ARBITRATION AS DELEGATION

DAVID HORTON*

Hundreds of millions of consumer and employment contracts include arbitration clauses, class arbitration waivers, and other terms that modify the rules of litigation. These provisions ride the wake of the Supreme Court's expansive interpretation of the Federal Arbitration Act (FAA). For decades, scholars have criticized the Court's arbitration jurisprudence for distorting Congress's intent and tilting the scales of justice in favor of powerful corporations. This Article claims that the Court's reading of the FAA suffers from a deeper, more fundamental flaw: It has transformed the statute into a private delegation of legislative power. The nondelegation doctrine forbids Congress from allowing private actors to make law unless they do so through a process that internalizes the wishes of affected parties or that is subject to meaningful state oversight. The FAA as construed by the Court violates this rule. First, companies have invoked the statute to create a parallel system of civil procedure for consumer and employment cases. This river of privately made law not only washes away Congress's procedural rulemaking efforts but dilutes the potency of substantive rights. Second, although businesses ostensibly impose these rules through the mechanism of contracting—a process normally rooted in mutual consent—the Court's arbitration case law deviates from traditional contract principles. It funnels consumers and employees into arbitration even when they truthfully claim that they did not agree to arbitrate. Third, despite the fact that the FAA as enacted mandates robust judicial review of privately made procedural rules, the Court has all but abolished this safeguard. This Article concludes that the Court should recognize that the FAA as interpreted raises grave private delegation issues and should thus limit the statute.

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INTRODUCTION

Congress passed the Rules Enabling Act (REA) in 1934.[1] The REA, which authorized the Supreme Court to create a single, transsubstantive procedural regime for federal courts, reflected the ethos of the New Deal: faith in centralized government as a guarantor of social justice.[2] The Court delegated its task to an Advisory Committee,[3] which set out to draft a procedural code that limited the impact of process itself. By abolishing rigid pleading standards and fusing law and equity, the Committee sought "to get rid of technicali-

[1] Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)).

[2] *See* Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981) ("The federal rules ultimately were passed as New Deal legislation."); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272–80 (1997) (describing influence of New Deal principles such as nationalism, expertise, and social reform on REA).

[3] Appointment of Committee To Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1935).

ties and simplify procedure and get to the merits."[4] Its handiwork, the Federal Rules of Civil Procedure, took effect in 1938.[5]

Three-quarters of a century later, procedural rules in many cases stem from a different federal statute—one that turns the REA's objectives on their head. In 1925, Congress passed the Federal Arbitration Act (FAA), which provided that contracts to arbitrate disputes would be enforceable as a matter of federal law.[6] These agreements were hardly revolutionary: Merchants and trade groups had long employed them to settle conflicts quickly and under industry norms.[7] However, in the last two decades, arbitration has shed its humble, communitarian origins. The Court has dramatically expanded the scope of the FAA.[8] Arbitration has become "the new litigation," increasingly resembling a parallel judicial system.[9] Arbitration clauses appear in hundreds of millions of consumer and employment contracts.[10] Businesses do not merely use these provisions to funnel cases away from the courts; rather, they seize the opportunity to redefine the parameters of the dispute resolution process—from the scope of discovery, to the right to bring a class action, to the payment of fees and costs.[11] As the touchstone for this massive private procedural rulemaking, the FAA has emerged as the REA's shadowy twin.

Arbitration's ascendancy has sparked intense debate. Consumer and employment arbitration has its staunch defenders. Indeed, Justices across the political spectrum fueled the Court's initial expan-

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[4] Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2179 (1989) (quoting *Rules of Civil Procedure for the District Courts of the United States: Hearings on H.R. 8892 Before the H. Comm. on the Judiciary*, 75th Cong. 24 (1938) (statement of William D. Mitchell, Chairman, Advisory Committee)); *see also* Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 154 (1948) (arguing that proper role of procedure is "an aid to the understanding of a case, rather than a series of restrictions on the parties or the court").

[5] *See* Rules of Civil Procedure for the Dist. Courts of the U.S., 308 U.S. 645 (1937) (transmitting Federal Rules of Civil Procedure to Congress).

[6] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2006)).

[7] *See, e.g.*, Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 135 (2002) (describing rise of arbitration among merchant and trade groups).

[8] *See infra* Part I (tracing this development).

[9] Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 8.

[10] For example, in a recent petition for a writ of certiorari, AT&T acknowledged that its arbitration clauses were embedded in "tens (if not hundreds) of millions" of wireless service agreements. Reply Brief for the Petitioner at 1, AT&T Mobility LLC v. Concepcion, No. 09-893 (U.S. May 3, 2010), 2010 WL 1787380.

[11] *See infra* notes 132–41 and accompanying text.

sion of the FAA in the 1980s.[12] Moreover, arbitration arguably reduces the judiciary's workload[13] and reduces litigation costs, allowing companies to offer lower prices and higher wages.[14] On the other hand, few niches on the Court's docket have provoked such sustained criticism. Scholars and judges have questioned the accuracy of the Court's interpretation of the FAA[15] and have argued that companies use fine-print dispute-resolution terms in a clandestine effort to tilt the scales of justice.[16]

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[12] For instance, in *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984), the Court held that the FAA preempts state law. Chief Justice Burger's majority opinion won support from two other Nixon appointees (Justices Powell and Blackmun), a moderate Kennedy appointee (Justice White), and two liberal icons (Justices Marshall and Brennan).

[13] *See, e.g.*, Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989) (describing FAA as "therapy for the ailment of the crowded docket"); *Chief Justice Urges Greater Use of Arbitration*, N.Y. TIMES, Aug. 22, 1985, at A21 (quoting then–Chief Justice Warren Burger as saying "[a] host of new kinds of cases have flooded the courts: students seeking to litigate a failing mark, professors litigating denial of academic tenure and another great load on the courts, welfare recipients").

[14] *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("[A]rbitration . . . is usually cheaper and faster than litigation . . . ." (quoting H.R. REP. NO. 97-542, at 13 (1982))). Under basic economic theory, both contractual partners can benefit from arbitration. *See* Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 5–7 (1995) (describing benefits that parties might derive from ex ante alternative dispute resolution agreements). Accordingly, "individuals may be better off agreeing even to one-sided arbitration clauses instead of retaining their right to go to court, if the resulting cost savings are passed on to consumers through reductions in the price of goods and services [or] to employees through higher wages." Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741; *see also* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 ("[C]ompetition forces businesses to pass their cost-savings on to consumers.").

[15] *See, e.g.*, *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) ("[T]he 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."); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 ("The Supreme Court has created a monster.").

[16] *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 ("[A]rbitration and forum selection clauses in contracts of adhesion are sometimes a method for stripping people of their rights." (emphasis omitted)); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1248 (2009) (calling arbitration "do-it-yourself tort reform"); Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1657–58 (2006) ("[S]ome firms . . . plac[e] unfavorable terms in small print, or perhaps in the middle of a sea of fine print, to reduce the likelihood that consumers will read the terms . . . ."); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648 (2005) ("Empirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read.").

Despite these critiques, the Court continues to expand the ambit of the FAA. In May 2010, the Court held in *Stolt-Nielsen v. AnimalFeeds International Corp.* that the statute forbids arbitrators from hearing class actions if the parties' contract is "silen[t]" on whether such a procedure is permissible.[17] A month later, in *Rent-A-Center, West, Inc. v. Jackson*, the Court upheld a "delegation provision"—a clause in an employment contract giving the arbitrator, rather than courts, the exclusive right to resolve the very question of whether the arbitration clause is valid.[18] And in November 2010, the Court heard oral arguments in *AT&T Mobility LLC v. Concepcion*, which presents the issue of whether the FAA prohibits lower courts from striking down class arbitration waivers under the unconscionability doctrine in certain circumstances.[19]

In this Article, I argue that the Court's interpretation of the FAA suffers from a flaw that is deeper and more fundamental than it's fidelity to congressional intent or its fairness: It allows private parties to engage in lawmaking. Article I, section 1 of the Constitution vests all legislative power in Congress.[20] The nondelegation doctrine enforces this monopoly by prohibiting Congress from transferring the right to make law to another branch of government without articulating an "intelligible principle" to limit that branch's discretion.[21] Yet different, even more forceful rules apply when the recipient of lawmaking power is a private party. Under the private nondelegation doctrine, Congress cannot let private actors make law unless they do so through a process that internalizes the wishes of affected parties or is subject to meaningful state oversight.[22]

The Court's interpretation of the FAA does not comply with this constitutional mandate. It gives companies broad discretion to create elaborate procedural codes. Spurred on by the Court's pronouncement that the statute embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or pro-

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[17] 130 S. Ct. 1758, 1776, 1775 (2010).

[18] 130 S. Ct. 2772 (2010).

[19] 130 S. Ct. 3322 (2010) (granting certiorari); *see also* Supreme Court of the U.S., *Hearing List for Session Beginning October 2010*, SUPREME COURT OF THE UNITED STATES 4 (2010), http://www.supremecourt.gov/oral_arguments/hearinglists/HearingList-October2010.pdf (scheduling oral argument for November 9, 2010).

[20] U.S. CONST. art. I, § 1.

[21] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

[22] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (striking down statute for permitting some coal producers and miners to set working conditions for all coal producers and miners in their region); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1437–40 (2003) (arguing that cases subsequent to *Carter* continued to emphasize significance of government review with respect to private delegation).

cedural policies to the contrary,"[23] businesses have developed their own private procedural regimes for consumer and employment cases. This river of privately made law is wide, covering entire industries, and deep, full of complex regulations. And unlike other private delegations, the FAA as interpreted by the Court does not just allow private parties to engage in law*making*—it allows them to engage in law *revision*, abrogating Congress's procedural rulemaking duties and eroding substantive statutory and common law rights.

Admittedly, the Court has not invoked the nondelegation doctrine for decades—inspiring the quip that it should be called the "delegation non-doctrine."[24] In addition, at first glance, the nondelegation rule does not seem to apply to the FAA. First, Congress has already delegated its power to make procedural rules to the Court through the REA, and no one seriously claims that this arrangement is unconstitutional.[25] Second, although the nondelegation rule bars private parties from making law through a process that excludes affected parties, arbitration supposedly arises out of a consensual, contractual relationship.[26] Third, the Court has upheld delegations if Congress has reserved some modicum of state control over the private rulemaker.[27] The FAA appears to meet this requirement: It requires judges to resolve disputes about both the enforceability of an arbitration clause and the ultimate arbitral award.[28] Finally, the nondelegation doctrine bars private actors from making substantive law, not procedural rules. Perhaps for these reasons, no judge or scholar of whom I am aware has examined whether the FAA raises a nondelegation issue.[29]

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[23] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[24] Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1036 (2007).

[25] *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941) (upholding REA as constitutional); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 907 (1999) (explaining that *Sibbach*'s holding is not "up for grabs").

[26] *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration . . . is a matter of consent, not coercion . . . .").

[27] *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 400–01 (1940) (upholding delegation on grounds that government was actively involved in creation of rules).

[28] 9 U.S.C. §§ 2, 9–11 (2006).

[29] *See* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 13 n.38 (1997) (noting possibility of nondelegation problem only in passing). The relationship between arbitration and delegation is not completely foreign terrain. Outside of the FAA context, state and federal statutes sometimes raise nondelegation issues by creating rights that can be enforced only through arbitration. *See* Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 444–45 (1989) (describing three broad categories of disputes in which federal agencies are authorized or

Nevertheless, I contend that the FAA as construed by the Court presents a strong case for the revival of nondelegation principles. First, Congress's transfer of rulemaking power to the Court through the REA is subject to a range of accountability mechanisms that do not govern the private creation of procedural rules. Second, although contracting is usually rooted in mutual consent, the Court's arbitration case law deviates from contract law in the most elemental way: It shunts consumers and employees into arbitration even when they truthfully claim that they did not agree to arbitrate. Third, although the FAA mandates judicial review of arbitration clauses, the aptly named delegation clause—as fortified by *Rent-A-Center*—all but eviscerates this safeguard by giving arbitrators the authority to decide whether an arbitration clause is valid.[30] Finally, the policies underlying the nondelegation doctrine militate in favor of applying it to the production of procedural rules. The nondelegation doctrine serves two purposes: It bars private actors from creating legislation that furthers their own interests, and it ensures congressional transparency.[31] By allowing private parties to wield Congress's procedural rulemaking authority, the FAA creates a perverse dynamic in which Congress creates substantive rights and then permits firms to eliminate these rights through the under-the-radar mechanism of procedural reform. These are precisely the evils against which the private nondelegation rule guards.

This Article contains three parts. Part I describes the rise of arbitration hegemony. It reveals that the Court's expansion of the FAA's reach has given private parties broad discretion to create procedural rules. It then describes how the Court has construed the statute in a manner that deviates from black letter contract principles,

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required by statute to employ arbitration); *see also* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 592–93 (1985) (holding that statute requiring arbitration in administrative proceedings does not violate Article III, but declining to analyze Article I nondelegation issue because parties did not brief it). In addition, plaintiffs have occasionally brought nondelegation challenges against statutes that require arbitration of labor disputes. *See, e.g.*, Int'l Bhd. of Elec. Workers, Local Union No. 53 v. City Power & Light Dep't, 129 S.W.3d 384, 391 (Mo. Ct. App. 2003) (reading collective bargaining agreement narrowly to avoid interpretation that would raise nondelegation concerns); *see also* Hays Cnty. Appraisal Dist. v. Mayo Kirby Springs, Inc., 903 S.W.2d 394, 397 (Tex. App. 1995) (recognizing that statute requiring specialized arbitration of property tax valuation without allowing for effective judicial review raised nondelegation concerns under state constitution).

[30] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2779–81 (2010); *see also infra* Part II.C.3 (conceptualizing delegation clauses as freestanding miniarbitration clauses within larger arbitration clauses that can be challenged on only extraordinarily narrow grounds).

[31] *See infra* Part II.B.1 (describing importance of "neutrality" and "transparency" values in nondelegation jurisprudence).

permits the unilateral, nonconsensual imposition of arbitration on consumers and employees, and reduces judicial oversight of arbitration clauses. Part II establishes the parameters of the private nondelegation doctrine. It explains that the Court's reading of the FAA is incompatible with this rule because it permits private parties to alter procedural and substantive rights through a process that neither internalizes the wishes of affected parties nor is subject to meaningful state review. Part III explains how the Court could assuage nondelegation concerns by reconsidering the interplay between arbitration and substantive rights, the rules governing the delegation clause, and the FAA's preemptive ambit.

I
THE RISE OF PRIVATE PROCEDURAL RULEMAKING

Congress passed the FAA in order to provide a forum for merchants to settle fact-bound breach of contract disputes.[32] Gradually, however, the Court transformed the statute into something else: an invitation to the business community to create a parallel procedural regime for consumer and employment cases. In this Part, I describe this metamorphosis, emphasizing three themes that dovetail with my later normative claims. First, the FAA as construed by the Court gives private parties tremendous power. Because it makes arbitration clauses enforceable with few restrictions, it is, in essence, a hollow shell of a statute that companies can fill with their own customized procedural rules. Second, the Court's reading of the FAA has warped the contract law around arbitration. It requires consumers and employees to arbitrate claims even when black letter contract principles would not. Third, although the FAA originally tasked judges with policing arbitration clauses for fairness, the Court has allowed drafters to cut judges out of the loop.

A. The FAA as Enacted

Arbitration has a venerable commercial pedigree. Yet in eighteenth-century England, courts became skeptical of extrajudicial dispute resolution.[33] They invented special rules, such as the ouster

[32] *See, e.g.*, Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) ("[The FAA] is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like.").

[33] *See, e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599–600 (1997) (noting that judges

and revocability doctrines, to nullify contracts to arbitrate.[34] These unique antiarbitration measures held sway for the next three hundred years, in both England and the United States.[35]

Finally, in 1925, business groups and the American Bar Association persuaded Congress to pass the FAA to eliminate judicial hostility to arbitration.[36] The FAA's centerpiece, section 2, admonishes courts that only traditional contract principles, such as fraud, duress, and unconscionability—and not merely a generalized distrust of arbitration—can be grounds to invalidate an arbitration clause: "[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[37]

However, the FAA did not completely eliminate judges from the equation. If a dispute arises about the scope or validity of the arbitration clause, section 4 tasks courts with resolving the matter.[38] That provision states that if the "making of the arbitration agreement" is "in issue," then "the court shall proceed summarily to the trial thereof."[39] Section 4 allows a court to grant a motion to compel arbitration only if it is "satisfied that the making of the agreement for arbitration . . . is not in issue."[40]

Although Congress's intent remains fiercely contested in the literature, there is strong evidence that Congress wished to limit the FAA in three crucial ways. First, the vast majority of scholars believe that Congress understood the statute to be a federal procedural rule

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were either wary of quality of justice available in arbitration or—because they were paid on per case basis—protective of their own pocketbooks).

[34] Under the ouster doctrine, courts refused to enforce arbitration clauses on the grounds that they improperly ousted courts of their jurisdiction. *See* Kill v. Hollister, (1746) 95 Eng. Rep. 532 (K.B.) 532; 1 Wils. K.B. 129 ("[T]he agreement of the parties cannot oust this Court."). In a similar vein, under the revocability doctrine, agreements to arbitrate were "of [their] own nature countermandable." This feature allowed parties to ignore otherwise binding language and withdraw their consent to arbitrate at any time. Vynior's Case, (1609) 77 Eng. Rep. 597 (K.B.) 599; 8 Co. Rep. 81 b.

[35] *See, e.g.*, Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) ("[A]greements to oust the courts of the jurisdiction conferred by law are illegal and void."). *But see* Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 20 (2009) (surveying treatises and concluding that "English and American colonial courts were neither hostile nor blindly deferential to arbitration").

[36] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2006)); *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW 84–91 (1992) (describing how American Bar Association officials and businessmen successfully lobbied for FAA's enactment).

[37] 9 U.S.C. § 2 (2006).

[38] *Id.* § 4.

[39] *Id.*

[40] *Id.*

that neither applied in state court nor preempted state law.[41] Indeed, the FAA does not contain an express preemption clause, and its enforcement provisions (such as section 4) govern federal courts exclusively.[42] Likewise, the statute's legislative history indicates that it "relate[s] solely to procedure of the [f]ederal courts" and "is no infringement upon the right of each [s]tate."[43] In addition, as Ian Macneil has argued, the fact that the FAA passed unanimously belies the notion that Congress perceived it to be a substantive rule that deprived states of the right to regulate arbitration. Such a dramatic expansion of federal power would have provoked at least some congressional opposition.[44]

Second, Congress likely did not intend the FAA to cover employment agreements. Section 1 excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[45] The FAA did not contain this limi-

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[41] *See, e.g.*, MACNEIL, *supra* note 36, at 145 ("Congress[ ] limit[ed] the applicability of the statute both to federal court procedurally and interstate commerce substantively."); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 127–31 (2006) (arguing that Congress intended FAA to be procedural only and to apply only in federal courts); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 23–25 (2004) (asserting that Congress did not intend to preempt state law with FAA); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1154–57 (2002) (arguing that Supreme Court misinterpreted FAA when it held that FAA preempted state law).

[42] *See* 9 U.S.C. § 4 (describing mechanics of petitioning to compel arbitration in "any United States district court"); *see also id.* § 3 (allowing "any of the courts of the United States" to stay cases pending outcome of arbitration); *id.* § 7 (allowing parties to file petition in a "United States district court" to compel attendance at arbitration); *id.* §§ 9–11 (authorizing parties to enforce or challenge arbitral awards in "United States court").

[43] *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 37 (1924) [hereinafter *Joint Hearings*] (brief of Julius Henry Cohen, Member, American Bar Association); *see also id.* at 40 ("There is no disposition . . . by means of the [f]ederal bludgeon to force an individual State into an unwilling submission to arbitration enforcement."); H.R. REP. NO. 68-96, at 1 (1924) ("The bill declares that [arbitration] agreements shall be recognized and enforced by the courts of the United States.").

[44] MACNEIL, *supra* note 36, at 115–16. In a thoughtful critique, Christopher Drahozal argues that because Congress lacked power to regulate wholly intrastate transactions under the Commerce Clause in 1925, the FAA could not have applied to the states at the time of passage—which might explain the lack of opposition even if Congress understood the statute as applying in state court. *See* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 127–30 (2002). Even under this view, however, it is apparent that Congress assumed that the FAA would not apply broadly and thus set out to give arbitration only a modest foothold in a narrow band of transactions.

[45] 9 U.S.C. § 1 (2006).

tation when it was first introduced into Congress in 1923,[46] but union representatives complained that the statute, as it then stood, would compel enforcement of arbitration clauses in employment cases.[47] In a Senate Judiciary Subcommittee hearing, W.H.H. Piatt, a committed pro-arbitration reformer, responded to this concern by declaring that "[i]t is not intended that this shall be an act referring to labor disputes, at all."[48] Then–Secretary of Commerce Herbert Hoover proposed an amendment to ameliorate what he characterized as an "objection . . . to the inclusion of workers' contracts in the law's scheme."[49] Congress adopted the language of Hoover's suggestion almost verbatim in section 1.[50]

Third, and more generally, even a cursory review of the FAA's legislative history reveals that Congress did not want the statute to apply to contracts between parties with unequal bargaining power. Julius Henry Cohen, the lobbyist who drafted the statute, testified that the ouster and revocability doctrines were justified to the extent they prevented exploitation:

> [A]t the time [antiarbitration rules were] made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. And the courts said, "If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones." And that still is true to a certain extent.[51]

Cohen's acknowledgement that the rules he wanted to abolish helped to deter overreaching implies that he did not see the statute as presenting any such risks. Likewise, Senator Walsh of Montana asked whether the statute would apply to contracts that are not in fact voluntary because they are offered on a "take it or leave it" basis.[52] Piatt

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[46] *See Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) [hereinafter *Sales and Contracts*] (statement of W.H.H. Piatt, Chairman, Comm. of Commerce, Trade and Commercial Law, American Bar Association) (suggesting addition of language excluding seamen and workers in interstate and foreign commerce).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 14.

[50] *Compare id.* (reporting Hoover's proposal that Congress add words "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce"), *with* 9 U.S.C. § 1 ("[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

[51] *Joint Hearings*, *supra* note 43, at 15.

[52] *Sales and Contracts*, *supra* note 46, at 9.

replied that he "would not favor any kind of legislation that would permit . . . forcing a man to sign that kind of [sic] a contract."[53] Piatt then reiterated that an arbitration agreement is merely "a contract between merchants one with another, buying and selling goods."[54]

Admittedly, the FAA does not expressly limit its scope to bargained-for deals between relative equals. Then again, any such restriction would have been superfluous. When it was enacted, the FAA governed in two situations. First, because the statute was an exercise of Congress's Article III power to create rules for federal courts, it controlled in diversity cases—disputes between citizens of different states that satisfied the minimum amount-in-controversy requirement (then $3000).[55] At a time when a new car cost $290,[56] most consumer contracts would not have fallen within the statute. Second, because section 2 applies to "contract[s] . . . involving commerce," Congress arguably also drew upon its Commerce Clause authority.[57] During this period, however, Congress could not regulate wholly intrastate conduct.[58] As a result, regardless of whether the FAA emanated from Congress's Article III or Commerce Clause powers, it would have applied only to parties sophisticated enough to broker deals across state lines.

And indeed, the FAA lurked in relative obscurity for decades despite the centuries of common law it abrogated. Even after the Court expanded Congress's Commerce Clause power[59] following the New Deal, it refused to expand the scope of the FAA accordingly.[60] As late as 1962, judges declined to enforce arbitration clauses for the

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[53] *Id.* at 10 (correction in original); *see also* 65 CONG. REC. 1931 (1924) (statement of Rep. George S. Graham) (describing bill as applying only to "an agreement to arbitrate, when voluntarily placed in the document by the parties to it").

[54] *Sales and Contracts*, *supra* note 46, at 10.

[55] *See* MACNEIL, *supra* note 36, at 105.

[56] *See* KATHLEEN DROWNE & PATRICK HUBER, THE 1920s, at 245 (2004) (noting price of Model T Ford in 1925).

[57] 9 U.S.C. § 2 (2006). *Compare* Drahozal, *supra* note 44, at 163–64 (arguing that Congress enacted FAA under both its Article III and Commerce Clause powers), *with* Moses, *supra* note 41, at 120–21 (arguing that Congress acted primarily under its Article III authority and that references to Commerce Clause were merely "fall-back" justification).

[58] *See* Hammer v. Dagenhart, 247 U.S. 251, 272–73 (1918) (invalidating statute that prohibited child labor on ground that "labor" was not "commerce").

[59] *See* Wickard v. Filburn, 317 U.S. 111, 127–29 (1942) (finding that cumulative effect of purely intrastate activity can affect interstate commerce and trigger Congress's Commerce Clause power).

[60] *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200–02 (1956) (finding that employment contract between Vermont citizen and New York corporation did not "involv[e] commerce" and thus did not fall under FAA).

sole reason that both contracting parties were citizens of the same state.[61]

B. *The Separability Doctrine*

The first glimmer that arbitration would become the juggernaut it is today came in 1967, when the Court decided *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*.[62] In that case, Prima Paint executed a consulting agreement with Flood & Conklin that contained an arbitration clause. Later, Prima Paint sued, alleging that Flood & Conklin had procured the consulting agreement by fraud.[63] The issue before the Court was not the merits of Prima Paint's fraud claim, but the antecedent question of who—a judge or an arbitrator—should decide the merits of that claim. This created a mind-bending dilemma. As noted, section 4 of the FAA requires judges to hear challenges to the validity of an arbitration clause.[64] On its face, Prima Paint's fraud claim was such a challenge since it sought to invalidate the consulting agreement that included the arbitration clause. Then again, the arbitration clause in the agreement also required the arbitrator to resolve all disputes between the parties—and, of course, Prima Paint's fraud claim was such a dispute.

The Court resolved this tension by creating the "separability" doctrine: the fiction that arbitration clauses are their own, stand-alone minicontracts within larger "container" contracts. According to the Court, any contract that contains an arbitration clause is, in fact, two contracts: (1) a contract to arbitrate disputes and (2) the overarching container contract.[65] Thus, the Court held that although section 4 of the FAA requires judges to hear claims that specifically target the enforceability of the arbitration clause, it does not apply to claims that are merely directed at the container contract:

> [A]rbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself,

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[61] *See, e.g.*, John W. Johnson, Inc. v. 2500 Wis. Ave., Inc., 231 F.2d 761, 764 (D.C. Cir. 1956) (holding that FAA was not applicable to contract to paint building); Livingston v. Shreveport–Tex. League Baseball Corp., 128 F. Supp. 191, 202 (W.D. La. 1955) (holding that FAA did not apply to minor league baseball manager's contract even though it was clear that he would travel from state to state); Coles v. Redskin Realty Co., 184 A.2d 923, 927 (D.C. 1962) (ruling that FAA did not apply to settlement agreement stemming from sophisticated real estate deal).

[62] 388 U.S. 395 (1967).

[63] *Id.* at 398.

[64] 9 U.S.C. § 4 (2006).

[65] *Prima Paint*, 388 U.S. at 395.

> a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.[66]

Because Prima Paint argued that fraud tainted the overall consulting agreement—and not the arbitration clause within it—the Court sent the claim to arbitration.[67]

The separability doctrine made it far more likely that disputes would end up in arbitration. If a party asserted that she was defrauded, mistaken, or coerced when she signed a contract that included an arbitration clause, the arbitrator would hear that claim.[68] Even if she alleged that the contract that included an arbitration clause was illegal, the arbitrator would hear the claim.[69] Only if she alleged that the arbitration clause itself was somehow defective would a judge decide the issue. It is difficult to imagine a set of facts that would give rise to a fraud or duress claim that centered specifically on the arbitration clause, rather than the container contract. After all, if a drafter had the desire and opportunity to exploit the other party, she would likely manipulate major terms such as price and quantity, rather than those that govern dispute resolution.[70] Thus, by insulating the arbitration clause within the container contract, the separability doctrine shields the clause from several major contract defenses.

At the time the Court decided *Prima Paint*, arbitration was still a sleepy legal backwater,[71] and this major departure from traditional

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[66] *Id.* at 402 (describing and ultimately affirming Second Circuit's approach).

[67] *Id.* at 406–07.

[68] *See, e.g.*, Masco Corp. v. Zurich Am. Ins. Co., 382 F.3d 624, 629 (6th Cir. 2004) ("[M]utual mistake . . . amounts to an attack on the underlying liability, and only derivatively on the obligation to arbitrate."). Although the separability doctrine requires parties to arbitrate the issue of whether a traditional contract defense like fraud nullifies the container contract, it does not require parties to arbitrate the claim that the arbitration clause does not apply to them. *See, e.g.*, First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945–47 (1995) (explaining that court, not arbitrator, must decide whether arbitration clause applied to stock trader in his personal capacity after it had been executed by company he owned); Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992) ("The calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration."). For excellent discussions of the difficulties inherent in precisely defining the scope of the separability doctrine, see Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 861–71 (2003), and Stephen J. Ware, *Arbitration Law's Separability Doctrine After* Buckeye Check Cashing, Inc. v. Cardegna, 8 NEV. L.J. 107, 114–17 (2007).

[69] *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448–49 (2006) (holding that allegation that loan contract was usurious and thus illegal was for arbitrator to decide).

[70] *See* Sternlight, *supra* note 29, at 24 n.87 ("If a party wants to defraud or use duress on its opponent, why not go after something big like the price or quality of the goods or services at issue?").

[71] *See supra* text accompanying notes 59–61 (describing Court's disinterest in expanding reach of FAA or in enforcing arbitration clauses for decades after New Deal).

contract principles made little difference. But it proved far more important in subsequent decades, as the Court transformed arbitration into a hallmark of the civil justice system.

C. *The Expansion of the FAA*

Between 1960 and 1980, the number of cases filed in federal court more than doubled.[72] Newspapers and magazines ran stories declaring that lawsuits were this country's "secular religion"[73] and that citizens "in all walks of life [were] being buried under an avalanche of lawsuits."[74] Even judges and law professors described the United States as "the most litigious nation in human history"[75] with a population that cannot tolerate "more than five minutes of frustration without submitting to the temptation to sue."[76] Seeking a release valve for this pressure, the Court began to read the FAA broadly. As I explain next, the Court soon held that the FAA required parties to arbitrate statutory claims and preempted state law.

1. *Statutory Rights*

During the first sixty years of the FAA's existence, courts uniformly held that a plaintiff could not be compelled to arbitrate statutory causes of action.[77] They mandated a judicial forum for claimed violations of the federal securities,[78] labor,[79] antitrust,[80] patent,[81] pen-

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[72] *See* David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 144 (1981) ("The current dominance of the civil docket in federal district courts dates from 1961: [C]ivil cases filed and terminated from that point have increased 190%.").

[73] Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 8 (1983) (quoting *The Chilling Impact of Litigation*, BUS. WK., June 6, 1977, at 58, 58).

[74] *Id.* (quoting David F. Pike, *Why Everybody Is Suing Everybody*, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50, 50).

[75] *Id.* at 7 (quoting LOIS G. FORER, THE DEATH OF THE LAW 133 (1975)).

[76] *Id*. (quoting Jerold S. Auerbach, *A Plague of Lawyers*, HARPER'S, Oct. 1976, at 37, 42).

[77] In fact, a year after Congress passed the FAA, Henry Julius Cohen and Kenneth Dayton strongly implied that statutory claims were not amenable to arbitration. *See* Cohen & Dayton, *supra* note 32, at 281.

[78] *See* Wilko v. Swan, 346 U.S. 427, 434–35 (1953) (holding that Securities Act prohibits waivers of right to select judicial forum).

[79] *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745 (1981) (holding that Fair Labor Standards Act preserves workers' right to bring claims in court).

[80] *See* Applied Digital Tech., Inc. v. Cont'l Cas. Co., 576 F.2d 116, 117 (7th Cir. 1978) (stating that arbitration is inappropriate for antitrust claims); Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 828 (2d Cir. 1968) (concluding that antitrust claim cannot be arbitrated).

sion,[82] and civil rights laws.[83] The reason was simple: Arbitration was "comparatively inferior to judicial processes in the protection of [statutory] rights."[84] Indeed, as the Court flatly declared, "[t]he change from a court of law to an arbitration panel may make a radical difference in ultimate result."[85]

Nevertheless, with its 1985 decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court reversed course and held that antitrust claims could be arbitrated.[86] The Court placed the onus on Congress to be clear when it wanted to exclude statutory rights from arbitration.[87] Moreover, in stark contrast to its previous jurisprudence, the Court breezily declared that there was nothing harmful about arbitrating statutory claims because the choice between a judicial and an arbitral forum was outcome neutral:

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.[88]

At the same time, the Court added an important caveat: A plaintiff need not arbitrate a statutory claim if she can prove that arbitration prevents her from fully vindicating her rights.[89]

Soon, however, the Court made clear that to invoke this vindication-of-rights exception, a plaintiff had to offer forceful, concrete proof. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court compelled the plaintiff to arbitrate his claim under the Age Discrimination in Employment Act (ADEA).[90] The plaintiff contended that he could not effectively pursue his ADEA cause of action in arbitration, citing its potentially biased decision makers, limited dis-

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[81] *See, e.g.*, Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (reasoning that patent issues "may be unfamiliar to arbitrators").

[82] *See, e.g.*, Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 277–78 (E.D. Pa. 1977) ("[A]greements to arbitrate ERISA claims [are] invalid.").

[83] *See, e.g.*, McDonald v. City of W. Branch, Mich., 466 U.S. 284, 292 (1984) (§ 1983 claims); Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974) (Title VII claims); Criswell v. W. Airlines, Inc., 709 F.2d 544, 548 (9th Cir. 1983) (ADEA claims).

[84] *Alexander*, 415 U.S. at 57; *see also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222–23 (1985) ("[A]rbitration cannot provide an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights . . . .").

[85] Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956).

[86] 473 U.S. 614 (1985).

[87] *See id.* at 627 (stating that courts will depend on Congress's expressed intent when deciding whether statutory claims are arbitrable).

[88] *Id.* at 628.

[89] *See id.* at 637 (recognizing remedial function of statute through its ability to vindicate claimant's rights).

[90] 500 U.S. 20, 35 (1991).

covery, lack of written opinions, and unavailability of equitable relief.[91] The Court brushed aside these arguments as "generalized attacks on arbitration" that were based on mere suspicion and were "far out of step with [the Court's] strong endorsement of the federal statutes favoring this method of resolving disputes."[92]

Later, in *Green Tree Financial Corp. v. Randolph*, the Court rejected a potentially more compelling variation of the vindication-of-rights doctrine.[93] The plaintiff claimed that she could not pursue her Truth in Lending Act claims because the arbitration clause in her standard form loan contract was silent about who would pay for arbitration.[94] The Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as [the plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum."[95] Yet even though the plaintiff had offered evidence that she lacked the resources to pay arbitral filing fees and costs, the Court held that her submission was insufficient and ordered her to arbitrate.[96]

Thus, the Court moved from forbidding the arbitration of statutory claims to saddling plaintiffs with the burden of proving that they could not vindicate their rights in the extrajudicial forum. Moreover, by predicating this vindication-of-rights defense on a strong showing, the Court announced that it would tolerate a great deal of private procedural rulemaking—even if it likely altered litigants' rights.

2. *Preemption and Unconscionability*

At the same time that the Court opened the door for the arbitration of statutory claims, it also abruptly announced that the FAA preempts state law. Recall that section 2 makes arbitration clauses "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[97] In *Southland Corp. v. Keating*, the Court held that this language set forth the exclusive grounds for refusing to enforce agreements to arbitrate.[98] The

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[91] *Id.* at 30–32.

[92] *Id.* at 30 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).

[93] 531 U.S. 79, 92 (2000) (finding that plaintiff failed to prove that arbitration would be prohibitively expensive).

[94] *See id.* at 90 (noting plaintiff's claim that loan agreement's silence about costs and fees made arbitration potentially prohibitively expensive).

[95] *Id.*

[96] *See id.* at 91 & n.6 (finding that plaintiff failed sufficiently to support her claim).

[97] 9 U.S.C. § 2 (2006).

[98] 465 U.S. 1, 10–11 (1984). The Court had sown the seeds of *Southland* a year earlier by opining that the FAA expresses "a liberal federal policy favoring arbitration agree-

Court explained that although state courts remained free to invalidate arbitration clauses under principles that apply to "any contract"—such as fraud, duress, and unconscionability—state legislatures could not enact specific anti-arbitration rules.[99] Applying this logic, the Court held that the FAA preempted a California statute that prohibited arbitration clauses in franchise contracts.[100]

Three years later, in *Perry v. Thomas*, the Court further enlarged the FAA's preemptive sweep.[101] The plaintiff argued that an arbitration clause in his employment agreement was invalid under both a California statute that exempted wage disputes from arbitration and the unconscionability doctrine.[102] Under *Southland*, the Court quickly concluded that the FAA eclipsed the arbitration-specific labor statute.[103] In addition, the Court found that the plaintiff had waived his unconscionability argument by asserting it for the first time on appeal.[104] In a lengthy footnote, however, the Court provided guidance for future judges considering unconscionability challenges. It described the FAA as a kind of equal protection clause that barred state courts from applying contract principles in a manner that discriminated against arbitration:

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.[105]

Like the separability doctrine, FAA preemption under *Perry* drove a wedge between arbitration and contract law. Under black letter unconscionability doctrine, the obscure, legalistic nature of an arbitration clause—the fact that it speaks to an issue beyond the ken of most consumers and employees—should tip the scales toward

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ments, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[99] *See Southland*, 465 U.S. at 16 (noting that Congress intended FAA to prevent states from undermining validity of arbitration agreements).

[100] *See id*. (holding that California statute violates Supremacy Clause).

[101] 482 U.S. 483 (1987).

[102] *Id.* at 486, 492 n.9.

[103] *See id.* at 489–91 (finding that California statute was in clear conflict with FAA and thus was invalid).

[104] *See id.* at 492 n.9.

[105] *Id.* at 493 n.9.

unenforceability.[106] Yet now lower courts could not factor "the uniqueness of an agreement to arbitrate" into the unconscionability calculus.[107]

In fact, although the Court soon applied the FAA to claims brought by consumers[108] and employees[109]—neglecting the colorable argument that Congress never intended the FAA to apply to adhesion contracts[110]—it seemed queasy about the notion that arbitration clauses could ever be unconscionable. For instance, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, first-time investors argued that the arbitration clause in their preprinted broker contracts had been presented to them "face down" and thus were "adhesive, . . . substantively unconscionable and beyond the[ir] reasonable expectations."[111] The Court rejected the argument in one sentence, opining that the record contained insufficient evidence.[112]

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[106] For example, in the watershed case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), the D.C. Circuit acknowledged that a cross-collateralization clause that permitted a company to repossess all of the furniture it had sold over the years to a customer if she missed one installment payment could be unconscionable. The fact that few consumers could understand the practical effect of this "rather obscure" provision was key to the court's analysis. *Id.* at 447.

[107] *Perry*, 482 U.S. at 493 n.9. For example, in *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002), the Fourth Circuit summarily belittled the relevance of the plaintiffs' evidence that they "did not complete high school . . . and did not know what arbitration was when they signed the employment application."

In addition, the Supreme Court held that the FAA preempts state laws that seek to ensure that agreements to arbitrate are consensual. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 684, 687 (1996) (invalidating Montana statute that required "'[n]otice that [the] contract is subject to arbitration . . . in underlined capital letters on the first page of the contract'" because it "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally" (quoting MONT. CODE ANN. § 27-5-114(4) (1995) (amended 2009))).

[108] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (upholding arbitration clause in homeowner's contract with termite inspection company).

[109] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (finding that only transportation workers are exempt from FAA and upholding arbitration clause in application for employment at electronics retail store).

[110] *See supra* notes 51–61 and accompanying text (arguing that Congress did not intend FAA to apply to adhesion contracts). The term "adhesion contract" refers to preprinted form agreements that are drafted by economically powerful parties and offered on a take-it-or-leave-it basis. *See, e.g.*, Izzy v. Mesquite Country Club, 231 Cal. Rptr. 315, 318 (Ct. App. 1986) ("A contract of adhesion has been defined as a 'standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" (quoting Neal v. State Farm Ins. Cos., 10 Cal. Rptr. 781, 784 (Ct. App. 1961)).

[111] Brief for Petitioners at 2, 46, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (No. 88-385), 1989 WL 1127804.

[112] *Rodriguez de Quijas*, 490 U.S. at 484. Investors in a similar case had argued that their broker contract was "a contract of adhesion" and thus its "purported arbitration clause should not be enforced routinely without close scrutiny by the courts." Brief for Respondents at 14 n.8, Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987) (No.

Thus, as with the vindication-of-rights doctrine, the Court has calibrated the unconscionability doctrine in a manner that is quite deferential to arbitration. As I discuss next, by doing so, the Court has done more than widen the dominion of federal arbitration law. It has also aggrandized private parties.

D. Private Procedural Rulemaking

As the Court ratcheted up the presumption that arbitration clauses are valid, companies saw an opportunity. The FAA would drape these lenient doctrines and other vigorous pro-arbitration policies over whatever contract terms drafters embedded in an arbitration clause. The statute thus gave firms broad discretion not only to mandate arbitration but also to shape the path of proceedings and dictate the rules under which they must be conducted.

1. The Unilateral Amendment

The Court's transformation of the FAA left banks, retailers, hospitals, franchisors, restaurant chains, software licensors, computer manufacturers, technology startups, credit card issuers, and telecommunications firms scrambling to add compulsory arbitration clauses to their contracts.[113] Yet some of them faced an initial hurdle: They were already locked into agreements for set periods of time with their consumers, franchisees, and employees. And most of these contracts said nothing about extrajudicial dispute resolution.

Undaunted, Bank of America and Wells Fargo placed a notice in the monthly statements of a combined 25.5 million checking and credit card customers informing them that "any controversy with us will be decided . . . by arbitration."[114] Shortly thereafter, American Express, MBNA Corp., Fleet Bank, First USA, Chase, Discover Bank, Citibank, Sears, Shell, Comcast, and a wide range of corporations in

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86-44), 1987 WL 880930. The Court acknowledged that "broker overreaching" could be "grounds for revoking the contract under ordinary principles of contract law" but did not discuss the issue further. *Shearson/Am. Express Inc.*, 482 U.S. at 230–31.

[113] *See, e.g.*, Mark Curriden, *A Weapon Against Liability: Fine Print Often Removes Jury Resolution as Option for Complaints*, DALL. MORNING NEWS, May 7, 2000, at 25A (noting American Bar Association estimate that more than one thousand companies employ arbitration clauses); Tom Lowry, *Bill Would Ban Mandatory Wall Street Arbitration*, USA TODAY, Mar. 7, 1997, at 2B (noting spread of arbitration clauses in employment agreements); Michelle Quinn, *Firms Try Pre-hiring, Pre-firing Accord*, PHILA. INQUIRER, June 25, 1996, at F2 ("In an informal survey of a dozen Silicon Valley companies, most said they had recently enacted a mandatory arbitration policy.").

[114] Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 277 (Ct. App. 1998); *see also Bank of America Is Sued over Arbitration Policy*, WALL ST. J., Aug. 5, 1992, at A1 (describing claims by consumer and public interest groups that Bank of America's unilaterally added arbitration clause was illegal).

other industries also slipped arbitration clauses into hundreds of millions of contracts—in all likelihood, billions of contracts—through nondescript bill stuffers.[115]

As I have discussed in a previous article, the power that drafters drew upon to make these unilateral modifications was not contract law.[116] Because firms conferred no benefit on adherents and subjected themselves to no detriment other than agreeing to continue the contractual relationship, the unilateral revisions lacked consideration under the preexisting duty rule.[117] Similarly, although many companies gave adherents a minimal opportunity to reject the changes—for example, thirty days to close their accounts—the fact that adherents never affirmatively agreed to the new terms is hard to square with the strong presumption against inferring acceptance by silence.[118]

Many financial services companies argued that they were merely exercising a boilerplate term in their customer agreements that permitted them to change terms at any time.[119] However, the purpose of these change-of-terms clauses was to allow lenders to modify existing terms—such as adjusting interest rates in light of shifts in the financial

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[115] *See, e.g.*, Joan Lowy, *Consumers Losing Right To Sue Without Knowing It*, CLEVELAND PLAIN DEALER, May 14, 2000, at 5L ("In January, MBNA Corp. sent a dense notice in small type to its 40 million credit card customers informing them that they were giving up their right to go to court in favor of arbitration unless customers responded in writing within the next three weeks."); Caroline E. Mayer, *Customers Often Are Losing Rights To Sue in the Fine Print*, HOUS. CHRON., May 30, 1999, at 7 ("Last month's notice from American Express seemed routine, even innocuous . . . . But card holders who read the 'F.Y.I.' update closely would have discovered that simply by using their card after June 1, they will give up their right to sue the company.").

[116] David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 665–66 (2010) (listing reasons why "giving drafters the power to revise terms unilaterally is more of a subsidy to drafters than an appendage of contract doctrine").

[117] *See, e.g.*, McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc., 66 F.3d 89, 93 (5th Cir. 1995) (applying preexisting duty rule); U.C.C. § 2-209 cmt. 2 (2005) (barring drafters from modifying contracts "to escape performance on the original contract terms"); RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981) (stating that unilateral modifications are enforceable in only specific contexts not applicable here).

[118] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) ("Acceptance by silence is exceptional."). For a vivid illustration of why unilateral amendments should be invalid under traditional contract principles, see *Thompson v. Chase Bank USA*, No. H-07-1642, 2009 WL 290186, at *2 (S.D. Tex. Feb. 5, 2009), which held that a consumer could not unilaterally modify terms of his credit card agreement by writing a letter to the bank because "modifications to an agreement can occur only with the consent of both parties and consideration."

[119] *See, e.g.*, *Badie*, 79 Cal. Rptr. 2d at 280 (discussing Bank of America's argument that its unilaterally added arbitration clause "is not really a modification at all because, by entering the original account agreements, the customers agreed ahead of time to be bound by any term the Bank might choose to impose in the future").

climate—not to authorize them to inject wholly new provisions.[120] As a result, the implied covenant of good faith and fair dealing should have barred the unilateral introduction of a compulsory arbitration clause into these contracts.[121]

For example, in *Badie v. Bank of America*, a California appellate court refused to enforce a unilaterally added arbitration clause.[122] The bank sought to justify the revision by citing a provision in its customer agreement that allowed it to "change or terminate any terms, conditions, services, or features."[123] The court held that this provision did not allow the bank to add "an entirely new term" that went beyond "any subject, issue, right, or obligation addressed in the original contract."[124] The court reasoned that the contrary conclusion—reading the change-of-terms clause broadly—would render the change-of-terms clause illusory by giving the bank boundless discretion.[125]

Yet the fact that these new "contract" terms were not rooted in contract law did not stop them from spreading widely. At first, a few courts followed *Badie* and invalidated unilaterally added arbitration clauses as improper modifications.[126] But other judges overlooked the limits of a drafter's ability to change terms on its own.[127] And eventu-

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[120] *See id.* at 281 (interpreting modification clause to authorize only changes, subject matter of which was anticipated by parties at formation).

[121] Although the meaning of "bad faith" can fluctuate with the context, most commentators agree that it centers on action that one party takes to gain from the other party what the parties "should have understood to be precluded by the contract at issue." CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 449–50 (6th ed. 2007). In addition, if the implied covenant of good faith did not restrict a drafter's exercise of a change-of-terms clause, then the clause would be an invalid illusory promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981) ("A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances.").

[122] *Badie*, 79 Cal. Rptr. 2d at 291.

[123] *Id.* at 278 (capitalization altered).

[124] *Id.* at 284.

[125] *Id.*

[126] *E.g.*, Stone v. Golden Wexler & Sarnese P.C., 341 F. Supp. 2d 189, 197–98 (E.D.N.Y. 2004); Perry v. FleetBoston Fin. Corp., No. 4-507, 2004 WL 1508518, at *4 (E.D. Pa. July 6, 2004); Long v. Fid. Water Sys., No. C-97-20118, 2000 WL 989914, at *3 (N.D. Cal. May 26, 2000); DirecTV, Inc. v. Mattingly, 829 A.2d 626, 634–35 (Md. 2003); Sears Roebuck & Co. v. Avery, 593 S.E.2d 424, 432 (N.C. Ct. App. 2004); Martin v. Comcast, 146 P.3d 380, 389 (Or. Ct. App. 2006).

[127] For instance, in *Herrington v. Union Planters Bank, North America*, the Southern District of Mississippi allowed a bank to graft an arbitration clause onto an existing contract. 113 F. Supp. 2d 1026, 1029–31 (S.D. Miss. 2000). The court relied entirely on the fact that the change-of-terms clause permitted the bank to "amend" the contract. *Id.* at 1031. It did not discuss the possibility that the consideration doctrine or the implied covenant of good faith might limit the bank's discretion to invoke the change-of-terms clause to graft an arbitration clause onto a contract that said nothing about alternative dispute resolution. Likewise, in *Beneficial National Bank, U.S.A. v. Payton*, another judge in the Southern

ally, banks and credit card issuers realized that they did not need contract law to add or amend dispute resolution terms unilaterally. The Uniform Consumer Credit Code authorizes lenders to "change the terms" of their revolving credit accounts after giving debtors written notice, and several states have adopted its terms by statute.[128] Despite the fact that these statutes were intended to govern conspicuous clauses such as fees and interest rates,[129] they contained no textual limitation on the type of provisions to which they applied. Thus, in case after case, banks and credit card issuers claimed that these laws gave them free reign over the terms of their contracts.[130] These arguments were so successful that even when the drafter was not a commercial lender—and thus did not fall within a change-of-terms statute—courts stopped inquiring whether the drafter had the right to insert or change terms unilaterally.[131]

District of Mississippi relied on *Herrington* to reach the same result. 214 F. Supp. 2d 679, 687 n.9 (S.D. Miss. 2001).

[128] UNIF. CONSUMER CREDIT CODE § 3.205 (1974) (allowing creditors to "change the terms of an open-end credit account" but requiring creditors to give notice before revising finance charges and interest rates). A number of states have adopted this provision. *See* ALA. CODE § 5-20-5 (LexisNexis 1996); FLA. STAT. ANN. § 658.995(4) (West 2004); GA. CODE ANN. § 7-5-4(c) (2004); IOWA CODE ANN. § 537.3205(1) (West 1997); KAN. STAT. ANN. § 16a-3-204(2) (2007); ME. REV. STAT. ANN. tit. 9-A, § 3-204(2) (2009); NEV. REV. STAT. § 97A.140(4) (2009); N.D. CENT. CODE § 51-14-02 (2007); OHIO REV. CODE ANN. § 1109.20 (West 2010); S.D. CODIFIED LAWS § 54-11-10 (Supp. 2010); TENN. CODE ANN. § 45-2-1907(a) (2007).

[129] Section 3.205 of the Uniform Consumer Credit Code was drafted long before the rise of arbitration hegemony and explicitly references "finance charge" and "additional charges," which suggests that its drafters did not imagine that companies would invoke it to add or amend private dispute resolution provisions. UNIF. CONSUMER CREDIT CODE § 3.205 (1974). However, Delaware, Rhode Island, Virginia, and Utah expressly permit lenders to include or change provisions relating to arbitration or other forms of alternative dispute resolution. DEL. CODE ANN. tit. 5, § 952(a) (2001); R.I. GEN. LAWS § 6-26.1-11(a) (Supp. 2009); UTAH CODE ANN. § 70C-4-102(2)(b) (LexisNexis 2009); VA. CODE ANN. § 6.2-433 (2010).

[130] Courts have been quite receptive to these arguments. *See, e.g.*, Fields v. Howe, No. IP-01-1036-C-B/S, 2002 WL 418011, at *5 (S.D. Ind. Mar. 14, 2002); Bank One, N.A. v. Harris, No. 3:00CV665LN, 2001 U.S. Dist. LEXIS 9615, at *36 (S.D. Miss. Jan. 2, 2001); Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 915 (N.D. Tex. 2000); Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1413, 1418 (M.D. Ala. 1998); SouthTrust Bank v. Williams, 775 So. 2d 184, 191 (Ala. 2000); Joseph v. M.B.N.A. Am. Bank, N.A., 775 N.E.2d 550, 553 (Ohio Ct. App. 2002).

[131] *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 30 (1st Cir. 2006) (compelling arbitration despite fact that "[w]hen Plaintiffs first subscribed for cable services, none of their service agreements contained an arbitration provision"); *In re* Universal Serv. Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1122–26, 1136 (D. Kan. 2003) (rejecting claim that arbitration clauses unilaterally added by AT&T and Sprint were unconscionable and not addressing threshold issue of whether either company enjoyed power to add clauses unilaterally in first place).

2. *Procedural Rulemaking in Arbitration*

Companies quickly realized that their ability to shunt claims out of the court system also gave them license to create an alternative procedural universe in arbitration. They laced their arbitration clauses with terms that shortened statutes of limitations,[132] drastically restricted discovery,[133] required confidentiality,[134] specified distant fora,[135] nominated biased arbitrators,[136] made the proceedings prohibitively expensive,[137] cherry-picked which claims must be arbitrated,[138] and waived plaintiffs' right to recover attorney's fees and other substantive remedies.[139] To be sure, many courts found the most blatantly one-sided among these terms to be unconscionable.[140] But perhaps out of respect for the buffer zone that the Court had created around arbitration clauses, other judges upheld even seemingly unfair terms.[141]

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[132] *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894-95 (9th Cir. 2002) (involving arbitration agreement that "imposes a strict one year statute of limitations"); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997) (similar).

[133] *See, e.g.*, Estate of Ruszala v. Brookdale Living Cmtys., Inc., 1 A.3d 806, 821 (N.J. Super. Ct. App. Div. 2010) (noting that discovery limitations in nursing home contract were "clearly intended to thwart plaintiffs' ability to prosecute a case").

[134] *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (featuring confidentiality clause that allowed drafter to "ensur[e] that none of its potential opponents have access to precedent while, at the same time, . . . accumulat[ing] a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract").

[135] *See, e.g.*, Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1285 (9th Cir. 2006) (en banc) (involving arbitration clause that required arbitration to be conducted in Boston, "a location considerably more advantageous to [the drafter]").

[136] *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) ("[The] mechanism for selecting a panel of three arbitrators . . . [was] crafted to ensure a biased decisionmaker.").

[137] *See, e.g.*, McNulty v. H&R Block, Inc., 843 A.2d 1267, 1274 (Pa. Super. Ct. 2004) ("[T]his arbitration clause requires a consumer to pay $50.00 in the hopes of receiving, at most[,] $37.00.").

[138] *See, e.g.*, Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 785 (9th Cir. 2002) ("[T]he [arbitration] agreement 'compels arbitration of the claims employees are most likely to bring against Countrywide . . . [but] exempts from arbitration the claims Countrywide is most likely to bring against its employees.'" (alterations in original) (quoting Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671, 677 (Ct. App. 2002))).

[139] *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 45, 52 (1st Cir. 2006) (featuring arbitration clause that stripped plaintiffs of certain damages remedies and burdened them with costs and attorney's fees); *see also* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 56–59 (2003) (collecting more examples).

[140] *See, e.g.*, *Hooters*, 173 F.3d at 938 (nullifying arbitration clause that contained private procedural rules that were "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding"); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 150 (Ct. App. 1997) (striking down arbitration clause that deprived employer of "no common law or statutory remedies," but "severely curtailed" employees' remedies).

[141] *See, e.g.*, Carter v. Countrywide Credit Indus., 362 F.3d 294, 298–99 (5th Cir. 2004) (upholding potentially onerous discovery and forum selection provisions); Adkins v. Labor

For companies, however, the most advantageous aspect of their control over arbitral procedures was the chance to prohibit class action lawsuits.[142] Corporate lawyers had long complained about class actions being a form of legalized "blackmail."[143] In the 1990s, most courts held that the FAA did not allow arbitrators to aggregate claims.[144] Thus, even without an express class action waiver, an arbitration clause was a "powerful deterrent to class action[s]."[145]

Yet firms were pressed to take further action after the Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*.[146] The issue in *Bazzle* was whether an arbitration clause that did not mention class actions allowed an arbitrator to aggregate claims.[147] A plurality of the Court held that the arbitration clause was ambiguous and thus an issue of contract interpretation for the arbitrator to resolve.[148] By implicitly sanctioning the idea that arbitrators could conduct class actions in some instances, the plurality suggested that the FAA does not preclude class-wide relief.[149] As a result, firms realized that arbitration clauses alone would not foreclose class actions. Instead, they needed arbitration clauses that expressly forbade class actions.

Ready, Inc., 303 F.3d 496, 501 (4th Cir. 2002) (rejecting argument that arbitration clause was invalid because plaintiffs could not afford to pay arbitral fees despite plaintiffs' showing that they "were paid at or near the minimum wage . . . [and] live in low-income neighborhoods"); We Care Hair Dev., Inc. v. Engen, 180 F.3d 838, 843 (7th Cir. 1999) (upholding asymmetrical clause that required "franchisees to arbitrate their claims while permitting the franchisor to litigate its claims").

142 Some arbitration clauses expressly prohibited class actions in any event. Margaret Mannix, *No Suits for You*, U.S. NEWS & WORLD REP., June 7, 1999, at 58, 60.

143 *Panel To Consider Changing Rules on Class Action Suits*, BOS. GLOBE, Oct. 12, 1996, at A12. Some judges echoed these views. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) ("Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973))).

144 *See, e.g.*, Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995); Herrington v. Union Planters Bank, N.A., 113 F. Supp. 2d 1026, 1034 (S.D. Miss. 2000); Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993); Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998). *But see* Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998) (permitting class-wide arbitration); Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 867 (Pa. Super. Ct. 1991) (same).

145 Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, but Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, BUS. L. TODAY, May/June 1998, at 24, 24.

146 539 U.S. 444 (2003).

147 *Id.* at 447.

148 *Id.* at 451–53 (plurality opinion).

149 *See also id.* at 454–55 (Stevens, J., concurring in judgment) (arguing that FAA contained nothing to override state court's allowance of class arbitration).

Thus, in another wave of unilateral revisions, firms added such terms to their existing contracts.[150]

Needless to say, the plaintiffs' bar did not take this lying down. In a range of cases, attorneys in putative class actions argued that class arbitration waivers are unconscionable. At first, most courts rejected this theory, holding that the contractual relinquishment of the right to bring a class action did not impact substantive rights and thus was not unfair.[151] In 2005, however, the California Supreme Court reached a different conclusion in *Discover Bank v. Superior Court*.[152] The court explained that because class arbitration waivers eliminate any incentive for plaintiffs to prosecute low-value claims, they greatly reduce a defendant's aggregate liability.[153] Accordingly, the court held that class arbitration waivers improperly limit a defendant's exposure to damages when they appear in consumer contracts and are applied to allegations that a defendant cheated many customers out of small amounts of money:

> Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because '[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit,' 'the class action is often the only effective way to halt and redress such exploitation.'[154]

Soon other state supreme courts and federal courts of appeals went even further, voiding class arbitration waivers when the cost of litigating dwarfed any individual plaintiff's potential recovery.[155] For

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[150] Nora Lockwood Tooher, *Plaintiffs Wrestle with Class Action Arbitration Bans*, LAWYERS USA, Nov. 19, 2007, at 1, *available at* http://www.allbusiness.com/legal/legal-services-litigation/8921629-1.html (noting that after *Bazzle*, "[e]very big company rewrote their arbitration clauses to ban class actions").

[151] *See* Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting argument that agreement was unenforceable because of lack of class relief); Randolph v. Green Tree Fin. Corporation–Alabama, 244 F.3d 814, 818–19 (11th Cir. 2001) (enforcing arbitration agreement so long as statute's substantive goals could be vindicated through arbitration); Johnson v. W. Suburban Bank, 225 F.3d 366, 373 (3d Cir. 2000) (enforcing arbitration agreement and characterizing class action relief as procedural right); Arnold v. Goldstar Fin. Sys., Inc., No. 01 C 7694, 2002 WL 1941546, at *9 (N.D. Ill. Aug. 22, 2002) ("As a general matter, the right to bring a class action in federal court is a procedural right . . . ."); Sagal v. First USA Bank, 69 F. Supp. 2d 627, 631 (D. Del. 1999) (holding that availability of other enforcement mechanisms can obviate right to proceed by class action).

[152] 113 P.3d 1100 (Cal. 2005).

[153] *Id.* at 1107–08.

[154] *Id.* at 1108–09 (alteration in original) (quoting Linder v. Thrifty Oil Co., 2 P.3d 27, 38 (Cal. 2000)).

[155] *See* Homa v. Am. Express Co., 558 F.3d 225, 231 & n.2, 233 (3d Cir. 2009) (holding class arbitration waiver invalid when "the claims at issue are of such a low value as effectively to preclude relief if decided individually"); Lowden v. T-Mobile USA, Inc., 512 F.3d

instance, the New Jersey Supreme Court decided two cases on the same day: one enforcing a class arbitration waiver where each plaintiff sought over $100,000 in damages,[156] and one voiding a waiver where each plaintiff could not win more than $600.[157]

Companies were not satisfied. Even for low-value claims, damages increase exponentially when multiplied by thousands or millions of class members. Determined to eliminate the class action completely, companies turned to the most formidable weapon in their arsenal: their total dominion over contract terms. If judges were chafing at the fact that class arbitration waivers deterred plaintiffs from asserting low-value claims, then drafters would remedy this flaw themselves. In a seemingly counterintuitive gambit, companies began to create elaborate incentives for plaintiffs to sue them individually. With another salvo of "bill stuffers," they dressed their class arbitration waivers in sheep's clothing. Much like a legislature subsidizes the prosecution of antitrust or civil rights claims by providing for treble damages or awards of attorney's fees, businesses sweetened the pot for plaintiffs who arbitrated small-value grievances against them on an individual basis. For example, the Verizon Wireless customer agreement once required consumers to pay Verizon's fees and costs if they recovered less than seventy-five percent of what Verizon offered to settle the claim.[158] But as courts began to void class arbitration waivers on unconscionability grounds, Verizon changed its terms, promising to pay consumers' attorney's fees and a $5000 bonus if consumers agree to arbitrate on an individual basis and ultimately recover

1213, 1218–19 (9th Cir. 2008) (holding class action waiver substantively unconscionable and thus unenforceable); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (similar); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 274–75 (Ill. 2006) (holding class action waiver unenforceable after concluding that litigation costs were too high); Scott v. Cingular Wireless, 161 P.3d 1000, 1007–08 (Wash. 2007) (en banc) (holding class action waiver unenforceable because it "effectively prevents one party . . . from pursuing valid claims").

[156] *See* Delta Funding Corp. v. Harris, 912 A.2d 104, 115 (N.J. 2006) ("Harris's claim is not the type of low-value suit that would not be litigated absent the availability of a class proceeding. Harris has adequate incentive to bring her claim as an individual action.").

[157] *See* Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 99, 100–01 (N.J. 2006) ("[Because plaintiff's] individual consumer-fraud case involves a small amount of damages, . . . a class-action waiver can act effectively as an exculpatory clause.").

[158] *See* Exhibit E Attached to Supplemental Declaration of Scott M. Johnson in Support of Motion To Compel Arbitration and Dismiss Action in Favor of Arbitration, or Alternatively, Stay Action Pending Arbitration at 8, Halprin v. Verizon Wireless Servs., No. 3:07-CV-04015 (D.N.J. Jan. 9, 2008), 2008 WL 7739538 (providing 2007 customer agreement).

more than Verizon's last written settlement offer.[159] By doing so, Verizon gives itself ammunition to argue in court that because its contract actually *encourages* individual plaintiffs to arbitrate low-value claims, it cannot be unfair to force consumers to waive their right to bring a class action.

These revamped clauses also serve a second purpose: They allow companies to argue that the FAA preempts any ruling that their class arbitration waivers are unconscionable. Recall that the FAA severely limits state regulation of arbitration clauses; state law can invalidate such clauses only under principles that apply with equal strength to all other contracts.[160] This antidiscrimination mandate means that state contract law cannot single out arbitration clauses for heightened scrutiny. Therefore, courts can invalidate arbitration clauses under the unconscionability doctrine only if they administer that rule in an even-handed fashion—the same way they do when faced with contracts that do not contain arbitration clauses. Firms like Verizon have a colorable argument that any judge who finds their reward-laden class arbitration waiver to be unconscionable is impermissibly discriminating against arbitration clauses. After all, how can a term be unfair if it seeks to facilitate lawsuits against its drafter?

Sure enough, on May 24, 2010, the Court granted certiorari in *AT&T Mobility LLC v. Concepcion* to decide whether the FAA preempts judges from finding AT&T's class arbitration waiver to be unconscionable.[161] Several factors suggest that the Court will (at the very least) further restrict the grounds on which lower courts can refuse to enforce class arbitration waivers. For one, the Court overruled *Bazzle* in April 2010 and held that arbitrators cannot hear class actions when the arbitration clause is silent about whether class arbitration is permissible.[162] Moreover, AT&T describes its class arbitration waiver as "the most pro-consumer arbitration provision in the country."[163] It lavishes a minimum of $10,000 and double attorney's fees upon plaintiffs who arbitrate on an individual basis and

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[159] *See Customer Agreement*, VERIZON WIRELESS, http://www.verizonwireless.com/customer-agreement.shtml (last visited Jan. 15, 2010) (setting forth dispute resolution terms).

[160] *See supra* notes 97–105 and accompanying text (discussing Court's decisions forbidding states from targeting arbitration contracts specifically).

[161] 584 F.3d 849 (9th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3687 (U.S. May 24, 2010) (No. 09-893); *see* Petition for Writ of Certiorari at (i), AT&T Mobility LLC v. Concepcion, No. 09-893 (Jan. 25, 2010), 2010 WL 304265.

[162] *See* Stolt-Neilsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.").

[163] *See* AT&T Mobility LLC's Motion To Compel Arbitration and To Dismiss Action at 3, Francis v. AT&T Inc., No. 2:07-CV-14921 (E.D. Mich. Jan. 25, 2008), 2008 WL 393982

recover more than AT&T's last written settlement offer.[164] If the Court does carve out a broad space for class arbitration waivers, it may mean the end of the class action device in consumer and employment cases.[165]

In sum, from initially deploying blunt remedy-stripping terms to eventually adopting nuanced and complex "proconsumer" class action waivers, companies have invoked the FAA to engage in a staggering amount of private procedural rulemaking. They have sought to change arbitration from an alternative to litigation to a parallel, private judicial system in which they make the rules.

3. *The Delegation Clause*

Finally, the Court's June 2010 decision in *Rent-A-Center, West, Inc. v. Jackson* further drives the FAA from its contractual foundations and adds a new dimension to private procedural rulemaking.[166] As discussed above, lower courts have helped keep drafters in check by deeming unfair terms to be unconscionable.[167] Firms may not like this searching judicial review, but section 4 of the FAA mandates it. As noted, section 4 states that "court[s] shall proceed summarily to . . . trial" if "the making of the arbitration agreement . . . [is] in issue."[168] When plaintiffs argued that a specific component of an arbitration clause was unconscionable, they placed its making in issue and were entitled to a judicial forum to resolve that claim. Or were they? As with unilateral amendments and "proconsumer" class arbitration waivers, clever drafters again capitalized on their dominion over contract terms. First in business-to-business transactions and then expanding to standard form contracts, companies added "delegation

("The revised arbitration provision is, to [AT&T's] knowledge, the most pro-consumer arbitration provision in the country.").

164 *2.2 Arbitration Agreement*, AT&T WIRELESS, at section 4, http://www.wireless.att.com/cell-phone-service/legal/index.jsp?q_termsKey=wirelessCustomerAgreement&q_termsName=Wireless+Customer+Agreement&subSection=arbAgreement (last visited Feb. 4, 2011).

165 *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375–77 (2005) (hypothesizing that widespread adoption of class arbitration waivers, coupled with judicial acceptance of them, may lead to end of class action device).

166 130 S. Ct. 2772 (2010).

167 *See supra* note 140 and accompanying text (noting that some courts invalidated one-sided arbitration clauses).

168 9 U.S.C. § 4 (2006). In addition, as I have argued elsewhere, section 4 appears to be a mandatory rule that parties cannot override by contract. David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1, 4–5 (2010), http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf.

clauses" that gave the arbitrator—not courts—the exclusive ability to resolve the very issue of whether the arbitration clause was valid.[169]

Rent-A-Center involved a delegation clause in an arbitration contract that an employer required its employees to sign. Both sides, following dicta in previous Court opinions, agreed that delegation clauses could be enforceable if there was "clear and unmistakable" evidence that the parties actually wanted the arbitrator to determine whether the arbitration clause was valid.[170] Prior to the Court's decision in *Rent-A-Center*, the dominant view was that because consumers, franchisees, and employees often do not read fine print terms, the mere fact that one of those individuals had signed a standard form contract that included a delegation clause did not satisfy the "clear and unmistakable" requirement.[171]

Nevertheless, in *Rent-A-Center*, the Court, speaking through Justice Scalia, declined to adopt the "clear and unmistakable" rule that it had previously endorsed in dicta. Instead, in a dizzying sleight of hand, the Court held that just as arbitration clauses are their own freestanding minicontracts within larger container contracts, delegation clauses are their own freestanding miniarbitration contracts within larger arbitration clauses.[172] As Justice Scalia put it, "[the] delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement."[173] Under this logic, delegation clauses are contracts within contracts within contracts: (1) a contract to arbitrate the issue of whether the arbitration clause is enforceable (2) within a contract to arbitrate substantive claims between the parties (3) within the container contract.[174]

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[169] For cases discussing delegation clauses and upholding the ability of the arbitrator to determine the validity of an arbitration clause, see *Terminix International Co. v. Palmer Ranch Ltd.*, 432 F.3d 1327, 1332–33 (11th Cir. 2005), *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 205, 211 (2d Cir. 2005), and *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472–74 (1st Cir. 1989).

[170] *See* Petitioner's Reply Brief at 21, Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010) (No. 09-497), 2010 WL 1554408; Brief for Respondent at 54, *Rent-A-Center*, 130 S. Ct. 2772 (No. 09-497), 2010 WL 1186482; *see also* Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. (forthcoming 2011) (manuscript at 61–68), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1552966 (citing other cases that rested on this assumption).

[171] *See, e.g.*, Jackson v. Rent-A-Center W., Inc., 581 F.3d 912, 917 (9th Cir. 2009) (holding that employee did not clearly and unmistakably assent to delegation clause even though he signed arbitration clause in which delegation clause was embedded), *rev'd*, 130 S. Ct. 2772 (2010); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 12–13 (1st Cir. 2009) (holding that courts must review delegation clause for fairness before enforcing).

[172] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2722, 2777–78 (2010).

[173] *Id.* at 2777.

[174] Justice Stevens's dissent analogized this approach to "Russian nesting dolls." *Id.* at 2786 (Stevens, J., dissenting).

In turn, viewing delegation clauses this way triggered the separability doctrine.[175] Recall that *Prima Paint* decreed that a challenge to the validity of the container contract (but not the arbitration clause) is a matter for the arbitrator to hear.[176] The Court in *Rent-A-Center* took this principle one step further and held that if an arbitration clause includes a delegation clause, a challenge to the validity of the arbitration clause (but not the delegation clause) is also for the arbitrator to evaluate.[177] As a result, a plaintiff cannot ask a judge to review the fairness of the arbitration clause unless she first proves that the delegation clause is invalid.

The two-tiered framework adopted by the Court doomed plaintiff Antonio Jackson's claim that the delegation provision in *Rent-A-Center* was unenforceable. In district court, Jackson had argued that the arbitration contract his employer required him to sign was unconscionable because it limited discovery in his fact-sensitive civil rights lawsuit and called for him to pay for a portion of the arbitrator's fees.[178] But he had not offered any reason that the delegation clause itself was invalid. Thus, the Court held that Jackson had conceded the relevant issue and ordered him to arbitrate the question of whether the arbitration clause was unconscionable.[179]

Furthermore, Justice Scalia took pains to point out that even if Jackson had contested the enforceability of the delegation clause, he would have lost. As Justice Scalia noted, the aspects of the arbitration clause that Jackson claimed made it unfair for him to arbitrate his substantive claim—the discovery-limiting and fee-sharing provisions—had little bearing on whether it would be unfair for him to arbitrate the more self-contained question of whether the arbitration clause was unconscionable:

> Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the [arbitration clause] is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain . . . . Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination.[180]

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[175] *See id.* at 2779 ("Application of the severability rule does not depend on the substance of the remainder of the contract.").

[176] *See supra* text accompanying notes 65-70.

[177] *See Rent-A-Center*, 130 S. Ct. at 2779 (stating that unless specifically challenged, delegation provisions are treated as valid).

[178] *Id.* at 2780.

[179] *Id.* at 2780–81.

[180] *Id.* at 2780.

Indeed, plaintiffs may never be able to prove that a delegation clause is unconscionable. To be sure, flagrant arbitrator bias or outrageous arbitral fees might give rise to a claim that it would be unfair to force a plaintiff to arbitrate the issue of whether the arbitration clause is valid. But other than these unlikely scenarios, any claim that a delegation clause is unconscionable comes perilously close to being a non sequitur. It is difficult to imagine how a plaintiff could prove that it is unfair to arbitrate the discrete issue of whether the arbitration clause is valid unless she somehow links it to the forfeiture of a substantive right. But to show that a delegation clause imperils a substantive cause of action, a plaintiff must establish not just that the arbitration clause makes it harder to pursue the cause of action, but that the arbitrator will, in fact, enforce the arbitration clause. Most courts will be unlikely to indulge in that kind of speculation.[181] Thus, a delegation clause gives drafters a potent new weapon: a way to strip judges of their traditional role as bulwarks against overreaching arbitration clauses.

E. Summary

The FAA confers broad power on private parties. It is an empty husk that companies can fill with contracts to arbitrate, which then radiate with the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[182] Capitalizing on both the Court's refusal to consider seriously whether arbitration alters substantive rights and the freedom to add and amend arbitration clauses—a power that exceeds the boundaries of contract law itself—businesses have invoked the FAA to create elaborate private procedural regimes. In the next Part, I offer a novel theory as to why the Court's interpretation of the statute is problematic.

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[181] If judges push back, drafters can always contract around these rulings as well. For instance, firms could create "double-decker" arbitration clauses: (1) offering to pay all costs and fees associated with arbitrating the issue of whether the arbitration clause is enforceable, but (2) requiring plaintiffs to pay for arbitrating substantive claims. Under *Rent-A-Center*, the arbitrator would end up deciding whether this arrangement is fair: Courts can focus on only how onerous it would be for the plaintiff to arbitrate whether the arbitration clause is valid, not how onerous it would be for the plaintiff to arbitrate substantive claims. Similarly, firms could embed a delegation clause within a delegation clause and task the arbitrator with deciding whether it would be unconscionable to have the arbitrator decide whether it would be unconscionable to have the arbitrator decide whether the arbitration clause is unconscionable.

[182] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

II
ARBITRATION AS DELEGATION

The first substantive sentence of the Constitution, Article I, section 1, states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[183] These words have sparked intense debate. The majority view among scholars, which the Court has implicitly endorsed, is that the phrase "legislative Powers" refers broadly "to the power to make rules for society."[184] In addition, although the meaning of the "Vesting" Clause remains controversial, the Court has explained that the Clause has both a positive and a negative purpose: It allows Congress to make these rules and then denies this right to anyone else.[185]

The nondelegation doctrine enforces this stricture by prohibiting sweeping transfers of congressional lawmaking authority. While this rule applies most commonly when Congress vests legislative power in other branches of government, it applies with special force when Congress transfers lawmaking authority to private parties. In this Part, I explore the tension between the private nondelegation doctrine and the Court's reading of the FAA.

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[183] U.S. CONST. art. I, § 1.

[184] Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298 (2003); *see also* Loving v. United States, 517 U.S. 748, 758 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."). *But see* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing that "legislative power" means only literal "authority to vote on federal statutes").

[185] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("[The] text [of Article I, section 1] permits no delegation of [legislative] powers . . . ."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 350–51 (2002) (arguing that although Constitution does not contain express nondelegation clause, nondelegation principle arises from text and structure of Constitution). This principle can be traced to John Locke. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 141, at 381 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (claiming that state power "being derived from the People[,] . . . the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands"). Not all authorities agree that Article I, section 1 constrains congressional delegation, however. *See, e.g.*, *Whitman*, 531 U.S. at 489 (Stevens, J., concurring) (noting that Article I, section 1 does not facially purport to limit Congress's power to delegate authority); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2109 (2004) (proposing understanding of Article I, section 1 that focuses not on fact that Congress cannot delegate lawmaking power, but on fact that agencies lack right to promulgate regulations in absence of congressional transfer of power).

A. The Public Nondelegation Doctrine

In its best-known manifestation, the nondelegation doctrine stands for the proposition that "Congress may not constitutionally delegate its legislative power to another branch of Government."[186] This version of the rule comes into play when Congress passes an open-ended statute that gives agencies the freedom to fill the gaps with regulations. I will call this the "public" nondelegation doctrine.

As a matter of black letter law, the Court will strike down a public delegation if Congress has failed to articulate an "intelligible principle" to limit the agency's discretion.[187] Although this rule has deep roots,[188] the Court has invoked it to nullify only two statutes in the twentieth century.[189] Indeed, in light of the practical complexities of modern governance, Congress simply cannot make, interpret, and enforce the laws itself. The Court has responded by repeatedly upholding public delegations, even if they are vast or vague.[190] For instance, the Court found an "intelligible principle" in a provision of the Controlled Substances Act that authorized the Attorney General to deem a drug unlawful if "necessary to avoid an imminent hazard to the public safety"[191] and in the Clean Air Act's instruction to the Environmental Protection Agency to set air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[192]

Yet in the last three decades, the public nondelegation doctrine has experienced a scholarly flowering. Several commentators have urged the Court to resuscitate the rule, claiming that it maintains the first principle of representative democracy: ensuring that the govern-

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186 Touby v. United States, 500 U.S. 160, 165 (1991).

187 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (formulating intelligible principle test).

188 *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

189 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Rfg. Co. v. Ryan, 293 U.S. 388, 420–30 (1935). As I discuss, *Schecter*'s elusive holding can also be seen as applying the private nondelegation doctrine. *See infra* notes 214–16.

190 Even Justices who might naturally be inclined to resist delegations acknowledge the practical difficulties of barring delegations completely. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[N]o statute can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it . . . .").

191 *Touby*, 500 U.S. at 163 (quoting 21 U.S.C. § 811(h) (1988)).

192 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting 42 U.S.C. § 7409(b)(1) (2000)).

ment is responsive to popular will.[193] Arguably, when elected legislators transfer the right to make policy decisions to unelected bureaucrats, they sever this essential link.[194] In fact, public delegation can be even more pernicious. As David Schoenbrod argues, delegation allows Congress simultaneously to reap the benefits and to avoid the blame of legislating by passing nebulous laws that leave difficult policy choices to agencies, or by pressuring agencies to regulate in ways that appease powerful interest groups.[195] By forcing Congress to accept responsibility for its actions, the nondelegation doctrine serves what I will call the "transparency value."

On the other hand, some scholars question whether delegation is undemocratic.[196] However, even they generally have no quarrel with the idea that the nondelegation doctrine facilitates transparency. Instead, they argue that there is no need for a special rule to protect this value because other forces constrain agency action. For example, the "presidential control" theory posits that the chief executive, who enjoys a unique position as the one official elected by the entire country, exerts considerable influence over agencies and "establishes an electoral link between the public and the bureaucracy."[197] Other

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[193] *See, e.g.*, Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 237 (2005) ("[T]he Constitution contains *some* limitation on the extent to which Congress can grant discretion to other actors . . . ."); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1254 (1985) (claiming that nondelegation rule should be understood as prohibiting Congress from enacting abstract "goals statute[s]," which "empower[ ] the agency to complete the job by making rules of conduct").

[194] *See, e.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) ("[T]he nondelegation doctrine . . . ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will."); JOHN HART ELY, DEMOCRACY AND DISTRUST 132 (1980) ("[B]y refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 335-36 (1999) ("[T]he [nondelegation] doctrine is designed to promote a distinctive kind of accountability—the kind of accountability that comes from requiring specific decisions from a deliberative body reflecting the views of representatives from various states of the union.").

[195] DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993) ("[D]elegation allows legislators to claim credit for the benefits which a regulatory statute promises, yet escape the blame for the burdens it will impose.").

[196] *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 139–40 (1997) (arguing that because voters can penalize their representatives for enacting vague statutes, "[the] notion that vague statutory language somehow severs the electoral connection" is "deeply puzzling").

[197] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001). Similarly, others argue that Congress can bring agencies in line through ex ante and ex post oversight mechanisms, such as imposing hard deadlines for agency action and prescribing substantive criteria to guide agency choices. *See* Sidney A. Shapiro & Robert L.

scholars draw on the tenets of participatory and deliberative democracy to claim that agency rulemaking can actually be superior to legislative rulemaking. According to these accounts, agencies must consider public input and offer reasoned explanations for decisions—requirements that discourage cynical, self-interested political deals and enhance accountability.[198] These powerful normative arguments against strict application of the public nondelegation doctrine, coupled with the prudential recognition that such a rule would topple the sprawling administrative state, likely explain its current dormancy.[199]

B. The Private Nondelegation Doctrine

However, a second, more muscular version of the nondelegation doctrine governs transfers of congressional power to private parties. Private delegations "clearly raise even more troubling constitutional issues than their public counterparts."[200] Recall that the public nondelegation doctrine serves what I have called the "transparency value": It prevents Congress from passing vague legislation and thereby transferring the responsibility for making hard policy choices to unelected bureaucrats. Delegations to private parties amplify these transparency concerns. Indeed, the factors that mitigate the potential evils of public delegations do not apply to private delegations. Agencies are subject to presidential oversight; private parties are not. Similarly, while the Administrative Procedure Act helps narrow the democracy gap in agency rulemaking by requiring agencies to hold notice-and-comment periods and justify their decisions,[201] it does not

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Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1998 DUKE L.J. 819, 827–28 (discussing how perceived problems with EPA in 1980s spurred Congress to reduce its discretion).

[198] *See* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1284 (2009) ("[R]eason-giving can certainly be understood as a viable alternative to elections for purposes of holding public officials democratically accountable for their specific policy choices."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545 (1988) ("The requirement of appeal to public-regarding reasons may make it more likely that public-regarding legislation will actually be enacted.").

[199] The opinions of Justice Thomas and Justice Stevens illustrate the sharp divide over the viability of the public nondelegation doctrine. *Compare* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (arguing that Article I, section 1 flatly forbids delegations of legislative power whether Congress has supplied "intelligible principle" or not), *with id.* at 489 (Stevens, J., concurring) (arguing that Article I, section 1 "do[es] not purport to limit the authority of [Congress] . . . to delegate authority to others").

[200] Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997); *see also* United Chiropractors of Wash., Inc. v. State, 578 P.2d 38, 40 (Wash. 1978) ("Delegation to a private organization raises concerns not present in the ordinary delegation of authority to a governmental administrative agency.").

[201] 5 U.S.C. § 553(b)–(c) (2006).

bind private parties. Thus, even more so than public delegations, private delegations "dilute the people's right to be governed only by their constitutionally chosen representatives."[202]

Private delegations also raise abuse of power concerns. Public officials, be they legislators or bureaucrats, are expected to exercise their authority to further "some conception of what is good for the community."[203] Private parties, on the other hand, have fundamentally different incentives: They inevitably "select regulation that provides them with maximum benefits without considering the effect on the other regulated parties or the public."[204] By checking the self-serving exercise of state power, the private nondelegation doctrine furthers what I will call the "neutrality value."

Unfortunately, the private nondelegation rule is notoriously elusive. For one, its constitutional foundation has never been entirely clear. Courts and commentators have alternatively opined that private delegations violate Article I, section 1,[205] the Due Process Clause of

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[202] Hetherington v. McHale, 329 A.2d 250, 254 (Pa. 1974); *see also Boll Weevil*, 952 S.W.2d at 469 ("[T]he basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.").

[203] David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659 (1986).

[204] Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1428 (2000); *see* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 146 (2000) ("[T]he private nondelegation doctrine focuses on the dangers of arbitrariness, lack of due process, and self-dealing when private parties are given the use of public power without being subjected to the shackles of proper administrative procedure."); Metzger, *supra* note 22, at 1445 (noting that delegation allows private parties to "wield . . . government powers in ways that raise serious abuse of power concerns"); *cf.* Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 468 (2006) ("When private contractors perform inherent government functions, they jeopardize core values of public law and weaken government's capacity to do the common good.").

[205] *See, e.g.*, Crain v. First Nat'l Bank of Or., Portland, 324 F.2d 532, 537 (9th Cir. 1963) (reasoning that, under Article I, section 1, "Congress cannot delegate to private corporations or anyone else the power to enact laws"); Metro Med. Supply, Inc. v. Shalala, 959 F. Supp. 799, 801 (M.D. Tenn. 1996) (considering plaintiff's claim that private nondelegation doctrine comes from Article I, section 1); Hornell Ice & Cold Storage Co. v. United States, 32 F. Supp. 468, 469 (W.D.N.Y. 1940) (same); David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 823–24 (1987) (linking private nondelegation doctrine to Article I, section 1); *cf.* Merrill, *supra* note 185, at 2168 (arguing that although text of Article I, section 1 does not speak to private delegations, private nondelegation doctrine stems from "the Constitution's implicit design principle limiting the federal government to three branches"). Similarly, state courts often hold that private delegations violate "vesting clauses" in state constitutions that mirror Article I, section 1. *See, e.g.*, Proctor v. Andrews, 972 S.W.2d 729, 733 (Tex. 1998) (holding that Texas Constitution's legislative vesting clause is "the proper constitutional source for a prohibition of delegations to private entities"); Newport Int'l Univ., Inc. v. Dep't of Educ.,

the Fifth Amendment,[206] or both.[207] In addition, the doctrine's contours remain open to debate. Unlike the public nondelegation doctrine, which hinges on the toothless "intelligible principle" test, the private nondelegation rule requires a fact-sensitive examination of whether a statute allows private parties to make law without the safeguards necessary to "inhibit[ ] arbitrary or self-motivated action."[208] As I will show, this inquiry primarily revolves around three factors. The first focuses on the nature of the delegation: whether it authorizes private actors to make law in a non-neutral, nontransparent way. The second is whether affected parties are adequately represented in the private lawmaking process. The third is whether the state retains control over the private delegate.

1. *The Nature of the Delegation: Transparency and Neutrality*

The first and most important variable in the private nondelegation inquiry is whether a statute has given private actors broad discretion to make rules that further their own agendas. The greater leeway the private delegate enjoys, the less work the legislature has done: an abstention that raises transparency issues.[209] In addition, if the subject matter of the delegation is one in which the private delegate has a

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186 P.3d 382, 388 (Wyo. 2008) ("State constitutional vesting clauses, which entrust certain branches of government with specified functions and powers, are the primary source of limitations on delegations.").

206 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (determining that statute which allowed some miners and coal producers to set terms of labor agreements binding on all miners and coal producers in region was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment"); Donald A. Dripps, *Delegation and Due Process*, 1998 DUKE L.J. 657, 659 ("[D]ue process cases are an enforcement tool for the nondelegation doctrine."). Some courts apply the Due Process Clause of the Fourteenth Amendment to private delegations at the state level. *See, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531, 555 (9th Cir. 2004) ("When a State delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process."); McGuire v. Reilly, 260 F.3d 36, 50 (1st Cir. 2001) ("[T]he Due Process Clause forbids standardless delegations of governmental authority, especially to private parties.").

207 *See, e.g.*, Santa Fe Natural Tobacco Co. v. Judge, 963 F. Supp. 437, 440 (M.D. Pa. 1997) (noting that private delegations violate both due process and separation of powers principles); Chester C. Fosgate Co. v. Kirkland, 19 F. Supp. 152, 163 (S.D. Fla. 1937) (holding that Agricultural Adjustment Act was "contrary to [A]rticle [I] of the Federal Constitution, and contrary to the Fifth Amendment to that instrument").

208 Santaniello v. N.J. Dep't of Health & Senior Servs., 5 A.3d 804, 810 (N.J. Super. Ct. App. Div. 2010).

209 *See, e.g.*, Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 472 (Tex. 1997) (surveying literature and federal and state case law and noting that important variables include breadth of delegation, powers given to private delegate, and whether "the Legislature [has] provided sufficient standards" to constrain delegate).

financial or political interest, it is more likely that the delegate will exercise its lawmaking prerogative in a non-neutral fashion.[210]

The private nondelegation rule emerged in the early twentieth century in the context of zoning regulations that contained gaps that property owners could fill by supermajority vote. For instance, in *Eubank v. City of Richmond*, an ordinance allowed two-thirds of the owners on a street to trigger setback requirements by requesting them in writing.[211] The Court held that the ordinance was unconstitutional because rather than regulating directly, "it enable[d] the convenience or purpose of one set of property owners to control the property right of others."[212] In turn, the Court explained, this possibility raised the specter that owners might exercise their power "solely for their own interest or even capriciously."[213]

During the New Deal, the Court struck down two federal statutes because they gave private parties the freedom to engage in self-interested lawmaking. First, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated a portion of the National Industrial Recovery Act, which allowed trade groups to propose codes of fair competition for their industries that would become effective upon approval by the President.[214] The opinion, though not a model of clarity, can be read as emphasizing the values of transparency and neutrality. The Court was troubled by the breadth of the powers that Congress had conferred, a point that Justice Cardozo captured with the phrase "delegation running riot."[215] Moreover, the Court noted with consternation that the delegates who enjoyed the right to fill these statutory gaps were not governmental officials, but private firms:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent[?] . . . The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[216]

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[210] *See, e.g.*, *id.* (noting importance of whether delegate has "a pecuniary or other personal interest that may conflict with his or her public function").

[211] 226 U.S. 137, 141 (1912).

[212] *Id.* at 144.

[213] *Id.*; *see also* Washington v. Roberge, 298 U.S. 116, 121–22 (1928) (invalidating ordinance that allowed convalescent home to be established in first district where two-thirds of property owners consented).

[214] 295 U.S. 495, 521–23 (1935).

[215] *Id.* at 553 (Cardozo, J., concurring).

[216] *Id.* at 537. Despite this condemnation of private parties' exercising lawmaking power, *Schechter*'s holding remains notoriously elusive. *See, e.g.*, Bruff, *supra* note 29, at 456–57 (noting that Court "failed to distinguish clearly between three possible grounds for objecting to the NIRA: that the delegation was too broad to be exercised by *anyone*, that

Likewise, in *Carter v. Carter Coal Co.*, the Court nullified part of the Bituminous Coal Conservation Act (BCCA).[217] The BCCA established twenty-three coal districts. Instead of specifying wage and hour standards within each district, the statute authorized certain high-volume coal producers and a majority of miners to craft these rules by private agreement.[218] The Court struck down the statute, describing it as "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[219]

Although the Court has not invalidated a law on private delegation grounds since *Carter*, lower courts continue to invoke the rule. For instance, in *General Electric Co. v. New York State Department of Labor*, a statute required employers who contracted with the state to pay their workers wages that had been established through collective bargaining between unions and employers.[220] The plaintiff claimed that the unions and employers had not engaged in adversarial negotiations but instead had conspired to inflate wages on public projects artificially.[221] Reversing the district court's grant of summary judgment, the Second Circuit held that these allegations, if proven, would reveal that the statute allowed private parties to further their "arbi-

government should have retained discretion granted to private parties, or that government supervision of private decision making was insufficient"); *cf.* Mistretta v. United States, 488 U.S. 361, 374 n.7 (1989) (describing *Schechter* as case where Congress "delegate[d] regulatory power to private individuals").

[217] 298 U.S. 238 (1936).

[218] *Id.* at 281–84.

[219] *Id.* at 311. The Court went on to conclude that the statute denied the dissenting miners and coal producers due process. *Id.* As noted above, however, it has never been clear whether *Carter* simply applied due process principles to private delegation or recognized a freestanding doctrine against private delegations with roots in Article I, section 1. *See supra* notes 205–07 and accompanying text (discussing potential constitutional foundations of private nondelegation doctrine).

A year after *Carter*, the Court considered a challenge to a Virginia statute that permitted a majority of milk producers to reject minimum prices set by a marketing board in *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937). The Court held that it did not need to determine whether this private veto power was unconstitutional, noting that the milk producers had not threatened to invoke it. *Id.* at 614. However, the Court remarked in dicta that the statute might violate due process because "[d]elegation to official agencies is one thing, . . . [but] delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law may be something very different." *Id.*

[220] 936 F.2d 1448 (2d Cir. 1991).

[221] *Id.* at 1457.

trary self-interest" and thus would be an impermissible private delegation.[222]

By the same token, courts have rejected challenges to private delegations that did not raise transparency or neutrality concerns. For instance, in *Biener v. Calio*, the plaintiff sought to invalidate a Delaware statute that allowed political parties to set filing fees for candidates in primary elections.[223] The Third Circuit acknowledged that "[w]ithout sufficient limitations, the delegation of authority can be deemed void for . . . giving unfettered discretion to the private party."[224] Nevertheless, the court noted that by capping the filing fees at one percent of the salary for the particular office, the legislature—not the political parties—had dictated the most important issue: the maximum fee.[225] Given this restriction, the court reasoned that the plaintiff had failed to explain how the political parties could "set filing fees selfishly, arbitrarily, or based on will or caprice."[226]

In sum, statutes raise private nondelegation issues when they give private actors the freedom to make law in a fashion that furthers their own interests. As I discuss next, lawmakers can ameliorate these concerns by ensuring that affected parties are represented in the decision-making process or by maintaining state control over the private delegate.

2. *Whether Affected Parties Are Represented*

Delegations to private parties can be valid if they are designed to minimize the risk of self-interested lawmaking. As courts and scholars have noted, one way of preventing private actors from abusing their power to legislate is to establish a private representative process—a decision-making structure that includes all affected constituencies.[227] Unlike the BCCA in *Carter*, which allowed a handful of industry

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[222] *Id.* at 1457–58; *see also* Beary Landscaping Inc. v. Shannon, No. 05 C 5697, 2008 WL 4951189, at *1, *3 (N.D. Ill. Nov. 18, 2008) (denying motion to dismiss similar nondelegation challenge to Illinois Prevailing Wage Act).

[223] 361 F.3d 206 (3d Cir. 2004).

[224] *Id.* at 216.

[225] *Id.* at 216–17.

[226] *Id.* at 217.

[227] *See, e.g.*, Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 472 (Tex. 1997) (listing as critical variable whether "the persons affected by the private delegate's actions [are] adequately represented in the decision-making process"); Lawrence, *supra* note 203, at 689 (noting that private delegations are not troubling if they are "to groups that arguably contain all those importantly affected by the set of rules made by the group").

players to regulate their competitors,[228] these benign delegations encourage participation and attempt to achieve consensus.

For instance, the private National Fire Protection Association (NFPA) promulgates electrical safety codes. Many state legislatures not only incorporate these guidelines but also permit the NFPA to amend the state laws that incorporate the guidelines.[229] At first blush, the fact that the NFPA enjoys the ability to change existing legislation simply by altering its own standards seems troubling. Yet the NFPA's drafting process incorporates input from "electrical contractors, inspectors, manufacturers, utilities, testing laboratories, regulatory agencies, insurance organizations, organized labor, and consumer groups"—the full range of parties who have a stake in the matter.[230] As a result, "no single interest is permitted to dominate."[231]

Similarly, federal agencies sometimes engage in negotiated rulemaking.[232] Unlike notice-and-comment rulemaking, where agencies hold themselves open for public input, under "reg neg," bureaucrats actively seek compromise among all major interest groups.[233] To be sure, this process gives private actors a significant voice in the content of laws.[234] Nevertheless, because it is inclusive and predicated on consent from all affected parties, it dispels transparency and neutrality concerns. Indeed, any time the legislature creates a private representative process, "political accountability exists and there is no need to be wary of delegation because the harm it seeks to avoid has been avoided from the outset."[235]

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[228] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) ("[O]ne person may not be entrusted with the power to regulate the business . . . of a competitor.").

[229] *See, e.g.*, Galaxy Fireworks, Inc. v. City of Orlando, 842 So. 2d 160, 166 (Fla. Dist. Ct. App. 2003) (noting that state statute adopts NFPA guidelines as amended by NFPA "from time to time").

[230] Lawrence, *supra* note 203, at 689.

[231] *Id.*; *see also* People v. Shore Realty Corp., 486 N.Y.S.2d 124, 127 (Dist. Ct. 1984) (rejecting nondelegation challenge to fire safety code promulgated by NFPA).

[232] *See* 5 U.S.C. §§ 561–570 (2006) (authorizing agencies to regulate by negotiation); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 42–112 (1982) (proposing that agencies experiment with regulation by negotiation).

[233] *See, e.g.*, William Funk, *Bargaining Toward the New Millenium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1351 (1997) ("Rather than conducting arm's length, adversarial undertakings loaded down with procedural requirements to protect everyone's interests, affected persons and the agency would sit together and cooperatively seek agreement.").

[234] *See, e.g.*, Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1216 (1994) (noting that regulation by negotiation may trigger private nondelegation concerns).

[235] Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1695 (1986).

3. *State Involvement*

Finally, after *Schechter* and *Carter*, the Court acknowledged another exception to the rule against private nondelegation: Otherwise impermissible private delegations could be valid if the government either participated in, or retained meaningful control over, the private lawmaking.[236] By adding its imprimatur, the state assumes responsibility for the private lawmaking and thereby reduces transparency concerns. In addition, governmental involvement or review can discourage delegates from attempting to wield power in a nonneutral fashion.

For example, in *Sunshine Anthracite Coal Co. v. Adkins*, the Court considered a revised version of the BCCA that allowed coal producers to generate rules relating to coal sales but subjected these rules to the approval of the government's Coal Commission.[237] Rejecting a nondelegation challenge, the Court distinguished *Carter*, noting that the coal producers now "function[ed] subordinately to the Commission."[238] Similarly, in *Currin v. Wallace*,[239] the Court upheld the Tobacco Inspection Act, which permitted the Secretary of Agriculture to issue regulations that became binding if two-thirds of the growers in an area approved them. Again, the Court reasoned that because the state determined the content of the rules and the growers merely decided whether to accept them, "[t]his is not a case where a group of producers may make the law and force it upon a minority."[240] In subsequent decades, executive, legislative, or judicial influence in private lawmaking became a critical litmus test for a delegation's validity.[241]

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[236] *See, e.g.*, Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 472 (Tex. 1997) (noting importance of whether "the private delegate's actions [are] subject to meaningful review by a state agency or other branch of state government"); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 717–18 (1975) (listing whether "the actions of private delegates [are] subject to no further public or judicial review, or to review only upon attenuated standards such as the substantial evidence rule," as relevant factor in nondelegation analysis). The precise degree of state oversight necessary to ameliorate nondelegation concerns remains unclear. For instance, in *Schechter*, the Court struck down section 3 of the National Industrial Recovery Act despite the fact that the President enjoyed the power to veto the privately made "codes of fair competition." *See* A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 521–23 (1935).

[237] 310 U.S. 381, 387–88 (1940).

[238] *Id.* at 399.

[239] 306 U.S. 1 (1939).

[240] *Id.* at 15.

[241] *See, e.g.*, Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 610 (6th Cir. 2006) (upholding statute that allowed private hospitals to veto abortion provider's license application because state officials possessed power to "make the final decision"); United States v. Frame, 885 F.2d 1119, 1128 (3d Cir. 1989) (finding that Beef Promotion and Research

C. *The FAA as a Private Delegation*

In this section, I argue that the bloated FAA that the Court has created bears the hallmarks of an impermissible private delegation. First, it gives companies virtually unfettered power to create a parallel system of civil procedure for consumer and employment cases. To be sure, the statute differs from most delegations because it merely allows private parties to create procedural rules rather than substantive law. Nevertheless, the ability to manipulate procedure is also the ability to manipulate substantive outcomes, and the Court has failed to establish a meaningful restriction on private procedural rulemaking that dilutes substantive entitlements. Second, because companies unilaterally dictate and amend arbitration clauses, they do not impose them through a process that internalizes consumers' and employees' interests. Finally, although the FAA as enacted mandates judicial review of privately made procedural rules, the Court has all but abolished this safeguard.

1. *The Nature of the Delegation: Transparency and Neutrality*

Delegations are troubling if they give private parties too much discretion (thus diminishing legislative accountability) and allow the delegate to further its own self-interest (rather than the common good). The FAA as interpreted by the Court raises both concerns.

For starters, the statute gives companies tremendous leeway to tilt the scales of justice in their favor. Unlike the laws in *Schechter* and *Carter*, which allowed private parties to define fair competition and set maximum wages and hours for workers—relatively self-contained issues—the FAA gives businesses dominion over the entire sprawling universe of procedural rulemaking. The statute is a hollow shell into which companies can pour privately made rules that govern discovery, statutes of limitations, the aggregation of claims, the permissibility of

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Act does not improperly delegate legislative power because "the amount of government oversight of the program is considerable"); Cospito v. Heckler, 742 F.2d 72, 88–89 (3d Cir. 1984) (rejecting private delegation challenge to Medicaid and Medicare provisions that allowed private organization to handle accreditation decisions because Secretary of Health, Education, and Welfare "retains ultimate authority over decertification decisions"). Similarly, the Court has relied heavily on the existence of state oversight in the analogous context of an asserted delegation of the executive's power to enforce the law. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), the Court upheld the citizen-suit provision of the Clean Water Act, which allowed private parties to file lawsuits against polluters even though any damages they might win would be paid to the U.S. Treasury. Although the dissent argued that the citizen-suit provision had "grave implications for democratic governance," *id.* at 202 (Scalia, J., dissenting), the majority brushed aside nondelegation concerns, noting that the statute authorized the government to intervene and assume control over any such litigation. *See id.* at 188 n.4 (majority opinion).

consequential and punitive damages, the payment of arbitral fees and costs, and the scope of judicial review.[242] In addition, as I have discussed above, there is a well-documented history of companies filling this regulatory gap with self-serving provisions.[243] Thus, because the FAA as interpreted by the Court confers broad discretion upon private parties to feather their own nests, it raises transparency and neutrality concerns.

One might argue that the FAA differs from previous delegations because it allows private parties to create procedure, not substantive law.[244] This rejoinder is unpersuasive for two reasons. First, even assuming that procedure and substance are separate, watertight containers, the state has an interest in preventing partiality in procedural rulemaking. Adjudication is one of the most important ways that citizens interface with the state, and a vast literature illustrates that individuals' perceptions of procedural fairness affect "their opinion of legitimate power and legal authority, sometimes even more so than case outcome."[245] As a result, procedural codes aspire to be impartial

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[242] Businesses have accepted this invitation on a massive scale. For instance, a recent survey of leading financial services and telecommunications firms found arbitration clauses in almost ninety-three percent of employment agreements and nearly seventy-seven percent of consumer contracts. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–83 (2008). Another study determined that all nine major wireless service providers and the vast majority of credit card companies use class arbitration waivers. Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reform*s, 15 HARV. NEGOT. L. REV. 115, 144–50 (2010). These industries provide services to hundreds of millions of customers, a fact which makes lockstep use of arbitration clauses and class arbitration waivers in these industries akin to nationwide legislation.

[243] *See supra* notes 132–39 and accompanying text (providing examples of these tactics).

[244] Similarly, one might argue that Congress enjoys greater leeway to transfer its procedural rulemaking powers under Article III than its core legislative powers under Article I. *Cf.* Posner & Vermeule, *supra* note 184, at 1730–31 (noting that Supreme Court has seemingly ignored intelligible principle test when determining whether Congress permissibly delegated its Article III powers under Rules Enabling Act). However, for the reasons I state in the remainder of this subsection, I see the FAA as a delegation of both Article III and Article I powers. The statute allows private parties not just to create procedural rules but to do so in a way that undermines statutes that Congress has created under Article I. The extent to which Article III imposes its own limitations on arbitration lies outside the scope of this Article. For illuminating discussions of that issue, see Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1201–04 (2008), which argues that the FAA "strip[s] federal courts of the power to interpret the meaning of federal law" and proposes that Article III requires that federal courts must have a meaningful opportunity to review arbitral awards, and Sternlight, *supra* note 29, at 79, which states that "Congress may not use a general preference for binding arbitration in all cases to reduce the jurisdiction of federal courts."

[245] Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 7 (2009). Burch goes on to argue that, "[l]egal systems that thwart litigants' preferences will have trouble compelling adherence to their judgments, pro-

toward both parties and all types of claims: "an unclogged artery through which substantive rights [can] flow."[246] Allowing private actors to create byzantine procedural rules such as the delegation clause and the "proconsumer" class arbitration waiver undermines this norm.[247]

More importantly, nondelegation concerns cannot be dismissed on the grounds that the FAA merely authorizes procedural rulemaking because procedure inevitably affects substantive rights.[248] Congress recognized this fact—and that the dangers of nondelegation flow from transferring its procedural rulemaking duties—when it passed the Rules Enabling Act (REA). The REA authorizes the Court to "prescribe general rules of practice and procedure," but it still prohibits the Court from "abridg[ing], enlarg[ing], or modify[ing] any substantive right."[249] As initially drafted, the REA did not contain this caveat.[250] Senator Cummings of Iowa suggested it as a response to concerns that "Congress could not if it wanted to, confer upon the Supreme Court, legislative power."[251] Accordingly, the REA's drafters believed that only by denying the Court the ability to promulgate procedural rules that impacted substantive rights did they

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moting voluntary compliance, and maintaining public confidence." *Id.* at 8; *see also* E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE, at v (1989) ("[L]itigants' satisfaction with their experiences had less to do with actual case outcomes, costs, and delay than with how the litigants' experiences with the system compared with their expectations.").

[246] Janice Toran, *'Tis a Gift To Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 376 (1990); *see also* Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 164 (1999) ("When we look to the Federal Rules of Civil Procedure, . . . we find that the rules are designed not only to ensure an impartial decision maker and the equal treatment of the litigants, but also to be impartial as to type of claim.").

[247] In a recent study, fewer than thirty percent of customers who had arbitrated securities claims rated the arbitral panel as "open-minded" and "impartial" or found arbitration to be "fair." Nancy A. Welsh, *What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 423–24 (2010).

[248] *See, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) ("The test is not whether the rule affects a litigant's substantive rights; most procedural rules do."); *see also* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) ("The substantive implications of procedural law are well understood. Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights."); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 214 (2004) ("[S]ubstance and procedure are thoroughly entangled in the actual rules of existing legal systems.").

[249] 28 U.S.C. § 2072 (2006).

[250] *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1311–12 (2006) (noting REA was redrafted to add caveat in response to concerns about delegating legislative power to judiciary).

[251] Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1073 & n.260 (1982) (quoting Letter from Senator Albert B. Cummins to Chief Justice William Howard Taft (Dec. 17, 1923)).

"immunize[ ] the Act from constitutional scrutiny as an improper delegation."[252]

Unlike the REA, the FAA does not expressly forbid companies from creating procedural rules that affect substantive rights. The only such limitations are the federal vindication-of-rights doctrine, which empowers courts to nullify arbitration clauses that impact substantive claims, and section 2's requirement that arbitration clauses conform to traditional contract principles like unconscionability. Yet the Court has structured these rules in a way that is extraordinarily deferential to arbitration. Again and again, the Court has declared that "[b]y agreeing to arbitrate[,] . . . a party does not forgo [any] substantive rights."[253] This is an empirical assertion: The Court is not saying that arbitration *should not* affect substantive rights, it is saying that, absent extraordinary circumstances, it *does not* affect substantive rights.[254] This assumption significantly weakens both the vindication-of-rights and unconscionability doctrines. In part because the Court presumes that rights-altering arbitration clauses are rare birds, it has insisted on forceful, concrete proof before finding that a plaintiff cannot effectively vindicate her statutory rights. Similarly, the Court has declined to consider whether adhesive contracts are unconscionable in cases involving consumers, investors, and employees, and has forbidden lower courts from "rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable."[255] By making it so difficult to invalidate an arbitration clause, the Court has encouraged private parties to make procedural rules that almost certainly alter substantive rights—the very result that the REA prohibits.

In fact, the Court's interpretation of the FAA raises a unique transparency and neutrality issue: It does not just allow private actors to *make* the law; it allows private actors to *change* the law. When pri-

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[252] Redish & Amuluru, *supra* note 250, at 1312–13.

[253] This quotation first appeared in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court has repeated it in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1469 (2009), *Preston v. Ferrer*, 552 U.S. 346, 359 (2008), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123–24 (2001), *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989), and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229–30 (1987).

[254] To be sure, because of significant variation among individual cases, it is extremely difficult to compare a consumer's or employee's actual results in arbitration with how they would have done in court. However, there is some evidence that consumers and employees—especially consumer defendants and low-level employee plaintiffs—do not fare as well in arbitration as they do in court. For an excellent collection of the nascent literature, see Welsh, *supra* note 247, at 419–22.

[255] Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

vate parties legislate under conventional delegations, they write on a blank canvas. For instance, *Carter*'s wage and hour regulations and *Schechter*'s codes of fair competition governed subject matters in which there was no preexisting, comprehensive statutory scheme.[256] But the FAA occupies the field of procedural rulemaking, where Congress has already spoken. Through the statutory-like mechanism of adhesion contracts,[257] companies re-regulate an area that Congress has already regulated.

Consider the class arbitration waiver. Federal Rule of Civil Procedure 23 entitles plaintiffs to aggregate claims.[258] In response to perceived problems with Rule 23, Congress has flexed its muscle to create procedural rules directly, passing two broad overhauls of the class action device in the last fifteen years.[259] Despite continued vociferous opposition to the very existence of Rule 23, Congress has declined to delete it. Yet when every company in an industry uses a class arbitration waiver, they effectively delete Rule 23 and override this congressional policy choice.

Rent-A-Center's delegation clause raises an even starker example of private law reform. Section 4 of the FAA prohibits courts from granting a motion to compel arbitration if there is a dispute about the validity of the arbitration clause.[260] A delegation clause trumps this statutory command by assigning the question of whether an arbitration clause is enforceable to an arbitrator. As I discuss below, delegation clauses have already become fixtures in consumer and

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[256] *See supra* notes 214–19 and accompanying text (discussing *Schecter* and *Carter*).

[257] Because binding agreements allow private parties to summon the coercive arm of the state to enforce rights and duties that the third parties themselves designed, such agreements "represent a kind of private lawmaking." Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77, 100 (2009); *see also* H.L.A. HART, THE CONCEPT OF LAW 40 (1961) (noting that contracting process transforms individuals into "private legislator[s]"); Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 260 (1909) (opining that contracting makes "a legislative body of any two persons"). Thus, in 1971, David Slawson claimed that standard forms—which allow each drafter to impose unilaterally one overarching set of provisions on all of its contractual relationships—shattered the barrier between contract and statute. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) ("The privately made law imposed by standard form has not only engulfed the law of contract; it has become a considerable portion of all the law to which we are subject.").

[258] FED. R. CIV. P. 23.

[259] In 1995, with the Private Securities Litigation Reform Act, Congress imposed stringent new standards for pleading and lead plaintiff and class counsel selection in securities cases. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. § 78u-4 (2006)). Then, with the Class Action Fairness Act of 2005, Congress expanded federal jurisdiction to eliminate forum shopping for favorable state courts by plaintiffs' lawyers. Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1711–1731 (2006)).

[260] 9 U.S.C. § 4 (2006).

employment contracts.[261] Thus, companies have effectively written section 4 out of the FAA. And unlike Rule 23, section 4 was not promulgated by the Supreme Court under the REA but rather passed through the traditional process of bicameralism and presentment.

By allowing private actors to abolish these rules, the FAA distorts the signal that voters receive from their elected representatives. Scholars have noted that the least polarizing, lowest-profile—and thus least accountable—way for Congress to enact tort reform is by manipulating procedure in lieu of eliminating substantive rights.[262] The FAA, as interpreted by the Court, does Congress one better. It hums along under the radar, weakening statutory entitlements. This dilution allows Congress to have it both ways by creating rights that will be underenforced.

To be clear, I do not fault Congress for the contemporary shape of the FAA: The statute is what it is largely due to the Court's interpretations and the concerted actions of business groups. My point is simply that the FAA as it now stands makes it difficult to map the contours of the substantive law and truly to assess Congress's handiwork when it creates rights. Just as delegation adds a layer of opacity when Congress transfers its lawmaking duties to agencies, excessive private procedural rulemaking is inimical to representative democracy.

In sum, the FAA as interpreted by the Court gives companies the freedom to create legal rules that further their own interests. It thus bears the hallmarks of an impermissible private delegation. As I discuss next, flaws in the private lawmaking process—the fact that consumers and employees are not adequately represented and the lack of a meaningful state role—reinforce this conclusion.

2. *Whether Affected Parties Are Represented*

Even if a statute allows private actors to make law, it does not necessarily violate the private nondelegation doctrine. As noted, some delegations give all affected groups a voice and then seek to achieve consensus among them. This "private representative process" dispels neutrality problems by ensuring that the resulting law does not "favor any private interest at the expense of either some theoretical public interest or other private interests."[263]

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[261] *See infra* note 289 and accompanying text.

[262] *See, e.g.*, Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 61 (1998) ("Congress and partisan lobbyists have discovered the usefulness of procedural provisions in effectuating substantive purposes . . . .").

[263] Lawrence, *supra* note 203, at 688.

Again, consider the REA. After receiving its grant of procedural rulemaking authority from Congress, the Court assigned its duties to three administrative bodies: the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, and the Judicial Conference of the United States.[264] These entities, which consist of judges, lawyers, and professors—not elected officials—draft new rules and amendments.[265] Yet the institutional design of the rulemaking process assuages nondelegation concerns. Since the 1985 amendments to the REA, Congress has self-consciously sought to "parallel the openness requirements of the House and Senate committees and subcommittees."[266] The Advisory Committee must consider proposed new rules or amendments from anyone, including lawyers, judges, public interest groups, and lobbyists.[267] Once the Advisory Committee obtains approval from the Standing Committee, it circulates the new rule or amendment along with a detailed explanatory note for public comment.[268] Consistent with the principles of both participatory and deliberative democracy, interested parties actively engage in this dialogue: There are over 10,000 individuals and entities on the Advisory Committee's mailing list.[269] Recent proposals have generated hundreds of responses and prompted the Committee to revise its handiwork.[270] Thus, the REA may be a private delegation, but it is structured to diminish the risk of any particular constituency running roughshod over others.

On its face, the FAA seems to achieve an even more inclusive decision-making regime. The statute simply requires courts to enforce

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[264] *See* James C. Duff, *The Federal Rules of Practice and Procedure*, U.S. CTS. (Oct. 2010), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx (explaining process by which federal rules are amended including respective roles of each committee).

[265] *See* Bone, *supra* note 25, at 892–93 (explaining court rulemaking model); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04 (2002) (providing overview of rulemaking process).

[266] H.R. REP. NO. 99-422, at 25 (1985).

[267] Duff, *supra* note 264.

[268] *Id.*

[269] *Id.*; *see also* Bone, *supra* note 25, at 954 ("Indeed, rulemaking today more closely resembles a legislative process with broad public participation and interest group compromise than the process of principled deliberation it was originally conceived to be.").

[270] *See* Lori A. Johnson, *Creating Rules of Procedure for Federal Courts: Administrative Prerogative or Legislative Policymaking?*, 24 JUST. SYS. J. 23, 27 (2003) (noting that Advisory Committee receives comments from "the American College of Trial Lawyers, numerous state bar association groups, the Federation of Insurance and Corporate Counsels, Public Citizen Litigation Group, the Lawyer's Committee for Civil Rights Under Law, the FBI, the National Association of Independent Insurers, law professors, individual attorneys, and private citizens"); Struve, *supra* note 265, at 1111 (noting that proposed amendments to Rule 11 drew responses from more than one hundred individuals and groups).

contracts that modify procedural rules. Indeed, as the Court has repeatedly intoned, the statute is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered."[271] Contractual bargaining is the archetypical representative process: It allows parties to custom tailor their rights and duties. And contracts do not arise without mutual consent; they are a pure form of consensus.

But although negotiated deals between equals may be products of a representative process, most consumer and employment contracts are not. Consumers and employees do not bargain over arbitration clauses in preprinted standard forms. In fact, a drafter "does not ordinarily expect his customers to understand or even to read the standard terms."[272] Businesses thus enjoy complete control over these contracts. Moreover, contracts scholars have long recognized that an adherent's *apparent* consent to an adhesion contract cannot be reasonably construed as *actual* consent to all of the contract's terms:

> Instead of thinking about 'assent' to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few [negotiated] terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form . . . .[273]

This attenuated "assent" deviates sharply from the goal of a private representative process, which seeks to achieve a true consensus among affected individuals and groups.[274]

And even if contracting usually is a representative process, the Court does not apply traditional contract law to arbitration. Consider the gateway issue of whether a party agreed to arbitrate at all. Black letter contract principles would bind a party to such a promise unless a defense to enforcement applied to the container contract. Under the Court's jurisprudence, however, a defense to enforcement makes no difference: The separability doctrine dictates that arbitration clauses are their own freestanding minicontracts within container contracts, and arbitrators (not courts) resolve challenges to the validity of the container contract. As a result of this legal fiction, a party who truthfully claims that she did not consent to the container contract because

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[271] Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985).

[272] RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979).

[273] KARL N. LLWELLYN, THE COMMON LAW TRADITION 370 (1960).

[274] *See* Lawrence, *supra* note 203, at 689 (arguing that promulgation of National Electric Code by National Fire Protection Association meets this requirement of private representative process).

she was defrauded, mistaken, or coerced still ends up in arbitration.[275] And *Rent-A-Center*'s delegation clause significantly expands the gulf between arbitration and contract law. In that case, the plaintiff argued that "he did not meaningfully assent" to the arbitration clause.[276] Even accepting this assertion at face value, the Court held that the delegation clause required Jackson to arbitrate the issue unless he could prove that he specifically did not consent to the delegation clause.[277] The delegation clause—separability squared—quite literally empowers drafters to impose arbitration on others without their consent, an outcome completely contrary to the fundamentals of contract law. This nonconsensual imposition of rights and duties is also the antithesis of a representative process.

Moreover, in the last decade, companies have imposed and unilaterally changed arbitration clauses through "bill stuffers"—a maneuver that is specifically designed to exclude consumers and employees from having any influence in the creation of private procedural rules.[278] To be sure, firms often give adherents a few weeks to reject unilateral changes by closing their accounts. But drafters deliberately condition the exercise of this right on prohibitive transaction costs—for example, search costs. Adherents who care about their procedural rights must vigilantly monitor their mail for updates to their contractual terms. And once a change-of-terms notice arrives, they must carefully compare the new terms to other companies' provisions. Unlike an initial purchasing choice, they cannot take their time; they must act by the drafter's deadline. Then, in order to refuse the unilateral change, they must incur switching costs. For instance, some wireless companies charge an early termination fee of hundreds of dollars.[279] Likewise, consumers cannot close a credit card account

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[275] For instance, even Stephen Ware—an eloquent defender of the Court's arbitration jurisprudence—has argued that Congress should abolish the separability doctrine because it deviates from traditional contract law. *See* Ware, *supra* note 68, at 121 ("[T]he right to litigate (like other rights) [sh]ould be alienable through an *enforceable* contract, but not a contract that is unenforceable due to misrepresentation, duress, illegality, or any other contract-law defense."); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 134–35 (1997) (arguing that separability doctrine "violates a fundamental principle of contract law" because it "enforces a duty assumed through coerced, not voluntary, consent").

[276] Jackson v. Rent-A-Center W., Inc., 581 F.3d 912, 917 (9th Cir. 2009), *rev'd*, 130 S. Ct. 2772 (2010).

[277] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2779 (2010).

[278] *See* Horton, *supra* note 116, at 650–51 (explaining that bill-stuffing gives drafter complete dominion over contractual terms).

[279] *Id.* at 650.

without paying off the full balance; in any event, closing an account lowers one's credit score.[280]

For these reasons, though contracting may be a private representative process, it is not so in the context of fine print dispute resolution terms. In fact, the Court's FAA jurisprudence deviates so far from traditional contract principles that it allows companies to impose extrajudicial dispute resolution without securing a consumer's or employee's consent. The statute's supposed foundation in contract law thus does not dispel the neutrality concerns that arise when Congress delegates lawmaking power to private parties.

3. *State Involvement*

Finally, the state can salvage an otherwise impermissible private delegation by retaining control over the delegate. For instance, the REA gives elected officials the final say over private lawmaking by providing Congress with at least seven months to reject rules or amendments promulgated by the Court.[281] Similarly, the FAA as enacted also envisions an active role for the government. Section 4 requires courts to consider challenges to the validity of arbitration clauses before enforcing them.[282] Similarly, sections 10 and 11 empower courts to modify and vacate awards for irregularity after the arbitral proceedings.[283] At first blush, this double-barreled judicial review seems to eliminate any nondelegation issue.

However, *Rent-A-Center*'s approach to delegation clauses changes the landscape dramatically. Consider a hypothetical based on the facts of *Rent-A-Center* and *Concepcion*. Jackson signs up for wireless service based on the promise of a "free" cellular phone.[284] His service agreement contains an arbitration clause that limits all discovery to one set of interrogatories.[285] After Jackson's service begins, he receives a "bill stuffer" with a new arbitration clause that abolishes discovery completely and contains a class arbitration waiver.[286] Jackson files a class action complaint in district court, alleging that the

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[280] *See* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 779 (2008) (reporting that effective cost of switching credit cards is about $150).

[281] 28 U.S.C. § 2074 (2006). Unless Congress rejects the new rules or amendments, they take effect. *Id.*

[282] 9 U.S.C. § 4 (2006).

[283] *Id.* §§ 10–11.

[284] *Cf.* Laster v. T-Mobile USA, Inc., No. 05cv1167, 2008 WL 5216255, at *1 (S.D. Cal. 2008). *Laster* was the trial court opinion in the case that eventually became *Concepcion*.

[285] *Cf.* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2780 (2010) (describing Jackson's arbitration clause).

[286] *Cf. Laster*, 2008 WL 5216255, at *2–3 (describing AT&T's invocation of its change-of-terms clause).

wireless service carrier fraudulently charged its customers $100 for the supposedly "free" phone. Before it orders arbitration, the court must determine whether (1) the first version of the arbitration clause is unconscionable because it limits discovery; (2) the second version of the arbitration clause is unconscionable because it limits discovery even more; (3) the class arbitration waiver is unconscionable because it deters the prosecution of low-value claims; and (4) the second version of the arbitration clause is invalid as an improper unilateral amendment.

Now suppose Jackson's service agreement also contains a delegation clause. The court may decide only the narrow issue of whether the delegation clause is unconscionable. That is it. And the delegation clause most certainly is not unconscionable. The limitations on discovery in the underlying arbitration clause may make it nearly impossible for Jackson to pursue his fact-sensitive substantive claims, but they do not make it burdensome for him to litigate the pure question of law of whether the delegation clause is invalid. Even if the class arbitration waiver, the discovery-limiting arbitration clause, or the "bill stuffer" would almost certainly be invalid, under mandatory authority the court must submit these disputes to arbitration. The court must do so even though arbitrators need not follow precedent and thus can flout controlling law.[287] As such, the delegation clause eviscerates the first layer of judicial review under the FAA and deprives courts of their traditional role as bulwarks against overreaching arbitration provisions.

Compounding this lack of judicial oversight, virtually all consumer and employee contracts already contain delegation clauses—although virtually no consumers and employees are aware of this fact. Rather than expressly stating that they empower the arbitrator to determine whether the arbitration clause is valid, these contracts incorporate by reference the rules of the American Arbitration Association (AAA). In turn, the AAA's rules empower the arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."[288] Accordingly, in *Awuah v. Coverall North America, Inc.*, the First Circuit held that a standard form franchise contract contained a delegation clause simply because it stated that "arbitration shall be in

[287] *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002) (characterizing mandatory arbitration as extralegal process that is contributing to dismantling of American contract law).

[288] RULES FOR CONSUMER ARBITRATION 7(a) (Am. Arbitration Ass'n 2009), *available at* http://www.adr.org/sp.asp?id=22440#R7.

accordance with the then current Rules of the American Arbitration Association."[289]

The ubiquity of these "ghost" delegation clauses effectively reduces court oversight of the content of arbitration clauses to ex post consideration of the propriety of an arbitrator's award. This inquiry takes place under "one of the narrowest standards of judicial review in all of American jurisprudence."[290] Indeed, to preserve arbitration's efficacy as a dispute resolution mechanism, courts can set aside an arbitrator's ruling only for extraordinary defects.[291] Under the FAA, these grounds include "[w]here the award was procured by corruption, fraud, or undue means," where "there was evident partiality or corruption in the arbitrators," or where "the arbitrators exceeded their powers."[292] Courts can also vacate an award for "manifest disregard" of law, but "only in 'those exceedingly rare instances where some egregious impropriety on the part of the arbitrator[ ] is apparent,'"[293] such as when a plaintiff presents convincing proof that the arbitrator "recognized the applicable law and then ignored it."[294]

Applying these deferential standards, judges are especially unlikely to second-guess an arbitrator's resolution of fact-sensitive issues such as unconscionability. To return to my hypothetical case involving Jackson's class action, suppose it arose in California. The

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[289] 554 F.3d 7, 9 (1st Cir. 2009); *see also* Preston v. Ferrer, 128 S. Ct. 978, 988 (2008) (reasoning that contract at issue incorporated Arbitration Association Rule 7(b) by reference); Terminix Int'l Co. v. Palmer Ranch Ltd., 432 F.3d 1327, 1332 (11th Cir. 2005) (reaching same result for contract between sophisticated parties); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989) (reaching same result for contract referencing rules of International Chamber of Commerce). *But see* Burlington Res. Oil & Gas Co. v. San Juan Basin Royalty Trust, 249 S.W.3d 34, 40 (Tex. App. 2007) (finding that despite "the parties' reference to the AAA rules, the parties simply did not clearly and unmistakably submit the issue of arbitrability to arbitration"). The language that the *Awuah* court found controlling is ubiquitous in consumer and employee arbitration clauses. *E.g.*, *2.2 Arbitration Agreement*, AT&T WIRELESS, at section 1, http://www.wireless.att.com/cell-phone-service/legal/index.jsp?q_termsKey=wirelessCustomerAgreement&q_termsName=Wireless+Customer+Agreement&subSection=arbAgreement (last visited Jan. 18, 2011); *Comcast Agreement for Residential Services*, COMCAST, http://www.comcast.com/Corporate/Customers/Policies/SubscriberAgreement.html (last visited Jan. 18, 2011).

[290] Lattimer-Stevens v. United Steelworkers of Am., 913 F.2d 1166, 1169 (6th Cir. 1990).

[291] *See, e.g.*, Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) ("Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation."); Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) ("Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.").

[292] 9 U.S.C. § 10(a) (2006).

[293] T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339 (2d Cir. 2010) (quoting Duferco Int'l Steel Trading v. T. Klaveness Shipping, 333 F.3d 383, 389 (2d Cir. 2003) (alteration in original)).

[294] Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co., 44 F.3d 826, 832 (9th Cir. 1995).

discovery-abolishing arbitration clause would almost certainly be invalid, since the California Supreme Court has held that plaintiffs are entitled to "discovery sufficient to arbitrate their . . . claim[s]."[295] Likewise, the class arbitration waiver would fail because individual consumers lack incentives to prosecute $100 claims on an individual basis.[296] Nevertheless, suppose that the arbitrator enforced both provisions. Given the amorphous nature of unconscionability—a doctrine built around inherently subjective notions of fairness—one will almost always be able to argue with a straight face that the arbitrator was correct. For instance, the defendant in Jackson's case could bolster the arbitrator's ruling by analogizing to California cases that have both upheld severe limitations on discovery[297] and rejected unconscionability challenges to class arbitration waivers on the grounds that several hundred dollars in damages is "not . . . a small amount of money."[298] Even if these arguments would not survive traditional appellate review, they likely are strong enough to disprove that the arbitrator "ignored" controlling law and to immunize the arbitrator's award in district court.[299]

In sum, the delegation clause all but abolishes court oversight of private procedural rulemaking. Courts once struck down flagrantly one-sided arbitration clauses rather than granting motions to compel arbitration; now they must defer to the arbitrator's determination of whether the arbitration itself is fair. This meager form of judicial review is a far cry from the direct veto of privately made law that the Court has previously upheld in private nondelegation challenges. The

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[295] Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 683–84 (Cal. 2000).

[296] *See* Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (holding that class arbitration waivers in contracts of adhesion are unenforceable when individual damage awards will be small).

[297] *See, e.g.*, Dotson v. Amgen, Inc., 104 Cal. Rptr. 3d 341, 349 (Ct. App. 2010) (upholding arbitration clause that "purports to limit discovery to one deposition of a natural person").

[298] Provencher v. Dell, Inc., 409 F. Supp. 2d 1196, 1202 (C.D. Cal. 2006); *see also* Dalie v. Pulte Home Corp., 636 F. Supp. 2d 1025, 1029 (E.D. Cal. 2009) (enforcing class arbitration waiver on similar grounds).

[299] The only cases of which I am aware in which a court confronted an arbitrator's assessment of unconscionability have upheld the award. Some of these cases affirmed an arbitrator's decision that a term *was* unconscionable. *See, e.g.*, Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 713 (6th Cir. 2005) (affirming arbitrator's decision to strike liability-limiting clause), *overruled on other grounds by* Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576 (2008). Other cases affirmed an arbitrator's decision that a term was *not* unconscionable. *See, e.g.*, Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 265 (Tex. App. 2003) ("[T]he failure to find that the Lawyers' fees were unconscionable is not in manifest disregard of the law."). Given the extreme pliability of unconscionability doctrine, it seems reasonable to assume that courts will continue to exhibit this level of deference to arbitrators who decline to invalidate contract terms.

Court's reading of the FAA thus allows private actors to create rights-altering procedural rules through a process that neither internalizes the wishes of affected parties nor is subject to meaningful governmental control.

III
Nondelegation as a Limit on the FAA

In this Part, I argue that recognizing that the FAA raises nondelegation issues should lead the Court to reconsider two important policy issues: (1) the intersection of private procedural rulemaking and substantive rights and (2) the rules governing delegation clauses. Using the specific example of FAA preemption, I also explore how future judges and litigants might combine the private nondelegation rule and the canon of constitutional avoidance to reject expansive readings of the statute.

A. Rethinking the FAA's Effect on Substantive Rights

From a nondelegation perspective, the most glaring flaw in the Court's jurisprudence is its assumption that excessive private procedural rulemaking does not alter substantive outcomes in consumer and employment cases. As I have explained above, the Court has made it exceedingly difficult for plaintiffs to invalidate arbitration clauses under the vindication-of-rights and unconscionability doctrines.[300] In response, companies have transformed the FAA into what the nondelegation doctrine forbids: a private liability reform statute.

Acknowledging the nondelegation issue might prompt the Court to reconsider the interplay between modified procedural rules and the substantive law. In an article written just before his recent, untimely death, Richard Nagareda notes that the Court's rosy view of procedural rulemaking under the REA mirrors its rosy view of procedural rulemaking under the FAA.[301] The Court has never found a rule promulgated by the Advisory Committee improperly to "abridge, enlarge, or modify any substantive right."[302] Instead, the Court has created a lenient test that asks only if rules are "rationally capable" of being classified as procedural.[303] Nagareda calls this the "Will Rogers

[300] *See supra* notes 253–55 and accompanying text.

[301] Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 Notre Dame L. Rev. (forthcoming 2011) (manuscript at 17, 21), *available at* http://ssrn.com/abstract_id=1670722.

[302] 28 U.S.C. § 2072(b) (2006); *see also* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) ("[W]e have rejected every statutory challenge to a Federal Rule that has come before us.").

[303] Hanna v. Plumer, 380 U.S. 460, 472 (1965).

theory of the [REA]—one whereby the Court has never yet met a Federal Rule that it didn't like."[304] He detects the same sanguinity about procedure and substance in the Court's repeated denials that the FAA affects substantive rights.[305]

Nondelegation analysis reveals the fallacy of the Court's symmetrical treatment of the REA and FAA. Even if federal procedural rulemaking does impact substantive laws—making the REA a potentially troubling private delegation—the representativeness of the rulemaking process and Congress's veto power over the Advisory Committee assuage transparency and neutrality concerns. The FAA contains no such safeguards. Thus, the Court's "Will Rogers" approach to the FAA overlooks the fact that rights-altering private procedural rules are more troubling than rights-altering public procedural rules.

The Court could acknowledge the FAA's special delegation dangers in two ways. First, it could throttle back on the showing required to invalidate an arbitration clause. In *Green Tree Financial Corporation-Alabama v. Randolph*, the leading vindication-of-rights case, the plaintiff argued that because the arbitration clause said nothing about fees and costs, it created the risk that arbitration would be prohibitively expensive.[306] The Court rejected this argument but left the door open for future plaintiffs to assert the same theory on a better-developed factual record.[307] The Court could grant certiorari in precisely such a case and establish a summary judgment–like standard entitling a plaintiff to a judicial forum if she introduces sufficient evidence to support a reasonable inference that arbitration prevents her from effectively vindicating her statutory rights.

Second, in order to restrict the FAA's impact on substantive rights, the Court should seize the opportunity in *Concepcion* to preserve class arbitration. There are indications that the Court will do just the opposite. In its recent decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, the Court strongly implied that class arbitration is inconsistent with the FAA.[308] According to the Court, class arbitration "changes the nature of arbitration to such a degree that it cannot

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[304] Nagareda, *supra* note 301 (manuscript at 17).

[305] *Id.* (manuscript at 21) (noting modern Court's opinion that arbitration amounts to "a mere change of forum" that does not affect substantive rights). Nagareda notes that the similar treatment of the REA and FAA appears anomalous, as "private contracts do not go through anything like the Rules Enabling Act process." *Id.* (manuscript at 22).

[306] 531 U.S. 79, 90 (2000).

[307] *Id.* at 92 ("How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss.").

[308] 130 S. Ct. 1758 (2010).

be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."[309] This language suggests that the FAA forbids class arbitration unless the parties affirmatively agree to it, a conclusion which would make class arbitration waivers superfluous.

However, importing this logic into the context of consumer and employment contracts would magnify arbitration's effect on substantive rights and thus would push the FAA deeper into nondelegation terrain. Just as excessive arbitral costs can thwart the exercise of rights, mandating that all arbitration take place on an individualized basis deters plaintiffs from prosecuting low-value claims.[310] Indeed, "[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[311] And when statutory rights are at issue, the problem is not simply that class arbitration waivers are unfair. It is that, in the aggregate, they "write private enforcement out of the underlying statute."[312] Allowing the FAA to swallow the class action device would thus allow private parties to rewrite substantive laws. The Court should hold that the FAA does not preclude class arbitration of low-value consumer and employment disputes.

B. Heightened Regulation of Delegation Clauses

To sidestep constitutional concerns, the Court could also reconsider the way it has conceptualized delegation clauses. Giving companies the virtually unfettered right to assign to the arbitrator the question of whether the arbitration clause is valid impacts the second and third factors in the private nondelegation test. It distorts the representative, consensual nature of the contracting process by forcing consumers and employees to arbitrate even when they truthfully deny having agreed to do so. In addition, it eradicates state oversight of arbitration clauses for fairness.

An important move in the right direction would be for the Court to limit its dicta in *Rent-A-Center* about the exceedingly narrow scope of judicial review of a delegation clause. Recall Justice Scalia's explanation that Jackson would almost certainly have lost had he argued that the underlying arbitration clause's discovery limitations and fee-

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[309] *Id.* at 1775 (citations omitted).

[310] *See supra* note 153 and accompanying text (discussing California Supreme Court's reasoning in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

[311] Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (emphasis omitted).

[312] Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1904 (2006).

splitting provisions made it unfair for him to arbitrate the issue of the arbitration clause's validity.[313] According to Justice Scalia, then, a court's role in assessing whether a delegation clause is unconscionable turns solely on how onerous it would be for a plaintiff to arbitrate the issue of the arbitration clause's enforceability.[314] Scalia's approach removes from court supervision terms that are exceedingly likely to impair a plaintiff's ability to vindicate her rights—for example, a class action waiver—but that do not bear on the discrete issue of whether it is fair to arbitrate the validity of the arbitration clause.

The Court could remedy this problem by recognizing a "look through" doctrine that expands the scope of judicial review beyond the question of how difficult it is for the plaintiff to arbitrate the arbitration clause's validity. Under this rule, courts could consider the content of the underlying arbitration clause when deciding whether to enforce a delegation clause. Out of deference to the delegation clause, courts need not apply full-on unconscionability analysis when they review the underlying arbitration clause; rather, they could apply a modified version of the doctrine that smokes out flagrant unfairness. For instance, a court could enforce borderline clauses and invalidate delegation clauses only when the underlying arbitration clause contains multiple remedy-stripping provisions or other terms that controlling precedent forbids. By ensuring that judges continue to police arbitration clauses for fairness, the "look through" rule would add a prophylactic layer of governmental review to proceedings under the FAA, thus diminishing private delegation concerns.

C. The FAA and Constitutional Avoidance

Finally, at the very least, judges and litigants should invoke the nondelegation doctrine in the future to limit the FAA's scope. Even if the Court has not invalidated a statute on nondelegation grounds since *Carter*,[315] it has repeatedly invoked the rule in conjunction with the canon of constitutional avoidance "to giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[316] Likewise, federal appellate courts continue to read a

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[313] Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2780–81 (2010); *see also supra* Part I.D.3 (discussing Justice Scalia's analysis of Jackson's claim).

[314] *Rent-A-Center*, 130 S. Ct. at 2780–81.

[315] *See supra* notes 217–22 and accompanying text (discussing *Carter* and its treatment by lower courts).

[316] Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); *see also* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (rejecting government's argument that Occupational Safety and Health Act allowed Secretary of Labor to regulate exposure to even insignificant amounts of chemical benzene in workplace on grounds that reading statute so broadly would transform it into "sweeping delegation of legislative power");

wide array of laws narrowly to sidestep thorny nondelegation questions.[317] Thus, if nothing else, the nondelegation doctrine lives on as a tool of statutory interpretation—a force that counsels against interpreting statutes to authorize expansive grants of legislative power.[318]

For instance, the canon of constitutional avoidance could be valuable in the brewing storm over the scope of FAA preemption. The extent to which the statute trumps state law has never been clear. On the one hand, it undeniably eclipses state regulation that singles out arbitration clauses for invalidity. For example, Alabama cannot outlaw predispute arbitration clauses,[319] and Montana cannot condition the validity of such clauses on drafters complying with idiosyncratic notice requirements.[320] On the other hand, there is no definitive answer as to whether, and under what circumstances, the FAA overrides state statutes that are capable of nullifying arbitration clauses but are also capable of nullifying other kinds of contracts. Do these laws yield to the FAA because they are not "grounds as exist at law or in equity for the revocation of any contract"[321]—i.e., traditional contract defenses such as fraud, duress, and unconscionability? Or do these laws survive because they do not apply exclusively to arbitration clauses and thus do not "place[ ] [such clauses] in a class apart from 'any contract'"?[322]

For example, California's Consumers Legal Remedies Act (CLRA) governs agreements for "the sale or lease of goods or services to any consumer."[323] It expressly permits class actions[324] and for-

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Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 341–42 (1974) (drawing on nondelegation principles to construe Independent Offices Appropriations Act as not allowing federal agency to impose tax on television broadcasters).

317 *E.g.*, United States v. Hinckley, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (Sex Offender Registration and Notification Act); Sokol v. Kennedy, 210 F.3d 876, 879 & n.7 (8th Cir. 2000) (Wild and Scenic Rivers Act); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 247 (2d Cir. 1996) (Foreign Sovereign Immunities Act). *But see* Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976) (declining to apply doctrine of constitutional avoidance to section 232(b) of Trade Expansion Act on grounds that section 232(b) "establishes clear preconditions" to exercise of delegated power and thus does not raise serious constitutional issue).

318 *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 342–43 (2000) (arguing that public nondelegation doctrine consists of series of canons of statutory interpretation and reflects idea that "certain decisions are ordinarily expected to be made by the national legislature, with its various institutional safeguards, and not via the executive alone").

319 *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268–69 (1995) (holding that state statute making all predispute arbitration agreements unenforceable is preempted by FAA).

320 Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996).

321 9 U.S.C. § 2 (2006).

322 *Doctor's Assocs.*, 517 U.S. at 688 (quoting 9 U.S.C. § 2).

323 CAL. CIV. CODE § 1770(a) (West 2009).

bids "[a]ny waiver by a consumer of the provisions of this title."[325] Does the FAA preempt the CLRA's nonwaivable right to assert a class action when a drafter employs a class arbitration waiver in a consumer contract? In 2003, the Ninth Circuit held that because the CLRA relates only to consumer contracts—and not "any contract" in the language of the FAA—it was preempted.[326] In 2010, however, a California appellate court reached the opposite conclusion, reasoning that the CLRA did not discriminate against arbitration because it preserved the class action device in both arbitration and nonarbitration contracts.[327] Which view is correct?

Reading the FAA as overriding the CLRA would raise private nondelegation concerns. As I have argued above, class arbitration waivers in consumer contracts are a form of private law revision, insofar as they eliminate the class action device and warp substantive laws.[328] In fact, to the extent that the private nondelegation doctrine stands for the proposition that Congress cannot assign lawmaking responsibility to self-interested, unelected private parties, a robust FAA preemption doctrine would be a double whammy: It would enable companies not only to serve their own ends but also to thwart the wishes of democratically accountable state legislatures. The desire to avoid grappling with the constitutionality of such a rule should prompt courts to adopt a relatively modest view of FAA preemption in the context of state legislation that does not apply only to arbitration clauses.

Conclusion

Two statements recur time and time again in the Court's arbitration decisions. The first is that arbitration "is a matter of consent, not coercion."[329] But even the bare choice to arbitrate is often nonconsensual. That conclusion follows no matter one's political beliefs or views of adhesion contracts; indeed, it is woven into arbitration jurisprudence through the separability doctrine and the delegation clause. Second, the Court often asserts that "by agreeing to arbitrate[,] . . . a party does not forgo [any] substantive rights."[330] That is a dubious

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[324] *Id.* § 1781(a).

[325] *Id.* § 1751.

[326] Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003).

[327] Fisher v. DCH Temecula Imps. LLC, 114 Cal. Rptr. 3d 24, 34 (Ct. App. 2010).

[328] *See supra* text accompanying notes 256–62.

[329] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989). For cases citing this proposition see *Stolt-Nielsen South America v. AnimalFeeds International Corp.*, 130 S. Ct. 1758, 1773 (2010); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

[330] *See* cases cited *supra* note 253.

normative judgment masquerading as an empirical claim. What the Court is really saying is that under the FAA, arbitration is rooted in consent (even when it is not) and does not affect substantive rights (even when it does).

This understanding of the statute violates the private nondelegation rule. First, it gives private parties wide leeway to create procedural rules—even when rampant private procedural rulemaking likely dilutes substantive rights. Second, it allows businesses to impose these rules on consumers and employees through a process that does not internalize their interests. Finally, it dispenses with meaningful state oversight. Going forward, the Court should either explain how the FAA is consistent with the private delegation doctrine or limit the statute.