.org/aaa/faces/s/about?_afzLoop=222264190865295&_afzWindowMode=0&_afzWindowId=43k4w8p2q_1#%40%3F_afzWindowId%3D43k4w8p2q_1%26_afzLoop%3D222264190865295%26_afzWindowMode%3D0%26_adf.ctrl-state%3D43k4w8p2q_55) (last visited Sept. 28, 2015) (“[T]he AAA aims to move cases through arbitration or mediation in a fair and impartial manner until completion.”); *Why JAMS?*, JUD. ARBITRATION & MEDIATION SERVS., <http://www.jamsadr.com/> (last visited Sept. 28, 2015) (“JAMS mediators and arbitrators successfully resolve cases ranging in size, industry and complexity, typically achieving results more efficiently and cost effectively than through litigation.”); *Employment Arbitration and Mediation*, NAT'L ARBITRATION FORUM, <http://www.adrforum.com/Employment> (last visited Sept. 28, 2015) (“When it comes to the arbitration of employment disputes, the FORUM Code of Procedure provides an efficient framework through which to resolve employment disputes, and sufficient due-process

have endorsed expensive, lengthy, and unfair arbitration practices.<sup>8</sup> By selectively prioritizing the goals of the FAA on a case-by-case basis, the Court has made arbitration the vehicle of choice for those who bargain from a position of power.<sup>9</sup> For most American workers and consumers, arbitration is now an adjudicative alternative they must accept, even when the process is structured to ensure that they cannot effectively vindicate their legal rights.<sup>10</sup>

This Article offers a new perspective on how a law created to help merchants avoid the costs, delays, and inept judgments of courts became a national policy of enforcement that harms consumers and workers who do not wish to arbitrate. First, it recounts the Court's jurisprudence on the scope, preemptive, and substantive powers of the FAA.<sup>11</sup> This Article then complements existing scholarship by demonstrating that it is historically implausible to reach the Court's interpretive conclusions about the FAA.

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protections to ensure that Employees have ample opportunity to assert all of their contractual and statutory rights.”).

8. See generally *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (upholding an arbitration agreement that imposed the high costs of prosecuting an antitrust claim on each individual claimant seeking a modest recovery); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1753 (2011) (upholding a class action ban in a consumer contract although the practical effect was to insulate the business from legitimate claims because each consumer would have to adjudicate a claim for \$30.22). Class bans are enforced, although they provide an unfair advantage to businesses and saddle workers and consumers with high costs and generate duplicative litigation. See *id.* See also Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 14 (2014) (describing the Court's holding in *American Express* as a “sweeping embrace of forced arbitration”).

9. Instead of considering all of the virtues of arbitration to be equally important, the Court has created its own ranking system, and appears to deploy individual virtues of arbitration to justify particular results on a case-by-case basis. For example, on some occasions, consent or the parties' contractual freedom is preeminent, while in others, efficiency is controlling. See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (holding that Congress's primary desire in passing the FAA was to enforce the parties' agreement to arbitrate); *Concepcion*, 131 S. Ct. at 1749 (holding that the principal advantage of arbitration is its informality). In contrast, fairness of the arbitral forum is not necessarily considered an FAA interest. See *Am. Express*, 133 S. Ct. at 2311–12 (holding that the FAA does not seek to ensure that low-value claims can be prosecuted).

10. See *Am. Express*, 133 S. Ct. at 2308, 2312. See also Adam Raviv, *Too Darn Bad: How the Supreme Court's Class Arbitration Jurisprudence Has Undermined Arbitration*, 6 Y.B. ON ARB. & MEDIATION 220, 225–27 (2014) (discussing the ramifications of *Concepcion* for arbitration agreements and those who participate in them).

11. The FAA does not contain an express preemption provision, and Congress did not evince an intention in the FAA to occupy the entire field of arbitration. See generally *Federal Arbitration Act*, 9 U.S.C. §§ 1–16 (2012). See also Norman T. Braslow, *Contractual Stipulation for Judicial Review and Discovery in United States-Japan Arbitration Contracts*, 27 SEATTLE U. L. REV. 659, 704 (2004) (noting that “there is no express preemption clause in the Federal Arbitration Act”); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5, 23–26 (discussing the absence of Congress's preemptive intent when passing the FAA). However, the Court has ruled that state laws that are obstacles to the objectives of the FAA are preempted. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

In 1925, the consumer, labor, and employment laws that the FAA now preempts did not exist, and therefore played no role in shaping the FAA's text or national arbitration policy.<sup>12</sup> In cases where a conflict exists between two federal laws, the later-enacted statute normally takes precedence.<sup>13</sup> Yet the Court has rejected federal and state regulations, passed after the FAA's enactment, that seek to protect workers and consumers by guaranteeing judicial resolution of certain types of disputes.<sup>14</sup> This analysis complements textual and legislative evidence that indicates that the Court is reading the FAA too broadly.

Part II of this Article evaluates the Court's enforceability rules for the FAA, and demonstrates that the Court created new national principles that depart from those set by Congress when it passed the FAA. It posits that Congress, in passing the FAA, acted on the premise that both parties voluntarily consented to arbitration for its speed, lower costs, and expert neutrals,<sup>15</sup> that parties regularly agreed to arbitrate both before and after disputes arose,<sup>16</sup> and that substantive rights were not regulated in arbitration contracts.<sup>17</sup>

However, the Court has upended the FAA by ignoring the fact that voluntary consent is no longer the touchstone of arbitration agreements, as well as the reality that the more powerful contracting party often exclusively controls the rules for the arbitration forum.<sup>18</sup> The Court has also nullified the FAA's provision for post-dispute arbitration through a severability myth that pre-dispute arbitration contracts can exist independent of the underlying

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12. See Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 399 (2012).

13. See *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (holding that when two federal statutes collide, inconsistent provisions in the earlier enacted law are impliedly repealed). See also *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).

14. See generally *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671, 673 (2012) (holding that a federal law that expressly granted the right to sue, and prohibited waiver of that right, does not prevent enforcement of an arbitration agreement). See also *Southland Corp. v. Keating*, 465 U.S. 1, 15–17 (1984) (holding that a state franchise law that required judicial resolution of disputes is preempted as contrary to the parties' contract and the FAA); *Perry v. Thomas*, 482 U.S. 483, 490–91 (1987) (holding that a state labor law providing for court resolution of wage claims is preempted by the FAA); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361–62 (5th Cir. 2013) (relying on the FAA precedents to reject the National Labor Relations Board's decision that employers cannot prohibit collective claims of workers covered by the National Labor Relations Act).

15. See STONE ET AL., *supra* note 7 and accompanying text.

16. See 9 U.S.C. § 2 (2012) (expressly providing for enforcement of "an agreement in writing to submit to arbitration an existing controversy").

17. See generally ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 1-11–12 (7th ed. 2012).

18. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (explaining how previous Court rulings have recognized that arbitrating a statutory claim does not result in a loss of substantive rights); *Shearson/Am. Express, Inc., v. McMahon*, 482 U.S. 220, 240 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–37 (1985) (holding that when parties agree to arbitrate certain claims, those claims should be judged based on the national law governing them).

transaction.<sup>19</sup> These enforcement rules have effectively transferred to businesses control of court access as well as some of the state and federal rights of workers and consumers.<sup>20</sup>

Part III evaluates the options that are available to reverse the new arbitration rules that allow a handful of powerful parties to control employees' and consumers' access to courts, and choose the rules of arbitration. It discusses a strategy of defiance by lower court judges, partisan attempts at legislative override, and the prospect of a Court reversal, based on interpretive disagreement of the Justices.<sup>21</sup> This section demonstrates that the Supremacy Clause, principles of stare decisis, and partisan politics are effective barriers to the reversal of the Court's arbitration decisions.<sup>22</sup> Part III concludes with a proposal for a simple and narrow legislative fix that has not been considered before. It proposes adding a definition of "arbitration" to the FAA, in order to codify the forum attributes of speed, lower costs, fairness, and informality, while voiding practices that interfere with these fundamental arbitration attributes and goals.

### I. THE TRANSFORMATION OF THE FAA

At the turn of the twentieth century, courts were reluctant to allow private parties to settle their disputes outside of the judicial system.<sup>23</sup> Agreements to resolve controversies by private arbitration were frowned upon, and were impeded by the common law rule that contracts ousting the court's jurisdiction were unenforceable.<sup>24</sup> But the drive of commercial parties to avoid the costs and delays of litigation, and the involvement of inexpert judges, gradually garnered legislative support for the enforcement of private arbitration agreements.<sup>25</sup> In 1925, the FAA codified a national policy for enforcing such agreements.<sup>26</sup> In enacting the FAA, Congress decided that arbitration complemented the courts,

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19. See *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010) (holding that "the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rules does not depend on the substance of the remainder of the contract.") (footnote omitted).

20. See generally *id.* at 2778–79. Powerful contracting parties are not only free to decide whether the weak party litigates, but also they control all of the issues that an arbitrator can decide by prescribing this in their arbitration policies. *Id.*

21. See *infra* Part III.A–C.

22. See *infra* notes 307, 318, 334 and accompanying text.

23. See *STONE ET AL.*, *supra* note 7, at 26–27 (noting that before 1920, courts used a revocability doctrine to deny specific enforcement of agreements to arbitrate, premised on the view that private parties cannot oust a court's jurisdiction and on reservations that the arbitral process may not be fair).

24. See *id.*

25. See generally *id.* at 29–33 (noting that businessmen pushed for the rejection of the revocability doctrine because they desired expert neutrals familiar with industry practices, over the costs, delays, and uncertainties of courts that were increasingly inundated with statutory claims).

26. See *id.* at 33–34. See also *Wasserman*, *supra* note 12, at 394–95.

and enacted a narrow law that made agreements to arbitrate just as valid as other contracts.<sup>27</sup>

However, since then the Supreme Court has converted the FAA into a super-statute. In a wide array of decisions, the Court has held that the FAA's statement that arbitration agreements are equally as enforceable as any other contractual arrangement trumps any law that interferes with the FAA's text, policy, or goals.<sup>28</sup> In practice, this has meant that businesses can require workers and consumers to waive their public court forum rights and procedures as a condition of securing employment or purchasing goods and services.<sup>29</sup> This power to take away the judicial forum includes the right to design the processes of the arbitration forum in a way that makes the pursuit of legal claims unattractive or impractical.<sup>30</sup> Furthermore, this power includes the prerogative to reserve the judicial forum for claims against workers and consumers.<sup>31</sup>

Many in the private and public sectors have found the Court's FAA jurisprudence objectionable.<sup>32</sup> Some of the harshest and most eloquent

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27. See Wasserman, *supra* note 12, at 395–96.

28. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404–05 (1967) (holding that the FAA made arbitration contracts enforceable as all other contracts); *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, and it preempts any law that stands as an obstacle to this goal). See also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1753 (2011) (rejecting state precedent that classified arbitration agreements that prohibited class claims for small sums in consumer contracts of adhesion that immunized the wrongdoing of powerful parties as unconscionable).

29. The Court's broad rule of enforcement is grounded in the premise that no substantive right is lost in the arbitral forum. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (holding that arbitration agreements are enforceable so long as they permit the vindication of federal rights). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that workers still retain their substantive employment protections when they agree to arbitrate); *Perry v. Thomas*, 482 U.S. 483, 490–91 (1987) (precluding an employee from litigating his wage claim under a California law that granted him that right irrespective of the existence of an arbitration agreement); *Concepcion*, 131 S. Ct. at 1748 (holding that consumers cannot prosecute a class claim for fraud in court because their arbitration agreement, although unconscionable under state law, barred class actions); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (enforcing an arbitration agreement that barred class actions even though its structure made it practically impossible for merchants to prosecute their antitrust claims).

30. *Am. Express*, 133 S. Ct. at 2311 (holding that a class action ban on arbitration that made it financially impractical to pursue legal claims is still enforceable because it did not eliminate the right to pursue such claims).

31. See *supra* note 8 (discussing how the Court has ruled that businesses have the ability to design arbitration agreements that preclude certain avenues of litigation for workers, while such agreements place no limits on businesses' ability to litigate claims against workers and consumers in a judicial forum).

32. See Brief of the AFL-CIO and Change to Win as Amici Curiae Supporting Respondents at 2–4, 11–15, 14 *Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (No. 07-581), 2008 U.S. S. Ct. Briefs LEXIS 621, at \*5–6, 18–23 (arguing that FAA forum waiver prerogatives should not be extended to unions); *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 109, 121–22 (2001) (noting the objections of twenty-one state attorneys general to the broad coverage the Court granted to the



criticisms have come from fellow Supreme Court Justices,<sup>33</sup> and some lower court judges have done the unthinkable by refusing to apply the Court's rules.<sup>34</sup>

This broad coalition of opponents is driven by the reality that the FAA has become a tool that powerful bargainers use to shield themselves from claims.<sup>35</sup> The Court's conclusion that effective prosecution of legal rights is not an FAA interest, and in fact is an interest subordinate to the FAA, places the enforceability of a broad spectrum of federal and state rights in doubt.<sup>36</sup> Although the practical effect of the Court's FAA rules has been a loss of substantive rights for many employees and consumers, the Court has not relented.<sup>37</sup> In fact, the Court has made the FAA's preemptive powers and

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FAA); *Murphy Oil U.S.A., Inc.*, 361 N.L.R.B. 72, slip op. at \*7–8, 17, 21 (2014) (distinguishing the Court's class action waiver jurisprudence in order to find that such waivers in mandatory arbitration contracts violate the NLRA), *aff'g* *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 279 (W. Va. 2011), *vacated by* *Marmet Health Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (stating that the court's severability doctrine, which permits an arbitration agreement to survive even when the underlying contract is defective, was "created from whole cloth").

33. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (noting that "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation"); *Circuit City*, 532 U.S. at 132–33 (Stevens, J., dissenting) (suggesting that the Court "stand[s] on its own shoulders" to justify its FAA interpretation, thereby advancing its policy preferences while ignoring the interests of weak workers); *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2786 (2010) (Stevens, J., dissenting) (stating that the Court's severability doctrine is "something akin to Russian nesting dolls" because it allows courts to pluck from an invalid arbitration agreement other valid provisions empowering the arbitrator to decide all disputes).

34. See *Casarotto v. Lombardi*, 886 P.2d 931, 933, 938–39 (Mont. 1994), *rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1995) (holding that a Montana law that required contracts with arbitration requirements to have conspicuous notice of arbitration on the first page was not preempted by the FAA). See also *Brown*, 724 S.E.2d at 263 (holding that the FAA did not apply to a West Virginia nursing home law that made all predispute arbitration agreements for personal injury claims unenforceable).

35. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396 n.121 (2005) (observing that since the 1990s, arbitration has become a corporate mechanism to avoid liability).

36. See *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (concluding that the FAA does not evince a congressional intent to prevent states from regulating areas they traditionally occupied). See also *Casarotto*, 886 P.2d at 941. In *Casarotto*, the court stated:

[I]f the Federal Arbitration Act is to be interpreted as broadly as some of the decisions from our federal courts would suggest, then it presents a serious issue regarding separation of powers. What these interpretations do, in effect, is permit a few major corporations to draft contracts regarding their relationship with others that immunizes them from accountability under the laws of the states where they do business, and by the courts in those states.

*Id.*

37. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting) (concluding that the Court's FAA jurisprudence undermines federal statutory rights and converts arbitration into a device "to block the vindication of meritorious federal claims and

substantive rules so expansive that fellow judges have called the Court's FAA work "fantastic" and "revisionist," among other things.<sup>38</sup>

No one has been able to persuade the Court to curb its expansive view of the FAA, even after pointing to the theoretical weaknesses or practical harms caused by this jurisprudence. As a result, there has been an unprecedented reshuffling of rights provided to citizens by their states and the federal government.<sup>39</sup> Now, most workers and consumers have access to the courts only when businesses permit them, and they have a daunting, if not impossible, task of enforcing their legal rights in arbitration because class action bans, cost-shifting provisions, and distant forum clauses, among other instruments, make it economically infeasible for such individuals to pursue legal remedies.<sup>40</sup>

#### A. *The FAA's Coverage: From Merchants to Workers*

Expanding the FAA's coverage to the nation's workforce required creative theorizing because of the law's narrow commercial origin. Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such 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.<sup>41</sup>

Section 1 excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate

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insulate wrongdoers from liability"). See also *Casarotto*, 886 P.2d at 939–40 (Triewiler, J., specially concurring) (indicating that federal judges' misinterpretation of the FAA allows any party with sufficient leverage, usually large national corporations, to draft oppressive arbitration policies and impose them on weak parties, all the while avoiding procedural and substantive safeguards provided by states).

38. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, Douglas, and Stewart, JJ., dissenting) (labeling the Court's doctrine of severability for FAA arbitration agreements "fantastic"); *Southland Corp. v. Keating*, 465 U.S. 1, 35–36 (1984) (O'Connor and Rehnquist, JJ., dissenting) (stating that the Court's decision to ignore unusually clear congressional guidance that the FAA is a procedural device solely for federal courts is an "exercise in judicial revisionism [that] goes too far").

39. See *Casarotto*, 886 P.2d. at 941 (Triewiler, J., specially concurring) (stating that the FAA precedents "have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up"). See also *Am. Express*, 133 S. Ct. at 2320 (Kagan, J., dissenting) (stating that the Court's interpretation of the FAA portends to turn arbitration into a device inimical to the meaningful resolution of valid claims).

40. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649–52, 1661, 1671–72 (2005).

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

commerce.”<sup>42</sup> Section 4 directs federal courts to order arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.”<sup>43</sup>

In recent years, the Court has interpreted these three provisions to mean that the FAA applies to virtually all contracts except employment contracts of transportation workers.<sup>44</sup> One contracting party may unilaterally decide the rules of arbitration, provided that those rules do not restrict legal remedies.<sup>45</sup> Even before the Court came to these conclusions, it ruled that the FAA granted to federal courts the power to make substantive law governing the enforcement of arbitration agreements, and preempted state laws regulating arbitration agreements.<sup>46</sup>

These conclusions have triggered a firestorm of criticism because they contradict what arbitration is normally understood to be: a fast, fair, and inexpensive alternative to litigation.<sup>47</sup> Despite the simplicity of the FAA’s text, Court interpretations have made it controversial. Section 2 of the FAA expressly extends coverage to transactions involving commerce.<sup>48</sup> Section 1 exempted seamen, railroad workers, and other workers engaged in foreign and interstate commerce from its coverage.<sup>49</sup> Although the FAA was enacted in 1925, it was not until 2001 that the Court ruled that the FAA applies to all employment contracts except those of transportation workers.<sup>50</sup> In construing Section 1, the Court concluded that its textual exclusion of seamen, railroad employees, and workers engaged in interstate commerce demonstrated Congress’s intent to

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42. *Id.* § 1.

43. *Id.* § 4.

44. *See* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

45. *See* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314, 2317 n.3 (2013).

46. *See* *Southland Corp. v. Keating*, 465 U.S. 1, 18, 26 (1984) (Stevens, J., dissenting). *See also id.* at 26 (O’Connor, J., dissenting).

47. *See* *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 748 (1981) (Burger, C.J., dissenting) (arguing that arbitration is a good alternative for resolving wage and hour claims because it is swift, cheap, fair, and presided over by expert neutrals). Organizations that provide arbitration services boast about arbitration’s efficiency and cost effectiveness. For example, the National Arbitration Forum’s website stated that their arbitration process “is the faster, lower cost and superior alternative to litigation, that ensures parties receive the same outcomes they would in court.” *About the National Arbitration Forum*, NAT’L ARB. FORUM, <http://test.adrforum.com> (last visited Sept. 12, 2015). The American Arbitration Association’s website states that it is “committed to making arbitration a faster, more economical alternative to litigation, even in the largest, most complex cases.” *Arbitration and Mediation Process*, AM. ARB. ASS’N, <https://www.adr.org/aaa/faces/services/arbitrationmediationprocess> (last visited Sept. 12, 2015). Judicial Arbitration and Mediation Services’ website states that it “ensure[s] arbitration remains an attractive alternative to litigation.” And its procedural options “save clients time and money.” *ADR Clauses, Rules and Procedures*, JUDICIAL ARB. & MEDIATION SERVS., <http://www.jamsadr.com/rules-clauses/> (last visited Sept. 12, 2015).

48. 9 U.S.C. § 2.

49. *Id.* § 1.

50. *See* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

exclude only a narrow class of employees; namely, transportation workers.<sup>51</sup> The Court has ruled that the law's text, as well as a canon of construction—*eiusdem generis*—command this conclusion.<sup>52</sup> According to the Court, any other interpretation would be “superfluous” and “pointless,” and would impair the reliance interests of employers who had subjected their employees to arbitration policies.<sup>53</sup> However, the Court initially stayed silent on the question of whether unionized employees were also covered by the law.<sup>54</sup>

In 2009, the Court expanded the FAA's coverage by concluding that it also applies to labor contracts.<sup>55</sup> In *14 Penn Plaza LLC v. Pyett*,<sup>56</sup> the Court ruled that the FAA's pro-arbitration principles apply to labor contracts that provide for arbitration of individual rights.<sup>57</sup> In effect, the Court determined that third-party or union-negotiated contracts with arbitration provisions are as enforceable as individual agreements where the parties are in privity.<sup>58</sup> The net result is that the FAA's pro-arbitration mandate is controlling upon virtually every employee who is bound by an arbitration policy. Only transportation workers' employment contracts escape its clutches.<sup>59</sup> From the Court's perspective, the FAA should have broad coverage because the statute was enacted to reverse “judicial hostility to [private] arbitration agreements” in general.<sup>60</sup> Any exemptions should be read narrowly in order to effectuate Congress's goal.<sup>61</sup>

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51. *Id.* at 119. The Court had an opportunity since the 1950s to say whether the FAA applies to employment contracts. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, the Court was confronted with a labor dispute in which the employer refused to arbitrate, even though it had agreed to do so in the collective bargaining contract. 353 U.S. 448, 449 (1957). Instead of relying on the FAA, the only federal law that expressly provided for enforcing arbitration promises, the Court utilized Section 301 of the LMRA to create a federal doctrine of enforceability for arbitration promises in the employment context. *Id.* at 449–51. In his dissent, Justice Frankfurter noted that the Court gave the FAA “the silent treatment” because it knew that the FAA excluded employment contracts from its coverage, and therefore had to invent an enforcement mandate for labor arbitration promises from Section 301 of the LMRA. *Id.* at 466–67 (Frankfurter, J., dissenting).

52. *Circuit City*, 532 U.S. at 114–15.

53. *Id.* at 118, 123 (stating that an interpretation excluding employment contracts from FAA coverage “would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers”).

54. *See id.* at 130 (Stevens, J., dissenting) (noting that the Court was silent when it was first asked in 1957 to rule that the FAA applies to the enforceability of arbitration agreements in labor contracts). *See also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 41 (1991) (Stevens, J., dissenting) (noting that in 1957, the Court did not overrule lower court holdings that the FAA exempted employment and labor contracts, even though it had the opportunity to do so).

55. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 255, 260, 274 (2009).

56. 556 U.S. 247 (2009).

57. *Id.* at 258.

58. *Id.* *See also* *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 n.6. (2010) (commenting that the FAA and the LMRA employ the same rules of arbitrability).

59. 9 U.S.C. § 1 (2012).

60. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995).

61. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001).

*B. Looking Away from the Past: The FAA's Historical Context*

In order to give the FAA such a broad reach, one must ignore the context and the era in which the law was enacted. One core flaw in the Court's interpretation is that employment arbitration as it is known today did not exist in 1925,<sup>62</sup> and Congress had not yet shaped a national policy on labor arbitration.<sup>63</sup> Hence, judicial or state hostility to employment or labor arbitration was not a problem that commanded Congress's attention in 1925.<sup>64</sup> This means that Congress must have been concerned about something else when it exempted seamen and railroad employees from the FAA. Generous legislative history, which the Court consciously ignores, shows that in enacting the FAA, Congress wanted to clarify that workers involved in interstate commerce, whose employment arrangements may be viewed as commercial contracts, were excluded from the Act's coverage.<sup>65</sup> Furthermore, through 1925, seamen and railroad workers had their own private or administrative processes for resolving workplace disputes.<sup>66</sup> This

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62. Up through the first quarter of the twentieth century, liberty of contract principles gave employers unfettered discretion over their employment practices. See Logan Everett Sawyer III, *Constitutional Principle, Partisan Calculation, and the Beveridge Child Labor Bill*, 31 L. & HIST. REV. 325, 341 (2013) (discussing *Lochner v. New York*, 198 U.S. 45 (1905), and noting with regard to the Court's pro-liberty of contract holding in that case that "it has been assumed that liberty of contract in the early twentieth century would have . . . prevented the federal government [similar to state governments] from using any of its enumerated powers to pass a maximum hour law or otherwise interfere with the employment relationship"); Michael Pillow, *Liberty Over Death: Seeking Due Process Dimensions for Freedom of Contract*, 8 FLA. A & M U. L. REV. 39, 44 (2012) (noting that "[t]he concept of liberty of contract as a constitutional right flourished in the late nineteenth and early twentieth centuries"). Except for workers' compensation claims for injuries on the job, employees had few claims to litigate or arbitrate. See *infra* note 72 and accompanying text. Employees gained minimum wage protection in 1938, and additional workplace rights were legislated incrementally in the succeeding decades. See *infra* notes 99–102 and accompanying text.

63. See *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 735 (1981) ("The national policy favoring collective bargaining and industrial self-government was first expressed in the National Labor Relations Act of 1935 . . .").

64. See *supra* note 63 and accompanying text. Before and after 1925, state courts decided labor or work related disputes using state law, unhampered by jurisdictional challenges created by private arbitration agreements. *Id.* Moreover, it was not until 1957 that the Supreme Court declared that federal law created by federal courts governed the enforcement of arbitration agreements. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–57 (1957). While the Court also ruled that state courts retained concurrent jurisdiction to decide such disputes, they are required to apply federal law. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507, 514 (1962).

65. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). The Court concluded that the text of Section 1 of the FAA alone provides all the answers and that the legislative history is "sparse." *Id.* at 119. See also *id.* at 132 (Stevens, J., dissenting) (commenting that legislative history makes it clear that fear of oppressive employment arbitration contracts triggered the Section 1 exemption).

66. See *id.* at 119, 121. The majority opinion in *Circuit City* conceded this point, but refused to attribute to the exclusion a congressional intent to keep the reach of the FAA narrow. *Id.* at 121.

explains Congress's decision to specifically identify these workers as exempted from arbitration agreements they could not resist.<sup>67</sup>

There is also abundant evidence from the drafters of the FAA that Congress was only interested in making enforceable agreements to arbitrate commercial disputes.<sup>68</sup> This narrower focus logically explains the Section 1 exemption of contracts of workers employed in interstate commerce. So as not to confuse the *employment contracts* of workers in interstate commerce with the *business contracts* of merchants or commercial parties, Congress made clear at the outset that any class of workers engaged in interstate commerce was specifically excluded from coverage.<sup>69</sup> While the Court labeled the legislative history that supports this interpretation "sparse,"<sup>70</sup> the very nature of arbitration up through 1925 strongly supports this conclusion.

At-will employees in the 1920s had few individual rights, and therefore almost no basis to file claims in a court or an arbitration forum against their employers.<sup>71</sup> The few claims that workers typically filed were for injuries sustained on the job, and these were governed by workmen compensation laws, which established commissions to resolve such claims.<sup>72</sup> Railroad employees could turn to the Railroad Labor Board if they felt their labor contract rights were violated, and the Board functioned as arbitrators.<sup>73</sup> Seamen also had their own administrative process for resolving disputes.<sup>74</sup> Outside of these

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67. *Id.*

68. *See id.* at 125–28 (Stevens, J., dissenting) (discussing the FAA's legislative history). *See also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 39–42 (1991) (Stevens, J., dissenting) (relying on context and legislative history for the conclusion that Congress created the FAA for contracts between business people, not adhesion contracts of employment); Wasserman, *supra* note 12, at 396–98 (further discussing the FAA's legislative history to indicate that the Act was meant to enforce arbitration agreements between commercial entities).

69. *Circuit City*, 532 U.S. at 112.

70. *Id.* at 119.

71. *See Adair v. United States*, 208 U.S. 161, 172 (1908) (holding that there is no justification for governmental interference with employers' and employees' equal contractual liberties). *See also* *Adkins v. Children's Hosp.*, 261 U.S. 525, 539, 545, 562 (1923) (holding that a District of Columbia minimum wage law was unconstitutional because it interfered with the private ordering of labor prices); *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587, 609 (1936) (holding that New York's minimum wage law violated the Fourteenth Amendment). Liberty of contract principles dominated the labor and employment scene through the first quarter of the twentieth century, and these principles prohibited government regulation of the contractual terms on which labor was bought and sold. *See, e.g., Adair*, 208 U.S. at 172.

72. *See, e.g., Fisk v. Bonner Tie Co.*, 232 P. 569, 570–71 (Idaho 1925). *See also* *Van Deusen's Case*, 149 N.E. 125, 126 (Mass. 1925); *Van Meter v. Hartford Accident and Indem. Co.*, 238 Ill. App. 210, 211 (App. Ct. 1925).

73. *See, e.g., Hoey v. New Orleans Great N. R.R. Co.*, 105 So. 310, 310 (La. 1925) (discussing an employment dispute that had been appealed to and adjudicated by the U.S. Railroad Labor Board).

74. *See, e.g., Circuit City*, 532 U.S. at 121 (noting that the Shipping Commissioners Act of 1872 provided for arbitration of seamen's claims). Courts were also protective of sailors who might be oppressed by arbitral awards. *See The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925) (rejecting

administrative contexts, which did not really constitute private arbitration, state courts decided workplace disputes.<sup>75</sup>

Through 1925, arbitration agreements had distinctive characteristics. They were voluntary agreements of commercial business people in contracts of insurance, ship charters, commercial leases, partnership agreements, goods contracts, construction contracts, and other such contracts.<sup>76</sup> Arbitration provisions were part of the underlying contract or made separately *after* a dispute arose.<sup>77</sup> Arbitration agreements did not incorporate statutory or other legal rights because the forum change was desired to avoid the delays and costs associated with legal rules and procedures as well as inexpert judges.<sup>78</sup> This contrasts sharply with contemporary arbitration agreements, in which it is typical that only the more powerful of the contracting parties desires arbitration, consent is not secured on a truly voluntary basis, and the agreement effectively reduces or eliminates the substantive rights of the weaker party.<sup>79</sup> This reconfiguration of arbitration practice could not have been envisioned by the 1925 FAA Congress.

The interpretation that the FAA applies to labor contracts is even more difficult to defend from a historical perspective. The National Labor Relations Act (NLRA) legally endorsed and promoted labor contracts in 1935,<sup>80</sup> ten years

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an arbitration decision that concluded it was the employer's contractual right to unilaterally reduce the wages of sailors).

75. It was not until 1957 that the Supreme Court decided that labor law was federal law with preemptive powers. *See* *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957).

76. *See generally* *Atl. Fruit Co. v. Red Cross Line*, 5 F.2d 218, 218–21 (2d Cir. 1924) (discussing a payment dispute regarding a ship charter); *Ezell v. Rocky Mountain Bean & Elevator Co.*, 232 P. 680, 680 (Colo. 1925) (adjudicating a bean contract dispute); *Fernandes Grain Co. v. Hunter*, 274 S.W. 901, 902 (Mo. Ct. App. 1925) (examining a wheat contract between members of the St. Louis Merchants' Exchange); *Am. Eagle Fire Ins. Co. v. N.J. Ins. Co.*, 148 N.E. 562, 562 (N.Y. 1925) (discussing an insurance contract dispute between two insurance companies); *In re Kelley*, 147 N.E. 863, 863 (N.Y. 1925) (adjudicating a business dispute between investment bankers); *Walesby v. Nat'l Polish Indep. Catholic Church*, 237 P. 291, 291 (Wash. 1925) (examining a construction contract dispute).

77. *See generally* *Indus. Ass'n of S.F. v. United States*, 268 U.S. 64, 74–75 (1925) (discussing a post-dispute agreement to resolve a labor dispute). *See also* *Killgore v. Dudney*, 271 S.W. 966, 966–67 (Ark. 1925) (adjudicating a post-dispute agreement to arbitrate a land sale dispute); *City State Bank of Chi. v. Detrick*, 236 Ill. App. 350, 351–57 (App. Ct. 1925) (examining a post-dispute arbitration agreement to settle a bank ownership dispute); *Forguson v. Newton*, 278 S.W. 602, 602–03 (Ky. 1925) (resolving a post-dispute agreement to arbitrate a boundary line property dispute); *Morgan v. Teel*, 234 P. 200, 200–01 (Okla. 1925) (discussing a post-dispute agreement to arbitrate to resolve an agricultural land lease controversy).

78. *City State Bank*, 236 Ill. App. Ct. at 354 (noting that the parties wanted a neutral individual who was an expert at bank audits to decide their dispute).

79. *See* *Chavarria v. Ralphp Grocery Co.*, 733 F.3d 916, 924–25 (9th Cir. 2013) (holding unconscionable an employer's arbitration policy giving it the power to choose the arbitrator and requiring employees to pay half of the arbitration fees that could be as high as \$14,000 per day).

80. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

after the FAA's enactment.<sup>81</sup> Before and after 1925, federal law remained hostile to judicial enforcement of executory contracts to arbitrate labor disputes.<sup>82</sup> Unions also did not want the FAA's pro-arbitration policies extended to labor contracts.<sup>83</sup>

The Supreme Court did not address the enforceability of arbitration agreements in labor contracts until 1957.<sup>84</sup> When the Court finally addressed whether a party to a labor contract must honor its promise to arbitrate, no mention was made of the FAA as justification for an order compelling arbitration.<sup>85</sup> Instead, the Court relied on Section 301 of the Labor Management Relations Act (LMRA), a federal law passed in 1947 that said nothing about arbitration.<sup>86</sup> The Court interpreted Section 301 of the LMRA as a congressional mandate for federal courts to grant specific performance as a remedy for breach of a promise to arbitrate, and to fashion federal common law to govern this issue.<sup>87</sup> This decision implicitly rejected the common law rule of non-enforcement of executory contracts to arbitrate labor disputes.<sup>88</sup>

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81. See, e.g., Federal Arbitration Act § 2, 9 U.S.C. § 2 (2012) (originally enacted February 12, 1925).

82. See, e.g., Norris-LaGuardia Act § 1, 29 U.S.C. § 101 (2012). This law was originally enacted as the Act of March 23, 1932, and broadly denied courts the power to grant injunctions or specific performance in labor disputes. *Id.*

83. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 462 (1957) (Frankfurter, J., dissenting) (“Restrictions made by legislation like . . . the Norris-LaGuardia Act of 1932 . . . upon the use of familiar remedies theretofore available in the federal courts, reflected deep fears of the labor movement of the use of such remedies against labor.”).

84. See *id.* at 449–59.

85. See generally *id.* at 466 (Frankfurter, J., dissenting) (discussing the Court's rejection of the FAA for purposes of enforcing “arbitration clauses in collective-bargaining agreements”). See also William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 638 (2006) (“No mention was made of the Federal Arbitration Act of 1925 and its jurisdiction over the enforceability of ‘contracts of employment’ in *Lincoln Mills*.”).

86. See *Lincoln Mills*, 353 U.S. at 455 (quoting Section 302 of the House bill as “the substantial equivalent of the present § 301”) Section 302 stated:

Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause.

*Id.* at 455 n.5.

87. See *id.* at 449–51, 452–56 (interpreting Section 301(b) of the LMRA, which gave a labor organization the right to “sue or be sued as an entity and in [sic] behalf of the employees whom it represents in the courts of the United States” as evidence of a congressional desire that federal courts take jurisdiction, enforce no-strike promises by unions and the arbitration promises by employers, and provide sanctions for the breach of such provisions) (citing Labor Management Relations Act of 1947 § 301(b), 29 U.S.C. § 185 (2012)).

88. See *id.* at 456–58. The Court conceded that enforcement of arbitration agreements fell squarely within the prohibitions of the Norris La-Guardia Act, but decided there was “no justification in policy for restricting § 301(a) to damage suits, leaving specific performance of a



The federal common law governing the enforceability of arbitration agreements in labor contracts was developed three years later in the *Steelworkers Trilogy*.<sup>89</sup> In this trio of cases, the Court relied on the NLRA's preference for private resolution of labor disputes as the antidote for disagreements, such as those over the justification for enforcing labor arbitration contracts.<sup>90</sup> Although a few years earlier in *Textile Workers Union of America v. Lincoln Mills of Alabama*,<sup>91</sup> the Court was specifically asked to rule that the FAA supported an order to compel arbitration under a labor contract, the Court remained silent.<sup>92</sup> In the trilogy, the Court again avoided reliance on the FAA.<sup>93</sup>

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contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act." *Id.* The Court commented, "[i]t seems . . . clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate." *Id.* at 456 (footnotes omitted).

89. See generally *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

90. See *Am. Mfg. Co.*, 363 U.S. at 566 (holding the congressional preference for private resolution found in Section 203(d) of the LMRA should be given "full play"). See also *Warrior & Gulf Nav. Co.*, 363 U.S. at 577–80. The Court noted that:

The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement. . . . In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. . . . For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

*Id.* (footnotes omitted). See also *Enterprise Wheel & Car Corp.*, 363 U.S. at 599. The Court stated: [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

*Id.*

91. 353 U.S. 448 (1957).

92. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 130 (2001) (Stevens, J., dissenting). Justice Stevens dissented:

The fact that the Court relied on § 301 of the LMRA, a statutory provision that does not mention arbitration, rather than the FAA, a statute that expressly authorizes the enforcement of arbitration agreements, strongly implies that the Court had concluded that the FAA simply did not apply because § 1 exempts labor contracts.

*Id.*

93. See *Serv. Emps. Int'l Union, Local No. 36, AFL-CIO v. Office Ctr. Servs., Inc.*, 670 F.2d 404, 407 n.6 (3d Cir. 1982) (noting that since the *Steelworkers Trilogy*, "parties to labor arbitration agreements have been able to enforce the terms of those agreements directly under section 301 [of the LMRA] without reference to the Federal Arbitration Act"); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 305 n.10 (1991) (noting that "the *Steelworkers Trilogy* involved arbitration compelled pursuant to Section 301 of the Labor Management Relations Act").

It was not until 2009 that the Court declared that the FAA's principles are equally applicable to labor contracts.<sup>94</sup> This interpretation is difficult to square with the laws of collective bargaining, which post-date and presumably trump the FAA. Labor contracts are very different from those made in commercial or other employment settings because they are made on behalf of workers by unions, and unionized workers do not directly participate in contract negotiations.<sup>95</sup> Furthermore, until recently, the terms of labor contracts did not include promises about arbitration as the exclusive forum in which to resolve union members' legal claims.<sup>96</sup> Unions and companies typically contract exclusively about their private economic interests as well as workplace rules and conditions.<sup>97</sup> Private bargaining between unions and employers about arbitral resolution of workers' legal claims is a new phenomenon that is still unsettled.<sup>98</sup>

The idea that unions could bargain and contract about their members' public rights could not have been envisioned by the FAA Congress because the individual employment rights wrapped into arbitration clauses today generally did not exist in 1925.<sup>99</sup> At that time, employees had few individual rights to

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94. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251, 266, 274 (2009).

95. See *White v. White Rose Food*, 237 F.3d 174, 182 (2d Cir. 2001) (noting that unions are not required by law to get member approval of negotiated contract terms). See also *O'Neill v. Air Line Pilots Ass'n, Int'l*, 886 F.2d 1438, 1447 (5th Cir. 1989), *rev'd on other grounds* 499 U.S. 65 (1991) (noting that "[t]he law does not require that a collective bargaining agreement be submitted to a local union or the union membership for authorization, negotiation or ratification, in the absence of an express requirement in the agreement, or in the constitution, by-laws or rules and regulations of the union") (quoting *Confederated Indep. Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3d Cir. 1972)).

96. After laws prohibiting employment discrimination were passed in 1964, unions and companies began including in their labor contracts promises of nondiscrimination on the bases forbidden by law. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 (1974). These provisions added the contractual grievance arbitration forum as a complement or alternative to the employees' statutory court forum, for resolving employment discrimination claims. *Id.* at 40–42, 59–60. Contracts with such promises allowed unionized workers to pursue a breach of contract grievance about discrimination, without limiting their legal right to go to court about the same matter. See *id.* at 36, 43, 47, 49. The Court stated that "[t]here is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Id.* at 47. See also *14 Penn Plaza LLC*, 556 U.S. at 260 (holding that *Gardner-Denver Co.* addressed the preclusive effects of arbitrating contractual rights, not agreements to waive a statutory forum).

97. *14 Penn Plaza LLC*, 556 U.S. at 251.

98. *Id.* at 273–74 (noting that the effect of a union's refusal to arbitrate a claim after it waived an employee's court forum rights is an open question).

99. For example, minimum wage and overtime laws emanated from the Fair Labor Standards Act, which was passed in 1938. See *Fair Labor Standards Act*, 29 U.S.C. §§ 201–219 (2012). The laws prohibiting employment discrimination originated with Title VII of the 1964 Civil Rights Act. See 42 U.S.C. § 2000e (2012). See also Gilles, *supra* note 35, at 395–96 (noting that corporate scheming to use arbitration policies as a shield from legal liability is a relatively new phenomenon made possible by the Court's FAA decisions).

vindicate because liberty of contract principles ruled the day.<sup>100</sup> When various individual rights laws were enacted in the succeeding decades after the FAA was passed, they reflected a congressional policy of increasing rather than diminishing the contractual rights that employees gained from collective bargaining.<sup>101</sup> This was reflected in the Court's ruling that unions and companies could not contractually bind workers to arbitral resolution of the workers' legal claims.<sup>102</sup>

The concern about companies and unions sacrificing workers' individual rights in labor contracts through arbitration agreements remains vibrant,<sup>103</sup> and serves as a further source of worry about the Court's conclusion that the FAA applies to labor contracts. That it took eighty-four years for the Court to reach this result, despite past opportunities to do so, strongly supports the claim that the Court's interpretation of this aspect of the FAA is tendentious. Historical arbitration practices before and after the FAA was enacted, and statutory developments after 1925, confirm that Congress did not contemplate the application of the FAA to employees generally.

## II. THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

The Court's jurisprudence on the enforceability of arbitration agreements, which are often part of a broader contract, is also defective. The FAA provides that an arbitration provision in a contract is as valid and enforceable as any other contractual agreement.<sup>104</sup> Although the Court has ruled that arbitration agreements have equal status—but not superior status—to other contractual

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100. It was not until 1936 that the Supreme Court began paring back its broad liberty of contract doctrine, which paved the way for progressive legislation that benefitted workers. *See W. Coast Hotel v. Parrish*, 300 U.S. 379, 383 (1936) (holding that legislatures can regulate with minimum wage laws because liberty of contract is not an express and unrestrained Fourteenth Amendment right but rather a qualified right).

101. *See, e.g., Gardner-Denver Co.*, 415 U.S. at 43, 47–49. The Court noted: [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

*Id.* at 48–49.

102. *See id.* at 47 (holding that employees were not required to exhaust a private grievance arbitration process, and courts do not have to defer to arbitral awards, in matters involving the vindication of employees' statutory civil rights).

103. *See Maalik v. Int'l Union of Elevator Constructors*, 437 F.3d 650, 653–54 (7th Cir. 2006) (finding that union officers were complicit in racially discriminatory practices under a collective bargaining contract). *See also Blue v. Int'l. Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 581 (7th Cir. 2012) (upholding a trial court ruling that union officials retaliated against a union employee because she complained about race discrimination in the union's job referral program).

104. *See* 9 U.S.C. § 2 (2012).

promises,<sup>105</sup> its rules of enforceability have made arbitration agreements a superior option to other contractual promises.

The Court has grounded most of its arbitration rules in the FAA's goal of enforcing the parties' contractual desire.<sup>106</sup> According to the Court, priority should be given to the arbitration contract because that document reflects the parties' design of an adjudicative process that suits their needs.<sup>107</sup> For example, parties can make the arbitration process efficient and confidential, or they can require arbitrators who have specialized competence in the matter being arbitrated.<sup>108</sup> While this was true in 1925, the arbitration agreement is not necessarily a bargained bilateral affair today.<sup>109</sup> The Court's emphasis on enforcing what the parties consented to ignores the fact that in most cases today, one party's consent is effectively involuntary, and the terms of the arbitration contract are written solely by the more powerful party in order to further that party's legal interests.<sup>110</sup> By ignoring this development, the Court requires enforcement of lopsided arbitration contracts in the same way as arms-length or more evenly-balanced contracts. As a result, weak parties must arbitrate even

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105. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995) (stating that “when Congress passed the Arbitration Act in 1925, it . . . intended courts to ‘enforce [arbitration] agreements into which parties had entered’”) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (stating that the FAA’s “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, and to place arbitration agreements upon the same footing as other contracts”).

106. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (holding that the FAA Congress’s purpose was “to ensure judicial enforcement of privately made agreements to arbitrate” and that the FAA’s “overriding goal” was “to promote the expeditious resolution of claims”); *Volt*, 489 U.S. at 478 (holding that the “principal purpose” of the FAA is the enforcement of private arbitration contracts).

107. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”).

108. See *id.* at 1749.

109. See, e.g., *id.* at 1744 (noting that “[t]he agreement authorized AT&T to make unilateral amendments”). See also, e.g., Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 450 (2006). Bales writes:

Few would doubt that an average employee presented by her employer with an employment arbitration agreement on a “take-it-or-be-fired” basis faces substantial economic pressure to sign the agreement. Some courts have concluded from this that pre-dispute employment arbitration agreements are not voluntary and therefore are unenforceable. However, employees must accept on a “take-it-or-be-fired” basis a substantial number of other employment terms, such as rate-of-pay and work-hours.

*Id.*

110. See *supra* note 35 and accompanying text. See also *infra* note 268 and accompanying text.

when the arbitration contract includes rules that make it practically infeasible to pursue their legal rights.<sup>111</sup>

The Court has also insulated the arbitration contract from common contract defenses to enforcement by giving the promise to arbitrate special status. For example, while provisions in other contracts generally fail when the contract is voided because of contractual defenses such as failure of consideration, duress, or fraud, this is not necessarily true of arbitration provisions.<sup>112</sup> Even if the entire contract is alleged to be defective, the Court has held that the arbitration clause survives unless it is proved that *the arbitration clause itself* is defective.<sup>113</sup> This severability rule was subsequently expanded to permit arbitral determination of enforceability issues, including the validity of the arbitration clause itself, if the contract delegates such authority to the arbitrator.<sup>114</sup>

The Court has created a federal substantive rule of severability that effectively allows a powerful party to place arbitrability issues outside the reach of courts.<sup>115</sup> The Court interpreted the FAA's Section 4 statement that a court must compel arbitration if "the making of the agreement for arbitration . . . is not in issue" as a congressional command to sever and enforce arbitration promises, even when the underlying contract that contains the arbitration clause fails.<sup>116</sup> The Court had no textual or legislative direction to do this because the FAA does not provide for the severing of an arbitration clause.<sup>117</sup> Legislative evidence suggests that the FAA proceeds on the assumption that the parties have a valid contract, and requires courts to enforce that contract's arbitration provision.<sup>118</sup>

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111. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). Jeffrey L. Oldham & Yvonne Y. Ho, *Avoiding Class Arbitrations: Italian Colors and Beyond*, 65 THE ADVOC. (TEXAS) 20, 20 (2013) (noting that the Court in *American Express* "requires strict enforcement of contractual provisions waiving the right to class arbitrations . . . even as applied to a federal statutory claim, and even if the cost of litigating on an individualized basis is economically infeasible").

112. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 406 (1967).

113. See *id.* See also *Buckeye Check Cashing, Inc., v. Cardegna*, 546 U.S. 440, 449 (2006). The Court stated:

*Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

*Id.*

114. See *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777–79 (2010) (holding that the FAA supports agreements to arbitrate gateway issues of arbitrability unless the delegation provision itself is challenged as infirm).

115. *Id.*

116. See *id.* at 2776.

117. See generally Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012).

118. See *Prima Paint*, 388 U.S. at 412–13 (Black, J., dissenting). The FAA provides no guidance about whether arbitration agreements should be treated as entire or severable contracts. *Id.*

Section 2 of the FAA states that courts must enforce an arbitration agreement in a contract, not an arbitration agreement in a void, voidable, or unenforceable contract.<sup>119</sup> This interpretation acknowledges the fact that the parties' concern about disputes arising under the broader underlying contract led them to include an arbitration provision. The only standalone arbitration agreements Congress contemplated in 1925 were those for post-dispute arbitration contracts, and the FAA specifically provided for such agreements.<sup>120</sup> Furthermore, there is scant evidence that the FAA Congress desired to displace state rules of severability or any common law rule of severability that focuses on the parties' intent.<sup>121</sup>

Today, contracting parties can make standalone predispute arbitration agreements, and parties sometimes attempt to unilaterally amend an existing contract to add or modify an arbitration provision.<sup>122</sup> During the pre-FAA era, such agreements were usually part and parcel of an underlying contract to ship goods, build structures, provide insurance, and execute other functions.<sup>123</sup> Standalone arbitration agreements were generally only seen in post-dispute cases, and the FAA Congress addressed such agreements.<sup>124</sup> Section 2 of the FAA provides that a court must order arbitration if there is "an agreement in writing to submit to arbitration an *existing controversy* arising out of such a contract."<sup>125</sup> This provision permits parties to make a separate post-dispute agreement to arbitrate, as contrasted with a predispute provision, which is normally a clause in the underlying contract.<sup>126</sup> The imposition of separate pre-

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119. See 9 U.S.C. § 2.

120. *Id.* (providing for the enforcement of agreements to arbitrate existing disputes).

121. See JOSEPH L. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 1, 447–48 (5th ed. 2003) (noting that "whether a contract is divisible is a question of interpretation or one of the intention of the parties"). See also *Polk v. Cleveland Ry. Co.*, 151 N.E. 808, 810 (Ohio Ct. App. 1925). The Ohio Court of Appeals stated:

If a contract is to be adjudged a severable contract rather than an entire one, it is because, by a judicial interpretation thereof, it appears that it was contemplated and intended by the parties that the nature and purposes of its subject-matter, and its various terms, were to be divisible and independent of each other, and that the parties intended that each provision therein stand as a contract between them, independent of the other terms or agreements.

*Id.*

122. Today, powerful parties reserve the right to make unilateral changes. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) ("The agreement authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions.").

123. See, e.g., *Atlantic Fruit Co. v. Red Cross Line*, 5 F.2d 218 (1924) (concerning an arbitration agreement in a ship charter contract).

124. 9 U.S.C. § 2 (2012). See also *supra* *Morgan v. Teel*, 234 P. 200, 200 (Okla. 1925) (concerning a post-dispute agreement to arbitrate a land lease controversy); *Killgore v. Dudney*, 271 S.W. 966, 966 (Ark. 1925) (concerning a post-dispute agreement to arbitrate a land sale dispute).

125. *Id.*

126. *Id.* See also Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 398 (2004) (noting that Section 2 of the FAA "provides that both pre-dispute and post-dispute arbitration agreements" are enforceable); Adam D. Maarec et al., *The CFPB's Final Report on Pre-*

dispute arbitration agreements on workers and consumers after the underlying relationship is established is a relatively new phenomenon only made possible by the Court's FAA jurisprudence.<sup>127</sup> Today, the powerful parties who desire arbitration have no incentive to wait until after a dispute arises to propose arbitration which can be rejected by weak parties. They have the legal right to unilaterally draft and implement arbitration rules before a dispute occurs, and this has made the FAA's post-dispute provision a dead letter.<sup>128</sup>

By creating and imposing federal rules of severability for the FAA, the Court has forced judges to isolate arbitration clauses when challenges are made, and ignore the rest of the contract. Any rule that treats a contract as "entire" or determines severability as a factual question, is displaced.<sup>129</sup> Despite the absence of textual support, the Court has ruled that Congress could not have intended federal courts to decide non-arbitration contractual issues such as fraud.<sup>130</sup> As a result, weak parties cannot delay arbitration by litigating the validity of the whole contract, but strong parties can delay arbitration and the vindication of statutory rights by implementing oppressive arbitration policies that consumers and employees must first prove are unconscionable before proceeding with their legal claim.

In *Rent-A-Center, West, Inc., v. Jackson*,<sup>131</sup> the Court stated that even if an employee alleges that the entire agreement that contains an arbitration clause is unconscionable, he must still arbitrate this claim if a provision in the contract

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*Dispute Arbitration Clauses*, PAYMENTLAWADVISOR (Mar. 16, 2015), <http://www.paymentlawadvisor.com/2015/03/16/the-cfpbs-final-report-on-pre-dispute-arbitration-clauses/> (commenting that "[m]any contracts for consumer financial products and services include a 'pre-dispute arbitration clause'").

127. Relying on the Court's FAA decisions, businesses have added arbitration agreements to existing contractual relationships such as employment and consumer transactions. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (noting that private parties likely wrote arbitration contracts in reliance on the Court's holding that states are preempted from specifically targeting certain aspects of arbitration agreements as unenforceable). See also *id.* at 283–84 (O'Connor, J., concurring) ("[P]arties have undoubtedly made contracts in reliance on the Court's interpretation of the Act . . ."). In his dissent, Justice Thomas stated, "I do not doubt that innumerable contracts containing arbitration clauses have been written since 1984, or that arbitrable disputes might yet arise out of a large proportion of these contracts." *Id.* at 295 (Thomas, J., dissenting).

128. In fact, a post-dispute contracting approach to arbitration agreements is precisely what opponents to the Court's FAA precedents would prefer. For example, one proposed piece of legislation, the Arbitration Fairness Act of 2013, provided that "[n]otwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." See Arbitration Fairness Act of 2013, S. 878, 113th Cong. § 402(a) (2013).

129. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967). The Court stated that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Id.* at 404.

130. See *id.*

131. 130 S. Ct. 2772 (2010).

delegates resolution of contract formation issues to the arbitrator.<sup>132</sup> The Court reasoned that the arbitration agreement itself is the underlying contract, and the delegation provision is the specific element in dispute.<sup>133</sup> When an employee does not challenge the validity of the delegation clause itself, a court must allow the arbitrator to decide the allegation of whether the overall arbitration contract is unconscionable.<sup>134</sup> In effect, the Court announced a double-severability rule that makes it impractical to avoid arbitral determination of gateway issues, contrary to the historical reality that arbitration agreements were not independent contracts.<sup>135</sup>

This view of the FAA cannot be squared with the general absence of standalone arbitration agreements up through 1925, and the nonexistence of arbitration for employment disputes until relatively recently.<sup>136</sup> It also cannot be reconciled with the FAA mandate for court enforcement when a valid contract *containing* an arbitration clause exists.<sup>137</sup> In effect, the severability rules force courts to evaluate arbitration agreements as independent contracts when in reality they normally incorporate by reference or relate to some other contractual relationship.<sup>138</sup>

The severability rules announced by the Court have far-reaching implications for workers and consumers who typically enter into non-bargained transactions.<sup>139</sup> For example, at-will employees who have no employment

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132. *See id.* at 2777–78. Writing for the majority, Justice Scalia stated, “[t]he delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.” *Id.* at 2777.

133. *Id.* at 2779. The Court observed that in this case the arbitration contract was the underlying agreement, but then decided it did not matter whether this was so or whether it was part of a single broader contract, as the rule of severability still applied. *See id.* at 2779–81 (noting that unless the delegation provision is challenged specifically, a court must enforce it, and leave challenges to the validity of the entire contract to arbitration).

134. *See id.*

135. *See, e.g.,* *Polk v. Cleveland Ry. Co.*, 151 N.E. 808, 810–11 (Ohio Ct. App. 1925) (holding that an arbitration clause cannot be severed from the underlying contract).

136. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745, 1750–51 (2011). The Court noted that the FAA was “enacted . . . in response to widespread judicial hostility to arbitration agreements,” and that “class arbitration was not even envisioned” by the FAA Congress. *Id.* at 1745, 1751.

137. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474–75 (1989).

138. *See Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772, 2781, 2786–88 (2010) (Stevens, J., dissenting). Parties have no need to make arbitration agreements unless they have some other relationship, because such agreements only provide a vehicle for settling disputes emanating from that other relationship; therefore, it is an anomaly to enforce arbitration agreements when no legal relationship exists or alternatively to allow arbitral determination of whether any relationship exists. *See generally id.* (criticizing the implications of the severability rule implemented by the majority).

139. *See Casarotto v. Lombardi*, 886 P.2d 931, 940–41 (Mont. 1994), *rev’d sub nom.* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1995) (Trieweiler, J., specially concurring) (observing that large businesses propose arbitration policies that are non-negotiable in form contracts to weak parties who must either accept them or lose the business opportunities such contracts would



contract<sup>140</sup> are still bound to arbitrate employment disputes if an employer unilaterally implements an arbitration policy without any consultation with the worker.<sup>141</sup> An at-will worker is bound even if the employer gave no real consideration for the employee's promise to give up his legal right to litigate disputes, and the employee had no input in fashioning the terms of the arbitration policy.<sup>142</sup>

Even when the arbitration policy exempts the employer from arbitrating the employer's claims, thereby creating the prospect of piecemeal, expensive, and protracted litigation, courts are required to enforce the arbitration "agreement."<sup>143</sup> The Court cites no statutory authorization of such practices that

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otherwise enable them to access). The Supreme Court of Montana noted that "[w]hat these interpretations do, in effect, is permit a few major corporations to draft contracts regarding their relationship with others that immunizes them from accountability under the laws of the states where they do business, and by the courts in those states." *Id.* at 941 (Trieweiler, J., specially concurring). See also Sandip H. Patel, Note, *Graduate Students' Ownership and Attribution Rights in Intellectual Property*, 71 IND. L.J. 481, 512 (1996) ("[M]ost standard employment contracts are offered on a take-it-or-leave-it basis.") (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 1-3, at 6 (3d ed. 1987)).

140. See PERILLO, *supra* note 121, at 60. At-will employment is grounded in non-committal promises of the employee and employer that are insufficient to legally bind them; either party can terminate the relationship with impunity at any time and for any reason. *Id.* Prohibitions against termination grounded in public policies are not part of the parties' contractual agreement, although this is being reversed "in many jurisdictions in cases where the discharge is contrary to public policy." See *id.* But see *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 26–27 (Mo. Ct. App. 2008) (stating that at-will employment is not valid consideration to support an arbitration promise); *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 742 (Mo. Ct. App. 2011) (providing that continued at-will employment is not valid consideration to support an arbitration promise).

141. See generally *Sprinkle v. Gen. Dynamics Land Sys.*, No. C09-1672Z, 2010 WL 1330328, at \*3–4, 7–10 (W.D. Wash. Mar. 30, 2010) (finding an arbitration agreement not to be unilateral because both parties are bound by its terms and restricted in the claims they can bring outside the scope of the agreement); *Marotta v. Toll Bros.*, No. 09-2328, 2010 U.S. Dist. LEXIS 20578, at \*15 (E.D. Pa. Mar. 3, 2010) (finding that a contract is not unconscionable merely because there is inequality in bargaining power; thus, it is an insufficient argument for finding an arbitration agreement unenforceable).

142. *Marotta*, 2010 U.S. Dist. LEXIS 20578, at \*15. Courts generally hold that mutual promises to arbitrate are sufficient to make arbitration contracts binding. See *In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (noting that when an employee "reported for work," he acceded to his employer's arbitration program). However, an employer cannot retain the unilateral power to amend the arbitration policy, or else the employer's promises with regard to such policy will be treated as illusory. *Id.* See also *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 775–76 (2014) (providing that continued at-will employment and employer's unilateral power to modify its arbitration promise make such agreements void).

143. See *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 19–20 (1983). Only if the employer retains the unilateral right to avoid arbitrating the claims it agreed to arbitrate, does it run into mutuality of obligations problems. See *Flex Enters. LP v. Cisneros*, 442 S.W.3d 725, 727–28 (Tex. App. 2014), *petition for review denied*, (Tex. Dec. 19, 2014) (noting that non-disclosure, non-compete, and non-interference claims were excluded from the arbitration agreement, but also that the employer reserved the right to change the arbitration policy at any time without notice, thereby making it illusory).

defeat the purpose of the FAA to enforce a contractual change by *both* parties to an efficient private forum.<sup>144</sup> The FAA was enacted because both parties wanted to avoid the delays and costs of courts.<sup>145</sup> It was not designed to force one party to arbitrate at all times while allowing the other party to arbitrate at its leisure.

While the Court has interpreted the FAA to require the parties' consent in order to find arbitration agreements valid,<sup>146</sup> its response to involuntary arbitration contract formation practices negates the refrain that consent is key. Although it is theoretically true that general contract law enforces one-sided or adhesion contracts,<sup>147</sup> neither contract law nor the FAA were intended to enforce agreements that remove the benefit of the bargain from one party or remove that party's legal rights and remedies.<sup>148</sup> Yet, the Court has ruled that arbitration clauses are valid even when they do just that.<sup>149</sup> The Court has approved as valid arbitration agreements in standalone contracts where all the terms of the contract give the employer or business an overwhelmingly favorable position, and simultaneously give the employee or consumer a decidedly disadvantageous position.<sup>150</sup>

While adhesion contracts are a normal part of commercial life today, enforcing contracts that degrade one party's legal rights as a condition of doing business is not a purpose of the FAA.<sup>151</sup> General contract law seeks to give the

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144. *Id.* at 728.

145. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22, 27. Congress's "clear intent" in passing the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Id.* at 22.

146. *See also* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775–76 (2010) (holding that the parties' silence on class arbitration cannot be interpreted as consent).

147. *See* PERILLO, *supra* note 121, at 399 ("There is nothing inherently wrong with contracts of adhesion. Most of the transactions of daily life involve such contracts that are drafted by one party and presented on a take it or leave it basis. They simplify standard transactions such as obtaining or using a credit card."). In many cases, such contracts are reasonable. *Id.* *See also* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (noting that "the times in which consumer contracts were anything other than adhesive are long past").

148. *See* PERILLO, *supra* note 121, at 382, 384, 388–90 (discussing the doctrine of unconscionability). Perillo and Calamari note, "[t]ypically the cases in which courts have found unconscionability involve gross overall one-sidedness or gross one-sidedness of a term disclaiming a warranty, limiting damages, or granting procedural advantages." *Id.* at 389.

149. *See* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–12 (2013) (approving an arbitration policy that made it practically impossible to prosecute antitrust violations because of its class claim prohibitions). The Court held that an exception to the FAA's enforceability rules providing that courts could void arbitration agreements that precluded "effective[] vindicati[on]" of "federal statutory rights" did not apply to a waiver of class arbitration rights. *Id.*

150. *See, e.g.,* *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1332, 1334 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014). By denying certiorari in *Walthour*, the Court effectively approved the Eleventh Circuit's decision that employers can use arbitration policies to bar class action claims of employees under the Fair Labor Standards Act. *See id.*

151. *See, e.g.,* *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474–75 (1989) (noting that the FAA does not provide an absolute right to forced arbitration). *See generally* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute*

parties the benefit of the bargain rather than give the strong bargainer a windfall or strip the legal rights of the weaker party.<sup>152</sup> Yet, the Court has in essence approved such consequences when they are cloaked in an arbitration policy or provision.<sup>153</sup> These conclusions give arbitration agreements a status superior to other contractual promises, contrary to the contemplation of the FAA.<sup>154</sup>

#### A. FAA Defenses

The Court has also stripped away traditional defenses to contract enforcement by molding the goals of the FAA.<sup>155</sup> Textually, the FAA promises to enforce arbitration agreements, subject to all the defenses applicable to any contract.<sup>156</sup> However, the Court's interpretation greatly narrows the range of defenses that can be applied to arbitration agreements.<sup>157</sup> For example, the Court ruled that

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*Resolution and Public Civil Justice*, 47 U.C.L.A. L. REV. 949, 1040–41 (2000) (discussing the fact that a waiver of rights under the FAA is not all-encompassing).

152. See PERILLO, *supra* note 121, at 382, 384, 388–90 (discussing the goals of the unconscionability doctrine).

153. See, e.g., *Marotta v. Toll Bros.*, No. 09-2328, 2010 U.S. Dist. LEXIS 20578, at \*15 (E.D. Pa. Mar. 3, 2010) (holding that traditional defenses against upholding a contract such as fraud or duress can invalidate the enforcement of an arbitration agreement); see also *supra* note 149 and accompanying text (discussing the Court's upholding of a provision that prevented a party from exercising its class arbitration rights). Richard Frankel, who is of the view that the doctrine of unconscionability withstands the Court's FAA jurisprudence, nonetheless notes:

A number of scholars have suggested that *Concepcion's* holding that the FAA can preempt state unconscionability doctrine and its focus on “fundamental attributes” of arbitration means that the FAA preempts most, or even all, unconscionability challenges to arbitration provisions. Defense-oriented organizations are advising defense lawyers “to be very bullish” in pushing *Concepcion* well beyond the class action context in order “to enforce arbitration clauses in general,” and courts already have cited the two cases more than one thousand times.

Richard Frankel, *Concepcion and Mis-Concepcion: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225, 227 (2014) (footnotes omitted).

154. *Volt*, 489 U.S. at 472. See also *supra* note 105 and accompanying text.

155. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 22–23 (1984) (O'Connor, J., dissenting). Dissenting in *Southland*, Justice O'Connor, joined by Justice Rehnquist, stated:

Today, the Court takes the facial silence of § 2 as a license to declare that state as well as federal courts must apply § 2. In addition, though this is not spelled out in the opinion, the Court holds that in enforcing this newly discovered federal right state courts must follow procedures specified in § 3. The Court's decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.

*Id.*

156. See *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1329 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014) (“The FAA's primary substantive provision provides that a written agreement to arbitrate a controversy arising out of that contract ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”) (citing 9 U.S.C. § 2 (2012)).

157. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996) (noting that “generally applicable contract defenses, such as fraud, duress, or unconscionability” may be used against

states cannot pass laws that limit the enforceability of arbitration agreements.<sup>158</sup> Although the FAA does not expressly preempt state arbitration laws and does not completely occupy the field of arbitration, the Court has held that the FAA preempts state laws that serve as obstacles to arbitration.<sup>159</sup> This has immobilized state enactments designed to protect consumers and workers from the abuses that pervade arbitration policies.<sup>160</sup> The Court does not distinguish between regulations that promote the arbitration goals of speed, reduced costs, and fairness, and those that outright prohibit arbitration of certain types of disputes.<sup>161</sup> This failure has degraded the value of common law defenses to enforceability.

The Court's foundational rule that insistence on arbitration is a federal substantive right that has few legal constraints has degraded the potency of common law defenses such as fraud, duress, unconscionability, and lack of mutuality.<sup>162</sup> Because arbitration is the legal prerogative of anyone, powerful parties need not misrepresent, defraud, or coerce the weak party to obtain such an agreement.<sup>163</sup> The absence of alternatives for weak parties guarantees their acceptance or acquiescence.<sup>164</sup> Additionally, because both parties are agreeing to give up their court forum rights or are trading other legal rights along with the promise to arbitrate, mutuality can often be found by applying ordinary contract

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arbitration agreements under the FAA, but that "state laws applicable only to arbitration provisions" may not be used).

158. See *Southland Corp. v. Keating*, 465 U.S. 1, 14–16 (1984). The Court stated that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Id.* at 16.

159. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 468, 478 (1989).

160. See *Doctor's Assocs.*, 517 U.S. at 687. See also Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 2 (2012) (noting that "[t]he United States Supreme Court, in advancing an aggressive pro-arbitration campaign since the mid-1980s, transformed the Federal Arbitration Act (FAA)—enacted in 1925 and not amended materially since then—from a statute that forbids judicial discrimination against arbitration agreements to a powerful source of anti-consumer substantive arbitration law").

161. *Doctor's Assocs.*, 517 U.S. at 687 (noting that any state laws applicable only to arbitration provisions and that invalidate arbitration agreements, including "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts" are preempted by the FAA).

162. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013) (declining to apply the "effective vindication" exception to invalidate an arbitration agreement, and noting that while it is possible that arbitration expenses could preclude individuals from exercising their federal statutory rights, this does not preclude such individuals from seeking remedies).

163. See *Casarotto v. Lombardi*, 886 P.2d 931, 940 (Mont. 1994), *rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1995) (Trieweler, J., specially concurring) (commenting that due to a lack of alternatives, weak parties are easily induced into arbitration agreements).

164. See *id.* (Trieweler, J., specially concurring). See also *supra* note 162 and accompanying text.

rules.<sup>165</sup> However, powerful parties abuse their arbitration contract formation prerogatives by inserting obstacles to the vindication of legal remedies, and this abuse has been the only real basis upon which to deploy a general contract defense of unconscionability.<sup>166</sup>

Nonetheless, Court precedents have even curtailed the availability of the doctrine of unconscionability.<sup>167</sup> This equitable and dynamic principle, which is used to prevent enforcement of oppressive contract terms regardless of the types of contracts that house them, has been paralyzed by the Court's conclusion that the FAA permits modification of procedural rights in arbitration agreements.<sup>168</sup> Powerful bargainers are given wide latitude to modify or eliminate rights as long as they can be labeled procedural.<sup>169</sup> By labeling statutory prescriptions as procedural rights or non-rights,<sup>170</sup> the Court has also greatly reduced the prospect of proving unconscionability by approving arbitration provisions that place procedural and financial hurdles in the path of weak parties.<sup>171</sup> The Court ruled that unless hurdles such as class action bans and cost-allocation provisions literally prevent the other party from *pursuing* their legal remedies, the arbitration requirements must be enforced because effective vindication is still *possible*.<sup>172</sup> Thus, showing that arbitration agreements are structured in such a way that they make the pursuit of legal rights

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165. The mutuality of obligation doctrine does not require that the parties exchange the same promises, for example, both parties agreeing to give up the court forum; as long as something of legal value was bargained for, consideration exists to bind both parties. *See* D.R. Horton, Inc. v. Brooks, 207 S.W.3d 862, 868 (Tex. App. 2006) (holding that mutual promises to arbitrate are sufficient consideration to support an arbitration contract).

166. *See, e.g.,* Hill v. Garda CL, Nw., Inc., 308 P.3d 635, 639 (Wash. 2013) (holding that a fourteen-day statute of limitations, a limit on backpay damages to two and four months, and high arbitration costs made the arbitration agreement unconscionable); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172–73 (9th Cir. 2003) (finding that Circuit City's arbitration policy was unconscionable because "provisions concerning coverage of claims, the statute of limitations, the prohibition of class actions, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to modify or terminate the arbitration agreement all operate to benefit the employer inordinately at the employee's expense").

167. *See infra* notes 168–74.

168. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (holding that a forum change in an arbitration agreement is enforceable as long as federal statutory rights can be vindicated); *see also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991) (holding that a forum change in an arbitration agreement does not equate to a loss of substantive rights).

169. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013) (holding that arbitration agreements that modify rights are enforceable, as long as they do not preclude legal remedies).

170. *See, e.g.,* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669–70 (2012) (finding that a congressional provision giving consumers a "right to sue" is not necessarily a right to go to court).

171. *Id.*

172. *See* Am. Express, 133 S. Ct. at 2311.

futile makes little impression on the Court.<sup>173</sup> Even when employees and consumers surmount the daunting rules and prove that arbitration terms are unconscionable, they face the reality that they may still have to arbitrate with modified or severed terms.<sup>174</sup>

Considered together, the Court's FAA decisions make almost everyone subject to the law's pro-arbitration mandates, fortify the position of powerful bargainers to require arbitration with obstacles to vindication, eliminate the defenses normally available for such contractual oppression, and negate the ability of states to regulate arbitration in a way that promotes the goals of the FAA.<sup>175</sup> But the Court has not limited its preemptive and substantive rules for the FAA to state laws designed to protect their citizens from oppressive contracts.<sup>176</sup> The FAA has also overtaken federal laws protecting weak and vulnerable contracting parties.<sup>177</sup>

### B. *The FAA and Federal Laws*

Although the FAA is one narrow federal prescription, it arguably has a deleterious effect on other federal laws.<sup>178</sup> Moreover, the FAA has paralyzed other federal statutes that post-date it, which has been cause for stinging criticism. Some members of the Court have accused the majority of "statutory mutilation,"<sup>179</sup> "playing ostrich,"<sup>180</sup> "misuse[] [of] authority,"<sup>181</sup> "building . . . , case by case, an edifice of its own creation,"<sup>182</sup> and "standing on its own shoulders."<sup>183</sup> The beneficiaries of the Court's FAA decisions have typically

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173. *See id.* at 2308–09 (upholding class claim prohibitions that made it financially untenable for merchants to pursue antitrust claims against American Express).

174. *See, e.g.,* Jackson v. Cintas Corp., 425 F.3d 1313, 1317 (11th Cir. 2005) (noting that the general rule is to sever unconscionable terms when they are found in contracts).

175. *See supra* notes 160–71.

176. *See, e.g.,* Am. Express, 133 S. Ct. at 2308 (noting that courts have held that the FAA trumps state law).

177. *Id.* at 2320 (Kagan, J., dissenting) (arguing that the Court is applying the FAA in a manner that is inimical to federal antitrust law).

178. *See id.* (Kagan, J., dissenting) (commenting that the Court has no basis for using the FAA to trump other federal laws). *See also* Casarotto v. Lombardi, 886 P.2d 931, 941 (Mont. 1994), *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1995) (observing that some courts' interpretation of the FAA raises serious separation of powers issues). The Supreme Court of Montana noted in *Casarotto* that "Congress, according to some federal decisions, has written state and federal courts out of business as far as [certain large] corporations are concerned." *Id.*

179. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 416 (1967) (Black, Douglas, and Stewart, JJ., dissenting).

180. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 128 (2001) (Stevens, Ginsburg, and Breyer, JJ., dissenting).

181. *Id.* at 132 (Stevens, Ginsburg, Breyer, and Souter, JJ., dissenting).

182. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

183. *See* Circuit City, 532 U.S. at 132 (Stevens, Ginsburg, Breyer, and Souter, JJ., dissenting).

been powerful parties, and the losers have been workers, consumers, and small businesses.<sup>184</sup>

Federal laws protecting workers and consumers have been compromised because of the Court's interpretations of the FAA. Take for example the plight of over 130 million workers covered by the Fair Labor Standards Act (FLSA).<sup>185</sup> This law regulates minimum wage and overtime pay issues, and was enacted primarily to protect "the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."<sup>186</sup> The FLSA Congress recognized that hourly workers lacked bargaining power and wanted to prevent employment arrangements that harmed them and the nation's health and efficiency.<sup>187</sup> That concern remains critical today, particularly in light of a variety of schemes to cheat workers out of their minimum wages and overtime pay.<sup>188</sup>

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184. See *Casarotto v. Lombardi*, 886 P.2d 931, 938–39 (Mont. 1994), *rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1995) (upholding a state law that required conspicuous notice of arbitration on the first page of such an agreement). One judge wrote, "[w]e have laws to protect our citizens from bad faith, fraud, unfair business practices, and oppression by the many large national corporations who control many aspects of their lives but with whom they have no bargaining power." *Id.* at 939–40 (Trieweiler, J., specially concurring). The judge further stated:

What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.

*Id.* at 940. The holding was later reversed by the U.S. Supreme Court. *Doctor's Assocs., Inc.*, 517 U.S. at 688. See also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2310, 2320 (2013) (Kagan, J., dissenting) (observing that the Court is converting arbitration into "a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability" while undermining "the Sherman Act and other federal statutes providing rights of action"); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 679 (2012) (Ginsburg, J., dissenting) (noting that the Court's interpretation that the right to sue is not a right to go to court "permits credit repair organizations to deny consumers, through fine print in a contract, an important right whose disclosure is decreed in the U.S. Code").

185. See generally Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2012) (providing for minimum wage and overtime pay for certain classes of workers). See also FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA), U.S. DEP'T OF LABOR, WAGE & HOUR DIV. (2009), <http://www.dol.gov/whd/regs/compliance/whdfs14.pdf> (reporting that more than 130 million American workers are covered or protected by the FLSA).

186. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945).

187. *Id.* at 706–07 (discussing the legislative intent underlying the FLSA).

188. See Lisa Nagele, *State High Court Affirms \$187 Million Award on Wal-Mart Employees' Wage & Hour Claims*, 241 DAILY LABOR REPORT (BNA) A-2 (Dec. 16, 2014) (reporting the Pennsylvania Supreme Court's confirmation of employees' claims that an employer denied rest breaks and forced employees to work off-the-clock); Anna Kwidzinski, *21,000 Workers at Apple Stores, Corporate May Advance Denied Break Claims as Class*, 142 DAILY LABOR REPORT (BNA)

The Court's FAA precedents now require judges to interpret the FAA as permitting employers to structure arbitration policies that insulate them from wage claim violations.<sup>189</sup> Using the Court's precedents as their guide, employers have designed and imposed arbitration rules for FLSA claims.<sup>190</sup> Although the FLSA expressly states that covered workers have the right to maintain an action in state or federal court, and may do so as a class,<sup>191</sup> employers are requiring that workers give up their court forum and class rights as a condition of employment.<sup>192</sup> Because of the Court's FAA jurisprudence, lower courts have enforced such arbitration agreements, although the prospect that employees will file individual claims is slim given the small sums involved in FLSA cases.<sup>193</sup>

Although the FLSA is a federal law and does not face the same preemption hurdles as state laws, it has been no match for the FAA.<sup>194</sup> The Court's FAA precedents have overtaken the FLSA when the two laws conflict. According to one court, workers must arbitrate their FLSA claims individually if they so agree, although the FLSA expressly provides for suit in state or federal court, as an individual or as a class.<sup>195</sup> To guarantee a court forum or class rights, a worker resisting arbitration must prove that the FAA's mandates were overridden by a "contrary congressional command" in the FLSA.<sup>196</sup> No such command is found in the FLSA.<sup>197</sup> The FAA's ability to override the FLSA places poor workers in an even more precarious place than the one they occupy; in order to recover relatively small sums of money, hourly workers must arbitrate individually under rules prescribed by their employers, and such

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A-11 (July 24, 2014) (reporting Apple Inc. employees' claim that they were not paid for meal and rest breaks as required by law).

189. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2310, 2320 (2013) (Kagan, J., dissenting) (finding that the Court has made it so that arbitration policies can now "insulate wrongdoers from liability").

190. See, e.g., *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335 (11th Cir. 2014), cert. denied, 134 S. Ct. 2886 (2014) (holding that the Court's interpretation of statutes similar to the FLSA requires judges to enforce bans on class actions for FLSA claims).

191. See 29 U.S.C. § 216(b) (2012). See also Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 532 (2012) (noting that the FLSA "authoriz[es] collective actions").

192. See *Walthour*, 745 F.3d at 1328.

193. In California, for example, minimum wage and overtime violations claims ranged from \$5,000–\$7,000. See *Gentry v. Sup. Ct.*, 165 P.3d 556, 564 (Cal. 2007). The average award made by the state's Department of Labor Standards Enforcement was \$6,038, and cases settled for much less, ranging from \$400–\$1,600. *Id.*

194. See, e.g., *Walthour*, 745 F.3d at 1332, 1334–35 (noting that "[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the [FAA]," and holding that the FAA trumps the FLSA in terms of waiving the right to participate in a class action in an arbitration agreement).

195. See *id.* at 1335 (holding that Congress did not provide for class actions in the FLSA as an essential element of vindicating FLSA rights).

196. See *id.* at 1334.

197. *Id.*



workers face prohibitive arbitration costs and the prospect of retaliation.<sup>198</sup> Arbitration costs coupled with relatively small recoveries will likely deter most FLSA claims, nullifying the FLSA mandate of minimum wage and overtime payments.<sup>199</sup> Nonetheless, the Court has silently affirmed the conclusion of lower courts that workers can effectively vindicate their FLSA rights via individual arbitration.<sup>200</sup>

Another federal statute that has met the wrath of the Court's FAA jurisprudence is the Credit Repair Organization Act (CROA).<sup>201</sup> This statute was enacted to protect individuals with credit problems, typically poor and uninformed consumers.<sup>202</sup> The law prohibits deceptive practices by credit repair businesses plying their services to consumers.<sup>203</sup> To prevent abuse, the CROA requires that credit repair businesses disclose to consumers that they have the right to *sue* the organization for violations of the CROA prior to contracting for credit repair services.<sup>204</sup> The CROA also provides that consumers may bring individual or class actions in court for damages.<sup>205</sup> The statute further provides that waiving any protection or right granted to consumers is void.<sup>206</sup>

Nonetheless, the Supreme Court ruled that consumers can be required to arbitrate their CROA claims in *CompuCredit Corp. v. Greenwood*.<sup>207</sup> The Court interpreted the statutory provision of a right to sue as limited to a “*right to enforce liability*” under the CROA rather than a right to go to court.<sup>208</sup> The Court rejected contextual arguments grounded in other sections of the CROA that referred to “action,” “class action,” and “court” as insufficient evidence of congressional intent to provide exclusively for a court forum.<sup>209</sup> The Court ruled that the congressional grant of a “right to sue” is simply a colloquial way of

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198. See *Gentry v. Sup. Ct.*, 165 P.3d 556, 564–67 (Cal. 2007) (discussing the significant costs of such court actions). See also *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109–10 (Cal. 2005) (discussing similar obstacles to individual recovery in the consumer transactions context).

199. See *Gentry*, 165 P.3d at 564.

200. The Court denied certiorari in *Walthour*, allowing the decision to stand. See 745 F.3d 1326, 1334 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014).

201. Consumer Credit Protection Act § 402, 15 U.S.C. § 1679 (2012).

202. See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 676 (2012) (Ginsburg, J., dissenting). See also *Arbitration and Consumer Protection—Credit Repair Organizations Act—Ninth Circuit Holds that Statutory Ban on Arbitration Is Nonwaivable—Greenwood v. Compucredit Corp.*, 615 F.3d 1204 (9th Cir. 2010), 124 HARV. L. REV. 1058 (2011) (discussing the congressional purpose behind CROA).

203. 15 U.S.C. § 1679(a).

204. See *id.* § 1679c(a).

205. *Id.* See also *id.* § 1679g.

206. See *id.* § 1679f(a) (“Any waiver by any consumer of any protection provided by or any right of the consumer under this [subchapter]—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.”).

207. 132 S. Ct. 665, 673 (2012).

208. See *id.* at 669–70 (emphasis added).

209. *Id.* at 670 (concluding that “[t]hese references cannot do the heavy lifting that respondents assign them”).

saying that a consumer has the legal right to seek damages in court.<sup>210</sup> It is not a congressional guarantee but rather a congressional “contemplation” of court resolution.<sup>211</sup> Further, according to the Court, when Congress wants to guarantee a court forum, it does so in “less obtuse” ways.<sup>212</sup> Faced with an express congressional ban on waiver of CROA rights, the Court decided to reframe the issue as one of whether the CROA is “silent” on arbitration.<sup>213</sup> Because going to court is not a CROA “right” and Congress did not use the magic words that arbitration is prohibited for CROA claims, businesses can bar class actions in their form contracts.<sup>214</sup>

The Court’s CROA opinion gave no hint as to what is at stake in the case. The fact is that plaintiffs complained that CompuCredit targeted consumers with weak credit ratings promising to help rebuild their credit with CompuCredit’s “Aspire Visa” card.<sup>215</sup> Consumers were promised a \$300 credit line with no required deposits.<sup>216</sup> Instead, consumers alleged that CompuCredit did not give them the disclosures required by statute (e.g., notice of the right to sue for deceptive practices), and “charged an initial finance fee of \$29, a monthly fee of \$6.50, and an annual fee of \$150 assessed immediately against the \$300 limit.”<sup>217</sup> Justice Ginsburg noted in her dissent that “[i]n the aggregate, plaintiffs calculated, fees charged the first year amounted to \$257.”<sup>218</sup>

In addition to barring class actions, the arbitration agreement required arbitration through the National Arbitration Forum (NAF), an organization that was sued by the Minnesota Attorney General for violating consumer protection laws.<sup>219</sup> The Attorney General claimed that NAF advertised itself to consumers as a neutral independent organization while it simultaneously tried to convince credit card companies to implement arbitration policies and name NAF as the

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210. *Id.* at 672.

211. *See id.* at 671.

212. *Id.* at 672. The Court’s conclusion is grounded in express congressional prohibition of arbitration in a few statutes that postdate the CROA. *See id.* But as the dissent pointed out, the statutes the Court relies on were enacted long after the CROA, when Congress recognized that the Court had greatly expanded the reach and powers of the FAA. *See id.* at 679 (Ginsburg, J., dissenting).

213. *See id.* at 669–70.

214. *See id.* at 672–73 (holding that “[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms”).

215. *See id.* at 676 (Ginsburg, J., dissenting).

216. *Id.*

217. *See id.*

218. *Id.*

219. Press Release, Lori Swanson, Attorney General of Minnesota, National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson (July 19, 2009), <http://voiceofsandiego.org/wp-content/uploads/2013/05/arbitration2-052313-5.pdf>.

arbitrator.<sup>220</sup> This lawsuit resulted in a consent decree in which NAF was barred from handling consumer debt cases for two years.<sup>221</sup>

The Court's CROA decision impelled Justice Ginsburg to write that the Court's interpretation enables the same deception that the CROA sought to suppress.<sup>222</sup> Laypersons of limited economic means who are uninformed in credit matters are required to understand that when Congress says that consumers have a right to sue, Congress means that such consumers can go to court only if arbitration is not made a condition precedent.<sup>223</sup> Justice Ginsburg doubted that a statute that expressly provides consumers with a right to sue, while also detailing what "courts" must consider in order to award punitive damages, and voiding any consumer waiver of any statutory right or protection, could authorize credit repair firms to effectively deceive consumers by telling them they have a right to sue that is actually only a right to arbitrate.<sup>224</sup>

Permitting such obstacles as bans on class arbitration has been rationalized as promoting the arbitration attribute of informality, which helps to reduce adjudication costs and speeds up the process.<sup>225</sup> But the Court equates informality with bilateralism by concluding that bilateral arbitration makes the arbitration forum informal and thereby efficient.<sup>226</sup> The reality is, however, that the parties make the forum informal and efficient by relaxing the rules of adjudication to achieve speedy and economical resolution.<sup>227</sup> The parties modify discovery, statute of limitations, evidentiary, and appellate rules, among others, to gain speed and economy.<sup>228</sup> If one party is allowed to include hurdles to adjudication, then informality and efficiency are reduced.<sup>229</sup>

The Court also ignores the fact that class arbitration was not a process contemplated by the FAA because this form of adjudication did not occur in 1925.<sup>230</sup> In furthering the FAA goal of efficiency via informality, the Court has

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220. *See id.*

221. *Id.*

222. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 676 (2012) (Ginsburg, J., dissenting).

223. *Id.* at 678.

224. *Id.*

225. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011).

226. *Id.* at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

227. *See, e.g., id.* at 1749 (discussing that a greater emphasis is placed on efficiency such as bringing in specialists).

228. *See Warren E. Burger, Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (1982) (showing the ways in which the dispute process is modified through arbitration). *See also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (noting the FAA's primary goal of enforcing the arbitration terms the parties agreed to).

229. *See infra* notes 239–47 and accompanying text.

230. *See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE* 758 (4th ed. 2005) (observing that class actions only became popular after the Federal Rules of Evidence were revised in 1966); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two*

focused exclusively on individual claimants, rather than the claims themselves.<sup>231</sup> For example, 10,000 bilateral arbitrations of the identical claim is viewed as more efficient than one class arbitration of the same claim.<sup>232</sup> In effect, the Court is construing the FAA as endorsing redundant claims, thereby making the arbitral forum less efficient than courts where class actions are permitted.<sup>233</sup> As such, efficiency is evaluated from the perspective of the powerful creator of the arbitration agreement, thereby converting the FAA into an efficient defense device, rather than an efficient dispute resolution mechanism.<sup>234</sup> Moreover, after lauding the competence of arbitrators to handle complex matters,<sup>235</sup> the Court has concluded that class arbitration is too sophisticated for them.<sup>236</sup>

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*Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1771 (2013) (noting that “[i]n 1966, the Supreme Court, acting under authority of a congressional delegation of power, revised Rule 23 of the Federal Rules of Civil Procedure, which provided for class actions.”). *See also* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (“The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938 . . .”).

231. *See Am. Express*, 133 S. Ct. at 2308 (noting that an economist estimated the cost of arbitration would far exceed the recovery for the claim); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., dissenting) (arguing that “small-dollar” claims will not be pursued).

232. *See Concepcion*, 131 S. Ct. at 1744–45, 1749. In this case, AT&T told customers they would get a free phone if they purchased AT&T’s service, but nonetheless charged them \$30.22 in sales tax for each phone. *Id.* at 1744–45. Based on the Court’s view of informality, it is more speedy and cost effective to arbitrate each claim individually, no matter how many customers are making the identical claim of fraud and false advertising. *Id.* at 1749. *See also* *Raviv*, *supra* note 10, at 221. *Raviv* remarks:

[A]lthough the Court’s recent class arbitration decisions have nominally “favored” arbitration by upholding particular arbitration provisions, in fact the rulings may ultimately undermine the use of arbitration as an efficient, flexible means of resolving disputes [in part by] . . . unders[elling] the efficiency benefits of class arbitration, thereby promoting inefficient piecemeal proceedings . . .

*Id.*

233. *See Concepcion*, 131 S. Ct. at 1760–61 (Breyer, J., dissenting) (stating that the Court is discouraging small claims which in many cases will be of such a low value that parties will not want to pursue the claim). *See also supra* note 232 and accompanying text.

234. *Concepcion*, 131 S. Ct. at 1748 (holding that the FAA’s purpose is to compel arbitration when it is part of the agreement despite what one party might want). *See also id.* at 1759 (Breyer, J., dissenting) (discussing the intent of Congress in passing the FAA, and Congress’s expectation that parties to arbitration agreements would “possess[] roughly equivalent bargaining power”).

235. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633–34 (1985) (discussing “access to expertise” provided by arbitration and stating that “the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter”). *See also* *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 268–69 (2009); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987), *rev’d*, 896 F.2d 17 (2d Cir. 1990).

236. *See Concepcion*, 131 S. Ct. at 1750 (finding that “while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the

### C. Fair Vindication Under the FAA

The Court's conclusions regarding effective vindication of rights under the FAA are also alarming.<sup>237</sup> Long before the Court construed the FAA as having near-universal application, it ruled that the contractual switch to arbitration was dependent on a complaining party retaining the right to vindicate their rights in that forum.<sup>238</sup> And for the limited rights the Court initially found arbitrable, it concluded that a party loses no statutory protection when it gives up the court forum.<sup>239</sup> As the Court expanded the reach of the FAA to other federal statutes in subsequent years, it reaffirmed the “effective vindication” principle that switching to an arbitral forum could not prevent a party from vindicating statutory remedies.<sup>240</sup>

The problem is that this assertion is factually incorrect, and it is not what the Court means. Responding to the Court's open embrace of arbitration, businesses and employers have designed arbitration processes that allocate heavy costs to employees and consumers that greatly exceed any potential claim or recovery they may have.<sup>241</sup> Furthermore, businesses and employers have allocated arbitration costs to consumers and employees that are not incurred in court cases.<sup>242</sup> The Court has approved these adjustments to a contracting party's statutory rights as attributes of arbitration, even though they make the forum inaccessible.<sup>243</sup> By labeling the non-remedial aspects of statutory protection as modifiable procedural rights that can be tailored for efficiency, the Court has concluded that no legal right is lost when weak parties face arbitration rules and

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protection of absent parties.”). *See also* Raviv, *supra* note 10, at 237 (discussing the Court's paradoxical views on the expertise of arbitrators and noting that “[t]he Court's reliance on arbitrators' alleged unfamiliarity with class proceedings is puzzling because in other contexts, the Court has repeatedly acknowledged that arbitrators' lack of expertise in an issue is not a legitimate obstacle to the arbitrability of those issues”).

237. *See* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (endorsing arbitration agreements that make it impractical for weak parties to pursue their claims).

238. *See Mitsubishi Motors Corp.*, 473 U.S. at 637.

239. *See id.* (holding that arbitration of federal claims are only enforceable “so long as the prospective litigant effectively may vindicate its statutory cause of action”).

240. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (demonstrating that there are many cases in which a statutory remedy is provided).

241. *See, e.g., Am. Express*, 133 S. Ct. at 2308 (noting that the respondents, with the use of an economist, had argued—and the Court of Appeals found—that arbitration would result in exorbitant costs to consumers).

242. *See Hall v. Treasure Bay V.I. Corp.*, 371 F. App'x 311, 312–13 (3d Cir. 2010) (requiring an eight dollar per hour employee to pay the entire costs of arbitration if she loses); *Ting v. AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003) (holding that arbitration costs greater than the costs of court proceedings are unconscionable if allocated to consumers).

243. The parties relinquish the court forum in exchange for the speed, lower costs, and informality of arbitration. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (“Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.”).

costs that deter or preclude their claims.<sup>244</sup> This is troubling because arbitration was endorsed in the FAA as an alternative forum for vindicating rights rather than a mechanism for limiting claims.<sup>245</sup>

Encouraged by the Court's FAA precedents, businesses and employers are constantly testing the waters to see how far they can go in adjusting the other party's "procedural rights."<sup>246</sup> Such provisions include dramatic reductions in the time allowed to file a claim, as well as severe restrictions on discovery, the elimination of class claims, the requirement of distant venues, and the allocation of arbitration fees and costs so as to deter claims.<sup>247</sup> All of these drafting strategies have been approved by the Court as consonant with the FAA subsidiary goals of providing an informal, speedy, and cheaper forum.<sup>248</sup> The Court ruled that employees and consumers are bound by such restrictions on their legal rights unless they prove that one or more restrictions prevent vindication of their claims.<sup>249</sup>

It turns out, however, that even the "effective vindication" principle is not what it seems. In a recent FAA case, the Court ruled that even if one party proves that the arbitration agreement makes it economically impracticable to prove a statutory remedy, the agreement is still valid and enforceable.<sup>250</sup> The Court declared that the effective vindication principle originated in dictum, and the proper inquiry is whether the arbitration agreement *eliminates* the right to pursue a statutory remedy.<sup>251</sup> This constricting of the effective vindication

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244. See *Gilmer*, 500 U.S. at 26, 30–32. See also *Am. Express*, 133 S. Ct. at 2310.

245. *Am. Express*, 133 S. Ct. at 2320 (Kagan, J., dissenting) (discussing how the Court's holding distorts the purpose of the FAA to turn the Act into a claim-blocking instrument).

246. See *supra* notes 241–45 and accompanying text (discussing the ways in which businesses and employers take advantage of the opposing party).

247. See, e.g., *Dortch v. Quality Rest. Concepts, LLC*, No. 1:12-CV-00198, 2013 WL 1789603, at \*6 (E.D. Tenn. Apr. 26, 2013) (noting that the employer's twenty-day statute of limitations was unreasonable); *Prieto v. Healthcare & Ret. Corp. of Am.*, 919 So.2d 531, 533 (Fla. Dist. Ct. App. 2005) (finding unconscionable an arbitration agreement between a nursing home and a resident's daughter that, among other things, prevented the daughter from obtaining the discovery required to vindicate her claim); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 1753 (2011) (upholding a prohibition on class actions in an arbitration agreement); *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1263–64 (D. Utah 2004) (finding unconscionable an arbitration agreement that would have required claimants to arbitrate in a "distant and inconvenient forum"); *Zaborowski v. MHN Gov't Servs., Inc.*, 601 F. App'x 461, 463 (9th Cir. 2014), *cert. granted*, No. 14-1458, 2015 WL 3646800 (U.S. Oct. 1, 2015) (finding unconscionable a fee-shifting provision in an arbitration agreement that provided that prevailing plaintiffs would still be required to pay the defendant's attorney's fees and costs).

248. See, e.g., *Concepcion*, 131 S. Ct. at 1749.

249. See *Am. Express*, 133 S. Ct. at 2310.

250. *Id.* at 2311–12. See also Bruce Wardhaugh, *Unveiling Fairness for the Consumer: The Law, Economics and Justice of Expanded Arbitration*, 26 LOY. CONSUMER L. REV. 426, 452 (2014) (discussing concerns related to arbitral fairness in the wake of *American Express*).

251. See *id.* at 2310.

principle further advances the interests of the powerful contracting parties, as the facts of the case in which it originated demonstrates.

In *American Express Co. v. Italian Colors Restaurant*,<sup>252</sup> merchants alleged that American Express violated the federal antitrust laws by forcing them to pay much higher fees on American Express cards than what was charged by competitors.<sup>253</sup> The agreement between the parties contained an arbitration clause that prohibited class actions or the joinder of claims or parties.<sup>254</sup> It also prohibited collaboration between merchants to prove antitrust violations, in addition to any cost-shifting, should a merchant prevail in arbitration.<sup>255</sup>

In *American Express*, the Court established that a merchant cannot win its antitrust case in arbitration unless it produces “an economic analysis defining the relevant markets, establishing Amex’s monopoly power, showing anticompetitive effects, and measuring damages.”<sup>256</sup> Such an analysis would cost at least several hundred thousand dollars and as much as one million dollars.<sup>257</sup> If the Italian Colors Restaurant prevailed, it would recover \$12,850, or \$38,549 as treble damages, under the antitrust laws.<sup>258</sup>

In upholding the arbitration agreement, the Court ruled that the antitrust laws do not prohibit class arbitration bans or “guarantee an affordable procedural path to the vindication of every claim.”<sup>259</sup> The purpose of the effective vindication “exception” is to prevent the *elimination* of the right to pursue statutory remedies.<sup>260</sup> This arbitration agreement does not do this, even if it makes vindication “not worth the expense.”<sup>261</sup> The Court concluded that the FAA does not approve of a cost-benefit analysis of claims by courts prior to approving arbitration contracts because such a process interferes with the benefits of arbitration: informality, speed, and lower costs.<sup>262</sup> This analysis failed to reckon with the reality that in a court action, the class claims would be permissible, thereby promoting vindication itself as well as a fair opportunity at vindication.

The Court’s *American Express* decision is detrimental to consumers, employees, and any weak party subject to the FAA because the effective vindication principle provided one of the few devices available to challenge

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252. 133 S. Ct. 2304 (2013).

253. *Id.* at 2308.

254. *Id.* (discussing the prohibition on class actions). *See also id.* at 2316 (Kagan, J., dissenting) (discussing the prohibition on joining claims and parties).

255. *Id.* at 2316–17 (Kagan, J., dissenting).

256. *Id.* at 2316.

257. *Id.*

258. *Id.* at 2308 (majority opinion).

259. *Id.* at 2309.

260. *Id.* at 2310.

261. *Id.* at 2310–11.

262. *See id.* at 2312.

class action bans and oppressive cost-sharing and cost-shifting practices.<sup>263</sup> Federal protection for employees and consumers generally lacks arbitration prohibitions or class bans, primarily because legislators were unaware that the FAA approved such practices.<sup>264</sup> That the FAA can be used as a shield for arbitration agreements that immunize one party from federal and state laws, or force a party to forego his claim, places large sections of society at risk of losing rights that previously existed. According to Justices Kagan, Ginsburg, and Breyer, the Court's ruling creates "a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."<sup>265</sup> The effective vindication principle permitted courts to accommodate the policy of the FAA—to promote arbitration—with the policies of other federal statutes.<sup>266</sup> Now consumers and workers must either forego their claims or make economically disastrous decisions in order to enforce their legal rights. This will continue to be the national rule for arbitral adjudication unless the Court's FAA precedents are overruled or circumvented.

### III. CRAFTING A SUSTAINABLE ARBITRATION POLICY

Arbitration today is a far cry from what the FAA Congress knew it to be. In 1925, arbitration was sought by merchants and other commercial parties who made arms-length and truly consensual contracts.<sup>267</sup> Today, arbitration is generally referred to as "mandatory" because the voluntary aspects are missing in most cases.<sup>268</sup> Outside of traditional commercial and labor cases, arbitration is often an effectively involuntary process.<sup>269</sup> Weak parties generally gain no

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263. For example, the Court ruled in *Green Tree Financial Corp. v. Randolph* that an arbitration contract could be invalidated with proof that arbitration costs were prohibitive. 531 U.S. 79, 91–92 (2000). This cost-allocation element of arbitration contracts greatly influences courts when they are evaluating whether arbitration agreements are unconscionable. See, e.g., *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 441–42 (Ct. App. 2004) (finding as unconscionable an arbitration agreement that required the employee to pay half of the forum costs).

264. See, e.g., *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 679 (2012) (Ginsburg, J., dissenting) (observing that it was many years after 1996 that Congress was alerted to the need to insert carefully crafted prohibitions of arbitration in federal statutes).

265. See *Am. Express*, 133 S. Ct. at 2320 (Kagan, J., dissenting).

266. See *id.* Justice Kagan stated, "[o]ur effective-vindication rule comes into play only when the FAA is alleged to conflict with another federal law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them." *Id.*

267. See *Sternlight*, *supra* note 40, at 1635 (noting that businesses typically sought arbitration to ensure neutral decisionmaking). See also *supra* notes 76–78 and accompanying text.

268. *Sternlight*, *supra* note 40, 1632–33 (discussing the involuntary nature of arbitration today for consumers and employees irrespective of whether the process is labeled "mandatory," "compelled," "promulgated," or "contractual"). See also *id.* at 1632 n.1 (discussing the debate over the propriety of some contemporary arbitration arrangements).

269. *Id.* at 1636. In 1925, one prescient Senator suggested that arbitration agreements might be "offered on a take-it-or-leave-it basis to captive customers or employees." *Id.* (quoting *Prima*



benefit from the arbitral forum, so the stronger party must impose it upon them.<sup>270</sup> The fact that the weak party has no bargaining input or choice is generally not a problem by itself, as contract law accommodates non-bargained transactions or adhesion agreements.<sup>271</sup> The problem today is that the more powerful party uses its contracting power to erect barriers to legitimate claims in the arbitration agreement. Because these barriers have been approved as attributes of arbitration, the arbitral forum has become an efficient vehicle to deny claims.

The attributes of arbitration have not changed over time. Speed, reduced costs, informality, fairness, and expert neutrals have always made arbitration attractive, but these benefits are no longer available to the majority of individuals governed by arbitration contracts.<sup>272</sup> Class action bans have been approved by the Court even though class arbitration promotes the efficiency that is the touchstone of arbitration.<sup>273</sup> Businesses insist on bilateral or piecemeal resolution of disputes in arbitration even when it produces redundancy and drives up costs.<sup>274</sup> While the Court has expressed concern about the economic and procedural burdens that class claims may impose on businesses, it has ignored the economic effects class bans have had on poor workers and consumers.<sup>275</sup>

The FAA precedents have made a mockery of the FAA goal of legitimizing a private alternative to court adjudication, and ignore recent developments that have changed the practice of arbitration. The Court has not been responsive to the implications of forced consent, and the wrapping of statutory rights and class

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Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J., dissenting)). See also Patel, *supra* note 139.

270. Sternlight, *supra* note 40, at 1649 (noting that “critics often point out that many (although admittedly not all) consumer and employment arbitration agreements . . . try to slant the odds in companies’ favor from a substantive standpoint”). Even if consumers and employees are free to shop or work elsewhere and not sign offensive arbitration agreements, it is becoming increasingly impractical to avoid such policies. *Id.* at 1632 n.1.

271. *Id.* at 1653 (discussing how contract law assumes consent and does not require subjective understanding, which accommodates the concept of adhesion contracts).

272. *Id.* at 1654 (noting that arbitration is not necessarily an easier, more fair alternative for individuals anymore).

273. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985) (holding that one goal of the FAA is efficient and speedy resolution of disputes). Class actions were created to permit suits by “large numbers of individuals or organizations whose interests are sufficiently related so that it is more efficient to adjudicate their rights or liabilities in a single action than in a series of individual proceedings.” See FRIEDENTHAL ET AL., *supra* note 230, at 757–58.

274. *Dean Witter Reynolds*, 470 U.S. at 217, 221 (observing that federal law requires piecemeal adjudication through arbitrations imposed by businesses, despite potential inefficiency and redundancy).

275. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (finding that class arbitration takes more time, adds formality to the arbitration process, and increases corporate liability risks). However, class actions “may represent the only viable method for people with small claims to vindicate their rights or for important social issues to be litigated.” See FRIEDENTHAL ET AL., *supra* note 230, at 758.

action bans in arbitration agreements. As a result, businesses now choose to spend tens of thousands of dollars to arbitrate a case even when less-expensive court resolution is quicker.<sup>276</sup> *Whataburger Restaurants LLC v. Cardwell*<sup>277</sup> offers a classic illustration of why it is better to have an expensive and protracted bilateral arbitration.<sup>278</sup>

In *Whataburger*, an employee sued her employer for workplace injuries, and her employer moved to compel arbitration consistent with its workplace policy.<sup>279</sup> From the American Arbitration Association's website, the trial judge determined that a three-day arbitration would cost about \$12,000 in fees, and about \$20,000 for the arbitrator.<sup>280</sup> The judge also responded to the employer's claim that arbitration was speedier because the case could be resolved in one year, by offering to try the case in six months.<sup>281</sup> When the employer rejected the judge's offer of a low-cost, quick trial, the judge concluded that the employer's claim in its arbitration policy that arbitration was quicker and cheaper was incorrect.<sup>282</sup>

In denying the employer's motion to compel arbitration, the trial judge noted:

Whataburger wants to pay approximately \$20,000 for an arbitrator to consider the claims at a later hearing for no conceivable reason . . . other than Whataburger's belief that it will fare much better, and Ms. Cardwell will fare much worse, before an arbitrator . . . . In this case Whataburger could proceed to trial more quickly with no costs, but, instead is asking to pay approximately \$20,000 for a slower process so that it can buy an AAA fact finder.<sup>283</sup>

Other aspects of the employer's arbitration agreement also drove up costs. The agreement provided that arbitration would take place in Dallas, Texas, even though the employee worked in El Paso.<sup>284</sup> The judge observed that the employee made \$7.40 per hour and would never be able to afford the costs to travel to Dallas and bring her witnesses along.<sup>285</sup> In response, the employer argued that the judge could sever this oppressive venue provision and the employer would consent to arbitration in El Paso.<sup>286</sup> The judge rejected this approach and ruled:

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276. See *Sternlight*, *supra* note 40, at 1652 (discussing the ways in which courts have rationalized class action bans). See also *infra* notes 277–90.

277. No. 08-13-00280-cv, 2014 Tex. App. LEXIS 8895 (Tex. App., Aug. 13, 2014), *opinion withdrawn by, substituted opinion at, and remanded by* 446 S.W. 3d 897 (Tex. App. Aug. 13, 2014).

278. *Id.* at \*35. See also *infra* notes 279–90.

279. *Whataburger*, 2014 Tex. App. LEXIS, at \*1–2.

280. *Id.* at \*19, 21.

281. *Id.* at \*7.

282. *Id.* at \*23.

283. *Id.*

284. See *id.* at \*2, n.2.

285. *Id.* at \*22.

286. *Id.* at \*11–12.

If Whataburger were ever to use the Dallas requirement to preclude an employee from pursuing a claim, that would be unconscionable. If Whataburger would always waive it and allow employees to have a hearing in their home community, then the Court can think of no reason to have it in the policy other than to discourage employees, and plaintiff's lawyers, from bringing claims in the first place.<sup>287</sup>

In the end, however, the employee was forced to arbitrate because an appellate court ruled that the trial judge erred by taking judicial notice of the AAA's fees, and decided a matter not before the court.<sup>288</sup> Nonetheless, judges are noting that arbitration has become "a system that lets large corporations lavishly buy their way out of judicial accountability and into a system more favorable to their side."<sup>289</sup> Another judge in an earlier case had noted that because of the Court's jurisprudence, the FAA now "permit[s] a few major corporations to draft contracts regarding their relationship with others that immunizes them from accountability under the laws of the states where they do business, and by the courts in those states."<sup>290</sup>

Ironically, if the Court pursued the true purposes of arbitration and the FAA, weak parties such as consumers and workers would be the beneficiaries. Collective claims in arbitration can greatly reduce adjudication costs for both parties and make vindication feasible for millions of workers claiming wage and hour violations.<sup>291</sup> Class actions are also instrumental in making consumer fraud cases viable, because the costs to prosecute individual claims often make it impracticable for plaintiffs to prosecute such cases on an individual basis.<sup>292</sup> Informal resolution by neutrals familiar with an industry would make the vindication of rights by workers and consumers speedier and cheaper, while significantly reducing judicial workload. These realities militate in favor of codifying practices that make the arbitration forum an attractive alternative to courts. Achieving this is the more difficult task.

#### A. Judicial Defiance

One approach used to infuse fairness into arbitration practices has been to ignore the Court's jurisprudence that allows a small group of powerful parties to impose lopsided arbitration agreements on others.<sup>293</sup> A few lower court judges

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287. *Id.* at \*23.

288. *See id.* at \*24–25.

289. *Id.* at \*19.

290. *Casarotto v. Lombardi*, 886 P.2d 931, 941 (Mont. 1994), *rev'd sub nom.* *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1995) (Trieweiler, J., specially concurring).

291. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that class actions were designed to overcome the problems individual small claimants face in pursuing their legal rights).

292. *See FRIEDENTHAL ET AL.*, *supra* note 230.

293. *See, e.g., Ferguson v. Countrywide Credit Indus. Inc.*, 298 F.3d 778, 782, 785 (9th Cir. 2002) (holding that California courts may invalidate an arbitration clause under the doctrine of

have ignored or reinterpreted Court precedents to restrict their impact.<sup>294</sup> In one West Virginia Supreme Court case, *Brown ex rel. Brown v. Genesis Healthcare Corp.*,<sup>295</sup> the court rejected the U.S. Supreme Court's interpretations of the FAA and refused to apply them.<sup>296</sup> The court stated that the Supreme Court had imposed its own biased viewpoint on the FAA, and created doctrine for the FAA "from whole cloth."<sup>297</sup> The court then upheld on public policy grounds, a state law that made predispute arbitration agreements covering personal injury or wrongful death claims against nursing homes unenforceable.<sup>298</sup> The court concluded that Congress did not intend the FAA to apply to such claims.<sup>299</sup>

Other judges have shown their discontent more indirectly. In *Casarotto v. Lombardi*,<sup>300</sup> the Montana Supreme Court refused to apply the U.S. Supreme Court's FAA preemption rules.<sup>301</sup> That court upheld a state law that made arbitration agreements unenforceable unless conspicuous notice of arbitration was typed on the first page of the contract.<sup>302</sup> While Supreme Court precedents treat such state laws as preempted for targeting arbitration, the Montana judges decided that the state statute did not undermine FAA policies or goals by making

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unconscionability). See also Paul T. Milligan, *Who Decides the Arbitrability of Construction Disputes?*, 31 CONSTRUCTION LAW., at 23 n.4 (2011) (noting that the Alabama chief justice in *Selma Med. Ctr. Inc. v. Fontenot*, 824 So.2d 668 (Ala. 2001), stated that "the Supreme Court had 'unconstitutionally expanded the boundaries of the Federal Arbitration Act' and 'defiantly concluded that the FAA still did not apply in state courts notwithstanding the Supreme Court's views'" (quoting Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of the Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1433 (2008)).

294. See *infra* notes 295–311 and accompanying text.

295. 724 S.E.2d 250, 263 (W. Va. 2011), *vacated by* *Marmet Health Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

296. See *id.* at 263 ("[A]fter considering the history and purposes of the FAA, we determine that Congress did not intend for the FAA to apply to arbitration clauses in pre-injury contracts, where a personal injury or wrongful death occurred after the signing of the contract.").

297. *Id.* at 279.

298. *Id.* at 292.

299. *Id.* Although the Supreme Court of Appeals of West Virginia acknowledged that the state law was preempted to the extent that it nullified any arbitration provision in a nursing home contract, it concluded that Congress did not intend the FAA to apply to predispute arbitration agreements covering personal injury and wrongful death cases arising under nursing home contracts. *Id.*

300. 886 P.2d 931 (Mont. 1994), *rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1995).

301. *Id.* at 938–39. In doing so, the court argued that its decision should not offend Supreme Court precedent:

Presumably, therefore, the Supreme Court would not find it a threat to the policies of the Federal Arbitration Act for a state to require that before arbitration agreements are enforceable, they be entered knowingly. To hold otherwise would be to infer that arbitration is so onerous as a means of dispute resolution that it can only be foisted upon the uninformed. That would be inconsistent with the conclusion that the parties to the contract are free to decide how their disputes should be resolved.

*Id.* at 939.

302. *Id.*

sure that arbitration agreements were made knowingly.<sup>303</sup> When the Court remanded this decision for reconsideration in light of an intervening precedent,<sup>304</sup> the Montana judges distinguished that case and stuck to their guns.<sup>305</sup> This defiance led to a second grant of certiorari and reversal.<sup>306</sup> Such recalcitrance is not constitutionally sound,<sup>307</sup> and it cannot operate as a long-term solution. The Court can readily grant certiorari in cases of resistance and overrule them, thereby forcing compliance.

Businesses know that the Court is keen on arbitration, so they are incentivized to challenge lower court rulings that do not go their way. Furthermore, the Court is accommodating these challenges by regularly granting certiorari to petitions alleging that judges have strayed from the Court's precedents. *Fowler v. CarMax, Inc.*<sup>308</sup> provides another example.<sup>309</sup> In this case, CarMax complained that the California courts were not following Court precedents that held that courts cannot weigh the effects of a class action ban on workers' employment law claims prior to enforcing the prohibition.<sup>310</sup> The Court granted CarMax's petition for certiorari, vacated the California court of appeal decision, and

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303. *See id.* at 938–39. The Supreme Court of Montana focused on the principles guiding the Court's precedent in *Volt Information Sciences, Inc.*, namely that the FAA did not preempt the entire field of arbitration, that contract interpretation is generally a state law issue, and that arbitration agreements should be entered into knowingly. *Id.* Because the Montana law targeted arbitration to promote one of its virtues, the court decided it was not preempted. *Id.*

304. After the Montana Supreme Court decided *Casarotto v. Lombardi*, the Supreme Court decided *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). This case dealt with an Alabama statute that made predispute agreements unenforceable, and a lower court ruling that the FAA did not apply to the parties' termite contract because the transaction was essentially a local one and not interstate. *Id.* at 268–70.

305. *See Casarotto*, 901 P.2d at 599. Besides demonstrating how unrelated the issues were in their case and the Court's intervening ruling in *Dobson*, the judges took a jab at the Court by noting that the *Dobson* decision simply extolled the virtues of arbitration based on guidance from the American Arbitration Association. *Id.*

306. *See Doctor's Assocs, Inc. v. Casarotto*, 517 U.S. 681, 689 (1996).

307. The Supremacy Clause requires all judges to follow the rules laid down by the U.S. Supreme Court. *See U.S. CONST.* art. VI, cl.2. The clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

308. No. B238426, 2013 Cal. App. Unpub. LEXIS 2159 (Cal. Ct. App. Mar. 26, 2013), *vacated by* 134 S. Ct. 1277 (2014).

309. *Id.* at \*25 (reversing a trial court order compelling arbitration and allowing a class action to proceed). *See also infra* note 311 and accompanying text (documenting the Court's reversal of the California Court of Appeals's decision).

310. *See* Petition for a Writ of Certiorari at 13, *CarMax Auto Superstores Cal., LLC v. Fowler*, 134 S. Ct. 1277 (2014) (No. 13-439), 2013 WL 5553442, at \*13.

remanded it for reconsideration, in light of its recent precedents.<sup>311</sup> These grants of certiorari demonstrate that businesses and the Court are vigilantly guarding the FAA precedents, making them difficult to circumvent by judicial fiat.

### B. Court Override

Another possibility for relief can be found in the Justices' disagreement about the FAA's applicability to the states.<sup>312</sup> This could be achieved were the Court to overrule its decision in *Southland Corp. v. Keating*,<sup>313</sup> which held that the FAA applies in both federal and state courts.<sup>314</sup> This single override can open space for states to regulate arbitration agreements that include obstacles to vindicating legal rights. There is some judicial support for such an override as evidenced by Justice Scalia's declaration that he stands ready to join other Justices to do just that.<sup>315</sup> Justice Thomas has also expressed that the FAA does not apply to state courts,<sup>316</sup> adding that businesses' reliance on arbitration policies is not an "unacceptably high" price to pay for correcting *Southland*.<sup>317</sup>

Other Justices frustrated with the Court's FAA precedents can join these Justices to overrule *Southland*. But while the Court override may be efficient, there are reasons to doubt that the Court itself will scale back its arbitration rules. The fact is that stare decisis provides an effective mask for refusing to overrule even wrongly decided cases.<sup>318</sup> Justice O'Connor cited this principle for her

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311. See *CarMax Auto Superstores Cal., LLC v. Fowler*, No. 13-439, 2014 U.S. LEXIS 1611 (Feb. 24, 2014) (granting review to and vacating and remanding the appellate court decision). The California Supreme Court got the message, as in *Iskanian v. CLS Transportation Los Angeles, LLC*, the state's highest court reversed state policy by ruling that class action bans are enforceable. 327 P.3d 129, 142 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). Lower courts are also falling in line. See, e.g., *Franco v. Arakelian Enters., Inc.*, 234 Cal. App. 4th 947, 965-66 (Feb. 25, 2015), *modified*, (Cal. Ct. App. Mar. 11, 2015) (en banc), *amended*, (Wash. Dec. 10, 2013), *reconsideration denied* (Wash. Dec. 12, 2013), *cert. denied*, 134 S. Ct. 2821 (2014) (holding that a class action ban for wage and hour claims in an arbitration agreement is enforceable).

312. Some Justices have argued that Congress did not intend the FAA to apply to the states. See *Southland Corp. v. Keating*, 465 U.S. 1, 21-22 (1984) (O'Connor and Rehnquist, JJ., dissenting) (analyzing Section 2 of the FAA and noting that the provision "does not, on its face, identify which judicial forums are bound by its requirements"). Others have argued for a narrower interpretation of the FAA's reach. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124 (2001) (Stevens, Ginsburg, and Breyer, JJ., dissenting) (agreeing that the "parsimonious construction of § 1 of the [FAA] is not consistent with [the Court's] expansive reading of § 2").

313. 465 U.S. 1 (1984).

314. *Id.* at 10, 16.

315. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting).

316. See *id.* at 283-84 (Thomas, J., dissenting).

317. See *id.* at 295.

318. This principle that seeks to uphold Court precedents unless special justification is shown, has particular force in the area of statutory construction. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (noting that while Court precedent is not "sacrosanct," overturning precedent usually requires extraordinary circumstances). For a discussion of the effect of stare

change of heart about overruling *Southland*.<sup>319</sup> In the case of arbitration jurisprudence, stare decisis involves more than businesses' reliance interests that have adopted arbitration policies.<sup>320</sup> It also implicates the Court's selfish but necessary drive to reduce judicial workload.<sup>321</sup>

The problem of overcrowded dockets and lengthy delays has plagued the judiciary for some time,<sup>322</sup> and the Justices recognize that the arbitral forum provides significant caseload relief.<sup>323</sup> Every year, the various arbitration agencies handle thousands of cases that may otherwise end up in courts.<sup>324</sup>

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decisis on wrongly decided cases, *see generally* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

319. Justice O'Connor changed her mind ten years after condemning the Court in the *Southland* case. *See Allied-Bruce*, 513 U.S. at 283–84 (O'Connor, J., concurring). She blamed her changed attitude on stare decisis and the increased reliance on arbitration to settle disputes, essentially concluding that forced arbitration works. *Id.* (noting that while “Congress never intended the [FAA] to apply in state courts, and that [the] Court has strayed far afield,” and “[w]ere we writing on a clean slate, I would adhere to that view,” because more than a decade had gone by since *Southland*, other cases have added to the body of law stemming from that case, and “parties have undoubtedly made contracts in reliance” on that precedent, “considerations of stare decisis” are persuasive).

320. In addition to the usual considerations that support upholding precedents, the Court has noted that “private parties have likely written contracts relying upon *Southland* as authority.” *See Allied-Bruce*, 513 U.S. at 272. Other factors that favor upholding *Southland* were congressional inaction on the decision, its practical workability, and the absence of later cases or other changes eroding its principles. *See id.*

321. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (citing litigation burden on the courts, among other things, as justification for reading the FAA broadly to cover most employment disputes).

322. In 1982, Chief Justice Warren E. Burger wrote:

[F]or at least the past 20 years there has been a slowly, all too slowly, developing awareness that the traditional litigation process has become too cumbersome, too expensive, and also burdened by many other disadvantages. In 1976 we took note of these problems in commemorating the 70th anniversary of Roscoe Pound's indictment of the American judicial and legal systems. . . . It is now clear that neither the federal nor the state court systems are capable of handling all the burdens placed upon them.

*See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (Mar. 1982). Caseloads continue to expand even as more cases are shuttled to arbitration. *See Judicial Caseload Indicators—Judicial Business 2014*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/statistics-reports/judicial-caseload-indicators-judicial-business-2014> (last visited Sept. 18, 2015) (reporting that between 2005 and 2014, filings in U.S. district courts increased from 253,273 to 295,310).

323. *See* Burger, *supra* note 322 (noting that in one pilot project in Philadelphia, 12,000 of about 16,000 civil cases were resolved by arbitration in one year). *See also* Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 19 (1983) (stating that “[a] promising development, perhaps accelerating as legal fees increase, is the attention now given to out-of-court dispute resolution through counseling, mediation, arbitration and other devices”).

324. *See* FED. MEDIATION & CONCILIATION SERV., 2014 ANNUAL REPORT 1, 3 (2014), [https://www.fmcs.gov/wp-content/uploads/2015/07/FOIA\\_FY\\_2014\\_Annual\\_Report.pdf](https://www.fmcs.gov/wp-content/uploads/2015/07/FOIA_FY_2014_Annual_Report.pdf) (reporting that the agency's arbitrators decided more than 2,100 labor cases in fiscal year 2014). While private arbitration service providers are not publishing or releasing the specific number of arbitrations they

Many high court justices have been outspoken about the need to move more disputes to the arbitral forum,<sup>325</sup> and they see claims that involve small sums as particularly well-suited for this.<sup>326</sup> Because vulnerable populations such as employees and consumers are the typical small claimants, their claims now face the harshest assaults from the Court's FAA jurisprudence. This practical need to reduce judicial workload stands as a major obstacle to getting a majority of Justices to agree to overrule one or more of the FAA precedents.

### C. Congressional Override

A third strategy that has been employed to reverse the Court's arbitration precedents is the congressional override.<sup>327</sup> The Court's wide-ranging embrace of arbitration agreements despite their negative impact on weak parties' legal rights has triggered successive congressional initiatives.<sup>328</sup> The latest attempt at congressional override is a bill titled the Arbitration Fairness Act of 2013 (AFA).<sup>329</sup> This senate bill, introduced by sixteen democrats, seeks to undo most of what the Court has interpreted the FAA to require.<sup>330</sup> Specifically, it seeks to make invalid and unenforceable predispute arbitration agreements for

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handle yearly, there is evidence that it ranges in the thousands. See *About JAMS, JUDICIAL ARBITRATION & MEDIATION SERVS.*, [http://www.jamsadr.com/aboutus\\_overview/](http://www.jamsadr.com/aboutus_overview/) (last visited Sept. 25, 2015) (noting that JAMS "handles an average of more than 12,000 cases per year"). The agency does not separate mediations from arbitrations. *Id.*

325. In 1981, when some Justices were still insisting that statutory rights were independent, non-waivable individual rights, Chief Justice Burger and Justice Rehnquist flatly stated the case for the business community and the judiciary, remarking that all three branches of government have approved pilot programs to remove small claims from the courts. See *Barrentime v. Ark.-Best Freight Sys.*, 450 U.S. 728, 746 (1981) (Burger, C.J., and Rehnquist, J., dissenting). Justices Burger and Rehnquist stated that the Court's decision to guarantee the statutory court forum for wage and hour claims ignores "the objectives of Congress, the agreement of the parties, and the common sense of the situation. It moves toward making federal courts small claims courts contrary to the constitutional concept of these courts as having special and limited jurisdiction." *Id.* Years later, Justice O'Connor also disclosed the influence of business efficiency on her interpretation of the FAA. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283-84 (1995) (O'Connor J., concurring). She wrote that the reliance interests of businesses require approval of the Court's FAA preemption rules even if those rules stem from erroneous legal interpretations. *Id.* This sentiment was repeated by Justice Kennedy in his majority opinion in *Circuit City*. 532 U.S. at 123 (stating that the arbitration of employment disputes would promote the reliance interests of employers in alternative dispute resolution while relieving the courts of the burdens of such litigation). *Id.*

326. *Allied-Bruce*, 513 U.S. at 281 (noting that by not enforcing arbitration agreements, "the typical consumer who has only a small damages claim [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery").

327. See Sternlight, *supra* note 40, at 1643 (noting that "[e]ven in this most pro-arbitration era . . . Congress has the power to make claims nonarbitrable").

328. See generally Arbitration Fairness Act of 2013, S. 878, 113th Cong. (1st Sess. 2013) (providing that agreements to arbitrate certain types of claims are not enforceable); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (1st Sess. 2009) (providing the same).

329. See generally S. 878.

330. See generally *id.*



employment, consumer, antitrust, and civil rights claims, thereby reversing the Court's conclusion that only transportation employees are excluded from FAA coverage.<sup>331</sup> Further, it seeks to reverse the Court's conclusion that contracting parties can delegate validity and enforceability issues to an arbitrator by requiring court determination of such issues.<sup>332</sup> In addition, it prohibits unions from contracting to arbitrate their members' statutory or constitutional rights under state and federal laws.<sup>333</sup>

This partisan proposal for override, like previous attempts, has little chance of success, and various iterations of the proposal (including the 2013 House bill) have died in committee.<sup>334</sup> The FAA precedents benefit the most powerful players in American society, such as businesses and the judiciary, so it will be a herculean task to get them all reversed.<sup>335</sup> Pre-dispute arbitration agreements also produce efficiencies that modern businesses and the judiciary need,<sup>336</sup> so attempts at an override must accommodate these realities.

#### *D. A Legislative Proposal*

Because a policy that permits only powerful parties access to courts, and accommodates a denial of legal rights is not sustainable, a narrow legislative strategy that is palatable to legislators of both political parties is worth considering. A more tailored response could garner bipartisan support for a narrow amendment to the FAA.

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331. *See id.* § 402(a).

332. *Id.* § 402(b)(1).

333. *Id.* § 402(b)(2). The 2009 proposal exempted labor contracts. *See* H.R. 1020 § 4. However, the Supreme Court subsequently held in *14 Penn Plaza LLC v. Pyett* that unions can bargain away their members' statutory rights in arbitration agreements. *See* 556 U.S. 247, 274 (2009).

334. Bills to reverse the Court's FAA precedents have failed early in the legislative process. *See generally* H.R. 1020; S. 878. *See also* Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751, 775 n.130 (2015) (noting that the Arbitration Fairness Act of 2013 died in committee); Tanya M. Marcum & Elizabeth A. Campbell, *The Arbitration Seesaw: Federal Act Preempts General Law Thereby Restricting Judicial Review*, 47 VAL. U. L. REV. 965, 974 n.37 (2013) (noting that the Arbitration Fairness Act of 2009 died in committee).

335. *See generally* Sternlight, *supra* note 40, at 1649 (arguing that arbitration harms consumers since they do not "typically read or understand the [arbitration] clauses" and "limits the amount of pretrial discovery available to consumers and also limits their opportunity for appeal").

336. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280–81 (1995) (stating that arbitration is cheaper, faster, simpler, and more flexible than litigation); *Casarotto v. Lombardi*, 886 P.2d 931, 939–40 (Mont. 1994), *rev'd sub nom. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1995) (Trieweller, J., specially concurring) (noting that while arbitration allows national corporations to oppress weak parties, federal judges regard arbitration as a solution to their swollen dockets).

Instead of attempting a broad ban on predispute agreements to arbitrate, legislators should propose a narrow amendment to the FAA. The FAA can be amended to include a definition of “arbitration”<sup>337</sup> that states, for example:

*Arbitration is a consensual dispute resolution process agreed to by the parties for its benefits of speed, informality, lower costs, or expert neutrals, that are not possible in the courts. Any provision or device that detracts from these attributes of arbitration are void. For example, class action bans, forum cost allocation, distant venue, and reservation of court forum provisions that interfere with or prolong the adjudication of claims are void, while practices that promote efficient resolution such as reasonable limits on discovery, statute of limitations, and appellate review, among others, are presumptively valid.*

This definition will codify the undisputed attributes of arbitration, and give each attribute equal importance. It will also account for new developments and unfair practices that the Court has endorsed as attributes of arbitration protected by the FAA. This is necessary because arbitration has to be a process that is cheaper, speedier, and less formal than courts. Efficiency should be gained from having expert neutrals and fair rules on costs, speed, and informality. A court should not be able to use any one of these attributes to trump another or all others. Courts must apply these attributes together to decide whether an implemented policy is an arbitration policy or merely an attempt at insulation from claims.

This narrow definition addresses these problems. For example, in *Circuit City Stores, Inc. v. Adams*,<sup>338</sup> the Court suggested that arbitration allows the parties to avoid the costs of litigation, and the parties traded the court forum in exchange for the speed, lower costs, and informality of arbitration.<sup>339</sup> But later in *American Express*, the Court ignored the reality that bilateral arbitration of antitrust claims would be more costly and protracted than class adjudication of those same claims in court.<sup>340</sup> This is a recurring problem in the Court’s FAA precedents.<sup>341</sup> In *AT&T Mobility LLC v. Concepcion*,<sup>342</sup> the Court ruled that the expeditious results associated with informality is arbitration’s “principal advantage,”<sup>343</sup> while in *Dean Witter Reynolds Inc. v. Byrd*,<sup>344</sup> the Court stated

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337. The FAA does not define “arbitration.” See *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997).

338. 532 U.S. 105 (2001).

339. *Id.* at 123.

340. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

341. Gilles, *supra* note 35, at 394–95.

342. 131 S. Ct. 1740 (2011).

343. *Id.* at 1751. See also *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (holding that the primary objective of an agreement to arbitrate is a speedy resolution of the dispute).

344. 470 U.S. 213 (1985).

that expeditious results is not an overriding goal.<sup>345</sup> However, making thousands of consumers or workers individually arbitrate the same claim makes the arbitration process slower and costlier than a single class action in court for the same claim.<sup>346</sup> Courts should not be allowed to consider and rely solely on the efficiency benefits to the party who drafted the arbitration policy in deciding its enforceability.

Arbitration agreements are consonant with the FAA only when they deliver a forum that is expeditious, neutral, and fair. So a court should be precluded from enforcing an arbitration policy that erects obstacles to vindication. In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>347</sup> the Court ruled that a forum change to arbitration does not affect substantive rights.<sup>348</sup> Yet in *American Express*, the effect of the Court's holding was to suggest that a fair opportunity to vindicate legal rights is not a central tenet of the FAA.<sup>349</sup> In a court action, consumers and workers do not face class bans, high forum cost, and distant venue provisions that make it impracticable to pursue their legal rights.<sup>350</sup> Arbitration must therefore reduce rather than add obstacles to vindication, and any policy that adds cost or complexity to pursuing claims should be regarded as antithetical to the FAA and therefore unenforceable.

The proposed definition of arbitration therefore guarantees that arbitration will be pursued for its speed, lower cost, informality, and expert neutrals. It also allows the courts to distinguish between laws that target arbitration to promote its attributes, and those that outright reject arbitration as unsuitable for certain types of claims. So, for example, a state law that prohibits bans on class arbitration when class resolution is more efficient can be upheld as consistent with the FAA goal of speedy resolution. Also, by making all the attributes of arbitration equally important, it eliminates the arbitrary prioritization of consent over speed, for example, in any particular case. The definition also consciously leaves out the word "voluntary," in recognition of the fact that in most cases today, consent is not voluntarily given.<sup>351</sup> Nonetheless, the process is not impaired because one party had no meaningful choice in agreeing to an arbitration policy.

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345. *Id.* at 221 (holding that when elements of consent and speed collide, consent must trump speed).

346. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1759 (2011) (Breyer, J., dissenting).

347. 500 U.S. 20 (1991).

348. *Id.* at 29.

349. *Am. Express v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013). *See also supra* notes 189–200 (discussing how the courts' application of the FAA has overtaken rights to sue under the FLSA).

350. *See generally Sternlight, supra* note 40, at 1641–42 (discussing the disadvantages of arbitration pursuant to certain companies' arbitration agreements).

351. *See supra* note 268 and accompanying text.

By promulgating a national definition of arbitration, Congress can reinforce the FAA's and states' endorsement of arbitration, while curtailing current abusive practices. This will protect weak parties from ceding their legal rights to partisan policies they must accept or are unable to challenge because of a lack of alternatives or limited financial resources. It will also significantly reduce litigation challenging arbitration policies on mutuality, unconscionability, and other grounds, thereby further reducing judicial caseload.

#### IV. CONCLUSION

Tens of millions of low-wage workers and consumers do not have the basic income they need for daily necessities.<sup>352</sup> Arbitration, an instrument thought of as promoting efficiency and fairness,<sup>353</sup> has become a choice mechanism for robbing workers and consumers of what little they have.<sup>354</sup> This reality was made possible by the Supreme Court, and will only continue unless Congress does something.<sup>355</sup> Congress can limit the Court's erroneous FAA jurisprudence by enacting national standards for arbitration agreements. Because arbitration is now an indispensable part of the adjudication process,<sup>356</sup> broad prohibitions of pre-dispute arbitration agreements are not necessary or feasible. However, bipartisan support should be available for arbitration rules that anchor the forum in speed, fairness, and reduced costs for all parties.

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352. See David Lazarus, *Wage Stagnation Puts the Squeeze on Ordinary Workers*, L.A. TIMES (Dec. 28, 2014), <http://www.latimes.com/business/la-fi-lazarus-20141228-column.html> (discussing how wages have not kept pace with inflation).

353. See *supra* note 7 and accompanying text.

354. See *supra* note 247 and accompanying text.

355. See *supra* notes 319–20 and accompanying text.

356. See *supra* notes 319–20 and accompanying text.