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## ARTICLES

### THE FEDERAL ARBITRATION ACT AS PROCEDURAL REFORM

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*Recent Supreme Court decisions such as American Express v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013), and AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011), represent dramatic developments with implications that extend far beyond the arbitration context. These decisions are a product of what the author refers to as the “contract model” of the Federal Arbitration Act (FAA). Heretofore largely unquestioned, the contract model posits the FAA’s original and dominant purpose as the promotion of private ordering in dispute resolution, as free as possible from state regulation. The model has, in turn, helped courts and commentators claim that the FAA requires arbitration agreements to be enforced strictly “according to their terms”—without regard to the way those agreements might compromise procedural values, such as when they preclude classwide relief.*

*This Article questions both the descriptive accuracy and normative persuasiveness of the contract model. It argues that when placed in their proper historical context, the FAA’s text and legislative history appear equally consistent (if not more so) with a purpose to improve upon the widely discussed procedural failings of the*

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courts circa 1925. From this standpoint, the FAA can be understood as an offshoot of ongoing efforts at the time to reform procedure in the federal courts—efforts spearheaded by figures such as Roscoe Pound and Charles E. Clark, and that eventually culminated in the Federal Rules of Civil Procedure in 1938. The FAA, in short, was arguably a type of procedural reform.

These insights lead the author to propose a “procedural reform” model of the FAA, one that he contends is both more faithful to the statute’s history (legislative and otherwise) and more adept at answering the difficult questions that confront arbitration law in the age of “contract procedure.” The author considers two recent examples to illustrate.

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## INTRODUCTION

In recent decades, contract—together with its associated values of autonomy, consent, and self-determination—has become the principal lens through which arbitration law and policy are debated and analyzed. This development has been made possible in large part by a particular conception of the original purpose behind the Federal Arbitration Act (FAA),<sup>1</sup> one that I shall refer to as the “contract model.” Far and away the dominant paradigm, the contract model posits the FAA as the brainchild of early twentieth-century merchants who saw arbitration as a means to achieve greater commercial autonomy and self-governance. On this view, the overarching purpose of the FAA was to promote private ordering in dispute resolution as free as possible from state interference. As one scholar put it, the FAA’s “core command [was] freedom of contract for arbitration agreements.”<sup>2</sup>

The contract model has had profound ramifications. It has empowered litigants to insist on the enforcement of arbitration clauses even when those clauses are contrary to state law or public policy.<sup>3</sup> It has helped legitimize the subordination of adjudicative values to the all-important purpose of keeping one’s promise to arbitrate.<sup>4</sup> For instance, in the recent case of *American Express v. Italian Colors Restaurant*,<sup>5</sup> the Court rejected uncontroverted evidence presented by the plaintiffs that a class arbitration waiver made it impossible to have their antitrust claims heard as a practical matter. It held that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The latter interest, we said, is ‘unrelated’ to the FAA.”<sup>6</sup> These and other developments, in turn, have skewed our understanding of arbitration and arbitration law. Rather than the backbone of a *bona fide* litigation

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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> 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).

<sup>3</sup> See *infra* Part I.B.1 (discussing changes in arbitration law with respect to the public-policy defense and FAA preemption).

<sup>4</sup> See *infra* Part I.B.2 (discussing the extent to which modern arbitration law values freedom of contract over procedural fairness); *infra* notes 398–405 and accompanying text (noting the trend toward enforcing arbitration agreements without regard to concerns about procedural inefficiency or waste).

<sup>5</sup> 133 S. Ct. 2304 (2013).

<sup>6</sup> *Id.* at 2312 n.5 (emphasis added) (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752–53 (2011)).

alternative, they have come to be seen as instruments of “self-deregulation”<sup>7</sup> and “‘lawless[ ]’ . . . private government.”<sup>8</sup>

But there is a radically different way to understand the origins and objectives of the FAA, and thus of the complicated balance that current FAA jurisprudence should strike between contract and procedure. On what I shall call the “procedural reform model,” early twentieth-century businessmen did not lobby for the FAA solely because they embraced Adam Smith’s invisible hand or Henry David Thoreau’s motto that “government is best which governs least.”<sup>9</sup> They also did so because they—and the judges and lawyers who supported them—were desperate for qualitatively superior adjudicative alternatives to the increasingly unworkable public system of civil justice.

The idea for a federal arbitration law originally arose out of debates about the need for reform in judicial procedure that captivated the nation in the early twentieth century. Figures such as Roscoe Pound and William Howard Taft contended that it was no longer possible to get substantial justice in the courts, in large part because practice and procedure had become too complicated, unforgiving, and self-important.<sup>10</sup> Meritorious cases were often tossed out because the wrong form had been filed or a precise turn of phrase had been omitted;<sup>11</sup> prejudicial errors were allowed to stand simply

<sup>7</sup> Paul D. Carrington, *Self-Deregulation, the “National Policy” of the Supreme Court*, 3 NEV. L.J. 259, 288 (2002); see also Owen M. Fiss, Comment, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985) (explaining Justice Burger’s turn to ADR as designed to “insulate the status quo from reform by the judiciary”); Henry S. Noyes, *If You (Re)Build It, They Will Come*, 30 HARV. J.L. & PUB. POL’Y 579, 639 (2007) (noting that arbitration has been “criticized for requiring the consumer to opt-out of the public dispute resolution system”).

<sup>8</sup> Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 66 (1944); see also Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1484 (1996) (referring to securities arbitration as “lawless”); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 782 (2002) (describing arbitration as the “denial of access . . . to the law itself”).

<sup>9</sup> HENRY DAVID THOREAU, *CIVIL DISOBEDIENCE* 2 (1849).

<sup>10</sup> See *infra* note 118 and accompanying text (describing Pound’s criticism of procedural law in the early 1900s and his arguments for reform).

<sup>11</sup> See *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the S. Comm. on the Judiciary*, 64th Cong. 6 (1915) [hereinafter *1915 Hearings on Procedure*] (statement of Thomas W. Shelton) (quoting a 1911 address by President Wilson to the Kentucky Bar Association for the proposition that “[t]he actual miscarriages of justice, because of nothing more than a mere slip in a phrase or a mere error in an immaterial form, are nothing less than shocking”); Edward J. McDermott, *Delays and Reversals on Technical Grounds in Civil and Criminal Trials*, 7 PROC. AM. POL. SCI. ASS’N 97, 104 (1910) (recounting the reversal of a rape conviction because the word “the” had been omitted from the indictment); William L. Ransom, *The Organization of the Courts for the Better Administration of Justice*, 2 CORNELL L.Q. 261, 264 (1917) (“A misplaced comma in the indictment invalidates the just conviction of the criminal and saves him from the punishment he merits.”); Jacob Trieber, *The Delays in the Courts*, 57 AM. L.

because counsel had failed to object in the manner provided by the controlling statute.<sup>12</sup> These reformers argued that the solution was to change the rules of judicial procedure—ironically, by *reducing* their number, complexity, and rigidity, and by increasing the power of courts to cast those rules aside when they frustrated the adjudication of disputes on their merits.<sup>13</sup>

As I shall demonstrate in greater detail, the FAA can be understood as a response to these same widely discussed failings of litigation circa 1925, and as having been inspired by the same philosophy of procedural reform that would eventually help produce the Federal Rules of Civil Procedure in 1938. Rather than proposing changes to *judicial procedure*, however, the FAA addressed these issues primarily by promoting access to an *alternative forum* whose simplicity, flexibility, and intolerance of technicalities embodied the basic procedural reform values shared by Pound and his colleagues.<sup>14</sup> In this way, the FAA was understood by merchants, judges, and lawyers as a vehicle for improving the procedure by which commercial disputes were adjudicated fair and square.

Few scholars have attempted to reconcile the FAA or its legislative history with this broader context.<sup>15</sup> As a result, both critics and sympathizers of the Court's jurisprudence have largely overlooked the possibility that the FAA's commitment to procedure might equal or rival its commitment to contract. My point is not that freedom of choice and privatization were unimportant; rather, it is that the dominant account of the FAA's history focuses almost exclusively on these things and thereby elides the complexity of the reasons behind the statute's enactment. Contract, in other words, was neither the whole story nor even its most compelling narrative.

Reconstructing a procedural reform model of the FAA is not just an academic exercise. Because the text of the FAA is so abbreviated, a great deal of arbitration law today turns on how a court interprets the legislative intent behind the statute. Some of the most significant developments in the Court's arbitration jurisprudence arguably do not

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REV. 24, 28–29 (1923) (recounting the common practice of dismissing cases simply because they were brought on the wrong side—law or equity—of the court).

<sup>12</sup> See, e.g., Thomas W. Shelton, *Hobbled Justice—A Talk with Judges*, 13 MINN. L. REV. 129, 130 (1929) (discussing similar facts in *Holmes v. State*, 240 S.W. 425 (Ark. 1922)).

<sup>13</sup> See *infra* notes 148–70 and accompanying text.

<sup>14</sup> See *infra* Part II.B.2 (arguing that the FAA also did so by establishing simplified, nationwide procedural rules for litigation about arbitration in federal court).

<sup>15</sup> Imre Szalai is the only one of whom I am aware. See *infra* notes 171–76 and accompanying text (discussing Szalai's scholarship on the influence that procedural reform had on the passage of the FAA).

follow from any clear textual directive.<sup>16</sup> Instead, they have typically been justified by claims about the underlying policies and purposes of the FAA.<sup>17</sup> Understanding where the FAA came from, in short, is at least as important as understanding what it purports to say.

All the more so as questions of procedure become increasingly salient in debates about arbitration law and policy. In the past thirty years, the Court has steadily shifted away from a “folklore” conception of arbitration to one that deems arbitration a *bona fide* litigation substitute.<sup>18</sup> This has allowed arbitration to evolve into something of a “civil court of general jurisdiction”;<sup>19</sup> indeed, some observe that it has become the “new litigation.”<sup>20</sup> But the more the law puts pressure on the proposition that “[a]n agreement to arbitrate . . . [is] a specialized kind of forum-selection clause,”<sup>21</sup> the more it will need to answer for any shortcomings of arbitration *procedures* born of contract. This, in turn, will require courts and legislatures to confront foundational questions about whether the FAA provides guidance on these issues and, if so, how. In short, it is time to start taking a procedural reform model of the FAA seriously.

This Article proceeds as follows. In Part I, I set up the primary arguments typically marshaled in support of the contract model and then briefly suggest what is problematic about the model for the future of arbitration law. In Part II, I draw on the history of both procedural and arbitration law reform to make the case for a “procedural reform” model of the FAA. In Part III, I apply this new model

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<sup>16</sup> See, e.g., Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1238 (2011) (noting, in relation to FAA preemption, that “the language of the FAA is simply too indeterminate, and the congressional record leading to its enactment too sparse, to draw any firm conclusions about its original meaning”); Comment, *Leading Cases*, 115 HARV. L. REV. 507, 515 (2001) (referring to the “hopelessly indeterminate text” of FAA section 1).

<sup>17</sup> Good examples are FAA preemption and the demise of the public-policy defense. See *infra* Parts II.B.1, II.B.2 (discussing these developments); see also *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (enforcing an arbitration agreement deemed unconscionable under California law even though the plain language of section 2 does not authorize enforcement if there are “grounds as exist in law or in equity for the revocation of any contract” (citing 9 U.S.C. § 2 (2012))).

<sup>18</sup> See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 42–47 (1999) (describing “the demise of folklore arbitration” and noting that “[t]oday, many arbitrations resemble litigation”); see also Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARO. L. REV. 1103, 1146–47 (2011) (describing this shift in terms of an “amiable compositeur” model to a “legal model of the arbitration process”).

<sup>19</sup> Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997).

<sup>20</sup> E.g., Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1.

<sup>21</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

to two contested issues that resurfaced during the Court's 2012 Term and are likely to recur in the future: (i) the proper default rule to be applied where an arbitration agreement is silent about the availability of class arbitration (and, by extension, other procedures and remedies)<sup>22</sup> and (ii) the continued viability of two critical safety valves on the enforceability of arbitration clauses—unconscionability and the so-called “vindication of rights” doctrine.<sup>23</sup> I argue that a procedural reform model of the FAA offers a richer and more satisfying way to frame and resolve these issues.

## I

### THE CONTRACT MODEL OF THE FAA AND ITS CONSEQUENCES

The contract model likely suggests different things to different people, so let me first be clear about the target of my critique. As I define it, the contract model consists of a descriptive and a normative claim. The descriptive claim has been articulated variously as follows: “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.”<sup>24</sup> “[T]he central or ‘primary’ purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.”<sup>25</sup> The FAA requires courts to “‘give effect to the contractual rights and expectations of the parties.’”<sup>26</sup> These are all claims about the *foundational* purpose of the FAA. On this view, private ordering in dispute resolution was not just one of many important objectives behind the statute; instead, it reflected Congress’s overriding objective.<sup>27</sup>

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<sup>22</sup> See *infra* Part III.A (discussing *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013)). The Court considered the same issue less than three years earlier, in *Stolt Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

<sup>23</sup> See *infra* Part III.B (discussing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)). The Court had considered the unconscionability defense two years earlier, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>24</sup> *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); accord *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (“[T]he basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate.”).

<sup>25</sup> *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal citations omitted); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–54 (1995).

<sup>26</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003) (Rehnquist, C.J., dissenting) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

<sup>27</sup> See, e.g., Brunet, *supra* note 18, at 79 (“The significance of furthering party autonomy lies at the heart of the FAA.”); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington and Haagen)*, 29

The descriptive claim, in turn, fuels certain normative claims about what the FAA or the federal common law of arbitration requires in particular cases. For instance, in *Southland Corp. v. Keating*, the Court relied on the proposition that “the purpose of the [FAA] was to assure those who desired arbitration . . . that their [contractual] expectations would not be undermined . . . by state courts or legislatures,”<sup>28</sup> in order to hold that the FAA *should* preempt contrary state law or public policy.<sup>29</sup> Although the contract model makes a variety of normative claims, they share certain common features. First, they each purport to follow in whole or in part from the descriptive claim of the FAA’s original purpose.<sup>30</sup> Second, in varying degrees they each evince a strong commitment to values such as party autonomy, freedom of choice, and self-governance free of interference by the state.

### A. *The Descriptive Claim*

Prior to the 1920s, United States arbitration law generally followed the old English revocability doctrine with respect to agreements to arbitrate future (as opposed to existing) disputes.<sup>31</sup> The doctrine allowed a party to an arbitration clause to “revoke” the arbitrator’s

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McGEORGE L. REV. 195, 197 (1998) (stating that the FAA “itself explicitly enacted the contractual approach to arbitration law”).

<sup>28</sup> 465 U.S. 1, 13 (1984) (internal quotation marks omitted).

<sup>29</sup> *Id.* at 16.

<sup>30</sup> To be sure, normative claims about the FAA sometimes take their meaning from a source other than the statute’s original purpose, such as a theory about the nature of the arbitration process. For example, Alan Rau has argued that “the arbitration process is in fact all about . . . private ordering and self-determination.” Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 486 (1997); accord EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3 (2006) (“Arbitration rests on a firm foundation of party autonomy. The parties own the dispute and should be able to control the details of their disputing process.”); Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 39 (“[A]rbitration is aimed first and foremost at ensuring the parties’ procedural autonomy.”). Although these descriptive claims carry normative implications that sound in contract, they are not strictly speaking examples of the contract model because they do not attempt to ground those implications in a theory about the original purpose behind the FAA.

<sup>31</sup> See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 15 (1992) (“The key characteristic distinguishing nonmodern [arbitration statutes] from modern is that the latter make simple executory agreements to arbitrate disputes—particularly future disputes—irrevocable and fully enforceable and the former do not.”). By the late nineteenth century, many states had overturned the revocability doctrine as to agreements to arbitrate *existing* disputes. *E.g.*, TENN. CODE, ch. 9, § 3439 (1858); 47 VA. CODE, ch. 153, § 2 (1849); *Shroyer v. Bash*, 57 Ind. 349, 354–56 (1877); *Carey v. Comm’rs of Montgomery Cnty.*, 19 Ohio 245, 281–82 (1850).

authority any time before the issuance of an award.<sup>32</sup> Revocation did not (for the most part) render arbitration agreements invalid, because the revoking party was always liable in breach of contract and the aggrieved party was always entitled to money damages.<sup>33</sup> The problem was that the right to revoke left courts powerless to compel arbitration using the equitable remedy of specific performance,<sup>34</sup> and in the absence of that remedy money damages were almost always an inadequate substitute.<sup>35</sup>

By the turn of the century, judges, lawyers, and business persons increasingly came to view the revocability doctrine as based on an irrational judicial “jealousy”<sup>36</sup> toward arbitration rather than on legitimate considerations of jurisdiction or procedure.<sup>37</sup> These suspicions came into sharp focus when Julius Henry Cohen, a New York lawyer and the chief draftsman of the FAA, published a book demonstrating in great detail that the revocability doctrine was built on a house of cards.<sup>38</sup> Among other things, Cohen argued that the doctrine had originated in dictum from an obscure seventeenth-century English case and was anyhow predicated on a conflation of agency and contract principles.<sup>39</sup> He and others dismissed the doctrine as an “anach-

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<sup>32</sup> See S. REP. NO. 68-536, at 2 (1924) (“It is very old law that . . . [arbitration] agreement[s] were] subject to revocation by either of the parties at any time before the award.”); U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1008, 1010 (S.D.N.Y. 1915) (describing the origins of the revocability doctrine). The doctrine of revocability has been traced to the ancient public policy against “ousting” the courts of their jurisdiction. See *infra* note 273 and accompanying text (discussing the ouster doctrine).

<sup>33</sup> This followed from the settled principle that the revocation of an agent’s authority neither excuses nor justifies a breach of contract occasioned by the revocation. *E.g.*, Warburton v. Storr, [1825] 4 B. & C. 103, 104–07 (Abbot, C.J.) (U.K.); FLOYD RUSSELL MECHEM, A TREATISE ON THE LAW OF AGENCY §§ 620–21 (1889).

<sup>34</sup> The reason was that equity never compels an idle gesture. See JOHN NORTON POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 368–69 (1879) (stating that agreements which are by nature revocable may not be specifically enforced because “specific performance would be an idle and useless proceeding”).

<sup>35</sup> Money damages were almost always considered nominal because common law courts were generally unreceptive to the idea that a litigant suffered any damage by trying his case in the Crown courts rather than before an arbitral tribunal. Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 604–05 (1927).

<sup>36</sup> H.R. REP. NO. 68-96, at 1 (1924); see U.S. Asphalt Ref. Co., 222 F. at 1007 (describing the “nature and history of the reasons” behind revocability in terms of “the hostility of English-speaking courts to arbitration”); JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 70 (1918) (characterizing the revocability doctrine as an instance of the common law’s “arrested development”); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926) (explaining revocability as “rooted originally in the jealousy of courts for their jurisdiction”).

<sup>37</sup> For further background see Aragaki, *supra* note 16, at 1250–54 (2011).

<sup>38</sup> See COHEN, *supra* note 36 (casting doubt on the precedential value of and policy justifications for the revocability doctrine and advocating its abrogation).

<sup>39</sup> *Id.* at 94–96.

ronism" in a changing world of interstate, indeed international, commerce.<sup>40</sup>

Proponents of arbitration law reform therefore called for the abrogation of revocability, which in turn would finally allow predispute arbitration agreements to be enforceable via specific performance. Liberty of contract was certainly an important theme in these calls for reform. During hearings on the federal arbitration bill in Congress, for instance, Cohen explained that "everybody to-day feels very strongly that the right of freedom of contract which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion."<sup>41</sup> A bargain was, after all, a bargain, and it was difficult to perceive any good reason why a bargain over arbitration should be less enforceable than one over price, delivery, or just about anything else.<sup>42</sup> As a House Report on the bill that would become the FAA explained:

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed upon the

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<sup>40</sup> *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 16 (1924) [hereinafter *1924 Hearings on Arbitration*] (statement of Julius Henry Cohen); H.R. REP. NO. 68-96, at 12; see also COHEN, *supra* note 36, at 70 (describing the revocability doctrine as "incongruous to modern business").

<sup>41</sup> *1924 Hearings on Arbitration*, *supra* note 40, at 14 (statement of Julius Henry Cohen). It was not uncommon for jurists and commentators who called for arbitration reform during this period to cite George Jessel's famous paean to freedom of contract in *Printing & Numerical Registering Co. v. Sampson*, [1875] 19 L.R.Eq. 462, 465 (Jessel, M.R.) (U.K.). See, e.g., COHEN, *supra* note 36, at 17 (quoting *Sampson* for the proposition that "if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting"); cf. *Adinolfi v. Hazlett*, 88 A. 869, 870-71 (Pa. 1913) (holding that the revocability doctrine was contrary to the constitutional guarantee of liberty and property); *Del. & Hudson Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258 (1872) ("The better way, doubtless, is to give effect to [arbitration] contracts, when lawful in themselves, according to their terms and the intent of the parties . . .").

Several decades ahead of their American counterparts, English judges expressed a similar solicitude for freedom of contract when repudiating the revocability doctrine. For example, in a case that overturned *Vynior's case*, [1609] 77 Eng. Rep. 597 (K.B.), Lord Coleridge criticized revocability as "directly contrary to the spirit of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals." *Scott v. Avery*, [1856] 5 HLC 811, 843, 852-54 (Coleridge, L.J.) (U.K.).

<sup>42</sup> See *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 8 (1923) [hereinafter *1923 Hearing on Arbitration*] (statement of W.H.H. Piatt) (testifying that the law should enforce contracts for arbitration the same as contracts for the sale of goods); Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 149-50 (1921) (arguing that when parties determine that it is in their interest to waive a jury trial and agree to arbitration, their free choice should be respected).

same footing as other contracts, where it belongs. . . . The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.<sup>43</sup>

Section 2 of the FAA accordingly provides that both pre- and post-dispute arbitration agreements “shall [henceforth] be valid, *irrevocable* and enforceable . . . .”<sup>44</sup> This is the sense in which the FAA is a species of “modern” arbitration law.<sup>45</sup>

To courts and commentators, these excerpts from the text and legislative history of the FAA do not just suggest one of several animating values behind the statute; they reveal the statute’s *raison d’être*. For example, Edward Brunet claims that “[t]he theme of upholding the intent of the parties resounds through the legislative history of the FAA” such that “[a]ny construction of the FAA that frustrates party intent . . . seems at odds with the general thrust of the legislation.”<sup>46</sup> Drawing on her meticulous account of the way that arbitration was historically used between merchant peers and within trade associations, Katherine Stone similarly argues that the FAA’s original purpose was consistent with “further[ing] a vision of voluntarism, delegation, and self-regulation within the business and commercial communities.”<sup>47</sup> Stephen Ware likewise contends that the FAA “itself explicitly enacted the contractual approach to arbitration law.”<sup>48</sup> These and other assessments of the FAA’s origins help rein-

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<sup>43</sup> H.R. REP. NO. 68-96, at 1–2; *see also* 65 CONG. REC. 1931 (1924) (“This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts . . . .”).

<sup>44</sup> 9 U.S.C. § 2 (2012) (emphasis added).

<sup>45</sup> Thus, when I refer to “modern” arbitration law in this Article, I mean arbitration law that follows the approach of the FAA (and the New York Arbitration Law of 1920, on which it was based) by abrogating the revocability of agreements to arbitrate both future and existing disputes.

<sup>46</sup> Brunet, *supra* note 18, at 84–85; *see also* Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1253 (2011) (“[T]his contract-based understanding of the [FAA] owes much to the Act’s legislative history . . . .”).

<sup>47</sup> Katherine Van Wezel Stone, *Rustic Justice*, 77 N.C. L. REV. 931, 936 (1999); *see also* JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 101 (1983) (arguing that “advocates of commercial autonomy . . . turned to arbitration as a shield against government intrusion” and that arbitration “permitted businessmen to solve their own problems ‘in their own way—without resort to the clumsy and heavy hand of Government’”).

<sup>48</sup> Ware, *supra* note 27, at 197; *see also* Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN’S L. REV. 99, 100 (2007) (arguing that what the author calls the “contractarian model” of arbitration was originally “put forward early in the twentieth century by proponents [such as Cohen] who emphasized the advantages of arbitration in commercial matters”); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 729 (1999) [hereinafter Ware, *Default Rules*] (“The entire FAA embodies a strongly contractual approach to arbitration law.”).

force the Court's conclusion that "the FAA [was] 'motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered.'"<sup>49</sup>

But as persuasive as this narrative appears at first blush, there are at least two reasons for immediate skepticism. First, the contract model's descriptive claim has been almost exclusively supported by the same isolated snippets from the statute's text and legislative history quoted above. It is very difficult to draw any persuasive conclusions about legislative intent from such a small sample, however. Furthermore, because the federal arbitration bill had been almost entirely cloned from the first modern arbitration statute passed by the New York State Assembly in 1920, it is widely acknowledged that there was "a dearth of intelligent discussion" on it in Congress.<sup>50</sup> Consider that the record of that discussion consists only of (i) testimony from less than three hours of hearings before House and Senate Judiciary Committees<sup>51</sup> and (ii) a mere six pages of House and Senate Reports. With few exceptions,<sup>52</sup> however, these sources—occasionally together with selected writings of Cohen or Charles Bernheimer<sup>53</sup>—represent the entire universe of materials that courts and commenta-

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<sup>49</sup> *Hall St. Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985)); see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quoting *Byrd* for the same proposition).

<sup>50</sup> MACNEIL, *supra* note 31, at 108 (quoting Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L.Q. 238, 428, 430 n.121 (1930–1931)). As Ian Macneil explained, Congress' role was more in the nature of putting a "stamp of approval" on a bill that had been thoroughly vetted elsewhere. *Id.* at 107.

<sup>51</sup> Only two hearings were held on the FAA. The first, held on January 31, 1923 before a subcommittee of the Senate Judiciary Committee, began at 2:30 p.m. and concluded at 4:00 p.m. *1923 Hearing on Arbitration*, *supra* note 42, at 1, 22. But the actual time spent on discussing the FAA was less than one and a half hours because part of the hearing was devoted to a consideration of a Sales bill. *Id.* at 11–14, 15–18. The second hearing, held on January 9, 1924 before the subcommittees of the House and Senate Judiciary Committees, began at 2:30 p.m. but there is no record of when it was adjourned. *1924 Hearings on Arbitration*, *supra* note 40, at 1, 41; see E-mail from Rodney A. Ross, Center for Legislative Archives, to Amber Madole, Ref. Librarian, Loyola Law School (Mar. 29, 2013, 14:47 EST) (on file with the *New York University Law Review*) (reporting that the minute books also did not indicate the time at which the hearing was adjourned). Judging from the written testimony and the fact that many of the same individuals were involved in both hearings, the second hearing was likely of a similar length.

<sup>52</sup> Modern scholars have sometimes found support for the contract model even after canvassing a broader set of materials from the period. See, e.g., IMRE S. SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013) (citing contemporaneous materials from bar associations, chambers of commerce, state and federal legislatures, judges, lawyers, and academics); Brunet, *supra* note 18, at 81–84 (citing the work of judges and lawyers from the period).

<sup>53</sup> Bernheimer, a businessman and nonlawyer, was a leading proponent of and lobbyist for modern arbitration law reform. See *C.L. Bernheimer, Merchant, Dies*, 79, N.Y. TIMES,

tors have consulted to back up their claims about a nearly one hundred-year-old statute.

Second, the descriptive claim is difficult to square with the bulk of the FAA's provisions, which simply set forth procedural rules for litigation about arbitration in "U.S. district court[s]." <sup>54</sup> The weight of scholarly opinion, moreover, is that the FAA was an exercise of Congress's Article III power over federal procedure rather than its Article I power over interstate commerce. <sup>55</sup> The contract model attempts to resolve this tension by taking section 2 (declaring arbitration agreements "enforceable") to be the FAA's "centerpiece" <sup>56</sup>—the prism through which the entire statute should be interpreted and applied. But even if abrogating revocability was the FAA's chief *innovation* over premodern arbitration law, it hardly follows that this captures the entirety of the statute's purposes or animating values. Consider that several of the FAA's numerous procedural sections, such as the standards for vacatur of arbitral awards, were modeled not on the New York Arbitration Law of 1920 (which included no provisions on vacatur) but rather on the premodern New York arbitration law in existence as of 1869. <sup>57</sup> This suggests at minimum that the FAA

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July 2, 1944, at 19 (stating that Bernheimer was "widely known as the father of commercial arbitration"). Thanks to Imre Szalai for pointing this out to me.

<sup>54</sup> 9 U.S.C. §§ 4, 9–11 (2012).

<sup>55</sup> E.g., MACNEIL, *supra* note 31, at 122–33 (arguing that the FAA was intended to apply only in federal court); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 18 (2004) (arguing that the FAA was "originally intended as a procedural rule for the federal courts" and that the idea that the FAA might derive from Article I was "beyond the contemplation of Congress; it simply did not arise in the legislative history of the Act"). *But see* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2002) ("[T]here are 'strong indications' in the legislative history that the drafters of the FAA intended it to apply in state court . . .").

<sup>56</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *see also* Brunet, *supra* note 18, at 78 (describing FAA § 2 as "the heart of the act").

<sup>57</sup> 1869 N.Y. Laws 560. The earlier Field Code provisions on vacatur of arbitration awards are substantially similar, although they do not list "evident partiality or corruption of the arbitrators" as a ground for vacatur. *Compare* 1850 N.Y. Laws tit. 8, § 1549, *with* 1869 N.Y. Laws 560. Those Field Code provisions arguably have an even longer pedigree. *See, e.g.*, Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. DISP. RESOL. 1, 16–17, 30–31 (2008) (tracing FAA § 10 to the English Arbitration Act of 1698).

Prior to the New York Arbitration Law of 1920, postdispute arbitration agreements (known as "submission agreements"), and the arbitration process more generally, were regulated by sections 2365 to 2386 of the New York Code of Civil Procedure. These sections were comprehensive in the sense that they treated both front- and back-end issues. The 1920 Arbitration Law was intended merely to complement these already-existing sections by introducing several front-end provisions relating to predispute arbitration agreements, which prior law had no reason to address due to the revocability doctrine. *See* 1921 N.Y. Laws 18–19 (providing procedures for enforcing predispute arbitration

embodies values that both predate and extend beyond making predispute arbitration agreements enforceable by specific performance. As I shall demonstrate, the reason why the legislative history of the FAA and contemporaneous commentary focused a great deal on front-end enforceability was because this was the only and most obvious aspect of existing law that needed to change in order to take full advantage of arbitration's *procedural* benefits.

### B. Normative Claims

The historical accuracy of the descriptive claim is not a matter of interest just to academics. In large part due to the brevity of the FAA's text,<sup>58</sup> a great deal of United States arbitration law today hinges on what a court takes to be the legislative intent behind the FAA. As a theory of the FAA's original purposes and what they require, therefore, the descriptive claim is poised to exert a far-reaching influence.

And indeed it already has. The contract model's descriptive claim has emboldened the Court to push modern arbitration law to a point where, rather than contract *law*, "[f]reedom of contract . . . is at the very core of how the law regulates arbitration."<sup>59</sup> Broadly speaking, there have been two stages in the creeping contractization of arbitration law: what I shall call "freedom of contract" and "freedom of contract procedure." In the first stage, the Court gradually disabled courts and legislatures from regulating whether and under what circumstances certain types of (substantive) claims may be arbitrated. In the

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agreements and amending existing Code of Civil Procedure sections 2365 to 2386 to apply to such agreements just as if they were submission agreements). The pre- and post-1920 arbitration provisions were eventually merged in the New York Civil Practice Act. See N.Y. C.P.A. §§ 1448–69 (1923). Although the FAA's front-end provisions were modeled on the New York Arbitration Law of 1920, its back-end provisions (such as the sections on confirming, vacating, and modifying awards) were in relevant respects taken *verbatim* from the already-existing provisions of the New York Code of Civil Procedure. Compare United States Arbitration Act, ch. 213, §§ 9–13, 43 Stat. 883, 885–86 (1925), with N.Y. CODE CIV. PROC. §§ 2373–76, 2379–80 (Parson's 1920).

<sup>58</sup> See *supra* note 16 and accompanying text (arguing that the plain language of the FAA is too indeterminate to support some recent developments in the Court's jurisprudence such as FAA preemption).

<sup>59</sup> Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1192–93 (2003); see also Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333–34 (criticizing the Court's FAA jurisprudence as predicated on a "blind commitment to freedom of contract"); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1336–37 (1996) (arguing that the Court's FAA jurisprudence has emphasized "freedom to contract" at the expense of "freedom from contract"); Ware, *Default Rules*, *supra* note 48, at 739 (arguing that substantive rules that override the agreements of the parties "contravene freedom of contract, and the FAA's endorsement of it").

second (current) stage, it is doing the same with respect to the parties' choice of procedures in arbitration.

### 1. *Freedom of Contract*

The contract model has played a central role in helping to legitimize the idea that courts and state legislatures must give parties maximal discretion over *substantive* arbitrability. As the Court has often remarked, “[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”<sup>60</sup> Two major shifts in the Court’s arbitration jurisprudence instantiate this normative claim: (a) the demise of the public-policy defense and (b) FAA preemption of state law.

#### a. Public Policy

For several decades after its enactment, the FAA was construed as placing limits on the arbitrability of selected federal statutory claims. Good examples from this period are *Wilko v. Swan*<sup>61</sup> and *Alexander v. Gardner-Denver Co.*,<sup>62</sup> which held that claims under the Securities Act of 1933<sup>63</sup> and Title VII of the Civil Rights Act,<sup>64</sup> respectively, could not be arbitrated despite the existence of a broadly worded arbitration clause. The basic rationale was that these public-regarding claims were too important to be resolved through arbitration, which lacked certain procedural safeguards available in court such as robust discovery, compulsory process, and appellate review.<sup>65</sup> In these early cases, therefore, the enforcement of arbitration agreements was balanced against procedural considerations—specifically, whether arbitration was an “adequate substitute for a judicial pro-

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<sup>60</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); see also *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010).

<sup>61</sup> 346 U.S. 427 (1953).

<sup>62</sup> 415 U.S. 36 (1974).

<sup>63</sup> 15 U.S.C. §§ 77a–77bbb (1952).

<sup>64</sup> 42 U.S.C. §§ 2000e–2000e-15 (1970).

<sup>65</sup> See, e.g., *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981) (reasoning that claims under the Fair Labor Standards Act typically involve “complex mixed questions of fact and law” that cannot be entrusted to arbitrators, whose “specialized competence . . . pertains primarily to the law of the shop, not the law of the land”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56 (1974) (describing arbitration as a “comparatively inappropriate forum for the final resolution of rights created by Title VII”); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968) (reasoning that the complexity and public nature of antitrust claims make them “far better suited to judicial than to arbitration procedures”).

ceeding” for purposes of safeguarding rights conferred by the applicable federal statute.<sup>66</sup>

Beginning in the 1980s, however, the Court eliminated this public-policy defense to the enforcement of arbitration agreements. Instead of framing the arbitrability question in terms of procedural adequacy or fairness, it began doing so in terms of the sanctity of promises and of protecting expectation interests. Thus, from the (descriptive) proposition that “[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,” the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*<sup>67</sup> concluded that claims under the Sherman Antitrust Act were arbitrable in principle.<sup>68</sup> “Having made the bargain to arbitrate,” the parties would be “held to it unless Congress itself” provided otherwise.<sup>69</sup> Since *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>70</sup> decided four years later, federal statutory claims are for all practical purposes no less arbitrable than ordinary contract and tort claims.<sup>71</sup>

## b. Preemption

About the same time as these developments were taking place, the Burger Court altered our understanding of the FAA in a second important respect: It took the bold step of construing FAA section 2 to be an exercise of Congress’s substantive lawmaking power under the Commerce Clause,<sup>72</sup> even though the great weight of opinion

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<sup>66</sup> *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985); see also *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202–04 (1956).

<sup>67</sup> 473 U.S. 614, 625 (1985) (quoting *Dean Witter Reynolds*, 470 U.S. at 221).

<sup>68</sup> *Id.* at 628.

<sup>69</sup> *Id.*; see also *Shearson/Am. Express v. McMahon*, 482 U.S. 220, 242 (1987) (holding that civil RICO claims were arbitrable for the same reason, their quasi-criminal character notwithstanding).

<sup>70</sup> 500 U.S. 20 (1991).

<sup>71</sup> Lower courts now routinely invoke the bargain principle to justify sending all manner of federal statutory claims to arbitration, leading many to conclude that the public-policy exception is now entirely defunct. See 2 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 16.3.3.1, at 16:47 (1999) (“[T]he public policy defense is [now] dead under the FAA [for all practical purposes].”); Kirgis, *supra* note 48, at 103 (arguing that *McMahon* and other progeny of *Mitsubishi* effectively “killed off” the adjudicative model of arbitration in favor of what the author calls a “contractarian” model). To be sure, a court may still refuse to compel arbitration if a party can demonstrate that it will be unable to vindicate federal statutory rights in the arbitral forum—an exception that arguably does not apply to ordinary contract and tort claims. But the recent case of *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), has placed the continued vitality of the vindication defense into serious question. See *infra* Part III.B (describing how the *Amex* Court limited the scope of the defense).

<sup>72</sup> See *Moses H. Cone Mem’l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983) (construing section 2 as “creat[ing] a body of federal substantive law of arbitrability” and as representing a “congressional declaration of a liberal federal policy favoring arbitration

was—and remains—that the FAA is from start to finish a procedural statute applicable only in federal court.<sup>73</sup> In the watershed case of *Southland v. Keating*,<sup>74</sup> the Court took this altered understanding to its logical conclusion: Under the doctrine of obstacle preemption, section 2 would displace any state law that “st[ood] as an obstacle to the accomplishment and execution of [its] full purposes and objectives.”<sup>75</sup>

The contract model takes those “purposes and objectives” to revolve around one paramount concern: the blinkered enforcement of private agreements to arbitrate.<sup>76</sup> Thus, to the extent the California Franchise Investment Law at issue in *Southland* guaranteed the plaintiffs a judicial forum for the resolution of claims they had agreed to arbitrate, it was deemed preempted by what the Court took to be the FAA’s “assur[ance] [to] those who desired arbitration . . . that their [contractual] expectations would not be undermined by federal judges, or . . . by state courts or legislatures.”<sup>77</sup> As with the public-policy defense, here, too, a descriptive premise about the FAA’s purposes underwrites a norm of contractual freedom. The Rehnquist and Roberts Courts have further extended FAA preemption to a point where, with limited exceptions, private arbitration agreements now enjoy the status of federal legislation, which effectively gives them the power of supremacy over all contrary state law and public policy.<sup>78</sup>

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agreements”); *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (“[I]t is clear beyond dispute that the [FAA] is based upon . . . the incontestable federal foundations of ‘control over interstate commerce and over admiralty.’”).

<sup>73</sup> See *supra* note 55 and accompanying text (citing scholarship arguing that the FAA was originally intended as a procedural statute applicable only in federal court).

<sup>74</sup> 465 U.S. 1 (1984).

<sup>75</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>76</sup> For example, Stephen Ware defends the Court’s FAA preemption cases as consistent with the FAA’s “contractual approach,” which he believes requires displacing consumer protection statutes that regulate the parties’ substantive bargain. Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1012–13 (1996); see also Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 73–74 (2001) (arguing that the Court’s FAA jurisprudence “leaves no doubt that special rules intended to protect persons in positions of inferior economic power . . . will not be tolerated” and that the FAA’s pro-arbitration public policy trumps “[s]tate laws of any ilk mooting contractual agreements to arbitrate”).

<sup>77</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (internal quotation marks omitted); see *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 520 (2d Cir. 1991) (Mahoney, J., concurring in part and dissenting in part) (“[A] state law which limits freedom of contract with respect to arbitration agreements covered by the FAA conflicts with the FAA and is preempted by it.”).

<sup>78</sup> As Thomas Carboneau has observed, “[w]hat the contracting parties provide in their agreement generally becomes the controlling law.” Carboneau, *supra* note 59, at 1193. To be sure, the contract model’s strong normative commitment to freedom of contract does not necessarily follow from its descriptive claim. Several scholars have

## 2. Freedom of Contract Procedure

Freedom of contract has helped underwrite a further, related development: the idea that courts must enforce the parties' choice of *procedures* to be followed in arbitration with the same rigor that they apply to the parties' choice of whether and what (substantive) claims should be arbitrated. I refer to this as "freedom of contract procedure."

Prior to *AT&T Mobility v. Concepcion*,<sup>79</sup> the Court had never invoked the contract model to justify freedom of contract procedure.<sup>80</sup> After all, it is not entirely clear why the FAA's purpose to reverse judicial hostility toward arbitration by strengthening the choice of *arbitration over litigation* extends *eo ipso* to strengthening the parties' selection of *procedures to govern within arbitration*. Such procedures are just as likely to be used in contracts that contemplate litigation of future disputes and for that reason would seem to be an "analytically separate" matter.<sup>81</sup> Courts can also refuse to enforce them even while they "rigorously enforce" the choice of the arbitral forum, such as by finding a class waiver to be unconscionable but otherwise compelling

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persuasively argued, for instance, that those commitments are inconsistent with contract law. *E.g.*, Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129 (2012) (arguing that despite invoking the rhetoric of contract, the Supreme Court's jurisprudence is in reality inconsistent with contract law in numerous ways); David Horton, *Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623–45 (2009) (discussing inconsistency between classical contract law and the phenomenon of unilateral amendments). It would therefore seem possible to accept the descriptive claim but reject the particular normative implications that the Court has imputed to it in order to arrive at a more moderate version of the contract model. But the fact remains that the descriptive claim makes certain normative arguments possible and closes off others. Rather than question its internal consistency, therefore, my approach is to question the model in its entirety—descriptively and normatively.

<sup>79</sup> 131 S. Ct. 1740 (2011).

<sup>80</sup> Lower courts had done so, however. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (enforcing the shortened statute of limitations and class waiver provisions in an arbitration clause and holding a state statute voiding such provisions to be preempted by the FAA); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999) (enforcing a forum selection provision in an arbitration clause despite a state statute voiding such provisions, which was held preempted).

<sup>81</sup> *See* David S. Schwartz, *State Judges As Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129, 133–34, 146 (2004) (arguing that the FAA "preempts only those state laws that regulate arbitration agreements per se or that declare certain types of substantive claims non-arbitrable"); *accord* Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 37–38 (2003) ("The FAA does not preempt state jury trial provisions because jury trial guarantees do not single out or target arbitration clauses for elimination.").

arbitration.<sup>82</sup> But *Concepcion* makes it increasingly clear that freedom of contract procedure is now the law of the land.<sup>83</sup>

In *Concepcion*, the plaintiffs contended that the class waiver contained in AT&T's arbitration clause was unconscionable under a 2005 precedent set by California's high court in *Discover Bank v. Superior Court*.<sup>84</sup> *Discover Bank* held that both class action and class arbitration waivers were unconscionable when found in certain types of consumer adhesion contracts.<sup>85</sup> The rationale was that representative rights-claiming is a critical procedural device that furthers the ultimate goal of helping low-dollar cases proceed to the merits instead of being suppressed for morally arbitrary reasons such as the economics of individualized litigation.<sup>86</sup>

Relying at least in part on the contract model,<sup>87</sup> however, the *Concepcion* Court held that the FAA preempted *Discover Bank*. “[T]he ‘principal purpose’ of the FAA,” it reasoned, “is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”<sup>88</sup> *Discover Bank* thwarted that objective because it “superim-

<sup>82</sup> Refusing to honor such contract procedures therefore poses no obvious danger of reviving any hostility toward the arbitration process. See Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 PENN. ST. Y.B. ARB. & MEDIATION 39, 78–79 (2012) (arguing that because the *Discover Bank* standard at issue in *Concepcion* prohibited class waivers equally in arbitration and litigation, it reflected a hostility toward mandated disaggregation more so than toward arbitration per se).

<sup>83</sup> A conspicuous exception to this trend is the judicial review of arbitration awards. In *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008), the Court held that private agreements for de novo judicial review of arbitration awards are unenforceable because they conflict with the exclusive grounds for review of arbitral awards set forth in sections 10 and 11 of the FAA. *Id.* at 586. In so doing, the Court appears to have emphasized procedural values of finality over freedom of contract procedure. Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1129–32 (2009).

<sup>84</sup> 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011).

<sup>85</sup> *Id.* at 1110. The so-called *Discover Bank* standard or *Discover Bank* unconscionability rule holds that collective action waivers (whether in arbitration or litigation) are presumptively unconscionable when they are

found in [1] a consumer contract of adhesion [2] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [3] 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.

*Id.*

<sup>86</sup> *Id.* at 1112.

<sup>87</sup> As I have elsewhere argued, the deeper logic of *Concepcion* sounds in antidiscrimination rather than in contract. Aragaki, *supra* note 82, at 42–45, 51–55. But in part because the antidiscrimination model of FAA preemption remains undertheorized, Justice Scalia drew heavily on the *rhetoric* of contract to justify preempting *Discover Bank*. See *Concepcion*, 131 S. Ct. at 1748–53.

<sup>88</sup> *Concepcion*, 131 S. Ct. at 1748.

pose[d]” class arbitration on parties who had explicitly agreed to waive it.<sup>89</sup> The upshot is that states may no longer require class procedures, “even if [they are] desirable for unrelated reasons,” when they contravene the parties’ objectively expressed contractual intent.<sup>90</sup>

*Concepcion* and cases like it from the lower courts have emboldened drafters of adhesion contracts to embellish arbitration clauses with increasingly sophisticated procedural bells and whistles.<sup>91</sup> Perhaps the most common of these is the class arbitration waiver, sometimes accompanied by elaborate mechanisms that ostensibly facilitate the prosecution of low-dollar claims.<sup>92</sup> Other provisions restrict the availability of interim and final remedies, limit discovery, shorten statutes of limitations, select distant venues, and alter statutory fee shifting rules.<sup>93</sup> Still others undo traditional default rules regarding the allocation of decisionmaking power between courts and arbitrators.<sup>94</sup>

In response, state courts have set precedents and state legislatures have passed countless measures aimed at staving off what appears to be the relentless colonization of procedure by contract.<sup>95</sup> But the force of these responses is increasingly doubtful after *Concepcion*. As the Court more recently explained, “the FAA’s

<sup>89</sup> *Id.* at 1752.

<sup>90</sup> *Id.* at 1753.

<sup>91</sup> See, e.g., Drahozal & Rutledge, *supra* note 18, at 1117 (documenting various examples).

<sup>92</sup> For good examples of such provisions, see AT&T Wireless Customer Agreement § 2.1(4), available at <http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#disputeResolutionByBindingArb>; Verizon Customer Agreement, Dispute Resolution Clause § 7, available at <http://www.verizonwireless.com/b2c/support/customer-agreement>.

<sup>93</sup> For examples of such provisions, see *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (limiting remedies, imposing one year statute of limitations, barring class arbitration, and splitting costs); *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001) (selecting distant forum); *In re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008) (limiting discovery to one six-hour deposition per party and prohibiting inquiries into employer’s finances, limiting punitive damages, and requiring employee to split costs); *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007) (limiting damages, shortening the statute of limitations, and restricting availability of statutory attorneys’ fees); *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995), *rev’d sub nom. Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (requiring Montana plaintiffs to arbitrate in Connecticut); *Compton v. Superior Court*, 154 Cal. Rptr. 3d 413 (Cal. App. 2013), *review granted*, 301 P.3d 1176 (barring class arbitration, shortening the limitations period only for employee and giving arbitrator discretion to deny statutory attorneys’ fees); *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663 (Cal. App. 2004) (limiting discovery, shortening the statute of limitations, and imposing excessive costs on employee).

<sup>94</sup> Examples are the arbitration agreements at issue in *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), both of which contained a clause that delegated to the tribunal gateway questions normally reserved for courts, such as the validity of the agreement to arbitrate.

<sup>95</sup> See, e.g., Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1242 (2011) (collecting statutes); Schwartz, *supra* note 81, at 160–61 (same).

command to enforce arbitration agreements [now] trumps any interest in ensuring the prosecution of low value claims.”<sup>96</sup> Many lower courts have taken *Concepcion* to imply much more: Procedural considerations, “*however worthwhile*, cannot undermine the FAA.”<sup>97</sup>

### C. Consequences

Freedom of contract—and freedom of contract procedure in particular—are impoverished paradigms for an adjudicative process such as arbitration. Freedom of contract procedure offers no principled way to distinguish, for instance, between good and bad arbitration procedure. It can only tell us what the arbitration process should *not* be—namely, one that lacks the imprimatur of mutual assent as defined by the common law of contracts.<sup>98</sup> Consider the following policy question that has been debated to death in the wake of *Concepcion*: “Should an arbitral class waiver be enforced even if it deprives the plaintiffs of their substantive rights?” As it currently stands, federal arbitration law’s only answer to this question is, “Yes, if the parties freely agreed to it.”

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<sup>96</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 n.5 (2013); *see also* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that states may not override party chosen arbitral procedures “even if [those procedures are] desirable for unrelated reasons”).

<sup>97</sup> *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) (emphasis added); *see also* *Homa v. Am. Express Co.*, No. 11-3600, 2012 WL 3594231, at \*4 (3d Cir. Aug. 22, 2012) (holding that state laws voiding class waivers are “inconsistent” with the FAA “irrespective of whether class arbitration is desirable for unrelated reasons” (quoting *Litman v. Cellco P’ship*, 655 F.3d 225, 231 (3d Cir. 2011))); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1233 (11th Cir. 2012) (holding that the FAA preempts Florida public policy against class waivers even where they make it impossible to prosecute small-dollar claims); *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011) (holding that after *Concepcion*, arbitration agreements must be enforced even if doing so on a large scale would “effectively end the ability to prosecute small-dollar claims” and let those claims “slip through the legal system”); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 503–04 (Mo. 2012) (holding that after *Concepcion*, “[c]ourts simply may not apply state public-policy concerns to invalidate an arbitration agreement, even if the public policy at issue aims to prevent undesirable results to consumers”).

<sup>98</sup> More recently, the Court has also cryptically suggested that states may not encumber arbitration with procedures such as class arbitration that would “change[ ] the nature of arbitration.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010); *see also* *Concepcion*, 131 S. Ct. at 1751. To be sure, these more recent suggestions do not flow from the contract model; instead, they may suggest a (still inchoate) procedural theory about arbitration’s purpose or role in the ecology of dispute resolution. This theory is inconsistent with the procedural reform model that I seek to develop here, however. *See infra* notes 370–74 and accompanying text (explaining that, to the extent *Stolt-Nielsen* and *Concepcion* are making claims that sound in procedural reform, those claims bear little resemblance to the procedural philosophy of Pound and his colleagues, nor are they anchored to a descriptive theory of the FAA’s original purposes).

The contract model's norm of freedom of contract procedure thereby forces courts to rely almost exclusively on defenses to contract formation to do the work of policing the adequacy and legitimacy of arbitration procedures. Thus, courts have used the unconscionability defense to deny enforcement of arbitration provisions that, *inter alia*, restrict discovery,<sup>99</sup> require individuals to pay or share in the costs of private arbitration,<sup>100</sup> select distant forums,<sup>101</sup> and waive class or representative claiming<sup>102</sup>—even when traditional indicia of procedural or substantive fairness are absent.<sup>103</sup> Not unlike the proverbial square peg in a round hole, concerns about the integrity of the arbitration process are thereby forced into unconscionability doctrine's analytically quite different rubric of extreme bargaining failure.<sup>104</sup> Critics

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<sup>99</sup> *E.g.*, *Hulett v. Capitol Auto Grp., Inc.*, No. 07-6151-AA, 2007 WL 3232283 (D. Or. Oct. 29, 2007); *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538 (E.D. Pa. 2006); *Ontiveros v. DHL Exp. (USA), Inc.*, 79 Cal. Rptr. 3d 471 (Cal. App. 2008).

<sup>100</sup> *E.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013); *Nagrampa v. MailCoups, Inc.* 469 F.3d 1257 (9th Cir. 2006) (en banc); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).

<sup>101</sup> *E.g.*, *Newton v. Am. Debt Servs., Inc.*, 854 F. Supp. 2d 712 (N.D. Cal. 2012); *Bolter v. Superior Court*, 104 Cal. Rptr. 2d 888 (Cal. App. 2003).

<sup>102</sup> *E.g.*, *Omstead v. Dell, Inc.*, 594 F.3d 1081 (9th Cir. 2010); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740; *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008).

<sup>103</sup> *See, e.g.*, Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner at 10–31, *Concepcion*, 131 S. Ct. 1740 (No. 09-893) (arguing that, as to arbitration agreements, California courts have “distorted” the procedural unconscionability analysis and applied substantive unconscionability in a manner that “uniquely disfavors” arbitration); 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) (arguing that California courts apply a more stringent version of traditional unconscionability law to arbitration agreements). The California Supreme Court's *Discover Bank* standard, for instance, eschews the traditional inquiry into substantive and procedural unconscionability in favor of a blanket determination that class waivers are procedurally unfair in certain contexts. *See supra* note 85.

<sup>104</sup> *See, e.g.*, *Hume v. United States*, 132 U.S. 406 (1889) (describing an “unconscionable bargain” as “‘a contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other’” (quoting Bouvier's Law Dictionary)); U.C.C. § 2–302 cmt. 1 (describing the principal purpose of unconscionability as “the prevention of oppression and unfair surprise”); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1979) (explaining that substantively unfair terms, together with bargaining inequality, are indicia of bargaining failure—i.e., that “the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms”).

These and other mismatches between contract and procedure are perhaps suggested in the finding that courts appear to hold arbitration clauses unconscionable more often than they do other clauses. *See generally* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (reporting, *inter alia*, that courts tend to find arbitration agreements unconscionable approximately twice as often as they find other agreements unconscionable).

of consumer and employment arbitration are likewise forced to shoe-horn procedural justice concerns into arguments about the lack of meaningful assent to preprinted form contracts.<sup>105</sup> Vital questions about the quality of arbitration procedure thereby redound imperfectly on questions about disparate bargaining power or the quality of consent.<sup>106</sup> In these and other ways, the contract model has helped shift the very terms of the debate.

But procedural concerns are important in their own right, and increasingly so as “contract procedure” becomes more commonplace. Consider that all of the hot-button issues in arbitration today have to do with process far more than consent: class arbitration and consolidation,<sup>107</sup> expanded judicial review of arbitration awards,<sup>108</sup> the “litigization” of arbitration,<sup>109</sup> and minimum fairness and due process

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<sup>105</sup> See, e.g., Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 128–31 (2011) (questioning whether arbitration agreements can even be considered a contract at all and suggesting that they should be regulated accordingly); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract*, 35 U. RICH. L. REV. 1085, 1105 (2002) (criticizing arbitration clauses and other prelitigation agreements as coercive because one party is typically without bargaining power).

<sup>106</sup> Judith Resnik makes a similar point when she argues that, contract rhetoric aside, the outcome of *Concepcion* turned largely on procedural concerns. See Resnik, *supra* note 105, at 132 (“[A] good deal of the substantive discussion [in *Concepcion*] sounded in differing assessments of the qualities of arbitration and adjudication, singular and aggregated.”); cf. Lisa B. Bingham, *Control over Dispute-System Design*, 67 LAW & CONTEMP. PROBS 221, 221 (2004) (arguing that the crux of the mandatory binding arbitration problem is that one party has “exclusive control of the design of the dispute-resolution system”—that is, over procedure).

<sup>107</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (enforcing class arbitration waiver despite evidence that individual arbitration was cost-prohibitive and threatened plaintiffs’ ability to vindicate federal rights); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that a state court ruling on the unconscionability of class waivers in consumer contracts was preempted by the FAA); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (finding reversible error where arbitrators interpreted “silent” arbitration clause as permitting class arbitration); *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003) (holding that the FAA did not preclude class arbitration).

<sup>108</sup> See, e.g., *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008) (holding that private parties may not contract around the FAA’s vacatur standards); *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (Cal. 2008) (holding the opposite with respect to the California arbitration statute’s vacatur standards); Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009) (arguing that *Hall Street* bears no necessary implications for judicially created vacatur standards such as “manifest disregard”).

<sup>109</sup> See, e.g., Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37, 38 (2003) (noting a developing opinion among practitioners that “arbitration is becoming more like litigation to one degree or another”); Stipanowich, *supra* note 20, at 384–88 (documenting widespread criticism that arbitration has taken on all the trappings of litigation).

standards for consumer and employment claims,<sup>110</sup> among others. This has forced arbitration scholars and professionals alike to confront new questions to which arbitration jurisprudence, still yoked to the contract model, offers few satisfying answers.

These new questions will require a more robust procedural conception of the FAA. In the next Part, I shall argue that such a conception emerges in sharp relief when the statute is situated in its proper historical context.

## II

### TOWARD A PROCEDURAL REFORM MODEL OF THE FAA

The contract model is a late twentieth-century invention.<sup>111</sup> It owes its existence almost entirely to recent pronouncements by the Court on the text and purpose of a law whose jurisprudential pedigree has largely been ignored. By fetishizing isolated phrases from one or two sections of the statute<sup>112</sup> and the same brief passages from a two-page House Report,<sup>113</sup> we have managed to overlook the forest for the trees.

I propose to study the FAA by zooming out from this frame—by viewing the statute as but one moment in a broader debate over the reform of judicial procedure that spread like wildfire during the early

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<sup>110</sup> *E.g.*, NAT'L CONSUMER DISPUTES ADVISORY COMM., CONSUMER DUE PROCESS PROTOCOL (2011); TASK FORCE ON ALT. DISPUTE RESOLUTION IN EMP'T, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995). Recently, for instance, Thomas Stipanowich and his colleagues convened a working group for the purpose of exploring an "Arbitration Fairness Index" that would rate and rank arbitration provisions in standard form consumer and employment contracts based on whether they promote a fair arbitral process. Thomas Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985, 1058 n.454 (2012).

<sup>111</sup> Indeed, up until the early 1980s, the Court arguably favored a procedural rather than a contractual model of the FAA, albeit one that it later described as "pervaded by . . . the old judicial hostility to arbitration." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)). For further background, see *supra* notes 61–66 and accompanying text.

<sup>112</sup> Prime examples are the phrase, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" in section 2 and the phrase, "upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" in section 4. 9 U.S.C. §§ 2, 4 (1925). In his concurrence in *Concepcion*, for example, Justice Thomas relied entirely on those provisions in order to advance an even more radical reading of the FAA. On this reading, even the unconscionability defense—traditionally understood as falling within section 2's savings clause and thus as a permissible ground for nonenforcement—would be preempted by the FAA. *Concepcion*, 131 S. Ct. at 1753–55 (Thomas, J., concurring).

<sup>113</sup> See *supra* note 43 and accompanying text.

twentieth century in Congress, in bar associations, and in the academy.<sup>114</sup> The basic problem at the time was that courtroom procedure too often got in the way of substantial justice. Cases were won or lost on technicalities unrelated to the merits; trivial yet unforgiving procedural requirements created unnecessary delay and expense, which only helped skew outcomes in favor of the party with the “longest purse.”<sup>115</sup> Calls for reform accordingly stressed the need for simplicity and flexibility. They were premised on the increasingly influential theory that procedure was not important in itself, but only as a means to a just resolution of disputes through the application of substantive norms to the facts.<sup>116</sup> The FAA’s underlying purpose can be understood as surprisingly consistent with this new theory of procedure.

In this Part, I substantiate this descriptive claim. Subpart A begins by offering a very rough and stylized sketch of the procedural reform movement led by figures such as Roscoe Pound, Thomas Shelton, and William Howard Taft. In Subpart B, I argue that modern arbitration law reform was responding to the same set of problems and was committed to the same basic set of procedural norms that eventually produced the Rules Enabling Act and the Federal Rules.<sup>117</sup> The differences between the two reform programs were a function more of the particular solutions they proposed than of the goals and

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<sup>114</sup> As one lawyer put it in 1912: “There is probably no subject in which the public, the bench, and the bar are more concerned at the present time than the reform of judicial procedure.” Clarence R. Wilson, *Some Suggestions as to Technicality and Delay in the Law*, 1 GEO. L.J. 20, 20 (1912); see also *1924 Hearings on Arbitration*, *supra* note 40, at 26 (Statement of Alexander Rose) (“[T]he crying demand and the need of the hour is what? It is to simplify legal matters. . . . People are dissatisfied with the courts.”); George W. Alger, *Treadmill Justice*, ATLANTIC MONTHLY 696, 697 (Nov. 1909) (“No one can read the reports of the transactions of the National and State Bar associations in our country without being struck with the increase in law-reform propositions . . .”).

<sup>115</sup> MOORFIELD STOREY, *THE REFORM OF LEGAL PROCEDURE* 4 (1912).

<sup>116</sup> See, e.g., Charles E. Clark, *Methods of Legal Reform*, 36 W. VA. L.Q. 106, 111 (1929) [hereinafter Clark, *Methods of Legal Reform*] (“Procedure is a tool, a means to an end and not an end in itself. That end is the application of rules of substantive law to the case in hand.”); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) [hereinafter Clark, *Handmaid of Justice*] (“[T]he relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress . . . .” (citing *In re Coles*, [1907] 1 K.B. 1, 4 (Eng.))). It might be more apt, therefore, to describe what I am calling a “procedural reform” model a “substantial justice” model of the FAA. Nonetheless, I shall continue to refer to this as the procedural reform model in order to underscore the connection between the FAA and contemporaneous efforts at procedural law reform.

<sup>117</sup> To be clear, I am not arguing that the FAA’s supporters sought to conform arbitration to litigation—far from it. As we shall see, litigation at the time was hopelessly unworkable. The FAA was simply one of the first in a series of reforms whose unifying agenda was to improve the delivery and administration of justice.

purposes they espoused. In Subpart C, I defend my descriptive claim against what I anticipate to be some likely objections.

### A. *The Broader Context of Early Twentieth-Century Procedural Law Reform*

In 1906, Roscoe Pound reinvigorated procedural law reform with his seminal speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*.<sup>118</sup> Pound's central claim might aptly be described today as one of procedural hyperlexis—that is, too much procedural law and legalism. Unlike the eighty-six provisions in today's Federal Rules, for example, it was not uncommon for procedural codes of the day to comprise upwards of one thousand.<sup>119</sup> This was due in large part to a key difference between the procedural landscape in Pound's day and in ours, one that is typically overlooked in historical treatments of the FAA: Prior to the enactment of the Rules Enabling Act (REA) in 1934, the law of procedure was largely a creature of statute.<sup>120</sup>

A statutory system of procedure created two broad problems. First, as Elihu Root explained, “[r]ights created by statute cannot be ignored by courts. Parties must be heard about them. The question . . . [becomes] not what accords with substantial justice in the particular case, but what the law has said shall be done in such proceedings.”<sup>121</sup> This lent a certain rigidity to the law of procedure.<sup>122</sup> Judges felt pow-

<sup>118</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906). Two years later, then-presidential candidate William Howard Taft delivered another important speech along the same lines. William H. Taft, *The Delays of the Law*, 18 YALE L.J. 28 (1908).

<sup>119</sup> See CAL. CIV. PROC. CODE §§ 307–1822f (Deering 1909); IND. CIV. PROC. CODE §§ 249–1291 (1893); N.Y. CODE CIV. PROC. §§ 416–2471a (Parson's 1900); OHIO CIV. PROC. CODE §§ 11215–12222 (1925); see also *infra* note 127 and accompanying text.

<sup>120</sup> Procedure was still a creature of the common law in a small fraction of states. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 20–22 (2d ed. 1947) (providing examples).

<sup>121</sup> Elihu Root, *The Layman's Criticism of the Lawyer*, 26 GREEN BAG 471, 479 (1914); see also Roscoe Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 168 (1915) (arguing that judges “could not alter . . . [statutory] rules which, unintended by their author, operated in the daily work of the courts to defeat the substantive rights of parties in complicated causes”); Adolph J. Rodenbeck, *The New Practice in New York*, 1 CORNELL L.Q. 63, 66 (1916) (“Where the procedure is regulated by statute the courts are powerless to deviate from the rules thus laid down and the procedure must necessarily become a matter of right.”); John H. Wigmore, *Qualities of Current Judicial Decisions*, 9 ILL. L. REV. 529, 538 (1914) (criticizing evidence statutes as “rigid steel-work” that is “never allowed to bend”).

<sup>122</sup> See *Procedure in the Federal Courts: Hearing on H.R. 2377 and H.R. 90 Before the H. Comm. on the Judiciary*, 67th Cong. 32 (1922) [hereinafter 1922 *Hearings on Procedure*] (describing “rigid, uncompromising [procedural] statutes”).

erless to bend or disregard rules to avoid miscarriages of justice<sup>123</sup> and any improvement to the law of procedure required formal legislative amendment.<sup>124</sup>

This led to a second problem: Because lawmaking by its very nature prescribes general rules to cover unknown future events, even well-intentioned legislative tinkering inevitably launched “a career of amendments and supplements that soon swell[ed] the original compact statute into an unwieldy code.”<sup>125</sup> A good example of this was New York’s Code of Civil Procedure,<sup>126</sup> which began its life just shy of 400 procedural provisions in David Dudley Field’s day and grew to over 3000 provisions by 1920.<sup>127</sup> This complexity was amplified in federal court because there was no complete set of national, trans-substantive procedural rules for actions at law as there are today. Instead, the Conformity Act required federal courts to “conform, as near as may be,” to the statutory procedure applicable in courts of the state in which they were located.<sup>128</sup> But because the rule of conformity was itself subject to a litany of exceptions in the form of local rules, subject-specific procedural statutes, and case law,<sup>129</sup> federal procedure became a veritable minefield of “disconnected, inharmonious . . . stat-

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<sup>123</sup> See THOMAS W. SHELTON, *SPIRIT OF THE COURTS* 93 (1918) (observing that if a judge sought to prevent “a miscarriage of justice occurring in his sight” by “depart[ing] in the least from the rigid, statutory regimen,” inevitably one party would appeal and the judgment would be reversed on technical grounds).

<sup>124</sup> See Clark, *Handmaid of Justice*, *supra* note 116, at 304–07 (noting that legislatures have historically exercised control over creating and modifying court procedure); Pound, *supra* note 121, at 168 (explaining that judges were unable to alter procedural rules themselves and that only the legislature could “remedy” the situation).

<sup>125</sup> Henry W. Jessup, *The Simplification of the Machinery of Justice with a View to its Greater Efficiency*, in *JUSTICE THROUGH SIMPLIFIED LEGAL PROCEDURE*, 73 *ANNALS AM. ACAD. POL. & SOC. SCI.* 1, 62 (Carl Kelsey & Henry W. Jessup eds., 1917) [hereinafter *SIMPLIFIED LEGAL PROCEDURE*]; see also Homer S. Cummings, *Immediate Problems for the Bar*, 20 *A.B.A. J.* 212, 213 (1934) (“Regulation follows regulation with bewildering multiplicity until there is created a morass of laws in which the whole profession is mired.”); Edward R. Finch, *Judicial, in Place of Legislative, Court Procedure*, 10 *N.Y.U. L.Q.* 360, 363 (1932) (observing that because it was “flooded with bills” every year to amend particular procedural rules, the New York legislature was “constant[ly] tinkering” with its procedural code).

<sup>126</sup> Act of April 12, 1848, 1848 N.Y. Laws, ch. 379.

<sup>127</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. PA. L. REV.* 909, 940 (1987) (noting that the New York Code of Civil Procedure grew “from its initial 392 provisions to 3,441 provisions by 1897”). Other state procedural codes underwent a similar transformation. See S. REP. NO. 64-892, at 2 (1917) (noting that between 1872 and 1917, state legislatures have “materially added to the complication [of their procedural statutes] by a multitude of amendments and alterations”).

<sup>128</sup> Conformity Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197.

<sup>129</sup> See BERKELEY REYNOLDS DAVIDS, *MONTGOMERY’S MANUAL OF FEDERAL JURISDICTION AND PROCEDURE*, § 336, at 283–85 (3d ed. 1927) (describing the practical application of the Conformity Act).

utes.”<sup>130</sup> As the American Bar Association reported, federal practitioners “‘even in [their] own state, feel no more certainty as to the proper procedure than if [they] were before a tribunal of a foreign country.’”<sup>131</sup>

The rigidity and complexity of statutory procedure was compounded by common-law adversarialism, which practically obligated lawyers to insist on procedural formalities for strategic gain. Pound famously referred to this as the “sporting theory of justice”—the view “that judicial administration of justice is a game, to be played to the bitter end as a game of football might be.”<sup>132</sup> As a result, rather than facilitate the disciplined and evenhanded search for justice, procedural rules more often than not became instruments for subverting it.

A similar situation prevailed with respect to the rules of evidence. For example, in an age before a mature business records rule,<sup>133</sup> authenticating copies and proving mundane acts such as mailing or delivery required the direct testimony of *all* persons involved in the act in question.<sup>134</sup> Counsel demanded strict compliance with these statutory formalities as a matter of right, even where the underlying facts sought to be proven were never in real dispute to begin with.<sup>135</sup>

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<sup>130</sup> 1915 *Hearings on Procedure*, *supra* note 11, at 13 (statement of Thomas W. Shelton); see also 1915 *Hearings on Procedure*, *supra* note 11, at 6 (statement of Thomas W. Shelton) (“[N]o man dared to conduct a case in a Federal court unless he was thoroughly trained in all its intricacies and technicalities.”).

<sup>131</sup> Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1041 (1982) (quoting A.B.A. *Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 420 (1896)).

<sup>132</sup> Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 391 (1910); see also Pound, *supra* note 118, at 404–06. Other key reformers shared this view. See, e.g., Clark, *Methods of Legal Reform*, *supra* note 116, at 112 (describing the prevailing conception of law as a “game,” in which the “rules are designed to glorify the process rather than the result”); Thomas W. Shelton, *The Press and the Administration of Justice*, 9 A.B.A. J. 9, 9 (1923) (analogizing American procedure to “a game of hide and seek to bedevil an opponent, confuse the jury, trip the judge, obfuscate the layman and impress the gallery with a super-heated knowledge of a difficult, technical game, that ought not to exist”).

<sup>133</sup> These exceptions were initially proposed by the Commonwealth Fund Research Committee headed by Edmund Morgan. EDMUND MORGAN, *THE LAW OF EVIDENCE* 50–63 (1927). They were first passed by the New York State Assembly in 1928 and later by Congress in 1935. 1928 N.Y. Laws, ch. 532; Act of June 20, 1936, ch. 640, § 1, 49 Stat. 1561.

<sup>134</sup> See *Gardam & Sons v. Batterson*, 91 N.E. 371, 372–73 (N.Y. 1910) (requiring the direct testimony of all involved to authenticate a mailing); *Hoffman House v. Hoffman House Mfg.*, 55 N.Y.S. 763, 763–74 (N.Y. App. Div. 1899) (requiring the direct testimony of all involved to authenticate a delivery). For example, in order to prove that a letter had been mailed, every witness who handled the letter, from the secretary who took the letter from her superior’s outbox to the mail clerk who placed the letter in the mail chute, was required to testify. See Manfred W. Ehrlich, *Unnecessary Difficulties of Proof*, 32 YALE L.J. 436, 440 (1923).

<sup>135</sup> See Arthur J. Keeffe et al., *86 or 1100*, 32 CORNELL L.Q. 253, 254–59 (1947) (describing cases in which counsel demanded unnecessary compliance with procedural

As a result, the only available proof of liability or innocence was often needlessly excluded.<sup>136</sup> Even when it was not, lawyers wound up spending more courtroom time debating the correct method for adducing evidence than debating the evidence itself.<sup>137</sup> “In thousands and thousands of rulings,” John Henry Wigmore explained, “this is and long has been the way of using the rules of evidence.”<sup>138</sup> The situation was so dire that judges sometimes implored counsel to disregard evidentiary technicalities, leading a prominent New York lawyer to conclude that “[w]hen justice can best be done by a judge who appeals to counsel not to insist too rigorously on the undisputed rules of evidence, it is certainly time to think of changing these rules.”<sup>139</sup>

Appellate review added a further level of complexity to this state of affairs, largely because the right of appeal was much broader than it is today in at least four respects. First, because all errors were presumed prejudicial, judgments were frequently overturned due to technicalities that made no difference to the outcome.<sup>140</sup> Second,

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formalities); *see also* Root, *supra* note 121, at 480 (“[T]here is no country in the world in which rules for the exclusion of evidence are applied with the rigidity and technicality obtaining in the United States.”).

<sup>136</sup> See Charles A. Boston, *Some Observations Upon the Report of the Committee of the Phi Delta Phi with Special Reference to the Typical Judiciary Article for a Constitution*, in SIMPLIFIED LEGAL PROCEDURE, *supra* note 125, at 105 (describing “an antiquated and unreasonable system of evidence which is so administered as often to exclude the very best attainable evidence of a fact”); Jessup, *supra* note 125, at 16–17 (describing the common view among nonlawyers that “the object of legal forms and procedural statutes and rules of evidence is to prevent rather than to effectuate justice”); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 619–20 (1908) (describing a case that was overturned because a doctor had been permitted to testify to the cause of death in a manner that was not strictly provided for by the rules of evidence, with the result that “the court shut out the best possible means of information, in the circumstances . . . and allowed an accused person to escape” on technical grounds).

<sup>137</sup> See Joseph M. Proskauer, *A New Professional Psychology Essential for Law Reform*, 14 A.B.A. J. 121, 124 (1928) (“Most of the time in our courts of law is not consumed with the adducing of evidence; it is largely occupied with controversy and discussion as to the manner in which the evidence shall be adduced.”); *see also* Wesley A. Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing?*, 34 YALE L.J. 480, 486–89 (1924) (recounting a case in which counsel for a seller of goods was forced to expend unnecessary time and expense gathering former employees from factories located in different states just to make the proper showing that goods were delivered, even though nobody disputed that delivery had been made).

<sup>138</sup> Wigmore, *supra* note 121, at 537. *See generally* Ehrlich, *supra* note 134 (recounting a case where, after putting his counterpart to the task of complying with technical evidentiary requirements, counsel ultimately stipulated to the facts sought to be proved).

<sup>139</sup> H. H. Nordlinger, *Law and Arbitration*, 30 COM. L. LEAGUE J. 621, 624 (1925).

<sup>140</sup> See S. Lamar Field, *The Majesty of the Law*, in PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION 163, 169–70 (1909) (“Many cases are decided on technical points contrary to the decision which would be made if the case were decided on its merits”); Pound, *supra* note 118, at 413 (criticizing the American practice of reversing judgments for nonjoinder, misjoinder, variance, or

interlocutory appeals could be taken from almost any procedural order not affecting the merits.<sup>141</sup> Third, there was generally an appeal as of right to the court of last resort, which created the problem of "double appeals" in practically every case.<sup>142</sup> Finally, because appellate courts typically lacked the power to correct a judgment, upon reversal they routinely ordered new trials no matter how trivial the error.<sup>143</sup>

The result was nothing less than Kafkaesque. Articles from the period are replete with tragicomic examples, such as a simple personal injury case that was retried before a jury seven times, appealed ten times, and litigated for over twenty years,<sup>144</sup> or a dispute over twenty-eight cents that was tried three times before it was finally heard in the Nebraska Supreme Court.<sup>145</sup> Part of the problem, no doubt, was that

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simply because it was proven in an amount that exceeded the prayer for relief). In one case, a judgment was reversed and a new trial ordered simply because counsel had challenged a juror for cause without first exhausting all of his peremptories (as required by governing law at the time). *Santee v. Standard Publ'g Co.*, 55 N.Y.S. 361 (1899).

Although this situation was largely rectified in the federal courts by the Act of Feb. 1919, ch. 48, § 1246, 40 Stat. 1181, state courts "spasmodically" continued to indulge the presumption of prejudicial error. Proskauer, *supra* note 137, at 124; *see also* Trieber, *supra* note 11, at 31 ("The old rule that there is a presumption that every error causes prejudice . . . is still adhered to by some of the appellate courts").

<sup>141</sup> *See* N.Y. CODE CIV. PROC. §§ 1347, 1349 (Parson's 1908); *see also* Keeffe et al., *supra* note 135, at 258 (stating that in New York, "the moving party is allowed the unlimited right of appeal on corrective motions"); Adolph J. Rodenbeck, *A Procedural Programme*, 32 J. AM. JUDICATURE SOC'Y 79, 85 (1948) (arguing that nonfinal orders should not be appealable).

<sup>142</sup> *See* Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 442 (1910) (describing "[t]he limitation of double appeals in the *certiorari* act [of Illinois]" as an important example of procedural reform); Rodenbeck, *supra* note 141, at 85 ("There should be one appeal so far as practicable . . ."); Edson R. Sunderland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 135 (1926) ("Double appeals are an economic waste and a menace to public confidence in the courts. Reversal of one appellate court by another appellate court tend to discredit the whole judicial establishment in popular esteem.").

<sup>143</sup> *See* STOREY, *supra* note 115, at 103 (arguing that as long as the error was not prejudicial, appellate courts "should be given liberal discretion" to affirm even where evidence was admitted or excluded improperly); Alger, *supra* note 114, at 698 (criticizing the practice of retrying cases from scratch "over and over again" following reversals for trivial errors); Pound, *supra* note 118, at 413 ("[T]he worst feature of American procedure is the lavish granting of new trials."); Sunderland, *supra* note 142, at 144-45 (contending that appellate courts should be given the power to consider all issues in the case, not just those for which an error was assigned or an exception taken, as was the case in equity).

<sup>144</sup> Alger, *supra* note 114, at 699 (offering numerous similar examples).

<sup>145</sup> *See* Petersen v. Mannix, 90 N.W. 210, 210-11 (Neb. 1902); *see also* *Hearing on S. 3676 Before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong. 169, 178 (1938) (statement of Roscoe Pound) (recounting the facts of *Mannix*); STOREY, *supra* note 115, at 145-46 (describing an employment case that had forty-seven hearings at Special Terms of the New York Supreme Court, twenty-one hearings at trial terms, eight appeals in the Appellate Division, and two in the Court of Appeals, and that lasted more than six years);

appellate courts were increasingly called upon to act as high priests of procedural perfection rather than as guardians of substantial justice. In the words of one lawyer, they

scan[ ] these small points of procedure with a microscope and in about forty percent of the cases, find[ ] a flaw somewhere; and once more the parties, after a delay ranging from six months to two or three years, must fight the whole battle over again, though every judge on the appellate bench might admit that the winning party ought to have won and should win again.<sup>146</sup>

The consequential delay and expense opened up avenues for opportunistic behavior. As one appellate judge explained, “it frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal.”<sup>147</sup>

Here, then, was a central insight of the procedural reform movement: Complex, voluminous, and ironclad procedural codes, together with the sporting attitude toward litigation, frustrated the ability of courts to adjudicate disputes on their merits. Procedure was supposed to be a mere vessel or conduit—what Charles Clark famously referred to as the “handmaid” of justice<sup>148</sup>—yet all too often “nitpicking over procedural technicalities” became an end in itself.<sup>149</sup> Pound described the prevailing mentality as follows: “The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly?”<sup>150</sup>

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Pound, *supra* note 118, at 414 (describing a personal injury case that was tried six times and a breach of contract case that was tried three times and appealed four times to the state supreme court).

<sup>146</sup> McDermott, *supra* note 11, at 105; see also Sunderland, *supra* note 142, at 148 (“No one demands that a stonemason shall show the same degree of precision as a diamond cutter, . . . [yet] common law judges overlooked this obvious truth, and were always examining masonry work with microscopes”).

<sup>147</sup> Walters v. Syracuse Rapid Transit Ry. Co., 70 N.E. 98, 99 (N.Y. 1904).

<sup>148</sup> Charles E. Clark, *Procedural Fundamentals*, 1 CONN. B.J. 67, 73 (1927) [hereinafter Clark, *Procedural Fundamentals*].

<sup>149</sup> Subrin, *supra* note 127, at 964; see also Elihu Root, *Reform of Procedure*, in PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING OF THE N.Y. STATE BAR ASS'N 87, 89 (1911) (“Rules and formulas originally designed as convenient aids to the attainment of ultimate ends become traditions and dogmas”); Thomas W. Shelton, *Greater Efficacy of the Trial of Civil Cases*, 33 COM. L. LEAGUE J. 661, 664 (1928) (arguing that “useless technical procedure” had become something of a “fetish” and that “pleading and procedure, normally a mere means to an end, became more important than the merits of the case”). For example, Pound and Shelton often lamented how the pages of the appellate reporters were saturated with cases that turned solely on points of procedure rather than of substantive law. See, e.g., 1915 *Hearings on Procedure*, *supra* note 11, at 9 (statement of Thomas W. Shelton); Roscoe Pound, *The Place of Procedure in Modern Law*, 1 SW. L. REV. 59, 76–77 (1917).

<sup>150</sup> Pound, *supra* note 118, at 406.

This procedural hyperlexis was thought to have two related consequences. First and quite ironically, *more* procedural law and legalism created *less* justice. Technical procedural requirements became “traps to catch the unwary; barbed wire entanglements; barriers which the subtle and adroit practitioner can interpose to hinder the pursuit of justice.”<sup>151</sup> Wrangling over points of procedure caused crippling delay and expense,<sup>152</sup> forcing many small businesses and parties with limited resources to settle valid claims rather than attempt to vindicate them in court.<sup>153</sup> Substantive rights were thereby sacrificed in slavish observance of the rituals of procedure.<sup>154</sup> As Pound summed it up, “the courts, instituted to administer justice according to law, [were] made agents or abettors of lawlessness.”<sup>155</sup>

Second, procedural law and practice were out of touch with common-sense notions of fairness, which in turn created the *appearance* of injustice. The layman who took a case to court often found “his rights lost altogether, on points too fine for his reason, common sense, or instinctive sense of fairness.”<sup>156</sup> For example, the hearsay rule and the rules on opinion testimony appeared to exclude the very facts on which jurors would routinely rely in forming reasonable judg-

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<sup>151</sup> Root, *supra* note 121, at 479.

<sup>152</sup> See STOREY, *supra* note 115, at 32–33 (attributing court congestion and delay in part to “the bringing of groundless suits and the making of false defences”); Wilson, *supra* note 114, at 30 (identifying the sheer volume of inconsequential appeals as the principal cause of the law’s delay).

To be sure, other factors contributed to the law’s delay, including preexisting court congestion, a noticeable spike in litigation after the First World War, Prohibition and the eventual passage of the Eighteenth Amendment, and cash-strapped courts. See Ransom, *supra* note 11, at 269 (attributing delay and congestion to a court calendaring system); Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUPREME CT. HIST. 1, 8 (2008) (“Litigation arising from prohibition alone accounted for an eight percent rise in the number of [federal] cases.”).

<sup>153</sup> Ransom, *supra* note 11, at 270–72; see also Keeffe et al., *supra* note 135, at 258 (arguing that in New York, counsel “who does not desire a decision of the controversy on the merits” can cause enough delay “to either exhaust the other party or secure a compromise settlement”); Nordlinger, *supra* note 139, at 622 (“It has long been considered sound advice that . . . it is more advantageous to surrender your legal rights without litigation than to enforce them through litigation.”).

<sup>154</sup> See Clark, *Methods of Legal Reform*, *supra* note 116, at 111; see also Subrin, *supra* note 127, at 962 (describing the problem of “procedural technicality stand[ing] in the way of reaching the merits” as a central theme in Clark’s work).

<sup>155</sup> Pound, *supra* note 118, at 406; see also A.C. Lappin, *The Case of Arbitration vs. Litigation*, 39 COM. L.J. 196, 196 (1934) (arguing that the courts were unable to administer justice); *Where Jury Trial Fails*, 9 J. AM. JUDICATURE SOC’Y 71, 72 (1925–1926) (“Courts come to exist largely for the comfort and protection of debtors in a manner wholly contrary to our exalted principles of doing justice.”).

<sup>156</sup> Ransom, *supra* note 11, at 265; see also Shelton, *supra* note 149, at 661 (remarking that delays and technicalities of courtroom procedure have “created a combative dissatisfaction among laymen . . . that is dangerously lessening popular faith in the courts”).

ments outside the courthouse.<sup>157</sup> Similarly, by reducing procedure to a mere “game,” the sporting theory gave a “false notion of the purpose and end of law.”<sup>158</sup> This led to the loss of public confidence in the administration of justice and, by extension, in the law itself.<sup>159</sup>

Pound and his colleagues believed that the solution to these problems was to “simplify” procedure, not just in the sense of reducing the number and complexity of procedural rules but also the importance ascribed to them.<sup>160</sup> Thus, technical requirements unrelated to safeguarding substantive rights or to developing the merits should be expunged.<sup>161</sup> Formal entitlements that created needless and sometimes insurmountable delay, such as multiple tiers of appellate review and new trials for harmless errors, should be jettisoned.<sup>162</sup> Exacting rules for the authentication of evidence should be relaxed to reflect the way that books and records were actually kept in the business world.<sup>163</sup> Procedure, in short, needed to shed its legalistic pretensions and conform more closely to the expectations of ordinary disputants—“farmers and business men and workmen” for whom justice was more important than law.<sup>164</sup>

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<sup>157</sup> See Boston, *supra* note 136, at 105.

<sup>158</sup> Pound, *supra* note 118, at 406.

<sup>159</sup> See, e.g., SHELTON, *supra* note 123, at 88. As Henry Jessup observed, “it is not unusual to hear a man assert with an air of finality that the object of legal forms and procedural statutes and rules of evidence is to prevent rather than to effectuate justice.” Jessup, *supra* note 125, at 16–17.

<sup>160</sup> See S. REP. NO. 69-1174, at 2 (1926) (detailing how the existing procedural system could be improved). Charles Evans Hughes later described the guiding philosophy of the Federal Rules project as follows: “It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances.” *Address of Chief Justice Hughes*, 21 A.B.A. J. 340, 341 (1935); see also S. REP. NO. 73-1049, at 1 (1934) (describing the purpose of the proposed Rules Enabling Act as bringing “uniformity and simplicity . . . and thus reliev[ing] the courts and the bar of controversies and difficulties which are continually arising wholly apart from the merits of the litigation” (quoting a letter from Senator Homer Cummings to the Chairman of the Senate Committee on the Judiciary)).

<sup>161</sup> See Pound, *supra* note 118, at 405; see also Roscoe Pound, *Appendix E, Principles of Practice Reform*, 33 ANN. REP. A.B.A. 635, 636 (1910) (“A leading principle which those who draw up a practice act should have in view should be to make it unprofitable to raise questions of procedure for any purpose except to develop the merits of the case.”).

<sup>162</sup> See Rodenbeck, *supra* note 141, at 85; Sunderland, *supra* note 142, at 134–35; William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 5 AM. L. SCH. REV. 2, 3–6 (1922).

<sup>163</sup> See Ehrich, *supra* note 134, at 436 (“The courts must mold the rules of evidence to fit business practice, for they cannot expect business carried on by men untrained in the law to be conducted in the technical spirit of the courtroom.”); Wigmore, *supra* note 121, at 538 (arguing that evidentiary rules “should bend” in order to reflect the realities of proof and recordkeeping in each case).

<sup>164</sup> Root, *supra* note 121, at 478. The idea that lawyers and their excessive legalism were part of the problem rather than its solution was an enduring theme of the procedural

A crucial component of this program of simplification was to entrust the judge with more discretion to adapt and even discard procedural rules where necessary to promote substantial justice.<sup>165</sup> This would be accomplished by taking power over the adjective law away from legislatures and putting it into the hands of the courts<sup>166</sup>—what Stephen Subrin has aptly described as a broad “shift to an equity-type jurisprudence.”<sup>167</sup> After all, equity’s role has traditionally been to mitigate the “rigour, hardness, and edge”<sup>168</sup> of the common law by giving the Chancellor the power to compromise general rules in order to prevent their unjust application in particular cases.<sup>169</sup> Rather than a completely informal system with nothing to guide the judge other than his “conscience,” however, the procedural reformers still cleaved to David Dudley Field’s vision of a *merger* of law and equity—a sensible

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reform movement. Leaders of the movement argued for the inclusion of laymen in part because in England, real progress took shape only after “laymen outnumbered the legal profession in the commissions which were created for the purpose of adopting a better legal procedure.” Finch, *supra* note 125, at 363.

<sup>165</sup> Pound, *supra* note 118, at 413 (“A modern practice act lays down the general principles of practice and leaves details to rules of court.”); Pound, *supra* note 132, at 403 (“A practice act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court.”).

<sup>166</sup> See *1922 Hearings on Procedure*, *supra* note 122, at 68 (describing the purpose of the proposed judicial reform bill as “giv[ing] the Supreme Court of the United States the authority to make rules governing the entire procedure in cases at law to the same extent that it now has power to regulate the procedure in equity and admiralty and the bankruptcy courts”); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601–03 (1926) (arguing that courts, not legislatures, should have control over procedure in the courts and suggesting the advantages of such a system); William H. Taft, *Delays and Defects in the Enforcement of Law in this Country*, 187 N. AM. REV. 851, 854 (1908) (arguing that judges should have the power and responsibility over procedural rules). This was finally made possible in the federal system by the Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934).

<sup>167</sup> Subrin, *supra* note 127, at 925. Other commentators have explained this shift in terms of progressivism, legal realism, pragmatism, and a philosophical opposition to formalism in the law rather than in terms of a shift toward equity. See, e.g., Robert G. Bone, *Making Effective Rules*, 61 OKLA. L. REV. 319, 323 (2008) (arguing that the normative vision of early twentieth-century procedural reform was “linked more generally to [an] attack on nineteenth-century formalism and the rise of pragmatic instrumentalism”).

<sup>168</sup> *Dudley v. Dudley*, [1705] 24 Eng. Rep. 118 (Ch.) 119.

<sup>169</sup> See, e.g., *Earl of Oxford’s Case*, [1615] 1 Rep. 1 (Ch.) 16 (Ellesmere, C.J.) (“The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.”); see also J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 102–03 (2002) (describing Chancery’s development as a response to the common law’s rigid and formalistic rules, which sometimes “exclude[d] the merits of the case from consideration but which could not be relaxed without destroying certainty and condoning carelessness”).

balance between *ex ante* rules that would provide consistency and predictability and *ex post* policing in light of experience and reason.<sup>170</sup>

### B. *The Descriptive Claim: The FAA as Procedural Reform*

It is commonly overlooked that all of the key developments in modern arbitration law, including the enactment of the FAA in 1925 and of other state arbitration statutes in the years following, occurred within the same pre-Federal Rules time frame that the reform of judicial procedure was being debated in legislatures and in the popular press. The procedural law discourses sketched in the previous Subpart would therefore appear crucial to understanding the reform of modern arbitration law epitomized by the FAA. The rest of this Subpart and the next will attempt to explain why and how.

With the exception of Imre Szalai, no commentator of whom I am aware has attempted to make this argument, let alone draw out its normative implications.<sup>171</sup> Because Szalai has already done a tremendous job documenting the linkages between the arbitration and procedural reform movements,<sup>172</sup> it may be helpful to take a moment to outline how my account differs from his.

First, my work extends Szalai's descriptive claim in order to explain specifically how the FAA embodies Pound's philosophy of procedural reform—in particular, the idea that procedure was not an end in itself but rather a means to the more important objective of securing substantial justice.<sup>173</sup> Second, Szalai has largely refrained

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<sup>170</sup> See Subrin, *supra* note 127, at 963–64 (“Clark’s portrayal of the Field Code and its problems also support his equity-prone view of procedure. He endorsed Field’s merger of law and equity, as well as his looking to equity for broader joinder and more flexible remedies.”); see also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508 (1986) (“[A] major stated purpose of the new Rules was to provide unified procedure for law and equity.”).

<sup>171</sup> In his seminal study of the history of American arbitration law, for instance, Ian Macneil did not suggest any concrete linkages between the arbitration and judicial reform movements other than to observe, consistent with Szalai, that it is “fairly clear . . . that the reformers saw the reform of arbitration as part of a broader package of legal simplification and responsiveness to commercial needs in general and avoidance of litigation in particular.” MACNEIL, *supra* note 31, at 29.

<sup>172</sup> See SZALAI, *supra* note 52, at 166–73; Imre S. Szalai, *Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 411–19 (describing the FAA as an “outgrowth” of early twentieth-century procedural law reform (quoting *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 Comm. on the Judiciary*, 67th Cong. 9 (1923))).

<sup>173</sup> Szalai documents “parallels or similarities” in the enactment of the FAA and the Rules Enabling Act (REA) primarily by reference to chronological overlaps and assertions about those similarities by historical actors. Szalai, *supra* note 172, at 411–18. For example, he notes that: (1) both statutes were responding to “dissatisfaction with the confusing, technical procedural landscape during the early 1900s”; (2) both deal “at their core” with

from drawing out the import of his descriptive claim other than to suggest that it underscores how “arbitration and litigation are interrelated to some degree.”<sup>174</sup> Third, Szalai does not interpret the broader

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dispute resolution; (3) supporters of both bills argued that they would help relieve courts of congested dockets; (4) the ABA played a significant role in the passage of both bills; (5) proponents of the REA and the FAA “viewed these laws as related and part of a larger movement to improve the administration of justice”; and (6) both bills were inspired by reforms and proposals originally developed in New York. *Id.* at 418–19. By contrast, I focus on (1) and (5) in order to explain in greater detail how the FAA embodies—and was understood to embody—the same basic philosophy of procedural reform that underpins the REA and the Federal Rules. See *infra* Parts II.B.1 & II.B.2 (arguing that the FAA did so by facilitating access to the arbitral forum and by unifying and simplifying the rules for litigation about arbitration). Whereas Szalai appears to believe that the FAA’s primary procedural reform objective was to relieve congested court dockets, I argue that it consists in *improving procedure*—that is, in helping to ensure that disputes would be adjudicated on their merits rather than being won or lost on mere technicalities (as was the case in courts of law at the time).

Also unlike Szalai, I do not view the FAA as related to the Judiciary Act of 1925 in quite the same way as it is related to the REA and the Federal Rules. See Szalai, *supra* note 172, at 396–401 (arguing that the FAA and the Judiciary Act of 1925, like the REA and the Federal Rules, were part of a larger procedural reform agenda to “help relieve an overburdened federal judiciary”). True, both the FAA and the 1925 Judiciary Act functioned to reduce court dockets. But the real question is why. In the case of the former, it was to improve the procedure by which disputes were resolved in order to help secure substantial justice on the merits. See *supra* Part II.A.1 (describing the broader context of twentieth-century procedural law reform). In the case of the latter, I believe it was primarily to promote the Court’s law-enunciation function. See *Appellate Jurisdiction of the Federal Courts*, S. REP. NO. 68-362, at 1 (1924) (explaining that the reason for certiorari review was to conserve the Court’s resources so that it could resolve questions of “grave public concern” and supervise conflicts among the inferior courts); FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 260 (1928) (“At the heart of the [1925 Judiciary Act] was the conservation of the Supreme Court as the arbiter of legal issues of national significance.”); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 962–68 (2013) (arguing that the 1925 Judiciary Act was “premised on a view that the ‘real function’ of the Supreme Court is to ‘settle’ important questions of federal law”).

<sup>174</sup> Szalai, *supra* note 172, at 426; see also SZALAI, *supra* note 52, at 190 (noting the “interrelated nature of arbitration and litigation” and how “the coexistence of a system of arbitration supported by the Federal Arbitration Act and a traditional court system can be mutually beneficial to both systems”). In Szalai’s view, this appears to mean one or all of the following: (1) that just as the FAA and the REA were “interconnect[ed],” so the “FAA can serve our legal system and society” in ways that extend beyond the resolution of private disputes; (2) that the FAA is “linked to our court system by helping relieve concerns about a docket crisis in the courts” and that “the FAA can in effect operate as a safety valve and help reduce the number of cases heard by the judiciary”; (3) that by allowing parties to create their own simplified, flexible alternatives to courtroom procedure, the FAA can “act like a safety valve today if parties are dissatisfied with more formal court procedures”—for example, by allowing them to contract around applicable pleading standards after *Twombly* and *Iqbal*; (4) that a (flexible) system of arbitration “can help show what is possible and give ideas for future changes in court procedure”; (5) that because the FAA and the REA were both originally intended in part to help “foster a national economy,” there is “a potential benefit of [arbitral and judicial] procedure beyond facilitating a particular dispute between two parties: procedural rules can potentially foster

procedural reform context of the FAA as in any way calling into question the descriptive or normative claims behind the contract model.<sup>175</sup> He does not, for instance, attempt to construct a procedural reform model of the FAA or to explain the implications of such a model for current debates and doctrinal developments.<sup>176</sup>

I argue that the FAA's procedural reform purpose is evident in at least two ways. First, by removing the barrier of revocability, the FAA was intended to facilitate access to a forum whose limited rights of appeal and simplified procedural and evidentiary rules made it the embodiment of much of Pound's core philosophy of procedural reform. Second, by collecting in one simple statute a set of straightforward, nontechnical procedures to govern litigation about arbitration in federal court, the FAA was itself an example of the type of judicial reform advocated by Pound and his colleagues.<sup>177</sup>

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commerce"; (6) that just as the REA delegates the power to create procedure to the judiciary, the FAA "helps respect party autonomy by giving parties the freedom to design and create their own procedure." Szalai, *supra* note 172, at 424–28. Although I am in agreement with several of these propositions, it is not my goal here to defend any of them. In my view, the primary significance of the FAA's procedural reform legacy is that it undermines both the descriptive and normative aspects of the contract model and points in the direction of a different, procedural reform model.

<sup>175</sup> To the contrary, Szalai argues that the broader procedural reform context of the FAA "helps emphasize a fundamental value behind the FAA"—namely, that the "FAA helps respect party autonomy by giving parties the freedom to design and create their own procedure." Szalai, *supra* note 172, at 428. As will become clear, I draw a very different conclusion. See *infra* Part II.C.1 (arguing that, rather than a fundamental value that trumps all others, party autonomy can be understood as a particularly effective means of furthering the FAA's broader commitment to procedural reform).

<sup>176</sup> See *infra* Part III (addressing the normative implications of the procedural reform model and how they might change the way that courts decide arbitration cases or how legislatures regulate arbitration going forward).

<sup>177</sup> Some readers might ask how the descriptive claim I am making here squares with the claim I have made elsewhere about the antidiscrimination logic of FAA preemption. In the latter context, my point was never that the FAA was originally intended as an antidiscrimination statute, but rather that the *Court's FAA jurisprudence* is implicitly and unavoidably based on the idea (whether historically accurate or not) that one of the FAA's purposes is to prevent unjustified hostility or discrimination toward arbitration:

To be clear, the anti-discrimination theory of FAA preemption that I seek to defend is grounded primarily in the Court's jurisprudence rather than in the FAA itself. . . . What is undeniable, however, is that courts routinely deploy the rhetoric of anti-discrimination when justifying the FAA's displacement of state law. . . .

[I]t is unlikely that drafters of the FAA conceived of the statute's purpose in terms of remedying "discrimination" against arbitration. Nonetheless, the historical record is replete with antidiscrimination themes. In the years following the FAA's passage, the Court would eventually organize those themes into a much more coherent norm of anti-discrimination.

Aragaki, *supra* note 16, at 1238, 1254. In my earlier work I specifically resisted making any claims about the original purposes of the FAA, reasoning that the statute's text and legislative history are too indeterminate. *Id.* at 1238 ("Although anti-discrimination themes

To be clear, my point is not that early twentieth-century proponents of the FAA were indifferent about freedom of contract or the virtues of privatized dispute resolution. Quite the contrary: It is that, given the increasingly intolerable situation in the courts and the seeming stagnation of judicial reform efforts in Congress, they saw privatization as the most effective vehicle for improving adjudicative dispute resolution.<sup>178</sup> As the House Report urging passage of the FAA explained, a national arbitration law was vital “at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated,” the Report concluded, “if arbitration agreements are made valid and enforceable.”<sup>179</sup> Section 2’s imperative that arbitration agreements “shall be . . . enforceable,”<sup>180</sup> in other words, was a means to an end rather than an end in

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are certainly evident in the text and history of the statute, the language of the FAA is simply too indeterminate, and the congressional record leading to its enactment too sparse, to draw any firm conclusions about its original meaning.”). Here, by contrast, I am making a claim (albeit not an exclusive one) about that original purpose and not about the Court’s FAA jurisprudence.

<sup>178</sup> Ironically, courts were widely criticized during this period for striking down progressive social legislation and for favoring conservative interests—*Lochner v. New York*, 198 U.S. 45 (1905), being perhaps the most celebrated example. See, e.g., John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 989 (2007) (“[T]here is no denying that numerous state court decisions [overruling social and economic legislation] were issued during this period and were viewed by Progressive reformers as blocking enactment of important policies.”); W.F. Dodd, *Social Legislation and the Courts*, 28 POL. SCI. Q. 1, 5 (1913) (“[T]he greater number of our state courts are illiberal and, under our present constitutional and judicial organization, are able to block needed social and industrial legislation.”); Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1542–46 (2010) (describing the common-law origins of state-court hostility toward progressive legislation during the period). Thus, even if merchants’ primary motive was to escape government regulation, there would have been little reason for them to seek alternatives to the already-conservative judicial system. See Carrington & Haagen, *supra* note 59, at 344 (“Arbitration as practiced in 1925 between merchants engaged in interstate and marine commerce was not a means of diverting from courts disputes arising in the enforcement of Progressive legislation regulating business to limit economic power and protect the weak from the strong.”).

<sup>179</sup> H.R. REP. NO. 68-96, at 2 (emphasis added); see also 66 CONG. REC. 984 (1924) (describing the FAA’s purpose in terms of furthering “business interests [in avoiding] . . . so much delay attending the trial of lawsuits in courts”). Similarly, even though it describes the FAA’s overall purpose in terms of enforcing arbitration agreements like any other contract, the Senate Report characterized the core business interests behind the legislation as a “desire to avoid the delay and expense of litigation.” S. REP. NO. 68-536, at 3; see REGINALD HEBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* 72 (1919) (describing arbitration as a solution to the “problem of denial of justice” in the courts).

<sup>180</sup> 9 U.S.C. § 2 (1925).

itself. That end was to “simplify[ ] business [disputing] procedure” and to improve the “administration of justice.”<sup>181</sup>

### 1. *Improving Access to a Better Procedural Forum*

At a time when it was still uncertain whether the reform of judicial procedure would ever succeed,<sup>182</sup> arbitration presented itself as an obvious solution. For example, arbitration lacks complex and unforgiving pleading rules.<sup>183</sup> Because the review of arbitral awards is limited, the likelihood of serial appeals and retrials was remote. Arbitrators are not bound by the rules of evidence, which in turn meant that all relevant facts could be admitted without fear of technical objections “whereunder so often truth has been silenced . . . and justice skillfully and effectively sandbagged.”<sup>184</sup> As a Detroit lawyer summed it up:

Arbitration is plain and not technical; an arbitrator will not ask for proof of the birth of the person standing before his very eyes (as has actually been done under strict court rulings); . . . The whole arbitration procedure is simple, plain and business-like; it is flexible instead of rigid; there are [sic] no confusion of witnesses and silly demands for impossible “yes” or “no” answers; . . . and no dramatic appeal intended to secure a decision on law and eloquence rather than on justice and equity.<sup>185</sup>

As compared with litigation, arbitration was also free of “[t]he usual court atmosphere . . . [of] abuse by one side or the other”<sup>186</sup>—

<sup>181</sup> Charles L. Bernheimer, *The United States Arbitration Act*, 3 W. PUB. CO. DOCKET 2928, 2928 (1925); Percy Werner, *Voluntary Tribunals*, 56 AM. L. REV. 852, 867 (1922).

<sup>182</sup> For a detailed account of the resistance that the procedural reformers met in Congress, see Burbank, *supra* note 131, at 1063–95.

<sup>183</sup> E.g., A.B.A. Committee on Commerce, Trade, and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155 (1925) [hereinafter *A.B.A. Comm.*] (“There are no technical pleadings . . . [and] no multiplicity of motions . . .”); Werner, *supra* note 181, at 866 (observing that arbitration “does away with the distinction between law and equity . . . together with the technicalities of pleading, trifling exceptions relating to procedure, and rules of evidence . . . and gets down to the marrow of a controversy in a simple, speedy, direct manner”).

<sup>184</sup> W.F. Weiss, *Arbitration*, 36 J. ACCOUNTANCY 327, 329 (1923); see also Note, *Arbitration Under the Modern Statutes*, 23 MICH. L. REV. 882, 882 (1925) (proposing arbitration as the “most likely solution” to the problem of “motions and counter-motions; the retrials and appeals; the highly technical and ancient rules of evidence and procedure, whereby the truth may be excluded”).

<sup>185</sup> Lappin, *supra* note 155, at 198. The avoidance of unnecessary legal technicalities has been a venerable theme in the history of American arbitration law. See, e.g., STEWART KYD, *A TREATISE ON THE LAW OF AWARDS* 2–3 (1808) (describing arbitration in part as a response to the pervasive “fear that a technical mistake in some part of [common-law] proceedings may endanger the party’s success”).

<sup>186</sup> 1924 *Hearings on Arbitration*, *supra* note 40, at 7 (statement of Charles L. Bernheimer); see also Sayre, *supra* note 35, at 614 n.44 (“The essential elements of

what Pound referred to as the “sporting” approach to justice. If “[i]n law, the object is to win, and technical advantages will be taken to gain a point,” in arbitration “the object is to decide the case on its merits.”<sup>187</sup> Thus, trade-association arbitration rules often provided that “[t]echnical or legal points should not prevail against the establishment of an equitable claim.”<sup>188</sup>

In these ways, the arbitral forum was understood as an alternative specifically to the *procedural* morass of litigation, not just as a moment in the privatization of public adjudication.<sup>189</sup> “In large measure commercial arbitration is based upon procedural superiorities which that system has or is claimed to have over our established system for the administration of justice,”<sup>190</sup> explained a report of the official committee on arbitration for the Association of the Bar of the City of New York. This was consistent with the widespread perception that “[b]usiness men go to arbitration to avoid legal *procedure*” rather than to avoid the law itself.<sup>191</sup>

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freedom from bitter contention, privacy, and informality may all be expected in commercial arbitration . . . .”); Wesley A. Sturges, *Modern Developments in the Practice and Law of Commercial Arbitration*, 5 B. BRIEFS 101, 105 (1928) (explaining that parties choose arbitration to avoid “[t]rial practice,” which to most litigants “seems strange, absurd, technical and treacherous, and not infrequently to involve bickering, bartering and compromise”). Arbitration hearings were also portrayed as amicable and conducive to ongoing business dealings. *E.g.*, Charles L. Bernheimer, *Advantages Ascribed to Arbitration*, 9 J. AM. JUDICATURE SOC’Y 73, 74 (1925) (“Arbitration [c]onserves [f]riendly [r]elations”).

<sup>187</sup> Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 244 (1929); *see also* SMITH, *supra* note 179, at 70 (describing the absence of “technical pleadings” and “predetermined detailed procedure” in arbitration); Baum & Pressman, *supra* note 50, at 249–50 (arguing that arbitration is “less technical than law procedure, even under the Codes” and that arbitrators “try to achieve justice in each dispute, based on its own facts”). For example, the U.S. Chamber of Commerce’s model rules for commercial arbitration, drafted for the benefit of trade associations nationwide, provided that “[t]he purpose of arbitration under these rules is to obtain a determination of business controversies upon their merits.” U.S. DEP’T OF COMMERCE, TRADE ASSOCIATION ACTIVITIES 99, 102 (1923).

<sup>188</sup> U.S. DEP’T OF COMMERCE, *supra* note 187, at 105.

<sup>189</sup> *See, e.g.*, Werner, *supra* note 181, at 864–65 (suggesting, with respect to “ordinary civil actions which choke our courts,” that arbitration using lawyers and legally-trained arbitrators “offers one solution of the vexed question of [judicial] procedure”).

<sup>190</sup> Special Committee, Ass’n of the Bar of the City of N.Y., *Attitude of the Legal Profession Toward Arbitration*, in SELECTED ARTICLES ON COMMERCIAL ARBITRATION 201, 203 (Daniel Bloomfield ed., 1927).

<sup>191</sup> William L. Ransom, *The Layman’s Demand for Improved Judicial Machinery*, in SIMPLIFIED LEGAL PROCEDURE, *supra* note 125, at 132, 149; *see also* Baum & Pressman, *supra* note 50, at 250 (citing the “inadequacies of our judicial system” and “dissatisfaction with the current mode of administration of justice” as the “raison d’être” of modern arbitration statutes); Roscoe Pound, *The Future of Law*, 47 YALE L.J. 1, 11 (1937) (“[J]ury trial of civil cases and a hypertrophy of civil procedure have driven men to find simpler and speedier agencies of justice for the time being . . . .”); Root, *supra* note 121, at 478 (arguing

Moreover, arbitration was not just any procedural alternative; it was one that strikingly resembled the core philosophy of procedural law reform. Cohen and Alexander Rose (the latter of the Arbitration Society of America) made this point in Congress by linking arbitration law reform to Chief Justice Taft's efforts at "improv[ing] the processes of justice."<sup>192</sup> The point was not lost on the likes of Pound or the Federal Rules' chief architect, Charles E. Clark, either.<sup>193</sup> Recall that the procedural reformers were deeply inspired by the model of equity.<sup>194</sup> Arbitration's strength, like that of the (early) courts of Chancery, was

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that merchants go to arbitration in order to avoid judicial procedure, which had "hardened into an iron-bound system which had ceased to fit the rapidly developing and changing life of American communities"). *But see* Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 609 (1934) (attributing to merchants the view that law is "antagonistic to proper business conduct").

<sup>192</sup> 1924 *Hearings on Arbitration*, *supra* note 40, at 13 (statement of Julius Henry Cohen); *id.* at 26–27 (statement of Alexander Rose).

<sup>193</sup> For example, notwithstanding their other reservations about informal tribunals, procedural reformers 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. *See* Clark, *Procedural Fundamentals*, *supra* note 148, at 71 (arguing that strict pleading rules might not be essential for ordinary litigation, considering that commercial arbitration tribunals and workmen's compensation boards dispense with them); Pound, *supra* note 166, at 602 (referring to "tribunals manned by laymen"); *cf.* Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 579 (2005) ("[E]xpert arbitrators and mediators are the true descendants of the judges that Pound dreamed of educating . . ."). Clark went as far as to laud the American Arbitration Association (AAA) for taking "[v]igilant care that the procedure [in arbitration] remain simple and effective." Clark, *Handmaid of Justice*, *supra* note 116, at 303 (emphasis added).

<sup>194</sup> *See supra* notes 165–70 and accompanying text (discussing how procedural reformers like Pound and his colleagues sought a merger of law and equity). Arbitration, it turns out, has enjoyed a long tradition of association with courts of equity. *See* Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 354–74 (2005) (examining the similarities between equity and ADR); J.B. Post, *Equitable Resorts Before 1450*, in LAW, LITIGANTS & THE LEGAL PROFESSION 68, 68–69 (E.W. Ives & A.H. Manchester eds., 1983) (arguing that the equity side of Chancery arose out of preexisting social practices of arbitration and mediation in medieval England); Darien Shanske, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053, 2055 (2005) (tracing association of arbitration and equity back to Aristotle).

It is no accident that, with one or two exceptions, the most rabid critics of Chancery were also consistently anti-arbitration and vice versa. For example, Sir Edward Coke was not just a celebrated opponent of equity, he was also the original authority for the infamous revocability doctrine. *See* *Vynior's Case*, [1609] 77 Eng. Rep. 597, 599 (K.B.) (Coke, J.) (stating, in dictum, that "an arbitration agreement is by the law and of its own nature countermandable"). By contrast, Lord Coke's archrival, Francis Bacon, served as Lord Chancellor and advocated the use of arbitration and mediation. *See, e.g.*, Joel J. Epstein, *Francis Bacon: Mediator in the Parliament of 1604*, 30 HISTORIAN 219 (1968) (describing how Bacon often mediated conflicts in Parliament). Lord Mansfield, another great champion of equity, was also a keen supporter of arbitration. *See, e.g.*, JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD* 72 (2004) (describing Mansfield's "encouragement of arbitration").

its relative lack of *ex ante* rules and its greater emphasis on giving the decisionmaker *ex post* flexibility to manage the proceedings in the interests of substantial justice. This is perhaps the spirit in which Cohen argued that the FAA was intended not to “narrow[ ] the jurisdiction of the Supreme Court” but rather to “add[ ] to its equity powers.”<sup>195</sup> Arbitration was also consistent with the goal of making judicial procedure better conform to the way that ordinary laypersons expected to resolve their disputes.<sup>196</sup> After all, arbitration was a “people’s court[ ].”<sup>197</sup> Witnesses could tell their stories in a natural way, free of technical rules that excluded the very testimony that jurors would consider relevant outside the courtroom.<sup>198</sup>

These features of arbitration, in turn, allowed it to further what was perhaps the most important goal of all good procedure: securing substantial justice. Thus, Moses Grossman, a former judge and founder of the Arbitration Society of America (a precursor of the American Arbitration Association (AAA)),<sup>199</sup> argued that arbitration afforded a “determination of rights and the enforcement of remedies” and allowed a party to “ascertain and obtain all he is entitled to from his opponent” as if he had proceeded in court.<sup>200</sup> As Bernheimer testified in Congress, the entire point of choosing arbitration was to “*obtain[ ] substantial justice* on the precise point on which a decision is sought, rather than, as often happens in court procedure because of the necessary application of general rules, obtaining a decision based

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<sup>195</sup> Cohen, *supra* note 42, at 150.

<sup>196</sup> See *supra* notes 156–59 and accompanying text (describing how laypersons lost faith in the law because the complicated nature of judicial procedure made the entire system seem unfair).

<sup>197</sup> “Peoples’ Courts” of Arbitration, LITERARY DIGEST, Oct. 4, 1924, at 14; see *New Tribunal Cuts Red Tape of Courts in Civil Disputes*, N.Y. TIMES, May 13, 1922, at 7 (describing arbitration as an “honest, fair, common sense proceeding throughout—the sort of a proceeding that a man with honest differences and honest purpose will desire”).

<sup>198</sup> See, e.g., *1924 Hearings on Arbitration*, *supra* note 40, at 27 (statement of Alexander Rose) (arguing that arbitration “appeals to the ordinary man” in part because he can “have his say unembarrassed by technicalities, so that the full truth may come out . . .”); Jessup, *supra* note 125, at 17–19 (praising workmen’s compensation boards and the “system of ‘arbitration and conciliation’” in New York as examples of forums in which rights are determined “upon the same kind of testimony that affects the man in the street in making his own daily determinations”); Weiss, *supra* note 184, at 330 (describing arbitration as a “simple, democratic procedure in which every disputant and every witness gives his evidence in his own way”).

<sup>199</sup> Joseph Wheelless, *Arbitration As a Judicial Process of Law: A New Era in Legal Procedure Created by the New York and New Jersey Statutes. The Principles and the Practice Defined*, 30 W. VA. L.Q. & B. 209, 229 (1924).

<sup>200</sup> Moses H. Grossman, *Speeding Up Justice Through Arbitration*, 5 ILL. L.Q. 135, 136 (1922).

on technical points with which [parties] had no concern whatever.”<sup>201</sup> Free of the “unwieldy bolt of red tape known as rules of evidence and procedure,”<sup>202</sup> arbitration delivered what the Journal of the American Judicature Society called “real justice, as against [the] mere theoretical justice” promised by the courts.<sup>203</sup> While testifying in Congress, Cohen accordingly described the proposed arbitration legislation as part of wider efforts “to improve the processes of justice as to make [arbitration] an instrument of justice indeed.”<sup>204</sup>

Modern readers—critics of “mandatory” binding arbitration in particular—will likely find it difficult to conceive of arbitration law reform as intended to achieve “justice” as opposed, say, to party autonomy, speed, or economy. But this is because they typically take arbitration’s flexibility and informality to be a sign of lawlessness, which in turn betrays the assumption that the number or rigor of *ex ante* procedural rules is positively related to the quality of adjudication.<sup>205</sup> This premise would have seemed far from obvious to anyone familiar with litigation circa 1920, however—a time, recall, in which

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<sup>201</sup> Charles L. Bernheimer, *The Advantages of Arbitration Procedure*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 100 (1926) (emphasis added); see also U.S. DEP’T OF COMMERCE, *supra* note 187, at 98 (“[A]rbitration affords a means for decision upon the merits . . . [with] less chance of the result to turn upon some technicality or some rule of which neither party had knowledge.”); FRANCES KELLOR, *ARBITRATION IN ACTION: A CODE FOR CIVIL, COMMERCIAL, AND INDUSTRIAL ARBITRATIONS* 4 (1941) (“Arbitration . . . goes deep into the causes, sifts the facts and, unhampered by legal technicalities, sees that justice is administered.”); Note, *supra* note 184, at 886 (“For those who want . . . controversies settled on their real merits, there is nothing that equals this ‘short-cut to substantial justice.’”).

<sup>202</sup> Phyllis Perlman, *Cutting the Red Tape of the Law*, 71 COLLIER’S 22, 22 (1923).

<sup>203</sup> *Model Arbitration Statute Offered*, 10 J. AM. JUDICATURE SOC’Y 122, 123 (1926).

<sup>204</sup> *1924 Hearings on Arbitration*, *supra* note 40, at 13 (statement of Julius Henry Cohen); see *id.* at 27 (statement of Alexander Rose) (arguing that, rather than a mere chance at pristine justice, arbitration afforded the layperson “plain justice, in as simple terms as it can be reduced to”). To be sure, Cohen would have been the first to admit that arbitration was not appropriate for all cases and was therefore not a complete substitute for litigation. See, e.g., Julius Henry Cohen, *Arbitration and Public Policy*, 5 ARB. J. 209, 213 (1941) (“Some of us have warned many times that the proponents of arbitration must not present it either as a panacea or as a substitute for the administration of justice in the courts.”); Cohen & Dayton, *supra* note 36, at 281 (noting that arbitration was “subject to abuse” and that “[n]ot all questions arising out of contracts ought to be arbitrated”). But he and Kenneth Dayton also argued that, at least with respect to commercial disputes, arbitration was unmatched *even by courts of law* in its ability to “attain the ends of justice as nearly, as quickly and as economically as [possible].” *Id.* at 282.

<sup>205</sup> See, e.g., Carrington, *supra* note 7, at 281–83 (arguing that arbitration “differs in vital ways” from litigation, in part because arbitrators are not required to follow the law); Kirgis, *supra* note 48, at 100–01, 110–11 (arguing that the FAA’s limited grounds for substantive review of arbitral awards is a telltale sign of a contract- rather than a procedure-based understanding of the FAA); Kronstein, *supra* note 8, at 66 (“No theory in support of organized arbitration can conceal the essential ‘lawlessness’ of this form of ‘private government.’”).

the weight of opinion was moving toward the opposite view that *less* procedure meant *more* justice.<sup>206</sup>

Here it might be retorted that arbitration was not just a forum with fewer and simpler *ex ante* procedures; it was a forum with no *ex ante* procedures at all.<sup>207</sup> Arbitrators are not bound by judicial rules of procedure and evidence and the FAA does not prescribe any such rules in arbitration.

There is a difference, however, between saying that arbitrators may disregard rules in the interest of justice and saying that there are *no* such rules or that arbitrators are free to disregard the evidence itself.<sup>208</sup> The arbitration reformers were keenly aware of the way that, unlike other forms of ADR, arbitration required “a foundation of procedural law” in order to fulfill its reform mission of “safeguarding the interests of the parties in obtaining a just determination of their dispute.”<sup>209</sup> They argued that arbitration offered unquestionable advantages over litigation so long as there was adequate “supervision of *procedure* by a chamber of commerce, trade association, or other organization which has special experience.”<sup>210</sup> They accordingly

<sup>206</sup> See *supra* notes 150–55 and accompanying text (discussing how complex procedural requirements at this time often stood in the way of achieving justice); see also McDermott, *supra* note 11, at 102 (arguing that simplifying judicial procedure through proposed reforms “will not prevent the attainment of substantial justice”).

<sup>207</sup> See, e.g., Arbitration Fairness Act of 2007, 110th Cong. § 2(5) (2007) (“With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.”); Carrington, *supra* note 7, at 282–83 (arguing that arbitrators are not required to follow the law and are “free to do equity or justice as they see it”).

<sup>208</sup> As Soia Mentschikoff explained, the rules of procedure or evidence “clearly must be” used in arbitration; the real question is “whether the ones used in arbitration are geared to the production of a *better, in the sense of more just, result, than those used in the court process.*” Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 117 LAW & CONTEMP. PROBS. 698, 704 (emphasis added). As was frequently noted at the time, because judicial rules of evidence typically have the effect of excluding rather than including testimony, greater discretion to disregard those rules actually results in *more* information being considered. See, e.g., KELLOR, *supra* note 201, at 99 (stating that arbitrators were often criticized for “accept[ing] too much evidence”).

Consider also that the rules of evidence are relaxed during bench trials. *E.g.*, Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 203. Yet this in itself does not lead us to believe that bench trials are inherently more inaccurate than jury trials. Even in jury trials, the enforcement of evidentiary rules is not guaranteed and depends on the active vigilance of counsel. See Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1714 n.8 (2001) (“Most lawyers and judges have quite a relaxed sense of the rules of evidence, often ignoring them by tacit agreement and not only in bench trials.”).

<sup>209</sup> KELLOR, *supra* note 201, at 10.

<sup>210</sup> JULIUS HENRY COHEN & KENNETH DAYTON, HANDBOOK AND GUIDE TO COMMERCIAL ARBITRATION UNDER THE NEW YORK AND UNITED STATES ARBITRATION STATUTES 5, 13 (1932) (stressing the advantages of arbitrating “pursuant to association or chamber of commerce rules”). Bernheimer explained that commercial organizations

emphasized the critical role of organizations such as the AAA in providing trained arbitrators and drafting fair arbitration rules.<sup>211</sup> Frances Kellor, one of the “principals” of the arbitration reform movement and a founder of the AAA,<sup>212</sup> went as far as to claim that adherence to institutional rules of arbitration procedure was an implicit precondition of state and federal laws that had liberated predispute arbitration agreements from the shackles of revocability. “[I]t may be seriously doubted,” she argued, whether

without the establishment and rather wide use of rules of procedure, legislatures would have granted the right to parties to submit future

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needed to establish “[a]rbitration machinery in charge of competent men” so that the “many merchants who will now seek this common sense method of settlement for their business difficulties may do so with the assurance that the proceedings will be conducted under proper guidance and strictly in accordance with the provisions of the law itself.” Bernheimer, *supra* note 201, at 103–04. At the New York Chamber of Commerce, for example, this supervision included attendance by arbitration committee members at arbitration hearings and provision of advice as *amicus curiae* on any questions that arose about the interpretation or application of the Chamber’s arbitration rules or applicable laws of arbitration. See *Conference of Bar Association Delegates*, 5 A.B.A. J. 15, 45–46 (1919) (describing the functions of the Committee on Arbitration).

<sup>211</sup> See, e.g., Cohen, *supra* note 204, at 219 (arguing that supervision of arbitration proceedings by associations such as the AAA and the New York Chamber of Commerce “demonstrates that, with carefully selected arbitrators, with rules governing their conduct, and such guidance as is contained in the handbooks issued by the two associations, the criticisms that have heretofore been made are completely met and overcome”). For example, Kellor believed that what made modern arbitration distinctive was its emphasis on “organized” arbitration—arbitration administered by an organization according to standardized procedural rules, prevailing arbitration law, and accepted principles and practices. KELLOR, *supra* note 201, at 12; see also *id.* at 12–14, 34–36, 41 (discussing the critical role of procedural rules in arbitration).

At the time, numerous trade organizations and chambers of commerce across the country had promulgated their own rules of arbitration, suggesting that arbitration procedure was somewhat institutionalized. See H. ARTHUR DUNN & HENRY P. DIMOND, *COMMERCIAL ARBITRATION, BEING A COMPILATION OF AWARDS OF ARBITRATION COMMITTEES OF VARIOUS TRADE ASSOCIATIONS AND CHAMBERS OF COMMERCE IN THE UNITED STATES 267–307* (1922) (setting forth examples). It may come as a surprise to modern readers that several associations and chambers of commerce (many of which openly endorsed the FAA’s passage) even provided appellate arbitration procedures. *Id.* at 275–76, 279–80, 283–84, 286–90, 295, 304, 306 (1922) (setting forth rules of the Chicago and New Orleans Boards of Trade, among others); *Grain Dealers National Association Arbitration Rules*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION*, *supra* note 190, at 105, 106. Those procedures were in existence at the time the FAA was being debated in Congress and appear to have been used with some regularity, suggesting that the practice of arbitration was much more rule-bound than the FAA’s text would lead us to believe. See DUNN & DIMOND, *supra*, at 29–266 (describing arbitral awards that were appealed to the Committee on Appeals of the San Francisco Chamber of Commerce from groups such as the Importers and Exporters Association, the Foreign Commerce Association, and the Rice Association of California); cf. Phillips, *supra* note 191, at 623 (“One is immediately struck in examining the trade association rules by the large number providing for an appeal after an arbitrator’s decision to another board of arbitration.”).

<sup>212</sup> MACNEIL, *supra* note 31, at 195 n.40.

disputes to arbitration under legally valid and enforceable arbitration clauses in contracts. . . . The American Arbitration Association believes so implicitly in the indispensability of rules to a proper proceeding that it does not accept nor supervise any proceeding in which rules of procedure are not provided.<sup>213</sup>

Arbitration under the FAA was therefore understood as a forum free of procedural rigidity and technicality—not free of procedure *tout court*. Cohen and his colleagues were hardly indifferent about the importance of *ex ante* procedural rules in arbitration and likely did not intend the FAA's silence on the matter to imply a policy of complete procedural agnosticism.

Instead, by making arbitration agreements “valid, irrevocable, and enforceable,”<sup>214</sup> modern arbitration statutes such as the FAA were both sold and received as improving access to a forum with the same procedural advantages that Pound and others promised through the reform of judicial procedure.<sup>215</sup> Indeed, the idea for a national arbitration act originally arose in this context during discussions within the New York State Bar Association on the prevention of unnecessary litigation.<sup>216</sup> As Cohen argued in a brief he submitted to Congress, the primary “evils” that the FAA was intended to correct sounded not so much in contract but in procedure:

(1) The long delay usually incident to a proceeding at law, . . . especially in . . . centers of commercial activity, where there has arisen great congestion of the court calendars. This delay arises . . . fre-

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<sup>213</sup> KELLOR, *supra* note 201, at 35, 41; *id.* at 34–36. Likewise, Bernheimer warned that the liberal enforcement of arbitration clauses made possible by the FAA “*carries with it serious responsibilities*,” which required arbitration proceedings to be conducted under the rules and guidance of associations such as the AAA. Bernheimer, *supra* note 201, at 103 (emphasis added); *see also* Moses H. Grossman, The Need of Arbitration to Relieve the Congestion in the Courts, *in* ADDRESS BEFORE THE ACADEMY OF POL. SCI. ANNUAL MEETING ON “LAW AND JUSTICE” (May 9, 1923) at 213 (emphasizing that at the “Tribunal of Arbitration,” arbitrators are chosen “jurists of the highest type” and suggesting that “arbitrators should be subject to the control of the court [for their own misconduct only] in the same way and to the same extent as referees appointed by the court”).

<sup>214</sup> 9 U.S.C. § 2 (1925).

<sup>215</sup> For instance, Alexander Rose testified in Congress that modern arbitration law was needed because “the crying demand and the need of the hour” is “to simplify legal matters . . . [because] [p]eople are dissatisfied with the courts.” 1924 *Hearings on Arbitration*, *supra* note 40, at 26. Judges and commentators echoed these reasons for arbitration law reform. *See, e.g.*, Rodenbeck, *supra* note 121, at 66 (criticizing the system of statutory procedure for preventing courts from “deviat[ing] from the rules thus laid down” and explaining the growth of arbitration as “a protest against the existing court procedure”).

<sup>216</sup> 1923 *Hearing on Arbitration*, *supra* note 42, at 8–9 (statement of W.H.H. Piatt); *see also* Cohen & Dayton, *supra* note 36, at 265 (“The [arbitration law reform] movement finds its origin in the unfortunate congestion of the courts and in the delay, expense, and technicality of litigation.”).

quently from preliminary motions and other steps taken by litigants, appeals therefrom, which delay consideration of the merits, and appeals from decisions upon the merits which commonly follow the decision of any case of real importance. (2) The expense of litigation. (3) The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world. This failure may result either because the courts necessarily apply general rules which do not always fit a specific case, and because, in the ordinary jury trial, the parties do not have the benefit of the judgment of persons familiar with the peculiarities of a given controversy.<sup>217</sup>

Cohen and his colleague Kenneth Dayton accordingly described the bill as “simply a new procedural remedy” akin to the procedural remedies (i.e., reforms) proposed by Pound and others that had garnered “the constant attention of the organized bar throughout the country.”<sup>218</sup> Both the ABA and Bernheimer went even further by calling the FAA a type of “procedural reform.”<sup>219</sup> This assessment was undoubtedly shared by advocates of judicial reform, many of whom pushed for modern arbitration legislation alongside more traditional proposals such as the simplification of procedural rules, the unification of state courts, and the substitution of judicial for legislative rulemaking.<sup>220</sup> For example, Elihu Root included a discussion of arbi-

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<sup>217</sup> 1924 *Hearings on Arbitration*, *supra* note 40, at 34–35; see *A.B.A. Comm.*, *supra* note 183, at 155–56 (describing the motivation behind the FAA in terms of these evils).

<sup>218</sup> Cohen & Dayton, *supra* note 36, at 279. They added that arbitration was “particularly adapted to the settlement of commercial disputes.” *Id.*

<sup>219</sup> Bernheimer, *supra* note 181, at 2928 (quoting a report of the ABA Committee on Commerce, Trade, and Commercial Law). Others echoed this sentiment. See, e.g., 1923 *Hearing on Arbitration*, *supra* note 42, at 9 (statement of W.H.H. Piatt) (explaining that the FAA was “one of the outgrowths of [the] movement” that originated in New York to discourage unnecessary litigation); Wesley A. Sturges, *Some Common Law Rules and Commercial Arbitration*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION*, *supra* note 190, at 156, 164 (stating that court congestion and technical rules of procedure and evidence were “part of the stimuli for the present day commercial arbitration movement”); Werner, *supra* note 181, at 854–64 (advocating arbitration using lawyers and legally trained arbitrators as a type of “new and reformed procedure” akin to “the suggestions put forth by the bar of the country relating to the substitution of elastic court rules for rigid statutory procedures, for liberalizing artificial rules of evidence, for the simplification of pleadings,” etc.).

<sup>220</sup> E.g., E.F. Albertsworth, *Leading Developments in Procedural Reform*, 7 CORNELL L.Q. 310 (1921); Lappin, *supra* note 155, at 205 (“Arbitration is not a panacea for all the evils of litigation but it is the oldest and best method devised to relieve and supplement the work of the courts and provide more perfect justice.”); Rodenbeck, *supra* note 141, at 85 (recommending arbitration as a “subject of consideration” together with eliminating double appeals, simplifying pleading rules, and reorganizing the courts); Taft, *supra* note 118, at 36–38 (including arbitration among a number of suggested reforms to improve the administration of justice). And even though several prominent proceduralists remained skeptical of arbitration, all appeared to be in agreement that the growing popularity of extrajudicial tribunals was a direct consequence of failures in the administration of justice

tration in a speech to the New York State Bar Association entitled, "The Reform of Procedure." In his view, the "real strength" of arbitration was the notion that if businesses could just "get away from lawyers and the law's delays and the cumbrous technical and expensive *procedure* of our courts, they can have the *merits* of their disputes determined swiftly, certainly, inexpensively, and adequately."<sup>221</sup>

At the macro level, therefore, it is possible to understand modern arbitration law reform as no less concerned than the movement that led to the Federal Rules with using the law to improve procedure. Rather than promoting an opt-out from all procedural regulation, it sought to make accessible a *better* type of procedure—that is, one that was more consistent with Clark's vision of procedure as the "hand-maid" of justice.<sup>222</sup> Procedural and arbitration law reform can thereby be understood as alternative responses, inspired by similar values, to the same basic problem.

The real difference between the two lay in the particular solutions they proposed.<sup>223</sup> Pound and his colleagues sought to entrust judges with the power to create and enforce rules of procedure. By contrast, the arbitration reformers—being perhaps distrustful of the historic judicial "hostility" toward arbitration<sup>224</sup>—preferred to make available an alternative forum whose rules were largely the province of the parties and of private organizations with special expertise in commercial dispute resolution. In all other respects, however, arbitration was an embodiment of the same basic theory of procedure that Pound, Shelton, Clark, and others sought to implement through their proposed reforms. According to that theory, procedure was not an end in itself but rather just the means; the overriding goal was always the adjudication of disputes on their merits.

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more so than of a desire to escape substantive regulation. *See, e.g.*, Root, *supra* note 121, at 478 (arguing that merchants go to arbitration in order to avoid judicial procedure); Shelton, *supra* note 149, at 666 (arguing that the technicality and dilatoriness of courtroom litigation has "ma[de] necessary the use of arbitration courts").

<sup>221</sup> Root, *supra* note 149, at 205 (emphasis added).

<sup>222</sup> *Supra* note 148 and accompanying text.

<sup>223</sup> In the words of one commentator, the difference was simply that the former chose to "besiege our legislatures with demands for the reform of our procedure," while the latter realized that through enforceable contracts to arbitrate, "we have command of the situation ourselves." Werner, *supra* note 181, at 867.

<sup>224</sup> *See supra* notes 36–42 and accompanying text (discussing how judges, lawyers, and business persons came to view the revocability doctrine as based on a judicial hostility toward arbitration).

## 2. *Creating a Mini-Procedural Code for Litigation About Arbitration*

The contract model takes section 2 of the FAA, which makes arbitration agreements enforceable by specific performance, to be the FAA's "centerpiece."<sup>225</sup> It thereby gives short shrift to the remaining sections of the FAA, which merely set forth the procedures to be followed in federal court for litigation about arbitration.

The significance of these remaining sections becomes clear, however, once we take into account the state of judicial procedure circa 1920. In a pre-Federal Rules era with no uniform set of federal rules for actions at law,<sup>226</sup> the FAA's procedural provisions revolutionized federal litigation regarding the enforcement of arbitration agreements and awards. Recall that because of the Conformity Act, the procedure for enforcing arbitration agreements and awards in federal court—like federal civil procedure more generally—varied depending on the state in which the district court was located.<sup>227</sup> As a result, the FAA did not just replace already-existing procedures; it took the bold step of creating nationwide rules in this area *ex nihilo*.<sup>228</sup> As suggested by the significant resistance that broader efforts to unify federal procedure encountered in Congress during this same period,<sup>229</sup> this was no small task and it stands as a testament to the FAA's procedural reform commitments.<sup>230</sup>

In addition to unification, the FAA reformed federal procedure in the following important respect: Consider that even after the FAA

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<sup>225</sup> *Supra* note 56 and accompanying text.

<sup>226</sup> For this reason, Clarence Birdseye noted early on that "an act of Congress and probably some rules of court" would be necessary for the successful reform of arbitration law. CLARENCE F. BIRDSEYE, *ARBITRATION AND BUSINESS ETHICS: A STUDY OF THE HISTORY AND PHILOSOPHY OF THE VARIOUS TYPES OF ARBITRATION AND THEIR RELATIONS TO BUSINESS ETHICS* 84 (1926).

<sup>227</sup> *Supra* notes 128–29 and accompanying text.

<sup>228</sup> See H.R. REP. NO. 68-96, at 2 (explaining that the federal arbitration bill would provide "a procedure in the Federal courts for [the] enforcement [of predispute arbitration agreements]").

<sup>229</sup> See, e.g., DAVIDS, *supra* note 129, § 328, at 276 (noting in 1927 that "[e]fforts have been made to secure an adoption of the reformed procedure, but without success," and that "unification in respect of the form of action and proceedings therein is not to be anticipated, apparently, in the immediate future").

<sup>230</sup> By contrast, for a statute whose overarching purpose was simply to make arbitration agreements "enforceable" like other contracts, it appears as quite a radical excursion. Contract law's primary goal, too, has been described as the enforcement of promises. *E.g.*, ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 1.1, at 2–3 (Joseph M. Perillo ed., 1993); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1–2 (1981). Yet apart perhaps from the Statute of Frauds and the parol evidence rule, it does not concern itself with the procedure by which contracts are enforced.

declared arbitration agreements “enforceable,” a party still had to avail himself of the courts in order to assert his rights under section 2. In court, however, he would face “the very [procedural] technicalities and details which . . . [he] sought to escape by [his] arbitration agreements.”<sup>231</sup> The FAA’s procedural sections were therefore intended to “reduce[ ] [this] technically [sic] and formality to a minimum”<sup>232</sup>—a goal that the procedural reformers plainly shared for civil actions more generally.

The text and legislative history of the FAA confirm this interpretation. Thus, section 4 allows a party claiming breach of an arbitration agreement to initiate proceedings by filing a motion with only five days’ notice.<sup>233</sup> If the making of the arbitration agreement or its applicability to the dispute were contested, section 4 assures a “prompt, speedy, and nontechnical determination of the merits” of the motion.<sup>234</sup> If a reluctant party sought to derail the process by refusing to select arbitrators, section 5 gave the court the power to appoint arbitrators on their behalf.<sup>235</sup> Cohen and others argued in Congress that these measures would help remove “[a]ll technicalities of legal procedure and requirements.”<sup>236</sup>

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<sup>231</sup> *1924 Hearings on Arbitration*, *supra* note 40, at 40. For instance, premodern state arbitration statutes relating to the enforcement of submission agreements and awards were known to be highly complex and formalistic. *See, e.g.*, Wesley A. Sturges & Richard E. Reckson, *Common-Law and Statutory Arbitration: Problems Arising from Their Coexistence*, 46 MINN. L. REV. 819, 824 (1962) (explaining that such statutes typically “prescribe one or more of a varying miscellany of recitals and formalities to qualify submission agreements,” many of which “are beyond those required at common law”).

<sup>232</sup> *1924 Hearings on Arbitration*, *supra* note 40, at 35.

<sup>233</sup> 9 U.S.C. § 4 (2012). As the House Report explained, “[t]he procedure is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties.” H.R. REP. NO. 68-96, at 2; *see also 1924 Hearings on Arbitration*, *supra* note 40, at 35 (statement of Julius Henry Cohen) (stating that FAA § 4 “is not . . . equally cumbersome with the old actions in the courts, nor is there any prospect that it will ever become so”). Likewise, FAA § 3 provides a summary process for seeking a stay of litigation pending arbitration. *1924 Hearings on Arbitration*, *supra* note 40, at 34.

<sup>234</sup> *1924 Hearings on Arbitration*, *supra* note 40, at 34.

<sup>235</sup> 9 U.S.C. § 5 (2012).

<sup>236</sup> *1924 Hearings on Arbitration*, *supra* note 40, at 36; Cohen & Dayton, *supra* note 36, at 267–68. The extent to which the statute actually succeeded in this regard is, of course, debatable. Commentators writing a decade after the FAA was passed noted the irony of mushrooming litigation about arbitration. *See, e.g.*, Nathan Isaacs, *Book Review*, 40 YALE L.J. 149, 149 (1930) (noting that parties to arbitration agreements often find themselves in court “fighting not on the merits of [the] case but on the merits of the arbitration”); Philip G. Phillips, *Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion*, 19 CORNELL L.Q. 197, 198 (1934) (arguing that the “net result [of arbitration reform] seems to have been the plaguing of the New York courts with untold litigation regarding the [arbitration] statute”). But that is a separate matter.

The FAA also simplified the procedure for enforcing arbitral awards. Before the advent of modern arbitration statutes, the prevailing party in a common law arbitration was generally required to initiate a new action in order to convert the award into a judgment.<sup>237</sup> Although he was spared the effort of relitigating the case from scratch, the problem was that the enforcement proceeding itself exposed him to “the delay always incident in any action at law and to defeat [sic] upon technicalities or otherwise in proving the award itself.”<sup>238</sup> Section 9 therefore flipped the script: Arbitral awards would now be enforced as a matter of course unless the complaining party could prove a ground for vacatur or modification.<sup>239</sup> As an added protection, the limited bases for overturning awards in section 10 helped remove any “opportunity for vacation [sic] upon a technical ground.”<sup>240</sup>

By seeking in these ways to consolidate and improve the procedures to be followed in federal court for litigation about arbitration, the FAA was to arbitration actions what the Federal Rules are to civil actions more generally.<sup>241</sup> This is not simply to reiterate the familiar claim that the FAA is a procedural statute.<sup>242</sup> It is also to claim that

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<sup>237</sup> 1924 *Hearings on Arbitration*, *supra* note 40, at 36; *see, e.g.*, *Banert v. Eckert*, 2 F. Cas. 584, 585 (1822) (observing that a common-law award based on a submission agreement can only be enforced by initiating a suit at law or in equity for breach of contract); *Gibson v. Burrows*, 3 N.W. 200, 202 (Mich. 1879) (holding that a common-law arbitration award “must be enforced as a cause of action, and not as a substitute for a verdict”).

<sup>238</sup> 1924 *Hearings on Arbitration*, *supra* note 40, at 36.

<sup>239</sup> *See* 9 U.S.C. § 9 (2012) (providing that the court “must grant” a properly filed motion for an order confirming an arbitral award “unless the award is vacated, modified, or corrected”).

<sup>240</sup> 1924 *Hearings on Arbitration*, *supra* note 40, at 36. Section 11 accomplished the same with respect to the modification of awards. *See id.* (describing the limited grounds for modification of awards under the statute).

<sup>241</sup> As Cohen put it, the FAA’s procedural provisions relating to litigation about arbitration are “part of our judicial machinery.” *Id.* at 17. Had the Rules Enabling Act already been in force at the time, the FAA’s provisions almost certainly would have been incorporated into the Federal Rules. Modern state arbitration statutes, for example, were consistently inserted into state codes of procedure. *E.g.*, ARIZ. REV. CODE §§ 4294–4301 (1929); CAL. CODE CIV. PROC. §§ 1280–93 (1927); N.Y. C.P.A. §§ 1448–69 (1921).

<sup>242</sup> *See supra* note 55 and accompanying text (arguing that the weight of scholarly opinion is that the FAA was intended to be a procedural statute). To be sure, my descriptive claim presupposes that the FAA derives at least *in part* from Congress’s Article III power. One could therefore accept that claim even while agreeing with the Court that FAA § 2 is a substantive provision. The procedural reform model is arguably inconsistent only with the view that the majority of the FAA’s other provisions are also substantive. But no court or commentator has, to my knowledge, taken such a radical position. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (describing FAA § 2 as “the only [FAA] provision that we have applied in state court”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) (“[W]e have never

the FAA *qua* procedural statute was responding to the same procedural problems and was intended to further the same procedural values identified by Pound and his colleagues.

### C. *Defending the Descriptive Claim: Replies to Possible Objections*

My account of the FAA and its underlying values will undoubtedly be met with skepticism, for it goes against the great weight of scholarship and case law that, whether in commending or condemning the Court's arbitration jurisprudence, typically accepts the contract model wholesale. The best-known historian of the FAA, for instance, persisted in the belief that freedom of contract was not just one of several but rather *the* animating influence behind modern arbitration law reform.<sup>243</sup> Even those who recognize the importance of situating the FAA in its historical context are wont to concede rather than contest the supremacy of contract. After his exhaustive account of the common origin and purposes of the arbitration and procedural reform movements, for instance, Szalai still concludes that "[t]he FAA helps respect party autonomy by giving parties the freedom to design and create their own procedure . . . . [C]ourts should enforce the parties' choice of arbitration procedures, which can help contribute to private ordering and self-governance."<sup>244</sup>

To be clear, my descriptive claim is not that procedural reform was the one true purpose behind the FAA or that freedom of contract was just window dressing. To the extent it is possible to talk coherently about congressional intent at all, 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. My point is rather that a reexamination of the historical record reveals that the contract model's descriptive claim—that honoring private choices about arbitration was the FAA's preeminent goal—is at best questionable and at worst inaccurate.

In this Subpart, I further develop my descriptive claim and defend it against what I anticipate to be some likely objections.

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held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court . . . are nonetheless applicable in state court.").

<sup>243</sup> See MACNEIL, *supra* note 31, at 61 (finding "little trace" of concern within the arbitration reform movement for public regulation of arbitration agreements and arguing that the "businessmen and business lawyers" who supported reform were "far more likely" to have been influenced by "freedom of contract sentiments").

<sup>244</sup> Szalai, *supra* note 172, at 428.

## 1. *The Scope of Contract Procedure*

The fact that the FAA—unlike the Federal Rules—does not prescribe any particular procedure to be followed in arbitration strikes many commentators as an unmistakable signature of the contract model.<sup>245</sup> But it is equally compatible with the view that the details of procedure were better left to the parties, to trade associations, or to chambers of commerce, each of whom was better positioned than Congress to design rules for a particular industry or dispute.<sup>246</sup>

For example, if parties could choose their own decisionmakers, their disputes were more likely to be heard by subject-matter specialists who, unlike juries,<sup>247</sup> were less prone to being duped by flashy

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<sup>245</sup> See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (holding that because the “FAA’s primary purpose” was to ensure the enforcement of arbitration agreements “according to their terms,” the FAA allows arbitration to be conducted under different procedural rules than those contained in the Act itself); Brunet, *supra* note 18, at 79 (arguing that the FAA does not impose any procedural restrictions on arbitrator power over the proceedings and does not define the arbitral process, which in turn is consistent with the idea that “furthering party autonomy lies at the heart of the FAA”).

<sup>246</sup> See *supra* notes 210–13 and accompanying text (describing the key role played by trade associations and chambers of commerce in setting procedural rules for arbitration); see also Werner, *supra* note 181, at 865 (describing arbitration’s procedural superiority over litigation in terms of the ability of arbitrators and counsel to “determine their own method of procedure best adapted to the situation of the parties and the demands of the particular case”). These and other considerations are perhaps what led the American Judicature Society to conclude that modern arbitration statutes “wisely refrain[ed] from laying down elaborate rules for arbitrators to follow.” *The Technique of Arbitration*, 9 J. AM. JUDICATURE SOC’Y 79, 79 (1925–1926). Those rules, the Society noted, were “needed” but more “properly adopted by trade associations.” *Id.*

<sup>247</sup> Although the absence of trial by jury currently figures as a central criticism of arbitration, it bears noting that many procedural reformers responsible for bringing about the current Federal Rules regime placed very little faith in the jury system. More often than not, they complained that jurors lacked the education or professional experience to understand the complexities involved in commercial cases, required precious additional time to become educated in the subject matter of the dispute, and were unduly swayed by emotional appeals having little to do with the merits. See, e.g., Boston, *supra* note 136, at 105 (criticizing the status quo’s “tenacious and idolatrous adherence to a civil jury as an agency in determining litigated matters”); Charles E. Clark & Harry Shulman, *Jury Trial in Civil Cases: A Study in Judicial Administration*, 43 YALE L.J. 867, 884 (1934) (analyzing data from Connecticut courts and suggesting that the jury system was an “inefficient trial device employed in cases where exploitation of the situation is made possible by underlying rules”); Subrin, *supra* note 127, at 968 (noting that Clark “and virtually everyone connected with urging uniform procedural rules denigrated juries”); Taft, *supra* note 166, at 853 (contending that jury trials “add to the elaborate machinery [of the courts]” and “greatly increase the time and expense involved in the disposition of litigation”). From this perspective, arbitration’s strength—not its weakness—was that it dispensed with “the stage play of the jury courtroom” and the “uncertainty and . . . irresponsibility of jurors.” *Where Jury Trial Fails*, *supra* note 155, at 72, 73.

presentations of zealous advocates and well-paid experts.<sup>248</sup> This, in turn, would make it harder for lawyers to play what Shelton described as their usual “game of hide and seek to bedevil an opponent, confuse the jury, [and] trip the judge.”<sup>249</sup> From this standpoint, freedom of choice was instrumentally rather than intrinsically valuable: It was more likely than, say, judicial or legislative rulemaking to facilitate the adjudication of disputes on their proper merits. Rather than “rustic” justice,<sup>250</sup> the result was more likely to be *better* justice.<sup>251</sup>

Here it may be asked what limits, if any, the arbitration reformers intended to place on the scope of contract procedure. For instance, did they believe the FAA’s purposes were consistent with setting aside party choices if, instead of helping to improve the quality of procedure, those choices made it patently worse? Although this question was likely not ripe for full consideration in 1925, there is certainly evidence to suggest that Bernheimer, Cohen, and others would have answered this question in the affirmative.

To begin with, the FAA imposes certain due process minima on arbitration procedure.<sup>252</sup> For example, arbitral awards are subject to

<sup>248</sup> See, e.g., *1924 Hearings on Arbitration*, *supra* note 40, at 27 (statement of Alexander Rose) (arguing that by using arbitrators, “no time will be lost in educating a man in the jury who is unfamiliar with the subject, and that on what may be doubtful testimony, that of the experts”); SAMUEL ROSENBAUM, *A REPORT ON COMMERCIAL ARBITRATION IN ENGLAND* 53 (1916) (arguing that arbitrators with subject-matter expertise are better suited than jurors and judges at “decid[ing] between conflicting testimony of experts”); Wheless, *supra* note 199, at 226 (arguing that arbitrators can decide “far more surely and exactly right than judge or jury”).

<sup>249</sup> Thomas W. Shelton, *The Press and the Administration of Justice*, 9 A.B.A. J. 9, 9 (1923).

<sup>250</sup> E.g., *Tobey v. Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (Story, J.); Stone, *supra* note 47, at 956 (quoting *Tobey v. Bristol* for the same proposition).

<sup>251</sup> See THE ARBITRATION FOUNDATION, *THE UNITED STATES ARBITRATION LAW AND ITS APPLICATION* 21 (1925) (“[B]usiness men fully familiar with business practices can reach a much juster [sic] conclusion than the ordinary court and jury” (quoting an address of Ogden L. Mills to the New York State Chamber of Commerce, April 2, 1925)); Moses H. Grossman, *Speeding Up Justice Through Arbitration*, 5 ILL. L.Q. 135, 137 (1922) (arguing that, with the support of the law, arbitration “will provide the most simple and direct way of aiding our courts in the speedy administration of justice”); Sayre, *supra* note 35, at 615 (observing that businessmen clamor for arbitration because they want relief from ignorant juries and rigid rules of procedure).

<sup>252</sup> See, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 114–15 (1992) (arguing that certain sections of the FAA itself imply procedural fairness baselines); Jack M. Graves, *Arbitration as Contract*, 2 WM. & MARY BUS. L. REV. 227, 254 (2011) (arguing that FAA § 10 can be understood as “mandating an arbitration process that comports with due process”).

Similar due process constraints were embedded in both state arbitration statutes and customary law. See, e.g., 1921 N.Y. Laws, ch. 199, § 1453 (providing that “[a]ll the arbitrators . . . must meet together and hear all the allegations and proofs of the parties”). At the time, for example, it was well established that arbitrators could not receive material evidence *ex parte* or fail to provide adequate notice of hearings without violating principles

vacatur if the “award was procured by corruption, fraud, or undue means”<sup>253</sup> or if the arbitrators demonstrated “evident partiality or corruption,”<sup>254</sup> “refus[ed] to hear evidence pertinent and material to the controversy” or committed “any other misbehavior by which the rights of any party have been prejudiced.”<sup>255</sup> The language of those provisions appears to be mandatory and not susceptible to modification by contract.<sup>256</sup>

Second, as we saw, Cohen, Kellor, and others operated under the assumption that arbitration procedure would be structured and overseen by private organizations and chambers of commerce rather than left entirely to the whims of the parties.<sup>257</sup>

Third, the fact that consent is a threshold jurisdictional requirement to *enter* the arbitral forum does not necessarily mean that the process itself is from start to finish a creature of contract akin to a settlement negotiation.<sup>258</sup> To the reformers, arbitration was plainly

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of natural justice. See DUNN & DIMOND, *supra* note 211, § 58, at 26 (noting that under applicable arbitration statutes and the common law, “arbitrators must hear all of the evidence offered by both parties, and such evidence must be taken in the presence of both parties. Arbitrators may not receive *ex parte* statements from either party”); KELLOR, *supra* note 201, at 97–102 (noting that arbitrators may not conduct hearings *ex parte* and should provide parties with “equal opportunity, under similar conditions . . . to present their evidence”).

<sup>253</sup> 9 U.S.C. § 10(a)(1) (2012).

<sup>254</sup> *Id.* § 10(a)(2).

<sup>255</sup> *Id.* § 10(a)(3).

<sup>256</sup> See *id.* § 9 (providing that “the court *must grant* . . . an order” to confirm an arbitration award “*unless* the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title” (emphases added)); *Hall St. Assocs LLC v. Mattel, Inc.*, 552 U.S. 576, 587 (2008) (holding that “[t]here is nothing malleable about” the FAA’s vacatur standards, which “unequivocally tell[] courts to grant confirmation in all cases, except when one of the [statutorily enumerated] exceptions applies”); Aragaki, *supra* note 108, at 7–8 (explaining *Hall Street* as standing for the proposition that parties may not contract around the FAA’s vacatur and modification provisions).

<sup>257</sup> See *supra* notes 210–13 and accompanying text (describing the key role played by trade associations and chambers of commerce in setting procedural rules for arbitration). Those rules, moreover, may not have been so readily alterable by contract as a practical matter. As the AAA explained:

The right reserved to the parties to make or modify rules has given rise to the inference that arbitrations are conducted in an informal, irresponsible, if not haphazard way. Such is not the case, for trade organizations which dispose of any considerable number of cases . . . have either adopted a carefully prepared procedure or follow the rules formulated by other organizations. These rules are scrupulously followed, as the award may be voided for an infraction of such rules.

Am. Arb. Ass’n, *Some Errors Concerning Arbitration*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION*, *supra* note 190, at 90–91.

<sup>258</sup> Thus, some scholars have argued that the FAA and other modern state arbitration statutes conceived of arbitration less as a process of adjudication in which the arbitrator makes decisions about right and wrong and more as a method of supplying additional terms when a subsequent dispute reveals unanticipated gaps in the parties’ respective

not just another word for unprincipled decisionmaking—or, worse, a coin toss or a raw compromise.<sup>259</sup> The AAA, for instance, regarded “[t]he ascertainment of the truth by subjecting the parties to the tests of proof” as an “essential” duty of any arbitrator.<sup>260</sup> And in distinguishing it from a negotiation, Bernheimer described arbitration as “conducted in accordance with the provisions of the law and the wise safeguards which it provides. . . . [T]here is a sound determination of the true merits by men experienced in the technique of the matter involved, with less compromising or splitting of differences than we find in the jury room.”<sup>261</sup> Arbitration, in other words, met all of Lon

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(contractual) obligations. See Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1, 29 (2006) (explaining that on the contractarian model of arbitration, “the arbitrator is not an adjudicator tasked with finding facts and applying generally applicable legal rules. The arbitrator is instead the parties’ agent, tasked with interpreting their agreement once they reach an impasse”); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977) (arguing that on the contract model, the arbitrator is little more than “the parties’ officially designated ‘reader’ of the contract”).

<sup>259</sup> See, e.g., U.S. DEP’T OF COMMERCE, *supra* note 187, at 95 (explaining that even the average business person often “has the misconception that to arbitrate means to compromise”); Bernheimer, *supra* note 201, at 98 (describing arbitration as involving “a sound determination of the true merits . . . with less compromising or splitting of differences than we find in the jury room”); Osmond K. Fraenkel, *The New York Arbitration Law*, 32 COLUM. L. REV. 623, 641 (1932) (criticizing the view of arbitral awards as compromises as “based on a lack of familiarity with the actual workings of arbitration”). In a related vein, Harlan Fiske Stone argued that a system of arbitration based on mere compromise or “splitting the difference” awards would undermine the legitimacy of the very procedure that the FAA was intended to invigorate. Harlan F. Stone, *The Scope and Limitation of Commercial Arbitration*, 10 PROC. ACAD. POL. SCI. N.Y. 195, 199 (1923).

<sup>260</sup> SUGGESTIONS FOR THE PRACTICE OF COMMERCIAL ARBITRATION 37 (Am. Arb. Ass’n 1928); see DUNN & DIMOND, *supra* note 211, §§ 37, 58, at 15–16, 26 (1922) (“Arbitrators . . . may not arrogate to themselves the power of denying a fair and full hearing as to all the material issues under submission.”). Similarly, Cohen believed that arbitral awards were valuable as “precedent for the future guidance of other arbitrators.” He accordingly advocated the use of written, reasoned opinions in complex cases. Julius Henry Cohen, *Hand Book for Arbitrators, in COMMERCIAL ARBITRATION: A METHOD FOR THE ADJUSTMENT, WITHOUT LITIGATION, OF DIFFERENCES ARISING BETWEEN INDIVIDUALS, FIRMS, OR CORPORATIONS* 52 (1911); see also KELLOR, *supra* note 201, at 127 (explaining that because trade-association arbitrators are often called upon to “interpret or apply the customs of a trade . . . [their decisions] are usually recorded and are placed at the disposal of subsequent arbitrators”).

<sup>261</sup> Bernheimer, *supra* note 201, at 98; see also ROSENBAUM, *supra* note 248, at 12 (warning against conflating arbitration with compromise, mediation, or other processes involving “mutual concessions between the parties,” and describing it instead as “a regular and recognized method sanctioned and governed by law, for the determination of rights and the enforcement of remedies”); Cohen, *supra* note 260, at 47 (describing arbitration as a “test of reason and analysis” aimed at “get[ting] a decision according to the justice and reason of the case”).

Fuller's now-classic criteria of an adjudicative process.<sup>262</sup> It was understood as consistent with one of Pound's "first principles of procedural reform," which was simply to "secure to all parties a *fair opportunity to meet the case against them and a full opportunity to present their own case.*"<sup>263</sup> It is unlikely that the arbitration reformers would have intended party consent to undermine this basic principle.<sup>264</sup>

Fourth, even while declaring most predispute arbitration agreements irrevocable and enforceable, modern arbitration law recognized several substantive limits on freedom of contract. To be sure, many of these limits were written into modern state arbitration statutes that, like the FAA, provided for the enforceability of predispute arbitration agreements.<sup>265</sup> But even when they were not, courts and commentators were sometimes prepared to construe silence in a manner *consistent* with further substantive limits on arbitrability. Thus, Wesley

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<sup>262</sup> See Lon L. Fuller and Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363–72 (1978) (categorizing arbitration and judicial procedure as forms of adjudication that demand the presentation of proofs and reasoned arguments). *But see* Robert G. Bone, *Party Rulemaking*, 90 TEX. L. REV. 1329, 1392–93 & n.258 (2012) (arguing that a proceeding such as arbitration, in which the neutral has "broad power to limit and control adversarial confrontation during oral argument or trial," is in tension with Fuller's concept of adjudication and noting that "Fuller had problems with tripartite arbitration panels").

<sup>263</sup> Pound, *supra* note 132, at 402 (emphasis added); *see* Werner, *supra* note 181, at 867 (quoting Pound's first principle of procedural reform in support of arbitration). This is corroborated by the fact that state arbitration statutes and provider rules from the period contemplated an adjudicative process in which both sides had an equal opportunity to present arguments and evidence. *See supra* note 252.

<sup>264</sup> Even defenders of the free market today, such as Seventh Circuit Judge Richard Posner and Ninth Circuit Judge Alex Kozinski, acknowledge that courts would be entitled to refuse enforcement of agreements providing for "trial by battle or ordeal or . . . by a panel of three monkeys," *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.), or for arbitrators to decide cases by "studying the entrails of a dead fowl," *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring).

<sup>265</sup> *See* MACNEIL, *supra* note 31, at 69 (noting the existence of subject-matter exclusions in modern state arbitration statutes, such as for employer-employee, medical malpractice, insurance, title and real estate claims). Thus, the New York Arbitration Law of 1920 (on which the FAA was based) specifically exempted controversies "respecting a claim to an estate in real property, in fee or for life." 1921 N.Y. Laws, ch. 199, § 1448. The Oregon arbitration law likewise excluded disputes over title to real estate. 1925 Or. Laws ch. 186, § 1 (exempting "any controversy . . . except such as respect the title to real estate"). The California statute exempted labor disputes. CAL. CODE CIV. PROC. § 1280 (1927) ("[T]he provisions of this act shall not apply to contracts pertaining to labor."). The Arizona, New Hampshire, Pennsylvania, and Rhode Island statutes excluded certain types of employment disputes. *See* 1929 Ariz. Laws, ch. 72, § 1 (excluding "collective contracts between employers and employees, or between employers and association of employers [sic]"); 1929 N.H. Laws, ch. 147, § 1 (excluding "collective contracts between employers and employees or between employers and associations of employees"); 1927 Pa. Laws 381, § 1 (excluding "contract[s] for personal services"); 1929 R.I. Acts and Resolves 295, ch. 1408, § 1 (excluding collective contracts between employers and employees).

Sturges opined that, even with respect to jurisdictions that had passed modern arbitration statutes, “it is not yet determined whether disputes involving the validity of a will . . . can be settled by arbitration in lieu of proceedings in a court.”<sup>266</sup> New York courts refused to compel arbitration of a dispute over child custody and visitation even though this subject was not specifically excluded in the New York Arbitration Law of 1920.<sup>267</sup> Likewise, in their *Handbook and Guide to Commercial Arbitration*, Cohen and his colleague Kenneth Dayton took it as a given that a party may challenge the enforceability of an arbitration agreement on public-policy grounds even though neither the FAA nor the New York Arbitration Law made this limitation on arbitrability explicit.<sup>268</sup> The AAA similarly explained that although virtually any civil dispute was arbitrable, there were important exceptions for

matters involving public interests, such as crimes and domestic relations; matters which have been consummated in accordance with specific laws, such as naturalized citizenship; and matters specifically exempt by statute, such as titles to real property. Claims, therefore, that *all* disputes may be resolved by arbitration do not

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<sup>266</sup> WESLEY A. STURGES, *A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS* § 64, at 212 (1930); *see also In re Jacobovitz's Will*, 295 N.Y.S.2d 527, 531 (1968) (“The probate of an instrument purporting to be the last will and testament of a deceased and the distribution of an estate can not be the subject of arbitration under the Constitution and the law . . . and any attempt to arbitrate such issue is against public policy.”); *Conference of Bar Association Delegates*, *supra* note 210, at 49 (stating that matters relating to wills, executors and administrators, and corporate governance should be excluded from a system of commercial arbitration); *cf. Swislocki v. Spiewak*, 75 N.Y.S.2d 147, 147 (N.Y. App. Div. 1947) (per curiam) (stating, in dictum, that the distribution of a decedent’s estate “would not constitute an arbitrable controversy”).

<sup>267</sup> *See Hill v. Hill*, 104 N.Y.S.2d 755, 758 (1951) (holding that such matters “are not properly the subject of arbitration, depending for their determination upon a judicial finding as to the best interests of the child” (citing *Waltman v. Waltman*, N.Y.L.J., Jan. 15, 1940, at 22 (unpublished opinion))); *see also Michelman v. Michelman*, 135 N.Y.S.2d 608, 608 (1954) (refusing to compel arbitration on public-policy grounds because arbitrators are not bound to follow the law regarding the best interests of the child); STURGES, *supra* note 266, § 65, at 213 (observing that courts would “[not] recognize an award which purported to grant any . . . readjustment of the marital relationship, or which disposed of the rights or duties of the parties with respect to children”).

<sup>268</sup> *E.g.*, COHEN & DAYTON, *supra* note 210, at 39 (“While only two defenses are prescribed by the statute, the courts will recognize a few additional defenses. . . . [such as] that the agreement was invalid because it was against public policy. . . .”); KELLOR, *supra* note 201, at 36 (“Nor does the law contemplate that in the name of arbitration . . . parties may perpetrate frauds, or submit matters that are against public policy.”). Although Cohen and Dayton had in mind agreements to arbitrate disputes arising under gambling and other immoral agreements, rather than agreements that violated statutes regulating arbitration itself, the point is fairly applicable to both contexts.

take into consideration the many fields where it may not or should not be tried.<sup>269</sup>

In sharp contrast to the contract model, therefore, early twentieth-century courts and commentators candidly acknowledged that arbitration agreements were subject to numerous constraints not just as a matter of law but also as a matter of public policy.<sup>270</sup>

## 2. *The Significance of Overturning Revocability*

Some critics will argue that the FAA's stated purpose to overturn the revocability doctrine is in fact more consistent with the contract model and less so with the procedural reform model I seek to develop. For example, Paul Carrington would retort that I have it precisely in reverse: The FAA *rejected* a procedural reform agenda by abrogating revocability—a doctrine he and many others believe had served the valid and important purpose of protecting weaker parties from oppressive contract terms.<sup>271</sup> On this view, the reason why the FAA made arbitration clauses irrevocable had nothing to do with substantial justice and everything to do with freedom of contract.

To begin with, Carrington and others' view of the purpose behind the revocability doctrine is questionable. It is often traced to Julius Henry Cohen's congressional testimony that "people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them."<sup>272</sup> But to my knowledge, Cohen never substantiated this assertion and only once reiterated it in his published writ-

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<sup>269</sup> Am. Arb. Ass'n, *Some Errors Concerning Arbitration*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION*, *supra* note 190, at 88–89 (emphasis added).

<sup>270</sup> See, e.g., *Stefano Berizzi Co. v. Kraus*, 203 N.Y.S. 442, 443–44 (1924) ("The disposition of to-day is to afford the widest possible opportunity for arbitration *confined only by those rules imposed by the Legislature.*" (emphasis added)), *rev'd on other grounds*, 146 N.E. 436 (1925); *Berkovitz v. Arbib & Houlberg, Inc.*, 130 N.E. 288, 290 (N.Y. 1921) (Cardozo, J.) ("A promise that differences will be arbitrated is not illegal and a nullity *without reference to the law in force when differences arise.* Since it is directed solely to the remedy, *its validity is to be measured by the public policy prevailing when a remedy is sought.*" (emphases added)). The entire *Berkovitz* opinion, moreover, was entered into the record of congressional hearings on the FAA. *1923 Hearing on Arbitration*, *supra* note 42, at 18–22.

<sup>271</sup> See Carrington, *supra* note 7, at 265 (stating that revocability functioned to protect "improvident individuals from their tendency to underestimate" the consequences of agreeing to arbitration); Carrington & Haagen, *supra* note 59, at 339–46 (claiming that the revocability doctrine was predicated on the view that "the best way to assure true assent to arbitration [by the unwary] was to afford a party having promised to arbitrate a future dispute an opportunity to withdraw assent when a real dispute has arisen and the revoking party is at last likely to be attentive to the hazards of dispute resolution").

<sup>272</sup> *1924 Hearings on Arbitration*, *supra* note 40, at 15; Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 *FORDHAM L. REV.* 2035, 2050–51 (2011).

ings.<sup>273</sup> In any event, the assertion suffers from an inherent implausibility. The revocability doctrine is widely believed to have originated in the early seventeenth-century *Vynior's Case*.<sup>274</sup> At that time, however, the distinctly modern conception of a contract as the exchange of executory promises had only just begun to replace the medieval contractual theories of debt and covenant.<sup>275</sup> And it was not until the industrial era that concerns about adhesive contracts and unequal bargaining power came into sharp focus.<sup>276</sup> The better view is that the revocability doctrine likely originated in *procedural* concerns about the adequacy (real or imagined) of extrajudicial forums.<sup>277</sup>

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<sup>273</sup> See Cohen, *supra* note 204, at 218 (asserting, without supporting references, that judicial opposition to arbitration—and, by implication, the revocability doctrine—was historically “due to the fundamental feeling, based on long experience, that laymen cannot be relied upon to protect their own rights, and that they would forswear their protection under the law unless they were guarded against themselves”). Indeed, elsewhere Cohen argued that revocability derived from the ancient (but according to him specious) public policy against ousting the courts of their jurisdiction—a policy that appears more consistent with protecting procedural interests than with correcting unequal bargaining power. See, e.g., Cohen & Dayton, *supra* note 36, at 283 (arguing that the ouster doctrine was “rooted originally in the jealousy of courts for their jurisdiction”).

<sup>274</sup> [1609] 77 Eng. Rep. 597, 599 (K.B.) (Coke, L.J.); Stone, *supra* note 47, at 973–74; Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 958 n.129 (2003) (“Judicial recognition of the freedom of a party to frustrate the reference merely by withdrawing the authority of the arbitrator is usually traced to Coke’s dictum in *Vynior’s Case* . . .”).

<sup>275</sup> A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 459–70* (1987) (identifying *West v. Stowell*, [1577] 2 Leon. 154, as the first case clearly to recognize the idea of a wholly executory contract). Other scholars place this development even later. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT*, 420 (Clarendon 1979) (“[T]here can be little doubt that shortly after 1800 the very concept of contract in English law and theory changed its character, and the executory contract became the paradigm of contract theory.”); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, HARV. L. REV. 917, 919–36 (1974) (arguing that the concept did not mature until the nineteenth century).

<sup>276</sup> See, e.g., ATIYAH, *supra* note 275, at 555–60 (tracing the origins of adhesion contracts to the latter part of the eighteenth century and the growth of railroads); Andrew Burgess, *Consumer Adhesion Contracts and Unfair Terms: A Critique of Current Theory and a Suggestion*, 15 ANGLO-AM. L. REV. 255, 260 (1986) (linking the evolution of adhesion contracts to “the growth of big enterprises and their need to control liability in a mass market” during the nineteenth century but arguing that the concept of an adhesion contract as an object of study did not surface until 1901); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 n.11 (1943) (observing that “[t]he word ‘contract of adhesion’ has been introduced into the [Anglo-American] legal vocabulary” by Edwin W. Patterson in his article, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919)).

<sup>277</sup> Thus, nineteenth-century jurists justified revocability on what they considered to be “the very good ground that the courts [should] remain open to the parties . . . [because they have] better provisions for securing justice than are possessed by arbitrators.” Kaufmann v. Liggett, 58 A. 129, 134 (Pa. 1904); see also *Tobey v. Bristol*, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845) (Story, J.) (rationalizing the revocability doctrine on the ground that arbitrators lacked procedures for compelling evidence and were generally unfamiliar with

But regardless of what one takes to be the true purpose behind the right to revoke, the problem was that revocability (like so many well-intentioned *ex ante* rules) facilitated strategic action *ex post*. As Cohen testified in Congress, a defendant would often revoke because he “sees an advantage in the delay and trouble to which his opponent will be put to enforce his rights through the courts, or believes that he may have the advantage of some technical objection which will absolve him from answering on the merits of the controversy.”<sup>278</sup> Similarly, it was often said that parties who knew they were at fault invoked the doctrine only because they “prefer[red] to take the chances of long delayed litigation” rather than submit to the “speedy justice” of arbitration.<sup>279</sup> And because a party could revoke any time until the award, sharp lawyers—accustomed as they were to the sporting approach—would use arbitration to preview the other side’s case and then revoke if an adverse award seemed inevitable.<sup>280</sup>

In other words, revocability exacerbated the very same problems that Pound and his colleagues argued had so beset the administration of justice.<sup>281</sup> Making arbitration agreements irrevocable would therefore help minimize litigation gamesmanship<sup>282</sup> and, from this standpoint, was just as consistent with procedural reform as it was with freedom of contract.

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the law); *Greason v. Keteltas*, 17 N.Y. 491, 496–97 (1858) (Selden, J.) (explaining that revocability “is founded in the obvious importance of securing fairness and impartiality in every judicial tribunal”); Stone, *supra* note 47, at 975–76 (describing similar, procedure-based justifications popular in the nineteenth century).

<sup>278</sup> 1924 *Hearings on Arbitration*, *supra* note 40, at 35; see also Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 158 (1921) (“The experience of centuries of commercial arbitration casts doubt upon his sincerity—it is the defaulting party who breaks his promise to arbitrate, the party who has most to gain by delay and technicality.”).

<sup>279</sup> Wheless, *supra* note 199, at 231. The practice was common enough that courts developed a reputation as a “haven for ‘contract breakers’ who anticipated an unfavorable award through arbitration and more desirable results through litigation.” Baum & Pressman, *supra* note 50, at 247.

<sup>280</sup> In his congressional testimony, Cohen described this as follows: “You go in and watch the expression on the face of your arbitrator and you have a ‘hunch’ that he is against you, and you withdraw and say, ‘I do not believe in arbitration anymore.’” 1924 *Hearings on Arbitration*, *supra* note 40, at 14.

<sup>281</sup> It bears noting that the revocability doctrine was frequently described as a “highly technical rule” and an “anachronism”—words that were also used to convey the backwardness of existing judicial procedure. See, e.g., H.R. REP. NO. 68-96, at 1–2 (1924) (describing revocability as an “anachronism”); 5 CORPUS JURIS 53 n.12[a] (1916) (describing revocability as “a highly technical rule” that sometimes “provoked protest from common-law judges”); Roscoe Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE SOC’Y 142, 144–47 (1920) (describing some existing rules of procedure as “anachronisms”).

<sup>282</sup> See H.R. REP. NO. 68-96, at 1 (explaining that the FAA’s abrogation of revocability would mean that a party could “no longer refuse to perform his [arbitration] contract when it becomes disadvantageous to him”).

### 3. *The Meaning of "Substantial Justice"*

The procedural reformers maintained that the ultimate purpose of judicial procedure was to facilitate the resolution of disputes through application of the positive law to the facts.<sup>283</sup> It is less clear whether the arbitration reformers entertained the same goal for the arbitration process. Arbitrators are not bound by the law; thus, even assuming they strove to do "substantial justice," did that mean the application of substantive law, or something more akin to the *lex mercatoria* or the Chancellor's conscience?<sup>284</sup>

On the one hand, it was not uncommon even for arbitration supporters to claim that the process was appropriate only for disputes in which legal issues were relatively simple.<sup>285</sup> On the other hand, it was also a well-established practice at the time for complex legal questions to be submitted to arbitrators and for trained lawyers to arbitrate cases based on the governing law.<sup>286</sup> Thus, "one of the great purposes

<sup>283</sup> See Bone, *supra* note 167, at 323 (describing how early twentieth-century reformers "believed that procedure should serve strictly as a means to the end of finding the facts and enforcing the substantive law accurately"); Clark, *Methods of Legal Reform*, *supra* note 116, at 111 ("Procedure is a tool, a means to an end and not an end in itself. That end is the application of rules of substantive law to the case in hand.")

<sup>284</sup> The term "substantial justice" was used in both senses. Commentators critical of arbitration, for example, sometimes claimed that the "substantial justice" available in arbitration was not the same as "pure justice." See Phillips, *supra* note 191, at 601–02. But the procedural reformers also used this term to describe the intended goal of judicial procedure. Elihu Root, *The Reform of Procedure*, 73 *CENT. L.J.* 389, 391 (1911); Shelton, *supra* note 12, at 133.

<sup>285</sup> See, e.g., Am. Arb. Ass'n, *Some Errors Concerning Arbitration*, in *SELECTED ARTICLES ON COMMERCIAL ARBITRATION*, *supra* note 190, at 87, 94 ("The value of litigation is to be found in vindication of legal rights in specific disputes, while the value of arbitration lies in maintaining good will in trade relations . . ."); Cohen & Dayton, *supra* note 36, at 281 (arguing that "[n]ot all questions arising out of contracts ought to be arbitrated" and that arbitration was a "remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact"); *Confederation of Bar Association Delegates*, *supra* note 210, at 49 (statement of Charles L. Bernheimer) (noting that the "system of arbitration as we operate at the chamber [of commerce of New York] is necessarily confined to a very limited field [sic] of litigious matter, in fact, is confined in the main, to 'contracts'").

In this vein, one should not discount the way in which remarks downplaying arbitration's ability to substitute for litigation may have had a strategic rather than a constative purpose. That is, they may have been intended to mollify arbitration skeptics who were mostly lawyers and who saw extrajudicial forums as a threat to the legal profession's traditional monopoly over dispute resolution.

<sup>286</sup> See, e.g., ARIZ. REV. CODE § 4296 (1928) (requiring all arbitrators to take an oath that they would decide "according to the evidence and the law"); BIRDSEYE, *supra* note 226, at 92–93 (explaining that the New York Chamber of Commerce's Court of Arbitration functioned "rather as a court of law in deciding many new and intricate points which arose in connection with commercial disputes"); Moses H. Grossman, *The Need of Arbitration to Relieve the Congestion in the Courts* 213, Address Before the Academy of Political Science Annual Meeting on "Law and Justice" (May 9, 1923) (arguing that arbitration is

of any system of . . . arbitration,” explained the New York City Bar’s Special Committee to Consider the Subject of Arbitration, was that it helped disputants “know with reasonable certainty what their rights and obligations are.”<sup>287</sup> Cohen and Dayton likewise observed that businessmen generally “draw their contracts in the light of ordinary rules of law” and that in arbitration, parties “ha[ve] the right to expect that [their] contract will be construed in accordance with such rules.”<sup>288</sup> Moreover, “[a]rbitrators will consider such rules and will not ignore them *if they think they are fair*,”<sup>289</sup> which may not be altogether different in substance from what happens more covertly in litigation. Judges, after all, are known on occasion to take liberties with flexible standards and even with statutory interpretation for the sake of equity or fundamental fairness.<sup>290</sup>

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suitable even where “the controversy is intricate and the law applicable is doubtful” and stating that arbitrators can be selected from “jurists of the highest type, profoundly versed in law”); Herbert Harley, *Introduction to ROSENBAUM*, *supra* note 248, at 3, 3 (describing the establishment of an arbitration branch of the Chicago Municipal Court that would “pass upon points of law”). Arbitration was also used in complex legal disputes. *See, e.g., Lawyers Testify to Work of Tribunal*, *ARB. NEWS*, 1924, at 5, 5 (quoting a letter by the New York City Assistant District Attorney that described the use of arbitration to achieve “substantial justice” in a “complicated issue in which four distinct actions at law were pending and another was in course of preparation”).

<sup>287</sup> *Report of the Special Committee to Consider the Subject of Arbitration*, in *YEARBOOK OF THE NEW YORK CITY BAR ASSOCIATION* 267, 273 (1925) [hereinafter *Special Committee Report*].

<sup>288</sup> COHEN & DAYTON, *supra* note 210, at 26–27; *see* SMITH, *supra* note 179, at 69–70 (calling it a “fact . . . of the highest importance” that the expansion of arbitration does not imply dissatisfaction with the “rules of substantive law” and that the challenge is to fuse arbitration’s “prompt, informal proceedings” with adjudication based on the substantive law); Ransom, *supra* note 191, at 132, 148 (“It is not a desire to avoid the application of rules of law which drives business men out of the courts. . . . The aversion of the average man is rather to the procedural and administrative side of our legal machinery.”).

<sup>289</sup> COHEN & DAYTON, *supra* note 210, at 27; *see also* SMITH, *supra* note 179, at 69 (recommending that arbitrators should “disregard pure technicalities” but apply the substantive law so long as it was “based upon sound sense and the experience of mankind generally” (quoting JULIUS HENRY COHEN, *Hand Book for Arbitrators*, in *COMMERCIAL ARBITRATION: A METHOD FOR THE ADJUSTMENT, WITHOUT LITIGATION, OF DIFFERENCES ARISING BETWEEN INDIVIDUALS, FIRMS, OR CORPORATIONS* 52 (1911))); Roscoe Pound, *Justice According to Law (Part II)*, 14 *COLUM. L. REV.* 1, 19–20 (1914) (noting that litigants typically seek relief in executive rather than common-law courts when the law no longer adequately reflects morality). *But see* Phillips, *supra* note 191, at 609 (attributing to merchants the view that law is “antagonistic to proper business conduct”). Rather than a flight from substantive rights and duties, therefore, this might simply reflect an equity-inspired theory (not unlike Pound’s theory of procedural reform) about the inherent limitations of substantive *ex ante* rules.

<sup>290</sup> *See, e.g.,* Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 *LOY. L.A. L. REV.* 187, 199–200 (2006) (citing contemporary studies showing that a significant percentage of judges and jurors admit to disregarding the substantive law in order to ensure justice and equity in particular cases); Mentschikoff, *supra* note 208, at 701–02, 704–06 (arguing that the real difference between arbitrators and judges was not that one could disregard the

The best explanation is perhaps that there was (and still is) no single practice of arbitration but rather a range of diverse practices.<sup>291</sup> If so, the fact that the FAA did not meaningfully distinguish among any of them would imply at minimum that it was intended to promote them all.<sup>292</sup> And even if the arbitration reformers intended to exclude a procedure that involved the strict application of substantive law to the facts, it is not clear that this undermines my argument. The courts of Chancery quite deliberately eschewed the substantive (common) law, yet that never stopped the likes of Pound and Shelton from turning to equity *procedure* as a model of reform. Regardless of how the arbitration reformers measured substantial justice, therefore, the bottom line is that they espoused the same philosophy of procedure that inspired the Federal Rules.

#### 4. *Discontinuities Between the Movements*

A final objection is that the procedural and arbitration reform movements represented fundamentally different constituents who subscribed to fundamentally different philosophies about markets, liberal individualism, and the scope of government regulation. On this view, procedural reformers like Pound were Progressives,<sup>293</sup> legal real-

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substantive law while the other could not, but rather that only the former was entitled to do so openly).

<sup>291</sup> For example, the reformers often distinguished between “formal” and “informal” arbitration. “[F]ormal arbitration,” Bernheimer explained, was “conducted in accordance with the provisions of the law and the wise safeguards which it provides.” Bernheimer, *supra* note 201, at 98; see also *Conference of Bar Association Delegates*, *supra* note 210, at 55 (statement of Julius Henry Cohen) (stating that arbitration “becomes really a judicial proceeding when it is a formal arbitration; it is a formal submission of the parties, and it becomes a judicial proceeding under our [New York] code of civil procedure”). For other iterations of this distinction, see KELLOR, *supra* note 201, at 11 (distinguishing between “casual” and “organized” arbitration); SMITH, *supra* note 179, at 71 (distinguishing between arbitration *simpliciter* and “judicial arbitration,” in which “the judgment rendered is in accordance with substantive law”); Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929, 929, 937–38 (1927) (distinguishing between a “realistic” view of arbitration, in which arbitration is a way of avoiding trials “and perhaps as much more of the machinery of ordinary legal procedure as is humanly possible” and a “legalistic” view, in which arbitration is posited as an alternative type of trial).

<sup>292</sup> See, e.g., KELLOR, *supra* note 201, at 54 (explaining in 1941 that the earlier view of arbitration as “largely limited to mercantile disputes” had disappeared, and that modern legislatures “intend that arbitration shall be generally applicable”).

<sup>293</sup> See, e.g., Bone, *supra* note 167, at 323 (noting that legal ideas developed by Progressives inspired procedural reform); Paul D. Carrington, *Protecting the Right of Citizens to Aggregate Small Claims Against Businesses*, 46 U. MICH. J.L. REFORM 537, 538 (2013) (arguing that the Federal Rules “should be seen as an expression of twentieth-century progressive politics first brought to bear on the law of civil procedure by Roscoe Pound’s [*The Causes of Popular Dissatisfaction with the Administration of Justice*]”).

ists,<sup>294</sup> and New Dealers<sup>295</sup> who supported social welfare legislation such as workers-compensation acts and public-health regulation. The arbitration reformers, by contrast, were largely business persons who opposed government intervention,<sup>296</sup> advocated industrial self-government, and aligned themselves with Herbert Hoover's ethos of "associationalism."<sup>297</sup> These differences, in turn, would seem to explain why the two movements did not appear to have coordinated their efforts at a broader level and why many key champions of judicial reform did not look favorably upon arbitration.<sup>298</sup>

A closer inspection of the historical record, however, suggests a more complex picture. To begin with, it is not clear that the two reform movements fall neatly on different sides of a progressivism/associationalism divide.<sup>299</sup> For instance, Cohen was at the forefront not just of the arbitration movement, but also of numerous Progressive-era reforms such as rent control and public-housing legislation, as

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<sup>294</sup> For example, the influence of figures such as Karl Llewellyn and Benjamin Cardozo is evident in the reformers' embrace of procedural simplification and greater judicial discretion. Cf. Charles E. Clark & David M. Trubek, *The Creative Role of the Judge*, 71 YALE L.J. 255 (1961) (reviewing favorably Llewellyn's book, KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960), and paying homage to Cardozo).

<sup>295</sup> See Stephen N. Subrin, *A Traditionalist Looks at Mediation: It's Here to Stay and Much Better Than I Thought*, 3 NEV. L.J. 196, 214 (2002) (describing Charles Clark as a legal realist and New Dealer).

<sup>296</sup> See AUERBACH, *supra* note 47, at 112 (pitting "New Deal liberals" against arbitration supporters); Carrington & Haagen, *supra* note 59, at 334, 337 (implying that the free-market philosophy behind arbitration law is contrary to Progressive regulation and values).

<sup>297</sup> See Stone, *supra* note 47, at 987–91.

<sup>298</sup> Pound and Shelton seemed to think that arbitration was more a symptom of the problem than its solution. See Roscoe Pound, *Courts of Injustice*, 105 U. PA. L. REV. 427, 433–34 (1957) (explaining the flight to arbitration as a way to escape "contentious procedure" and arguing that the true remedy lay in the reform of the court system); Thomas W. Shelton, *Uniformity of Judicial Procedure and Decision*, L. STUDENT'S HELPER, Oct. 1914, at 6 (describing "the erection by business men of private arbitration commissions and 'Trades Courts'" as "[u]nquestioned symptoms" of "a system of court procedure that is the curse of commerce and the jest of the civilized world"); see also Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 n.45 (1999) ("[T]he strong interest in [procedural] reform was fueled in part by fear that business clients, frustrated with the uncertainty, delay and expense of litigation, would abandon traditional adjudication in favor of arbitration . . .").

<sup>299</sup> Indeed, it has frequently been observed that the Progressive movement itself was a hodgepodge of diverse and sometimes opposing interest groups that often united business persons with defenders of the poor in unexpected ways. See, e.g., FAITH JAYCOX, *THE PROGRESSIVE ERA*, at viii (2005) ("Progressives did not all think alike. They ran a gamut from proponents of moderate adjustments to proponents of extreme change . . ."); Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. IN AM. HIST. 113, 115–16 (1982) (listing, among other progressive interest groups, "manufacturers' organizations, labor lobbies, civic leagues, trade associations, women's clubs, professional associations, and issue-oriented lobbies").

well as the establishment of agencies such as the Port Authority of New York and New Jersey, the New York Public Service Commission, and the Legal Aid Society.<sup>300</sup> Likewise, Kellor had been a social activist, helped run Theodore Roosevelt's unsuccessful presidential campaign on the Progressive Party platform, and later became a member of the Progressive Party's national executive board.<sup>301</sup> Arbitration and other ADR processes were also frequently advocated by Progressive reformers.<sup>302</sup> To its supporters, at least, arbitration was seen as exemplifying—not eclipsing—Progressive-era values.<sup>303</sup>

Second, there was undoubtedly a cross-pollination of ideas between the two movements. An obvious example is the New York State Bar Association's Committee on Arbitration, which evolved out of efforts to simplify the state's Code of Civil Procedure and eventually went on to draft the nation's first modern arbitration law.<sup>304</sup> The arbitration reformers frequently appealed to the works of Pound, Taft, Moorfield Storey, and Adolph Rodenbeck,<sup>305</sup> and leaders of both movements spoke at bar association conferences about reducing

<sup>300</sup> E.g., William M. Chadbourne, *They Built Better Than They Knew*, 61 HARV. L. REV. 379, 379 (1948); Samuel J. Levine, *Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study in the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation*, 33 J. LEGAL PROF. 1, 9–10 (2008).

<sup>301</sup> See MACNEIL, *supra* note 31, at 195 n.40 (describing her role in the progressive and arbitration movements, as well as her social activism); JOHN KENNETH PRESS, *FOUNDING MOTHER: FRANCES KELLOR AND THE QUEST FOR PROGRESSIVE DEMOCRACY* 314–15 (2011) (describing, *inter alia*, Kellor's work on behalf of immigrants, laborers, and women).

<sup>302</sup> See, e.g., Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 267–68 (1990) (describing how “[t]he first generation of Progressive law reformers, who . . . began their careers as business lawyers, created new institutions” such as public arbitration boards); Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2068 (1987) (book review) (“Many of the Progressive Era reformers of the early twentieth century . . . advocated reforms similar to ADR processes.”). Reginald Heber Smith, for instance, called arbitration and conciliation the “first line of attack” against the “inequalities in the administration of justice” and recounted the use of arbitration by legal aid societies. SMITH, *supra* note 179, at 70–71, 129–30, 243–44.

<sup>303</sup> See, e.g., SZALAI, *supra* note 52, at 98–99 (arguing that modern arbitration reform was consistent with progressivism).

<sup>304</sup> See N.Y. STATE BAR ASS'N, *Report of the Committee for the Prevention of Unnecessary Litigation*, 40 PROCEEDINGS OF THE FORTIETH ANNUAL MEETING OF THE N.Y. STATE BAR ASS'N 364, 370 (1917) (resolving that the membership of the Committee would be transferred to a newly created Committee on Arbitration).

<sup>305</sup> See, e.g., COHEN, *supra* note 36, at 260 (quoting with approval a “Preliminary Report on Efficiency in the Administration of Justice” prepared by Pound, Moorfield Storey, Adolph Rodenbeck, and others for the National Economic League); Wesley A. Sturges, *Some Common Law Rules and Commercial Arbitration*, in SELECTED ARTICLES ON COMMERCIAL ARBITRATION, *supra* note 190, at 159 (quoting Pound's criticism of judicial congestion); Szalai, *supra* note 172 at 412, 417 (noting references to Pound and Taft); Werner, *supra* note 181, at 867 (citing favorably a report prepared by Storey, Rodenbeck, Pound, and others in the course of arguing for the increased use of arbitration).

unnecessary litigation with little or no record of disagreement.<sup>306</sup> Finally, it is often overlooked that Pound was appointed to the first governing board of the AAA,<sup>307</sup> and that Harlan Fiske Stone was both an original member of the New York City Bar Association's Special Committee on Arbitration and a board member of the Arbitration Society of America.<sup>308</sup>

Consider also that the Judicature Society, founded by Pound and Albert Kales, published a number of studies on judicial alternatives<sup>309</sup> including a book-length report of commercial arbitration in England by Samuel Rosenbaum.<sup>310</sup> England was decades ahead of the United States, not just with respect to arbitration, but also with respect to the modernization of judicial procedure, and the English experience in both areas set something of a gold standard for the reform agenda on this side of the Atlantic.<sup>311</sup> A distinguishing characteristic of the

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<sup>306</sup> See, e.g., *Conference of Bar Association Delegates*, *supra* note 210, at 36, 45–58 (recording the proceedings of a conference at which Charles Bernheimer and Daniel Remsen presented on the subject of unnecessary litigation, receiving general support from Storey, and at which Shelton spoke about uniform federal procedure); Szalai, *supra* note 172, at 415 n.188 (arguing that the conference proceedings further serve as “a reminder that the efforts to secure uniform federal procedure and arbitration reform occurred contemporaneously in response to dissatisfaction with the complexity of existing court procedure”).

<sup>307</sup> See, e.g., FRANCES KELLOR, *AMERICAN ARBITRATION* 184 (1948) (listing Pound as a member of the first governing board of the AAA). By 1959, Pound came around to the view that “commercial arbitration is a useful instrumentality of justice.” 5 ROSCOE POUND, *JURISPRUDENCE* 359 (1959).

<sup>308</sup> E.g., *Special Committee Report*, *supra* note 287, at 267; Werner, *supra* note 181, at 852 n.\*.

<sup>309</sup> A small fraction of these articles include *Arbitration a Part of Judicial Administration*, 9 J. AM. JUDICATURE SOC'Y 69 (1925); *Arbitration in the United States*, 2 J. AM. JUDICATURE SOC'Y 53 (1918); *Commercial Arbitration and the Law*, 2 J. AM. JUDICATURE SOC'Y 125 (1918); Edgar J. Lauer, *Conciliation and Arbitration in the Municipal Court of the City of New York*, 1 J. AM. JUDICATURE SOC'Y 153 (1918); *Promoting Commercial Arbitration*, 2 J. AM. JUDICATURE SOC'Y 185 (1919).

<sup>310</sup> ROSENBAUM, *supra* note 248. Pound was a member of the Judicature Society's board at the time the report was published. *Id.* at cover page.

<sup>311</sup> See Subrin, *supra* note 127, at 942–46 (explaining how English procedural reform inspired similar efforts in America). Rosenbaum's study of arbitration was widely read and cited by arbitration reformers. E.g., COHEN, *supra* note 36, at 8, 19–22, 253; Baum & Pressman, *supra* note 50, at 239 n.3, 242 n.20, 246 n.41, 249 n.51 & 54.

In addition to his work on arbitration, Rosenbaum also wrote about the reform of civil procedure in England. SAMUEL ROSENBAUM, *STUDIES IN ENGLISH CIVIL PROCEDURE* (1914). His research in this area inspired figures such as Shelton, who used it to support the call for procedural reform in Congress. E.g., *1915 Hearings on Procedure*, *supra* note 11, at 22, 47–48. Many foundational tenets of procedural law reform in the United States, such as the rejection of procedural technicalities and the shift from procedural codes to judicial rulemaking, were modeled directly on the English experience. E.g., Clark, *Methods of Legal Reform*, *supra* note 116, at 108–09; see also Thomas W. Shelton, *The Drama of English Procedure*, 17 VA. L. REV. 215, 252 (1931) (suggesting that America could learn from England's procedural reform movement).

English approach was its dual emphasis on the simplification of procedural rules *along with* the establishment of extrajudicial forums for commercial cases.<sup>312</sup> Rosenbaum's research helped illustrate that, far from working at cross-purposes, court and arbitration reform actually benefitted from a certain synergy.<sup>313</sup>

Even if it can be assumed that the interests of arbitration and procedural law reform were mutually exclusive, membership in the reform movements was not as discrete and monolithic as is commonly supposed. Many arbitration reformers, such as Rodenbeck, Moses Grossman, and William Ransom were judges who were invested in the success of the courts and the civil justice system for the better part of their career. They supported arbitration as a way of restoring the "respect of the people for justice and for its administration under our law and by our courts,"<sup>314</sup> not to liberate merchants from substantive regulation.<sup>315</sup> By the same token, commercial interests and values were an undeniable driving force behind the decades-long campaign that produced the Federal Rules.<sup>316</sup> Many prominent procedural reformers such as Homer Cummings were defense-side lawyers who were used to representing banks, corporations, and utilities,<sup>317</sup> sug-

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<sup>312</sup> See ROSENBAUM, *supra* note 248, at 48–53 (describing the creation of the Commercial Court in the King's Bench Division in London as embodying "the central principle of commercial arbitration" and noting that private arbitration was also flourishing in this period).

<sup>313</sup> For instance, after praising the newly created Commercial Court in London for giving judges the discretion to disregard formal rules of pleading and evidence in order to facilitate a prompt consideration of the merits, Rosenbaum noted that the court's procedure resembled "a model set of arbitration rules" more so than rules of court. ROSENBAUM, *supra* note 248, at 49. Likewise, in nineteenth-century America, arbitration and other informal dispute resolution mechanisms were proposed as part of broader procedural reform packages such as New York's Field Code. *E.g.*, Amalia D. Kessler, *Deciding Against Conciliation*, 10 THEORETICAL INQUIRIES L. 423, 467–68 (2009).

<sup>314</sup> Grossman, *supra* note 213, at 211.

<sup>315</sup> See *supra* note 288 (providing evidence that merchants did not necessarily view arbitration as a vehicle for evading the law).

<sup>316</sup> See, *e.g.*, 1915 *Hearings on Procedure*, *supra* note 11, at 9, 14, 29 (statement of Thomas W. Shelton) ("[B]usiness men . . . had made up their minds . . . that they were going to bring about a simplification of the rules of procedure in the Federal courts . . . otherwise they were going to do it themselves . . ."); SHELTON, *supra* note 123, at 90 (arguing that although the courts were "established for the use of commerce and society," they have become the "fencing schools of highly trained pleaders"). As Subrin has explained, popular wisdom at the time was that "[b]usinessmen got things done by cutting through technicality, and by not letting rigid, antiquated rules get in their way." Subrin, *supra* note 127, at 959. In order to improve, courts therefore needed to function in a more "business-like" fashion. STOREY, *supra* note 115, at 98; Pound, *supra* note 132, at 399. A New York Municipal Court judge went as far as to predict that in the future, justice would be more effectively administered by "Judicial Corporations" rather than courts of law. FREDERIC DEWITT WELLS, *THE MAN IN COURT* 267–68 (1917).

<sup>317</sup> See Subrin, *supra* note 127, at 969.

gesting that it was certainly possible for big business interests to embrace reforms aimed at facilitating, rather than frustrating, the vindication of substantive rights.<sup>318</sup>

Ironically, liberal-leaning lawyers actually *opposed* the Federal Rules effort because they feared that a unified federal procedural code would only benefit elites of the profession: large law firms with ambitions of cultivating a nationwide practice.<sup>319</sup> The most indefatigable exponent of this view in Congress was Senator Thomas Walsh of Montana, who fashioned himself a champion of small businesses and individuals and who managed to derail the passage of a comprehensive procedural reform bill until his death in 1933.<sup>320</sup> It is no accident that Walsh also voiced the sharpest objections to the arbitration bill pending in Congress in the same time period.<sup>321</sup>

### III

#### THE NORMATIVE CLAIM: IMPLICATIONS OF THE PROCEDURAL REFORM MODEL

If the FAA's purpose can be understood not just in terms of privatization, but also (or more so) in terms of procedural reform, then procedural reform values should play a role in the way we interpret and apply the statute today. Like the contract model, in other words, the procedural reform model carries with it certain normative implications.

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<sup>318</sup> See Resnik, *supra* note 170, at 500 (asking why the procedural reformers, who were "often associated with interests linked today to the 'defense bar,' sound[ed] . . . like 'plaintiffs' lawyers? Why did they provide a structure of rules that . . . permitted the federal courts to open their doors to a new host of rights seekers?").

<sup>319</sup> See *id.* at 503 (stating that many individuals involved in the Federal Rules effort in the 1930s had a nationwide clientele and effectively "helped craft a reform that has aided the growth of multi-state practices"). By contrast, lawyers with a smaller, local clientele would be forced to learn a completely new set of procedural rules with no corresponding benefit.

<sup>320</sup> See *1915 Hearings on Procedure, supra* note 11, at 27–28 (statement of Thomas Walsh) (claiming "responsibility" for defeating an ABA proposal to give the Supreme Court control over procedural rules and declaring that he would "persist in [his] objection"); THOMAS WALSH, VIEWS OF THE MINORITY, S. REP. NO. 64-892, Pt. 2, at 6–8 (1917) (registering opposition to reform efforts in Congress); Burbank, *supra* note 131, at 1081, 1095 (providing detailed history of how Walsh was the "most vocal opponent" of the Cummings bill and observing that the senator's death in 1933 marked a turning point in the eventual passage of the REA).

<sup>321</sup> See *1923 Hearing on Arbitration, supra* note 42, at 9–11 (statement of Thomas Walsh) (expressing concerns about the unfairness of arbitration clauses presented on a "take-it-or-leave-it" basis); *1924 Hearings on Arbitration, supra* note 40, at 1, 8–9 (statement of Charles Bernheimer) (addressing some concerns previously raised by Walsh, who was unable to attend the 1924 Hearings); *id.* at 10 (statement of W.H.H. Piatt) (stating that changes had been made to the proposed arbitration bill as a result of questions raised by Walsh and others at the 1923 Hearing).

The bigger challenge is to figure out what those implications are and how they might change the way that courts decide arbitration cases or the way that legislatures regulate arbitration going forward. One approach might be to suggest minimum *ex ante* criteria of procedural due process that follow from a commitment to procedural reform.<sup>322</sup> Another might be to vest judges with the power to police arbitration procedure, again by reference to notions of fundamental fairness or procedural justice that are believed to flow from a procedural reform model. Both suggestions are quite radical and it is not my intention here to endorse either.

My ambitions in this Part are much more modest: to call attention and suggest solutions to the way that party-created arbitral procedure today is prone to much of the same formalism and sclerosis that characterized statutory procedure in Pound's era. For example, just as early twentieth-century courts claimed they were powerless to disregard procedural rules in the interest of ensuring substantial justice,<sup>323</sup> so courts today claim that the contract model requires them to enforce contract procedures (for example, class waivers) strictly, even when doing so might prevent claims not just from being adjudicated on their merits, but also from being brought at all. Cases are thereby won or lost based on formalistic considerations such as whether a decision to deny enforcement of a class waiver was based on general notions of fairness rather than on specific findings of substantive and procedural unconscionability,<sup>324</sup> or whether the arbitrators construed an agreement's silence about class arbitration by citing policy considerations

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<sup>322</sup> For examples of such an approach, see *supra* note 110 (discussing the consumer and employment due process protocols and Professor Stipanowich's Arbitration Fairness Index).

<sup>323</sup> *Supra* notes 121–22 and accompanying text.

<sup>324</sup> Some courts and commentators have interpreted *Concepcion* as standing for the proposition that a state unconscionability precedent will be preempted if, like *Discover Bank*, it represents a categorical impeachment of certain types of arbitration clauses rather than a case-by-case determination of substantive and procedural unconscionability. See, e.g., *Vargas v. Sai Monrovia B., Inc.*, 157 Cal. Rptr. 3d 742, 753 (Cal. Ct. App.) (holding that “traditional principles of unconscionability do not constitute a categorical rule invalidating arbitration agreements” and therefore do not stand as an obstacle to the FAA), *review granted*, 304 P.3d 1082 (2013); 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) (“[T]he unconscionability defense in *Concepcion* ‘stood as an obstacle,’ for preemption purposes, because it was a categorical rule that applied to all consumer cases. . . . *Discover Bank* . . . did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis.”). *But see* Aragaki, *supra* note 82, at 67, 79 (arguing that a categorical rule like *Discover Bank* that applies equally in arbitration and litigation cannot possibly express the type of anti-arbitration “hostility” absent a credible claim of pretext).

rather than evidence of party intent.<sup>325</sup> Not surprisingly, parties end up squandering more time and money “litigating whether or not they should be litigating.”<sup>326</sup> And so federal arbitration law devolves into something of a strategic “game,”<sup>327</sup> unhinged from any higher calling to promote a legitimate and workable system of private adjudication.

A procedural reform model would help restore some much-needed balance by giving judges discretion in extreme cases to disregard party intent *in matters of arbitral procedure* if doing so would help ensure that disputes are resolved on their proper merits. It would moreover justify this discretion not as a necessary imposition of “fairness” considerations that are external to the FAA’s core purposes, but rather as consistent with the full expression of those purposes and the procedural values that inform them.

In this Part, I illustrate how a procedural reform model can offer a more satisfying analytic framework for approaching two controversial issues in arbitration law today: (a) how, if at all, to fill gaps in the parties’ agreements relating to procedural issues in arbitration such as class arbitration, and (b) the future of equitable doctrines such as unconscionability and the vindication of rights doctrine.

### A. Procedural Defaults and Gap-Fillers

Does the FAA preclude a party from bringing a claim on behalf of a class of similarly-situated signatories to the same arbitration clause just because the parties had no implicit or explicit agreement regarding class arbitration? In the recent case of *Stolt-Nielsen S.A. v. AnimalFeeds International*,<sup>328</sup> the Court surprised most observers by answering this question in the affirmative and by requiring each claimant to arbitrate on an individual basis.

The standard charter party arbitration clause at issue in *Stolt-Nielsen* dated from 1950 and, not surprisingly, was “silent” as to the availability of classwide relief.<sup>329</sup> The claimants nonetheless argued that the clause should be construed so as to “permit class arbitration

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<sup>325</sup> See *infra* notes 328–42 and accompanying text (discussing *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1765 (2010)).

<sup>326</sup> *Anders v. Hometown Mortgage Servs.*, 346 F.3d 1024, 1026 (11th Cir. 2003).

<sup>327</sup> See, e.g., Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1454–55 (2008) (describing current arbitration doctrine as a product of a “game”-like interaction between state and federal courts with different ideological commitments regarding arbitration); Horton, *supra* note 78, at 654–60 (describing the strategic, “private conversation” between corporations and courts over the unconscionability of arbitration clauses and how this burdens the judicial system).

<sup>328</sup> 130 S. Ct. 1758 (2010).

<sup>329</sup> *Id.* at 1765–66.

as a matter of public policy.”<sup>330</sup> The tribunal agreed,<sup>331</sup> and the proceedings were stayed while Stolt-Nielsen sought judicial review.

In an opinion that takes the contract model to new extremes, the Court overturned this decision. “[C]onsistent with our precedents emphasizing the consensual basis of arbitration,” the Court explained, “we see the question as being whether the parties *agreed to authorize* class arbitration.”<sup>332</sup> Here, the parties specifically stipulated that there had been “no agreement” on the subject.<sup>333</sup> Rather than see this as a gap to be filled using considerations *other* than the parties’ intent, however, the Court held that the lack of agreement itself provided the answer: Class arbitration was simply not part of the deal at all.

On the contract model, the flaw in the tribunal’s award ordering class arbitration was that, given the stipulation of “no agreement,” the award could not have been “based on a determination regarding the parties’ intent.”<sup>334</sup> For example, the tribunal relied almost exclusively on arbitral awards that postdated the parties’ arbitration clause as well as on evidence of a consensus in the field that “class arbitration is beneficial in ‘a wide variety of settings.’”<sup>335</sup> But instead of shedding light on the parties’ intent at the time of contracting, these considerations “simply [allowed the tribunal] to impose its own view of sound policy regarding class arbitration.”<sup>336</sup> This led the Court to hold that “[t]he panel’s conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”<sup>337</sup>

There are several problems with the Court’s contract-based analysis. First, it sidesteps the real issue: What should the default rule be when there is *no* evidence of the parties’ intent whatsoever? The

<sup>330</sup> *Id.* at 1768 (internal citations omitted). The parties had previously agreed to submit the clause-construction issue to the arbitrators. *Id.*

<sup>331</sup> The tribunal also noted that the arbitration clause was worded broadly and covered “[a]ny dispute.” *Id.* at 1780. Moreover, there was nothing to indicate that the parties did *not* intend class arbitration. *Id.* at 1781.

<sup>332</sup> *Id.* at 1776.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 1768 n.4; *accord id.* at 1770 (“This stipulation left no room for an inquiry regarding the parties’ intent.”). As the Court later explained, “[t]he parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. . . . In that circumstance, we noted, the panel’s decision was not—indeed, could not have been—“based on a determination regarding the parties’ intent.” Oxford Health Plans, LLC v. Sutter, 133 S. Ct. 2064, 2069 (2013) (quoting *Stolt-Nielsen*, 130 S. Ct. at 1768 n.4).

<sup>335</sup> *Stolt-Nielsen*, 130 S. Ct. at 1769.

<sup>336</sup> *Id.* at 1767–68; *see also id.* at 1769 (criticizing the panel for “proceed[ing] as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation” rather than seeking to identify the “default rule” under New York or federal law in the absence of an express agreement of the parties).

<sup>337</sup> *Id.* at 1775.

entire point of gap-filling is to save the parties from their own failure to anticipate future events—that is, to save them from circumstances that they did *not* intend.<sup>338</sup> To say that such gaps may, in turn, be filled only by reference to the very thing that caused them—i.e., the lack of intent or agreement—is not just circular; it betrays a radical freedom-of-contract orientation that is scarcely consistent with modern contract law.<sup>339</sup> Even unflinching will theorists such as Charles Fried would agree that, given the stipulation in *Stolt-Nielsen*, any default rule chosen “must . . . be based on principles external to the will of the parties,”<sup>340</sup> such as efficiency<sup>341</sup> or equity.<sup>342</sup> The contract model alone cannot provide those principles.

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<sup>338</sup> See Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the “Just Result” Principle*, 31 LOY. L.A. L. REV. 557, 619–20 (1998) (“The goal of contract interpretation is to discover the intent of the parties . . .”).

<sup>339</sup> See, e.g., Cunningham, *supra* note 78, at 141–42 (arguing that even though the Court invoked the rhetoric of contract in *Stolt-Nielsen*, the decision cannot be explained on contract-law grounds). Contract law routinely permits judges to fill gaps using terms that are “reasonable in the circumstances.” RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981). The modern doctrines of impracticability and frustration of purpose, for instance, provide for the risk of loss to shift to one party even in the absence of any risk allocation in the contract. See *id.* § 261, cmt. c (noting that, “even absent an express agreement, a court may decide, after considering all the circumstances, that a party impliedly assumed” the risk of a supervening impracticability). In a similar fashion, Article 2 of the Uniform Commercial Code provides numerous gap-fillers relating to delivery, payment, and risk of loss. E.g., U.C.C. §§ 2–308, 2–310, 2–509 (1977).

<sup>340</sup> FRIED, *supra* note 230, at 60; see also Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489–90 (1989) (arguing that promissory theories of contract “have little or no relevance” to the bulk of contract disputes, which concern situations where courts are called upon to assist parties who had no expressed intention regarding the matter). Indeed, Fried does not consider such principles to be part of contract law at all. FRIED, *supra* note 230, at 69 (arguing that there are “gaps in contract” which must be “governed by residual general principles of law”).

Note that Fried’s point is limited to cases that involve what he calls “interpolation”—that is, cases in which intent-based interpretation does not (or cannot) resolve the issue. *Id.* at 89; see also Jody S. Kraus, *The Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 718 (Jules S. Coleman et al. eds., 2004) (describing interpolation as the “task of adding semantic content to terms, or imputing entirely new terms in agreements, that the parties did not subjectively intend when they entered into their agreement”). *Stolt-Nielsen* required interpolation because there was simply “no agreement” regarding class arbitration.

<sup>341</sup> See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97–100 (1989) (describing the various benefits that default rules based on the principle of efficiency would provide); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (using cost minimization as a metric for efficiency).

<sup>342</sup> Benjamin Cardozo’s opinions during his tenure on the New York Court of Appeals provide some of the most eloquent examples of filling contractual gaps on equitable grounds. See, e.g., *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214–15 (N.Y. 1917) (“We are not to suppose that one party was to be placed at the mercy of the other. . . . The implication [of the written agreement] is that the [agent’s] business organization will be

Second, by framing the issue in terms of mutual assent, the contract model turns a question about the proper default rule in the face of silence into a case-by-case determination of party intent. This creates a risk of inconsistent results and, worse, outright abuse. Consider in this vein the recent case of *Oxford Health Plans v. Sutter*,<sup>343</sup> in which a unanimous Court reached the *opposite* conclusion from *Stolt-Nielsen* on nearly identical facts.<sup>344</sup> The Court justified this inconsistency on the ground that the arbitrator in *Oxford* had at least attempted to construe the arbitration clause,<sup>345</sup> whereas in *Stolt-Nielsen* the tribunal had abandoned all pretense of ascertaining the parties' intentions.<sup>346</sup>

But the Court's attempt to distinguish these cases sounds in form rather than substance. The arbitration clauses in *Stolt-Nielsen* and *Oxford* were equally broad in scope and made no explicit mention of classwide relief. There was, moreover, no evidence in either case that the parties had ever discussed (let alone contemplated) what to do if one of them later sought to arbitrate on a representative basis.<sup>347</sup> And

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used for the purpose for which it is adapted."); Larry A. DiMatteo, *Equity's Modification of Contract: An Analysis of the Twentieth Century's Reformation of Contract Law*, 33 *NEW ENG. L. REV.* 265, 363 (1999) (describing an "equity component of the law of contracts," which implies that "cases ought to be decided in such a way as to bring about the best result as between the parties *at present* before the court").

<sup>343</sup> 133 S. Ct. 2064 (2013).

<sup>344</sup> The only difference was that the parties in *Oxford* had not specifically stipulated to the lack of an agreement on the matter. *Id.* at 2067–68.

<sup>345</sup> *Id.* at 2068. On reconsideration of the clause construction award in light of *Stolt-Nielsen*, the arbitrator clarified that the award was "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." *Id.* at 2069. The correctness of that interpretation was not relevant due to the extremely strict standard of review for arbitral awards. *See id.* at 2068 (explaining that an arbitral decision "'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits") (quoting *E. Associated Coal Corp. v. Mine Workers*, 121 S. Ct. 462, 466 (2000)).

<sup>346</sup> As the Court explained, the parties' "unusual" stipulation that there had been no agreement on class arbitration meant that there was absolutely no "contractual basis for ordering class procedures," and thus that the tribunal's decision could not possibly be traced to the parties' intentions. *Id.* at 2067–68.

To use Fried's nomenclature, *Oxford* presented a case of "interpretation," while *Stolt-Nielsen* involved a case of "interpolation." *Cf.* Brief for Petitioners at 31, *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013) (No. 12-135) (taking the opposite position that the arbitrator in *Oxford* engaged in interpolation even while couching it as interpretation). For an explanation of this distinction, see *supra* note 340.

<sup>347</sup> Class arbitration was not even a concept that enjoyed widespread currency until after the Supreme Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which gave implicit approval to class arbitration. By contrast, the arbitration clause in *Oxford* was entered in 1998. *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 217 (3d Cir. 2012), *aff'd*, 133 S. Ct. 2064 (2013). The Vegoilvoy standard charter party used for the various shipping transactions at issue in *Stolt-Nielsen* was drafted in 1950. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1765 (2010). The transactions themselves

even though the arbitrator in *Oxford* ostensibly based his award on the plain language of the arbitration clause, he was clearly influenced by procedural concerns unrelated to the parties' intent.<sup>348</sup> This led Oxford to argue persuasively before the Court that the arbitrator's decision was in fact "driven largely if not entirely by his policy view concerning what *procedural options Sutter ought to have*."<sup>349</sup>

What was truly at stake in both cases, therefore, was not contractual intent but rather procedural reform: In the interest of fair or legitimate arbitration procedure, should classwide relief be available *ex post* even if the parties did not agree either way *ex ante*? Because the contract model holds that "the foundational FAA principle [is] that arbitration is a matter of consent,"<sup>350</sup> arbitrators are forbidden from taking such considerations into account unless they can somehow be couched in terms of mutual assent. As a result, cases like *Stolt-Nielsen* and *Oxford* turn on arbitrary grounds having little to do with the merits, such as whether the tribunal looked like it was interpreting the parties' agreement (even though, as we have seen, the whole point of a gap is the *lack* of agreement)<sup>351</sup> or whether plaintiff's counsel happened to stipulate that there was no agreement on class arbitration (which on the contract model can only mean no class arbitration).<sup>352</sup>

A procedural reform model of the FAA would provide a much richer framework for approaching the problem of procedural gaps. First, highlighting the FAA's commitment to better adjudicative procedure does not just make it possible for us to consider procedural values alongside other values such as freedom of contract; on some level it *requires* us to do so if we are to remain faithful to the purposes and objectives behind the statute. Those values will no longer need to

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dated from before 2003. *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 86 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1758 (2010). The AAA, whose arbitration rules were used in the *Stolt-Nielsen* and *Oxford* arbitrations, did not even develop class arbitration procedures until after the *Bazze* decision. Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 9–12, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2009) (No. 08-1198).

<sup>348</sup> For instance, he noted that if the clause were construed both to preclude access to a judicial forum and to preclude classwide relief in the arbitral forum, Sutter would be unable to bring any type of representative claim, which is the same as saying that he could bring no claim at all. Brief for Petitioners, *supra* note 346, at 31. He further noted that Oxford could and should have raised its arguments against classwide relief at the time it moved to compel arbitration of Sutter's putative class action, suggesting that his decision to permit class arbitration was motivated at least in part by a concern about procedural gamesmanship. *See id.* at 31–32.

<sup>349</sup> *Id.* at 32 (emphasis added).

<sup>350</sup> *Stolt-Nielsen*, 130 S. Ct. at 1775.

<sup>351</sup> *Supra* notes 343–49 and accompanying text.

<sup>352</sup> *See supra* notes 328–42 and accompanying text (describing the rationale in *Stolt-Nielsen*).

find imperfect expression through concepts such as mutual assent, for on the procedural reform model that I have defended here, they can be traced directly to the FAA itself. This, in turn, would empower arbitrators to do exactly what the Court in *Stolt-Nielsen* held they could not: to develop “the best [procedural] rule to be applied” when the parties’ agreements run out.<sup>353</sup>

Second, a procedural reform model provides concrete criteria—Fried’s “principles external to the will of the parties”<sup>354</sup>—for developing what it considers to be the best procedural gap-fillers and default rules. Consistent with the philosophy of procedural reform more generally, those criteria would include, for instance, the notion that fealty to party-chosen arbitral procedures is not an end in itself; that rights created by contract procedure should not be enforced formalistically, especially when this would prevent the adjudication of disputes on their merits; and that the real reason for party autonomy and procedural flexibility is not “self-deregulation”<sup>355</sup> but rather substantial justice.<sup>356</sup>

It is, of course, a separate question which default rule—class arbitration or no class arbitration—follows from these criteria. On the one hand, a no-class-arbitration rule is in tension with them<sup>357</sup> because it may discourage meritorious cases from being brought in the first place. Instead of promoting the goal of substantial justice, it allows arbitration to become a vehicle for avoiding the determination of claims on their merits. A similar situation prevailed in the early twentieth century with respect to a close relative of the class action: joinder of parties.<sup>358</sup> The common law’s categorical restrictions on certain

<sup>353</sup> *Stolt-Nielsen*, 130 S. Ct. at 1769. By contrast, many scholars have argued that class arbitration is not just feasible but offers a workable method of extrajudicial collective claiming. See, e.g., Resnik, *supra* note 105, at 123–24 (discussing advantages of class arbitration for treating similarly situated parties equally and for correcting asymmetries between disputants).

<sup>354</sup> Fried, *supra* note 230, at 60.

<sup>355</sup> See Carrington, *supra* note 7, at 282 (arguing that the Court has enabled businesses to “self-deregulate” using arbitration); see also Noyes, *supra* note 7, at 639 (“Arbitration agreements have been criticized for requiring the consumer to ‘opt-out’ of the public dispute resolution system, thus giving up the right to a neutral and independent decision-maker . . .”).

<sup>356</sup> See *supra* Part II.B.

<sup>357</sup> Judith Resnik makes essentially the same point when she argues that the procedural reform values immanent in the Federal Rules seek to “sharpen the focus on the merits.” Resnik, *supra* note 170, at 515; see also Resnik, *supra* note 105, at 83–85 (arguing that these values include levelling the playing field between parties with asymmetrical resources).

<sup>358</sup> Class actions are a “species” of traditional joinder. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010). But see Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459, 504, 506

types of joinder were widely blamed for contributing to the delay, expense, and injustice that prevailed in the courts at the time the FAA was passed.<sup>359</sup> Consistent with their equity orientation, the procedural reformers advocated liberal joinder so that “there may be a speedy and final determination of legal controversies according to the substantive rights of the parties.”<sup>360</sup> These same considerations weigh in favor of a default rule giving the arbitrator discretion to certify a class when the agreement is otherwise “silent,” especially if this would help advance what Pound referred to as the “equitable principle of complete disposition of the entire controversy between the parties.”<sup>361</sup>

On the other hand, critics have raised important concerns about the way that classwide relief can exert pressure on defendants to settle claims for far more than their fair value.<sup>362</sup> Others have argued that

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(arguing that class actions are better understood as a representative device rather than as a type of joinder). Both originated in equity and were unknown at common law. *See, e.g.,* ZECHARIAH CHAFEE, *SOME PROBLEMS OF EQUITY* 200–02 (1950) (class actions); Charles E. Clark & Herbert Brownell, *Joinder of Parties*, 37 *YALE L.J.* 28, 30 (1928) (joinder).

<sup>359</sup> *See* Clark & Brownell, *supra* note 358, at 28–55 (describing the hardship occasioned by technical joinder rules); Subrin, *supra* note 127, at 940, 946–47, 954 (describing the liberalization of joinder rules as a key goal of procedural simplification).

<sup>360</sup> BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK, REPORT OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK ON A PLAN FOR THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF THE STATE app. at 84 (1912); *see also* Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 *A.B.A. J.* 447, 448–49 (1936) (describing liberal joinder as one of the most important features of the draft Federal Rules because sound policy requires resolving “all items of potential irritation between parties” in one action); Armistead M. Dobic, *The Federal Rules of Civil Procedure*, 25 *VA. L. REV.* 261, 271–72 (1939) (arguing that the Federal Rules’ proposed liberal joinder rules eliminate many technicalities in the existing joinder regime); Rodenbeck, *supra* note 141, at 84 (proposing a package of procedural reforms, including the principle that, where appropriate, parties and causes of actions should be consolidated in one action); Edson R. Sunderland, *Joinder of Actions*, 18 *MICH. L. REV.* 571, 585–86 (1920) (“Why should each [litigant] be forced to play a lone hand in his litigation, instead of pooling his efforts and his resources with some of his fellow sufferers.”).

<sup>361</sup> Pound, *supra* note 161, at 642 (stating that this was one of the nine reform principles put forward by the A.B.A.’s Committee of Fifteen). Prior to Rule 23 of the Federal Rules, of course, arbitration was, practically speaking, the only way to obtain classwide relief in actions at law, and was sometimes used for this very purpose. *See, e.g.,* Lappin, *supra* note 155, at 199 (recounting a case in which a judge, faced with a case involving two hundred possible plaintiffs that was predicted to take ten years, recommended arbitration); Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 *HARV. NEGOT. L. REV.* 399, 421–25 (2008) (describing National War Labor Board arbitrations from 1918 to 1919, which were representative in nature).

<sup>362</sup> *See, e.g.,* CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 33 (Deborah H. Hensler et al. eds., 2000) (describing common criticisms to the effect that “[t]he class action has become ‘an opportunity for a kind of legalized blackmail’”); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 *U. PA. L. REV.* 2043, 2071–72 (2010) (describing common criticisms such as that defendants overpay to settle meritless class action cases).

class actions enable opportunistic behavior by plaintiffs' lawyers, often at the expense of the class members themselves.<sup>363</sup> These considerations reflect a modern-day concern about the use of procedure for strategic gain—Pound's "sporting theory of justice."<sup>364</sup> Even if these considerations are not strong enough to justify a default rule prohibiting arbitrators from ordering class arbitration in the face of silence, a procedural reform model must nonetheless take them into account.

One final point: It is possible to read *Stolt-Nielsen*—and even more so *Concepcion*—as advancing a type of procedural reform model. In *Stolt-Nielsen*, the Court opined that classwide relief "fundamental[ly] changes" the nature of arbitration because it turns a simple, bilateral dispute into a dispute between "hundreds or perhaps even thousands of [absent] parties."<sup>365</sup> From this standpoint, the Court's refusal to imply class arbitration can be understood as consistent not just with the contract model, but also with a desire to preserve what makes arbitration a superior *procedural* alternative to litigation: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."<sup>366</sup>

The beginnings of such a procedural reform model are also evident in *Concepcion*. As an additional ground for holding the *Discover Bank* rule to be preempted by the FAA, the Court explained that classwide relief produces a "structural" change that "interferes with *fundamental attributes* of arbitration,"<sup>367</sup> because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbi-

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<sup>363</sup> See, e.g., Am. Bar Ass'n, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 194–95 (1976) (describing the "unseemly picture of the lawyer frequently as the real party in interest, representing vast numbers of plaintiffs no one of whom has substantial interest in the recovery"); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–84 (1987) (describing potential agency costs of class actions, in the form of "shirking," high fees/low recovery, fluid recovery, and other opportunistic behavior by lawyers); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 56–59 (1975) (describing the numerous ways in which conflicts of interests arise between plaintiffs' attorneys and class members).

<sup>364</sup> See Francis R. Kirkham, *Problems of Complex Civil Litigation*, 83 F.R.D. 497, 512 (1979) (arguing that current debate over class actions reflects many of the same concerns about "sporting" raised by Pound); Roger H. Transgrud, *The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 189 (2008) (arguing that today, class actions end up substantially interfering with "Pound's goal of keeping procedural decisions from interfering with the substantive merits of the case").

<sup>365</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010). This change, moreover, was so great that "it cannot be presumed the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator." *Id.* at 1775.

<sup>366</sup> *Id.*

<sup>367</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1750 (2011) (emphasis added).

tration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>368</sup> From this perspective, the Court’s decision in *Concepcion* to hold *Discover Bank* preempted can be seen as consistent not just with freedom of contract, but also with protecting the essentially fast, cheap, and simple arbitral process from the corrupting influence of more complex procedures such as classwide relief.<sup>369</sup>

But to the extent *Stolt-Nielsen* and *Concepcion* are committed to procedural reform, they are not committed to the procedural reform model that I have sought to defend here, for at least two reasons. First, their normative reform claims are not connected to a descriptive theory about the FAA’s original purposes—that is, to a model of arbitration law. They are grounded rather in a conception of the nature of arbitration itself,<sup>370</sup> one that many commentators consider to be spurious at best.<sup>371</sup>

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<sup>368</sup> *Id.* at 1751. The Court cited three reasons for this assessment. First, although bilateral arbitrations at the AAA typically reached a disposition on the merits within six months, no AAA-administered class arbitration had yet resulted in a merits award and the average time from filing to settlement or dismissal in the remaining cases was over eighteen months. *Id.* Second, because class arbitration purports to adjudicate the rights of absent third parties, it requires certain procedural formalities such as notice, an opportunity to be heard, and a right to opt out—formalities whose oversight Congress was unlikely to have implicitly entrusted to arbitrators. *Id.* at 1751–52. Third, “[a]rbitration is poorly suited to the higher stakes of class litigation.” *Id.* at 1752. For instance, unlike the de novo review of class certification questions available in court, arbitrators’ class-certification decisions are not appealable, which in turn magnifies the risk of injustice to defendants. *Id.* (“[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”).

<sup>369</sup> *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008), and *Preston v. Ferrer*, 552 U.S. 346 (2008), can also be understood in this way. In *Hall Street*, the Court held that private parties could not expand through contract the FAA’s enumerated grounds for vacatur of arbitral awards. *Hall Street*, 522 U.S. at 584. Although the decision is arguably at odds with freedom of contract, it is consistent with process values such as finality and efficiency. *See id.* at 588 (explaining the decision as consistent with safeguarding arbitration’s “essential virtue” of “resolving disputes straightaway” without any substantive review of the merits of arbitration awards). In *Preston*, the Court held that California’s Talent Agent Act (TAA) was preempted to the extent it required certain disputes subject to an arbitration agreement to be heard first before an administrative tribunal. *Preston*, 552 U.S. at 359. The Court reasoned that the TAA would thwart one of the chief procedural virtues of arbitration: “streamlined proceedings and expeditious results.” *Id.* at 357 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1986)).

<sup>370</sup> As I have already explained, the contract model is a theory (descriptive and normative) of the FAA, not of the arbitration process. *Supra* note 30. The procedural reform model that I seek to develop is also a theory about arbitration law rather than a theory about arbitration.

<sup>371</sup> *See, e.g.*, Born & Salas, *supra* note 30, at 38–44 (“Justice Scalia’s view about the ‘fundamental’ character of arbitration is as dangerous as it is misinformed.”); Ian D. Mitchell & Richard A. Bales, *Concepcion and Preemption under the Federal Arbitration*

Second, procedural reform according to *Stolt-Nielsen* and *Concepcion* bears little resemblance to the procedural philosophy of Pound and his colleagues. The former is primarily utilitarian, placing importance on values such as speed and economy. “The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute,” explained the Court.<sup>372</sup> “And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”<sup>373</sup> The latter, by contrast, is primarily deontological: It stresses the need for procedure to act as a “handmaid” to the greater goal of enabling disputes to be adjudicated on their merits. Although the arbitration reformers (like their procedural reform counterparts) also sought to minimize unnecessary delay and cost, they did so in order to help ensure that claims and defenses would be heard rather than abandoned, not because they regarded speed and economy as ends in themselves.<sup>374</sup>

### B. *Equitable Safety Valves*

As explained in Part I, the contract model requires courts to enforce arbitration clauses according to their terms, notwithstanding practically any state or federal statute or policy to the contrary. There are two notable exceptions to this policy of strict enforcement, however. The first is the contract defense of unconscionability, which courts may use to deny enforcement of an arbitration agreement regardless of the nature of the claim to be arbitrated. The second is the so-called “vindication of rights” doctrine, pursuant to which courts may refuse enforcement if federal statutory claims are asserted and

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*Act*, 4 Y.B. ARB. & MEDIATION 9, 24 (2012) (“[T]he Court’s view that arbitration under the FAA is restricted to a particular form is not only absent from the text of the FAA, it is reminiscent of the prejudices and attitudes towards arbitration that precipitated its enactment.”); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-a-Center, Concepcion, and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 388–89 (2011) (arguing that *Concepcion*’s claims about arbitration’s “nature” are at odds with the thrust of modern arbitration law and practice).

<sup>372</sup> *Concepcion*, 131 S. Ct. at 1749.

<sup>373</sup> *Id.*

<sup>374</sup> *See, e.g.*, *C. Itoh & Co. v. Boyer Oil Co.*, 198 A.D. 881, 884 (N.Y. App. Div. 1921) (“Arbitration [under the New York Arbitration Law of 1920] is intended to be a short cut to substantial justice.”); Lappin, *supra* note 155, at 198 (arguing that delay allowed “the stronger and richer litigant to force the weaker and poorer to surrender regardless of the merits” and recommending arbitration as a solution to this and other problems); Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 191 (1966) (“Expedient administration is an essential element of justice. Arbitration can furnish this element.”); Wheless, *supra* note 199, at 218 (arguing that arbitration can help realize “the ideal of speedy, cheap, and effective right and justice without [the] ‘denial, delay, or sale’ [of justice]” that prevails in the courts).

the plaintiff establishes that she will be unable effectively to vindicate those claims in the arbitral forum.<sup>375</sup> Both doctrines, however, are now under serious attack.

The unconscionability doctrine was recently dealt a heavy blow in *AT&T Mobility v. Concepcion*, where the Court held that the FAA preempted the *Discover Bank* unconscionability standard that declared certain class waivers unenforceable.<sup>376</sup> This decision is exceedingly difficult to square with the Court's longstanding position that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA section] 2."<sup>377</sup> Nonetheless, the Court defended its conclusion by drawing in important respects on the contract model.<sup>378</sup>

Recently, the Court decided *American Express Co. v. Italian Colors Restaurant (Amex)*,<sup>379</sup> a case that is to the vindication doctrine what *Concepcion* is to unconscionability. The issue in *Amex* was whether a class arbitration waiver in a merchant-to-merchant contract should be enforced even if the plaintiff could demonstrate that it would be cost-prohibitive to pursue its antitrust claims on an individual basis.<sup>380</sup> Applying the vindication doctrine, the Second Circuit refused to enforce the waiver.

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<sup>375</sup> See *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (rejecting respondent's claim but acknowledging the vindication of rights doctrine). A third exception applies where Congress has evinced an intention to exempt a statutory claim from arbitration. In general, this exception has applied only where Congress's intent has been made clear on the face of another federal statute. Aragaki, *supra* note 95, at 1224.

<sup>376</sup> 131 S. Ct. 1740, 1753 (2011); see also *supra* notes 84–89 and accompanying text (describing the holding in *Concepcion*, which found that the FAA preempted California's *Discover Bank* unconscionability standard).

<sup>377</sup> *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). This erosion of the unconscionability defense is, of course, fully consistent with the strong freedom-of-contract ideals that animate the Court's interpretation of the FAA. Of all the common-law contract defenses, unconscionability has drawn the most vociferous criticism from those who advocate minimal interference with private bargains. See, e.g., Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294–95 (1975) (describing unconscionability as one of the major "conceptual tools used by courts in their assault on private agreements" and arguing that the doctrine of substantive unconscionability should be eliminated, leaving only procedural unconscionability as a defense to enforcement). *But see* Eric A. Posner, *The Decline of Formality in Contract Law*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 61, 68–69 (F.H. Buckley ed., 1999) (arguing that unconscionability is fully consistent with *laissez-faire* principles).

<sup>378</sup> See *supra* notes 87–90 and accompanying text. As I have argued elsewhere, *Concepcion* also drew on antidiscrimination theory by holding that *Discover Bank* should be preempted because it was impermissibly "hostil[e]" toward arbitration. Aragaki, *supra* note 82, at 51–55.

<sup>379</sup> 133 S. Ct. 2304 (2013).

<sup>380</sup> *Id.* at 2308.

The Court reversed, holding that the vindication doctrine applies only in cases where a party can demonstrate that a particular arbitration procedure operates as a prospective waiver of its “‘right to pursue [federal] statutory remedies.’”<sup>381</sup> The plaintiff in *Amex* did not allege that it was deprived of any such right. For example, it did not claim that the arbitration agreement prohibited the assertion of certain statutory entitlements or that the high fees and costs of arbitration made it impossible to gain access to the forum. Rather, it only alleged that because the cost of procuring an expert economic report far exceeded the value of an individual claim, “it [was] not worth the expense involved in *proving*” a violation of the antitrust laws.<sup>382</sup>

This conclusion is at least somewhat surprising given that the Court had previously construed the doctrine to apply in situations where it was not just *de jure*, but also *de facto*, impossible for the plaintiff to vindicate its rights in arbitration. For example, analogizing to forum-selection doctrine, the Court held in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*<sup>383</sup> that an arbitration clause would be set aside if the plaintiff could prove that it “will be so gravely difficult and inconvenient that [it] will for all practical purposes be deprived of [its] day in court.”<sup>384</sup> Likewise, in *Green Tree Financial Corp. v. Randolph*,<sup>385</sup> the Court held that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating [its] federal statutory rights in the arbitral forum.”<sup>386</sup> In *Randolph*, the plaintiff argued that because her arbitration agreement failed to describe or limit the expenses for which she would be responsible, it exposed her to *potentially* “prohibitive arbitration costs” in the form of high filing and administrative fees.<sup>387</sup> Rather than hold that such financial obstacles are *per se* insufficient to establish the vindication defense, the Court merely explained that “where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden

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<sup>381</sup> *Id.* at 2310 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

<sup>382</sup> *Id.* at 2311.

<sup>383</sup> 473 U.S. 614 (1985).

<sup>384</sup> *Id.* at 632. In support of this proposition, the *Mitsubishi* Court cited *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which in turn held that forum selection clauses would not be enforced if litigating in the contractual forum would “be *so gravely difficult and inconvenient* that [the resisting party] will for all practical purposes be deprived of his day in court.” *Id.* at 18 (emphasis added).

<sup>385</sup> 531 U.S. 79 (2000).

<sup>386</sup> *Id.* at 90.

<sup>387</sup> *Id.*

of showing the *likelihood* of incurring such costs. Randolph did not meet that burden.”<sup>388</sup>

This broader interpretation of the vindication doctrine, however, appears no longer tenable after *Amex*. As the Court there explained, “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The latter interest, we said, is ‘*unrelated*’ to the FAA.”<sup>389</sup> These remarks are a testament to just how much the contract model has eclipsed any alternative understanding of the FAA based in procedural reform.

Justice Thomas went even further than the *Amex* majority in his concurring opinion. In Thomas’s view, “the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the *formation* of the arbitration agreement . . . .”<sup>390</sup> Because the vindication doctrine goes to procedural fairness rather than to the quality of consent, the argument goes, it cannot possibly defeat enforcement of the class waiver. The upshot is that Justice Thomas does not just believe (as did the majority) that the lower court incorrectly applied the vindication doctrine; instead, he contends that the doctrine is not a valid defense to the enforceability of arbitration agreements *at all*.<sup>391</sup> In Justice Thomas’s opinion, this conclusion moreover followed inexorably from the contract model: “[The plaintiff] voluntarily entered into a contract containing a bilateral arbitration provision. It cannot now escape its obligations merely because the claim it wishes to bring might be economically infeasible.”<sup>392</sup>

The historical evidence presented in this Article should help breathe some life back into unconscionability and the vindication of rights defense. These equitable safety valves can help further important procedural reform values by giving adjudicators *ex post* discretion

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<sup>388</sup> *Id.* at 92 (emphasis added). The Court did not rule on “[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence,” as the parties did not raise the issue in a timely fashion. *Id.*

<sup>389</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013) (emphasis added) (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752–53 (2011)).

<sup>390</sup> *Id.* at 2312 (Thomas, J., concurring) (emphasis added) (quoting *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring)). True to the contract model, moreover, Justice Thomas’s unique interpretation of the FAA relies entirely on the plain language of just two sections of the statute, isolated from any consideration of the historical context. *Supra* note 112.

<sup>391</sup> American Express had also taken this position in its brief to the Court and at oral argument. It framed the issue as a choice between respect for party autonomy and the vindication of rights doctrine, which it portrayed as little more than judicial “pro-class-action” policy making. Brief for Petitioners at 16, 18–19, 22, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133). It further argued that the FAA makes that choice resoundingly in favor of contractual autonomy and, moreover, that this conclusion was supported by the history of the FAA. *Id.* at 22.

<sup>392</sup> *Amex*, 133 S. Ct. at 2313 (Thomas, J., concurring).

to set aside even well-intentioned contractual directives when they end up interfering with what early twentieth-century procedural and arbitration reformers alike considered to be the first principle of good procedure—namely, to facilitate “a decision according to the justice and reason of the case.”<sup>393</sup> As in *Amex* and *Concepcion*, this may bring them in tension with the contract model, but that does not mean that they are in tension with the broader purposes and objectives of the FAA itself. As long as they remain consistent with those purposes, courts should continue to use them to strike down or modify problematic contract procedures. And even when this is doctrinally suspect or impossible (as where an essential element of the unconscionability defense is lacking), a procedural reform model would vest courts with the flexibility to intervene in sufficiently compelling circumstances. For example, when a particular arbitral procedure works injustice in particular circumstances for reasons unforeseen or underappreciated by one or both of the parties (but not necessarily in a way that is unconscionable), the FAA should empower courts to take this into consideration when deciding whether to enforce the procedural terms of an arbitration agreement.

By way of illustration, consider a hypothetical variation of *Amex* in which American Express is teetering on the verge of bankruptcy and the merchants proceed to arbitration individually.<sup>394</sup> It quickly becomes apparent that American Express does not have enough funds to fully compensate all merchant plaintiffs and, moreover, that the transaction costs of multiple individual arbitrations alone would deplete a large portion of those funds.<sup>395</sup> Would the injustice of this result be sufficient to override American Express’s interest in enforcing the class arbitration waiver, allowing a court to force consolidation of the individual arbitration proceedings? The contract model would not only answer this question in the negative, it would likely refuse to ask the question in the first place. A procedural reform model, however, would empower judges at least to consider this ques-

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<sup>393</sup> Cohen, *supra* note 260, at 47.

<sup>394</sup> This might be possible if they each retained the same plaintiff’s law firm, which in turn could spread the cost of an expert report across all of the individual plaintiffs. See David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1165–66 (2013) (proposing that by representing large numbers of plaintiffs individually, each asserting the same claim against the same defendant in arbitration, counsel can take advantage of economies of scale to achieve a comparable result to classwide relief).

<sup>395</sup> This resembles Owens Corning’s predicament in the 1990s, when it was faced with a tide of asbestos-related litigation. With bankruptcy a distinct possibility, Owens Corning established a private compensation fund to get around the impediments to Rule 23(1)(b) class certification. *E.g.*, Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. (forthcoming 2015).

tion.<sup>396</sup> Mutual assent is surely a factor to be weighed in the balance, in part because the procedural reform model assumes that freedom of choice is a reliable indicator of the procedure best suited to the dispute at hand.<sup>397</sup> But it is not—and should not—be dispositive. For even if the parties had waived class arbitration with their eyes wide open, as they did in *Amex*, there may be situations in which enforcing the waiver would have disastrous consequences.

Consider two further examples, this time outside the class arbitration context. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>398</sup> a construction dispute arose between two sophisticated parties who had entered into an arbitration agreement. The plaintiff filed an action in state court and joined a third-party indemnitor who was not a signatory to the arbitration clause.<sup>399</sup> The defendant subsequently filed a federal court action to enforce the arbitration agreement, which the plaintiff resisted on the ground that compelling arbitration would force it to resolve related disputes in separate forums—its claims against the defendant in arbitration and its claims against the indemnitor in state court.<sup>400</sup> On the contract model, the arbitration agreement must be enforced regardless of whether it would result in the type of delay, duplication, or expense that might prevent the plaintiff from prosecuting its claims at all. For

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<sup>396</sup> A similar question undergirded the disagreement between the majority and the dissent in *Amchem Products v. Windsor*, 521 U.S. 591 (1997). In *Amchem*, the majority took a formalistic approach when applying Rule 23(b)(3) to the facts at hand, the effect of which was to deny certification of a settlement class consisting of plaintiffs with disparate asbestos-related injuries. 521 U.S. at 622–25. By contrast, Justice Breyer’s concurring and dissenting opinion took a more equitable approach and emphasized the importance of respecting the trial court’s discretion in Rule 23 certification decisions. It noted, for instance, that unconscionable delays and transaction costs, together with the injustice whereby “[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease,” militated in favor of approving the settlement class. *Id.* at 633 (Breyer, J., concurring and dissenting) (quoting *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 335 (E.D. Pa. 1994)).

To return to the question in my hypothetical example, the *Amchem* majority’s opinion is analogous to the contract model’s approach: It insists on the letter of the rule regardless of whether the rule produces injustice *ex post*. See *id.* at 621–22 (stating that Rule 23 safeguards prevent courts from making “appraisals of the chancellor’s foot kind” and holding that certification determinations must hew closely to the criteria set forth in Rule 23). On the other hand, by urging greater deference to the trial court’s consideration of all the facts, Justice Breyer’s opinion comes closer to the procedural reform model’s approach, because it advocates giving judges greater discretion to consider and resolve the type of question I pose.

<sup>397</sup> See *supra* notes 247–51 and accompanying text (arguing that the FAA’s emphasis on enforceability is just as consistent with the idea that choice is an important means of improving procedure rather than an end in itself).

<sup>398</sup> 460 U.S. 1 (1983).

<sup>399</sup> *Id.* at 7.

<sup>400</sup> *Id.*

“[t]hat misfortune,” the Court explained, “occurs because the [FAA] requires piecemeal resolution when necessary to give effect to an arbitration agreement.”<sup>401</sup> By contrast, a procedural reform model would acknowledge that contract enforcement is not paramount; it would enable courts to consider whether, consistent with the procedural reform purposes behind the FAA, the arbitration agreement should be disregarded in the interest of avoiding a miscarriage of justice.

Similarly, in *Dean Witter Reynolds v. Byrd*,<sup>402</sup> an individual investor asserted claims under the Securities Exchange Act of 1934 and pendent state law claims against an investment brokerage. Because federal statutory claims were deemed nonarbitrable at the time, the defendant argued that the proceedings should be bifurcated—that is, the federal claims litigated in court and the state claims forced into arbitration—even if this ran the risk of duplicative proceedings or inconsistent results.<sup>403</sup> Relying on the contract model, the Court agreed. It reasoned that “passage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute.”<sup>404</sup> In doing so, it acknowledged that procedural concerns about eliminating unnecessary cost and delay had been expressed in the legislative history. But it deemed any promotion of those concerns to be a “fortuitous” byproduct of the statute’s commitment to freedom of contract rather than a cause or driver of the FAA itself.<sup>405</sup> By contrast, a procedural reform model would give the judge in cases like *Dean Witter* the discretion to disregard the arbitration agreement if enforcing the agreement to the letter would produce delay or inefficiency great enough to risk substantial injustice. Moreover, this discretion would not appear as an external factor that somehow invades or compromises the FAA’s original meaning and purpose. Instead, it would be acknowledged as a core element of the FAA’s commitment to procedural reform.

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<sup>401</sup> *Id.* at 20.

<sup>402</sup> 470 U.S. 213 (1985).

<sup>403</sup> *Id.* at 221.

<sup>404</sup> *Id.* at 220.

<sup>405</sup> *Id.*; see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (stating that the FAA “was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered,” rather than to promote efficient proceedings).

## CONCLUSION

In this Article, I have questioned the historical accuracy of the reigning “contract model” of the FAA, which posits the statute’s principal purpose as the relentless enforcement of private agreements to arbitrate.<sup>406</sup> I have proposed instead a new way to understand the FAA—namely, as an outgrowth of the procedural law reform movement that eventually led to the Federal Rules of Civil Procedure in 1938. The same basic procedural values that animate our public system of justice, in other words, likewise inspired the enactment of the FAA in 1925. Reclaiming this procedural reform legacy of the FAA is critical at a time when the Court, relying almost entirely on the contract model, has co-opted arbitration law toward increasingly libertarian and *laissez-faire* extremes. I argue that a “procedural reform” model of the FAA would help restore the balance by providing more satisfying answers to some of the most intractable controversies facing arbitration law today.

In her dissent in *Amex*, Justice Kagan has recently shown herself to be something of a proponent of the procedural reform model I seek to develop. Among other things, Justice Kagan saw the case as testing the limits of procedural adequacy and fairness. She worried, for instance, that rote enforcement of arbitration agreements would enable contract drafters to include terms dramatically shortening the statute of limitations, prohibiting arbitrators from awarding any meaningful relief, or preventing one party from adducing “the kind of proof that is necessary to establish the defendant’s liability—say, by prohibiting any economic testimony . . . .”<sup>407</sup> More to the point, she argued that the FAA has something to say about it. Like the early arbitration reformers, Kagan views the FAA not so much as a manifesto for freedom of contract but as providing a legitimate, alternative “‘method of resolving disputes’—a way of using tailored and streamlined procedures to facilitate redress of injuries.”<sup>408</sup> She continued: “What the FAA prefers to litigation is arbitration, not de facto immunity. The effective-vindication rule furthers the statute’s goals by

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<sup>406</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms . . . .”).

<sup>407</sup> *Amex*, 133 S. Ct. at 2314 (Kagan, J., dissenting). Justice Kagan also noted that, in addition to the class-arbitration waiver, the arbitration clause waived any other form of joinder and consolidation, imposed a strict confidentiality rule that prevented Italian Colors and other plaintiffs from pooling their resources to prepare a common expert report, and waived the Sherman Act’s cost-shifting provision in the event Italian Colors prevailed. *Id.* at 2316 (Kagan, J., dissenting).

<sup>408</sup> *Id.* at 2320 (Kagan, J., dissenting) (citing *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 481 (1989)).

ensuring that arbitration remains a real, not faux, method of dispute resolution.”<sup>409</sup>

These comments offer a glimmer of hope for the development of a procedural reform model of the FAA. To courts and commentators who share the hunch that Justice Kagan has unearthed a deeper truth about the statute, but for whom the precise reasons why may be less clear, I offer this Article as one explanation.

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<sup>409</sup> *Id.* at 2315 (Kagan, J., dissenting).