LIBERAL JUSTICE AND THE CREEPING PRIVATIZATION OF STATE POWER

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ABSTRACT

Liberal justice demands the levers of the state's coercive power be in the hands of public officials and institutions that society can hold accountable. This Article contends that the U.S. Supreme Court has gradually shifted courts' authorization of state power in contract disputes to arbitrators. The Court's expansive interpretation of the Federal Arbitration Act (FAA) has generated three default rules that together presume arbitrators, not courts, are the proper actors to ascertain the parties' assent to arbitration. This precedent in effect surrenders courts' discretion in deciding when the state enforces particular contracts. It risks infringing the principle of liberal justice because while courts are accountable for the authorization of state power through legal reasoning, arbitrators typically have fiduciary duties to the disputants alone. This Article proposes a congressional override that reverses the privatization of state power by placing the burden of proof on the party seeking to enforce an arbitration agreement.

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I. INTRODUCTION

The U.S. Supreme Court has come to rigorously enforce arbitration,[1] protecting arbitration agreements "pretty absolutely," as Justice Neil Gorsuch recently wrote in his 2018 opinion for *Epic Systems Corp. v. Lewis*.[2] This Article shows that the Court's increasingly broad application of the 1925 Federal Arbitration Act (FAA)[3] has generated three doctrines that have gradually privatized a court's discretion in authorizing the use of state power in contract cases.[4] By shifting an increasingly heavy burden of proof to the party opposing arbitration, the Court's default rules provide arbitrators with the presumptive jurisdiction to ascertain the contracting parties' assent to arbitration. I argue that this precedent effectively allocates control of the state's coercive power to private actors. This privatization of state power presents a departure from the oversight function of courts the FAA sought to protect, thereby risking violation of the principle of liberal justice that demands positive control of state power remain with the

1. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (citing Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) ("Indeed, we have often observed that the Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.'")).

2. *Id*.

3. 9 U.S.C. §§ 1–16 (2018). It was enacted by the U.S. Congress as the United States Arbitration Act and entered into force on January 1, 1926. The act is now generally referred to as the Federal Arbitration Act.

4. *See infra* Part IV. When I use *state power*, I refer to the coercive powers of the United States, or of a nation or state generally, not to be confused with the concept of state powers under the Tenth Amendment of the U.S. Constitution. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

institutions that are publicly accountable for it.[5] I propose three targeted amendments to the FAA to reverse the creeping privatization of state power through arbitration.

In recent years, the Supreme Court's broad application of the FAA has been the subject of an ongoing debate among justices, scholars, and advocates.[6] The discussion centers on issues of economic injustice and social inequality related to mandatory arbitration, which is the enforcement of arbitration clauses in contracts of adhesion between large companies and consumers or employees.[7] Commentators lament the "privatizing"[8] of the

5. Here, I use the term *liberal justice* as a procedural principle of justice advanced in theories of political liberalism. The demand for attributing state power to accountable institutions is further elaborated in Part II.

6. *See generally* Stephen Smerek & Daniel Whang, *Preemption and the Federal Arbitration Act: What Law Will Govern Your Agreement to Arbitrate?,* ABA SECTION OF BUS. LAW, http://apps.americanbar.org/buslaw/newsletter/0051/materials/pp7.pdf [https://perma.cc/M3TW-8VZE] (last visited June 17, 2019).

7. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just*, 57 STAN. L. REV. 1631, 1632 n.1 (2004) (citations omitted) ("The controversy surrounding mandatory arbitration begins with its name. Critics of the process feel comfortable labeling it 'mandatory,' 'compelled,' or even 'cram down' arbitration. . . . In contrast, defenders suggest this nomenclature is inappropriate and unfair."); *see also* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1011–12 (2016) ("[W]hile the wealthiest litigants have the greatest influence on how the civil litigation system works, they also have the ability to opt out of the system—and force their opponents out too . . . . In other words, the elite litigation player has the ability to dictate the rules of the game but also has the ability to refuse to play that game at all . . . ."); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 72 (2014) ("In contrast to the growing concerns over income inequality, much less attention has been paid to the question of equality of justice in employment.").

8. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015) ("Many observers have noted that this decades-long privatization of dispute resolution and attendant adjudicative mechanisms has led to both a loss of confidence in public adjudication and a loss of public adjudication itself—an erosion of the public realm."); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2836 (2015) [hereinafter *Diffusing Disputes*] (arguing the Court's approach has led to "diffusion, deregulation, and to the privatization of dispute resolutions that gain the force of law"); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1809 (2013) [hereinafter *Privatization of Process*] ("A third mechanism of privatization comes from the enforcement of contracts mandating arbitration in lieu of adjudication.").

civil justice system.[9] Some contend courts are outsourcing the primary constitutional functions of courts,[10] relegating parties to a "private system of justice" in the process.[11] Others go as far as saying the Court's expansion of the FAA might be unconstitutional.[12]

The position put forward by this Article intersects with the current debate but addresses a problem both broader and more fundamental. It critiques the Supreme Court's case law for effectively privatizing the authorization of state power in contract cases generally. On the surface, the Court appears to agree that the authorization of state power should remain with the courts.[13] It has repeatedly stated that the question of whether the contracting parties wish to arbitrate the arbitrator's jurisdiction is for courts to answer.[14] However, by presumptively deferring to an arbitrator's determination in the matter, the Court's precedent effectively allots the judicial authorization of state power to private "judges."[15]

9. Craig Smith & Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH. L. REV. 281, 282 (2011) ("The practical effect of enforcing these provisions is a paradigmatic shift in our civil justice system—no longer is it based upon the fundamental right of trial by jury.").

10. *See Privatization of Process*, *supra* note 8, at 1806–07 ("[T]he outsourcing to private entities through the Supreme Court's expansive reading of the 1925 Federal Arbitration Act [FAA] . . . ."); IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013); *see generally* Smith & Moyé, *supra* note 9.

11. SZALAI, *supra* note 10, at 7 ("When parties are bound by an arbitration agreement, the parties are limited to a private system of justice instead of a public system of justice involving a traditional court with a judge and a jury. This private system can be a polar opposite, in almost every way, to the public system."). "America has become an 'arbitration nation,' with an increasing number of disputes being taken away from the traditional, open court system and relegated to a private, secretive system of justice." *Id.* at 9.

12. *Id.* at 11 ("[S]ome believe that the Supreme Court's interpretations of the Federal Arbitration Act involve one of the greatest constitutional errors even made by the Court."); *Diffusing Disputes*, *supra* note 8, at 2809 ("[T]he Court has spun off decision making without imposing structured safeguards. The result is a system that ought to be seen as unconstitutional . . . .").

13. *See, e.g.*, AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 651 (1986).

14. *See id.* (stating it is the Court's duty to determine whether parties have agreed to resolve their dispute through arbitration).

15. *See id.*

I argue the Supreme Court's opinions fail to meet two criteria of judicial legitimacy.[16] First, a court's judgment should follow reasonably from the law to which it resorts.[17] Put differently, the law invoked should explain the subsequent decision.[18] Second, this explanation ought to present the law as justifying the employment of state power.[19] I demonstrate the Court's precedent has been gradually departing from the FAA's anticipated protection of courts' jurisdiction to authorize the use of state power. Moreover, this departure risks infringing the principle of liberal justice that requires the levers of the state's coercive power be in the hands of publicly accountable institutions.

Part II lays out this Article's analytical and normative framework. When the state supports arbitration, it severs a court's adjudicative power from its enforcive power—granting arbitrators the power to settle disputes while securing courts' enforcement of the outcome.[20] I caution that courts are also in effect ousted from their enforcive jurisdiction if arbitrators presumptively ascertain the parties' mutual assent to arbitrate their differences. Such an allocation of jurisdiction confronts the demands of liberal justice. Arbitrators and arbitral institutions may have fiduciary duties to the contracting parties, but they do not share the court's responsibility in a liberal society to publicly offer a justification of state power.[21]

In Part III, I show that, contrary to popular belief, the FAA did not repudiate the contemporaneous dread of arbitration ousting the court from

16. *See, e.g.*, Jody S. Kraus, Essay, *From Langdell to Law and Economics: Two Conceptions of Stare Decisis in Contract Law and Theory Essay*, 94 VA. L. REV. 157, 163–64 (2008) [hereinafter *From Langdell to Law and Economics*] (describing the two features of adjudicative legitimacy as "a theory of what it means for a decision to be based on law and a theory of what is required for law to be justified"); *see* Jody S. Kraus, *Legal Theory and Contract Law: Groundwork for the Reconciliation of Autonomy and Efficiency*, *in* 1 LEGAL AND POLITICAL PHILOSOPHY: SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 385, 395–96 (Enrique Villanueva ed., 2002) [hereinafter *Legal Theory and Contract Law*] (distinguishing between conceptual explanation and justificatory legal theory). A justificatory theory of arbitration is a "prescriptive theory about government action," paraphrasing Brian Bix. Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719, 727 (2011).

17. *From Langdell to Law and Economics*, *supra* note 16, at 163.

18. *See id.*

19. *Id.* at 164.

20. See *infra* Part II.A for a more elaborate discussion of the adjudicative and enforcive components of the administration of justice.

21. See *infra* Parts II.B–C for an elaboration on this position and references.

its jurisdiction. To the contrary, a study of the broader legislative background will bring to light that the FAA was intended to recognize and ease that concern by preserving courts' enforcive jurisdiction.[22] This historical approach to assessing the FAA's purpose is warranted given the Supreme Court's reliance on the congressional record in explaining and justifying its interpretation of the FAA.[23]

Part IV presents the argument that, over the course of 60 years, the Supreme Court has advanced three doctrines that diverge from the FAA's protection of courts' enforcive jurisdiction: the Arbitrability of Arbitrability, the Severability of the arbitration clause, and the Equal Treatment of arbitration agreements.[24] A critical reading of the Court's reasoning exposes that the resulting default rules have shifted the burden of proof to the party opposing arbitration while making it increasingly demanding to meet that burden. In this manner, the Court has been gradually privatizing the authorization of state power.

Part V illustrates the need for a congressional override by contrasting four methods of distributing the burden of proof in enforcement proceedings and highlighting which of these scenarios would reverse the privatization of courts' authorization of state power without breaking from the established principles of arbitration law.[25]

Lastly, I conclude by proposing three targeted amendments to the FAA that reallocate positive command of state power back to the courts by adjusting the distribution of the burden of proof in enforcement proceedings.[26]

22. *See infra* Part III.

23. *See generally* AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333 (2011).

24. *See infra* Part IV. Unless otherwise indicated, this Article uses the term *arbitration agreement* in the broadest sense, including freestanding arbitration contracts and the more common arbitration clauses embedded in contracts.

25. *See infra* Part V.

26. *See infra* Part VI.

II. LIBERAL JUSTICE AND STATE POWER

A. *Separating Adjudicative and Enforcive Jurisdiction*

Several variations of the concept of liberal justice exist,[27] but the element of consent is central to all.[28] The procedural aspect of liberal justice demands state institutions enable citizens to give or withhold consent to the restriction of their freedom.[29] To this end, courts facilitate political dialogue by offering reasonable justifications for the employment of the state's enforcement machinery.[30] In these two Parts, I develop the normative claim that in a liberal society, the authorization of the state's coercive power is therefore for the courts, not arbitrators or arbitral institutions.

The judicial administration of justice presents an amalgamation of peace and power. Courts keep the peace by authorizing the state's capacity for using physical force to compel compliance with their judgments.[31] As French philosopher Michael Foucault observed, the state's imposition of a judicial system links intrinsically with the support and availability of "the power of constraint."[32] It was on "the concentration of armed force, that the judicial apparatus was erected," he noted.[33] Indeed, a glance through the

27. *See* Richard Bellamy & Martin Hollis, *Liberal Justice: Political and Metaphysical*, 45 PHIL. Q. 1, 1–19 (1995) (discussing the debate in political science about the varying definitions of liberal justice); Daniel A. Bell, *The Limits of Liberal Justice*, 26 POL. THEORY 557, 557–82 (1998) (book review).

28. *See, e.g.*, Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 YALE J.L. & HUMAN. 435, 457 (1999) ("[T]he idea of consent is the fundamental principle of liberal justice . . . ."). This Article uses *the liberal notion of justice* as a broad term without regard of the various nuances debated under the banner of liberal justice in political theory.

29. *Id.* at 453.

30. Nirej S. Sekhon, *Equality and Identity Hierarchy*, 3 N.Y.U. J.L. & LIBERTY 349, 373 (2008) ("Here, Rawls' theory of liberal justice resonates with Bruce Ackerman's in that both position political dialogue as a key rite of civic culture."). "Civic friendship requires that citizens offer each other plausible justifications when defending their political beliefs - a justification is plausible if it draws upon public reason." *Id.* at 374.

31. *See* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977, at 5 (Colin Gordon ed., Colin Gordon et al. trans., 1st American ed., Pantheon Books 1980) (1977) ("[W]herever a feudal lord disposed of sufficient military power to enforce his 'peace' it was possible for him to impose juridical and fiscal levies.").

32. *Id.* at 5 ("At this point we can see . . . the increasing link between the judicial system and armed force."). "[A]ll this implies the availability of the power of constraint. It could not be imposed without armed force . . . ." *Id.*

33. *Id.* ("But supported by the force of arms [judgeships] developed in the direction

dictionary illustrates that coercing behavior is intrinsic to the meaning of doing justice.[34] The administration of what is just is the "impartial adjustment of conflicting claims."[35] In turn, the resolution of conflicts entails managing or directing conduct[36] by exercising the authority or power to order or command.[37] Doing justice thus entails the power to exert "a dominating influence" over the behavior of others.[38]

The role of state power in the judicial administration of justice is as significant in contract law as it is in criminal law.[39] After all, when courts resolve contractual disputes, they authorize the state to use physical force on those who fail to honor the contract as interpreted by the court.[40] Barring

of its ever increasing concentration.").

34. *See generally Justice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/justice [https://perma.cc/F63E-DLUS].

35. *Id.* (defining *justice* as "the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments").

36. *Administer*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/administer [https://perma.cc/P2A8-JCEK] (defining *administer* as an act "to manage or supervise the execution, use, or conduct of"); *Manage*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/managing [https://perma.cc/EQ72-852U] (defining *manage* as an act "to exercise executive, administrative, and supervisory direction of").

37. *Authority*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/authority [https://perma.cc/35BW-SU4P] (defining *authority* as the "power to influence or command thought, opinion, or behavior"); *Direction*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/direction [https://perma.cc/8ZX4-CRJC]; *Order*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/order [https://perma.cc/X4SV-BBMD] (defining *order* as an act "to give an order to : command").

38. *Command,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/command [https://perma.cc/FT9L-388H] (defining *command* as an act "to direct authoritatively : order").

39. FREDERICK SCHAUER, THE FORCE OF LAW 138 (2015) ("[V]arious aspects of so-called private law still serve important functions in enforcing a polity's collective norms."). It is not to say that private law necessitates state involvement. *See id.* at 3; *see also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 589 (1933) [hereinafter *The Basis of Contract*] ("We may thus view the law of contract not only as a branch of public law but also as having a function somewhat parallel to that of the criminal law.").

40. *See The Basis of Contract*, *supra* note 39, at 586 ("The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal

reservations on the grounds of public policy, only those bargains that a court believes the parties have freely assented to will warrant enforcement by state power.[41] As the Ninth Circuit noted in *Barnes v. Yahoo!, Inc.*, "It is no small thing for courts to enforce private bargains. The law justifies such intervention only because the parties manifest, ex ante, their mutual desire that each be able to call upon a judicial remedy if the other should breach."[42]

It follows from the peace–power dichotomy that the jurisdiction of courts to administer justice in contract cases is constructed from two distinct jurisdictions.[43] On the one hand, courts offer a final resolution of the contractual dispute in question on the merits.[44] This task falls within a court's adjudicative jurisdiction.[45] On the other hand, a court's judgment is final in the sense that the court also authorizes the state to enforce its decision once parties have exhausted all available remedies.[46] Here, the court exercises its enforcive power.[47]

When courts enforce arbitration agreements and arbitral awards, the adjudicative and enforcive elements of the administration of justice disengage. Arbitrators perform the adjudicative component by settling contractual differences, while courts retain their enforcive jurisdiction as they have the discretion to decide when the state will enforce arbitration agreements and the resulting arbitral awards.[48]

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of one party to be exercised over the other party."); *see also* Emily Erikson & Joseph M. Parent, *Central Authority and Order*, 25 SOC. THEORY 245, 252 (2007) ("[D]isputants . . . retain the ability to summon the state as a useful threat.").

41. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1106 (9th Cir. 2009).

42. *Id.*

43. *See* Brian A. Blum & Juliana B. Wellman, *Participation, Assent, and Liberty in Contract Formation*, 1982 ARIZ. ST. L.J. 901, 902, 927.

44. *Id.* at 927.

45. *Id.*

46. *See id.* at 902.

47. *See id.* ("Enforcement authority entails a regulatory power. Courts thus have some discretion to fashion and employ practical rules governing when and on what terms contracts should be enforced.").

48. Under the FAA, a court achieves this result, for example, by staying court proceedings until arbitration is had, ordering arbitration (9 U.S.C § 3 (2018)), or by confirming an award (9 U.S.C. § 9). *See* RESTATEMENT (SECOND) OF CONTRACTS § 345 cmt. e (AM. LAW INST. 1981) ("Although arbitration is not in itself a judicial remedy, enforcement by a court of an award of an arbitral tribunal is."). For completeness, under the FAA courts are also authorized to render other enforceable decisions such as the court appointment of arbitrators (9 U.S.C § 5), the compelling of the attendance of witnesses (9 U.S.C. § 7), or the modifying or correcting of the award (9 U.S.C. § 11).

B. *The Accountability for State Power*

The allocation of courts' adjudicative jurisdiction to arbitrators should not be controversial. In a liberal society, no principle would dictate that differences among the members of a given society ought to be settled by courts alone. Moreover, if individuals are free to settle differences among themselves, why would the state prevent them from retaining a third individual to resolve their dispute? Indeed, courts might be a gateway to the enforcement of arbitration but not to the practice of arbitration itself.[49] Arbitration existed in the United States within trade associations before the FAA was enacted, as early as the time of the early settlements.[50] In fact, private dispute resolution was practiced in Europe long before the rise of the modern nation-state or courts of common law.[51]

Whether the allocation of courts' enforcive jurisdiction is appropriate is a different matter. In a society that adheres to a liberal notion of justice, control of the levers of the state's enforcement machinery should be exercised by the actors and institutions that are accountable for the authorization or use of state power. The state is a formidable, "centralized enforcement mechanism," as Anthony Kronman once wrote.[52] No other institutions can exert the amount of brute force that the public institutions

49. Not all practices of arbitration would be able to exist or thrive without the support of judicial enforceability, especially cross-border institutional arbitration. From a sociological perspective, one could perceive the courts as the gateway—or enabler—of modern-day institutional arbitration. *See generally* Cornelis J.W. Baaij, *Hiding in Plain Sight: The Power of Public Governance in International Arbitration*, 60 HARV. INT'L L.J 135 (2018).

50. William Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 195 ("In 1653, after considerable opposition by Stuyvesant and the Company, the new court of 'schout, burgomasters, and schepens,' similar to the court of the city of Amsterdam, was established for the town of New Amsterdam.").

51. *E.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 24–29, 34 (2d ed. 2014) (noting commentators around the 1900s indeed perceived the North American trade associations of the nineteenth and early twentieth centuries as successors of the medieval guilds); FRANCES KELLOR, ARBITRATION IN THE NEW INDUSTRIAL SOCIETY 32 (1934); *see, e.g.*, CLARENCE F. BIRDSEYE, ARBITRATION AND BUSINESS ETHICS 15, 28 (1926) (noting guilds provided arbitration at trade fairs in Europe, particularly in England); JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 76 (1918) [hereinafter COMMERCIAL ARBITRATION AND THE LAW]; MARTIN DOMKE ET AL., DOMKE ON COMMERCIAL ARBITRATION § 2:4 (3d ed. 2018).

52. Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J. L. ECON. & ORG. 5, 10 (1985).

of a nation-state can.[53] In a liberal society, that power of the state belongs to the people.[54] The coercive power of the state embodies the collective power of equal citizens.[55] This society's point of departure is the citizens' freedom from interference by the state. Therefore, any exercise of state power requires a justification.[56]

Liberal justice resists the allocation of control of state power to actors that are under no obligation to account for the use or authorization of it.[57] In a liberal society, officials and institutions commanding the state's enforcement machinery stand under an obligation to justify, or rather to excuse, the exercise of brute force on its citizens.[58] They have a societal duty to provide appropriate reasons for the exercise of state power.[59] Politically legitimate institutions of the state offer a justification for "coercively

53. *Id.* at 5 ("The state may be thought of as a kind of machine [an enforcement machine]. There is no other like it; within its own territory, the state possesses matchless powers of compulsion."); *see* Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1138–39 (1989) (referencing and agreeing with Max Weber, in disagreement with Joseph Raz's concept of the state). The state is in "command of considerable means of violence," and "[d]espite what Raz says, [the state's] supremacy ultimately springs from its command of considerable means of violence." *Id.* at 1139.

54. *See* JOHN RAWLS, THE LAW OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED" 59 (Harvard Univ. Press 2001) (1993) [hereinafter THE LAW OF PEOPLES].

55. *See* JOHN RAWLS, POLITICAL LIBERALISM 61 (expanded ed. 2005) ("[S]tate power, the collective power of equal citizens . . . ."). Legal philosopher Thomas Nagel observes that the Hobbesian need for survival may serve as the theoretical rationale for citizens subjecting themselves to "a sovereign of unlimited power." Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 219 (1987) ("Hobbes argues that it is rational for all of us to converge from this self-referential starting point on the desirability of a system in which general obedience to certain rules of conduct is enforced by a sovereign of unlimited power."); *see also* Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging Essay*, 101 CALIF. L. REV. 699, 701 (2013) ("An adequate theory of adjudication in a democracy must illuminate the nature of the relationship between judicial officers and the people they serve.").

56. *See* Gerald F. Gaus, *The Place of Autonomy Within Liberalism*, *in* AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS 272 (John Christman & Joel Anderson eds., 2005).

57. *See* THE LAW OF PEOPLES, *supra* note 54, at 55.

58. *Id.*

59. RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE 21 (Jeffrey Flynn trans., 2011) ("[I]n Kantian terms, respect for moral persons as 'ends in themselves' means that one recognizes their right to justification and the duty to be able to give them appropriate reasons.").

imposed political and social institutions."[60] Consequently from this perspective, each participant in society has a substantive moral right to justification.[61]

Courts are accountable for the authorization of the state's exercise of brute force on citizens.[62] U.S. courts agree that it is incumbent upon them to "have a measure of accountability and for the public to have confidence in the administration of justice."[63] In the words of the most prominent exponent of political liberalism, John Rawls, "discourse of judges in their

60. Nagel, *supra* note 55, at 218 ("[The question of impartiality] is part of the wider issue of political legitimacy—the history of attempts to discover a way of justifying coercively imposed political and social institutions to the people who have to live under them . . . ."). "We have to be impartial . . . in the imposition of burdens, the exercise of coercion to ensure compliance with a uniform set of requirements . . . . I suggest that this element of coercion imposes an especially stringent requirement of objectivity in justification." *Id.* at 223; *see* John Rawls, *Political Liberalism: Reply to Habermas*, 92 J. PHIL. 132, 143 (1995) ("[P]ublic justification by political society . . . is a basic idea of political liberalism and works in tandem with the other three ideas: those of a reasonable overlapping consensus, stability for the right reasons, and legitimacy.").

61. FORST, *supra* note 59, at 5. Justice includes the absence of bias or arbitrary rules. "[T]he core idea of a just order . . . consists in the idea that its rules and institutions of social life be free of all forms of arbitrary rule or domination. Guaranteeing this is the first task of justice." *Id.* at 189.

62. *See* Blum & Wellman, *supra* note 43, at 902 (depicting the enforcement of contracts as "a government function exercised by courts"). For a similar position, see Leib et al., *supra* note 55, at 701 ("[J]udges speaking the law must be held accountable if their rulings stray too far from the will of the people who authorize the judiciary to exercise this power in the first [place]."). See also Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351–52 (1973), for a description of the liberal theory of justice, albeit in disagreement. "[I]n the liberal state it is judges, not legislative bodies or elected executive officers, who are in charge of the application of state force to the citizens . . . ." *Id.* Still, the legislature might be the most apparent state institution obliged to account for its authorization of state power. *See, e.g.*, Alan Calnan, *The Instrumental Justice of Private Law*, 78 UMKC L. REV. 559, 603 (2010) ("Our system of checks and balances gives primary lawmaking authority to the legislature, the branch most directly accountable to the electorate.").

63. N.Y. Times Co. v. United States, 403 U.S. 713, 732 (1971) (White, J., concurring) ("If the United States were to have judgment under [the grave and irreparable danger standard] . . . our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records . . . ."); Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348 (7th Cir. 2006) ("The Supreme Court issues public opinions in all cases, even those said to involve state secrets."), *abrogated by* Americold Realty Tr. v. Conagra Foods, Inc., 136 S. Ct. 1012 (2016); United States v. Amodeo (Amodeo II), 71 F.3d 1044, 1048 (2d Cir. 1995).

decisions, and especially of the judges of the supreme court" is part of the public political forum.[64] Courts satisfy their duty to account for their power to authorize state power by legal reasoning.[65] The public presentation of the principles and rules, purportedly explaining the court's decisions and justifying the use of force to compel compliance, permits the public to assess and critique the sanction of state power.[66] As philosopher Rainer Forst writes, "Justice demands that every political and social basic structure must be justified to all those subject to it . . . ."[67] Judicial reasoning is thus a matter of legitimacy.[68] For illustration, the Seventh Circuit stated, "The political branches of government claim legitimacy by election, judges by reason,"[69] adding, "[a]ny step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat . . . ."[70]

In contrast, arbitrators are under no obligation to account for the use of state power.[71] The same holds for permanent, private arbitration institutions, which presently administer the bulk of all arbitration. These private actors have a commercial interest in honoring their commitments toward disputants but not to society as a whole.[72] Any concept, principle, or rule the arbitrator invokes to explain the resolution of the dispute in

64. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 767 (1997) [hereinafter *Public Reason Revisited*].

65. *Bartell*, 439 F.3d at 348 (discussing the importance of holding judicial proceedings in full view of the public).

66. *Id.* ("What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records."). More familiar reasons for public judicial reasoning include permitting the public to participate in the judicial process, allowing the review of lower courts by higher courts, and inducing higher quality decisions. *See* Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 504–14 (2015) [hereinafter *A Comparative Law Approach*].

67. FORST, *supra* note 59, at 249.

68. *See id.*

69. *Bartell*, 439 F.3d at 348.

70. *Id.*; Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000); *see A Comparative Law Approach*, *supra* note 66, at 504–14; *see also* Perez-Guerrero v. U.S. Attorney Gen., 717 F.3d 1224, 1235 (11th Cir. 2013); *Bartell*, 439 F.3d at 348.

71. *See Bartell*, 439 F.3d at 348.

72. *See* David McLean, *US Arbitral Institutions and Their Rules*, LATHAM & WATKINS L.L.P., https://www.lw.com/thoughtleadership/us-arbitral-article-mclean [https://perma.cc/M2ZZ-2MYD] (last visited June 20, 2019) (providing an overview of U.S.-based arbitral institutions).

question does not also justify the state's enforcement of it.[73] Moreover, if the parties so desire, the arbitrator will not even need to present any reasoning whatsoever.[74]

Because private actors such as arbitrators and arbitral institutions bare no burden to account for the use of state power, let alone publicly, liberal justice opposes bestowing arbitrators with the final determination of the circumstances under which the state enforces particular contracts.

Hence, the enforcive jurisdiction of the administration of justice should remain in the hands of courts. That standpoint does not preclude private actors availing themselves of the power of the state altogether. To the contrary, the principle of party autonomy in contract law entails the power of individuals to employ the power of the state in compelling compliance with contracts.[75] When a court enforces a private bargain, it lets the contracting parties choose when the state's coercive powers are available to them in regulating their private bargain.[76] Still, here, private actors do not

73. *See* United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award.").

74. *See id.* ("Arbitrators have no obligation to the court to give their reasons for an award."); Wall St. Assocs., L.P. v. Becker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994) ("Our role in reviewing an arbitration award is extremely limited . . . Arbitrators are not required to provide the rationale for their award, and courts generally will not look beyond the lump sum award in an attempt to analyze the reasoning processes of the arbitrators." (internal quotation marks omitted) (citation omitted)); Koch Oil, S.A. v. Transocean Gulf Oil Co., 751 F.2d 551, 554 (2d Cir. 1985) ("It is settled law in this circuit that arbitrators may render a lump sum award without disclosing their rationale for it, and that when they do, courts will not inquire into the basis of the award unless they believe that the arbitrators rendered it in 'manifest disregard' of the law or unless the facts of the case fail to support it."); Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972) ("Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement.").

75. *See The Basis of Contract*, *supra* note 39, at 587 ("If, then, the law of contract confers sovereignty on one party over another (by putting the state's forces at the disposal of the former), the question naturally arises: For what purposes and under what circumstances shall that power be conferred?"); *see also* Kronman, *supra* note 52, at 5 ("A contract is a legally enforceable agreement, one the state will enforce by placing its coercive powers at the disposal of either party if the other fails to perform. The rules that specify when the state will do so constitute our law of contracts. . . . [I]t enables them to harness the state's powers of coercion for their own private ends.").

76. *See* Kronman, *supra* note 52, at 5.

have direct control over the authorization of state power.[77] Courts determine the bargain's enforceability, and it ought to be in the court's discretion to decide whether the employment of the state's coercive forces is warranted.[78]

The court's enforcive jurisdiction is in jeopardy, however, when arbitrators, not courts, are permitted to determine with finality whether the parties agreed to arbitrate the arbitrator's adjudicative jurisdiction. Arbitrators instead of courts will then in effect decide the enforceability of the arbitration agreement and the ensuing arbitral award. For the same reason, courts presumptively permitting arbitrators to exercise the courts' enforcive jurisdiction risk infringing the principle of liberal justice. The need for the accountable use of state power calls for courts to retain the presumptive exercise of their enforcive jurisdiction.

Below it will become clear that while the original purpose of the FAA was consistent with liberal justice, the Supreme Court since has moved toward effectively allocating courts' enforcive jurisdiction to arbitrators.

III. THE ORIGINAL CONCERN FOR OUSTING THE COURTS

A. *Why a Historical Critique Is Warranted*

The following historical analysis of the origins of the FAA will reveal that both lawmakers and lobbyists appear to have meant for the FAA to advance arbitration but not to the detriment of a court's meaningful and substantial enforcive jurisdiction.[79] The original purpose of the FAA satisfied the demands of liberal justice in this respect.[80]

On its face, a historical method to assess the Supreme Court's current precedent might not appear appropriate for evaluating the Court's interpretation of a statute.[81] After all, today both judges and scholars generally discard a historical method of statutory interpretation.[82] Courts

77. *See id.*

78. *See id.*

79. *See* discussion *infra* Parts III.A–C.

80. *See* discussion *infra* Parts III.A–C.

81. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 646 (1985) ("Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.").

82. *See, e.g.*, Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH. L. REV. 1185, 1192 (2011) ("Both Justices Scalia and Breyer agree that their

tend to consult the congressional record merely when, in their view, the statutory language or structure fails to provide a definitive answer.[83] Indeed, the Supreme Court says to look to the FAA's legislative history only when the statutory language is ambiguous or contains a lacuna.[84] Courts generally do not consult the broader legislative background altogether.[85] By this token, the Supreme Court has expressly rejected inferring the FAA's purpose from the motives of the lobbyists who petitioned Congress.[86]

On closer inspection, however, the Supreme Court's interpretation of the FAA is historical after all. The precise language the Court uses to explain its broad application of the FAA originates not from the statutory language but directly from the FAA's legislative history.[87] Specifically, the content and wording of the Court's reasoning echo the House and Senate reports, which in turn follows almost verbatim the lobbyists' submissions to Congress in the early 1920s when they petitioned Congress to enact a federal arbitration

differences over statutory interpretation arise only when the text is to some degree uncertain.").

83. *See, e.g.*, *id.*

84. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 274 (1995) ("For another, the Act's legislative history, to the extent that it is informative, indicates an expansive congressional intent." (citations omitted)); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."); *Mitsubishi Motors Corp.*, 473 U.S. at 646 ("Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims."); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) ("Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.").

85. For a relatively uncommon example of a court employing a broader historical interpretation, see *Leo Sheep Co. v United States*, 440 U.S. 668, 676–78 (1979), discussed in WILLIAM ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 784–86 (5th ed. 2014).

86. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120 (2001) ("We ought not attribute to Congress an official purpose based on the motives of a particular group that lobbied for or against a certain proposal—even assuming the precise intent of the group can be determined, a point doubtful both as a general rule and in the instant case. It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes.").

87. *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010).

act.[88] Hence, if one is to critique the Supreme Court's reasoning by the Court's own measure of statutory interpretation, historical analysis is not only defensible but indispensable.[89]

The broader legislative background of the FAA shows that the two policy principles the Supreme Court appeals to stem from the arguments put forward by the private actors who lobbied Congress for what would become the FAA during the Joint Hearings before the Subcommittees of the House and Senate Judiciary Committees.[90]

The first of the two principles the Court has invoked to explain its broad application of the FAA is party autonomy. The Court has consistently stated arbitration is a "creature"[91] or "matter of contract."[92] In the Court's reasoning, the contractual nature of arbitration is the "fundamental,"[93] "basic,"[94] "central,"[95] "principal,"[96] "primary,"[97] or "overarching principle"[98]

88. *See id.*

89. *See id.*

90. *See Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomm. of the H. and S. Judiciary Comms. on S. 1005 and H.R. 646*, 68th Cong. 2 (1925) [hereinafter *Joint Hearings*].

91. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585 (2008).

92. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

93. *Id.* ("The FAA reflects the fundamental principle that arbitration is a matter of contract.").

94. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 275 (1995) ("[T]he Act's basic purpose [is] to put arbitration provisions on the same footing as a contract's other terms." (internal quotation marks omitted) (citation omitted)).

95. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) ("[T]he central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." (internal quotation marks omitted) (citations omitted)).

96. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) ("In recognition of Congress's principal purpose of ensuring that private arbitration agreements are enforced according to their terms . . . .").

97. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 360 (2011) (Breyer, J., dissenting) ("[The] primary objective was to secure the enforcement of agreements to arbitrate." (internal quotation marks omitted) (citation omitted)); *see also In re* Fletcher, 143 N.E. 248, 249 (N.Y. 1924) ("The primary purpose of the Arbitration Law was to make valid and enforceable provisions for arbitration which had previously been regarded as contrary to public policy . . . .").

98. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) ("[The text of the FAA] reflects the overarching principle that arbitration is a matter of contract.").

of the FAA.[99] The FAA therefore "places arbitration agreements on an equal footing"[100] or "the same footing"[101] with other contracts.

Nowhere does the statutory language invoke party autonomy as a policy principle of arbitration.[102] To be sure, the contractual basis of arbitration is a fair inference from § 2 of the FAA, which reads in relevant part: "A written provision in . . . a contract . . . to settle by arbitration a controversy . . . 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."[103] Still, nowhere does the FAA articulate that arbitration is a creature or a matter of contract and that arbitration agreements should therefore be treated on equal footing with contracts generally.[104]

Instead, the congressional record shows the depiction of arbitration as a form of contract originates from the lobbyists' pleadings.[105] The House Report of January 24, 1924, states, "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement."[106] It adds, "An arbitration agreement is placed upon the same footing as other contracts, where it belongs."[107] Likewise, the Senate Report of May 14, 1924, explicitly designates § 2 of the FAA as "clearly set[ting] forth" the "purpose of the

99. *See also* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585 (2008).

100. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010); *see Concepcion*, 563 U.S. at 339; *Mattel, Inc.*, 552 U.S. at 581.

101. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 275 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 225–26 (1987); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974); Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942) ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs.").

102. *See generally* 9 U.S.C. §§ 1–16 (2018).

103. *Id*. § 2.

104. *Id*. §§ 1–16 .

105. H.R. REP. NO. 68-96, at 1 (1924).

106. *Id.*

107. *Id.* Similarly, during one of the House floor proceedings, on February 4, 1925, Representative George Graham of Pennsylvania summarized the bill's intended result as follows: "[I]f you and I agree in the contract to arbitrate we must arbitrate and can not shirk it afterwards." 66 CONG. REC. 3003 (1925) (statement of Rep. Graham).

bill."[108] Yet, the depiction of arbitration as a form of contract does not originate from these reports.[109] Both documents replicated almost verbatim the lobbyists' submissions to Congress on January 9, 1924.[110] Julius Cohen, the writer of the draft bill,[111] wrote in his brief submitted to Congress, "An agreement for arbitration is in its essence a business contract. It differs in no essential from other commercial agreements. It should stand upon the same plane and be regarded by the law in the same light."[112]

The second principle the Court has invoked to explain its rigorous application of the FAA is economic efficiency.[113] The Court has emphasized that the FAA "manifests a liberal federal policy favoring arbitration" as a desirable alternative to litigation[114] because of the efficiency of arbitration.[115] Efficiency was the "unmistakably clear congressional purpose"[116] to advance arbitration because it saves disputants both money and time compared to

108. S. REP. NO. 68-536, at 2 (1924).

109. *See generally Joint Hearings*, *supra* note 90, at 2.

110. *See id.*

111. *Id.* at 19 (statement of Francis B. James, representing the Westory Building in Washington D.C.). The American Bar Association's Committee on Commerce, Trade, and Commercial Law prepared a draft bill for a federal statute, which was introduced to the House in 1922. *Id.* at 13, 19; H.R. REP. NO. 96, at 1 (1924); American Bar Association, *The United States Arbitration Law and Its Application*, *in* SELECTED ARTICLES ON COMMERCIAL ARBITRATION 212 (Daniel Bloomfield ed., 1927) [hereinafter *The United States Arbitration Law and Its Application*]; *see also* BIRDSEYE, *supra* note 51, at 109.

112. *Joint Hearings*, *supra* note 90, at 38; *see also The United States Arbitration Law and Its Application*, *supra* note 111, at 14 ("Then what objection can there be . . . to letting me pay you whatever Mr. Piatt says I owe you?").

113. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (citing Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013)).

114. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991); *see* Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974); Wilko v. Swan, 346 U.S. 427, 431 (1953); David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London), 923 F.2d 245, 248 (2d Cir. 1991) ("As a point of departure, we note that federal policy strongly favors arbitration as an alternative dispute resolution process.").

115. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983) (explaining "the statutory policy of rapid and unobstructed enforcement of arbitration agreements"); Adkins v. L. Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002) ("Underlying this policy is Congress's view that arbitration constitutes a more efficient dispute resolution process than litigation.").

116. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (noting "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

litigation.[117] Arbitration relieves congestion in the courts and provides parties with an alternative method for dispute resolution that helps avoid the "costliness and delays of litigation."[118] In his opinion in *Epic Systems*, Justice Gorsuch underscored that Congress favors arbitration because it promises "quicker, more informal, and often cheaper resolutions for everyone involved."[119]

Again, the text of the FAA does not mention the efficiency of arbitration.[120] The emphasis on the efficiency of arbitration appears in both the House and Senate reports, which highlight the "costliness and delays"[121] and "delay and expense"[122] of litigation.[123] Representative Leonidas Dyer, on the House floor on June 6, 1924, specifically reiterated the "result of such a bill will be to do away with a lot of expensive litigation."[124] Likewise, Senator Thomas Walsh, on December 30, 1925, underscored that "[t]he business interest of the country find so much delay attending the trial of lawsuits in courts."[125]

Still, the policy principle of economic efficiency does not stem from either of the House or Senate reports. Rather, both reports recite the

117. *E.g.*, AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 344 (2011) ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010) (explaining the benefits of private dispute resolution as "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); WellPoint, Inc. v. John Hancock Life Ins. Co., 576 F.3d 643, 647 (7th Cir. 2009) (saying the FAA "is designed to facilitate efficient resolution of commercial disputes"); *see also* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) ("The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness—characteristics said to be at odds with full-scale litigation in the courts . . . ."); Mid-S. Maint. Inc. v. Paychex Inc., No. W201402329COAR3CV, 2015 WL 4880855, at *14 (Tenn. Ct. App. Aug. 14, 2015) ("[T]he goal of both Tennessee arbitration law and the FAA is to 'provide an efficient procedure . . .' and that judicial involvement should be kept to a minimum to ensure that the goals of 'speed, simplicity, and economy' inherent in the arbitration system can be met.").

118. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974).

119. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

120. *See generally* 9 U.S.C. §§ 1–16 (2018).

121. H.R. REP. NO. 68-96, at 2 (1924).

122. *Id.*; S. REP. 68-536, at 8 (1924).

123. *See Joint Hearings*, *supra* note 90, at 6, 16, 26, 34–35.

124. 65 CONG. REC. 11081 (1924) (statement of Rep. Dyer).

125. *Id.*; 66 CONG. REC. 984 (1924) (statement of Sen. Walsh).

submissions by the business lobbyists.[126] Julius Cohen and the other petitioners emphasized the economic benefits of arbitration over litigation.[127] Two of the "evils" that a federal arbitration act would correct, Cohen put forward, would be both the "great congestion of the court calendars" and the "expense of litigation."[128] Charles L. Bernheimer, chairman of the Committee on Arbitration of the New York Chamber of Commerce,[129] testified, agreeing that litigation is "costly and ruinous" and the "most unprofitable thing" for merchants or businessmen.[130] Likewise, Alexander Rose, representing the Arbitration Society of America,[131] indicated in this respect on January 1, 1921, that some 21,380 cases were pending at the New York Supreme Court, going up to 23,000 in 1923.[132]

Notwithstanding the Supreme Court's overall textualist means of statutory interpretation, the principles it has invoked to explain its liberal application of the FAA stem from the congressional record and specifically from language the lobbyists' used when petitioning to Congress. Even Justice Antonin Scalia, the most ardent and consequential advocate of textualism and critic of historical methods of statutory interpretation, has relied on the lobbyists' language, even though he did so mostly indirectly by citing the Court's previous opinions referenced the FAA's legislative history.[133]

126. *See* H. REP. NO. 68–96, at 1.

127. *See Joint Hearings*, *supra* note 90, at 16.

128. *Id.* at 34–35. In his testimony, he underscored the congestion of the courts as one of the remedies the FAA would provide. *Id.* at 18. This reiterates statements by Bernheimer years prior. *See* Special Committee, New York Bar Association, *Reasons for Growth of Arbitration*, *in* SELECTED ARTICLES ON COMMERCIAL ARBITRATION, *supra* note 111, at 213–14; Charles L. Bernheimer, *Report*, *in* COMMERCIAL ARBITRATION 3, 8 (1911). Contemporaneous writings concur, criticizing the congestion of the courts, which caused delays and thus were costly for businesses. *See* Justice Vernon M. Davis, *Address*, *in* COMMERCIAL ARBITRATION, *supra* note 128, at 20; KELLOR, *supra* note 51, at 66.

129. *Joint Hearings*, *supra* note 90, at 6.

130. *Id.* He anecdotally pointed out that suing for any claim below $3,000 or $4,000 was a losing proposition. *Id.* at 6–7 ("The lawyer's work . . . is an economic wastage in the everyday commercial transactions."). Cohen retorts, however, that "the business of arbitration does not take away" any lawyer's business, adding "[lawyers] can handle an ordinary arbitration case in our offices and make more money out of it than [they] can if the case goes into litigation." *Id.* at 13.

131. *Id.* at 25.

132. *Id.* at 26.

133. *See* AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 339 (2011) ("The FAA

Critically assessing the Court's explanation of its interpretation of the FAA therefore requires an examination of the rules and principles it derives from the FAA's broader legislative background. Next, this background shows the FAA was intended to advance arbitration and secure the meaningful enforcive jurisdiction of the courts.[134]

B. *The "Judicial Jealousy" Fallacy*

A closer analysis of the legislative background of the FAA reveals the Supreme Court's case law has generated a misleading (or at least a partial misreading) of the Act's purpose.[135] That portrayal suggests the FAA curtails a court's jurisdiction further than the congressional record and contemporaneous legal context support.[136]

The Supreme Court and lower courts consistently suggest the FAA embodies a dismissal of a centuries-long fear that arbitration would oust the courts of their jurisdiction.[137] They suggest that at the time of the enactment

was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. . . . In line with these principles, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." (citing Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 581 (2008); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)); *Buckeye Check Cashing, Inc.*, 546 U.S. at 443 ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts . . . ."). For Justice Scalia's overall denunciation of using congressional record in statutory interpretation, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (Amy Gutmann et al. eds., 1997). Justice Scalia's unwavering support, for instance in *AT&T Mobility L.L.C. v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*, for enforcing class action waivers in arbitration agreements with consumers is based firmly on the importance of preserving arbitration's efficiency. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013) ("'[T]he switch from bilateral to class arbitration,' we said, 'sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'" (quoting *Concepcion*, 563 U.S. at 334)); *Concepcion*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.").

134. *See supra* note 133 and accompanying text.

135. *See infra* notes 144–65 and accompanying text.

136. *See infra* notes 144–79.

137. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 (1985) (explaining the FAA was meant to "overrule the judiciary's longstanding refusal to enforce agreements

of the FAA, the fear of arbitration ousting the courts was outdated,[138] to be dismissed,[139] or even scoffed at.[140] In this respect, the FAA was a means to overcome, reverse, or shake off a longstanding hostility toward arbitration.[141]

Moreover, courts often attribute the fear of ousting the courts as the product of an irrational judicial jealousy.[142] Often, courts cite the 1924 House Report in support of the jealousy rhetoric.[143] In his brief to Congress, Julius Cohen described the English courts' jealousy of their own jurisdiction resulted in the "anachronism in the law" of courts refusing to enforce

to arbitrate"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 n.4 (1974) ("English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act.").

138. Cent. Contracting Co. v. Md. Cas. Co., 367 F.2d 341, 344 n.5 (3d Cir. 1966) ("The early common law rule had been that such provisions were attempts to oust the courts of jurisdiction and would therefore not be enforced.").

139. Carbon Black Exp., Inc. v. The Monrosa, 254 F.2d 297, 301 n.9 (5th Cir. 1958) ("Both in England and the United States it has been decided in a great number of cases . . . to be settled law that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that private persons are incompetent to make any such binding contracts, and that all such contracts are illegal and void as against public policy." (quoting 14 AM. JUR. *Courts* § 196, at 389–90 (1938))).

140. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (speaking of forum-choice clauses in general, including arbitration clauses) ("The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction."); Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) ("Perhaps the true explanation is the hypnotic power of the phrase, 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark . . . .").

141. Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 232 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration."); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 80 (2000) ("FAA's purpose [is] to reverse longstanding judicial hostility to arbitration agreements and to place them on the same footing as other contracts . . . ."); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 272 (1995) ("[W]e are interpreting an Act that seeks broadly to overcome judicial hostility to arbitration agreements . . . ."); *Scherk*, 417 U.S. at 510 (noting the FAA "revers[ed] centuries of judicial hostility to arbitration agreements"); *Kulukundis Shipping Co., S/A*, 126 F.2d at 985 ("In the light of the clear intention of Congress, it is our obligation to shake off the old judicial hostility to arbitration.").

142. *E.g.*, Park Constr. Co. v. Indep. Sch. Dist. No. 32, 296 N.W. 475, 477 (Minn. 1941) ("[T]he rule was the product of judicial jealousy rather than judicial reasoning.").

143. *See, e.g.*, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985); Southland Corp. v. Keating, 465 U.S. 1, 13 (1984); DiMercurio v. Sphere Drake Ins., 202 F.3d 71, 77 n.5 (1st Cir. 2000); *Kulukundis Shipping Co., S/A*, 126 F.2d at 985.

arbitration agreements and arbitral awards fully.[144] The House Report picked up on this language to explain the need for discarding the old common law rule.[145] The Senate Report cited courts' "jealousy" and the outdated fear of arbitration ousting the courts.[146] This rhetoric then reached the House floor on June 6, 1924, as Representative Graham of Pennsylvania summarily defended the bill in these terms.[147] Ultimately, this part of the legislative history made its way into the opinions of courts in defense of an expansive interpretation of the FAA for decades to come.[148]

On closer inspection, the notion that before the FAA courts were hesitant to enforce arbitration because of deep-seated jealousy of their jurisdiction is erroneous.[149] It suggests courts dreaded ceding their adjudicative jurisdiction to arbitration.[150] It turns out, however, that judicial reluctance to enforce arbitration was based instead on a grave concern for effectively ousting the courts from their enforcive jurisdiction.[151]

In his testimony before Congress, Julius Cohen tackled concerns for arbitration ousting courts from both their adjudicative and enforcive jurisdiction.[152]

Cohen's first reassurance involved the possible ousting of adjudicative jurisdiction.[153] A federal arbitration act would by no means affect the jurisdiction of courts. In his testimony, he pointed out, "We oust the courts of jurisdiction every day by settling . . . ."[154] Cohen's argument holds that every time parties decide not to go to court, they effectively oust courts.[155] Hence, parties may oust courts when they pass on litigation in favor of

144. *Joint Hearings*, *supra* note 90, at 39.

145. *See generally* H.R. REP. NO. 68–96, at 1 (1924) (calling the rule an "anachronism," caused by the "jealousy of our American courts").

146. S. REP. NO. 68-536, at 2 (1924).

147. 65 CONG. REC. 11079 (1924) (statement of Rep. Graham).

148. *See, e.g.*, Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 275 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991); *Dean Witter Reynolds, Inc.*, 213 U.S. at 219–20 n.6; *Southland Corp.*, 465 U.S. at 219–20; Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974); *Kulukundis Shipping Co., S/A*, 126 F.2d at 985.

149. *See Joint Hearings*, *supra* note 90, at 14, 17.

150. *See id.*

151. *See id.* at 17.

152. *Id.* at 14–15; *see id.* at 17.

153. *Id.* at 14.

154. *Id.*

155. *See id.*

arbitration.[156] Arguing otherwise would prevent individuals from resolving disputes among themselves outside of the courts.[157] Cohen alludes here that any fear of ousting the courts pertains to the courts' adjudicative jurisdiction.[158] His argument presents a strawman argument; no one would contend that resolving any dispute between individuals should involve an intermediating court.[159]

Cohen's second reassurance pertained to the possibility of arbitration ousting courts from their enforcive jurisdiction.[160] His reasoning indicates that he was aware of serious concern for courts being ousted.[161] In his brief, Cohen reasoned that the enforcement of predispute arbitration agreements would not deprive parties in advance of their fundamental right of access to the courts.[162] Instead, in Cohen's view, the very notion of parties contractually superseding the courts' jurisdiction is an illogical construct.[163] In his testimony, Cohen explained that by waiving a right one does not also waive the right to have courts determine whether the waiver is valid.[164] To Cohen, agreeing to arbitrate rather than litigate one's conflict does not mean one waives the right to ask the courts to ascertain "whether there is an agreement to arbitrate or not."[165]

Previously, in his 1918 treatise on commercial arbitration, Cohen offered a more elaborate version of this second argument against arbitration ousting the courts from their enforcive jurisdiction. There, he explained why the notion a private agreement could oust courts is void of "logical consistency."[166] Cohen built his argument on what he perceived as "the clear

156. *See id.*

157. *See id.*

158. *See id.* (statement of Julius Henry Cohen, Comm. Member, American Bar Association).

159. Cohen himself recognized the undisputed nature of private settlement of disputes when he stated that the right of two individuals to defer to a third individual's resolution of their dispute "is always recognized." *Id.*

160. *See id.* at 17.

161. *See id.*

162. *Id.*

163. *See id.*

164. *Id.*

165. *Id.*

166. COMMERCIAL ARBITRATION AND THE LAW, *supra* note 51, at 277, 278 (quoting Meacham v. Jamestown, F. & C.R.R. Co., 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring) ("[A]n agreement that a foreign court shall have exclusive jurisdiction is to be condemned, it is not saved by a declaration that resort to the foreign court shall be

and binding result" of English precedent that U.S. courts had failed to follow.[167] He cited Lord Watson in the English case of *Hamlyn & Co. v. Talisker Distillery*,[168] who wrote:

> The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the Court free to entertain the suit, and to pronounce a decree in conformity with the award of the arbiter.[169]

Cohen further referenced Lord Gifford in *Wilson v. Glasgow Tramways Co.*[170] Cohen reasoned, "In strict language a contract of arbitration does not destroy the jurisdiction of the common law Judge. It only introduces a new plea . . . ."[171] "[T]he plea of arbitration is a plea on the merits of the case which, if well-founded, will, indeed, prevent the Judge from himself entering on the merits or going into proof, but which will not and cannot deprive him of his jurisdiction."[172] Whether the court deems the arbitration agreement valid or invalid or whether the award is defective, "in dealing with arbitrations and awards the Judge is exercising his inherent jurisdiction and is in no way divested thereof."[173] In fact, in Cohen's reasoning, courts ousted themselves by refusing to enforce arbitration agreements.[174]

In his book, Cohen affirmed the judicial enforcement of arbitration agreements would not or should not impair courts' enforcive jurisdiction and

deemed a condition precedent to the accrual of a cause of action. A rule would not survive if it were subject to be avoided by so facile a device. . . . This must be so whether the tribunal is a court or a board of arbitrators.")).

167. *Id.* at 207.

168. *Id.* at 263 (quoting Hamlyn & Co. v. Talisker Distillery, [1894] AC 202 (HL) 211–12 (appeal taken from Scot.).

169. *Id.* at 263–64 (quoting *Hamlyn & Co.*, [1894] AC, at 211–12).

170. *Id.* at 262.

171. *Id.* at 263. Referenced in *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 292 (N.Y. 1921) ("The situation is the same in substance as when effect is given to a release or to a covenant not to sue. Jurisdiction is not renounced, but the time and manner of its exercise are adapted to the convention of the parties restricting the media of proof.").

172. *Id.*; *see also, e.g.*, Morales Rivera v. Sea Land of P.R., Inc., 418 F.2d 725, 726 (1st Cir. 1969) ("The agreements are recognized today, but they still are not destructive of jurisdiction. They are, precisely, agreements, and as such may be pleaded as a personal defense.").

173. COMMERCIAL ARBITRATION AND THE LAW, *supra* note 51, at 263.

174. *See id.* at 265–78.

thus not oust the courts in that sense.[175] His testimony did not show that he meant to say a court's role in enforcement procedures should be broad or invasive.[176] He underscored to Congress that a court's examination of whether there is an arbitration agreement or whether it is valid[177] would be made summarily, so there is minimum "expense or delay."[178] Still, in his brief presented to Congress, he added that any party who "believes in good faith his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy," will be "protected by the provision of the law which requires the court to examine into the merits of such a claim."[179]

C. *Protecting the Regular Administration of Justice*

Julius Cohen's testimony before Congress clarified that any fear of ousting the courts due to some outdated judicial jealousy pertains only to courts' adjudicative jurisdiction, not their enforcive powers.[180] That is to say that, in Cohen's view, courts acted irrational or unreasonable when they refused to enforce agreements to have arbitrators resolve contractual disputes.[181] He did not make a case for arbitrators instead of courts to determine under what conditions particular arbitration agreements are enforceable.[182]

Contemporaneous case law corroborates that judicial reluctance to enforce predispute arbitration agreements before the FAA was at least in part based on a concern that courts would surrender their enforcive jurisdiction to arbitrators.[183]

Before the enactment of the FAA, the available legal remedies for breaches of predispute arbitration agreements were generally insufficient to avoid litigating the dispute in court rather than arbitration.[184] Under the rules

175. *See id.* at 265.

176. *See id.*

177. *See Joint Hearings*, *supra* note 90, at 17.

178. *Id.* at 35.

179. *Id.*; *see also* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985) (citing the House Report) ("This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.[] H.R. REP. NO. 96, 68th Cong., 1st Sess., 1-2 [1924].").

180. *See generally Joint Hearings*, *supra* note 90.

181. H.R. REP. NO. 68-96 (1924).

182. *See id*.

183. *Dean Witter Reynolds, Inc.*, 740 U.S. at 220 n.6 (citing H.R. REP. No. 68-96).

184. *See* AMERICAN ARBITRATION ASSOCIATION, DECENNIAL REPORT OF THE

of common law and equity, damages for breaching an arbitration agreement in which parties referred possible future disputes to arbitration were generally perceived to be merely nominal, not compensatory.[185] Courts would not consider predispute arbitration agreements void[186] but would refuse to specifically enforce them.[187]

To elucidate which aspect of arbitration courts thought capable of ousting the courts from their enforcive jurisdiction, it helps to make a distinction that courts at the time made between two kinds of arbitration: limited arbitration and arbitration proper.

Judge John Webster explained limited arbitration involves contracts that assign the appraisement or valuation to a third party.[188] This form of arbitration merely functioned as a precedent to suit.[189] An example of a

AMERICAN ARBITRATION ASSOCIATION ON THE PROGRESS OF COMMERCIAL ARBITRATION: 1926–1936, at 16 (1936) (discussing the New York State Arbitration Law of 1920) ("Prior to 1920, there was no security against such litigation for the parties could generally find a way, if so inclined, to bring arbitration into litigation or to avoid arbitration altogether."). Neither arbitration agreements nor arbitral awards could really avoid conventional litigation. *See* Julius Henry Cohen, *The Proposed Federal Arbitration Statute*, *in Joint Hearings*, *supra* note 90, at 38.

185. New York Chamber of Commerce, Committee on Arbitration, *Lord Coke's Dictum in Vynior's Case*, *in* SELECTED ARTICLES ON COMMERCIAL ARBITRATION *supra* note 111, at 6, 7; Wesley A. Sturges, *Some Common Law Rules and Commercial Arbitration*, *in* SELECTED ARTICLES ON COMMERCIAL ARBITRATION *supra* note 111, at 156, 158; Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 153 (1921).

186. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 276, 284 (1926) (looking to Justice Cardozo's opinion in *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 290, 292 (N.Y. 1921)); *see* 1 LEGISLATIVE HISTORY OF THE UNITED STATES ARBITRATION ACT PUB. LAW. 68-401, at 1924, 1931 (1924).

187. U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1009 (S.D.N.Y. 1915); Hurst v. Litchfield, 39 N.Y. 377, 379 (1868) ("[A] mere agreement to submit cannot oust the Superior Courts of their jurisdiction.").

188. Meacham v. Jamestown, F. & C.R. Co., 105 N.E. 653, 654 (N.Y. 1914) (pointing out a distinction must be made "between the provisions of a contract providing that before a right of action shall accrue certain facts shall be determined, or amounts or values ascertained, and an independent covenant or agreement to provide for the adjustment and settlement of all disputes and differences by arbitration to the exclusion of the courts"); Martin v. Vansant, 168 P. 990, 992 (Wash. 1917) (drawing "the proper and fit distinction between an arbitration, in the proper sense of the term, and an appraisement or valuation").

189. *Trinidad Lake Petroleum Co.*, 222 F. at 1010 (noting "The Theory That a Limited Arbitration, Not Ousting the Courts of Jurisdiction, May be Valid").

clause for limited arbitration would be one in an insurance agreement explicitly stipulating no action on the insurance company's liability shall be maintained before an arbitrator would first appraise the value of the loss.[190] Webster wrote, "[A] valuation undoubtedly *precludes* differences . . . it *prevents* differences and does not settle any which have arisen."[191] Webster added, "If nothing has been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them."[192]

On the other hand, Judge Webster described arbitration proper as involving the submission to an arbitration award of actual "controversies of law or fact"[193] between the parties, "the validity and effect of a contract," or a "finding which construes the contract or determines rights."[194] Arbitrators try and decide the controversy, proceeding "in a judicial way, sometimes as an adjunct to a court of justice."[195] "Their investigation is in the nature of a judicial inquiry."[196] The ensuing award is the tribunal's judgement, selected by the parties to "determine matters actually in variance between them."[197]

Courts deemed agreements of limited arbitration as not against public policy because these were merely a condition precedent for a cause of action.[198] Rather than ousting the courts, limited arbitration leaves "the

190. Hamilton v. Liverpool & London & Globe Ins. Co., 136 U.S. 242, 255 (1890).

191. *Martin*, 168 P. at 992 (emphasis added).

192. *Id.*

193. *Id.* at 994 (citing Flint v. Pearce, 11 R.I. 576, 578 (1877)).

194. *Id.* at 993 (citing Parsons v. Ambos, 48 S.E. 696, 697 (Ga. 1904)); *see also* JOHN T. MORSE, THE LAW OF ARBITRATION AND AWARD 36 (1872) ("There must be, at least, a conceivable possibility of a difference of opinion between the parties.").

195. *Martin*, 168 P. at 993 (citing Omaha Water Co. v. Omaha, 162 F. 225, 233 (8th Cir. 1908)).

196. *Id.* (citing *Omaha Water Co.*, 162 F. at 233).

197. *Id.* at 992 (citing Green & Coates St. Passenger Ry. Co. v. Moore, 64 Pa. 79, 91 (1870)).

198. *See* W.H. Blodgett Co. v. Bebe Co., 214 P. 38, 39 (Cal. 1923) ("It was early settled in the jurisprudence of this state . . . that an agreement between parties to a contract to arbitrate all disputes thereafter to arise thereunder is invalid and unenforceable, as constituting an attempt to oust the legally constituted courts of their jurisdiction and to set up private tribunals; but that, if the matter to be submitted to the arbitrators was the mere finding of a fact or facts the determination of which is essential to the accrual of the cause of action itself, such arbitration or finding becomes a condition precedent to the right to sue, and is therefore, not within the general rule."), *superseded by statute*, The New California Arbitration Act, Stats. 1927, ch. 225, pg. 403, *as recognized in* Moncharsh v. Heily & Blasé, 832 P.2d 899 (Cal. 1992); Del. & Hudson Canal Co. v.

general question of liability to be judicially determined" and merely provides "a reasonable method of estimating and ascertaining the amount of the loss."[199] Enforcing an appraisal agreement was merely enforcing a contract. As agreements of appraisal could not be considered arbitration agreements properly, these did not "trench upon the jurisdiction of the courts,"[200] and thus, agreements to refer a matter to appraisals cannot be revoked as arbitration agreements can.[201]

In contrast, agreements that make arbitration a condition precedent to *any* right of action were regarded as "against the policy of the common law."[202] These agreements tended "to exclude the jurisdiction of the courts, [which is] provided by the government with ample means to entertain and decide all legal controversies."[203] The law, not the contract, "prescribes the remedy,"[204] and predispute arbitration agreements would supersede the jurisdiction of the court.[205]

Hence, courts dreaded the prospect of enforcing the arbitral resolution of contractual disputes without any judicial oversight whatsoever. In *Home Insurance Co. of New York v. Morse*, Justice Ward Hunt for the U.S. Supreme Court explained this fear's origin. Justice Hunt wrote:

> Every citizen is entitled to resort to all the courts of the country . . . . A man may not barter away his life or his freedom, or his substantial rights . . . . He cannot . . . bind himself in advance by an agreement, which may

Pa. Coal Co., 50 N.Y. 250, 250 (1872) ("Where by the same agreement which creates a liability, and gives a right, it is made a condition precedent to a right of action thereon, either in express terms or by necessary implication, that certain facts shall be determined or amounts and values ascertained by arbitrators in case the parties cannot agree thereon . . . there is no cause of action . . . either at law or in equity, until the award is made as provided.").

199. Hamilton v. Liverpool & London & Globe Ins. Co., 136 U.S. 242, 255 (1890); *see also* Marchant v. Mead-Morrison Mfg. Co., 169 N.E. 386, 392 (N.Y. 1929) ("The operation of this rule might, however, be avoided if an award as to specific differences was stated in the contract to be a condition precedent to the existence of a cause of action.").

200. *Martin*, 168 P. at 994 (citing Ca. Annual Conference of the Methodist Episcopal Church v. Seitz, 15 P. 383 (Cal. 1887)).

201. *Id.* (citing Toledo S.S. Co. v. Zenith Transp. Co., 184 F. 391 (6th Cir. 1911)).

202. Hurst v. Litchfield, 39 N.Y. 377, 379 (1868).

203. *Id.*

204. Stephenson v. Piscataqua Fire & Marine Ins. Co., 54 Me. 55, 70 (1866).

205. *Id*.

> be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented. [206]

Enforcing predispute arbitration agreements would amount to "divest[ing] the ordinary jurisdiction of the common tribunals of justice," thus impeding or interfering with the "regular administration of justice."[207] Therefore, the opinion added, courts would better "leave the parties to their own good pleasure in regard to such agreements."[208] In a similar vein, the opinion of the Supreme Court of California in *W.H. Blodgett Co. v. Bebe Co.* explained the concern for the ousting of the courts.[209] It stated, "[C]itizens ought not to be permitted or encouraged to deprive themselves of the protection of the courts by referring to the arbitrament of private persons or tribunals, in no way qualified by training or experience to pass upon them, questions affecting their legal rights."[210]

In the light of the contemporaneous case law, Cohen appears to have hoped to convince Congress that the enforcement of arbitration proper was to be as harmless to the courts' enforcive jurisdiction as limited arbitration

206. Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874). The Court cites *Stephenson v. Piscataqua Fire & Marine Insurance Co.* in saying:

> While parties may impose as condition precedent to applications to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law and not the contract prescribes the remedy, and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law; such stipulations are repugnant to the rest of the contract, and assume to divest courts of their established jurisdictions; as conditions precedent to an appeal to the courts, they are void.

Id. at 452–53 (citing *Stephenson*, 54 Me. at 70).

207. *Id.* at 452 ("And where the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement . . . .").

208. *Id.* (quoting JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (1884)).

209. W.H. Blodgett Co. v. Bebe Co., 214 P. 38, 40–41 (Cal. 1923), *superseded by statute*, The New California Arbitration Act, Stats. 1927, ch. 225, pg. 403, *as recognized in* Moncharsh v. Heily & Blase, 832 P.2d 899 (Cal. 1992).

210. *Id.*; *see also* Parsons v. Ambos, 48 S.E. 696, 697 (Ga. 1904) ("By first making the contract, and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy.").

was perceived to be.[211] An agreement to arbitrate is in effect no different than an agreement that assigns the valuation or appraisal to a third person. After all, Cohen underscored in his 1918 book that "what is intended by the usual arbitration clause" is that it "does not deprive either party of the right to sue; it merely fixes the method for determining the liability."[212] He continued that "[n]o one is deprived of his protection by the court," neither under arbitration statutes nor common law.[213]

As previously pointed out, Congress enacted the FAA based on Senate and House reports, which received little floor debate and were in full agreement with the arguments offered by Julius Cohen and other lobbyists testifying before Congress.[214] In light of the congressional record the Supreme Court has invoked, as well as the broader legal background of the FAA including contemporaneous case law, the picture emerges that the FAA reflected a desire to bolster arbitral adjudicative jurisdiction but not to the detriment of courts' enforcive jurisdiction.

Next, it will become clear, however, that the U.S. Supreme Court precedent has lost sight of the FAA's protection of the courts' enforcive jurisdiction and come to overemphasize arbitrators' powers.

IV. THREE DOCTRINES PRIVATIZING STATE POWER

A. *The Arbitrability of Arbitrability*

Contrary to lobbyists' depictions of the FAA's purpose, three doctrines the U.S. Supreme Court developed over the last six decades illustrate a precedent that is incrementally moving the FAA in the direction of ousting courts of their enforcive jurisdiction.[215] These doctrines are the so-called

211. *See generally* COMMERCIAL ARBITRATION AND THE LAW, *supra* note 51.

212. *Id.* at 274.

213. *Id.*

214. *See* H.R. REP. NO. 68–96 (1924).

215. One could identify three stages of expansion in the Court's application of the FAA. As discussed in Part II.A, above, the extension of the FAA to contracts of adhesion and to disputes involving substantive statutory rights began in the 1980s. Smith & Moyé, *supra* note 9, at 290 (discussing Southland Corp. v. Keating. 465 U.S. 1, 3–4 (1984)). The doctrines discussed here, in Part IV, involve an extension of arbitral jurisdiction generally that began in the 1960s. The first 35 years were relatively uneventful in this respect. *See* Paul D. Carrington, *Self-Deregulation, the "National Policy of the Supreme Court,"* 3 NEV. L.J. 259, 266–88 (2002) ("Thus, in the first half century, the Federal Arbitration Act posed no serious problems for anyone. It was

Arbitrability of Arbitrability, the Severability of the arbitration clause, and the Equal Treatment of arbitration agreements under § 2 of the FAA. By gradually shifting the burden of proof of an enforceable arbitration agreement to the party opposing arbitration, the Court has developed default rules that hand over increasing control of the levers of the state's coercive force to private "judges" who do not bear the responsibility of publicly justifying the employment of state power.

The first doctrine developed by the U.S. Supreme Court that has diminished the import of the courts' enforcive jurisdiction is the Arbitrability of Arbitrability.[216] This doctrine permits arbitrators to review their own jurisdiction; that is to say it allows them to assess the validity or enforceability of the arbitration agreement or arbitration clause.[217] In *First Options of Chicago, Inc. v. Kaplan*, the Court phrased the question this doctrine pertains to as asking who—courts or arbitrators—should have the primary power to decide whether the parties agreed to arbitrate the merits of the dispute at hand.[218] To put it differently, the question of the Arbitrability of Arbitrability asks whether the court or the arbitrator has the jurisdiction to determine the arbitrator's jurisdiction to resolve the contractual dispute in question.[219]

However, in *AT & T Technologies, Inc. v. Communications Workers of America* and *First Options of Chicago*, the Supreme Court explained that whether the parties agreed to arbitrate the merits of the dispute in question is "undeniably an issue for *judicial* determination."[220] Courts must not send parties to arbitration against their will.[221] The position recognizes the

interpreted in a manner generally consistent with state law expressed in many states in a uniform law upholding pre-dispute arbitration agreements in commercial contracts.").

216. *See generally* AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 651 (1986).

217. *See id.*

218. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995). The Court reiterated that it is critical that parties are not sent to arbitration against their will: "[W]here the party has agreed to arbitrate, he or she, in effect, has relinquished much of . . . the practical value [of the right to a court's decision about the merits of its dispute]." *Id.* ("Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.").

219. *See id*.

220. *Id.*; *AT & T Techs.*, 475 U.S. at 650 (emphasis added).

221. Only if the court determines that the parties agreed to "arbitrate the arbitrability question" can it send the questions on the merit to arbitration. *AT & T*

importance of securing the court's enforcive authority.[222] However, the Court has interpreted this "undeniable" rule as a default rule parties can deviate from by contract. Thus, parties can delegate the court's prerogative to arbitration.[223]

The doctrine of the Arbitrability of Arbitrability does not in itself risk the relegation of the courts' jurisdiction; how the Court subsequently sets the burden and standard of proof does. The possibility of parties to arbitrate the arbitrability of a dispute raises the question: who, the court or the arbitrator, is to ascertain whether the parties indeed referred disputes about the jurisdiction of the arbitrator itself to arbitration?[224]

Two default rules make up the doctrine of the Arbitrability of Arbitrability.[225] One applies to the determination of the existence of an arbitration agreement, while the other determines the scope of the agreement.[226] First, the question of whether an arbitration agreement exists is presumptively for courts to decide.[227] Cases involving these issues would involve agreements signed by a party other than the disputants, raising questions of agency.[228] Parties can agree to send the arbitrability question to

Techs., 475 U.S. at 651.

222. *See id.*

223. *Id.* ("If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement."). This holding confirmed Justice William Douglas's footnote to the opinion in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, mentioning the parties may "exclude[] from court determination" the question of arbitrability. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583, n.7 (1960); *see infra*, note 232.

224. *AT & T Techs.*, 475 U.S. at 651.

225. *Id.* at 648–49.

226. *Id*.

227. *See id*. at 649.

228. *See, e.g.*, Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992) (determining a valid arbitration agreement did not exist between the parties) ("[W]hen it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration. . . . that party is challenging the very existence of any agreement, including the existence of an agreement to arbitrate. Under these circumstances, there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the Act."); *see also* Sarhank Grp. v. Oracle Corp., 404 F.3d 657, 662 (2d Cir. 2005) (holding that Oracle was not bound by the signature of its wholly owned subsidiary to the arbitration agreement with Sarhank); Regan v. Stored Value Cards, Inc., 85 F. Supp. 3d 1357, 1364 (N.D. Ga. 2015) ("Giving Plaintiff the benefit of all reasonable doubts and inferences" about whether using the

arbitration only if they do so "clearly and unmistakably," according to the opinion in *AT & T Technologies*.[229] This standard of proof is relatively low. A common arbitration clause incorporating or referencing, for example, the American Arbitration Association (AAA) Arbitration Rules suffices.[230] These clauses typically include the phrase "any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration."[231]

Second, parties can delegate the question of the scope of an arbitration agreement to arbitration as well.[232] Here, the Court adopted a default rule

credit card counted as an acceptance of the arbitration clause in the Cardholder Agreement). Conversely, the court in *Githieya v. Global Tel*Link Corp.* determined an arbitration agreement existed even though the parties made an oral contract, as it nonetheless referenced the Terms of Use, which contained an arbitration clause. Githieya v. Glob. Tel*Link Corp., No. 1:15-CV-0986-AT, 2016 WL 304534, at *5 (N.D. Ga. Jan. 25, 2016).

229. *AT & T Techs.*, 475 U.S. at 649. This reasoning, too, follows Justice Douglas's footnote to the opinion in *Warrior & Gulf Navigation*, in which he remarked that a claim that an issue of arbitrability is for the arbitrator should "bear the burden of a clear demonstration of that purpose." United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583, n.7 (1960).

230. *See Githieya*, 2016 WL 304534, at *3.

231. The standard arbitration clause for commercial contracts reads:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Clauses, AM. ARBITRATION ASS'N, https://www.adr.org/Clauses [https://perma.cc/33UG-V5WE] (last visited Sept. 21, 2018). A number of circuit courts have taken the position that the typical, broadly phrased, boilerplate arbitration clause does not meet the clearly and unmistakable test. *See, e.g.*, Carson v. Giant Food, Inc., 175 F.3d 325, 329–30 (4th Cir. 1999). Still, most circuit courts agree that the incorporation of, or reference to the AAA rules, does provide sufficient evidence of the parties' intent to arbitrate the arbitrability question. *See, e.g.*, Arnold v. Homeaway, Inc., 890 F.3d 546, 553 (5th Cir. 2018).

232. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010) ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."); *see, e.g.*, *Arnold*, 890 F.3d at 553 ("The mere fact that an arbitration provision does not apply to every possible claim does not render the parties' intent to delegate threshold questions about that provision less clear."); Shipman Agency, Inc. v. TheBlaze, Inc., 315 F. Supp. 3d 967, 976 (S.D. Tex. 2018) ("Because the clause governs all disputes 'relating to' the Agreement it must be construed broadly to

presuming the jurisdiction of arbitrators. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, the Court held it presumptively is for arbitrators to decide whether the dispute at hand falls within the scope of the arbitration agreement that encompasses the dispute.[233] Arbitration "should not be denied unless it may be said with positive assurance" that the arbitration clause does not cover the dispute in question.[234] This standard of proof is relatively high. In *AT & T Technologies*, the Court clarified that rebutting this "positive assurance" requires an "express provision" or "the most forceful evidence" that parties wish courts to entertain the question of scope.[235] The commonly used arbitration clause referring to the rules of an arbitral institution such as the AAA would *not* suffice.[236] Once an arbitration clause exists, it must be presumed to cover the claim or dispute in question, especially if it is broadly phrased.[237]

At first glance, the Supreme Court's reasoning suggests a protective attitude toward the Court's jurisdiction to ascertain the Arbitrability of Arbitrability. Indeed, under the Supreme Court's doctrine, all questions of arbitrability, involving both the existence and scope of arbitration

include disputes that 'touch' matters covered by the Agreement."); Aiken v. World Fin. Corp. of S.C., 644 S.E.2d 705, 709 (S.C. 2007) ("In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. . . . We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties.").

233. *See Warrior & Gulf Navigation*, 363 U.S. at 575 n.7. Justice Douglas, writing for the majority in *Warrior & Gulf Navigation*, reiterated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* at 582.

234. *AT & T Techs.*, 475 U.S. at 650 ("[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'").

235. *Id.*

236. *Id.*; *see* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (referencing the "'procedural' questions which grow out of the dispute and bear on its final disposition"); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945 (1995).

237. *See AT & T Techs.*, 475 U.S. at 650. In *First Options of Chicago*, the Court provided the ratio for adapting this default rule in favor of the arbitrator: "The latter question arises when the parties have a contract that provides for arbitration of *some* issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration." *First Options of Chi., Inc.*, 514 U.S. at 945 (emphasis added).

agreements, are for the courts.[238] The point at issue here is the circumstances under which courts are subsequently expected to send the arbitrability question to arbitration.[239] A closer analysis of the two discussed default rules shows the Court has significantly curtailed courts' enforcive jurisdiction of their enforcive authority.

The first default rule regarding the existence of an arbitration agreement, which presumes the court's jurisdiction, is mostly absorbed by the second one presuming the arbitrator's jurisdiction in matters of the agreement's scope. Only if a court determines no arbitration agreement between the parties exists does the default rule favoring the court's jurisdiction preclude sending the arbitrability question to arbitration.[240] Moreover, the easy-to-rebut default rule favoring courts' jurisdiction in combination with the not-so-easy-to-rebut default rule favoring the arbitrator makes it more likely an arbitrator will settle the arbitrability question.[241] If parties use the standard arbitration clause recommended by arbitration institutions, the court will, in most cases, readily refer the arbitrability question to arbitration.[242]

The Arbitrability of Arbitrability doctrine, therefore, diminishes courts' final say over the circumstances under which the state will enforce an arbitration agreement. Different dissenting opinions corroborate the concern for effectively allocating the presumptive exercise of courts' enforcive jurisdiction to arbitrators. In his dissent in *Warrior & Gulf Navigation*, Justice Charles Whittaker considered the presumption of arbitrability of questions of scope "an entirely new and strange doctrine."[243] He further wrote the power of arbitrators to decide issues with finality amounts to "ousting the normal functions of the courts" and thus must "rest upon a clear, definitive agreement of the parties, as such powers can never be implied."[244] In a similar voice, Justice John Paul Stevens, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor in dissenting from the majority in *Rent-A-Center, West, Inc. v. Jackson*, deemed

238. *AT & T Techs.*, 475 U.S. at 649.

239. *See id.*

240. *See id.*

241. *See id.*

242. *See* Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 76–77 (2014).

243. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 589 (1960) (Whittaker, J., dissenting).

244. *Id.* at 586.

the sending "as a matter of course" any arbitrability question to arbitration "bizarre."[245] Justice Stevens added, "I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity."[246] In his judgment, "The notion that a party may be bound by an arbitration clause in a contract that is nevertheless invalid may be difficult for any lawyer—or any person—to accept . . . ."[247]

B. *The Severability of the Arbitration Clause*

The second doctrine the U.S. Supreme Court developed that contributed to effectively surrendering the courts' enforcive jurisdiction is the Severability or Separability doctrine. This doctrine conceptually separates the clause that sends a dispute to arbitration from the remainder of the contract in such a way that the unenforceability or nullity of the contract as a whole does not cancel out the arbitrator's jurisdiction to review the validity of the contract.[248]

The doctrine progressed in two stages. First, a narrow majority in the landmark case of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* introduced the separability or severability of the arbitration clause from the remainder of the contract of which it is part.[249] Justice Abe Fortas, writing the opinion, looked to the plain meaning of § 4 of the FAA[250] and interpreted

245. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 78 (2010) (Stevens, J., dissenting).

246. *Id*. at 85 ("But even assuming otherwise, I certainly would not hold that the *Prima Paint* rule extends this far.").

247. *Id.* at 87, 88 ("While I may have to accept the 'fantastic' holding in *Prima Paint*," referencing Justice Hugo Black's dissent in that case, "I most certainly do not accept the Court's even more fantastic reasoning today.").

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

249. *See id.* at 397–99. Prima Paint took its claim to court, but Flood & Conklin was of the position that the question of fraud was for arbitration instead. *Id.* at 399. Justice Black dissented, with Justices Douglas and Stewart joining. *Id.* at 407 (Black, J., dissenting).

250. *Id.* at 404 (majority opinion). In footnote 11, the opinion cited the following passages of § 4:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

Id. at 403.

it as saying, "[I]f the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally."[251] As with the Arbitrability of Arbitrability, the Court took this rule as a default rule[252] and decided the common, broadly phrased arbitration clause satisfies the burden of showing a claim of fraud should be sent to arbitration.[253]

The second stage of the Severability doctrine was introduced by the Supreme Court in *Rent-A-Center*, which took the Severability doctrine one step further.[254] The Court clarified it is not necessarily enough to direct one's contract defense at the arbitration clause.[255] Justice Scalia, for the majority, discerned what he called a delegation provision within an arbitration clause—that is, an "additional, antecedent agreement" by which parties expressly agreed to arbitrate the question of arbitrability.[256] Hence, as the arbitration clause is separable from the commercial contract, the delegation provision is separable from the arbitration clause.[257] If one's contract defense is not directed against this delegation provision specifically,[258] the question of arbitrability is for the arbitrator.[259] Separating the delegation provision from other provisions of an arbitration agreement creates "distinct mini-

251. *Id.* at 403–04. To Justice Fortas, Prima Paint's claim of fraud did not specifically target the arbitration clause itself, and the contractual language in question was broad enough to cover questions of fraudulent inducement of the consulting agreement generally, concluding that the dispute in question was thus for the arbitrator. *Id.* at 406.

252. *See id.* at 403 (referencing in agreement the Second Circuit as saying that "arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded," except where the parties intend otherwise).

253. *Id.* at 402 ("[W]here no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.").

254. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 69, 72 (2010). Justice Stevens wrote the dissent, with Justices Ginsburg, Breyer, and Sotomayor joining. *Id.* at 75 (Stevens, J., dissenting).

255. *Id.* at 69, 72 (majority opinion).

256. *Id.* at 68.

257. *See id.*

258. *See id.* at 73.

259. *Id.* at 72 ("Section 2 operates on the specific 'written provision' to 'settle by arbitration a controversy' that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.").

arbitration agreement[s]," as the dissenters phrased it.[260] This "infinite severability rule"[261] creates "infinite layers of severability,"[262] not unlike "Russian nesting dolls."[263]

Application of the severability rule reinforces the propensity of a court to send a dispute to arbitration without confirming both parties agreed to do so.[264] The rule thus risks marginalizing the judicial safeguards the FAA was meant to keep in place.[265] The number of dissenters in the relevant cases indicate the Court's precedent is debatable or at least not uncontroversial. In his dissent in *Rent-A-Center*, Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, expressed this concern. Justice Stevens called the *Prima Paint* decision "likely erroneous."[266] Questions of validity and formation, including unconscionability, are threshold questions relating to the existence of the arbitration agreement, the dissent reasoned.[267] Hence, validity questions should only be for the arbitrator to answer if the court has first applied the default rules of the Arbitrability of Arbitrability as laid out in *AT & T Technologies* and *First Options of Chicago*.[268] According to the dissenters, courts' jurisdiction for entertaining defenses against arbitration agreements should not be governed by the rule of severability but by the two default rules of arbitrability.[269]

The dissenters' grievances in *Rent-A-Center* echoed earlier criticism by the dissenters in *Prima Paint*.[270] Justice Black, with Justices Douglas and Stewart joining, rejected the severability rule based on reasons pertaining to the Arbitrability of Arbitrability doctrine.[271] Considering the severability

260. *Id.* at 85 (Stevens, J., dissenting).

261. *Id*. at 87.

262. *Id.* at 86.

263. *Id.* at 85.

264. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 413 (1967) (Black, J., dissenting) ("These provisions were plainly designed to protect a person against whom arbitration is sought to be enforced from having to submit his legal issues as to validity of the contract to the arbitrator.").

265. *See id.*

266. *Rent-A-Ctr., W., Inc*., 561 U.S. at 83 ("In applying *Prima Paint*, the Court has unwisely extended a 'fantastic' and likely erroneous decision.").

267. *Id.* at 82.

268. *See id.* at 80–81.

269. *See id.* at 78.

270. *Id.* at 80.

271. *See id.* at 83.

rules as "fantastic,"[272] Justice Black argued § 2 of the FAA presumes "the existence of a valid contract."[273] It is thus the courts, not the arbitrators, that should consider "grounds as exist at law or in equity for the revocation of any contract."[274] There is nothing to arbitrate, Justice Black wrote, if the contract is procured by fraud.[275]

C. *The Equal Treatment Requirement*

The third doctrine through which the Supreme Court effectively surrendered courts' enforcive jurisdiction is the Equal Treatment principle under the so-called saving clause of § 2 of the FAA.[276] This doctrine requires courts to treat the validity or enforceability of arbitration agreements and arbitration clauses no less favorably than agreements and contractual clauses generally.[277]

Section 2 of the FAA stipulates arbitration agreements are "valid, irrevocable, and enforceable, *save upon such grounds* as exist at law or in equity for the revocation of any contract."[278] The Court in *Rent-A-Center* read this provision to entail an Equal Treatment requirement.[279] The requirement entails that while arbitration agreements or clauses "may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability,"[280] courts should treat agreements to arbitrate on equal footing with other contracts and contractual clauses.[281]

272. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting).

273. *Id.* at 412.

274. *Id.*

275. *See id.*

276. One of the earliest times the Supreme Court coined the term *saving clause* was in a footnote in *Prima Paint*. *See id.* at 404 n.12.

277. *See* Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr. v. Horne, L.L.P., 853 F.3d 804, 808 (5th Cir. 2017).

278. 9 U.S.C. § 2 (2018) (emphasis added).

279. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

280. *Id.* at 68 (internal quotations omitted) (citation omitted). This follows from the final sentence of § 2 of the FAA, "save upon such grounds as exist at law or in equity for the revocation of any contract," which Justice Scalia has called the saving clause. *See* AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 339 (2011) (following *Prima Paint Corp.*, 388 U.S. at 404 n.12 ("As the 'saving clause' in s 2 indicates . . . .")).

281. *Rent-A-Ctr., W., Inc.*, 561 U.S. at 67. In *Rent-A-Center*, for example, the Court reiterated, "The FAA reflects the fundamental principle that arbitration is a matter of contract. . . . thereby plac[ing] arbitration agreements on an e qual footing with other

Over time, however, the Court has presented an exceptionally stringent interpretation of the Equal Treatment doctrine, making it harder for the party fighting arbitration to present a successful defense against a claim of a breach of the arbitration agreement.

Initially, the Court reasoned arbitration agreements should not be treated less favorably than any other contract.[282] State courts and state legislatures must refrain from discriminating against arbitration agreements by admitting defenses that single out arbitration provisions for suspect status.[283] Hence, as Justice Gorsuch explicated in *Epic Systems*, § 2 of the FAA allows for contract defenses that parties can raise against any contract, not ones "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[284]

In more recent decisions, however, the Supreme Court has come to interpret the saving clause as a *minimum* requirement; arbitration agreements should be treated at least as favorable as contracts in general.[285] In *AT&T Mobility L.L.C. v. Concepcion*, Justice Scalia, writing for the majority, took issue with the *Discover Bank* rule created by the California Supreme Court.[286] According to the *Discover Bank* rule, a California court would deem a class action waiver unconscionable if it "becomes in practice the exemption of the party 'from responsibility for its own fraud, or willful injury to the person or property of another.'"[287] The dissenters agreed with the Concepcions that the California rule treats arbitration agreements "upon the same footing" as any other contract because it applies to class action

contracts." *Id.*, *see also, e.g.*, Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 225–26 (1987); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974).

282. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

283. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). The Court underscored that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Id.*

284. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018). In *Kindred Nursing Centers Limited Partnership v. Clark,* Justice Elena Kagan, writing for the Court, pointed out that the Kentucky Supreme Court revealed the kind of hostility against arbitration that the FAA aimed to remedy by placing these on the same footing with "both patently objectionable and utterly fanciful contracts." Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1427 (2017). Justice Scalia's opinion for *Concepcion*—the decision Justice Gorsuch relied on the most— was far more contentious. This is discussed below. *See infra* notes 285–304 and accompanying text.

285. *See* AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 339 (2011).

286. *See id.* at 341.

287. *Id.* at 340.

waivers in both litigation and arbitration equally.[288] Justice Scalia disagreed.[289] However, he nonetheless found the *Discover Bank* rule was inconsistent with the FAA because a defense cannot interfere "with *fundamental attributes* of arbitration and thus create[] a scheme inconsistent with the FAA."[290] In *Epic Systems*, Justice Gorsuch spelled out the three steps of Justice Scalia's interpretation of the saving clause in *Concepcion*.[291]

First, bilateral or individualized arbitration proceedings are a "fundamental attribute of arbitration."[292]

Second, a defense against a waiver of class or collective action in an arbitration clause "require[s] individualized arbitration proceedings instead of class or collective ones,"[293] causing the "speed and simplicity and inexpensiveness" of arbitration to be "shorn away," resulting in arbitration "looking like the litigation it was meant to displace."[294]

Third, by way of deduction, "by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's *fundamental* attributes."[295]

288. *Id.* at 360 (Breyer, J., dissenting).

289. *Id.* at 338 (majority opinion). At least, Justice Scalia observes without express opposition that in the judgment of the Ninth Circuit, the *Discover Bank* rule "placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration." *Id.*; *see also id.* at 359 (Breyer, J., dissenting).

290. *Id.* at 344 (majority opinion) (emphasis added). It should be noted the pertinent California rule did not require class arbitration but merely found a waiver of class arbitration unconscionable. *See id.* at 346.

291. *See* Epic Sys. Corp v. Lewis, 138 S. Ct. 1612, 1622 (2018).

292. *Id.* ("And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with *one of arbitration's fundamental attributes*." (emphasis added)).

293. *Id.* ("[The employees] object to their agreements precisely because they *require* individualized arbitration proceedings instead of class or collective ones.").

294. *Id.* at 1623. This consideration follows Justice Scalia's opinion in *Concepcion,* which reads, "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 563 U.S. at 344. Justice Scalia added, "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration . . . and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348.

295. *Epic Sys. Corp.*, 138 S. Ct. at 1622 (emphasis added). "But an argument that a contract is unenforceable just because it requires bilateral arbitration . . . . is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability."

Hence, a defense against a class action waiver is directly aimed against arbitration specifically and is thus precluded by the equal treatment aspect of the saving clause.[296] Nothing in § 2 of the FAA "suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishments of the FAA's objectives," added Justice Scalia in *Concepcion*.[297] The FAA "cannot be held to destroy itself."[298]

Under this interpretation used by the Court, if a defense affects an aspect that is not unique to arbitration but still central to arbitration, § 2 will not allow it.[299] This limitation on permissible defenses does not apply to breaches of contracts generally.[300] It turns out there is something special

Id. at 1623. "[C]ourts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." *Id.* "Our precedent clearly teaches that a contract defense 'conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures' is inconsistent with the Arbitration Act and its saving clause." *Id.* at 1631. In *Concepcion*, Justice Scalia reasoned that invalidating a class arbitration waiver as unconscionable would frustrate the purpose of the FAA. *Concepcion*, 563 U.S. at 344 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). It is worth pointing out that, strictly speaking, the *Discover Bank* rule did not require class arbitration. *Id.* at 346. The rule merely found a waiver of class arbitration unconscionable. *Id.* at 356.

296. *Epic Sys. Corp.*, 138 S. Ct. at 1622 ("[T]he saving clause still can't save [the employees'] cause . . . because the saving clause recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts.").

297. *Concepcion*, 563 U.S. at 343.

298. *Id.* The prioritizing of individualized arbitration over class action arbitration is suspect, however. In *Oxford Health Plans L.L.C. v. Sutter*, the majority held arbitration is a matter of contract, and the courts should thus honor the parties' consent to class arbitration, even if parties did so in broad contractual language. Oxford Health Plans L.L.C. v. Sutter, 69 U.S. 564, 565–66 (2013) ("Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them."); *see* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) ("[T]he relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures."); *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (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."). It turns out the Court does not deem the inefficiencies of class or collective action in arbitration that fundamental after all. *See generally id.*

299. *See, e.g.*, *Epic Systems Corp*., 138 S. Ct. at 1622.

300. *See id.*

about arbitration agreements, making them exceptionally enforceable—more so than contracts generally.[301]

The revised equal treatment rule in *Concepcion* is markedly more stringent than the Court's earlier interpretation of merely barring defenses that expressly or covertly target or single out arbitration agreements.[302] The FAA now bars defenses that are generally applicable and do not aim to discriminate against arbitration agreements.[303] It limits otherwise successful contract defenses in the context of arbitration.[304] In this manner, the Supreme Court's interpretation of the not-so Equal Treatment doctrine is partial to sending disputes about the validity of arbitration agreements or clauses to arbitration without a judicial determination of the parties' intent.[305]

V. CORRECTING COURSE

A. *The Lack of Recourse at the Back End of Arbitration*

Recall Julius Cohen's pledge to Congress that the bill he drafted for a federal arbitration act would secure courts' protection of anyone who in good faith claims the arbitration agreement is not binding or not applicable to the dispute in question.[306] The FAA was enacted on the premise not to oust courts from their jurisdiction but to give a right of action and authorize

301. Justice Fortas expressed a similar concern in a footnote to his opinion in *Prima Paint*: "To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate [the arbitration agreement] over other forms of contract—a situation inconsistent with the 'saving clause.'" Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (citing Moseley v. Elec. & Missile Facilities, 374 U.S. 167, 171 (1963)). Moreover, the dissenting justices in *Prima Paint* argued the Severability doctrine infringes on the saving clause as well, as it treats the arbitration clause preferentially over other clauses of the contract. *Id.* at 411 (Black, J., dissenting). In his dissent in *Prima Paint*, Justice Black, with Justices Douglas and Stewart joining, wrote that contrary to the equal footing rhetoric, the rule of separability elevates arbitration clauses above other provisions in the contract. *See id.*; *see also id.* at 423 ("I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not titbits, and is not given the option of denying the existence of some clauses and affirming the existence of others.").

302. *See Concepcion*, 563 U.S. at 343.

303. *See id.* at 339.

304. *See id.*

305. *See id.* at 339–46.

306. *Joint Hearings*, *supra* note 90, at 14.

the use of state power.[307] It appears the core of Cohen's case before Congress was that the FAA would not deprive parties of the protection of the courts.[308] The enforcement of arbitration agreements was not to impede or interfere with what Justice Hunt in *Morse* called the regular administration of justice.[309]

Together, the Arbitrability of Arbitrability, the Severability, and the Equal Treatment doctrines have made it increasingly difficult for a party resisting arbitration to make its case in court.

First, when a contract includes the commonly used, standard arbitration clause as promulgated by the various arbitration institutions, the Arbitrability of Arbitrability doctrine will send questions as to the existence and scope of the arbitration agreement to arbitration.[310] Due to the distribution of the burden of proof and the respective standards of proof set by the two default rules of this doctrine, in most cases arbitrators—rather than courts—will determine their own jurisdiction.[311]

Second, in the remaining instances where the court determines it has jurisdiction to assess the existence or scope of the arbitration agreement or clause, in most instances the Severability doctrine will compel it to have the arbitrator consider a defense against a claim of breach of the arbitration agreement.[312] This is different only when the defendant's grievances happen to pertain specifically to the validity or enforceability of the delegation portion within the arbitration clause rather than the contract or arbitration clause generally.[313]

Third, in the residual occasions where the court decides it has jurisdiction to consider a contract defense against an arbitration clause or agreement, it will more likely than not determine the defense violates the Equal Treatment doctrine and send the question to arbitration after all.[314] Not only may a defense not discriminate against arbitration clauses but it also is unsuccessful when it targets an element that is common to all contracts

307. *See id.*
308. *Id.* at 14.
309. *See* Home Ins. Co. v. Morse, 87 U.S. 445, 452 (1874).
310. *See supra* Part IV.A.
311. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).
312. *See* AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 339 (2011).
313. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).
314. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 72 (2010).

yet fundamental to arbitration agreements.[315] For example, any generally applicable contract defense that happens to affect the purported simplicity and efficiency of arbitration is futile to stop the question from going to arbitration.[316]

In addition to the difficulty under these three doctrines of resisting a dispute from being sent to arbitration, the party resisting arbitration has limited redress at the back end of arbitration, too, or in other words, if the party contests the final arbitral decisions in the matter.[317] The lack of judicial review of arbitral awards reinforces the courts' limited enforcive jurisdiction at the front end of arbitration and the review of the arbitration agreement.[318] Three subsequent rules advanced by the Supreme Court illustrate this point.

First, courts can review an arbitral award on the arbitrator's decision on arbitrability de novo.[319] However, the scope of judicial review at the back end of arbitration is as limited as the court's jurisdiction at the front end of arbitration.[320] Courts must generally apply the same default rules to the judicial review of the arbitrator's jurisdictional decision as they do for determining who first decides the existence and scope of the arbitration agreement.[321] In *First Options of Chicago*, the Court explained, "The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances."[322] If the parties "did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently."[323] After all, "A court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration."[324] Consequently, the scope of judicial deference to arbitrators' decisions on their own jurisdiction in the

315. *See Concepcion*, 563 U.S. at 339.

316. *See Rent-A-Ctr., W., Inc.*, 561 U.S. at 68.

317. *See First Options of Chi., Inc*, 514 U.S. at 942.

318. *See id.*

319. *See id.* at 949.

320. *See id.* at 948.

321. *Id.* at 943 (holding a court "must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration").

322. *Id.* at 942.

323. *Id.* at 943.

324. *Id.*

post-award stage follows the default rules of the Arbitrability of Arbitrability question.[325]

Second, whereas the jurisdiction of courts in arbitrability and severability cases are default rules, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Court interpreted the limited scope of judicial review as a mandatory rule.[326] In this case, the arbitration agreement included a clause demarcating the scope of judicial review, reading, "The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."[327] The Court deemed this agreement unenforceable.[328] The language of § 9 of the FAA, wrote Justice David Souter for the majority, "carries no hint of flexibility" and does not permit courts to vacate, modify, or correct the arbitral award on any other grounds.[329]

Third, while the Supreme Court curtailed the scope of judicial review, it expanded the scope of the FAA's applicability.[330] Presently, the FAA is not just applicable to commercial contracts between merchants or businesspeople.[331] Most notably, in *Gilmer v. Interstate/Johnson Lane Corp.*[332] and *Circuit City Stores, Inc. v. Adams*, the Court extended the scope

325. *See id.* at 946.

326. Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008).

327. *Id.* at 579.

328. *Id.* at 581.

329. *Id.* at 587; *see also id.* at 584–85 (explaining why judicial review of arbitral error cannot be accepted under the FAA). For a defense of the limits on the freedom of contract set by *Hall Street Associates*, see Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 556 (2002) (arguing that the freedom "to sculpt their arbitration process as they see fit" does not expand to "[c]ontracting for expanded review" because that "involves the parties attempting to dictate how the judicial process must be run"). At the same time, federal courts have shown no reluctance in enforcing arbitration agreements expanding the powers of arbitrators. *See* T.Co Metals, L.L.C. v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 346 (2d Cir. 2010) (finding no support in the language of the FAA "for interpreting the statute as silently placing . . . significant constraints on the freedom of parties to bargain for the arbitral procedures of their choice" such as "assigning their arbitrators powers of reconsideration beyond those available to a court when vacating or modifying an arbitration award").

330. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 69 (2010).

331. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

332. *Id.* at 33.

of the FAA to encompass employment agreements,[333] while in *DIRECTV, Inc. v. Imburgia*, the Court enforced an arbitration clause containing a waiver of class action in a consumer service agreement.[334] The Court also gradually expanded the substantive statutory rights that are arbitrable, including those under the Securities Act of 1933,[335] the Securities Exchange Act of 1934,[336] the antitrust rules of the Sherman Act,[337] and rights under the Age Discrimination in Employment Act of 1967 (ADEA).[338]

B. *The Risk of Infringing Liberal Justice*

Strictly speaking, none of the three doctrines examined here outright eliminate courts' enforcive jurisdiction. After all, it is in court that these doctrines are applied. If one party resists arbitration, the parties will still go through court.[339] However, while parties in those cases cannot bypass courts altogether, the Supreme Court's precedent has marginalized courts' discretion in matters of arbitral jurisdiction.[340] Arbitrators have, in effect, presumptive jurisdiction to determine the existence, scope, validity, and enforceability of the arbitration clause and thus their own jurisdiction.[341] At least when a contract contains a standard arbitration clause or when parties did not expressly provide details for the arbitrability of arbitral jurisdiction, it is virtually impossible for the party having good reasons to oppose arbitration to keep the dispute in court.[342] More likely than not, therefore, going to court entails going to arbitration through the court.[343]

333. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113 (2001) ("If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce' would be pointless.").

334. *See* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015).

335. *E.g.* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 478, 486 (1989).

336. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519–20 (1974).

337. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 640 (1985).

338. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–27 (1991); *see also* 14 Penn Plaza L.L.C. v. Pyett, 556 U.S. 247, 258 (2009).

339. *See* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

340. *See, e.g.*, AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 339 (2011).

341. *See, e.g.*, Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68–69 (2010).

342. *See id.* at 68.

343. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400 (1967).

Hence, even though these doctrines appear to protect courts' enforcive jurisdiction, it is usually a jurisdiction in name only. Courts have minimal discretion and thus can exercise little review or oversight over arbitral determinations as to the existence and extent of arbitral jurisdiction.[344] Consequently, if there is a hint of an arbitration clause or agreement, courts presumptively defer to arbitrators to decide, in effect, when the state will be authorized to employ its enforcement machinery.[345]

The court's comprehensive deference to the arbitral determination of arbitral adjudicative jurisdiction permits arbitrators to effectively exercise courts' power to enforce jurisdiction.[346] When courts presumptively let arbitrators consider a party's resistance against arbitrating the dispute in question, arbitrators indirectly control the enforceability of their decisions.[347] At least presumptively, courts permit arbitrators to control the use of state power, which is substantiated by the limited room for judicial review of arbitral decisions.[348]

The Supreme Court's presumptive privatization of state power presents a departure from the meaningful exercise of courts' enforcive jurisdiction that the congressional record shows the FAA was intended to protect.[349] By this departure, the Court's precedent risks infringing the principle of liberal justice that the FAA originally observed.[350] It tells courts to effectively allocate control over the levers of the state's enforcement machinery, encompassing the public institutions that are accountable for its use, to private institutions that are not.

C. *Reconsidering the Burdens and Standards of Proof*

The Supreme Court's doctrines reviewed in Part IV, in light of courts' marginal review of arbitral awards, warrant a congressional course correction. By having shifted a weighty burden of proof to the contracting party opposing arbitration, the Supreme Court has developed specific

344. *See Rent-A-Ctr., W., Inc.*, 561 U.S. at 68.

345. *See, e.g.*, AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 651 (1986).

346. *See* AT&T Mobility v. Concepcion, 563 U.S. 333, 344 (2011).

347. *See id.*

348. *See id.*

349. *See* 66 CONG. REC. 1931 (1925).

350. *See Concepcion*, 563 U.S at 339.

default rules that risk sending disputants to arbitration too soon rather than keeping them in court too long.[351]

Justice Scalia best explained the risk involved in these scenarios. Writing for the majority in *Buckeye Check Cashing, Inc. v. Cardegna*, he asked, do we wish courts "to enforce an arbitration agreement in a contract that the arbitrator later finds to be void," or do we wish to permit a court "to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable[?]"[352] To put it differently, should a court risk sending parties to arbitration too soon or risk keeping them in court too long? Justice Scalia interpreted the FAA as preferring to take the first risk.[353] By accepting the risk of sending unwilling parties to arbitration, the Court has handed presumptive control of the levers of the state's coercive force to private "courts" that do not bear the responsibility of publicly justifying the employment of state power.[354] I argue that living up to the ideal of liberal justice demands the contrary approach.

A change in direction requires changing the risks. It entails adjusting the presumptions of the relevant default rules and thus redistributing the burden of proof and reversing the relevant standards of proof.

To illustrate which aspects of the Court's doctrines warrant revision, I compare four hypothetical risk scenarios. The first scenario paints one extreme on the spectrum of risk: courts refusing to enforce arbitration agreements or arbitral awards altogether. The second depicts the opposite extreme: one in which courts enforce arbitration without any measure of review or oversight. Against the background of these extremes, the following moderate risk scenarios contrast the present arbitration doctrines the Supreme Court has developed and the congressional override this Article proposes.

It is worth noting that in the following problem, I assume not to know for a fact what the contracting parties actually intended. Instead, we assume that what the parties agreed to is what the appropriate referee—court or arbitrator—found the parties to have agreed to. This premise brings out the crucial question of this comparison, namely: Who—the court or the

351. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448–49 (2006).
352. *Id.*
353. *Id.* at 449.
354. *See, e.g.*, *id.*

arbitrator—is the appropriate referee and thus the institution with the final say over the use of state power?[355]

1. *Scenario #1: Ousting the Arbitrators*

The first scenario is on one end of the spectrum. The rule applied in this scenario risks keeping the parties in the court system longer than the court ends up finding they agreed to. Picture a court that will assume exclusive jurisdiction to entertain all questions about the existence, validity, and scope of the arbitration agreement. Hence, it would reject any default rule permitting the Arbitrability of Arbitrability. Thus, in this scenario, the courts' enforcive jurisdiction carries great weight relative to the arbitrator's adjudicative jurisdiction, leaving the levers of state power firmly in the hands of the judiciary.

There are two possible consequences to this approach. On the one hand, if the court finds the dispute nonarbitrable, the court entertains and resolves the suit on the merits—precisely as it determined the parties intended. On the other hand, if the court decides a valid and applicable arbitration agreement exists, it will send the dispute on the merits to arbitration. The court will have ascertained that this is what the parties intended but not before having spent time and incurring costs entertaining all jurisdictional claims and contract defenses raised.

2. *Scenario #2: Ousting the Courts*

The second scenario presents the opposite extreme. It is what, strictly speaking, ousting the courts from jurisdiction would look like. It involves a court sending the parties to arbitration for all matters—including all arbitrability issues—once one of the parties presents minimal prima facie evidence of an arbitration agreement. Assume that in this scenario, the court even bars any evidence to the contrary and sends any evidentiary matters to

355. This premise agrees with the principle in contract law that mutual assent entails a manifested assent. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons."); *Id*. § 18 cmt. a ("Assent to the formation of an informal contract is operative only to the extent that it is manifested."). By the time one of them brings their dispute to a referee, be it a court or arbitrator, we may assume that the parties already have a different understanding of what they actually agreed to. Furthermore, this Article focuses only on the jurisdictional issues at the front end of arbitration pertaining to the arbitration agreement. For the purpose of this exercise, assume the arbitrator's award will be enforced without any further challenge.

arbitration. Here, courts perform no meaningful role in arbitration altogether.

Without any substantive supervision, this scenario has two outcomes as well. First, the arbitrator may find the dispute to be arbitrable and continue resolving the issue and rendering a final award. In the second outcome, the arbitrator may determine that the dispute was not arbitrable after all. The court will then assume jurisdiction of the merits but not before parties have spent resources on having gone through arbitration.

The first outcome might not appear problematic at first. After all, the arbitrator has established the arbitrability of the dispute and then resolved it as it saw fit. However, as the court has declined to exercise any meaningful supervision, the court has not itself ascertained whether the arbitrator was the appropriate referee to make these decisions to begin with. The court has risked authorizing the employment of the state's coercive powers to compel whatever the arbitrator has determined, which could be in contradiction of what the court might have found was the intention of the parties.

Hence, in this scenario, the court's enforcive jurisdiction is marginalized and effectively allocated to the arbitrator, virtually permitting the arbitrator complete control of the levers of state power that normally are firmly in the hands of the judiciary.

3. *Scenario #3: The Status Quo*

The third scenario depicts the status quo, that is to say, the interpretation of the FAA under the Supreme Court's doctrines addressed in Part IV.[356] It also entails a moderate version of the previous scenario.

In this third scenario, the enforcive jurisdiction of the court is considerably more substantive than in the second. The court assumes jurisdiction of arbitrability questions, including possible defenses to breach of contract claims, as well as questions of the Arbitrability of Arbitrability. However, it is relatively difficult for parties to refute in court the existence, scope, validity, or enforceability of the alleged arbitration agreement. It is thus burdensome, if not impracticable, for the court to avoid sending the dispute, including the arbitrability question, to arbitration.

In this scenario, the court avoids the risk that it takes in the first extreme scenario. It prevents keeping parties in the court system longer than the court in hindsight would ascertain the parties intended. Conversely, the

356. *See supra* Part IV.

court in this scenario accepts some of the risk involved in the second scenario. By risking sending the parties to arbitration without itself having fully ascertained the parties' intent, the court surrenders the substantive decision-making discretion associated with its enforcive jurisdiction to arbitration.

Thus, the third scenario does not oust the court's enforcive jurisdiction outright, but it does presumptively outsource the court's discretion in the matter to arbitration. In this manner, it effectively privatizes state power by allowing arbitrators to indirectly handle the levers of state power instead of courts.

4. *Scenario #4: The Proposed Course Correction*

Lastly, the fourth scenario is the one this Article argues is preferred. It is a moderate version of the first scenario and the basis for its proposed amendments. Moreover, it reflects the distribution of enforcive and adjudicative authority that the broader legislative background shows the FAA intended.

For this scenario, consider courts that adopt a default rule permitting the Arbitrability of Arbitrability but one that is more conservative than the one the U.S. Supreme Court has developed. These courts apply a high evidentiary standard, demanding an express provision or the most forceful evidence that the parties intended to send these gateway questions to arbitration instead. A general arbitration clause such as the one recommended by the AAA would not suffice.[357] Furthermore, these courts would consider ordinary contract defenses regardless of whether the defenses target the arbitration clause in particular or the contract as a whole.[358] The courts might refuse to permit defenses that target features that are unique but not necessarily essential to arbitration, thereby excluding the feature of arbitration generally being more efficient than litigation.[359]

Contrary to the third scenario, the court, not the arbitrator, enjoys presumptive jurisdiction over questions of existence, scope, validity, and enforceability of the arbitration agreement or clause. There are again two possible outcomes. First, if the court finds that the dispute is not arbitrable, it will have ascertained that the outcome of the litigation is the one the

357. *See, e.g.*, AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986).

358. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68 (2010).

359. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018).

parties agreed to accept. Second, the court eventually decides to send the dispute to arbitration.

In the second outcome, the court risks keeping parties in the court system longer than they intended. Moreover, there is a chance the parties end up in arbitration against their will, meaning the arbitrator might establish that the alleged arbitration agreement does not exist, is invalid, or does not apply to the dispute at hand. However, no matter how the arbitral-jurisdiction matter turns out, the court will have been the institution ensuring the parties have agreed to accept whatever the outcome in arbitration will be. The court will thus have had the final say over the employment of the state's enforcement machinery.

This last scenario not only reflects the policy principles that inspired the enactment of the FAA but it is also consistent with the demands of liberal justice. Control of state power remains in the hands of the courts, which, unlike arbitrator or arbitration institutions, are public institutions that, through public, legal reasoning, offer an account for the circumstances under which engagement of the state's coercive force is authorized.

VI. IN CONCLUSION: A PROPOSAL

I conclude by proposing three minimally invasive but targeted amendments of the general provisions in Chapter 1 of Title 9 of the United States Code.

To avoid seeking the infeasible, it is worth taking note of previous congressional attempts to amend the FAA that have failed. Over the years, both members of the U.S. Senate and the House of Representatives have attempted to offer a congressional response to the Supreme Court's case law. Senator Jeff Sessions introduced the first comprehensive bill on October 1, 2002.[360] The proposed amendments were to "improve the Federal Arbitration Act so that it will remain as a cost-effective means of resolving disputes, but will do so in a fair way" for consumers, employees, and small

360. 148 CONG. REC. S9721–23 (daily ed. Oct. 1, 2002) (statement of Sen. Sessions). The bill regulated the arbitral process in great detail by, for example, stipulating the applicable law the arbitrator should apply (Article 2), laying out rules of evidence (Article 5), and compelling the arbitrator to provide "written explanation of the factual and legal basis for the decision" (Article 9). *See* Jeff Sessions, TEXT - S.3026 - 107TH CONGRESS (2001-2002): ARBITRATION FAIRNESS ACT OF 2002 (2002), https://www.congress.gov/bill/107th-congress/senate-bill/3026/text [https://perma.cc/2XUH-QVTZ] (last visited Sep. 15, 2018).

businesses.[361] The bill had no cosponsors and never came out of the Judiciary Committee.[362] The latest bill was for the Arbitration Fairness Act of 2018, introduced by Senator Richard Blumenthal on March 22, 2018.[363] It supports arbitration but only "when consent . . . is truly voluntary, and occurs after the dispute arises."[364] It introduced exemptions from the general federal arbitration law for employment, consumer, antitrust, and civil rights disputes.[365] The bill expressly pushes back against the Supreme Court's expansive application of the FAA.[366] The language of this bill was identical or similar to the Senate bills proposing the Arbitration Fairness Act of

361. 148 CONG. REC. S9720 (daily ed. October 1, 2002) (statement by Sen. Sessions).

362. Jeff Sessions, S.3026 - 107TH CONGRESS (2001-2002): ARBITRATION FAIRNESS ACT OF 2002 (2002), https://www.congress.gov/bill/107th-congress/senate-bill/3026 [https://perma.cc/W59V-TL7Y] (last visited Sep. 15, 2018).

363. Richard Blumenthal, TEXT - S.2591 - 115TH CONGRESS (2017-2018): ARBITRATION FAIRNESS ACT OF 2018 (2018), https://www.congress.gov/bill/115th-congress/senate-bill/2591/text [https://perma.cc/KS96-XGRW] (last visited Sept. 16, 2018). The 2018 bill's central provision, section 402(a), stipulates that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute." Arbitration Fairness Act of 2018, S. 2591, 115th Cong. § 402(a) (2018).

364. S. 2591 § 2(5).

365. *Id.* § 402(a).

366. *Id.* § 2(2) ("A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.").

2007,[367] 2009,[368] 2011,[369] 2013,[370] 2015,[371] 2017.[372] Like its predecessors, the 2018 bill never left committee.[373]

These past proposals show that in order to have any chance of success, a congressional override should trigger the least political uproar. It serves no purpose to restrict the freedom of parties to arbitrate their disputes or to limit arbitrators' adjudicative jurisdiction. Even if that were desirable, such a transformation is unnecessary. The amendments need only be limited in number, general in scope, and free from the political controversy surrounding mandatory arbitration.

Therefore, this Article's proposal does not entail an overhaul of the FAA. It merely tweaks the generally applicable default rules that the Supreme Court has developed through its gradually broadening application of the FAA. At the same time, similar to the Fairness Arbitration Act of 2002, the proposed amendments do not make exceptions for contracts between parties of unequal bargaining power, thus mostly avoiding the contentious topic of mandatory arbitration.

Consequently, the proposed legislative adjustments of the three central doctrines in the Supreme Court's case law would look as follows.

367. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007). The introductory language, however, elaborated more on expressing considerable skepticism of the trustworthiness of arbitral institutions. *See id.* § 2(4)–(7). Moreover, the 2007 bill did not address the vindication rule as section 402(b)(2) of the 2018 bill did. *See id.*; S. 2591. Additionally, the 2007 bill did not apply to arbitration of antitrust disputes but did include franchise disputes. S. 1782.

368. Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009). The language of the 2009 bill was identical to the 2007 bill. *Id.*; Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

369. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011). The language and scope of the 2011 bill was similar to the 2018 bill except that the former did not apply to arbitration of antitrust disputes. *See* § 402(a).

370. Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013). The language of this bill was identical to the 2018 bill. *See also* Imre Stephen Szalai, *Correcting a Flaw in the Arbitration Fairness Act*, 2013 J. DISP. RESOL. 271, 296 ("While the AFA seemingly strips the courts of some of their adjudicative authority, by prohibiting courts from enforcing certain arbitration agreements, the AFA restores the broader judicial power to resolve significant employment, consumer, civil rights, and antitrust disputes.").

371. Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015). The language of this bill was identical to the 2018 bill. *Id.*; S. 2591.

372. Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017). The language of this bill was identical to the 2018 bill. *Id.*; S. 2591.

373. S. 2591.

The first amendment would address the Arbitrability of Arbitrability doctrine. It would add a provision to Title 9 U.S.C., specifying in express terms that a court rather than an arbitrator shall determine the existence, scope, and validity of an agreement to arbitrate, unless the party seeking arbitration presents an express provision or the most forceful evidence of the parties clearly and unmistakably agreeing to arbitrate these matters. The provision should add that broadly phrased arbitration clauses do not meet the required standard of proof.

The second amendment would target the Severability doctrine. It does so in two parts. One part would paraphrase the language in the Arbitration Fairness Act of 2018 for an added provision on the Severability doctrines.[374] It would provide that the court, not the arbitrator, would hear defenses to the breach of the arbitration agreement "irrespective of whether the party opposing arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement."[375] The second part would use the same language as arbitrability questions, permitting parties to contract around the severability by meeting the same high standard of proof in requiring more than a generic arbitration clause.[376]

The third amendment would attend to the Equal Treatment doctrine. It would add two provisions to the current § 2 of the FAA. One would state arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, even if these aim at attributes of arbitration that are fundamental to arbitration. The second part would permit courts to reject a defense if it interferes with attributes that are unique to arbitration, not including considerations of efficiency.

Given the political propensity of the sitting (and possibly future) Justices and thus the unlikelihood of the Court reversing course itself, a congressional override appears to be the most fertile approach. By redistributing the burden of proof in enforcement proceedings in the manner proposed by these amendments, courts would retain a meaningful exercise of their enforcive jurisdiction without restricting arbitration's broad adjudicative powers. The proposal honors the principle of liberal justice without sacrificing the principles of party autonomy and economic efficiency that support the freedom to arbitrate one's differences.

374. *See id.* § 402. The 2018 bill abolished the Court's severability rule for specific contracts. *Id.*

375. *Id.* § 402(b)(1).

376. *See supra* Part IV.A.