

# THE PARITY PRINCIPLE

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*The Supreme Court has interpreted the Federal Arbitration Act of 1925 (FAA) in a broad way that has allowed firms to widely privatize disputes with workers and consumers. The resulting expansive growth of American arbitration law has left commentators both concerned about the structural inequalities that permeate the regime and in search of an effective limiting principle. This Article develops such a limiting principle from the text and history of the FAA itself. The Article reinterprets the text and history of section 1 of the statute, which, correctly read, excludes individual employee-employer disputes from the statute's coverage. The Article argues that section 1, though targeted at employees, is based on a parity principle that holds that the state has reason to regulate and limit the enforcement of arbitration agreements where deep economic power imbalances exist between the parties—that is, where relative parity is lacking. The parity principle underlying section 1 can best be understood through the lens of Progressive-Era thought at the time of the FAA's enactment that focused on the regulatory responsibility of the state, through public adjudication and legislation subject to judicial interpretation, to publicly oversee the resolution of disputes and distribution of rights between parties of highly disparate economic power. This Article develops the logic and theory of the parity principle, and explores its implications for how courts should interpret the FAA and for legislative and administrative reforms targeted at workers and consumers.*

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\* Copyright © 2018 by Luke P. Norris, Visiting Assistant Professor, Benjamin N. Cardozo School of Law; Incoming Assistant Professor, University of Richmond School of Law. For incredibly helpful comments and suggestions, I thank Philip Bobbitt, Stephanie Bornstein, Christopher Buccafusco, Jud Campbell, David Carlson, Jessica Clarke, Erin Collins, Jim Gibson, Myriam Gilles, Betsy Ginsberg, Claudia Haupt, Michael Herz, Doug Kysar, Justin Lo, Anna Lvovsky, Jon Michaels, Christina Ponsa-Kraus, Michael Pollack, Dave Pozen, Alex Reinert, Judith Resnik, Jeanne Schroeder, Vicki Schultz, Stew Sterk, Matt Shapiro, Allison Tait, Stephen Ware, and Chuck Yalbon. I am also grateful for the excellent editorial work of Raj Mathur and the *N.Y.U. Law Review* editors.

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## INTRODUCTION

The Federal Arbitration Act of 1925 (FAA),<sup>1</sup> at its inception a modest statute intended to allow merchants to arbitrate disputes, has transformed American civil procedure. Building “an edifice of its own creation,”<sup>2</sup> the Supreme Court has interpreted the statute to apply to millions of contracts of adhesion between firms and consumers and workers across the economy.<sup>3</sup> Along the way, the Court has displaced much of state consumer and worker protection law under an expansive preemption doctrine and read atop the statute a “national policy favoring arbitration”<sup>4</sup> that has, among other things, resulted in contractual ambiguities being read in favor of arbitration and broadly permitted the waiver of class action rights.<sup>5</sup> Scholars have critiqued the Court’s FAA jurisprudence for producing a system that is not constitutionally adequate,<sup>6</sup> delegating the power to alter substantive rights to private parties,<sup>7</sup> and privatizing dispute resolution in ways

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<sup>1</sup> United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15 (2012)).

<sup>2</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

<sup>3</sup> See *infra* Section I.A.

<sup>4</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>5</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (holding that the FAA preempts a state law prohibiting contracts from banning class-wide arbitration); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (reading ambiguities in favor of arbitration).

<sup>6</sup> E.g., 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, 2809 (2015) (arguing that present systems of mandated arbitration, without sufficient safeguards or transparency, should be considered unconstitutional).

<sup>7</sup> E.g., David Horton, *Arbitration as Delegation*, 86 *N.Y.U. L. REV.* 437 (2011) (exploring mandated arbitration as an impermissible delegation of legislative power to the private sphere); 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, 1809–14 (2014) (critiquing the Court’s preference for arbitration over adjudication); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 *TUL. L. REV.* 1, 13 n.38 (1997) (surveying scholarship and case law on mandatory arbitration as improper delegation).

that undercut the development and vitality of law.<sup>8</sup> Indeed, some scholars predict that arbitration's effect on public adjudication, through shifting disputes into privatized processes, may spell the "end of law."<sup>9</sup>

Two basic problems permeate these critiques: what I call the *power differential problem* and the *regulatory enforcement problem*. The power differential problem is that, because firms mandate arbitration with parties who lack meaningful bargaining strength, they are able to erode the public protections and processes that benefit those parties in favor of privatized processes that are designed by firms. These processes redound to firms' benefit as repeat players, and unlike public processes, are not largely utilized by the parties subjected to the arbitration mandate.<sup>10</sup> The regulatory enforcement problem is that, in part because of the way those processes are structured and in part because they are often not utilized, parties such as

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<sup>8</sup> E.g., MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 33–51 (2013) (arguing that mass-market boilerplate forms that curtail rights of public redress ultimately undermine private ordering); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (investigating how mandated arbitration may stall doctrinal development in entire areas of law); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015) (stating that recent developments in arbitration jurisprudence threaten substantive law at large); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 806–07 (2009) (lamenting the "sphere of privacy surrounding arbitration"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 110–21 (examining mandatory arbitration as a prospective waiver of substantive rights); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 695–96 (1996) (framing the lack of publicity and inadequate compensation as two socially costly features of mandated arbitration).

<sup>9</sup> E.g., Gilles, *supra* note 8; Glover, *supra* note 8; see also Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11–17 (2003) (warning that arbitration poses a particular risk to the development of consumer protections); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002) (noting that decisions from arbitration do not follow or contribute to precedent); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 28–32 (2004) (addressing mandatory arbitration as one means by which the law has receded from public scrutiny); cf. David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017) (exploring how arbitration can subvert or undermine the enforcement of statutory regulation); Resnik, *supra* note 6, at 2817 (considering how arbitration law affects and interacts with "the contingency of courts as public institutions").

<sup>10</sup> See *infra* notes 97, 227–29 and accompanying text; see also Eric W. Macaux, *Limiting Representation in the Age of Private Law: Exploring the Ethics of Limited-Forum Retainer Agreements*, 19 GEO. J. LEGAL ETHICS 795, 806–07 (2006) ("[T]he plaintiffs most likely to be disadvantaged [by arbitration are] . . . low income individuals . . ."); Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103 (exploring how arbitration and class action bans remedy wage theft).

workers and consumers are not enforcing the statutes that establish their rights and regulate firms and the economy.<sup>11</sup>

Because so much of the law of arbitration and its ability to displace public adjudication hinges on how courts interpret the terse text of the FAA, scholars have developed two theoretical paradigms of the FAA to guide its interpretation and address these problems. These paradigms are built from the FAA's text, history, and purposes to justify or critique the Court's FAA jurisprudence. The first is the "contract" paradigm, which reads a focus on freedom of contract from the language in section 2 of the statute about enforcing arbitration contracts.<sup>12</sup> The second is a "procedural reform" paradigm, which reads from various parts of the statute a commitment to easily adjudicating disputes on the merits in arbitral fora.<sup>13</sup>

Each paradigm illuminates the meaning of the FAA, and each has its limitations. For example, the contract paradigm is used by scholars to query the extent to which contracts of adhesion binding millions of consumers and workers across the economy fit the FAA's model of arms-length bargaining among merchants.<sup>14</sup> Similarly, the procedural reform paradigm would give judges the ability to set aside agreements to arbitrate when they interfere with resolving disputes on the merits.<sup>15</sup> However, the paradigms may not be best suited to addressing the power differential and regulatory enforcement problems, and this Article therefore suggests another source for addressing them. The paradigms assume the permissibility of privatization as the default, and move away from that default when contractual deficiencies or procedural hurdles threaten the integrity of privatized process. But this is not always the approach of the FAA. Section 1 of the statute excludes individual workers, switching the default to federal courts not enforcing arbitration contracts. In this way, section 1 provides a puzzle for these paradigms: Its exception is not limited to circumstances where there are contract formation issues or where disputes cannot plausibly be adjudicated on the merits in arbitration. Section 1 offers a broader limit on arbitration and therefore suggests a different underlying principle.

I argue that section 1 is indeed undergirded by a different underlying principle, one that addresses the power differential and regulatory enforcement problems more directly. Section 1 can best be understood as being motivated by what I refer to as a parity principle.

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<sup>11</sup> See *infra* note 97; *supra* notes 8–10 and accompanying text.

<sup>12</sup> See *infra* Section I.A.

<sup>13</sup> See *infra* Section I.B.

<sup>14</sup> See *infra* Section I.C.

<sup>15</sup> See *infra* Section I.C.

It roughly holds that where *wide* economic power disparities exist between parties, the state has reason to insist on public adjudication rather than arbitration. The principle does not always hold wherever there is a power disparity. For example, it may not apply where a small business must arbitrate with a large business, as was the case in *American Express Co. v. Italian Colors Restaurant*.<sup>16</sup> It holds most strongly where unorganized, individual parties must resolve disputes with corporate parties. The principle, I will argue, is better suited to addressing the power differential and regulatory enforcement problems. By focusing on how the unbalanced nature of certain economic relationships provide the state with reason to be skeptical of privatized dispute resolution, the principle addresses head on the power differential problem. And, as I explore in greater detail below, section 1 also offers a regulatory theory of why the state should insist as the default on public adjudication and judicial interpretation of certain statutes when those parties are involved. In doing so, the theory responds to the regulatory enforcement problem.

The impulse driving this Article, then, is that section 1 has more to offer for arbitration theory than scholars have thought. Thus, while the contract paradigm, as the leading paradigm of the FAA, begins with section 2's text about enforcing contracts specifying arbitration, this Article begins with the text of section 1, where Congress circumscribes the universe of arbitration. As scholars have long recognized and argued, section 1's command that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"<sup>17</sup> was intended to exclude all workers within Congress's sphere of regulatory authority from the statute's coverage.<sup>18</sup> A narrow Supreme Court majority in *Circuit City Stores v. Adams* concluded otherwise, finding that the clause was limited to classes of workers like seamen and railroad employees,<sup>19</sup> and scholars and the dissenters have well mined the legislative history to show that this conclusion is incorrect.<sup>20</sup>

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<sup>16</sup> 133 S. Ct. 2304, 2309 (2013). It also may not extend to an individual consumer where that consumer is a well-resourced and financially sophisticated party.

<sup>17</sup> 9 U.S.C. § 1 (2012).

<sup>18</sup> See *infra* Section III.A; see also Matthew W. Finkin, "Workers' Contracts" Under the *United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 298 (1996); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106–08 (2006).

<sup>19</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

<sup>20</sup> See *id.* at 124–33 (Stevens, J., dissenting); *id.* at 133–40 (Souter, J., dissenting); Moses, *supra* note 18, at 106–08; see also Finkin, *supra* note 18; *infra* Section III.A.

This Article adds to these critiques of the *Circuit City* decision but also endeavors to build upon these arguments to show that, properly understood, section 1 offers more than a definitional exclusion of employees that aids in judicial interpretation. Studying its legislative history, one can glean a limiting principle from within the FAA that reveals the logic of *why* and *where* the framers of the statute intended to limit arbitration's reach.

I develop this argument about the parity principle in two ways. First, I reconstruct the history of section 1. I consider together the legislative history around excluding employees from the Act's coverage with other statements in the legislative history that flesh out section 1's meaning.<sup>21</sup> These sources demonstrate how economic power differentials motivated the inclusion of section 1 in the statute. Brought into legislative discussions by labor leaders, section 1 was fueled by a concern that if Congress did not act to exclude workers from the FAA, workers would sign contracts specifying arbitration out of necessity and be subjected to private processes that lacked the protections of the judicial system. Leading reformers and congressmen expressed concern that enforcing arbitration clauses in this context would lead weaker parties to be taken advantage of in privatized processes. This concern, for them, triggered the need for Congress to protect workers through insisting on public adjudication.

Conceptualized at a time when the federal government's ability to protect workers was in dispute, section 1 stands out as both worker-protectionist and litigation-promoting. Thus, rather than only treating section 1 as a worker exclusion in the service of critiquing the Court's decision in *Circuit City*, I ask what the fact that the framers of the FAA took this ambitious step says about their views of the federal government's role in policing the line between privatized process and public adjudication. I argue that the history of section 1 both defines and in historical light reflects the beginnings of the federal government's commitment to publicly overseeing disputes between individual workers and firms and thereby, through public process, protecting workers.

Second, I argue that this history can best be interpreted as offering a deeper principle that comes into shape through the lens of

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<sup>21</sup> Scholars have placed this history under the frame of the contract paradigm to clarify the kinds of mutual assent that informed section 2 and to critique contracts of adhesion. See, e.g., Moses, *supra* note 18, at 106–08 (exploring legislators' and drafters' statements about economic power disparities to argue that section 2 extended only to merchant-to-merchant contracts and was not intended to apply to contracts of adhesion).

Progressive-Era thought.<sup>22</sup> As a descriptive matter, the framers of the FAA embraced Progressive-Era thinking by viewing the relationship between workers and employers through the lens of power differentials, seeing how power disparities made the notion of freedom of contract inapt in the employer-employee context in light of the weaker bargaining power of workers, who would sign contracts specifying arbitration out of necessity rather than choice. This view differs substantially from the freedom of contract view that characterized much of constitutional jurisprudence at the time,<sup>23</sup> as well as from the view that animates the Supreme Court's current interpretation of the FAA.<sup>24</sup>

As a normative matter and a statement of regulatory theory, the framers of the FAA believed that in light of these significant power imbalances and their social welfare effects for workers, the state should intervene to rebalance the scales, protecting workers not only from privatized processes of dispute resolution by insisting that federal courts not enforce arbitration agreements between them and their employers, but also by passing regulatory legislation that would be subjected to judicial interpretation. Thus, precisely because with the rise of industrialism firms had accrued great power, the framers' concern was that allowing the parties whom our legal system had already benefitted to force weaker parties to "contract out" of public process would remove the state from its role in policing economic arrangements and making them compatible with public or constitutional values.

The framers of the FAA thus envisioned a shared role for Congress, through legislating, and for courts in providing economically less powerful parties with procedural rights, in regulating the power disparities that industrialism had created. Section 1, then, is rooted in both American law's reckoning with the rise of industrial capitalism and a vision of the role of law and public adjudication in

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<sup>22</sup> While I outline this progressive view in Part II, the progressive tradition with regard to arbitration is not monolithic and indeed is complicated. For example, the views that I develop here about workers and economic power can be distinguished from more paternalistic progressive impulses behind local forms of arbitration and conciliation used in the early twentieth century to "promote the Americanization of the urban immigrant poor." Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 *YALE L.J.* 2940, 2955 (2015). Similarly, after the enactment of the FAA, Frances Kellor, a progressive reformer committed to Americanization who was also a leader of the American Arbitration Association, became an arbitration evangelist in ways that conflict with the economic views described here. See *id.* at 2989–90 (describing how Kellor adopted a free market view of arbitration that found unproblematic arbitration between firms and mass consumers).

<sup>23</sup> See *infra* notes 154–59 and accompanying text.

<sup>24</sup> See *infra* Section I.C.

regulating it—a vision prefiguring the one that came to characterize the New Deal legal order a decade later. In this way, the logic underlying section 1 is embedded in a theory of public regulation that demonstrates why today's regulatory enforcement gaps are concerning.

Several implications flow from recognizing the parity principle. At the most general level, it conflicts with the Court's current understanding of the economic commitments of the FAA and its reformers. The Court views the enforcement of contracts as the FAA's central goal and, in what I refer to as a neo-contractarian approach, upholds arbitration agreements even in relationships that lack the indicia of consent and mutual bargaining that characterize contract law traditionally, viewing the statute as being largely indifferent to economic power disparities.<sup>25</sup> The parity principle instead shows how the judicial enforcement of arbitration contracts that section 2 envisions is subject to a limiting principle that is both internal to the FAA and premised on relative parity. It is a limiting principle that is attuned to how disparities in economic power can infect privatized process and that articulates the baseline reasons for the legal system both to protect less advantaged parties through regulation and to use public process to enforce that regulation. The parity principle is thus responsive to the power differential and regulatory enforcement problems.

Furthermore, the principle both aids in judicial interpretation of the FAA and provides a better theoretical framework from which to argue for legislative amendments and administrative actions limiting worker and consumer arbitration. With regard to judicial interpretation, as I argue in Part III, the parity principle demonstrates the incorrectness of the Supreme Court's extension of the statute to individual workers and calls into question its decisions broadly allowing the arbitration of statutory rights designed to protect less powerful parties. Workers, of course, are the subjects of section 1's text, reflecting the fact that worker issues dominated early twentieth century political, legal, and constitutional debates. Section 1 therefore cannot be applied to consumers as a matter of judicial interpretation. But the theory of section 1 can inform legislative and administrative reforms today. I thus explore how the logic of the parity principle extends from workers to consumers and provides the most coherent and tailored justifications for reform efforts to limit or ban worker and consumer arbitration.

This Article proceeds in three Parts. In Part I, I outline the contract and procedural reform paradigms and explore their implications and limitations. In Part II, I develop the parity principle first by

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<sup>25</sup> See *infra* Section I.C.



presenting the text and history of section 1 of the FAA. I then draw out the principle's logic, consider its advantages, and respond to potential objections to it: namely, that it relies too much on legislative purpose, that changed circumstances undermine its usefulness, and that it is in tension with the rise of labor union arbitration. In Part III, I turn to implications, demonstrating how the principle can be used by both purposivists and textualists to critique the Supreme Court's interpretation of the scope of section 1 of the FAA,<sup>26</sup> and to the Court's application of the FAA to statutory rights. I also argue that the principle can better justify legislative and administrative reforms limiting worker and consumer arbitration. This Article thus adds to the critiques of how courts have interpreted the FAA, while laying out the progressive foundations of the FAA that can guide reform efforts beyond courts.

Before proceeding, a caveat is necessary. In developing the parity principle, I recognize that there is no "founding moment of consensus" in arbitration law and do not argue that the parity principle reflects the only impulse guiding the FAA or American arbitration law.<sup>27</sup> I think that the contract and procedural reform paradigms are legitimate and useful frameworks for interpreting the FAA. However, I also think that the limiting impulses and logic underlying section 1 have been underexplored. Ultimately, then, my aim is to develop a theory of section 1 much in the way that scholars have developed these theories of other parts of the statute in order to provide a richer account of the meaning, limitations, and significance of the FAA.

## I

### EXISTING PARADIGMS OF THE FAA

In this Part, I explore and critique the two leading paradigms through which the FAA is understood. The first is the contract paradigm, which is pervasive within FAA cases and scholarship, and the second is the procedural reform paradigm, which scholars have more recently introduced into the literature. While each paradigm has much to admire, each is also limited. I thus explore the implications and limitations of the paradigms—limitations that suggest the need for a

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<sup>26</sup> I argue that this Article's account of the legislative history is methodologically useful both to textualists and purposivists, since interpreters have found the text of section 1 to be unclear—querying whether it is a broad employee exclusion or one limited to a small class of workers. See *infra* Sections II.C.1, III.A. And generally, as I also explore below, the Supreme Court has opened the door to purposive interpretation of the FAA, making this Article's contributions timely. See *infra* Section II.C.1.

<sup>27</sup> See Kessler, *supra* note 22, at 2991 (concluding that lawyers have disagreed with one another on the efficacy of arbitration since the Progressive Era).

stronger limiting principle for American arbitration law that the parity principle ultimately provides.

### A. *Contract*

The contract paradigm of the FAA is the most pervasive in the cases and scholarship interpreting the statute.<sup>28</sup> Under this model, the FAA is principally about freedom of contract—namely, the freedom to contract to arbitrate disputes. The model stems from section 2’s command that a “written provision in any . . . contract” mandating arbitration “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>29</sup> Courts have interpreted section 2 as being the central pillar of the FAA.<sup>30</sup> As one scholar describes this view, it holds that “the overarching purpose of the FAA was to promote private ordering in dispute resolution as free as possible from state interference.”<sup>31</sup> Or, as the Supreme Court put it, “the central or ‘primary’ purpose of the FAA is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’”<sup>32</sup>

The contract paradigm evolved out of historical circumstances surrounding the ability of merchants to arbitrate with one another in the United States. At the center of this history is the judicially created revocability doctrine which, prior to the FAA’s enactment, allowed “revocation [of the arbitration provision] by either of the parties at any time before the [arbitral] award.”<sup>33</sup> When parties revoked, courts could not compel arbitration. As the Senate Report of the FAA asserted, this made arbitration agreements “ineffectual” because the aggrieved party lacked an adequate remedy to enforce the agreement.<sup>34</sup> Scholars have tied the revocability doctrine to a then-existing judicial hostility to arbitration in the United States, growing out of

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<sup>28</sup> See, e.g., Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1941 (2014) (noting that the contract paradigm is “[f]ar and away the dominant paradigm”).

<sup>29</sup> United States Arbitration Act, ch. 213, Sec. 2, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 2 (2012)).

<sup>30</sup> See Stephen J. Ware, *Punitive Damages in Arbitration: Contracting out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 547 (1994); see also *infra* note 42 (collecting cases).

<sup>31</sup> Aragaki, *supra* note 28, at 1941.

<sup>32</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Lehigh Univ.*, 489 U.S. 468, 479 (1989)).

<sup>33</sup> S. REP. NO. 68-536, at 2 (1924); see also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 20 (1992) (overviewing the history of the revocability doctrine).

<sup>34</sup> S. REP. NO. 68-536, at 2 (1924).

courts' fear that arbitration might "oust" them of their jurisdiction.<sup>35</sup> Proponents of the FAA came to believe that the revocability doctrine was thus "rooted . . . in the jealousy of courts for their jurisdiction."<sup>36</sup> The FAA's solution, the FAA's architect argued in advocating for the bill, was to no longer allow "the dishonest party [to] escape from his obligations" and instead to treat arbitration agreements the same as other enforceable contracts between merchants.<sup>37</sup>

The normative values of the FAA under the contract paradigm therefore include "party autonomy, freedom of choice, and self-governance free of interference by the state."<sup>38</sup> Scholars disagree, however, about whether these commitments are premised on arbitration between *commercial* parties. On one side, scholars such as Margaret Moses assert that "the central concept behind the Act [was] to provide for enforceability of arbitration agreements between merchants—parties presumed to be of approximately equal bargaining strength."<sup>39</sup> These scholars not only limit the reach of the FAA but also tend to fold questions about parity into the contract model, arguing that a lack of parity can indicate a lack of the kind of consent that contract law typically requires.<sup>40</sup> On the other side, scholars such as Stephen Ware contend that the FAA "explicitly enacted [a] contractual approach to arbitration law"<sup>41</sup> that sweeps

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<sup>35</sup> See Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926) (discussing the common law origins of judicial hostility to arbitration).

<sup>36</sup> *Id.*

<sup>37</sup> *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16, 38–39 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen).

<sup>38</sup> Aragaki, *supra* note 28, at 1946.

<sup>39</sup> Moses, *supra* note 18, at 106 ("The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations."); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409 (1967) (Black, J., dissenting) (noting that the FAA's "legislative history . . . indicates that the Act was to have a limited application to contracts between merchants for the interstate shipment of goods").

<sup>40</sup> See, e.g., Sternlight, *supra* note 8, at 676–77 (arguing that there is a lack of consent in employment and consumer contracts due to unequal bargaining power).

<sup>41</sup> Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 McGEORGE L. REV. 195, 197 (1998).

broadly across contracting parties in interstate commerce,<sup>42</sup> save a few parties explicitly excluded in section 1.<sup>43</sup>

A divided Supreme Court has embraced the latter approach,<sup>44</sup> and endorsed a thinner conception of contractual consent.<sup>45</sup> Indeed, the contract paradigm has had a strong pull on the law of arbitration, and the Court has interpreted the FAA's commitment to contract as its central pillar. Reasoning from the supposed "national policy favoring arbitration" embodied by the FAA,<sup>46</sup> courts have: found that the FAA preempts state laws that impede its contract-enforcement purposes,<sup>47</sup> enforced arbitration agreements found on shrink-wrap accompanying shipped products,<sup>48</sup> resolved contractual ambiguities about whether arbitration was intended in favor of arbitration,<sup>49</sup> and allowed arbitrators to adjudicate disputes about whether the parties agreed to arbitrate.<sup>50</sup> Indeed, the Supreme Court recently upheld an arbitration clause that appeared to make arbitration itself impracticable by employing contract-enforcement reasoning. In *American Express Co. v. Italian Colors Restaurant*, in which a contract-

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<sup>42</sup> See, e.g., Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 738 (2001) ("The FAA's contractual approach applies to employees' agreements to arbitrate, just as it applies to any other party's agreement to arbitrate.").

<sup>43</sup> United States Arbitration Act, ch. 213, § 1, 43 Stat. 883, 883 (1925) (stating that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce").

<sup>44</sup> See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate . . ."); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (concluding that section 2 generally "mandate[s] the enforcement of arbitration agreements").

<sup>45</sup> See, e.g., Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 962 & n.171 (1999) (gathering Supreme Court and federal court cases "compelling arbitration when consent is thin, if not outright fictitious," including cases involving "arbitration agreements that appear in a document incorporated into a contract by reference, even when one party had no opportunity to see or no reason to anticipate the incorporated term").

<sup>46</sup> *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008); see also *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.").

<sup>47</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding that the FAA preempted a California rule that found contracts unconscionable because they disallow class-wide claims); *Southland*, 465 U.S. at 16 (holding that the FAA required franchisees suing under California state law to arbitrate their claims against a franchisor as required by their contracts).

<sup>48</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150-51 (7th Cir. 1997) (enforcing an arbitration agreement found inside a box containing computer software).

<sup>49</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

<sup>50</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

mandated ban on class arbitration likely meant that plaintiffs would not bring an antitrust claim because the cost of individual arbitration would exceed the potential award, the Court still upheld the mandatory arbitration clause because “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”<sup>51</sup>

Over the past several decades, the contract paradigm has seemingly swallowed other considerations in the FAA context. Historically, the Supreme Court exhibited skepticism toward allowing arbitration of statutory rights, finding that statutory claims under the Securities Act of 1933 and Title VII of the Civil Rights Act could not be arbitrated because adjudication better protected the statutory rights in question.<sup>52</sup> However, the Court began to move away from this position in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, where the Court found that “[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered.”<sup>53</sup> Since then, the Court has expanded the scope of statutory claims that can be resolved in arbitration, allowing arbitration “so long as the prospective litigant may effectively vindicate [his or her] statutory cause of action in the arbitral forum.”<sup>54</sup>

### B. Procedural Reform

More recently, principally due to contributions by Hiro Aragaki and Imre Szalai, scholars have viewed the FAA through a procedural reform paradigm. Under this model, the FAA was part of the process by which reformers sought to simplify procedure in order to let parties

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<sup>51</sup> 133 S. Ct. 2304, 2312 n.5 (2013).

<sup>52</sup> See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435–36 (1953) (declining to enforce an arbitration provision for a Securities Act claim because the statute “was drafted with an eye to the disadvantages under which buyers [of securities] labor” and awards could be issued without explanation or the right to appeal the arbitrator’s “conception of the legal meaning of . . . statutory requirements.”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (declining to enforce an arbitration provision with regard to a Title VII claim because arbitration was a “comparatively inappropriate forum for the final resolution of rights created by Title VII”).

<sup>53</sup> 473 U.S. 614, 625 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (alteration in original)).

<sup>54</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (alteration in original)). More recently, the Court has suggested an even stricter approach. Thus, where in *Green Tree*, 531 U.S. at 90, the Court concluded that high costs might preclude a party from effectively vindicating rights, in *American Express*, 133 S. Ct. at 2310–12 (2013), the Court concluded that an arbitration clause only is suspect when it forces a party to waive its “right” to vindicate a statutory claim. See also Aragaki, *supra* note 28, at 2018–21 (examining shifts in the Court’s reasoning with respect to arbitration of statutory claims).

more swiftly and effectively adjudicate disputes on the merits.<sup>55</sup> This perspective links the passage of the FAA in 1925 and the rise of the Federal Rules of Civil Procedure in 1938<sup>56</sup> as alternative mechanisms responding to the same problem: procedure had become too complicated and adjudication on the merits was too often thwarted by it.<sup>57</sup>

The FAA thus “originally arose out of debates about the need for reform in judicial procedure that captivated the nation in the early twentieth century.”<sup>58</sup> At the time, there were no federal rules of civil procedure in actions at law and federal district courts generally followed state civil procedure.<sup>59</sup> Reformers complained of increasingly complex systems of state procedure, focusing on voluminous codes that had turned procedure into a “sport”<sup>60</sup> allowing crafty lawyers to

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<sup>55</sup> Aragaki thus links the FAA to the procedural simplification and reform efforts of leading lawyers such as Charles Clark and Roscoe Pound. Aragaki, *supra* note 28, at 1978–80.

<sup>56</sup> FED. R. CIV. P. (1938). The Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended 28 U.S.C. § 2072) delegated authority to the Supreme Court to implement uniform rules for the federal courts, which led to the promulgation of the Federal Rules of Civil Procedure in 1938.

<sup>57</sup> See Aragaki, *supra* note 28, at 1973–88 (describing the historical relationship between procedural reform and the FAA).

<sup>58</sup> *Id.* at 1942; see also IMRE S. SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 166–73 (2013) (describing the push for modern arbitration laws as a conscious element of a broader movement for procedural reform); Imre S. Szalai, *Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 411–19 (arguing that arbitration reform was an “outgrowth” of procedural reform responding to “dissatisfaction with the confusing, technical procedural landscape during the early 1900s”).

<sup>59</sup> Since the beginning of the republic, federal courts lacked the authority to draft rules of procedure for actions at law. Instead, in actions at law, federal courts employed state law procedure as mandated by the Process Act of 1789. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94; see also 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1002 (3rd ed. 2002) (discussing the development of procedural rules in federal courts up to the enactment of the Federal Rules of Civil Procedure). For about the first century of the country’s existence, federal courts applied the state law procedures that were in effect at the time that the state had joined the union, even if the procedural practices within the state had evolved through common law or the adoption of codes of procedure. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825) (upholding the constitutionality of the Process Act of 1789 and establishing the right of federal courts to set their own procedures); P. BATOR ET AL., *HART AND WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 668–70 (2d ed. 1973) (discussing the implementation of state procedural rules in federal courts under the Process Act of 1789). The Conformity Act of 1872 ended this regime, mandating that federal courts follow the procedures currently used in the states where they sat. Conformity Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197; see also JULIUS GOEBEL, JR., 1 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 512–14, 574–75 (1971) (describing the passage of the Process Act of 1789 and its impact on federal procedure).

<sup>60</sup> Roscoe Pound, *Some Principles of Procedural Reform*, 4 U. ILL. L. REV. 388, 391 (1910) (stating that under the “sporting theory of justice . . . judicial administration of justice is a game, to be played to the bitter end as a game of football might be . . .”); see

confuse, delay, and otherwise complicate the process of achieving adjudication on the merits.<sup>61</sup> Frustrated by the way that procedure had interfered with adjudicating disputes on the merits, reformers sought to simplify procedure and saw arbitration as one solution.<sup>62</sup>

Thus, while one route to procedural reform was to merge law and equity under flexible rules of federal civil procedure, as the Rules Enabling Act of 1934 and Federal Rules in 1938<sup>63</sup> eventually did, another way for reformers to address the problem was to “promot[e] access to an *alternative forum* whose simplicity, flexibility, and intolerance of technicalities embodied the basic procedural reform values.”<sup>64</sup> The enactment of the FAA was therefore an early procedural reform intended to make it easier for parties to litigate disputes effectively. The driving force behind the FAA was “that procedure was not an end in itself but rather a means to the more important objective of securing substantial justice.”<sup>65</sup> Section 2’s command that contracts mandating arbitration be enforced was intended “to simplify business disputing procedure and to improve the administration of justice.”<sup>66</sup>

The FAA on this understanding was not designed to allow parties to evade the dictates of law or regulation, but as a simplifying reform intended to make procedure a “handmaid” of justice.<sup>67</sup> As Hiro Aragaki puts it, “[p]rocedural and arbitration law reform can thereby

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also Aragaki, *supra* note 28, at 1966 n.132 (collecting references to procedural reformers that compare complex procedure to games or sport).

<sup>61</sup> New York’s Field Code, adopted in 1848 and followed by similar codes in other states, is a leading example of a long and complicated code. See An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, Act of Apr. 12, 1848, ch. 379, 1848 N.Y. Laws 497. It was criticized by law reformers as being “unnecessarily rigid and elaborate.” EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 28 (2000).

<sup>62</sup> See, e.g., MACNEIL, *supra* note 33, at 29 (arguing that reformers “saw the reform of arbitration as part of a broader package of legal simplification”).

<sup>63</sup> FED. R. CIV. P. (1938).

<sup>64</sup> See Aragaki, *supra* note 28, at 1943.

<sup>65</sup> *Id.* at 1973.

<sup>66</sup> *Id.* at 1976–77 (internal quotations and alterations omitted).

<sup>67</sup> Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938); see also *id.*, at 303 (stating that the American Arbitration Association was exercising “[v]igilant care that [arbitration] procedure remain simple and effective”). Aragaki notes that although procedural reformers like Clark had “other reservations about informal tribunals,” they “sometimes pointed to arbitration as an example of how a forum that had fewer technical rules and that vested greater discretion in the decisionmaker to disregard them could nonetheless administer justice effectively.” Aragaki, *supra* note 28, at 1979 n.193; see also Charles E. Clark, *Procedural Fundamentals*, 1 CONN. B.J. 67, 71 (1927) (noting that arbitration successfully administers justice without strict pleading rules).

be understood as alternative responses, inspired by similar values, to the same basic problem.”<sup>68</sup>

### C. *Implications and Limitations*

Both the contract and procedural reform paradigms illuminate the meaning and purposes of the FAA. But neither provides a comprehensive theory of the statute. As a baseline matter, each paradigm’s internal logic for limiting arbitration cannot fully explain the presence of section 1 in the statute and its wholesale exception for individual workers. Put another way, the paradigms cannot explain why, even if arbitration process can produce a merits decision and there are no contract formation issues, the state would limit federal courts in enforcing some arbitration agreements, as Congress did with those involving workers and employers in section 1. At a deeper level, this fact relates to why section 1 supplies a logic that more fully addresses the power differential and regulatory enforcement problems.

Section 1 excludes an entire class of contracting persons—individual workers in interstate commerce contracting with employers—from the statute’s coverage.<sup>69</sup> Under the logic of the contract paradigm, this exception is a puzzle. The contract paradigm would only exclude contracting people from the statute’s coverage where contractual deficiencies such as unconscionability, fraud, or duress undermined contractual consent.<sup>70</sup> Clearly, not every employment contract between an individual worker and an employer would qualify as one involving such a deficiency. Therefore, section 1 seems to suggest a different limiting principle, one that the paradigm does not capture.

The contract paradigm does have tools for allowing courts to refuse to enforce arbitration agreements, and those tools focus in part on power differentials between the parties. The contract paradigm therefore might be thought to be getting at the power differential problem. However, the contract paradigm’s chief tool for addressing this problem, unconscionability, has been largely unsuccessful as applied by courts. Under the doctrine, courts can generally refuse to enforce contracts specifying arbitration that are so one-sided, unfair, oppressive, or abusive that enforcing them would be unconscionable. Courts, however, have made the hill to climb to prove unconscionability in arbitration incredibly high because, as I suggested above, their baseline conception of contractual consent is so thin in the first

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<sup>68</sup> Aragaki, *supra* note 28, at 1986.

<sup>69</sup> 9 U.S.C. § 1 (2012).

<sup>70</sup> Aragaki, *supra* note 28, at 2019.



place. In many instances, courts have held that providing parties with a short period to reject an arbitration agreement precludes a finding of unconscionability<sup>71</sup> (even though “[t]he opt-out period is part of the boilerplate [and] is no more likely to be read, understood, or acted upon than any other fine print term”);<sup>72</sup> construed narrowly the unconscionability defense (as well as fraud and duress defenses) in light of the supposed national policy favoring arbitration;<sup>73</sup> and, as I mentioned above, have found state unconscionability laws to be preempted because they conflict with the FAA’s commitment to enforcing agreements specifying arbitration.<sup>74</sup> Thus, as courts have increasingly employed a thin view of the kind of consent that must inhere in contract and of the kinds of defects that might trigger the applicability of the defense, unconscionability has withered as a limiting tool.<sup>75</sup>

However, even in its heyday, unconscionability was employed conservatively in the arbitration context. Indeed, many courts employed a more rigorous unconscionability standard in the arbitration context than in others.<sup>76</sup> And other courts made an underlying

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<sup>71</sup> *E.g.*, *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1073 (9th Cir. 2007) (stating that “if an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then [the agreement] is not procedurally unconscionable” and collecting cases); *Guadagno v. E\*Trade Bank*, 592 F. Supp. 2d 1263, 1270 (C.D. Cal. 2008) (precluding a finding of unconscionability when the plaintiff had 60 days to opt-out in writing); *Sanders v. Comcast Cable Holdings, LLC*, No. 3:07-cv-918-J-33HTS, 2008 WL 150479, at \*7 (M.D. Fla. Jan. 14, 2008) (stating plaintiff could have opted out); *see also* *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1289 (N.D. Ga. 2008) (“[Plaintiff’s] ability to opt out of the arbitration provision dilutes her unconscionability argument because the provision was not offered on a take-it-or-leave-it basis.”). *But see* *Clerk v. First Bank of Del.*, 735 F. Supp. 2d 170, 183 (E.D. Pa. 2010) (noting that “the presence of an opt out clause does not automatically spare the arbitration provision from a finding of procedural unconscionability” and collecting cases).

<sup>72</sup> David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 483 (2014).

<sup>73</sup> *E.g.*, *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248–49 (2d Cir. 1991) (holding that, as an experienced member of his field, plaintiff had notice of the use of arbitration clauses).

<sup>74</sup> *See supra* note 48 and accompanying text.

<sup>75</sup> *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Scholars dispute whether, after *Concepcion*, categorical unconscionability rules applying equally in arbitration and litigation survive preemption analysis. Compare Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 651 (2012) (arguing that such rules could survive preemption analysis), with Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 PENN ST. Y.B. ON ARB. & MEDIATION 39, 67, 79–80 (2012) (arguing that they could not).

<sup>76</sup> *See, e.g.*, Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 803–07, 842 (2004) (exploring how the courts have employed unconscionability cautiously and listing “specific traits” courts looked for in

problem with the arbitration clause itself a prerequisite for finding the contract to be unconscionable.<sup>77</sup> Overall, the unconscionability doctrine's weakness as a tool for regulating arbitration agreements stems from various causes, including its dependence on how contractual consent is construed, the willingness of courts to use the doctrine—which is not without its critics<sup>78</sup>—to interfere with contracts, and the ease with which courts have found state unconscionability laws to be preempted by the FAA.<sup>79</sup> Thus, as contract has become the principal vehicle for interpreting the FAA, unconscionability has failed to effectively limit arbitration where power is disparate.

Failing to rein in arbitration through contractual defenses like unconscionability, scholars have attempted to do so through the prism of the concept of contract itself, taking aim at how underlying power disparities between the parties make the model of contract inapt in the context of arbitration. Though a rich debate has taken off about how power dynamics between parties with deeply unequal power and ability to bargain should affect the extension of the concept of contract to arbitration law, these efforts have largely failed to limit the rise of arbitration or address the power differential problem.

On the one side, scholars argue that it is either not unreasonable or is objectively reasonable for consumers and employees to be bound by arbitration agreements, even if they have no bargaining power and have not read the arbitration clause. They rationalize this position either because arbitration provides efficiency benefits as compared to more expensive and time-consuming litigation,<sup>80</sup> or because it lowers prices for companies and the savings may be passed back to consumers in the form of lower prices and workers in the form of higher

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arbitration clauses before finding them unconscionable); cf. Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 85–90 (2005) (noting how California departs from this dominant approach and applies heightened unconscionability standards in arbitration cases).

<sup>77</sup> See Stempel, *supra* note 76, at 842 (noting that courts “have looked for a particular type of problem in the arbitration arrangement as a prerequisite for refusing to enforce the text of the written clause”).

<sup>78</sup> See *id.* at 813–29 (overviewing various critiques of the unconscionability doctrine).

<sup>79</sup> See, e.g., Aragaki, *supra* note 28, at 1956–58.

<sup>80</sup> See, e.g., Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 158 (2001) (“Fair arbitral procedures can provide a more expeditious and less expensive alternative that may benefit workers more than judicial proceedings.”); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (“In a world without employment arbitration as an available option, we would essentially have a ‘cadillac’ system for the few and a ‘rickshaw’ system for the many.”).

wages.<sup>81</sup> Furthermore, scholars argue that the lack of mutual bargaining is not fatal in adhesion contracts containing arbitration clauses, since they are common in the modern economy and are entered into voluntarily and should be no less enforceable in arbitration than they are elsewhere.<sup>82</sup> In recent years, this position has been embraced broadly by the Court, which has enforced arbitration clauses in contracts of adhesion and contracts where one party is unaware of the arbitration clause.<sup>83</sup>

On the other side, commentators assert that courts—ignoring the norms of shared power that undergird contract—have stretched contractual consent beyond its limits in arbitration law. Under this understanding, arbitration law has diverged from the classically liberal notion of freedom of contract based on mutual assent and bargaining. Instead, these scholars argue that the Court’s FAA jurisprudence has attributed contractual consent broadly across contracts of adhesion and in other circumstances that deviate from widely understood notions of contracting.<sup>84</sup> As Judith Resnik has explained, the Court enforces agreements to arbitrate that diverge from “fundamental principles of contract law.”<sup>85</sup> For example, it widely honors contracts of adhesion that are “products of non-bargaining.” In a seminal article, Arthur Leff called such agreements “thing[s],” or “unilaterally manufactured commodities,” rather than contracts.<sup>86</sup> This is why I refer to

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<sup>81</sup> *E.g.*, Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 741 (noting that even “one-sided arbitration clauses” may be beneficial to individuals “if the resulting cost savings are passed on to consumers through reductions in the price of goods and services, to employees through higher wages”); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (exploring the “pro-consumer” aspect of arbitration agreements, and asking when, if ever, the costs of judicial intervention may outweigh the benefits).

<sup>82</sup> Ware, *supra* note 41, at 201 (“There is no duress in the typical ‘adhesion’ contract. A consumer who contracts in such circumstances does so voluntarily.”); *id.* at 210 (“The great virtue of the contractual approach to contract law is the great virtue of contract generally.”).

<sup>83</sup> *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346–47 (2011) (enforcing an arbitration clause in a consumer contract with AT&T and noting that “the times in which consumer contracts were anything other than adhesive are long past”); Horton, *supra* note 72, at 463 (“More than ever, the Court seems steered against the argument that form contracts are non-consensual.”).

<sup>84</sup> *See, e.g.*, Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 L. & CONTEMP. PROBS. 129, 131 (2012) (arguing that the Court’s “jurisprudence imposes on private parties, impinges on freedom both of contract and from contract, intrudes upon state contract law, and changes and distorts actual contract-law doctrine”); Resnik, *supra* note 6, at 2870–71 (exploring how the Court has stretched the notion of contract applicable to arbitration clauses); *cf.* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 138 (1970) (arguing, among other things, that contracts require “not only a deal, but dealing”).

<sup>85</sup> Resnik, *supra* note 6, at 2869–70.

<sup>86</sup> *Id.* at 147.

the Court's jurisprudence in this arena as neo-contractarian: it differs even from traditional freedom of contract analyses in that the Court does not presume bargaining or consideration between the parties. Thus, scholars argue that while the contract paradigm "has some appeal as applied to two entities engaging in an arm's length transaction, it cannot realistically be used to justify imposing binding arbitration through contracts of adhesion on unwitting consumers."<sup>87</sup> Unlike the merchants that the contract paradigm of the FAA is intended to reach, consumers do not read, understand, or have any meaningful ability to negotiate most of the contracts that commit them to binding arbitration.<sup>88</sup>

Scholars also counter that contracts of adhesion in arbitration law differ from contracts of adhesion across the economy. This is in part because while contracts of adhesion can be theoretically "anchored in voluntary, knowing agreement . . . [to] the contractual husk,"<sup>89</sup> arbitration law treats them differently. With a blanket assent to the husk, a party gives specific consent to the transaction and blanket consent to "any not unreasonable" term<sup>90</sup> and is thus aware that boilerplate exists.<sup>91</sup> This scenario cannot be extended to much of modern arbitration law. For example, many judges have embraced the concept of a "rolling contract" and enforce arbitration clauses that come in later mailings, emails, or even on shipping packages.<sup>92</sup> In these circumstances, it makes no sense to assume that a party is giving blanket consent to the fine print, as the arbitration provision often comes after the deal is made or is packaged in a clandestine manner.<sup>93</sup>

Finally, scholars take aim at the notion that less economically powerful parties benefit from arbitration. Scholars argue, among other things, that arbitration processes are structured to "slant the odds in companies' favor" against workers and consumers;<sup>94</sup> that repeat-player bias slants the system in favor of corporate actors;<sup>95</sup> and that harmed parties pursue fewer claims in arbitral fora than in public

<sup>87</sup> Sternlight, *supra* note 8, at 676.

<sup>88</sup> *Id.* at 676–77.

<sup>89</sup> Horton, *supra* note 72, at 480–81.

<sup>90</sup> KARL L. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

<sup>91</sup> Horton, *supra* note 72, at 482.

<sup>92</sup> *Id.*; see also *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1259 (10th Cir. 2012) (email); *Bank One v. Coates*, 125 F. Supp. 2d 819, 826 (S.D. Miss. 2001) (bill stuffer); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997) (shipping box).

<sup>93</sup> Horton, *supra* note 72, at 482–83 (arguing that contract law must include a concept of "nonconsent" in such scenarios).

<sup>94</sup> Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *STAN. L. REV.* 1631, 1649 & n.97 (2005) (collecting sources).

<sup>95</sup> *Id.* at 1650–51.

adjudicatory fora.<sup>96</sup> Scholars also query the “oversimplified” assumption that firms will pass on litigation cost-savings back to consumers and workers.<sup>97</sup>

To my mind, these critics of expanded arbitration have the better argument than the proponents, but it is one that has had little effect on the law. Using the concept of contractual consent to get at underlying power disparities has proven so difficult in part because the concept of consent is contested.<sup>98</sup> Despite the burgeoning academic literature about how the contract paradigm should require stronger notions of consent to fit the inter-merchant model of the FAA or the legal concept of contract, courts have broadly adopted attenuated notions of consent under the banner of the contract paradigm and used it to expand the law of arbitration dramatically.<sup>99</sup> In a world where firms offer take-it-or-leave-it adhesion forms to mass consumers and employment agreements to workers mandating arbitration, the model of contract may be ill-suited to addressing the underlying social welfare issues at stake. What may be needed is a model that begins not with private ordering as the default, as contract does, but instead with a positive theory of why the nature of certain relationships makes stronger forms of public oversight necessary for dispute resolution and the fulfillment of regulatory goals. As I argue below, this is what the parity principle provides.

Perhaps as a result of the twin failures of unconscionability and contractual consent to address these issues, scholars and courts have

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<sup>96</sup> See, e.g., Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 4 (2011) (analyzing data of employment claims filed before the AAA and finding that about 1000 claims per year were filed); Resnik, *supra* note 6, at 2893 (“Because so few individuals, as contrasted with those eligible to bring claims, do so in the newly mandated system, arbitration works to erase rather than to enhance the capacity to pursue rights.”); *id.* at 2894 (finding that between 2009 and 2014, “134 individual consumers—or about 27 per year—[ ] filed claims through the AAA against AT&T”). Empirical data from the Consumer Financial Protection Board also support this assertion. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 13 (Dec. 12, 2013) (“From 2010 through 2012, there was an annual average of 415 individual AAA cases filed for four product markets combined: credit card, checking account, payday loans, and prepaid cards.”).

<sup>97</sup> See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 93 (2004) (“While it is certainly true as a matter of economic theory that all of a company’s savings may be passed on to consumers in the form of lower prices, it is also true that they may not.”).

<sup>98</sup> See Horton, *supra* note 72, at 480 (“Proving that adhesion contracts are non-consensual is no easy task. For one, consent is an essentially contested concept, a term of art that lacks a generally accepted meaning.”) (internal quotation marks omitted).

<sup>99</sup> See Stone, *supra* note 45, at 962 (stating that “in many recent cases, courts have applied attenuated notions of consent, compelling arbitration when consent is thin, if not outright fictitious”).

come to rely on principles external to the FAA, advocating, for example, for strengthening the vindication-of-rights doctrine to rein in arbitration of federal statutory claims.<sup>100</sup> This approach, in turn, might be thought to get at the problem of regulatory enforcement by denying enforcement of arbitration agreements where they interfere with the vindication of statutory rights. But as I explored above in Section A, this external doctrine has been weakened by interpretations of the contract paradigm internal to the FAA, which place contract enforcement above all other values.<sup>101</sup> All of this further suggests that what may be needed is a limiting principle within the FAA independent of the contract paradigm that can rein arbitration in and more directly address the power differential and regulatory enforcement problems.

Proponents of the procedural reform paradigm argue that it does not suffer from many of these infirmities. Rather than focusing on contested issues surrounding contract formation or the meaning of consent, the procedural reform paradigm gives courts flexibility to ensure that arbitration does not stand in the way of adjudicating disputes on the merits. To the extent that arbitration today stands in the way of allowing parties to do so, it deviates from the FAA's purposes.<sup>102</sup> Locating procedural reform values in the FAA could thus allow courts to use equitable safety valves that give adjudicators discretion "to set aside even well-intentioned contractual directives when they end up interfering with" reaching a merits decision.<sup>103</sup> Procedural reform values would, for example, enable a court to set aside even a mutually-consented-to agreement where enforcement would create a miscarriage of justice or where arbitral process would interfere with the enforcement of a statutory right.<sup>104</sup>

Still, as a baseline matter, section 1 also remains a puzzle for the paradigm: section 1 offers a wholesale prohibition against federal judges enforcing individual worker arbitration agreements, even where a resolution on the merits could be reached swiftly. Furthermore, the procedural reform paradigm's principal focus on whether a merits decision can be reached in private fora may not make it an

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<sup>100</sup> See, e.g., Aragaki, *supra* note 28, at 2021–22.

<sup>101</sup> See *supra* notes 52–54 and accompanying text; see also Aragaki, *supra* note 28, at 1953–62.

<sup>102</sup> Aragaki, *supra* note 28, at 2008 (explaining that similarly to early twentieth century courts that were unable "to disregard procedural rules in the interest of ensuring substantial justice, so courts today claim that the contract model requires them to enforce contract procedures . . . even when doing so might prevent claims not just from being adjudicated on their merits, but also from being brought at all").

<sup>103</sup> *Id.* at 2021–22.

<sup>104</sup> *Id.* at 2021–24.

ideal vehicle for addressing power disparities. If the 1938 procedural reforms succeeded in making public adjudication function better, it is unclear why arbitration remained as necessary as a federal procedural reform measure after that point, as firms used the statute to mandate arbitration for parties like workers and consumers with little bargaining power. Arguably, the obstacles of complex state procedural codes had been removed with the advent of simplified federal rules of civil procedure designed to aid parties in resolving disputes on the merits, all with the benefits of due process and publicity protections that might inure to the benefit of less powerful parties.

At the very least, even if arbitration remained preferable for reasons of economy or preference for parties of relatively equal bargaining power, the 1938 procedural reforms to public adjudication call into question why the revocability doctrine was not resuscitated decades later. During the second half of the 20th century, companies demanded arbitration in contexts that increasingly looked different from inter-merchant arbitration, provided thin or non-existent indicia of consent, and instead suggested one-party control of arbitral processes.<sup>105</sup> With complex procedural labyrinths out of the way in public adjudication, a revocation right would not so much allow for gamesmanship as give less powerful parties the ability to access the protections of public process.<sup>106</sup>

Apart from the power differential problem, the procedural reform paradigm would respond most directly to the regulatory enforcement problem by breathing life back into the vindication-of-rights doctrine.<sup>107</sup> But the proponents of the paradigm admit that regulatory enforcement was not a central goal of the reformers who championed the FAA as a tool of procedural reform, noting that it is “less clear” that procedural reformers behind the FAA *intended* arbitration to “facilitate the resolution of disputes through application of the positive law to the facts.”<sup>108</sup>

Moreover, when the paradigm becomes about enforcing law, it equates resolving disputes on the merits, whether through arbitration or courts, with doing “justice.”<sup>109</sup> This approach underemphasizes

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<sup>105</sup> See, e.g., Stone, *supra* note 45, at 1028 (proposing that the revocability doctrine be revived so that parties of weaker bargaining power outside of the typical commercial associations engaged in arbitration can opt out).

<sup>106</sup> See Aragaki, *supra* note 28, at 1997 (noting that other commentators might question the compatibility of abrogating revocability with a procedural reform agenda because the doctrine “served the valid and important purpose of protecting weaker parties from oppressive contract terms.”).

<sup>107</sup> *Id.* at 2021–22.

<sup>108</sup> *Id.* at 2000.

<sup>109</sup> *Id.*

how having public proceedings—where a judge must give reasons to the public and make decisions creating precedent, put the public on notice of what the law means, and clarify public values and the scope of rights—may be related to, or an essential part of, not only doing justice in a constitutional democracy but also to ensuring that justice is done for less powerful parties seeking to vindicate their rights.<sup>110</sup> Public processes may be integral both to the effective functioning of dispute resolution when power disparities are so wide and to the effective functioning of public regulatory enforcement when private rights of action are nested in federal and state regulations. Rather than making public process the default in certain circumstances in order to ensure that power does not infect process or that the regulatory state works properly, however, the procedural reform paradigm relies on giving judges *ex post* discretion “in extreme cases” to set aside contractual directives mandating arbitration that would interfere with reaching a merits decision.<sup>111</sup>

Once again, then, the same issue arises: what may be needed to address the power disparity and regulatory enforcement problems is a model that begins not with private ordering as the default but instead with a positive theory of why the nature of certain relationships and the content state’s regulatory aims may make another default rule—public process—better suited to resolving disputes between such parties. My task in the following Part is to develop the history and theory of section 1 to show that it leads to such a theory.

## II

### THE PARITY PRINCIPLE

In this Part, I develop the parity principle. In Section II.A, I explore the legislative history of section 1’s exclusion of employees from the FAA and pair it with other legislative history to show how the Act offers a broader view of the state’s role in protecting certain parties from arbitration outright in light of economic power dispari-

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<sup>110</sup> See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671 (1986) (“[W]e must determine whether ADR will result in an abandonment of our constitutional system in which the ‘rule of law’ is created and principally enforced by legitimate branches of government and whether rights and duties will be delimited by those the law seeks to regulate.”); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–87 (1984) (offering a conception of public adjudication as a process by which a judge, who must hear a case and give reasons, articulates public values); Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 224 (1995) (noting that under the *Wilko* standard, “[t]he arbitrator as dispute resolver was posited as a potential hazard to the state, as lawmaker”).

<sup>111</sup> See Aragaki, *supra* note 28, at 2009, 2021–22.



ties. In Section II.B, I explore how section 1 is best understood as being animated by a parity principle that can be understood through Progressive-Era legal thought: both articulating a power-based view of what economic relationships between firms and workers look like and a view of the role that the state should play in regulating those relationships by insisting on public adjudication rather than arbitration as a default. In this way, I endeavor to show how the principle frames both the power differential problem and justifies a regulatory enforcement response.

This effort is therefore largely interpretive: to take the text of section 1, the legislative history which directly speaks to excluding employees, and other aspects of the legislative history that speak to economic power together to reveal a deeper principle and situate it in its context. Finally, in Section II.C, I weigh both the advantages of and potential objections to the principle: including that it relies too much on purpose as derived through legislative history, that changed circumstances have diluted its relevance or applicability, and that it conflicts with the logic of another worker-protective form of dispute resolution, labor arbitration.

### A. *Text and Legislative History*

In section 1 of the FAA, before the statute details the circumstances where arbitration agreements will be enforced by federal courts, Congress put up a wall, cabining arbitration. The few words—“but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”<sup>112</sup>—are no more expansive than those in section 2 that form the basis of the contract paradigm. Like the words in section 2, relatively concise legislative history from the 1923 and 1924 legislative hearings surrounds them.<sup>113</sup> What distinguishes section 2 is that its text, legislative history, and historical context have been unfolded and elaborated by courts and scholars into the contract paradigm.<sup>114</sup> This section traces the history of the employment exclusion in section 1, and begins to suggest a broader

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<sup>112</sup> 9 U.S.C. § 1 (2012).

<sup>113</sup> See, e.g., Aragaki, *supra* note 28, at 1950 (noting the small amount of text and legislative history supporting the contract paradigm). The statute itself bears little legislative history. See *id.* (noting that the record of discussions consists mainly “of (i) testimony from less than three hours of hearings before House and Senate Judiciary Committees and (ii) a mere six pages of House and Senate Reports”).

<sup>114</sup> See *id.* at 1949 (arguing that courts and commentators have unwound pieces of text and legislative history into the contract paradigm as the statute’s “raison d’être”).

interpretation of it, before turning to a more theoretical explanation in the following section.

While section 2 focuses on the parties meant to be included in the statute's coverage, section 1 begins with the parties meant to be excluded from it. The focus on those parties to be excluded came into clearest shape not long after legislators introduced a version of the bill at the end of 1922, when labor leader Andrew Furuseth, then president of the International Seamen's Union, persuaded his union and the American Federation of Labor to oppose the law as it stood and developed the opposition argument in a published analysis.<sup>115</sup> The analysis, which I explore more below, focused on power differentials: how employee contracts mandating arbitration would be signed by employees out of necessity and subject them to private processes that lacked the protections of the judicial system and in which arbitrators would be more interested in enforcing contract and property expectations than following and developing law.<sup>116</sup>

At the January 1923 legislative hearings, W.H.H. Piatt, who was testifying as chairman of the Committee of Commerce, Trade and Commercial Law of the ABA, alluded to Furuseth and the labor movement's objections.<sup>117</sup> The committee indicated that it was aware of Furuseth's objections,<sup>118</sup> which made sense because they had been published, reflected the views of two powerful unions, and Furuseth often appeared before Congress.<sup>119</sup>

Piatt clarified that the FAA was "not intended [to] be an act referring to labor disputes, at all. It is purely an act to give . . . merchants the right or the privilege" of arbitrating disputes.<sup>120</sup> To respond to labor's objection, Piatt recommended adding to the bill: "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce."<sup>121</sup> Shortly after, then-

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<sup>115</sup> See Finkin, *supra* note 18, at 284 (overviewing Furuseth's efforts to secure labor support); *Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America*, 26 INT'L SEAMEN'S UNION AM., 83-89, 203-05 (1923) [hereinafter *Seamen's Union*] (Furuseth's analysis).

<sup>116</sup> *Seamen's Union*, *supra* note 115, at 83-89, 203-05 (1923); see also *infra* notes 140-42 and accompanying text.

<sup>117</sup> *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) [hereinafter *1923 Hearings*].

<sup>118</sup> Piatt referred to an objection from a "labor union," and Senator Sterling, who had introduced the bill, replied, "Mr. Furuseth?" *Id.* Piatt replied: "Yes; some such name as that." *Id.*

<sup>119</sup> Finkin, *supra* note 18, at 284 (explaining that Furuseth "was a well-known and respected figure in Congress, having appeared before its committees and having actively lobbied it for more than two decades").

<sup>120</sup> *1923 Hearings*, *supra* note 117, at 10.

<sup>121</sup> *Id.* at 9.

Commerce Secretary Herbert Hoover wrote a letter to Congress on the subject, noting the labor movement's objection to the "inclusion of workers' contracts" in the bill, urging the adoption of Piatt's verbiage, and adding railroad employees to it.<sup>122</sup> Hoover's letter was introduced into both the 1923 and 1924 legislative hearings.<sup>123</sup>

When the FAA passed without a "nay" vote in 1925, becoming law on the first day of the next year,<sup>124</sup> the language introduced by Piatt and slightly amended by Hoover became section 1's exception: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>125</sup>

Scholars focus on how this history demonstrates that Congress intended to exclude all workers in interstate commerce within its regulatory authority from the statute's enforcement provisions, but my effort is to understand something deeper about the exclusion's structure and meaning.<sup>126</sup> Most generally, the exception must be understood in the context of the era, a time when the "labor question" was the central political issue of the day and when the government's ability to regulate the economy and protect workers was perhaps the most contested political battle.<sup>127</sup> At a time when the federal government's ability to protect workers was in dispute, the fact that the federal government took a step to protect workers by denying the extension of the FAA to them says something about the framers' views of both the federal government and its social welfare goals and how they relate to public adjudication. Taking the exception in the text together with other statements in the legislative history about social welfare reveals something deeper about the inner logic of the FAA, and can provide superior grounds within the statute for thinking about problematic issues in arbitration today as they relate to power differentials and the logic of regulation.

Thus, consider Senator Walsh's exchange, again with Piatt, at the Senate Judiciary Committee hearings in 1923 in the context of both the discussion around employee arbitration and labor struggles. Senator Walsh began:

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<sup>122</sup> *Id.* at 14.

<sup>123</sup> *Joint Hearings, supra* note 37, at 21; *1923 Hearings, supra* note 117, at 14.

<sup>124</sup> Moses, *supra* note 18, at 110.

<sup>125</sup> 9 U.S.C. § 1 (2012).

<sup>126</sup> Margaret Moses and Matthew Finkin offer path-breaking historical accounts of the employment provisions of section 1 on which I build theoretically here. See Moses, *supra* note 18, at 105–08. See generally Finkin, *supra* note 18.

<sup>127</sup> See, e.g., ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 118 (1998) (exploring how "the 'labor question' replaced the struggle over slavery as the dominant focus of public life" as the economy industrialized).

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. . . . It is the same with a good many contracts of employment. A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.<sup>128</sup>

Piatt responded that he "would not favor any kind of legislation that would permit the forcing [of] a man to sign that kind [of] a contract" and reiterated that the statute's intended end is arbitration between merchants.<sup>129</sup> Their exchange is illuminating, and not only because Piatt is so emphatic in his response. Walsh was expressing a view about how the model of contract was ill-suited to the labor context in light of power disparities and about the superiority of public adjudication, at a time when animosity between workers and courts ran high.<sup>130</sup> Though a union clearly might prefer labor arbitration (which I discuss later and involves a substantially different power dynamic from an individual employee arbitrating with a firm), he was surmising that an individual employee would prefer a court of law.

At the Joint Hearings, the reasons one might prefer courts to oversee arbitration were made clearer by Julius Cohen. Cohen had been general counsel for the New York State Chamber of Commerce and architect of the New York state arbitration act that served as the model for the FAA<sup>131</sup> and he was the principal architect of the FAA and a reformer committed to arbitration as a progressive vehicle.<sup>132</sup> At the hearings, Cohen was faced with a question from Senator Sterling about the revocability doctrine and its roots.<sup>133</sup> Cohen

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<sup>128</sup> 1923 *Hearings*, *supra* note 117, at 9.

<sup>129</sup> *Id.* at 10.

<sup>130</sup> In large part, the complicated relationship between labor and courts traced back to courts enjoining various forms of labor activity, including striking, protesting, and picketing. For histories of the development of labor injunction practices and how workers challenged and protested them, see generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND THE LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 49-52 (1985).

<sup>131</sup> See MACNEIL, *supra* note 33, at 28-43 (noting Cohen's view of and role in developing arbitration law); Moses, *supra* note 18, at 101-12 (describing Cohen's influential involvement in the rise of state arbitration law and in the construction of and passage of the FAA).

<sup>132</sup> Kessler, *supra* note 22, at 2949-52; see also SZALAI, *supra* note 58, at 42 (discussing Cohen's history of accomplishments, his protection of workers, and his prominence in the arbitration reform movement); Aragaki, *supra* note 28, at 1947.

<sup>133</sup> See *Joint Hearings*, *supra* note 37, at 14.

admitted that courts were not only jealous of their authority in refusing to enforce arbitration agreements but also concerned that “people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker [in arbitration], and the courts had to come in and protect them.”<sup>134</sup> When Senator Sterling queried in response about “take it or leave it” contracts, Cohen’s response was to say that the FAA would not extend to such circumstances because the “Federal Government” was taking on an increasingly important role in “protect[ing] everybody” through legislation.<sup>135</sup> He referenced in passing one piece of legislation, the Bills of Lading Act of 1909, and stated that the government would protect parties both through such regulation and its “regularly constituted bodies,” making it clear that he envisioned judicial or administrative enforcement of regulation at least vis-à-vis workers.<sup>136</sup> Cohen was thus not content to use the model of contract to hash the issue out. Instead, he was expressing a theory of public regulation. Indeed, Cohen, speaking in 1925 about worker arbitration, was elaborating central components of the New Deal theory of the regulatory state a decade early: In light of problematic economic power disparities, Congress would take an active role in protecting workers and courts and public processes would continue the endeavor through interpretation and implementation.<sup>137</sup> It matters that this statement was made when Congress was embedding one such exception in its federal arbitration act, protecting individual workers from arbitration.

In the context of this notion that less powerful economic parties would be protected by the state, one can better understand the repeated and emphatic statements of congressmen about the legislation’s limitations. Thus, in analyzing statements such as Representative Graham’s on the House floor debate that the bill “simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts,”<sup>138</sup> Margaret Moses is correct to assert that the FAA was “not intended to permit a party with greater economic strength to compel a weaker party to arbitrate.”<sup>139</sup> The contract and procedural reform

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<sup>134</sup> *Id.* at 14–15.

<sup>135</sup> *Id.* at 15.

<sup>136</sup> *Id.* In contrast, some progressive reformers believed that arbitration was the tool for aiding groups like the poor and consumers. *See generally* Kessler, *supra* note 22.

<sup>137</sup> *See, e.g.*, Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) (overviewing FDR’s view of how problematic accumulations of economic power had built up and of the government’s role in protecting workers and citizens from such problematic economic power arrangements).

<sup>138</sup> 65 CONG. REC. 1931 (1924).

<sup>139</sup> Moses, *supra* note 18, at 108.

paradigms would cast these statements and section 1's protections as concerning the ability to contract to arbitrate or about arbitration process. These statements and section 1's protections, however, are less about the ability to contract to arbitrate or about arbitration process than *the state's role in protecting certain economic parties from arbitration outright*. They both define, and, in historical light, reflect the beginnings of the federal government's commitment to publicly overseeing disputes between unorganized workers and firms and thereby, *through public process*, protecting the former. In this way, they offer a theory of regulation against which regulatory enforcement problems today can be judged.

Indeed, Furuseth's published analysis of the proposed FAA, which sparked the congressional dialogue at the root of section 1, confirms this understanding of section 1. In the analysis, Furuseth worried that applying the FAA to individual workers would "take away from [them] . . . the present right to a day in [c]ourt" and with it all of the "procedure and constitutional guarantees" that exist in courts and were designed to protect them.<sup>140</sup> As Matthew Finkin aptly puts it, Furuseth "saw judges as public officers, charged with doing justice. He saw arbitrators . . . as creatures of contracts unilaterally dictated by employers, charged with enforcing the rights of property."<sup>141</sup>

Furuseth thus predicted that, were the FAA to pass without the exception for individual workers, workers would, "through [their] necessities" and "because [they are] hungry," sign arbitration contracts and "thus lose the right to the protection of the Courts with the machinery, which . . . civilization has built up around the perhaps otherwise weak and defenseless."<sup>142</sup> He worried that the arbitrator would be more concerned with enforcing the contract and protecting employers' property interests than with enforcing the law relating to labor conditions, and indeed might be biased on behalf of the employer, which would pay for the proceedings.<sup>143</sup> Furuseth reflected on the protections that certain workers had gained both through law and from the federal government in instances such as the Seaman

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<sup>140</sup> *Seamen's Union*, *supra* note 116, at 203.

<sup>141</sup> Finkin, *supra* note 18, at 288.

<sup>142</sup> *Seamen's Union*, *supra* note 116, at 203–04.

<sup>143</sup> *See id.* at 205 (noting that the arbitrator will believe "it is his duty to protect the existing status" and will be "induce[d] . . . to err . . . on the side of the employer, because half a loaf is better than no bread").

Act<sup>144</sup> and the Jones Act,<sup>145</sup> and imagined them being lost through the FAA.<sup>146</sup>

Through Furuseth's words and the legislative discussions, one can begin to glean the deeper motivations for *why* section 1 would exclude employees from the FAA. Reducing section 1 to issues of contract formation or procedural efficiency misses its regulatory logic: that the federal government, courts, and public process are instrumental to protecting weaker parties in the evolving industrial order, and in developing and evolving law to ensure that protection. Publicity is essential to that theory. Thus, before Congress sets out an image of a world of arm's length merchants contracting to privatize the process of resolving their disputes in section 2, it first sets out an image of a domain where the state has an essential role in overseeing how law is applied to disputes involving parties with great economic power disparities.

To better understand this congressional viewpoint, it is necessary to understand how law had created those power disparities in the first place.

### B. Text in Context

In insisting that courts adjudicate disputes between individual employees and employers due to the power disparity between them, the leaders behind the FAA advanced views about both existing economic power disparities in the market and the duty of the federal government—both Congress and courts—to regulate market ordering. That is, they formed a view of both what the problem of economic power differentials looked like and how the regulatory state would respond.

Section 1 and its history are therefore best understood as expressing a theory of political economy<sup>147</sup> founded in Progressive-Era

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<sup>144</sup> 46 U.S.C. app. § 688 (1994) (providing remedies for injured seamen). Furuseth had played a leading role in agitating for and securing the passage of the legislation. See HYMAN WEINTRAUB, ANDREW FURUSETH: EMANCIPATOR OF THE SEAMEN 108–32 (1959).

<sup>145</sup> Ch. 153, § 20, 38 Stat. 1164, 1185 (1915) (codified as amended at 46 U.S.C. app. § 688 (1994)) (regulating the hours, wages, and safety of workers at sea).

<sup>146</sup> See *Seamen's Union*, *supra* note 116, at 204 (warning that “rider” arbitration clauses in labor contracts would void seamen’s right to wages, food, and damages under the Jones Act, as well as the right to “quit work in harbor”).

<sup>147</sup> By political economy, I refer to “the interrelationship between economics and politics”—in this context, how democratic laws, institutions, and practices regulate, influence, guide, and structure the economic system and relationships within it. Barry R. Weingast & Donald A. Wittman, *The Reach of Political Economy*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 3, 3 (Barry R. Weingast & Donald A. Wittman eds., 2008); see also K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L.

thought: they focus on how, in light of the development of economic power relationships, the state had affirmative regulatory obligations to use public process to protect less advantaged parties. The principle that section 1 embodies relies on descriptive claims about how the economy and economic relationships function and how law had structured each, as well as normative claims about the obligation of the federal government and its legal institutions to regulate those relationships and shift power back to its citizens.

The relationships that legislators and leaders in the charge for the FAA refer to and their claims about duties of government were nested in the wide-ranging Progressive-Era legal thinking at the time that had its climax in the New Deal. Progressive reformers focused on how conditions necessary for freedom of contract did not extend to the relationships between individual workers and large industrial firms. They also argued that in light of the law-created advantages of those firms, the state had a responsibility to protect workers through regulation. It is through the lens of this legal thinking that one can best theoretically unwind both the FAA framers' statements about economic power and state intervention and the parity principle that they and section 1's text together create.

### 1. *The Economy*

Begin with the descriptive claims in the FAA's legislative history about economic disparities. First and most basically, the claims reflect an understanding that Americans had become a nation of workers in an evolving industrial economic order. With the Industrial Revolution, the nation saw the decline of an agrarian system—where citizens were thought to either live from their property or own small enterprises as “citizen entrepreneurs”—and the rise of one in which the vast majority of the nation's citizens had to become workers in enterprises.<sup>148</sup> Indeed, large enterprises were becoming pervasive across the economy. With the Industrial Revolution came “the growth of giant, complex industrial enterprises in several industries, starting with the railroads.”<sup>149</sup> By the early 20th century, across a variety of

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REV. 1329, 1332 (2016) (defining political economy as “how our politics and economics relate to one another, how they are structured by law and institutions, and how they ought to be structured in light of fundamental moral values”).

<sup>148</sup> See, e.g., TOMLINS, *supra* note 130, at 148–96.

<sup>149</sup> Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1253 (2010); see generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977) (describing the rise and structure of modern corporations).



industries, a few large firms controlled the market.<sup>150</sup>

Second, in addition to Furuseth, leaders such as Senator Walsh and Julius Cohen made claims about how economic power disparities affected contracting within the new order. Far from the Supreme Court's view of freedom of contract at the time, which assumed arm's length contracting between workers and employers as an aspect of their freedom,<sup>151</sup> Senator Walsh's comment regarding "take it or leave it" contracts<sup>152</sup> and Furuseth's reference to "hungry" workers who will take whatever conditions the employer imposes<sup>153</sup> were embedded in a long-ranging progressive dialogue about economic power.

Progressives showed how "theoretic[al] freedom of contract . . . has no existence in fact" under circumstances where workers dealt with powerful firms.<sup>154</sup> As John Dewey put it in *The Public and Its Problems*, social legislation for workers does not violate freedom of contract protections because "the economic resources of the parties to the arrangement are so disparate that the conditions of a genuine contract are absent; action by the state is introduced to form a level on which bargaining takes place."<sup>155</sup> Indeed, some took the view that the development of a rosier view of freedom of contract—much like the one the Supreme Court subscribes to in its current arbitration jurisprudence—"was a judicial answer to the demands of industrialists in the period of business expansion following the Civil War."<sup>156</sup>

Progressives understood that the nascent and developing "freedom of contract" rationale for limiting government intervention into economic relationships to protect workers was in part a descriptive theory of economic relationships, and at that rate, a poor one.

<sup>150</sup> See, e.g., Wells, *supra* note 149, at 1253 ("By the mid-1910s, a few giant 'center firms' dominated many sectors of the American economy and maintained their preeminence for decades."); see also Walton Hamilton, *The Problem of Anti-Trust Reform*, 32 COLUM. L. REV. 173, 174 (1932) (noting the rise of firms that had come to be "of unprecedented size and power").

<sup>151</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45, 64 (1905) (concluding that a New York law limiting the hours of bakery workers interfered with the "freedom" of employers and employees "to contract with each other in relation to their employment").

<sup>152</sup> See *supra* note 126 and accompanying text.

<sup>153</sup> See *supra* note 139 and accompanying text.

<sup>154</sup> Louis M. Greeley, *The Changing Attitude of the Courts Toward Social Legislation*, 5 U. ILL. L. REV. 222, 223 (1910).

<sup>155</sup> JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 62 (1927); see also RICHARD T. ELY, *STUDIES IN THE EVOLUTION OF INDUSTRIAL SOCIETY* 406 (1903) ("[C]oercion . . . is largely due to the unequal strength of those who make a contract, for back of contract lies inequality in strength of those who form the contract. Contract does not change existing inequalities and forces, but is simply the medium through which they find expression.").

<sup>156</sup> CLYDE E. JACOBS, *LAW, WRITERS, AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* 24 (1954).

Listen to Roscoe Pound, asking a series of questions whose answers, he says, should be evident “[t]o everyone acquainted at first hand with actual industrial conditions”:

Why . . . do courts persist in the fallacy [of freedom of contract]? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as if they were farmers haggling over the sale of a horse? Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?<sup>157</sup>

One prominent contract scholar, answering these very questions and sounding very much like Senator Walsh, put it thus: “There is, in fact, no real bargaining between the modern large employer (say the United States Steel Corporation) and its individual employees. The working-man has no real power to negotiate or confer with the corporation as to the terms under which he will agree to work.”<sup>158</sup> These claims about contract also became claims about social welfare, because the inability of workers to control their wages or working conditions affected their welfare. Thus, as William Forbath explains, “[g]rowing concentrations of wealth and power in the new giant corporations” were linked to “widening class inequalities” and “low wages.”<sup>159</sup>

## 2. *The Political Economy*

These descriptive claims lead to a final claim, this one normative, that is also reflected in the FAA hearings: that in light of these wide power imbalances, the state should intervene to rebalance the scales, or as FAA architect Cohen put it, to “protect” workers.<sup>160</sup> Section 1’s exclusion of workers from the FAA’s coverage embodies a worker-protective view of the role of Congress and courts in protecting the parties that had been disadvantaged by the rise of industrialism.

Cohen’s view of the state’s responsibility and section 1’s embodiment of it can be understood through a progressive vision of reform.

<sup>157</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

<sup>158</sup> Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 569 (1933).

<sup>159</sup> William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115, 1125 (2011) [hereinafter Forbath, *The Distributive Constitution*]; see also William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 28–29 (1999) (“[I]ncreasing concentration of ownership of resources and capital” had factory workers “competing against new machines and new unskilled and underpaid workers” and the proprietors of these factories “demand[ed] longer and longer hours.”).

<sup>160</sup> See Joint Hearings, *supra* note 37, at 14–15.

For some reformers, it was the state's role in creating these unequal conditions that produced this obligation. Robert Lee Hale was perhaps most incisive among them. Hale articulated how the government was complicit in creating unequal bargaining conditions through legally constructing the market.<sup>161</sup> Under his account, the state aided the development of corporate power by protecting it through property and contract law. These laws provided owners with title to the products that laborers worked to produce, and then required workers to pay to consume those products on the market.<sup>162</sup> Workers, rather than having a claim to the ownership of the product their labor produced, negotiated for wages.<sup>163</sup> The system thus required workers to both sell their labor for wages and to purchase the products made through such arrangements for consumption and subsistence with wages.<sup>164</sup>

For Hale, this structure diminished the relative freedom of workers, who needed to sell their labor in bargaining transactions with employers. The low wages and poor working conditions of workers merely “reflect[ed] the low degree of compulsion [the worker could] bring to the bargaining process, as compared to the compulsion brought to bear by the employer.”<sup>165</sup> And precisely because “the law endows [the employer] with rights that are more advantageous than those with which it endows [the worker],” bargaining did not approximate anything like the supposed ideal of freedom of contract.<sup>166</sup> Hale argued that government intervention created the imbalance in power, and government intervention could be applied positively to correct

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<sup>161</sup> See ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952) (exploring both the government's role in creating conditions of coercion in the market as well as its interest in adjusting the imbalances it created); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (discussing government action inherent in protection of private property rights); Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920); see also Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) [hereinafter Hale, *Economic Liberty*]. For additional analysis of Hale's ideas, see BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 12 (1998) (expounding Hale's view); and Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261, 262–63 (1973) (analyzing, among other things, how Hale's writing focused on “the structure and diffusion of the distribution of power, the role of the state in determining and changing the structure of private economic power, and the question, to which (or whose) interests should the state be responsive”); Forbath, *The Distributive Constitution*, *supra* note 159, at 1132 (discussing how progressives and legal realists framed the “public, legally constructed character of private economic power”).

<sup>162</sup> See, e.g., Hale, *Economic Liberty*, *supra* note 161, at 605.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> *Id.* at 627.

<sup>166</sup> See *id.* at 627–28.

it.<sup>167</sup> The state had “intervene[ed]” on behalf of firms, augmenting their property and contract rights, and because workers’ ability to exercise power over contracts was limited, Hale viewed it as appropriate for the state to intervene on behalf of workers as well.<sup>168</sup>

Another leading scholar similarly argued that the state, in enforcing contracts, augmented the power of the firm, and that to put no restriction on freedom of contract would necessarily lead the state to enforce unconscionable or exploitative agreements.<sup>169</sup> In other words, it would be nonsensical to use the fiction of arm’s length contracts to impede the state from regulating to protect workers and consumers. Thus, at a minimum, although the power of the state was used to enforce contracts, it should not be used “for unconscionable purposes, such as helping those who exploit the dire need or weaknesses of their fellows.”<sup>170</sup> At this point, the thesis sounds in the register of the contract paradigm. But the author continues that more positive intervention by the government was also required, because state non-interference into market arrangements as they existed would just redouble the advantages that the regimes of property and contract had created for employers, making freedom of contract anything but free for workers.<sup>171</sup> The government’s interventions on behalf of workers were therefore “as necessary to real liberty as traffic restrictions are necessary to assure real freedom in the general use of our highways.”<sup>172</sup>

Like Furuseth and Cohen, progressives thus viewed law as playing an essential role in correcting inequalities that the legal

<sup>167</sup> See *id.* at 628.

<sup>168</sup> See *id.* (explaining that, as “unplanned” government intervention contributed to what progressives viewed as a breakdown in true freedom of contract, “planned” government intervention could fairly be employed to restore it).

<sup>169</sup> See Cohen, *supra* note 158, at 587 (explaining that contract law solidifies the power of one party over another by placing government resources at their disposal); see also ELY, *supra* note 155 (arguing that contract law reinforces existing inequalities).

<sup>170</sup> Cohen, *supra* note 158, at 587.

<sup>171</sup> See *id.* (noting that government non-intervention “would logically lead not to a maximum of individual liberty but to contracts of slavery, into which, experience shows, men will ‘voluntarily’ enter under economic pressure—a pressure that is largely conditioned by the laws of property”).

<sup>172</sup> *Id.* Cohen argued further that the norm of state non-intervention into the relationships on freedom of contract arguments was itself novel, because through the end of the eighteenth century the government regulated master-servant law. It was “only after the Civil War that the United States Supreme Court invented the doctrine that the ‘right to contract’ is property and is thus protected against real government regulation by the Fifth and Fourteenth Amendments of our Federal Constitution.” *Id.* at 569–70 (emphasis in original).

accommodation of industrialism had created or magnified.<sup>173</sup> As Barbara Fried puts it, progressives believed that since law and the state were “unavoidably constitutive of economic life . . . one should make a virtue of necessity, by turning the government into a positive force in the economy.”<sup>174</sup> She notes that Hale believed the primary goal of government was to better the conditions of citizens and to maximize the aggregate freedom enjoyed by society as a whole.<sup>175</sup> Given this purpose and since the “current balance of bargaining power strongly favored employers over labor, a government policy directed towards maximizing freedom [should] use its own coercive weapons to tilt the balance of power more towards labor.”<sup>176</sup> Hale also believed, as clearly did the reformers behind the FAA, that economic life was rooted in law: that courts and legislators had an essential role in enforcing promises, structuring contractual arrangements, and in shifting power balances.<sup>177</sup>

The progressive approach to shifting power back to workers through legislation was justified not only by a different view of market power relationships but also a set of social welfare reasons for doing so. These reasons help to explain *why* the state would come to protect workers, as did the FAA reformers. For some, the line between economic life and political life was fuzzy or fictive, such that providing workers with more power or supporting “industrial democracy” was part and parcel of sustaining our democratic system.<sup>178</sup> For others still, it was merely the case that government had an obligation to ensure the welfare of its citizens. Under this view, in a system where the workers who made up the backbone of the country enjoyed so little power over their wages, working hours, safety, and conditions, the state needed to intervene to shift power back to them and, as Cohen said during the FAA hearings, protect them.<sup>179</sup> For others who held

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<sup>173</sup> For accounts of how progressives viewed positive government intervention, see, for example, T.H. Green, *Liberal Legislation and Freedom of Contract*, in LIBERTY 21 (David Miller ed., 1991) (explaining how interferences with freedom of contract support freedom in its true sense), RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 5–6, 227, 240, 254 (1955) (tracing Progressive economic reform efforts), and GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA 1900–1912*, at 41–42, 81–82 (1958).

<sup>174</sup> FRIED, *supra* note 161, at 11–12.

<sup>175</sup> See *id.* at 4 (describing Hale’s views of the proper role of government); *id.* at 46 (describing Hale’s view of maximizing the aggregate liberty of society).

<sup>176</sup> *Id.* at 68.

<sup>177</sup> See *id.* at 71, 79–84 (expounding Hale’s view of political economy).

<sup>178</sup> See Forbath, *The Distributive Constitution*, *supra* note 159, at 1125–32 (overviewing how Brandeis and other progressive reformers rejected a sharp line between the economic and political spheres).

<sup>179</sup> See *supra* note 135 and accompanying text; see also, e.g., FLORENCE KELLEY, *SOME ETHICAL GAINS THROUGH LEGISLATION* (1905), reprinted in *THE CITIZEN’S LIBRARY OF*

this view and some who did not, the accumulation of corporate power raised the specter that such economic power would bleed into political power, creating an oligarchy, and this threat justified counterbalancing that power.<sup>180</sup> One could thus view section 1 not only as a statement about political economy, but also as one about what William Forbath and Joseph Fishkin have called constitutional political economy.<sup>181</sup> That is, one could understand arbitration to be a form of economic governance that results in the economic domination of citizens—domination of the kind that is constitutionally impermissible in part because it may bleed into political domination.<sup>182</sup>

Thus, whatever the underlying motivation, the concern was that allowing the parties whom our legal system had already privileged to force the weaker to “contract out” of public process would remove the state from its role in policing economic arrangements and making them compatible with constitutional or public values. The state had already left so much of governance to the private domain. To redouble that private power by not providing a safety valve out of the private domain for dispute resolution and rights-establishment would swell private economic governance too much, forcing less powerful parties to enter a privatized process that would lack the benefits of public

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ECONOMICS, POLITICS, AND SOCIOLOGY (Richard T. Ely ed., 1910) (exploring how legislation such as child labor and minimum wage laws would improve the welfare of the nation’s citizens).

<sup>180</sup> See, e.g., Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), in 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 230, 233 (Samuel I. Rosenman ed., 1938) (“[T]he political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people’s property, other people’s money, other people’s labor—other people’s lives. . . . [L]ife was no longer free; liberty no longer real . . .”).

<sup>181</sup> See, e.g., Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, and the Constitution of Opportunity*, 58 NOMOS (forthcoming 2018) (manuscript at 2) (on file with author) (“[A]rguments about constitutional political economy begin from the premises that economics and politics are inextricable, and that our constitutional order rests on and presupposes a political-economic order.”).

<sup>182</sup> See ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 1 (1985) (noting the American consensus “that a well-ordered society would require . . . political liberty[ ] and economic liberty”); FONER, *supra* note 127, at 9 (claiming that since the Revolution it has been “an axiom” in American constitutional thought that “political freedom” and a decent measure of “economic independence” are both required); Jon D. Michaels, Note, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 11 YALE L.J. 1457 (2002) (delineating the historical and theoretical relationship between socioeconomic resources and the American civic republican constitutional order). See generally K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2017) (explaining the progressive theory of democratic economic governance and its application to modern politics and economics); Fishkin & Forbath, *The Anti-Oligarchy Constitution*, *supra* note 137, at 671 (asserting that the anti-oligarchy principle is fundamental to our constitutional order and should be recovered as a constitutional argument).

process and therefore likely inure more to the benefit of the stronger party. Private governance of that kind, by nearly fully removing the state when parties of such power disparity resolved disputes, would be too synonymous with the kind of domination that was constitutionally unallowable. It would also simply remove the state from its counterbalancing role established for social welfare reasons.

The role of courts in this counterbalancing or protecting may seem more complicated. Progressives, after all, critiqued *Lochner*-era courts; so one may wonder, why protect employees by insisting on public adjudication? The answer is that the fact that courts needed to be improved had to be weighed against privatized process under conditions of vastly unequal economic power. While, for example, courts had been critiqued by progressives in the decades around the enactment of the FAA for their decisions in labor injunction cases<sup>183</sup> and for developing freedom-of-contract substantive due process jurisprudence,<sup>184</sup> these issues were not a mark against public adjudication *compared* to private arbitration when such inequalities of power were involved. Indeed, in a way, the troubled histories of these issues may prove the point about public adjudication's virtues compared to arbitration. Consider labor injunctions. The public and reasoned nature of judges' labor decisions allowed the appellate process to work, mobilized citizens and reformers to challenge judges' interpretations of labor activity, and ultimately sparked legislative reform in the Norris-La Guardia Act.<sup>185</sup> A similar process occurred with the legislative and judicial transformation in freedom-of-contract substantive due process cases.<sup>186</sup> The courts' forays, if anything, helped shift the balance

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<sup>183</sup> See *supra* note 130.

<sup>184</sup> For histories of the rise and fall of freedom-of-contract substantive due process, whether through doctrinal development or political and constitutional transformation, see 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993); PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990). See also Jack M. Balkin, "Wrong the Day it Was Decided": *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 686–88 (2005); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

<sup>185</sup> Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101–115 (1994)). I have overviewed this process elsewhere. See Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 499–508 (2017) (discussing the evolution and structure of the Norris-La Guardia Act, which limited and defined the courts' jurisdiction when issuing injunctions in labor disputes in order to address bargaining power disparities).

<sup>186</sup> See *supra* note 184.

towards administrative agencies—sometimes acting alone, at others in combination with courts, but all through public processes.

Along the way, reformers such as Furuseth never lost faith in courts generally. And the legislators who listened to his and Hoover's concerns did not once make an argument that private arbitration for individual workers was superior to public adjudication. Indeed, it was not only the case, as Furuseth's comments reflect, that courts would interpret statutes designed to protect employees in ways that were subject to public oversight. Some progressive procedural reformers had even more ambitious views of what improving courts could do for workers and other parties in shifting power back to them.<sup>187</sup>

Taking all of this together, then, one can see how the text and legislative history of the FAA sound in the register of progressive theorists, echoing their view of market relationships and advancing the evolving commitment of the federal government to protecting workers. What is so critical—and what existing accounts do not capture—is that the prohibition against employee arbitration is both about economic power disparities and part of a broader theory of political economy that would come to define the rise of the modern state in the New Deal. The parity principle, brought into the legislative discussions by labor leaders, is rooted in the American experience with industrial capitalism and in a regulatory vision of the role of law and public adjudication in correcting capitalism's imbalances for diffuse parties, and principally in the New Deal model, workers.

The problem then cannot be reduced to contract formation or the efficiency of arbitral process. The role of the state in overseeing and adjudicating both the power struggles between institutionalized firms and diffuse economic parties and in interpreting the laws designed to protect them is *essential* to the American legal reckoning with industrial capitalism of which section 1 of the FAA is part. Publicity is an indispensable pillar of that compromise because counterbalancing as a function of the state requires it to oversee disputes and interpret,

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<sup>187</sup> One leading progressive reformer, Charles Clark, thought that courts could hear claims with no basis in positive law—such as those arising out of the evolving conditions in the workplace—and decide cases in an equitable, flexible manner to do “justice” for the party. *See, e.g.*, Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 *How. L.J.* 73, 84 (2008) (exploring how Charles Clark “believed that a plaintiff with a compelling story should be able to bring it before a judge and ask for justice”). Another leading reformer, Homer Cummings, thought that public adjudication could shift power back to the “sometimes forgotten people” in the American system by allowing courts to hear their claims in a flexible manner modeled on equity. *See* Homer Cummings, *Speech Before the Federal Bar Council* (June 1938) (transcript available in the Papers of Homer Stille Cummings, Albert and Shirley Small Special Collections Library, University of Virginia, Box 208).



develop, and put parties on notice about the reach of its protective law. It is in this way that section 1 of the FAA and its parity principle prefigure the rise of the New Deal legal order.

Section 1 therefore elaborates a principle that is useful above and beyond employer-employee cases, especially as the economy developed in a way that maintained large firms and, beyond unionized workers, deep inequalities of bargaining power between employees and consumers on the one side and firms on the other. The economy then or now is not the one that some progressive reformers, such as Louis Brandeis, sought to summon, in which large firms would be broken up because of the dangers to democracy from vesting so much power in them.<sup>188</sup>

Indeed, there is an important point there: The economy that Brandeis wanted the country to return to is one of small trade associations and merchants; the economy that is the model of section 2 of the FAA. In a world of small trade associations and merchants, arbitration might function as the norm. But Brandeis lost that battle, and the world that came instead is one of large enterprises, citizen-workers, mass-consumers, and contracts involving vastly unequal economic power. That is, the world carved off by the logic and theory of section 1. Once we develop the principle of section 1, once we understand how it seeks to close off from arbitration disputes between parties in that world because of the state's role in correcting power imbalances, we can see how the evolution of the American economy narrows the world to which the FAA's logic applies. Of course, the Supreme Court instead has expanded that world. It has not hurt the Court's efforts that commentators have not developed a theory of section 1 to counter its ever-growing contract theory of section 2.

### *C. Advantages and Objections*

Having explored the history and theory of the parity principle, it is now possible to consider and weigh its advantages and some of the objections that may be levied against the account I have offered.

The parity principle's advantages mirror the disadvantages of the other paradigms. The contract paradigm limits courts to a world where the question is whether an agreement to arbitrate was made and whether contractual defenses can be established. It can tell us little about the reasons, beyond failed agreement, that Congress wanted to limit arbitration. The parity principle reminds us that in-

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<sup>188</sup> See generally LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed., 1934) (promoting the concept of industrial democracy and the importance of equal bargaining power between parties).

quality of bargaining power in contract was only one part of the problem of political economy that the state needed to solve during the early-mid twentieth century. The question was not merely whether an agreement had been struck, but a deeper one about the role of law in both creating an unequal playing field for workers and in intervening to equalize the field. This is the logic of much of the regulatory law that arbitration today weakens. In this way, the parity principle defines both the problem of power differentials and offers a regulatory theory to counter it and to critique the regulatory enforcement problem.

This history shows that the denial of arbitration where parity was lacking therefore was only in part about the less powerful party's ability to agree to arbitrate. It was more so about recognizing the pre-existing, law-structured power differential that required the active presence, protection, and oversight of the state in resolving disputes between more and less powerful parties. Thus, even where a decision within arbitration might resolve the dispute on the merits, satisfying the procedural reform paradigm, this was insufficient. Even a colorable decision on the merits, say, interpreting a worker-protective statute may be insufficient if it would not allow the parties a right to appeal it, provide the public with the information to organize to amend the statute if it did not serve workers sufficiently, or provide other firms with notice of what the law requires. The key point is that the government was regulating great power disparities in an economic system and apportioning the rights between workers and firms *in part through litigation*. This is why the FAA was litigation-promoting for parties where parity was so lacking.

It is worth noting in this vein that the parity principle is motivated differently than the unconscionability doctrine, which the contract paradigm largely relies on to limit arbitration's reach. In a somewhat stylized manner, one might think of unconscionability as epitomizing contract law's classical focus on securing and arranging the interests of individuals by denying contract enforcement where interests are too slanted. In contrast, the parity principle can be thought of as being rooted in a historical "penetration of public law into the domain of private law"<sup>189</sup> that is founded more on an ideal of distributive justice than securing the interests of individuals.<sup>190</sup> Thus, the parity principle is not only concerned with the wills of the parties, but also serves a larger goal, through judicial reasoning and publicity and statutory

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<sup>189</sup> Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L. REV. 469, 471 (1939) (quoting GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 122 (1932)).

<sup>190</sup> See *id.* at 470–73 (describing these theoretical foundations of the regulatory state).

interpretation, of counterbalancing corporate power and shifting power back to diffuse economic parties in order to ensure their social welfare. It is founded on an ideal of regulation rather than privatization. That ideal, in turn, shapes its ability to circumscribe arbitration law.

I should pause to clarify, however, that my argument is not that the parity principle is *the* way to understand the FAA.<sup>191</sup> I am convinced that the contract and procedural reform paradigms are legitimate interpretive models for understanding the statute, whatever their limitations. The most interesting work to be done interpretively involves negotiating the interplay of the paradigms and the principle.<sup>192</sup> One stylized way of viewing the interplay is as follows: The parity principle tells courts and legislators the most about the logic of where arbitration is to be denied outright. The contract paradigm hones in on questions of consent and contractual defenses for parties where the parity differential is not significant enough to deny arbitration outright. Where consent and relative parity have been established, the procedural reform paradigm allows courts to ask whether arbitration will actually aid parties in getting to a merits decision. At times, however, the paradigms can overlap as well, serving double functions: for example, Hiro Aragaki has argued that the procedural reform paradigm supports a stronger unconscionability approach.<sup>193</sup> Similarly, one can imagine a more liberal unconscionability approach honing in on questions of economic power at the heart of the parity principle.

Having explored some of the advantages of the parity principle, it is worth considering a few potential objections. I consider three objections, which go, respectively, to the limits of the account of parity, to the effect of intervening circumstances, and to the potential conflict between my account and the development of labor arbitration.

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<sup>191</sup> See Aragaki, *supra* note 28, at 1990 (“To the extent it is possible to talk coherently about congressional intent at all [in the passage of the FAA], that intent was likely complex and perhaps even contradictory, reflecting the support of diverse interest groups that each wanted different things out of a new federal arbitration law.”).

<sup>192</sup> See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 (arguing that scholars should focus on “the relationship among” procedural changes).

<sup>193</sup> Unconscionability is viewed not only as a contract defense but also an “equitable safety valve[ ]” that provides judges with “*ex post* discretion to set aside even well-intentioned contractual directives when they end up interfering with” reaching a merits decision. Aragaki, *supra* note 28, at 2021–22.

## 1. *The Limits of Purpose*

First, one might object that the parity principle relies too much on legislative history and purpose to build up an account that spans beyond the terse text of section 1. The contract and procedural reform paradigms are also susceptible to this critique. The contract paradigm relies on the text of section 2 and an equally sparse legislative history.<sup>194</sup> And the procedural reform paradigm also relies on scattered statements in the legislative history that are consonant with a procedural simplification message and on the fact that later sections in the statute—such as sections 4 and 5—reflect an impulse to simplify process.<sup>195</sup> Each paradigm, then, is both rooted in text and legislative history but must contend with the scarcity of both.

Debates about purpose, of course, are most salient in the context of judicial interpretation of the statute. I will argue in Part III.A that my account is useful for interpreting the scope of section 1's worker exclusion. Since many interpreters have found the text of section 1 to be unclear, the legislative history and context offer resources for judicial interpretation. As Hart and Sacks, the most influential proponents of purposivist analysis, asserted, when the text is not clear, materials like legislative history, context, and shared background understandings help to narrow and hone in on the range of meanings.<sup>196</sup> Some textualists also turn to such materials when the text is not clear.<sup>197</sup> Thus, the turn to these materials helps interpreters to understand and narrow the range of meanings that one can attribute to section 1. For example, one could view section 1 as being only about maritime and railroad workers, or about preserving industrial peace, or reflecting the presumption that most workers would be in unions and covered by and protected by labor union arbitration. But the legislative history narrows the range of meanings and reveals the logic of why the FAA framers fashioned a broad exclusion for workers.

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<sup>194</sup> See *supra* note 113 and accompanying text.

<sup>195</sup> See Aragaki, *supra* note 28, at 1973–88 (discussing those who advocated for the FAA because its simpler procedural requirements allowed the administration of justice and suggesting that sections 4 and 5 of the FAA support the theory that the statute was created with the goal of procedural simplicity).

<sup>196</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1375–76* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Text still plays a central role in purposivist analysis. *Id.* at 1375 (“The words of a statute, taken in their context, serve both as guides in the attribution of general purpose and as factors limiting the particular meanings that can properly be attributed.”).

<sup>197</sup> See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84–85 (2006) (explaining that, when faced with ambiguous text, textualists will consider a statute's overall purpose by examining the structure, title, or mischief being addressed, although textualists often still find legislative history unreliable).

It is also worth noting generally that purposivist analysis is pervasive and perhaps unavoidable in the FAA context. David Horton argues that the Supreme Court engages in purposivist analysis in interpreting the FAA and is justified in so doing.<sup>198</sup> For example, the Supreme Court in *AT&T Mobility LLC v. Concepcion* turned to the FAA's "purposes and objectives" to ask whether it preempted the California unconscionability doctrine at issue in the case.<sup>199</sup> The Court focused on "accomplish[ing] . . . the FAA's objectives" by understanding "[t]he overarching purpose of the FAA."<sup>200</sup> Horton embraces this purposive analysis, although he argues that the Court got the statute's purposes wrong in the case by reading a stronger intent to preempt state law than the legislative history suggests.<sup>201</sup>

While Horton limits his embrace of FAA purposive analysis to the case before him—preemption—he also recognizes that there are more general reasons for engaging in purposive analysis of the statute in ways that are convincing. For example, he notes that the FAA "requires judges to adapt the legislative blueprint to nine decades' worth of new developments. . . . When circumstances have changed since a statute's enactment, slavish devotion to the text can produce unintended consequences."<sup>202</sup> Purposive analysis, by focusing on the general purposes of lawmakers, especially in interpreting a statute with terse text, can better "bend with the times."<sup>203</sup> In addition, again, one might simply say that it is justified because the text of the statute is not always clear and purposive analysis can draw one closer to congressional intent.<sup>204</sup>

The Court's purposive analysis is thus, to my mind, justifiable. Indeed, I think that the Court's purposive analysis of the FAA arguably goes further than Horton suggests, because the Court reads section 2's contract paradigm to be the centerpiece of the FAA,

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<sup>198</sup> David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1223 (2013) (stating that, because the FAA is only meant to preempt state rules that subvert its goals and policies, "preemption should hinge on what lawmakers wanted to accomplish with the statute, not a hypertechnical parsing of its text").

<sup>199</sup> 563 U.S. 333, 352 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>200</sup> *Id.* at 343–44.

<sup>201</sup> See Horton, *supra* note 198, at 1223 ("But unlike Justice Scalia's cursory analysis in *Concepcion*, a searching examination of the FAA's 'purposes and objectives' reveals that Congress did not intend to preempt state public policy wholesale." (quoting *Concepcion*, 563 U.S. at 352)).

<sup>202</sup> *Id.* at 1248–49.

<sup>203</sup> *Id.* at 1249.

<sup>204</sup> See Manning, *supra* note 197, at 87 n.60 (referencing statements by Supreme Court Justices known for advocating a purposivist approach that reveal their concerns with solely analyzing the literal meaning of text).

imputing its *overarching* purpose to be to enforce contracts.<sup>205</sup> However, like Horton, I think that the Court's incorrect reading of that purpose—or inflating of its import—is not a mark against employing a purposive analysis. The statute's terse text on its face simply does not allow courts to resolve all of the FAA disputes that come before them, and turning to other materials is justified.

## 2. *Changed Circumstances*

Second, one might argue that, whatever the views of the FAA's framers, circumstances have changed in the near century intervening since its enactment, and in a modern economy factors such as the cost of litigation and the need for efficient procedures justify the shift towards more expansive use of arbitration. This argument works in favor of dynamic interpretation of the FAA, and I should note that scholars who favor dynamic interpretation view its applicability on a continuum and tether its strongest application to circumstances where “neither the text nor the historical context of the statute clearly resolves the interpretive question, and the societal and legal context of the statute has changed materially.”<sup>206</sup> Thus, if we are in a world where purposive interpretation can work by elucidating text and context, overriding those interpretive conclusions in favor of considerations of “present societal, political, and legal context”<sup>207</sup> may well be less than entirely justified. And the point of the contract and procedural reform paradigms and the parity principle is that in many instances they allow courts to interpret the statute faithfully.

Even putting these considerations aside, I am not persuaded that the present context undercuts the vitality of the parity principle. Instead, it reflects its continuing importance. The arguments that questions of parity are overridden or eclipsed by intervening developments are of two flavors. The first kind of argument concerns the problems with public adjudication, and the second, the advantages of arbitration in the modern economy.

According to the first, there has been a “litigation explosion” in federal district courts, as parties pursued more claims, with ever costly discovery, making public adjudication ever more cumbersome.<sup>208</sup>

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<sup>205</sup> See *supra* notes 30–32; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (declaring that section 2 and its emphasis on enforcing contracts are the “centerpiece” of the FAA).

<sup>206</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1496 (1987).

<sup>207</sup> *Id.* at 1479.

<sup>208</sup> Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 292 (2002) (quoting Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 J. JUDICATURE 109, 109 (1970)).

These claims have been well responded to in the civil procedure literature. Scholars have cast serious doubt on this notion of a “litigation explosion,” arguing for example that there was a decline in per capita litigation in the first half of the twentieth century,<sup>209</sup> that the perceived rise in tort litigation (which was the hook for much of the claim of an explosion) was overstated or non-existent, and that in some areas of law, there was a modest rise in litigation rates, although with most cases settling and many parties with valid claims choosing not to bring them.<sup>210</sup> Claims about the cost of discovery have also been shown to be drastically overstated; indeed, the most comprehensive data show that discovery costs have been stable and add up to a few hours in most cases.<sup>211</sup>

As Stephen Burbank and Sean Farhang have showed, however, there was beginning in the 1960s an increase of “private lawsuits to enforce federal statutes.”<sup>212</sup> This increase resulted from a “legislative choice to rely on private litigation in statutory implementation,” or what the scholars refer to as a “private enforcement regime” (as contrasted with or often coupled with an administrative enforcement regime).<sup>213</sup> The combination of this private enforcement regime, an expanded class action rule in 1966,<sup>214</sup> and the “broad highway created by the 1938 Federal Rules,”<sup>215</sup> which simplified procedure and made it easier for parties to bring claims and access discovery, contributed to a rise in litigation in which private parties enforced federal laws.<sup>216</sup> Thus, the increase of litigation was the result of an active political choice. Burbank and Farhang show how that very rise was met with a

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<sup>209</sup> *Id.* at 285–87.

<sup>210</sup> See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61–62 (1983); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103 (1996).

<sup>211</sup> See, e.g., Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1088–89 (2012); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1729–30 (2013).

<sup>212</sup> Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1547 (2014).

<sup>213</sup> *Id.* at 1547–48 (emphasis omitted) (quoting SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 19–60 (2010)).

<sup>214</sup> See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 375–400 (1967); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014).

<sup>215</sup> Burbank & Farhang, *supra* note 212, at 1587.

<sup>216</sup> *Id.* at 1586–87.

relatively unsuccessful conservative legislative backlash,<sup>217</sup> and more successful conservative judicial backlash, where the Supreme Court has rolled back private enforcement.<sup>218</sup> It has done so, in part, by raising hurdles to forming class actions, heightening pleading requirements, and importantly, expanding arbitration.<sup>219</sup>

One can glean a few conclusions for the parity principle from the contextualized history that Burbank and Farhang offer. The first is that the very state that had, according to progressive reformers, disadvantaged diffuse economic parties such as workers vis-à-vis firms came to rely on those less powerful parties to use litigation to regulate those more powerful firms through acting as “private attorney generals.” Today, this regulation must occur in an economic context where corporate power is concentrating<sup>220</sup> and worker and consumer power imbalances vis-à-vis firms remain wide, as consumer bargaining power has reduced in important ways<sup>221</sup> and workers increasingly lack

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<sup>217</sup> *Id.* at 1587. Some legislative victories include the Private Securities Litigation Reform Act of 1995, the Prison Litigation Reform Act of 1996, and the Class Action Fairness Act of 2005. See Pub. L. No. 104–67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) (setting heightened pleading standard for federal securities cases); Pub. L. No. 104–134, 110 Stat. 1321–66 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.) (limiting federal courts’ discretion in remedies concerning prisoner litigation); Pub. L. No. 109–2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.) (imposing new requirements on diversity jurisdiction and amount in controversy for certain class action claims).

<sup>218</sup> Burbank & Farhang, *supra* note 212, at 1586–87.

<sup>219</sup> *Id.* at 1603–06.

<sup>220</sup> Corporate concentration levels are said to be at their highest levels today, with many industries being controlled by just a few firms. *E.g.*, Council of Economic Advisers, Issue Brief on Benefits of Competition and Indicators of Market Power (Apr. 2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414\\_cea\\_competition\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf); STEPHEN P. DUNN, THE ECONOMICS OF JOHN KENNETH GALBRAITH, chs. 5, 7 & 8 (2011); JOHN BELLAMY FOSTER & ROBERT W. MCCHESENEY, THE ENDLESS CRISIS: HOW MONOPOLY-FINANCE CAPITAL PRODUCES STAGNATION AND UPHEAVAL FROM THE U.S.A TO CHINA (2012); Corporate Concentration, THE ECONOMIST (Mar. 2016).

<sup>221</sup> See, *e.g.*, Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 586 (2009) (noting that today “most consumers are not in a position to bargain over the terms on which they purchase ordinary consumer goods”); Steven Flower, Note, *Toward Correcting the Misapplication of Subrogation Doctrine in California Healthcare*, 77 S. CAL. L. REV. 1039, 1060 (2004) (“In modern society, the bargaining power of consumers is weak due to their necessary dependence on products and services provided by others with greater knowledge of those products and services.”); Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 323–24 (1999) (“Today, the typical agreement consists of a standard printed form prepared by one party in the superior bargaining position and adhered to by the other party, who has little or no opportunity for bargaining.”).



the protections of unions.<sup>222</sup> The second is that the content of the regulation the state must enforce is often designed to shift power back to them or to constrain abuses of power by firms—whether through wage and hour regulation, workplace safety law, antidiscrimination law, antitrust law, consumer protection law, and the like.

Congress's choice to rely so often on private enforcement to regulate firms' power and shift or remedy power imbalances, if anything, provides *more* reasons today to insist on public adjudication for parties like individual workers and consumers taking on corporate behemoths. That is, in light of the relatively unequal power between citizen-regulators and firms, one would expect that the state, in asking those citizens to regulate, would provide easily accessible public pathways for them to achieve the social welfare goals embodied in legislation. Procedural deconstruction is being used to remove the protections of public process for the very parties whose rights, statutory and otherwise, depend on litigating and therefore to weaken the American regulatory system generally.<sup>223</sup>

All of this is not to deny that questions about litigation's efficiency, manageability, or excesses are appropriate values to consider.<sup>224</sup> Instead, it is to assert that the empirical evidence suggests

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<sup>222</sup> See, e.g., Wilma B. Liebman, "Regilding the Gilded Age": *The Labor Question Reemerges*, 45 STETSON L. REV. 19, 23–24 (2015) (attributing the growing imbalance between worker and corporate power to factors including: growth in foreign trade and deregulation, technology advancement, globalized markets, Wall Street's influence "expand[ing] dramatically," and a shift to financial capitalism that treats companies as "assets to be bought and sold"). See generally KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) (arguing that employment laws today fit an outdated notion of stable employer-employee relationships, thus providing less security for workers); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014) (analyzing how fundamental restructuring of employment decreases protections for workers).

<sup>223</sup> Burbank & Farhang, *supra* note 212, at 1613–14.

<sup>224</sup> For example, one can see the issues and areas for reform in the class action context while still thinking it serves useful purposes. See generally JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE (2015) (providing a "warts and all" view of, and ultimate defense of, class action); David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and "Indivisible" Remedies*, 79 GEO. WASH. L. REV. 542, 569–70 (2011) (considering circumstances under which benefits accrue unevenly to counsel and class representatives); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 418–25 (2000) (considering potential conflicts between class counsel and members); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21 (1996) (considering issues related to class counsel's self-appointment and notice to plaintiffs); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991) (exploring how plaintiffs' counsel play an entrepreneurial role that raises the prospect of pursuing their own interests over those of their clients).

that these concerns have been overstated, while concerns about ensuring that litigation can fulfill its regulatory and social welfare functions have been undervalued. Indeed, the time period where arbitration was more constrained, the class action was stronger, and public adjudication was less encumbered and more easily allowed workers and consumers to vindicate statutory rights may have served a more modest end—working towards shifting unequal economic power to workers and consumers. This is an end that the progressive logic underlying the parity principle would welcome, if not demand.

The second argument—that arbitration is superior—might offer some saving grace if it could be established. But here, too, the findings are troubling for parties lacking relative parity. Analyzing nearly five thousand cases filed by consumers before the American Arbitration Association, David Horton and Andrea Chandrasekher came to three conclusions.<sup>225</sup> First, the weakening of consumer class actions has led plaintiffs' lawyers to bring more individual cases before arbitral fora than before.<sup>226</sup> Second, consumers and workers lose more often than they win in those fora, even though predictively this should not be the case.<sup>227</sup> And, third, “high-level” and “super” repeat players such as “elite corporations” win even more.<sup>228</sup> The researchers conclude that the Supreme Court's caselaw has both “shield[ed] big companies from class action liability” and, by shifting public claims—including class ones—to individual claims within arbitration, has “allow[ed] them to dominate [those] individual cases.”<sup>229</sup>

Other empirical studies also cast doubt on the claim about arbitration's virtues. One scholar studying how employees fare in arbitration concludes that they are subjected to poorer process, see their bargaining power in dispute resolution reduced, receive lower payouts, and that the arbitral process generally “disrupts existing mechanisms for enforcement of individual employment rights.”<sup>230</sup> As I alluded to in Part I, some studies suggest that while parties litigate, they largely do not arbitrate, thereby foregoing valid claims.<sup>231</sup> Recent studies also cast doubt on the efficiency of arbitration, noting high

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<sup>225</sup> David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63 (2015).

<sup>226</sup> *Id.* at 63, 99–101.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 63, 102–14.

<sup>229</sup> *Id.*

<sup>230</sup> Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 89–90 (2014).

<sup>231</sup> See *supra* note 96 and accompanying text.

costs and its limited ability to enable parties to vindicate even clearly established statutory rights.<sup>232</sup>

### 3. *Relationship to Labor Arbitration*

Finally, one might argue that labor arbitration in the union-firm context undermines this Article's thesis because, to the extent that the parity principle and labor arbitration are intended to be worker-protective, they each offer conflicting views about the benefits or drawbacks of privatized process and disparate ways of achieving social welfare goals.

To sort these points out, it is helpful to briefly consider the unique structure and history of labor arbitration in the United States. Labor arbitration arose in part because unions could not rely on courts to enforce collective bargaining agreements in the late nineteenth and early twentieth centuries, and they turned instead to grievance arbitration.<sup>233</sup> Arbitration through collective bargaining agreements spread in the following decades, and while the model was entrenched at the time of the enactment of the National Labor Relations Act of 1935, which protected the right of workers to bargain collectively, the statute did not speak to labor arbitration but generally left the regime intact.<sup>234</sup> In 1947, Congress passed the Labor Management Relations Act.<sup>235</sup> Section 301 provided federal district courts with jurisdiction to hear labor disputes,<sup>236</sup> and a series of decisions written by Justice Douglas interpreting it created a preference for labor arbitration and a strong presumption of non-interference with labor arbitration agreements and awards.<sup>237</sup>

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<sup>232</sup> See, e.g., Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 133–34, 161 (2004) (concluding that “the cost of arbitration is often prohibitively high”); Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 95–96, 112 (2014) (surveying employment discrimination claims and finding that “outcomes in arbitration are starkly inferior to outcomes reported in litigation”); Horton & Chandrasekher, *supra* note 225, at 82, 101–02 (finding that arbitration costs were higher than reported or predicted).

<sup>233</sup> See Stone, *supra* note 45, at 1008–09 (studying the historic use of arbitration in labor relations as a self-regulating measure).

<sup>234</sup> Pub. L. No. 64–198, 49 Stat. 449 (1935) (codified at 29 U.S.C. § 151–169 (2012)).

<sup>235</sup> Taft-Hartley Act § 301, 29 U.S.C. § 185 (1947).

<sup>236</sup> *Id.* § 301.

<sup>237</sup> See, e.g., *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) (holding that courts should honor agreements to arbitrate without weighing the merits of the suit or grievance); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (holding that, in considering arbitration awards and remedies, courts should not go into the merits); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960) (holding that courts should presume the validity of an arbitration provision and only intervene when there is no agreement to arbitrate); *Textile*

There are two main justifications for labor arbitration. The first is that it prevents strikes and therefore economic disruption and industrial unrest.<sup>238</sup> The second is that it is part and parcel of industrial self-government.<sup>239</sup> It is part of a model of “self-regulation” between organized workers and firms, overseen by an administrative body, the National Labor Relations Board.<sup>240</sup> At its roots, labor arbitration reflected a distrust of courts and a voluntarist view that “the processes of the state—the courts and administrative tribunals—should keep out” of the workplace, “an island of self-rule.”<sup>241</sup> Labor arbitration in this way reflects a view that industrial relations between organized workers and firms are distinctive. As Justice Douglas put it in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, “[t]he collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.”<sup>242</sup> Labor arbitration is a process by which that common law is made.<sup>243</sup>

Labor arbitration, then, does not involve the relatively unequal bargaining power that exists in the individual employee-employer dispute. The notion, indeed, is that labor arbitration helps to constitute a “shared normative community in which both parties participate,” much unlike individual worker-employer arbitration in which the employee does not “play a participatory role in framing the rules,

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Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957) (concluding that Section 301 “expresses a federal policy that federal courts should enforce [arbitration] agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way”).

<sup>238</sup> See Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 923 (1998) (“The major impetus for arbitration in the late nineteenth and early twentieth centuries, and during World War II, was as an alternative to disruptive, and sometimes violent, strikes.”); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 382 (1983) (“Arbitration gained early acceptance in those American industries that were especially vulnerable to economic losses occasioned by strikes.”).

<sup>239</sup> See, e.g., Corrada, *supra* note 238, at 924 (arguing labor arbitration “encourages collective bargaining, consistent with a private industrial pluralist vision of labor-management relations”); see also *United Steelworkers*, 363 U.S. at 567 (“Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement.”); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (describing the development of the ideal of industrial self-government).

<sup>240</sup> Stone, *supra* note 45, at 1008 (describing self-regulation as a “central theme” in the interpretation and implementation of the National Labor Relations Act).

<sup>241</sup> Stone, *supra* note 239, at 1515.

<sup>242</sup> 363 U.S. 574, 579 (1960).

<sup>243</sup> *Id.* at 578–79.

norms, and customs of the community.”<sup>244</sup> In this sense, one could argue that the existence of labor union arbitration and the prohibition of individual employee arbitration in section 1 make sense together. And neither predominates as a statement of the desirability of arbitration or avoiding it for workers, because even at their height, unions did not cover half of American workers, and therefore significant shares of the workforce faced differing contexts when resolving disputes with employers.<sup>245</sup> The different approaches of labor arbitration and the parity principle may reflect contextualized, rather than competing, views about courts. One need not believe that courts excel at protecting workers’ rights to believe that, in the absence of unions and where individual workers are involved, they are superior to a privatized process that companies may dominate.

Thus, the reason the state may not want individual workers to resolve disputes with companies, but may accept organized workers doing so, is that in the former case, the economic power disparity helps to form the state’s interest in protecting workers and shifting power back to workers. But unions are a mechanism of countervailing power themselves. They are more equipped to resolve disputes on relatively equal footing and are capable of shifting power back to workers; therefore, the lack of state oversight is justifiable in labor arbitration.<sup>246</sup> That is, both unions and the state can serve as vehicles of countervailing power for workers; in this case, one substitutes for another. And while publicity is lost, other advantages may be gained. Indeed, some assert, including the Supreme Court, that labor arbitration is superior to courts in adjudicating disputes that arise in the industrial process.<sup>247</sup> A labor arbitrator is “usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”<sup>248</sup>

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<sup>244</sup> Stone, *supra* note 45, at 1029–30 (contrasting arbitration in trade association cases with arbitration in franchise and employment cases).

<sup>245</sup> Steven Greenhouse, *Union Membership in U.S. Fell to a 70-Year Low Last Year*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/22/business/22union.html> (“The peak unionization rate was 35 percent during the mid-1950s, after a surge in unionization during the Great Depression and after World War II.”).

<sup>246</sup> See JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 137–55 (1952) (exploring how both labor unions and New Deal legislation facilitated the ability of workers and consumers to aggregate power and to counterbalance the power of concentrated industries).

<sup>247</sup> *Warrior & Gulf*, 363 U.S. at 581 (“The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.”).

<sup>248</sup> *Id.* at 582.

While I think this argument explains why labor arbitration and section 1's individual worker exclusion can coherently coexist and have historically coexisted on separate planes, the argument is not without weaknesses. In particular, there are strong arguments that privatizing disputes between unions and firms does not always serve workers well. For example, some query whether the voluntarist ideal of privatizing relations between unions and firms stifles a broader public collective consciousness that might strengthen the labor movement.<sup>249</sup> Furthermore, scholars argue that labor arbitration does not function as described and indeed may systemically undercut worker power<sup>250</sup> and be employer-biased.<sup>251</sup> (One might argue that class arbitration, where parties aggregate into class form within arbitral fora, might face similar structural burdens.<sup>252</sup>)

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<sup>249</sup> See, e.g., William Forbath, *Law and the Shaping of Labor Politics in the United States and England*, in *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS* (Christopher L. Tomlins & Andrew J. King eds., 1992) (comparing American and English labor's experiences with their respective countries' legal orders); Katherine V.W. Stone, *The Steelworkers' Trilogy: The Evolution of Labor Arbitration*, in *LABOR LAW STORIES* 186–87 (Laura J. Cooper & Catherine L. Fiske eds., 2005) (arguing arbitration's private nature contributes to the labor movement's isolation rather than bringing labor's concerns "into the public arena and foster[ing] alliances with other social groups.").

<sup>250</sup> Stone, *supra* note 239, at 1516–17, 1565 (finding labor arbitration to be "a vehicle for the manipulation of employee discontent and for the legitimation of existing inequalities of power in the workplace" insofar as it removes employees' greatest tool of power—disorder—and makes arbitrators, "by intervening to preserve order . . . not only non[-]neutral" but also "act[ ] consistently on the side of management").

<sup>251</sup> See, e.g., Corrada, *supra* note 238, at 926 (summarizing these arguments); see generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 160–70 (1983) (discussing the duties of successor employers to arbitrate pursuant to a predecessor's collective agreement); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 *MINN. L. REV.* 265 (1978) (arguing that the attempt to ease the oppression of working people through the National Labor Relations Act ultimately reinforced institutional bases of oppression).

<sup>252</sup> Class arbitration could also be thought to resolve some of the power asymmetries I have addressed, but I do not consider it here because I have concerns that it is a procedurally problematic variant on class actions. As one commentator puts it, class actions within the sphere of public adjudication are justified because they, unlike class arbitration, "require court involvement to, among other things, ensure fairness, obtain public input, ensure strict adherence to rules, and provide other procedural safeguards." Neal Troum, *The Problem with Class Arbitration*, 38 *VT. L. REV.* 419, 443 (2013). Class arbitrations also pose due process issues because they allow absent members' claims to be extinguished based on a contract under which "[a]bsent class members cannot by definition have empowered an arbitrator to adjudicate their claims." *Id.* at 442; see also Andrew Powell & Richard A. Bales, *Ethical Problems in Class Arbitration*, 2011 *J. DISP. RESOL.* 309, 310 (considering various procedural problems with class arbitration, including the lack of "standard[s] to keep arbitrators neutral and their counsel selection decisions unbiased from financial and social influence"). The Supreme Court has also cast doubt on whether class arbitration is compatible with the FAA, though, because it reduces the speed and efficiency of arbitration. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of

These critiques of labor arbitration do not strike at the vitality of the parity principle. On a rosy view of the story, the parity principle and labor arbitration both align with Furuseth's view:<sup>253</sup> When parity is lacking, courts play an important role in overseeing disputes and when it is not, unions hold power in the scheme of industrial self-government, and arbitration is permissible and maybe preferable. On a less rosy view, the parity principle and its commitments to the role of courts in fleshing out rights and protecting workers may have broader application. But however one judges them, historically the FAA and labor arbitration were twin vessels steered on the path to augmenting worker power and protecting workers. As the economic world has fractured, unraveling workers from unions and positioning them and consumers against increasingly concentrated firms,<sup>254</sup> the parity principle may have more to offer in guiding where law ends and arbitration begins.<sup>255</sup>

### III IMPLICATIONS

In this Part, I explore the implications of recognizing the parity principle. In Section A, I argue that it provides a theory demonstrating the incorrectness of the Supreme Court's reading of section 1 as it applies to employees. In Section B, I argue that the principle provides a better conceptual framework for animating legislative and administrative reforms excluding workers and consumers from federal arbitration law. In Section C, I argue that the principle supplies argu-

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arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–86 (2010) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution . . . . But the relative benefits of class-action arbitration are much less assured.”).

<sup>253</sup> See *supra* notes 140–46 and accompanying text.

<sup>254</sup> See, e.g., Heather M. Whitney, *Rethinking the Ban on Employer-Labor Organization Cooperation*, 37 *CARDOZO L. REV.* 1455, 1457 (2016) (“In 1959, 32.3% of the private sector labor force was unionized. In 2005, only 7.8% of workers in the private sector were. By 2011, that number was down to 6.9%, and in 2014 that number dropped again, to 6.6%.”); Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 *SEATTLE U. L. REV.* 859, 892–93 (2016) (“Union density in the United States has declined to an all-time low.”). See generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014) (exploring why most Americans lack constitutional rights—including freedoms of speech, association, and privacy—in the workplace).

<sup>255</sup> However, labor unions can and should play roles in this endeavor. For example, Ann Hodges argues that unions should provide both representation for individual workers in arbitration, where plaintiffs' lawyers may not have the incentives to do so, and should lead the campaign against individual employee-employer arbitration. Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 *MINN. L. REV.* 1682 (2014).

ments for at least limiting the extension of the FAA in cases involving statutory rights, if not outright denying it in many instances, and for rethinking the Court's FAA preemption cases.

### A. Worker Arbitration

The interpretation of the legislative history that I have offered here at its most basic level reveals the logic of why the statute excludes all individual employees within Congress's regulatory authority from its coverage. Scholars have made claims about section 1's exclusion, and this Article's contribution has been to reason outward towards a theory that captures the purpose, logic, and context of section 1. I thus explore here how this Article's recasting of the legislative history strengthens and provides a richer theoretical framework for interpreting section 1 vis-à-vis employees.

Individual employee agreements mandating arbitration "exploded onto the scene in 1991" and have grown ever since.<sup>256</sup> In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that a claim under the Age Discrimination in Employment Act of 1967<sup>257</sup> could be subjected to compulsory arbitration so long as the worker could not establish that an arbitration proceeding was inadequate to vindicate rights under the statute.<sup>258</sup> Because the plaintiff brought his claim pursuant to an agreement in a securities registration application—not an employment contract—the *Gilmer* Court did not address whether section 1 excludes individual employees from the FAA's coverage. It took up the invitation in *Circuit City Stores, Inc. v. Adams* in 2001.<sup>259</sup> A narrow majority declined to look at legislative history or context, and instead held that section 1 only excluded "transportation workers, but not other employment contracts."<sup>260</sup>

Recall that section 1 excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>261</sup> The majority reached its conclusion about the narrowness of the section applying the *ejusdem generis* canon, which as it said, is "the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar

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<sup>256</sup> Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 332 (2006) (arguing mandatory arbitration needs a clear set of due process rules, as well as penalties for employers who deter valid claims).

<sup>257</sup> 29 U.S.C. §§ 621–634 (2012).

<sup>258</sup> 500 U.S. 20, 30–32 (1991).

<sup>259</sup> 532 U.S. 105, 109 (2001).

<sup>260</sup> *Id.*

<sup>261</sup> 9 U.S.C. § 1 (2012).



in nature to those objects enumerated by the preceding specific words.”<sup>262</sup> The majority thus limited section 1’s general reference to employees “engaged in foreign or interstate commerce” to employees like the seamen and railroad workers with which the clause begins.<sup>263</sup> The majority also reasoned that because section 2 of the statute provides for arbitration of contracts “involving commerce,” and section 1 exempts workers “engaged in” interstate commerce, section 1 is likely intended to be narrower.<sup>264</sup>

The dissents showed the flaws in the Court’s reasoning. Justice Stevens, joined by three other justices, asserted that the history of the FAA “makes clear that the FAA was a response to the refusal of courts to enforce commercial arbitration agreements.”<sup>265</sup> Justice Stevens also addressed some of the legislative discussions presented in Part II, demonstrating that employees were generally intended to be excluded, and concluded that the history “amply supports the proposition that [section 1] was an uncontroversial provision that merely confirmed the fact that no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.”<sup>266</sup> The majority, however, was “[p]laying ostrich” with this history, pretending that the text was so clear that, reading it and employing the maxim *ejusdem generis*, it needed not turn to it.<sup>267</sup>

Margaret Moses views the Court’s interpretive position on *ejusdem generis* as an ironic one, because:

the Court has repeatedly asserted that canons of construction are to be used when a statute is not clear and that legislative history can overcome the use of canons of construction. Here, the Court turned the methodology upside down, saying that *ejusdem generis* made the statute so clear that legislative history did not need to be assessed.<sup>268</sup>

At any rate, as David Schwartz notes, it is difficult to argue that the text is *not* ambiguous in a way that would trigger the canon: “The distortion worked on the FAA by the subsequent expansion of the Commerce Clause, the unusual ‘involving commerce’ and ‘evidencing

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<sup>262</sup> *Circuit City*, 532 U.S. at 114–15 (internal quotations omitted).

<sup>263</sup> *Id.* at 115 (rejecting a broader interpretation of the clause, because “[u]nder this rule of construction the residual clause should be read to give effect to the terms ‘seamen’ and ‘railroad employees,’ and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it”).

<sup>264</sup> *Id.* at 115–18 (“The plain meaning of the words ‘engaged in commerce’ is narrower than the more open-ended formulations ‘affecting commerce’ and ‘involving commerce.’”).

<sup>265</sup> *Id.* at 125 (Stevens, J., dissenting).

<sup>266</sup> *Id.* at 128 (Stevens, J., dissenting).

<sup>267</sup> *Id.*

<sup>268</sup> Moses, *supra* note 18, at 147–48.

a transaction' language in section 2's coverage provision, and the sharp disagreement among courts and commentators over the exclusion's meaning all support th[e] conclusion" that section 1 is at least ambiguous.<sup>269</sup>

In a powerful dissent also joined by three other justices, Justice Souter reasoned that Congress named seamen and railroad workers because they were the parties that the federal government could at the time regulate under the common understanding of the reach of the Commerce Clause, and then followed the description of those parties with others "engaged in . . . interstate commerce" so the exclusion could grow elastically with workers considered to fall within Congress's Commerce Clause authority.<sup>270</sup> Justice Souter also posited that the Court's conclusion that section 1's verbiage "engaged in commerce" was narrower than "affecting commerce" was nonsensical. The phrase "engaged in" was merely linked to the way Congress understood its Commerce Clause power vis-à-vis workers at the time.

Justice Souter's dissent, to my mind, shows why even some committed textualists would have reason to be concerned with the majority's decision in *Circuit City*: Because the text is unclear, the legislative history and context surrounding the scope of the Commerce Clause at the time help to illuminate the meaning of the text. In this way, the history and context are useful to a textualist insofar as they clarify which workers Congress had in mind and the historical context that shaped its regulatory undertaking. Yet, the majority ignores this history. And it does so in ways that conflict with its approach in other arbitration cases. As Justice Souter noted, the Court had before read the phrase "affecting commerce" in section 2 to be elastic, to expand as the definition of interstate commerce expands.<sup>271</sup> The most logical conclusion was that the drafters added "workers engaged in . . . interstate commerce" after specifying ones who were then thought to be engaged because they wanted section 1 to be elastic: to encompass all workers within the federal government's regulatory domain.<sup>272</sup>

The history and interpretation I have offered help to support the dissenters' reading of the meaning of "engaged in . . . interstate commerce" by showcasing the underlying logic of why section 1 would be designed to exclude all employees within Congress's ambit. First,

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<sup>269</sup> David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5, 14–15 (2004) (arguing the oft-cited "national policy favoring arbitration" is problematic from a federalism perspective).

<sup>270</sup> *Circuit City*, 532 U.S. at 134–39 (Souter, J., dissenting).

<sup>271</sup> *Id.* at 134.

<sup>272</sup> *Id.* at 135–37.

drawing together the statements about employees cited by Justice Stevens with other statements about economic power helps to reveal the purposes of the statute, which were not merely to avoid having seamen and railroad employees fall within its coverage, but instead to withdraw workers from its coverage when such deep economic power disparities mandated that the state oversee dispute resolution. Justices Stevens and Souter do not go into the statements by Senator Walsh about “take it or leave it contracts” involving employees generally, or the assurances from Piatt that the FAA was not intended to extend to such circumstances where power disparities were so wide. Nor do they go into the acknowledgement by Cohen that courts were concerned about arbitration clauses involving unequal bargaining power coupled with his assurance that Congress was intervening or would intervene to protect such parties. All of these statements evince a deeper intent to protect employees generally and a theory of the role of public adjudication in doing so. Section 1 reflects a progressive view about the nature of economic power and the need for state intervention that breathes life and purpose into the employee exception and supports the more expansive view of it.

Embedding the principle in a particular view of regulation reveals why *Circuit City* matters so much.<sup>273</sup> The parity principle conflicts with the view of the FAA’s regulatory commitments that the Court advances generally in its FAA jurisprudence. For that reason, it threatens much of the Court’s reasoning. After all, if Congress was excluding workers from the statute’s coverage based on power disparities and regulatory concerns, then why would Congress be construed as intending to preempt the very state laws and doctrines designed to protect economically less powerful parties like workers? Or how could it be construed as meaning to subject federal statutory claims so often designed also to protect workers and consumers to arbitration? Getting at the principle underlying section 1 shows why *Circuit City* touches a nerve: Understanding section 1 differently potentially entails understanding the FAA differently.

### B. Consumer Arbitration

The parity principle’s logic sweeps more broadly. It can do more novel normative work than it does in the employee context by pro-

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<sup>273</sup> One implication of the *Circuit City* decision permitting worker arbitration is that the Supreme Court is now considering whether employer-mandated arbitration agreements waiving class and collective actions interfere with the collective action provisions of the National Labor Relations Act. See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), cert. granted, 137 S. Ct. 809 (U.S. Jan. 13, 2017) (No. 16-285).

viding a more satisfying theory for why legislators and administrative agencies should shield individual consumers from arbitration.

To conclude that the FAA should not be applied to consumers, scholars typically argue that the FAA was meant to be applied only to merchants or that it was meant to be applied only when parties “consented knowingly and voluntarily.”<sup>274</sup> However, the Supreme Court, in its neo-contractarian interpretation, has extended the FAA to a variety of consumers, often bound by contracts of adhesion.<sup>275</sup> The arguments against so extending the FAA are unpersuasive in part because they fall prey to the issues around the meaning and scope of consent that plague the contract paradigm. These arguments also fail to articulate a deeper underlying theory of why consumers should not fall within the statute’s range. The parity principle can do work in this regard, showing more clearly why consumer arbitration is inconsistent with a central purpose of the FAA and the regulatory commitments it expresses.

Because section 1’s exclusion only references workers, the parity principle is unlikely to aid in judicial interpretation of section 1 or the statute generally. But the logic of the parity principle provides a firmer basis for legislative and administrative efforts to eliminate or oversee consumer arbitration. The text and history of section 1 make it clear that Congress excluded individual employees from the FAA’s coverage because (i) there was deeply unequal bargaining power between workers as diffuse parties and employers; (ii) workers would end up accepting “take it or leave it” contracts mandating arbitration; and (iii) these contracts would exclude workers from the processes and protections of courts and be contrary to legislators’ efforts to protect them. These views reflect a progressive view of economic power and the role of the state in correcting economic power disparities for social welfare reasons. All of this reasoning can be extended to individual consumers as well.

First, consumer protection law flows from the same premises about unequal economic power and supports the same conclusions regarding the need for state intervention to correct it. Consumer protection impulses stem from “reform notions rooted in the Progressive movement of the early twentieth century,” which sought to employ

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<sup>274</sup> Moses, *supra* note 18, at 112.

<sup>275</sup> *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (finding the Federal Arbitration Act preempts judicial rules regarding the unconscionability of class arbitration waivers); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that section 2’s interstate commerce language should be read broadly to extend the Federal Arbitration Act’s reach to the limits of the Commerce Clause power); *see also supra* Section I.C.

“government power to remedy the unequal bargaining power of the individual” through antitrust law, food safety protections, and other regulations “enacted in part to offset control by increasingly large and powerful corporations of the labor and consumer marketplace.”<sup>276</sup> At the turn of the twentieth century, Congress passed the consumer protection laws on food safety, which formed the foundations of the modern FDA,<sup>277</sup> created the Federal Trade Commission in 1914 to protect consumers from unfair competition and practices,<sup>278</sup> and continued passing consumer protection laws regulating various areas of the economy through the 1920s and 1930s in the lead up to the New Deal.<sup>279</sup> And in contrast to labor law, the Court largely did not interfere with Progressive-Era consumer protection law.<sup>280</sup>

Indeed, the various consumer protection laws later passed in the 1960s and 1970s were also “enacted in part to remedy the unequal bargaining power of individual consumers in a marketplace dominated by large corporations” and in this way followed the Progressive-Era view of economic power.<sup>281</sup> From the Progressive Era to the present, “perceived inequality of bargaining power between merchants and consumers” has been a cornerstone of consumer protection law.<sup>282</sup> But even with the rise of consumer protection law, consumers never developed a vehicle like labor unions to provide them with an adequate collective voice before legal disputes arise. Consumers are still relatively diffuse vis-à-vis the firms with which they interact,

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<sup>276</sup> Prentiss Cox, *Goliath Has the Slingshot: Public Benefit and Private Enforcement of Minnesota Consumer Protection Laws*, 33 WM. MITCHELL L. REV. 163, 172 (2006) (arguing that restricting individual private rights of action under statutory fraud laws impairs the enforcement of consumer protection laws); see also MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933* (1990) (describing the relationship between rapid economic change and regulatory policy in the early twentieth century); JOHN F. WALKER & HAROLD G. VATTER, *THE RISE OF BIG GOVERNMENT IN THE UNITED STATES 19–20* (1997) (tracing the evolution of public demands for intervention and government responses to those demands).

<sup>277</sup> See, e.g., Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1225–27 (1986) (discussing the passage of the Pure Food and Drugs Act and the Meat Inspection Act in 1906).

<sup>278</sup> Federal Trade Commission Act, ch. 311, §§ 1, 5, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41, 45 (2012)).

<sup>279</sup> See, e.g., Robert I. Field, *The Malpractice Crisis Turns 175: What Lessons Does History Hold for Reform?*, 4 DREXEL L. REV. 7, 26 (2011) (situating patient protections in medical malpractice law as part of a larger movement resulting in the enactment of several consumer protection measures).

<sup>280</sup> Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 754 & n.19 (2009).

<sup>281</sup> Cox, *supra* note 276, at 173.

<sup>282</sup> DEE PRIDGEN & RICHARD M. ALDERMAN, *CONSUMER PROTECTION AND THE LAW* § 2.9 (2017).

which may explain as much as anything the prevalence of contracts of adhesion.

The statements in the legislative history about parity also support the conclusion that the parity principle should encompass consumers. Piatt's response to Senator Walsh's concern about the FAA being used to enforce "take it or leave it" contracts applies as equally to consumers, who also lack meaningful bargaining power, as to workers; recall that he "would not favor any kind of legislation that would permit the forcing a man to sign that [kind of] a contract" and reiterated that the statute's intended end is arbitration between merchants.<sup>283</sup> Similarly, Cohen's response that courts designed ouster doctrine out of concern that stronger parties would take advantage of less advantaged ones through arbitration, and that both courts and Congress would protect them, also applies to consumer law.<sup>284</sup> From the beginning of the twentieth century through the present, Congress and state legislatures have passed consumer protection laws, and federal and state courts have enforced them, relying on this view of economic power disparities and of the state's role in correcting them. Finally, Furuseth's analysis about how courts offer advantages to less powerful parties and about the importance of having courts flesh out the contours of laws designed to protect those parties also applies to consumers.

Taking these points together, one can see how (i) there often is vastly unequal bargaining power between consumers and companies; (ii) individual consumers often end up accepting "take it or leave it" contracts mandating arbitration; and (iii) Congress has passed laws, which courts interpret, in order to protect consumers in light of the economic power imbalances and their social welfare effects. Consumers, then, look like the workers at the center of section 1's parity principle: They are diffuse, disadvantaged in negotiating and resolving disputes with firms, and, in light of the advantages that the law has granted firms and the state's interest in consumers' social welfare, the state has reason to oversee their disputes with firms and to interpret the laws designed to protect them. That is, for the same reasons laid out in Part II, the state has reason to insist on public adjudication.

Though these arguments about consumers do not offer relief for courts interpreting section 1, the parity principle provides stronger affirmative reasons to limit consumer arbitration now in the legislative and administrative context. And, to the extent that the Supreme Court's decision in *Circuit City*, though wrongly decided, remains in

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<sup>283</sup> See 1923 Hearings, *supra* note 117, at 9–10.

<sup>284</sup> See Joint Hearings, *supra* note 37, at 14–15.

place, it also provides stronger reasons for legislative and administrative interventions for employees. The parity principle unwinds section 1's terse text, clarifying the rich thought that shapes the state's interest in overseeing disputes so characterized by power disparities. The principle illuminates the reasons that worker and consumer disputes ought to be removed from the FAA's enforcement provisions, as the Arbitration Fairness Act, introduced in Congress several times over the past few years, would do.<sup>285</sup> The parity principle could be employed by legislators trying to pass the Arbitration Fairness Act as a statement of FAA reformers' intent to exclude diffuse parties contracting with firms from arbitration for social welfare reasons. And, more generally, the principle's progressive logic of worker and consumer protection could similarly be employed by legislators.

The parity principle could also be employed by administrative agencies that in recent years have assumed a more active posture over arbitration involving consumers and workers.<sup>286</sup> For example, pursuant to its authority under the Dodd-Frank Act,<sup>287</sup> the Consumer Financial Protection Bureau has studied the use of consumer arbitration agreements and has the authority to impose conditions on or limit such agreements if doing so is in "the public interest" and will protect consumers.<sup>288</sup> It recently released a final rule prohibiting banks, credit card companies, and other financial firms from impeding consumers' rights to file or join group lawsuits, which Congress prohibited from going into effect.<sup>289</sup> This is likely not the end of that battle. The parity

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<sup>285</sup> See, e.g., Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); see also Megan Leonhardt, *Democrats Fight to Curb Mandatory Arbitration*, TIME: MONEY (Mar. 7, 2017), <http://time.com/money/4694256/democrats-employers-court-mandatory-arbitration/> (describing the 2017 Senate bill and noting that "[t]his is not the first time lawmakers have attempted to curb companies' use of arbitration. [Senator Al] Franken, as well as others, have introduced bills in previous Congresses that have not gone anywhere.").

<sup>286</sup> See, e.g., Daniel I. Deacon, Essay, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 1014–22 (2017) (exploring how agencies have banned arbitration in some circumstances, gathered information to assess whether to ban it in others, and imposed limits on arbitration in yet others).

<sup>287</sup> See 12 U.S.C. § 5518(a)–(b) (2012).

<sup>288</sup> *Id.*; see CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE (2013), [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf); CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (2015); see also Deacon, *supra* note 286, at 1014–19; *CFPB Launches Public Inquiry into Arbitration Clauses*, CONSUMER FIN. PROT. BUREAU (Apr. 24, 2012), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>.

<sup>289</sup> See Arbitration Agreements, 82 Fed. Reg. 55,500 (Nov. 22, 2017) (revoking the earlier rule, 82 Fed. Reg. 33,210 (July 19, 2017), under the joint resolution of Congress and

principle offers a theory of why regulations protecting consumers going forward are justified.

### C. *Statutory Rights and Preemption*

The parity principle can also bolster arguments for shielding more statutory rights from arbitration. The FAA is silent on its application to statutory rights and most of the statutes implicated in FAA cases arose during or after the New Deal transformation, that is, after the enactment of the FAA. But the parity principle offers a regulatory theory that helps to justify the vindication-of-rights doctrine as a statutory common law doctrine. While many arguments for having courts more closely supervise the arbitration of statutory rights focus on the vitality of statutory regulation generally, section 1 and its history suggest a regulatory theory focused on both the importance of public adjudication in safeguarding the rights of less powerful economic parties and on the regulatory reasons for the state to protect these parties through legislation subjected to judicial interpretation.

Recall the shifting history of the vindication-of-rights doctrine, which has been weakened over time. In *Wilko v. Swan*,<sup>290</sup> the Court refused to enforce an arbitration clause in a dispute over whether a brokerage firm violated the Securities Act of 1933, concluding that the clause interfered with the Securities Act's purposes.<sup>291</sup> The Securities Act "was drafted with an eye to the disadvantages under which buyers [of securities] labor," and the arbitration clause would only exacerbate those disadvantages because arbitrators' awards "may be made without explanation of their reasons and without a complete record of their proceedings" and deprive the plaintiff of understanding or challenging "arbitrators' conception of the legal meaning of [the] statutory requirements."<sup>292</sup> Because the Court found that both public process and appellate rights mattered under the statute, it demanded public adjudication.

This would begin to change in the 1980s. In *Mitsubishi*, the Court stated that the FAA "as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements" and concluded that there was "no reason" to depart from contractual agreement

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by operation of the Congressional Review Act); see also *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROT. BUREAU (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court>.

<sup>290</sup> 346 U.S. 427 (1953).

<sup>291</sup> *Id.* at 435–38.

<sup>292</sup> *Id.* at 435–36.



“where a party bound by an arbitration agreement raises claims founded on statutory rights.”<sup>293</sup> The Court reasoned that “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”<sup>294</sup> The Court concluded that unless Congress expresses an intention that statutory rights not be vindicated via arbitration, they generally could be arbitrated upon a showing of consent to arbitrate.<sup>295</sup> The Court did not deny the possibility that “legal constraints external to the parties’ agreement [could] foreclose[ ] the arbitration of those claims,”<sup>296</sup> and noted that an agreement to arbitrate could be put aside where vindicating statutory rights would “be so gravely difficult and inconvenient” that by arbitrating a party would “for all practical purposes be deprived of [its] day in court.”<sup>297</sup> In future years, the Court held that factors such as arbitration costs and fees could qualify as such impediments.<sup>298</sup> However, recently, the Court has indicated that even this construction of the doctrine is too liberal: In *American Express Co. v. Italian Colors Restaurant*, the Court concluded that an arbitration clause only triggers the doctrine when it forces a party to waive its “right” to vindicate a statutory claim.<sup>299</sup>

Scholars’ critiques of this doctrine are largely external to the FAA’s text and history. Scholars argue that allowing for statutory claims to be arbitrated sacrifices the development of legal precedent, the public interpretation of statutes, which puts parties on notice of wrongdoing, and even if it works to serve parties’ private ends, fails to secure public justice.<sup>300</sup> They also note evidence of how rarely parties arbitrate as compared to how much they litigate, suggesting that arbitration weakens regulatory enforcement.<sup>301</sup>

The parity principle provides reasons emanating from the FAA’s history to critique the weakening of the vindication-of-rights doctrine, and also situates the argument for judicial interpretation of statutory

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<sup>293</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–26 (1985).

<sup>294</sup> *Id.* at 626–27.

<sup>295</sup> *See id.* at 627–28 (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

<sup>296</sup> *Id.* at 628.

<sup>297</sup> *Id.* at 632 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

<sup>298</sup> *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

<sup>299</sup> 133 S. Ct. 2304, 2310–12 (2013); *see also* Aragaki, *supra* note 28, at 2018–21 (overviewing the shifts in the Court’s reasoning).

<sup>300</sup> *See* sources cited *supra* note 8.

<sup>301</sup> *See* sources cited *supra* note 96.

rights in a progressive theory of regulation. The framers of the FAA articulated a regulatory role for the federal government in shifting power to diffuse parties disadvantaged by the rise of industrialism through public adjudication and legislation subjected to judicial interpretation. The FAA was thus designed to allow merchants to arbitrate *and* to protect workers from being forced into privatized process, in part out of a belief that Congress, in passing statutes, and courts, in interpreting them, would better protect them, re-shifting power through public processes. The reasons that scholars offer for shielding statutory rights involving workers and consumers from arbitration can thus be located in the legislative history of the statute.

Section 1's parity logic casts doubt on whether any statutory rights designed to shift power to parties like workers and consumers should be drawn into arbitration through section 2. Indeed, the very statutes that the Supreme Court, out of deference to the contract paradigm, allows to be interpreted within arbitral fora are often consumer and worker protection statutes: antitrust laws,<sup>302</sup> antidiscrimination and age discrimination laws for workers,<sup>303</sup> consumer protection laws,<sup>304</sup> and wage and hour laws, to name a few.<sup>305</sup> Enfeebling legislation by allowing powerful parties to insist, often through contracts of adhesion, on arbitration is to take away the two central actors that Cohen, the FAA's architect, expected would protect workers.

While the parity paradigm thus suggests the advantages of legislative and administrative efforts to shield statutory rights somewhat broadly from arbitration, it more modestly suggests the advantages of the Court's approach in earlier cases, where it had a healthy skepticism that arbitration could interfere with the vindication of statutory rights and supervised the enforcement of arbitration agreements. Recall that in *Wilko*, the Court considered the lack of parity between the parties,<sup>306</sup> the advantages of public process that the less powerful party gives up,<sup>307</sup> and how the "protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness."<sup>308</sup> This approach considers, as the parity principle

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<sup>302</sup> See, e.g., *Mitsubishi*, 473 U.S. at 628.

<sup>303</sup> See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

<sup>304</sup> See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 83, 92 (2000).

<sup>305</sup> See also *Sabbeth & Vladeck*, *supra* note 8, at 806 (laying out in greater detail the worker and consumer protective purposes of several statutes that arbitration undermines).

<sup>306</sup> See 346 U.S. 427, 435 (1953).

<sup>307</sup> See *id.* at 435-46.

<sup>308</sup> *Id.* at 437. Similarly, in *Alexander v. Gardner-Denver Co.*, 416 U.S. 36 (1974), the Court stated that arbitration was a "comparatively inappropriate forum for the final resolution of rights created by Title VII." 416 U.S. at 56.

would, the power dynamics between parties and the regulatory aims of legislation. In contrast, the post-*Mitsubishi* arbitration-valorization approach allows the presumed priority of contract to interfere with the ability of economically less powerful parties to demand public justice.

An implication of this line of reasoning would also be to call into question the Court's conclusion that the FAA was intended to preempt state consumer and worker protection laws. The Supreme Court has allowed the FAA to preempt state laws that are obstacles to fulfilling the statute's purposes—namely, contract enforcement purposes.<sup>309</sup> Scholars have argued persuasively that the FAA was not intended either to apply in state court or to preempt state law.<sup>310</sup> The parity principle can add to these arguments by showing worker-protective purposes in the statute that reveal why Congress, especially in 1925 when so much of worker and consumer protection existed in state law, would not want to override those regimes. Indeed, today the state doctrines and laws that the Court preempts are often worker and consumer protection ones. For example, the California unconscionability doctrine that the Supreme Court found was preempted by the FAA in *Concepcion* was one regulating consumer adhesion contracts.<sup>311</sup> The impulse not to extend section 2 to parties with deeply unequal economic power extends its demand for public adjudication logically both to federal and state statutes and doctrines that are worker and consumer protective. The principle provides another reason to call into question the Supreme Court's FAA preemption jurisprudence.

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<sup>309</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>310</sup> See, e.g., Aragaki, *supra* note 28, at 1954–55 (“[The Burger Court] took the bold step of construing FAA section 2 to be an exercise of Congress’s substantive lawmaking power . . . even though the great weight of opinion was—and remains—that the FAA is from start to finish a procedural statute applicable only in federal court.”); Moses, *supra* note 18, at 112 (“Today, the statute which was enacted as a procedural statute effective only in federal court has been interpreted to apply to states and to preempt state law that conflicts with the Court’s interpretation of the FAA.”); cf. Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOT. L. REV. 33, 61–76 (2016) (summarizing Justice Thomas’s dissents in FAA interpretation cases, which argue that the FAA is a procedural statute).

<sup>311</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340, 352 (2011). The doctrine that the Court held was preempted in *Concepcion* was the so-called *Discover Bank* unconscionability doctrine. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (holding that waivers of court proceedings are unconscionable when they are found in adhesion contracts “in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money”).

## CONCLUSION

This Article has developed the history and logic of section 1 of the FAA, arguing that a parity principle resides beneath it. Mining its text and legislative history, I have argued that section 1 offers recognition by Congress of how economic power disparities could infect privatized process and a regulatory commitment to ensuring public process where such disparities existed in order to ensure the social welfare of workers. The principle reflects a view of how power disparities came to infuse economic relationships and of the role of the state, through legislation and public adjudication, in facilitating the power of economically less powerful parties. The principle establishes the FAA as a foundational statute prefiguring the New Deal legal order and aspects of its regulatory theory.

More broadly, my aim has been to demonstrate some of the benefits of placing civil procedure in its early economic context. For a generation, scholars often turned to procedure's relationship to reordering the state rather than the market: to its function in reforming state institutions, whether through school or prison reform litigation, and in providing due process rights from and protections against the state. Our modern civil procedure, though, grew up with the problems of industrialism and was designed in part to be responsive to them. In the American system, it is a mechanism of economic regulation.

The FAA is an early example of civil procedure's role in American law's imperfect yet remarkable reckoning with the rise of industrial capitalism and the problems of economic power it created. The statute draws a line where private forms of economic governance cannot encroach any further without state oversight and public process. In doing so, the FAA establishes itself as a formative part of constructing civil procedure in the American tradition as an escape from the realm of private governance, where diffuse parties like workers and consumers deal with firms in the shadow of the state, as well as insurance against the hegemony of that realm.

The parity principle in this way shaped a tradition of civil procedure that allows diffuse economic actors to bring public claims alleging that the conditions of private governance violate public norms and values. The principle is both litigation- and regulation-promoting. In light of the vast economic inequalities that the legal order had allowed to develop with the rise of industrialism, it reflects an insistence that the disputes between parties whose power is so disparate remain in courts. The principle is a foundational part of the architec-

ture establishing why in adjudication, as in other areas of regulation, certain relationships require the active participation and oversight of the state.