

*ITALIAN COLORS AND FREEDOM OF
CONTRACT UNDER THE FEDERAL
ARBITRATION ACT: HAS THE SUPREME
COURT ENABLED DISAPPEARING CLAIMS
AND THE EROSION OF SUBSTANTIVE LAW?*

*Steven W. Feldman**

2016 MICH. ST. L. REV. 109

ABSTRACT

In her article, Disappearing Claims and the Erosion of Substantive Law, published in the June 2015 issue of the Yale Law Journal, J. Maria Glover argues that the Court's recent arbitration decisions reflect a "fundamental shift" in the normative prerogatives that support "the Court's freedom-of-contract conception of arbitration." The Court, she asserts, has devised the view that "such freedom enabled private parties to change the mechanisms of adjudication, but not to change the scope of obligations under substantive law." Glover is especially critical that the Court's recent decisions have "[a]bandoned [the] descriptive and normative premise that freedom of contract was justified in the arbitration context because it would result in more cost-effective procedures for 'settling' disputes."

This Article responds that Glover's key premises and conclusions are unsupported. Instead, the Court has endorsed the major principles of freedom of contract in its arbitration jurisprudence. The better view is that (1) freedom of contract in arbitration cases properly construed is not limited to devising streamlined cost-effective procedures but is broadly construed to allow parties the leeway to select the terms governing the arbitration; (2) the need to enforce the parties' mutual assent exists independently from arbitral efficiency, and the enforcement of

* Attorney-Advisor, U.S. Army Engineering and Support Center, Huntsville, Alabama. I greatly appreciate the comments and suggestions by prominent arbitration scholars David Horton, Christopher Drahozal, and Jean Sternlight, who generously gave of their time in reviewing this paper. Kudos to the Michigan State Law Review editorial staff for its diligent efforts. I also express my love and thanks to my wife, Gayla Feldman. The opinions in the article are solely my own and do not represent the views of any federal agency.

mutual assent takes priority over arbitral efficiency when there is a conflict; (3) pure freedom of contract (which Glover says is the current state of the law) does not exist because many limits from law and public policy (largely unmentioned by Glover) maintain the integrity of the arbitral process; and (4) Italian Colors is a legitimate evolution, and not a revolution, in FAA practice and procedure.

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INTRODUCTION

In her article, *Disappearing Claims and the Erosion of Substantive Law*,¹ published in the June 2015 issue of the Yale Law Journal, J. Maria Glover criticizes the U.S. Supreme Court for enabling a private arbitration takeover of civil dispute resolution. Glover contends that the Court's emerging approach distorts freedom of contract.² In response, I will explore the relationship of freedom of contract and arbitration in Supreme Court and lower court decisions. My counter thesis will demonstrate that the courts, in compliance with the arbitration statutes, have faithfully implemented the various strands of freedom of contract.

Glover argues that the Court's latest arbitration opinions construing the Federal Arbitration Act (FAA),³ most notably its 2013

1. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015). Glover is an Associate Professor of Law at the Georgetown University Law Center and has published extensively on civil procedure, complex litigation, and the interplay between private litigation and public regulation.

2. *Id.* at 3068.

3. *See* 9 U.S.C. §§ 1-16 (2012). In 1925, Congress enacted the original version of the FAA in response to widespread judicial hostility toward arbitration. This resistance stemmed from American courts adopting the practice of English courts to protect their jurisdiction against perceived competitors. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995). As a result, the FAA incorporates a "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). The statutes apply to all arbitration agreements involving interstate commerce. *See Perry v. Thomas*, 482 U.S. 483, 489 (1987).

The Supreme Court's arbitration decisions have generated intense debate among academic commentators. The authors criticizing the decisions frequently argue that the current arbitration system is heavily biased against consumers and other claimants. One writer, for example, has stated, "Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to 'disarm' employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice." Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015). Other commentators take a more favorable view of the Supreme Court's arbitration decisions. One writer, for example, has said that "increased government regulation of arbitration may be unnecessary, or at least can be more limited than the regulation that critics often propose." Christopher R. Drahozal, "*Unfair*" *Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 699 (2001).

Another strongly contested issue is the arbitration win rates for consumers and other claimants. One authority notes that "win rates in consumer arbitrations vary depending on the type of case being resolved and numerous other factors" and that consumers in one recent study obtained some relief in 53.3% of the

decision in *American Express Co. v. Italian Colors Restaurant*,⁴ has reduced many potential legal claims by consumers and other parties to “mere nullities” to the point that arbitration “has eroded the substantive law itself.”⁵ Citing the prevailing use of strongly adhesive agreements, she blames powerful corporations who “can, in effect, wield quasi-lawmaking power by rendering substantive law inapplicable to a great deal of [their] primary conduct.”⁶ She compares this environment with earlier Supreme Court cases whereby the Court “was unwilling to empower private parties with the ability to recalibrate the substantive law itself.”⁷

Glover believes the Court, in enabling this “revolution”⁸ in FAA arbitration, has distorted the meaning of freedom of contract. She contends that the Court’s recent arbitration decisions reflect a “fundamental shift” in the normative prerogatives that have “long underlain [the Court’s] freedom-of-contract conception of arbitration, namely, that such freedom enabled private parties to change the mechanisms of adjudication, but not to change the scope

arbitrations being studied and, in those cases, were awarded 52.1% of the amount sought. *Hearing on Arbitration: Is It Fair When Forced? Before the S. Judiciary Comm.*, 112th Cong. 5, 13 (2011) (statement of Christopher R. Drahozal, John M. Rounds Professor of Law, University of Kansas School of Law); *see also infra* notes 216-20 (collecting articles supporting the benefits of arbitration). Another set of authors derive a different conclusion, positing that consumers prevail in a small percentage of cases, and that the consumer win rate is particularly low with high-level, super repeat-player merchants. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *GEO. L.J.* 57 (2015). Glover concedes that it is an “open empirical question” whether consumers obtain more favorable outcomes in litigation as opposed to arbitration. Glover, *supra* note 1, at 3077 n.112.

4. 133 S. Ct. 2304 (2013).

5. Glover, *supra* note 1, at 3057, 3059. Glover does not mention that other writers also have argued that arbitration has undermined the substantive law. *See* David Horton, *Arbitration as Delegation*, 86 *N.Y.U. L. REV.* 437, 437 (2011) (contending that the Supreme Court’s reading of the Federal Arbitration Act has transformed the statute into a “private delegation of legislative power”); 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”); Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 *YALE L.J.* 36, 66 (1944) (describing arbitration agreements as instruments of self-deregulation and “lawless[]” . . . private government”). While they discuss freedom of contract to varying degrees, these other authors do not explore the full connection between arbitration and freedom of contract.

6. Glover, *supra* note 1, at 3054.

7. *Id.* at 3064.

8. *Id.* at 3058-74.

of obligations under substantive law.”⁹ According to Glover, the Court’s recent decisions have “abandoned [the] descriptive and normative premise that freedom of contract was justified in the arbitration context because it would result in more cost-effective procedures for ‘settling’ disputes.”¹⁰

The asserted result is that these departures from precedent have reconstituted arbitration itself. “[T]he overarching purpose of the FAA,” Glover argues, should be the enforcement of agreements “so as to facilitate streamlined proceedings.”¹¹ Instead, she posits that the Court has established a “vision of arbitration as pure freedom of contract”¹² that improperly takes priority over arbitral efficiency.¹³ Glover strongly objects that parties may now contract for any form of private dispute resolution “no matter how ineffective in resolving the parties’ disputes those procedures may be and (virtually) no matter what burdens they may impose on one party or the other.”¹⁴ Thus, *Italian Colors* in a “fundamental shift” has “cemented” a “reductionist view” of freedom of contract that empowers corporate parties to reduce or even eliminate the parties’ ability to file claims against the other party.¹⁵

I respectfully disagree with Glover’s key premises and conclusions. My counter-thesis is (1) freedom of contract in arbitration cases properly construed is not limited to devising streamlined cost-effective procedures but is broadly interpreted to allow parties the leeway to select the terms governing the arbitration; (2) the need to enforce the parties’ mutual assent exists independently from arbitral efficiency and the enforcement of mutual assent takes priority over arbitral efficiency when there is a conflict; (3) “pure freedom of contract” does not exist (as claimed by Glover) because many limits from law and public policy (largely unmentioned by Glover) maintain the integrity of the arbitral process; and (4) *Italian Colors* is a legitimate evolution and not a revolution in FAA practice and procedure.

9. *Id.* at 3068.

10. *Id.* at 3072.

11. *Id.* at 3070 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

12. *Id.*

13. *Id.* at 3068 (contending that freedom of contract should not be “divorced” from its “claim-facilitative function”).

14. *Id.* at 3067-68 (stating the exception regarding highly inconvenient choice of forum).

15. *Id.* at 3067-68, 3076.

This debate is important because courts and other commentators say freedom of contract is a “fundamental” element of arbitration,¹⁶ and an in-depth study of case law is needed to determine the validity of this observation. While various writers have touched upon the relationship of arbitration and freedom of contract,¹⁷ and a number of articles discuss *Italian Colors*,¹⁸ no article or treatise comprehensively examines the strong connection between arbitration and the various strands of freedom of contract. Accordingly, this Article goes beyond the bounds of Glover’s thesis and fills that gap in the literature.

I will proceed as follows: Part I considers the facts and holding in *Italian Colors*. My analysis shows the Court relied on established rules of construction of the FAA in denying the claimant’s requested remedy that the Court should invalidate the claimants’ waiver of class arbitration. Part II analyzes general principles of freedom of contract in the common law tradition and their association with arbitration. Part II also sets the stage for subsequent parts in the Article that show the Supreme Court’s valid interpretation in FAA case law regarding the freedom of contract. Part III cites numerous Supreme Court decisions and the FAA’s legislative history, and it shows that the prerequisite for enforcing mutual assent exists independently from arbitral efficiency and governs over efficiency

16. See *infra* note 45 and accompanying text.

17. E.g., Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 772 (2012); Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 61 DISP. RESOL. J. 16, 23 (2007); Thomas S. Meriwether, Comment, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739, 743 (2007).

The secondary source that comes closest to a full treatment of freedom of contract under the FAA is THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 295-368 (5th ed. 2014). This chapter centers on the parties’ agreement on the terms of the bargain in the sense of arbitrability but does not explore the strong link between arbitration and the other diverse elements of freedom of contract as explained below. See *infra* Part III.

18. I acknowledge that the commentary on *Italian Colors* generally disagrees with the decision. E.g., Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015); Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1 (2015); Emily Canis, *One “Like” Away: Mandatory Arbitration for Consumers*, 26 GEO. MASON U. C.R.L.J. 127 (2015). These commentaries focus on the “effective vindication of rights” doctrine but do not address in a substantive way (and generally fail even to mention) the role of freedom of contract in the Court’s arbitration case law. For analysis of the effective vindication of rights doctrine, see *infra* notes 202-10 and accompanying text.

issues when they conflict. Part IV considers the scope of the parties' freedom of contract to customize the procedural rules for their arbitration. No requirement exists for parties to devise only those guidelines that facilitate cost-effective, streamlined proceedings. Part V assesses Glover's heavy reliance on the Supreme Court's 1985 decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁹ Glover contends that this case sets the proper boundary between freedom of contract and private law making power.²⁰ I will explain how Glover gives excessive weight to the dicta from a footnote in *Mitsubishi* on when and how public policy will overcome freedom of contract. I also will cover the important role that a claimant's statutory waiver plays as part of freedom of contract. Part VI shows that despite its breadth, freedom of contract has significant statutory and case law limitations that help ensure basic fairness in the administration of arbitration agreements. Finally, Part VII disputes the interpretation that *Italian Colors* reflects a subtle, but definitive, abandonment of the Court's earlier cases on arbitration agreements. My analysis will establish instead that *Italian Colors* represents a legitimate evolution and not a revolution in the Court's arbitration jurisprudence.

I. THE FACTS AND HOLDING IN *ITALIAN COLORS*

In *Italian Colors*, a small restaurant owner filed a class action lawsuit against American Express under the Sherman Act for antitrust violations.²¹ The plaintiffs alleged that American Express improperly used its monopoly power to force merchants to accept credit cards at rates approximately 30% higher than the fees from competing credit companies.²² This tying arrangement, the plaintiffs said, violated § 1 of the Sherman Act.²³ American Express moved to dismiss the class action suit and to compel the plaintiffs to submit to individual, bilateral arbitration under the standardized agreement. The contract had an express class-action waiver.

In opposition, plaintiffs alleged that the maximum worth of each plaintiff's claims would be \$38,500 but that the separate litigation costs for an individual claimant could top \$1 million.²⁴

19. 473 U.S. 614 (1985).

20. See Glover, *supra* note 1, at 3064.

21. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2308 (2013).

22. *Id.*

23. *Id.*

24. *Id.*

Accordingly, the plaintiffs argued that individual arbitration would be prohibitively expensive and that enforcing the class-action waiver would unfairly prevent them from effectively vindicating their rights under the antitrust laws.²⁵

The *Italian Colors* Court upheld the arbitration agreement to include the class-action waiver.²⁶ Writing for the majority, Justice Scalia stated the issue for review as: “We consider whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.”²⁷ Citing § 2 of the FAA,²⁸ and a number of Supreme Court precedents, the majority summarized the key principles governing the controversy,

[9 U.S.C. § 2] reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must “rigorously enforce” arbitration agreements according to their terms, including terms that “specify *with whom* [the parties] choose to arbitrate their disputes,” and “the rules under which that arbitration will be conducted.” That holds true for claims that allege a violation of a federal statute, unless the FAA’s mandate has been overridden by a contrary congressional command.²⁹

The *Italian Colors* majority comprehensively reviewed this standard and found no basis for the restaurant owners to avoid their contractual commitment to abide by the class arbitration waiver. First, the Court ruled that “[n]o contrary congressional command requires us to reject the waiver of class arbitration here.”³⁰ The Court specifically disapproved the proposition that the mere availability of class relief under Rule 23 of the Federal Rules of Civil Procedure meant that the plaintiffs below had the right to file their claim and to avoid the contract’s class arbitration waiver.³¹

The Court further considered the plaintiff’s argument that the Court should accept a judge-made exception to the FAA that allows

25. *Id.* at 2316.

26. *Id.* at 2312.

27. *Id.* at 2307.

28. “As relevant here, the Act provides: ‘A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’” *Id.* at 2309 (quoting 9 U.S.C. § 2 (2012)).

29. *Id.* (citations omitted).

30. *Id.*

31. *Id.* at 2309-10.

courts to invalidate agreements that prevent the “effective vindication” of a federal statutory right.³² The plaintiffs asserted that enforcing the waiver of class arbitration would effectively bar vindication of the antitrust laws because a party (like the claimants here) has no economic incentive to pursue very low-dollar, cost-ineffective antitrust claims individually in arbitration.³³

The Court rejected the claimants’ argument, reasoning that no contrary congressional command required the Court to reject the waiver of class arbitration. Although the restaurant owners asserted that individual enforcement of the antitrust laws regarding cost-ineffective claims was less beneficial to society than class enforcement, the Court rejected this public policy argument. The Court reasoned that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”³⁴ The Court observed that Congress has already enacted a sufficient economic incentive for a person or entity to pursue such a cause of action; for example, it allows potential treble damages.³⁵ Therefore, the Court was unwilling to add an implied policy by judicial fiat that an individual plaintiff with a very low dollar claim needs even better incentives than what Congress has allowed it to pursue by individual action.³⁶

Indeed, the *Italian Colors* Court went further and indicated that class arbitration as so strongly desired by the plaintiffs was *not* a systemic benefit but served as an *obstacle* to the effective administration of the FAA. Here, the Court said, “[t]he switch from bilateral to class arbitration . . . sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final

32. *Id.* at 2310.

33. *Id.*

34. *Id.* at 2309.

35. *Id.* (citing 15 U.S.C. § 15 (2012)).

36. *Id.* at 2309-10; *see also id.* at 2312 (“The FAA does not sanction such a judicially created superstructure.”). One pair of commentators has suggested a narrow reading of the *Italian Colors* decision. They suggest that the core of the Court’s reasoning is that because class actions in their modern form did not exist when Congress enacted the Sherman Act in 1890, Congress could not have viewed class actions as necessary measures for the vindication of rights under the Act. Therefore, even if there is such a doctrine for the effective vindication of rights, it was not applicable in *Italian Colors*. Peter B. Rutledge & Christopher R. Drahozal, “*Sticky*” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 1007-08 (2014).

judgment.”³⁷ The majority opinion also emphasized, “courts must rigorously enforce arbitration agreements according to their terms.”³⁸ Therefore, the Court held that the FAA’s goals outweigh any incremental gains flowing from mandating class-based arbitration to remedy the potential loss of low-dollar claims that might slip through the system. These FAA objectives are to enforce the parties’ intent as reflected in the agreement and to achieve speedy nonjudicial resolutions of disputes.³⁹

II. FREEDOM OF CONTRACT: THE COMMON LAW TRADITION

A proper understanding of the role of freedom of contract in arbitration cases requires an explanation of this traditional common law concept in the general law of contracts. “Freedom of contract” is a party’s “power to decide whether to contract and to establish the [contract] terms.”⁴⁰ Many courts have commented:

[I]f 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, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.⁴¹

Because this power is so important, freedom to contract, while not explicitly stated in the Constitution, is protected under the Fifth and Fourteenth Amendments.⁴²

37. *Italian Colors*, 133 S. Ct. at 2312 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

38. *Id.* at 2309.

39. *Id.* at 2311-12. The dissenting opinion mainly disagreed with the majority opinion’s treatment of the “effective vindication of rights” doctrine. *See id.* at 2313 (Kagan, J., dissenting).

40. Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 *UMKC L. REV.* 647, 654 (2009). Commentators have noted the long-standing vitality of freedom of contract in the American commercial system. *See* Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 *CARDOZO L. REV.* 1529 (2002) (reviewing *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley ed., 1999)).

41. *E.g.*, *Balt. & Ohio Sw. Ry. v. Voigt*, 176 U.S. 498, 505-06 (1900); *see also, e.g.*, *First Ala. Bank of Montgomery v. First State Ins.*, 899 F.2d 1045, 1085-86 (11th Cir. 1990); *Baugh v. Novak*, 340 S.W.3d 372, 382 (Tenn. 2011).

42. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); 16B *AM. JUR. 2D Constitutional Law* § 594 (1998).

The contours of freedom of contract are well-established. This doctrine protects the parties' "justifiable expectations" for the agreement,⁴³ subject to defenses to enforcement, such as fraud, duress, illegality, or mistake.⁴⁴ This concept is "fundamental to . . . society"⁴⁵ and is a "deep-seated right that is given deference by the courts."⁴⁶ Freedom of contract also has a strong moral component for courts to uphold the "sanctity of contract."⁴⁷ As a further corollary, courts recognize "the strong public policy favoring freedom of contract" that exists in arbitration contracts.⁴⁸ In fact, freedom of contract is "the primary legal concept"⁴⁹ and a "fundamental"⁵⁰ policy of arbitration.

43. *Westerfield v. Quizno's Franchise Co.*, 527 F. Supp. 2d 840, 853 (E.D. Wis. 2007) (quoting *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 163 (Wis. 2006)).

44. *Marcinczyk v. State Police Training Comm'n*, 5 A.3d 785, 788-89 (N.J. 2010).

45. *Jones v. U-Haul Co. of Mass. & Ohio*, 16 F. Supp. 3d 922, 942 (S.D. Ohio. 2014); *see also United States v. Alabama*, 691 F.3d 1269, 1293 (11th Cir. 2012) ("The ability to contract is not merely an act of legislative grace; it is a capability that, in practical application, is essential for an individual to live and conduct daily affairs."); *Chavez v. Sargent*, 339 P.2d 801, 835-37 (Cal. 1959) (McComb, J., concurring) ("The citizen's rights of liberty, property, and the pursuit of happiness . . . apply as fully to his right to contract, unlimited by unnecessary regulation, as they do to the individual's freedom from arrest or restraint of person.").

46. *Cincinnati City Sch. Dist. Bd. v. Conners*, 974 N.E.2d 78, 83 (Ohio 2012).

47. *See Morta v. Korea Ins.*, 840 F.2d 1452, 1460 (9th Cir. 1988) (drawing this connection); *see also Chambers Dev. Co. v. Passaic Cty. Utils. Auth.*, 62 F.3d 582, 589 (3d Cir. 1995) ("The sanctity of a contract is a fundamental concept of our entire legal structure.").

48. *L&R Realty v. Conn. Nat'l Bank*, 715 A.2d 748, 753 (Conn. 1998).

49. CARBONNEAU, *supra* note 17, at 49 ("Freedom of contract is the primary legal concept that governs the law, practice, and regulation of arbitration in the vast majority of national jurisdictions, including the United States."). Another commentary observes:

Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organisations. The legislative history of the [United Nations Commission on International Trade Law (UNCITRAL)] shows that the principle was adopted without opposition . . .

ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 265 (4th ed. 2004) (citing article 19(1) of the UNCITRAL); *see also* UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration* (1985), with Amendments as Adopted in 2006, <http://www.uncitral.org/uncitral/en/>

Freedom of contract balances *party autonomy* and *party accountability*. First, with the autonomy component, parties have the right to bind themselves legally; it is a judicial concept that contracts are based on mutual agreement and free choice.⁵¹ The general freedom of “private autonomy, ‘premised on the ability of individuals to order their own affairs, and the desirability of allowing them to do so,’ stands at the foundation of contract law.”⁵² In an important principle, parties may exercise their liberty to contract even if the agreement “may not seem desirable or pleasant to outside observers.”⁵³ Autonomy principles also influence arbitration. Courts have ruled “arbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration.”⁵⁴

Second, under the accountability component, parties must accept the consequences of their voluntary choices. The general rule of freedom of contract includes the need for a party to accept a possible bad bargain without court interference or paternalism.⁵⁵ To accomplish this goal, freedom of contract confines courts to their judicial function and dictates that they should not rewrite contracts to make them more equitable⁵⁶ or reallocate the rights and obligations

uncitral_texts/arbitration/1985Model_arbitration.html [https://perma.cc/D666-CANV] (last visited Mar. 26, 2016) (UNCITRAL model law on international arbitration).

50. *E.g.*, *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 604 (Cal. 2008) (noting that “freedom of contract . . . is fundamental to arbitration”); *Weston, supra* note 17, at 772 (“A fundamental principle underlying the FAA is to respect freedom of contract.”).

51. *Autonomy*, BLACK’S LAW DICTIONARY (9th ed. 2009).

52. *Baugh v. Novak*, 340 S.W.3d 372, 382-83 (Tenn. 2011) (citation omitted); *see also* *Kona Vill. Realty, Inc. v. Sunstone Realty Partners, XIV*, 236 P.3d 456, 458 (Haw. 2010) (citing the “recognized autonomy of parties to enter into an arbitration agreement” that stems from the “right of freedom to contract”).

53. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 100 (Tenn. 1999).

54. *Kona Vill. Realty, Inc.*, 236 P.3d at 457 (quoting *In re Arbitration Between United Pub. Workers, AFSCME, Local 646, & City & Cty. of Honolulu*, 194 P.3d 1163, 1172 (Haw. Ct. App. 2008)); *see also* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 79 (2000) (“The significance of furthering party autonomy lies at the heart of the FAA.”).

55. *Morta v. Korea Ins.*, 840 F.2d 1452, 1460 (9th Cir. 1988); *Westmoreland v. High Point Healthcare Inc.*, 721 S.E.2d 712, 722-23 (N.C. Ct. App. 2012); *see also* CHARLES FRIED, *CONTRACT AS PROMISE* 113 (1981) (“If we take autonomy seriously as a principle for ordering human affairs . . . people must abide by the consequences of their choices . . .”).

56. *See* *Marriott Corp. v. Dasta Constr. Co.*, 26 F.3d 1057, 1068 (11th Cir. 1994) (citing *Steiner v. Physicians Protective Tr. Fund*, 388 So. 2d 1064, 1066 (Fla.

the parties have accepted under their agreement.⁵⁷ This judicial self-restraint is so strong and the public interest in contract enforcement is so important⁵⁸ that “[t]he fairness or unfairness, folly or wisdom, or inequality of contracts are questions exclusively within the rights of the parties to adjust at the time the contract is made.”⁵⁹

Freedom of contract also has a *societal impact* as it promotes “[t]he necessary certainty, stability and integrity of contractual rights and obligations.”⁶⁰ On the one hand, the public interest demands that “individuals have broad powers to order their own affairs by making legally enforceable promises.”⁶¹ In this regard, an important premise of the American free-market system is that liberty of contract allows both buyers and sellers to gain from a productive commercial environment.⁶² To the same end, the law encourages parties to maximize their personal objectives; “striving for that advantage is the source of much economic progress.”⁶³ On the other hand, “the freedom to contract is not unlimited and . . . contracts that are contrary to public policy will not be enforced.”⁶⁴ Public policy can override freedom of contract when necessary to protect “even stronger” societal interests.⁶⁵

Dist. Ct. App. 1980)) (quoting *Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955)).

57. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 811-12 (Tex. 2012).

58. *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143-45 (8th Cir. 2007).

59. *Baldwin v. Bill & Carolyn, L.P.*, 593 F.3d 1155, 1162 (10th Cir. 2010) (quoting *Barnes v. Helfenbein*, 548 P.2d 1014, 1021 (Okla. 1976)).

60. *McCall v. Carlson*, 172 P.2d 171, 187-88 (Nev. 1946).

61. *Kona Vill. Realty, Inc. v. Sunstone Realty Partners, XIV*, 236 P.3d 456, 458 (Haw. 2010) (quoting *City Express, Inc. v. Express Partners*, 959 P.2d 836, 840 n.4 (Haw. 1998)).

62. *Fleming v. U.S. Postal Serv. AMF O’Hare*, 27 F.3d 259, 261 (7th Cir. 1994); see also Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 466 (2005) (“A long held assumption about market behavior is that optimal results on the whole obtain when each individual actor in the market chooses the best option for that individual.”).

63. *Indus. Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128, 132 (7th Cir. 1996).

64. *Lewis v. Giordano’s Enters., Inc.*, 921 N.E.2d 740, 753 (Ill. App. Ct. 2009); see also *Padilla v. State Farm Mut. Auto. Ins.*, 38 P.3d 187, 188 (N.M. Ct. App. 2001) (“[P]ublic policies underlying the uninsured motorist statute and the [New Mexico] Uniform Arbitration Act collectively outweigh the public policy favoring freedom of contract.”), *aff’d*, 68 P.3d 901 (N.M. 2003).

65. *Salamone v. Gorman*, 106 A.3d 354, 370 (Del. 2014); see also *DeVetter v. Principal Mut. Life Ins.*, 516 N.W.2d 792, 794 (Iowa 1994) (“For a court to strike down a contract on [public policy] grounds, it must conclude that the preservation of

The upshot is that courts view competent parties as independent, rational actors with the right to decide their best interests when entering contracts (including adhesive transactions).⁶⁶ Each party understands and expects that the opposite party is also seeking its maximum advantage.⁶⁷ For that reason, “hard bargaining is not only acceptable, but indeed, desirable, in our economic system, and should not be discouraged by the courts.”⁶⁸ The ordinary consumer has no special immunity from the consequences of his or her choices.⁶⁹ Accordingly, a fundamental principle of contract law is “[w]ise or not, a deal is a deal.”⁷⁰

Courts have applied this same freedom of contract principle to arbitration agreements.⁷¹ The public has an interest that individuals entering arbitration have “broad powers to order their own affairs by

the general public welfare imperatively . . . demands invalidation so as to outweigh the weighty societal interest in the freedom of contract.”)

66. See *Rory v. Cont’l Ins.*, 703 N.W.2d 23, 31, 36-43 (Mich. 2005) (stating that the freedom of contract coexists with adhesion contracts). A federal district court in Alabama has made the following cogent points about adhesion contracts:

The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced . . . That is because there are important advantages to its use despite its potential for abuse. These advantages include the fact that standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.

Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) (citing *Roberson v. The Money Tree of Ala., Inc.* 954 F. Supp. 1519, 1526 nn.9-10 (M.D. Ala. 1997)); see also *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1167 (10th Cir. 2014) (noting that the FAA gives no special immunity to consumer contracts and that the Supreme Court has specifically held that the FAA adequately protects consumers) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

67. *SecurAmerica Bus. Credit v. Schledwitz*, No. W2012-02605-COA-R3-CV, 2014 WL 1266121, at *18 (Tenn. Ct. App. Mar. 28, 2014).

68. 28 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 71:7 (4th ed. 2003); see also *Cabot Corp. v. AVX Corp.*, 863 N.E.2d 503, 512 (Mass. 2007) (“Absent any legally cognizable restraint,” both parties remain “free to drive whatever bargain the market [will] bear.”).

69. *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 888 (N.D. Ill. 2000) (“Courts have been reluctant to assume consumers are too ignorant and benighted to fend for themselves merely because they are poor.”).

70. *United Food & Commercial Workers Union v. Lucky Stores, Inc.*, 806 F.2d 1385, 1386 (9th Cir. 1986).

71. *Id.* (rejecting claimant’s attempt to avoid an unambiguous arbitration agreement).

making legally enforceable promises.”⁷² Courts and commentators have observed that “[t]he rule of contract freedom is a cornerstone of the U.S. domestic arbitration law.”⁷³ Courts also have expressly approved “hard bargaining” with respect to arbitration agreements.⁷⁴ Thus, courts accept that extensive judicial review of arbitration contracts would “weaken the value of bargained for, binding arbitration and could damage the freedom of contract.”⁷⁵

III. THE CORE POLICY OF ARBITRATION: ENHANCING EFFICIENCY OR ENFORCING MUTUAL ASSENT?

Along with affirming the policy for an efficient and cost-effective arbitral system, courts have said that “arbitration ‘is a matter of contract’” and that courts must “give effect to the parties’ intent.”⁷⁶ Glover says no contradiction or tension can exist between these concepts because assent is part and parcel of the prerequisite for facilitation of arbitral efficiency.⁷⁷ Relying on her interpretation

72. *Baugh v. Novak*, 340 S.W.3d 372, 382 (Tenn. 2011).

73. CARBONNEAU, *supra* note 17, at 75; *see also* *State v. Nakanelua*, 345 P.3d 155, 172 (Haw. 2015) (“[A]rbitration is a consensual process in which autonomy of the parties who enter into arbitration agreements should be given primary consideration.”); *Kona Vill. Realty, Inc. v. Sunstone Realty Partners*, XIV, 236 P.3d 456, 457-58 (Haw. 2010) (The public has an interest that individuals entering arbitration have “broad powers to order their own affairs by making legally enforceable promises”); 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, 535 (1994) (“In light of [the FAA’s legislative] history, the FAA’s core is freedom of contract with respect to arbitration agreements . . .”).

74. *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 366-67 (7th Cir.), *cert denied*, 528 U.S. 811 (1999) (upholding an arbitration agreement even though it was a “take-it-or-leave-it” deal and consent to [the] agreement [was] secured because of hard bargaining”).

75. *Kitsap Cty. Deputy Sheriff’s Guild v. Kitsap Cty.*, 219 P.3d 675, 678 (Wash. 2009) (“[W]hen parties voluntarily submit to binding arbitration, they generally believe that they are trading their right to appeal an arbitration award for a relatively speedy and inexpensive resolution to their dispute.”) (quoting *Clark Cty. Pub. Util. Dist. No. 1 v. Int’l Bhd. of Elec. Workers*, 76 P.3d 248, 253 (Wash. 2003)); *see also* 9 U.S.C. § 10(a) (2012) (stating grounds for vacatur of awards in FAA arbitration).

76. Glover, *supra* note 1, at 3063 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989)).

77. Glover argues:

However, in these same cases, the Court emphasized not only the simplicity, expeditiousness, and cost-effectiveness of arbitration, but also the point that parties are “generally free to structure their arbitration

of the Court's *Mitsubishi* decision, her argument is that freedom of contract in arbitration properly understood merely seeks to foster "claim-facilitative procedures, both as a descriptive matter and a normative one."⁷⁸

My counter thesis is that facilitating efficient claim-dispute resolution is not the dominant FAA policy.⁷⁹ Instead, under consistent Supreme Court doctrine, the prerequisite for enforcing mutual assent exists independently from arbitral efficiency and governs over efficiency issues when there is a conflict—which is certainly possible. "The [Supreme Court] has repeatedly ruled that the terms of the parties' agreement are controlling over considerations of expediency in the dispute resolution process."⁸⁰

agreements as they see fit." As the Court put it repeatedly, arbitration "is a matter of contract," and courts must therefore give effect to the parties' intent. *Critical, though, is that in the view of these cases, there was no contradiction or tension whatsoever between both efficient and resolution-facilitative procedures, on the one hand, and freedom of contract, on the other. Rather, the Court embraced freedom of contract as fostering claim-facilitative procedures, both as a descriptive matter and as a normative one.* Descriptively, the Court believed that "it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." In other words, the Court believed that parties would contract for procedures that streamlined their disputes and resulted in more expeditious proceedings.

Id. (emphasis added) (quoting *Volt*, 489 U.S. at 479, 485).

78. *Id.* at 3063-64, 3077; see also *id.* at 3064 ("[T]he freedom of contract that parties' possessed vis-à-vis arbitration . . . extend[s] only so far as was necessary to facilitate the resolution of federal claims . . .") (discussing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

79. Glover's main support for this conclusion is an excerpt from *Concepcion*, where she quotes the Court as saying, "[T]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 3070 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)) (emphasis omitted). Glover takes this quote out of context, because the very next passage from the *Concepcion* opinion deals with the danger that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 343. Further, Glover omits the key passage from *Concepcion*, found elsewhere in the opinion, which states without qualification regarding efficiencies: "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *Id.* (quoting *Volt*, 489 U.S. at 478).

80. *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 598 (Cal. 2008) (analyzing Supreme Court decisions).

The “first principle” underlying all the Supreme Court’s decisions is that “[a]rbitration is strictly ‘a matter of consent.’”⁸¹ The Supreme Court has acknowledged this controlling feature of the FAA since at least 1932.⁸²

The leading decision is *Dean Witter Reynolds, Inc. v. Byrd*.⁸³ In *Dean Witter*, the Court unanimously “reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.”⁸⁴ Thus, the *Dean Witter* Court held that the FAA “requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.”⁸⁵ The Court stated:

We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters. *The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern*

81. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (quoting *Volt*, 489 U.S. at 479); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010) (“[A]rbitration ‘is a matter of consent, not coercion.’” (quoting *Volt*, 489 U.S. at 479)).

82. *See Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 274 n.2 (1932) (“*The purpose of this bill is to make valid and enforceable agreements for arbitration . . .*” (emphasis added) (quoting H.R. REP. NO. 68-96, at 1 (1924))). Commentators sometimes present survey or other empirical evidence that consumers have a “profound lack” of subjective understanding about the “existence and effect of arbitration agreements.” *E.g.*, Jeff Sovern et al., “*Whimsy Little Contracts*” with *Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 2 (2015). Glover relies on the same phenomenon. *See Glover, supra* note 1, at 3084 n.130 (citing studies concluding that “consumer understanding of arbitration is minimal”). As a legal argument, these findings have no traction. The fundamental rule in the law of contracts is that a party’s subjective understanding of unambiguous contract terms is “immaterial.” *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 65 (Ill. 1987). Under the objective test of contract assent and interpretation, the inquiry is whether parties have agreed to the words in the contract (absent a defense such as fraud or mistake). *Luden’s Inc. v. Local Union No. 6 of Bakery, Confectionery & Tobacco Workers’ Int’l Union of Am.*, 28 F.3d 347, 363 n.29 (3d Cir. 1994). Courts apply these rules to arbitration clauses and agreements. *See, e.g., Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 345 (S.D. Tex. 2008); *Mkt. Ins. v. Integrity Ins.*, 233 Cal. Rptr. 751, 752 (Cal. Ct. App. 1987).

83. 470 U.S. 213 (1985).

84. *Id.* at 219.

85. *Id.* at 217.

requires that we rigorously enforce agreements to arbitrate, even if the result is “piecemeal” litigation, at least absent a countervailing policy manifested in another federal statute.⁸⁶

Notably, *Italian Colors* cited *Dean Witter* with approval.⁸⁷ Therefore, a solid link exists between earlier and later Supreme Court decisions on the primacy of enforcing the parties’ manifested assent.⁸⁸

As shown above, from a descriptive perspective, the Supreme Court has differentiated mutual assent and efficiency in arbitration cases. Where these two goals conflict—which the *Dean Witter* Court (unlike *Glover*) stated is possible—the Court’s priority is to enforce

86. *Id.* at 221 (emphasis added); see also *id.* at 220 (“[P]assage of the Act 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, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.” (emphasis added)); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (“[T]he basic objective in [arbitration] is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, . . . but to ensure that commercial arbitration agreements, like other contracts, ‘are enforced according to their terms,’ . . . and according to the intentions of the parties.” (citations omitted)); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *WILLISTON & LORD*, *supra* note 68, § 15:11 (“This freedom of contract ideal, resulting in substantial party autonomy concerning arbitration, was reiterated forcefully in [*First Options of Chicago*].”).

87. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

88. In a few cases, the Supreme Court itself has fallen prey to the old view, expressing hostility to the parties’ free choice to use arbitration to settle their differences. In the most notable instance, *Wilko v. Swan*, 346 U.S. 427 (1953), the Court applied an excessively broad public policy doctrine and held that claims under the securities statutes were not arbitrable despite the parties’ pre-dispute arbitration agreement. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the Court overruled *Wilko* because “[the] federal arbitration statute ‘requires that we rigorously enforce agreements to arbitrate.’” 490 U.S. 477, 481, 484 (1989) (citations omitted). The Court also said that “[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Id.* (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). In another instance where the Court disapproved of earlier precedent, the Court has backed away from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974), which ruled “there can be no prospective waiver of an employee’s rights under Title VII.” See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-67 (2009) (noting that the *Alexander* line of decisions adopted “misconceived” language disapproving arbitration that the Court has since “abandoned”).

The Supreme Court’s acknowledgement of its error in *Wilko* and a few like cases has reinvigorated the policy to enforce the intent of the parties regarding arbitrability. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (relying on *Rodriguez de Quijas* to conclude that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context”).

mutual assent. This last finding should come as no surprise because the “fundamental goal” of contract law writ large is the determination of the parties’ mutual assent.⁸⁹ Surprisingly, Glover does not cite *Dean Witter* or the principle that mutual assent trumps arbitral efficiency with a conflict.

From a normative perspective, the Supreme Court’s emphasis on the enforcement of party assent properly facilitates freedom of contract. The Court recognized that the FAA gives parties the leeway to select which issues they want to arbitrate. If the arbitral contract does not indicate that the parties have agreed to arbitrate a particular issue, a court has no authority to order otherwise.⁹⁰ Accordingly, freedom of contract advances the FAA’s core objectives. The reason is that Congress sought simply to “place such agreements ‘upon the same footing as other contracts,’”⁹¹ and freedom of contract is a fundamental component of general contract doctrine in the American legal system.⁹²

89. See *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[A]s with any other contract, the parties’ intentions control”) (arbitration case); *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002) (“The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern.”).

90. See *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999); see also *Trimble v. Ameritech Publ’g, Inc.*, 700 N.E.2d 1128, 1129 (Ind. 1998) (stating if the courts imposed arbitration upon the parties without first ascertaining whether they agreed to this process such an approach could frustrate their intent and freedom of contract).

91. *Volt*, 489 U.S. at 474 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). 9 U.S.C. § 2 (2012) provides: “A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

92. *Royal Indem. Co. v. Baker Protective Servs., Inc.*, 515 N.E.2d 5, 7 (Ohio Ct. App. 1986) (“[F]reedom of contract” is “fundamental to our society.” (quoting *Blount v. Smith*, 231 N.E.2d 301, 305 (Ohio 1967))). While almost all states follow the established principles of freedom of contract, which makes the doctrine generally uniform under the FAA, variations do exist in a few states. The most prominent example is California, which has restricted freedom of contract in arbitration more so than other jurisdictions (only to be reversed by the Supreme Court for misapplying the test for federal preemption of contrary state law). See Lyra Haas, Note, *The Endless Battleground: California’s Continued Opposition to the Supreme Court’s Federal Arbitration Act Jurisprudence*, 94 B.U. L. REV. 1419, 1420-21 (2014) (analyzing decisions).

IV. FREEDOM OF CONTRACT IN ARBITRATION: THE PARTIES' GENERAL RIGHT TO CUSTOMIZE THE RULES OF PROCEDURE

Glover claims that in earlier Court decisions, “arbitration served merely as an alternative mechanism for dispute proceedings and claim resolution, and thus . . . the freedom to craft arbitration contracts was simply a freedom to streamline adjudicative mechanisms.”⁹³ The slippery concept of “streamlined proceedings” that she advocates so strongly raises intractable problems in gauging what Glover means regarding activities constituting “procedural adaptability” and “efficient dispute resolution mechanisms.”⁹⁴ These circumstances often exist only in the eye of the beholder, and no bright line separates efficient and inefficient arbitral proceedings. Significantly, no cases support the view that freedom of contract in arbitration is restricted to achieving efficient procedures.

The cases have explained the breadth as well as the limitations of freedom of contract in arbitration cases. Consistent with traditional notions of freedom of contract, a federal district court has commented, “[p]arties to an arbitration agreement are free to customize and structure the arbitration process, including the covered subject matter, procedural elements, and rules, *as they see fit*.”⁹⁵ In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr. University*, the Supreme Court remarked, “Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which that arbitration will be conducted.”⁹⁶ The above-referenced language shows the depth of the importance the Supreme Court and the lower courts place on the parties’ own notions of what they view as the procedures enhancing the quality of their arbitral process.

93. Glover, *supra* note 1, at 3062, 3064.

94. *Id.* at 3062-64, 3068.

95. *Westervelt v. Bayou Mgmt., L.L.C.*, No. Civ.A. 03-0860, 2003 WL 22533672, at *4 (E.D. La. Nov. 4, 2003) (emphasis added) (citing *Volt*, 489 U.S. at 477); *see also* *Roberts v. Cent. Refrigerated Serv.*, 27 F. Supp. 3d 1256, 1259 (D. Utah 2014) (“The parties are free to structure their agreement in any manner they desire. We respect the parties’ freedom to contract by enforcing arbitration agreements according to their terms and ensuring that arbitration proceedings are conducted in the manner to which the parties have agreed.”); *Universal Mgmt. Concepts, Inc. v. Noferi*, 605 S.E.2d 899, 901 (Ga. Ct. App. 2004) (“[P]arties are free to contract about *any* subject matter, on *any* terms, unless prohibited by statute or public policy” (emphasis added)) (arbitration case).

96. 489 U.S. at 479.

As in other areas of contract doctrine, traditional autonomy aspects of freedom of contract are an important element of arbitration proceedings. The judicial position is that “parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.”⁹⁷ Absent a violation of law or public policy, or a contrary contract term, the proceedings can be as efficient or inefficient as the parties intend. Again, consistent with traditional notions of freedom of contract, the FAA does not forbid parties from agreeing to rules that, in hindsight, result in an unequal or even foolhardy bargain for one party or the other; such is the accountability element of freedom of contract.⁹⁸ Thus, as the Supreme Court has pointed out, “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.”⁹⁹

V. *MITSUBISHI*, FREEDOM OF CONTRACT, AND THE ASSERTED
EROSION OF SUBSTANTIVE LAW

Glover’s interpretation is that the Supreme Court’s latest arbitration decisions grant law-making power to corporate parties “with the consequent erosion of both the private compensatory goals and public deterrent objectives of that law.”¹⁰⁰ She compares this legal environment with earlier cases whereby she asserts the Court “was unwilling to empower private parties with the ability to recalibrate the substantive law itself.”¹⁰¹

For her latter observation about the Court’s earlier cases, Glover relies almost exclusively on her interpretation of the Supreme Court’s 1985 decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁰² as establishing the proper boundary between freedom of contract and private law-making power. Because Glover makes *Mitsubishi* the centerpiece of her argument concerning the

97. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994)

98. *See supra* notes 55-59 and accompanying text.

99. *Volt*, 489 U.S. at 469. The statement that contracts should be enforced according to their terms is a corollary of the doctrine of freedom of contract. *See Rory v. Cont’l Ins.*, 703 N.W.2d 23, 30 (Mich. 2005) (“Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract.”).

100. Glover, *supra* note 1, at 3054.

101. *Id.* at 3064.

102. 473 U.S. 614 (1985).

prior (and what she contends was a superior) state of the law, my counter thesis will devote similar attention to the *Mitsubishi* case for its facts, its holding, and its current ramifications for the arbitral system.

Glover seizes upon a single sentence from footnote 19 in *Mitsubishi*. She frames the sentence as stating, “[I]f parties used arbitration contracts to effectuate ‘prospective waiver[s]’ of statutory rights, the Court ‘would have little hesitation in condemning the agreement as against public policy.’”¹⁰³ From this language she argues the law was (and should be) that “[a]n arbitration contract that eliminated the enforcement of substantive law [will] not stand.”¹⁰⁴ More to the point, she contends that under *Mitsubishi*, “if freedom of contract and the enforcement of substantive rights through arbitration came into tension, then freedom of contract would yield.”¹⁰⁵

Upon closer inspection, her interpretation of the *Mitsubishi* case and its implications is flawed. As will be seen below, the problems are (1) she takes footnote 19 out of context; (2) she misquotes the Court’s “prospective waiver” language; (3) the Court’s sentence was dicta; (4) her comparison of the FAA to other laws is inaccurate; (5) she omits that freedom of contract supports a party’s power to waive personal statutory protections; and (6) freedom of contract and the need for contract enforcement is paramount under the FAA, except as required by federal law.

A. The Facts in *Mitsubishi*

Although Glover does not discuss the setting in *Mitsubishi*, a discussion of the facts is crucial for a proper understanding of footnote 19 to this decision. In *Mitsubishi*, the Court considered a federal district court’s obligation under the FAA to order the enforcement of an arbitration agreement in Japan in proceedings conducted before the Japanese arbitration association.¹⁰⁶ The agreement was between a Puerto Rican auto dealer and a Japanese car company. The auto dealer sought enforcement of a Sherman Act¹⁰⁷ antitrust claim, and the dealer was concerned that the Japanese tribunal would misapply the U.S. law.

103. Glover, *supra* note 1, at 3059 n.24 (quoting *Mitsubishi*, 473 U.S. at 637 n.19).

104. *Id.* at 3059 (citing *Mitsubishi* as the sole authority for this statement).

105. *Id.* at 3058-59.

106. *Mitsubishi*, 473 U.S. at 617.

107. 15 U.S.C. § 1 (2012).

Mitsubishi emphasized that preserving “international comity” and facilitating the “predictability” of international commerce are important reasons for enforcing U.S. arbitration agreements in foreign countries.¹⁰⁸ The Court stated near the beginning of the opinion, “[w]e granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction.”¹⁰⁹ The Court did not address the fact situation at issue in most domestic arbitration decisions, i.e., the enforcement of private, domestic arbitration agreements between a corporation and a consumer that allegedly reduce or eliminate the corporation’s substantive statutory obligations to the claimant. Glover never cites the unique aspects of the Court’s rationale pertaining to international transactions.

As just indicated, international and domestic transactions raise differing policy concerns. The Supreme Court has long recognized that international commercial actions are “sui juris.”¹¹⁰ Based on concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, courts must take a stricter view of the prospective waiver of a firm’s statutory rights.¹¹¹ Therefore, *Mitsubishi* footnote 19 properly construed does not address the enforceability of arbitration agreements between merchants and consumers in the United States.

Another point that courts and commentators (such as Glover) sometimes overlook is that in *Mitsubishi* footnote 19, antitrust law under the Sherman Act was the sole statutory regime under review. Citing this “crucial restriction,” and the Supreme Court’s general emphasis on antitrust law as expressing national policy, the Fifth Circuit and other courts have stated that “this single sentence from *Mitsubishi* [in footnote 19] cannot be given the sweeping implications” that some courts and litigants have assigned to the case.¹¹² Thus, *Mitsubishi* has little to say about cases other than those

108. *Mitsubishi*, 473 U.S. at 629.

109. *Id.* at 624.

110. *Lipcon v. Underwriters at Lloyd’s London*, 148 F.3d 1285, 1294 (11th Cir. 1998) (applying *Mitsubishi*).

111. *Id.* at 1293-94.

112. *Haynsworth v. Corp.*, 121 F.3d 956, 968-69 (5th Cir. 1997); *see also* *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1230-31 (6th Cir. 1995); *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156, 159-61 (7th Cir. 1993); *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1364 n.3 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969

pertaining to arbitration and the extra-territorial enforcement of U.S. antitrust law.

Unlike Glover, many courts have cited the facts in *Mitsubishi* as part of the proper interpretation of footnote 19.¹¹³ This point illustrates an important component of the judicial method because the legal pronouncements in any court opinion flow from the facts in litigation. Unless a court specifically rules that it is adopting a broad principle of law that applies beyond the particular facts, an opinion's precedential effect is limited thereby.¹¹⁴ In footnote 19, *Mitsubishi* made no such all-encompassing observations.¹¹⁵ Accordingly, *Mitsubishi* cannot support a broad assertion that in arbitration the enforcement of statutory rights will always override the freedom of contract.

B. The Complete Version of Footnote 19

Glover's version of the sentence from footnote 19 is that if the parties use arbitration to effectuate "prospective waiver[s]" of statutory rights, the Court "would have little hesitation in condemning the agreement as against public policy."¹¹⁶ She also infers from the last-mentioned language that while the Court has no difficulty with the decline of litigation as a means for resolving disputes, the Court has great qualms about allowing corporations executing arbitration agreements with consumers to "recalibrate" the substantive law through the extensive waivers of statutory rights.¹¹⁷

Unfortunately, Glover quotes *Mitsubishi* inaccurately. She gives the reader only part of the sentence in footnote 19 upon which she so heavily relies for her broad claims. The full quote from the Court's opinion, with omitted portions italicized, is that "*in the event the choice-of-forum and choice-of-law clauses operated in tandem as*

F.2d 953, 956-57 (10th Cir. 1992). In citing *Mitsubishi*, the Supreme Court has applied it in circumstances other than international arbitration cases. See 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265-67, 270 (2009) (citing *Mitsubishi* in a non-international contract arbitration case).

113. See *supra* note 112 and accompanying text.

114. See *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 520 (2012) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

115. *Mitsubishi*, 473 U.S. at 637 n.19.

116. Glover, *supra* note 1, at 3059 n.24, 3068.

117. *Id.* at 3064.

a prospective waiver of a party's right to pursue statutory remedies for *antitrust violations*, we would have little hesitation in condemning the agreement as against public policy."¹¹⁸ In relying on footnote 19, Glover omits from her quote the narrowing language regarding antitrust violations and the joint effect of the "choice of forum" and "choice of law" clauses as the basis for the prospective waiver. Again, by giving the reader a truncated version of the Court's language, Glover's sweeping claims about the relation of arbitration and freedom of contract cannot withstand scrutiny.

C. Footnote 19 as Dicta

As later Supreme Court and lower federal court decisions have observed, the *Mitsubishi* Court's excerpt from footnote 19 is dicta.¹¹⁹ Indeed, courts and commentators have remarked that footnote 19 raises a mere hypothetical issue.¹²⁰ Some commentators even criticize the doctrine as contradicting the need and reason for the arbitral system in international commerce.¹²¹ Also, no Supreme Court

118. *Mitsubishi*, 473 U.S. at 637 n.19 (emphasis added).

119. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 n.2 (2013); *Haynsworth v. Corp.*, 121 F.3d 956, 968 (5th Cir. 1997); see also *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295 (9th Cir. 1998) ("[W]e do not believe dictum in a footnote regarding antitrust law outweighs the extended discussion and holding in [Supreme Court decisions] on the validity of clauses specifying the forum and applicable law"); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 159 (7th Cir. 1993) ("[T]he [*Mitsubishi*] Court stated in dicta that forum selection and choice of law provisions which operate as prospective waivers of statutory antitrust claims would not be enforced as against public policy."); Joseph R. Brubaker & Michael P. Daly, *Twenty-Five Years of the "Prospective Waiver" Doctrine in International Dispute Resolution: Mitsubishi's Footnote Nineteen Comes to Life in the Eleventh Circuit*, 64 U. MIAMI L. REV. 1233, 1245 (2010) (citing decisions in the Eleventh and Seventh Circuits discussing footnote 19).

120. See *In re Am. Express Merchs.' Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) ("The Court was there concerned with a hypothetical arbitral panel that might, relying on provisions concerning choice of forum or choice of law, refuse to apply American law to a federal statutory claim.").

121. See Thomas E. Carbonneau, *The Exuberant Pathway to Quixotic Internationalism: Assessing the Folly of Mitsubishi*, 19 VAND. J. TRANSNAT'L L. 265, 286 (1986) (advocating that the prospective waiver doctrine is inconsistent with the "policy favoring the recourse to arbitration, the principles of party autonomy and self-determination in contracts (especially international ones), and the need to avoid parochial determinations and to recognize the special requirements of transnational commerce").

decisions have given any claimant substantive relief based on the “prospective waiver doctrine.”¹²²

Even conceding for the moment that *Mitsubishi* has a broad sweep, later Supreme Court decisions have narrowed the “prospective waiver” doctrine. In *Shearson/American Express, Inc. v. McMahon*, the Supreme Court refined *Mitsubishi* and indicated that the case stood for the more general proposition that submission alone of a dispute to an arbitration panel does not compromise a claimant’s statutory rights.¹²³ Further, the Court in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* said that a prospective waiver violates U.S. public policy only when there is “no subsequent opportunity for review” in federal court.¹²⁴ This considerable narrowing of *Mitsubishi* blunts whatever support *Mitsubishi* has for Glover’s broad interpretation that if the parties use arbitration to effectuate “prospective waiver[s]” of statutory rights, the Court “would have little hesitation” in condemning the agreement as against public policy.

Another nuance in the Court’s arbitration cases is that different issues can occur in the arbitration-enforcement and the award-enforcement phases of litigation. As the Court stated in *Mitsubishi*, “at this stage in the proceedings,” i.e., the arbitration enforcement phase, a court has “no occasion to speculate” on whether the arbitration agreement’s potential deprivation of a claimant’s right to

122. Since 1985, the Supreme Court has cited the *Mitsubishi* “prospective waiver” doctrine only twice. In the first decision, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995), the Court merely acknowledged that “Were there no subsequent opportunity for review and were we persuaded that ‘the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.’” In the second case, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009), the Court said in citing *Mitsubishi* that “the party should be held to [the waiver] unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” The Court also said that the prospective waiver was not properly before the Court, *id.* at 273-74, which meant that the Court’s reference to the doctrine was again dicta. See *Orman v. Citigroup, Inc.*, No. 11 Civ. 7086(DAB), 2012 WL 4039850, at *3 (S.D.N.Y. Sept. 12, 2012) (drawing this conclusion about *14 Penn Plaza*).

123. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987), construed in *CARBONNEAU*, *supra* note 17, at 428.

124. *Vimar*, 515 U.S. at 540; see also *Aggaro v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 371 (4th Cir. 2012). See generally *Brubaker & Daly*, *supra* note 119, at 1245 (discussing the prospective-waiver doctrine).

pursue federal remedies may render that agreement unenforceable.¹²⁵ As just indicated, this type of speculation is disapproved because courts should not intervene in the proceedings at the arbitration-enforcement stage because that disruptive action would usurp the arbitrator's authority and discretion to apply the law and decide the proper remedies.¹²⁶ Thus, the Court said the issue was premature because the proper stage to raise this public-policy doctrine is not at the arbitration-enforcement stage but the award-enforcement stage (a point missed by Glover).¹²⁷ My counter-thesis corrects any misimpression that a party can raise the defense at the inception of the arbitration, whereas the true principle is that the defense is irrelevant until a party challenges an award.

The minor importance of this sentence from footnote 19 is particularly evident in arbitration cases involving another statutory program, the enforcement of securities regulation. Similar to the antitrust laws, these statutes adopt a broad national policy to protect the integrity of commercial markets.¹²⁸ Relying on numerous decisions, one commentator notes:

In fact, in a series of cases stemming from alleged securities fraud committed by Lloyd's of London, the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have all upheld the enforceability of both forum selection and choice of law clauses, even though doing so waived parties' rights under state and federal securities laws.¹²⁹

This example from the securities statutes shows that when the complainant has made a valid waiver of statutory rights in arbitration, no all-encompassing rule exists that freedom of contract always gives way to substantive law.¹³⁰

125. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 367 n.19 (1985).

126. *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1268, 1279, 1284 (11th Cir. 2011).

127. *See Aggaro*, 675 F.3d at 373 (explaining the distinction between the two stages).

128. *See Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1364 (2d Cir. 1993) (explaining the policies).

129. Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1289 (2011).

130. *See infra* notes 135-39 and accompanying text (expanding on the role of statutory waiver).

D. The FAA's Relation to Other Laws

One of Glover's key concerns is the relationship between the FAA and other federal statutes. Again, *Mitsubishi* is a good place to start for the analysis on this topic. Thus, the *Mitsubishi* Court reiterated the statement in *Dean Witter* that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered."¹³¹ As stated in *Mitsubishi*, freedom of contract in the sense of requiring "rigorous enforcement of arbitration agreements"¹³² will be paramount unless Congress has specifically provided otherwise:

Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . Having made the bargain to arbitrate, the party should be held to it *unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.*¹³³

The preceding passage demonstrates that to an extent, federal substantive statutory rights can trump the freedom of contract, but only in limited instances. Thus, Glover enters questionable territory by arguing that arbitration agreements may not infringe any statute that impacts the "procedural" aspects of the claim, such as a statute of limitations.¹³⁴

131. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 625 (1985) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

132. *Id.* at 625-26 (stating "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate'" (quoting *Dean Witter*, 470 U.S. at 221)).

133. *Id.* at 627-28 (emphasis added). This liberal doctrine governs even when the claims at issue are federal statutory claims, unless the FAA's mandate has been "overridden by a contrary congressional command." *Shearson/Am. Express v. McMahan*, 482 U.S. 220, 226 (1987). The Court will consider whether the legislative purpose is to override the FAA where "discoverable in the text of the [substantive statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). No instances exist where the Court, in subsequent decisions, found such an exclusionary intent. See Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 81 (2014) (drawing this conclusion).

134. See Glover, *supra* note 1, at 3065-66.

Glover's last-mentioned argument gives short shrift to the well-settled doctrine that parties, in assessing their own best interests, may generally relinquish personal procedural statutory rights, i.e., those rights designed primarily to accrue to that individual, versus society as a whole.¹³⁵ As the Seventh Circuit has observed in construing the FAA, "[o]ne aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly."¹³⁶ No legal issue exists simply because a party in arbitration waives personal procedural statutory rights.¹³⁷ The "general rule [is that] 'a party may waive any provision, either of a contract or of a statute, intended for his benefit.'"¹³⁸ Of course, this doctrine assumes that the other requisites of waiver are present, such as the waiver has occurred "knowingly."¹³⁹

One particularly important waiver issue with respect to freedom of contract is a party's power to accept a contract term waiving the party's election to pursue class arbitration. Does a viable argument exist that the Court has infringed the freedom of contract and eroded public law by enforcing arbitral class-action waivers?¹⁴⁰ Such a position is unsupported—no stand-alone substantive right or entitlement exists to a class action remedy. As the courts have held, absent a statute or a contract term, there is no right to bring a class action. In almost all instances, the right to bring a class action is only a procedural means for bringing a lawsuit under the purview of the Federal Rules of Civil Procedure.¹⁴¹

135. See also *Johannesen v. Eddins*, 963 N.E.2d 1061, 1067 (Ill. App. Ct. 2011) ("[P]arties may contract away rights, even those of constitutional or statutory dimension.").

136. *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'ns Int'l Inc.*, 294 F.3d 924, 929 (7th Cir. 2002).

137. *Id.* at 928 ("As far as we know, the Supreme Court has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver.").

138. *In re Lee*, 356 B.R. 177, 182 (Bankr. N.D. W. Va. 2006) (quoting *Shutte v. Thompson*, 82 U.S. 151, 155 (1872)); see also *Interstate 35/Chisam Rd., L.P. v. Moayed*, 377 S.W.3d 791, 797 (Tex. App. 2012) (also stating exceptions where the waiver is precluded by law or public policy).

139. *E.g.*, *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 761 (9th Cir. 1997) (construing waiver of court proceedings for purposes of arbitration).

140. Glover, *supra* note 1, at 3066-68 (criticizing the Court's enforcement of class-action waivers as a major tool the Court has used to erode the public law).

141. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) ("[A] party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200

Waivers of statutory and contractual rights are routine in many arbitral agreements. Victor Schwartz indicates that private parties in arbitral agreements often make the rational choice to waive such rights.¹⁴² While the private party might not understand all the terms and conditions of the agreement, Schwartz says the private party must realize he is signing an arbitration contract with this waiver possibility.¹⁴³ Similarly, consent is not lacking merely because the weaker party deliberately waives what he understands to be known (or unknown) rights under an adhesive arbitration agreement.¹⁴⁴ This commentator further states that if deep-seated consumer opposition existed toward current arbitration procedures, a market would develop for non-arbitration agreements. Glover essentially concedes

(Tex. App. 2003) (enforcing an arbitration clause that prohibited class-action claims, stating that “there is no entitlement to proceed as a class action”); *accord* Blaz v. Belfer, 368 F.3d 501, 504 (5th Cir. 2004). Courts frequently state that the use of class-action procedures is *not* a substantive right. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ [Fed. R. Civ. P.] 23 is a procedural right only, ancillary to the litigation of substantive claims.”).

142. *Hearing on Arbitration: Is It Fair When Forced? Before the S. Judiciary Comm.*, 112th Cong. 11 (2011) (testimony of Victor E. Schwartz, Partner, Shook Hardy & Bacon, L.L.P.).

143. *Id.*; *see also* *Sherman v. Lunsford*, 723 P.2d 1176, 1178 (Wash. Ct. App. 1986) (“Although the parties may not have fully understood the legal significance of each and every term, they knew they were signing a binding contract.”); RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981) (emphasis added):

Consumers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. *But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.*

144. *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011) (“[T]he times in which consumer contracts were anything other than adhesive are long past.”); *Rory v. Cont’l Ins.*, 703 N.W.2d 23, 41 (Mich. 2005) (holding that adhesive arbitral agreements can be enforceable); *see also* *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 367 (7th Cir. 1999), *cert denied*, 528 U.S. 811 (1999) (upholding an adhesive arbitration agreement in the face of the allegation that the provider used “hard bargaining”). The drafting party’s mere use of non-negotiable arbitral boilerplate is morally blameless. The reason is “[t]he very ubiquity of the practice precludes a conclusion that the use of a nonnegotiable contract, on its own, is in any way unethical.” *Vasquez v. Greene Motors, Inc.*, 154 Cal. Rptr. 3d 778, 787 (Cal. Dist. Ct. App. 2013) (reaching this conclusion about allegedly unconscionable terms).

this point when she observes that the American public does not “get[] worked up” about arbitration.¹⁴⁵

Courts and commentators should not presumptuously substitute their judgment for that of private parties simply because these observers believe the private party would be exercising *too much* freedom of contract in relinquishing procedural statutory rights and other terms intended for an individual’s benefit. The law is much narrower than such a free-wheeling critique. The arbitral agreement will be unenforceable only with either a recognized formation defense, such as fraud, duress, unconscionability, or a violation of public policy.¹⁴⁶

Regarding an example in the last category, an agreement would be unenforceable on public policy grounds if it purported to waive non-waivable rights. A good instance here is a purported waiver of the Fair Labor Standards Act (FLSA), in which the statute protects the general public and not just individual parties regarding such matters as employee wages and hours.¹⁴⁷ Otherwise, parties exercising their freedom of contract generally may enter contracts as they see fit, even though an outside observer might believe these agreements are unfair, unwise, or otherwise not in the best interests of a weaker party.¹⁴⁸

E. Freedom of Contract and the Statutory Policy Favoring Arbitration

The broad view of party leeway in arbitration comports with other established reasons for upholding the parties’ agreement on arbitration whenever possible. In citing the “liberal federal policy favoring arbitration,” the Supreme Court in *Mitsubishi* and other decisions has rejected the “outmoded presumption” and “suspicion of arbitration as a method of weakening the protections afforded in

145. Schwartz Testimony, *supra* note 142, at 3-4; Glover, *supra* note 1, at 3086-87 (acknowledging this issue).

146. See 9 U.S.C. § 10(a) (2012) (stating grounds for vacatur for these reasons).

147. Compare *Barrentine v. Arkansas-Beset Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (“FLSA rights cannot be abridged by contract or otherwise waived because this would . . . thwart the legislative policies it was designed to effectuate.”) (construing 29 U.S.C. §§ 201-219 (2012)), with *Rainere v. Citigroup Inc.*, 533 Fed. App’x 11, 14 (2d Cir. 2013) (collective-action waiver in arbitration agreement deemed enforceable regarding a claim under the FLSA).

148. See *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 100 (Tenn. 1999).

the substantive law.”¹⁴⁹ To the same effect, the Supreme Court has refused to “indulge [in] the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.”¹⁵⁰

In arguing that the Supreme Court has distorted freedom of contract to the point that statutory rights have become “mere nullities,”¹⁵¹ Glover fails to heed that arbitration is essentially a “species” of a forum selection clause.¹⁵² The selected “forum” here is the arbitration proceeding as opposed to a court case. Accordingly, as stated in *Mitsubishi*, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”¹⁵³ In particular, courts have said, “[E]ven claims arising under a statute designed to further important social policies may be arbitrated because ‘so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.’”¹⁵⁴ Unless waived, those statutes granting substantive rights in terms of authorizing a cause of action are alive and well and not “nullities.”¹⁵⁵

As the *Mitsubishi* majority acknowledged, “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”¹⁵⁶ Absent a

149. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 437 U.S. 614, 625 (1985).

150. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

151. Glover, *supra* note 1, at 3057.

152. See *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Armstrong v. LaSalle Bank Nat’l Ass’n*, 552 F.3d 613, 616 (7th Cir. 2009).

153. *Mitsubishi*, 473 U.S. at 628.

154. *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487 (2d Cir. 2013) (quoting *Gilmer*, 500 U.S. at 28).

155. See Glover, *supra* note 1, at 3057 (using the quoted term). Glover does state correctly that current Supreme Court doctrine would render unenforceable an “explicit exculpatory clause;” an example of such an ineffective arbitral clause would be a provision that “[X Corporation] shall not be liable under [federal statute].” *Id.*; see also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting) (indicating that all justices on the Court agree arbitration agreements cannot immunize a party from antitrust liability under the Sherman Act).

156. *Mitsubishi*, 473 U.S. at 626-27; see also *Gilmer*, 500 U.S. at 30-33 (rejecting the arguments that arbitration procedures in general are inadequate for

congressional directive to limit or prohibit waiver of a judicial forum for a specific statutory claim,¹⁵⁷ arbitral proceedings “do not entail any consequential restriction of substantive rights,” and judicial review suffices to ensure that the arbitrators will comply with the statutes giving rise to the claims at issue.¹⁵⁸ Therefore, Glover’s argument is not persuasive that the Supreme Court’s arbitration decisions have allowed federal statutes to become mere “nullities.”

F. Arbitration and Generalized Policy Objections

In her critique of the Court’s arbitration jurisprudence, Glover reveals her distrust of the corporate drafters of arbitration agreements. Without any supporting evidence, she mentions the “unfairness to some litigants that may flourish behind closed doors,” and she further mentions the “potentially corrupt practices by attorneys, judicial officers, and litigants.”¹⁵⁹ Glover further goes beyond a legal and doctrinal criticism of contemporary arbitration and challenges the integrity and good faith of businesses using strongly vendor-protective arbitration terms.¹⁶⁰ She strongly hints that these firms are guilty of “stealth perversion[s] of justice.”¹⁶¹ She also

effective conflict resolution and that an arbitration agreement should be invalidated where the contracting relationship involved unequal bargaining power).

157. *Cunningham v. Fleetwood Homes of Ga., Inc.*, 253 F.3d 611, 617 (11th Cir. 2001) (also stating that to deduce this intent, a court must review the statutory text, legislative history, and the possibility of conflict between the statute’s underlying purpose and enforcement of the arbitration agreement). Glover properly points out that federal statutory claims are arbitrable “unless Congress has expressly pointed to the contrary.” Glover, *supra* note 1, at 3061.

158. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (citing *Mitsubishi*, 473 U.S. at 628).

159. Glover, *supra* note 1, at 3056; *see also id.* at 3076 (discussing how corporate interests “hide the exercise of their significant power from the public”); *id.* at 3083 (citing industry’s objective to “recalibrate the law” and discussing how corporations are subverting the “democratic process”).

160. *See id.* at 3076.

161. *Id.* at 3059 n.26. Glover’s general disapproval of adhesion contracts is an important theme to her thesis, but these objections are outside the legal realm. Frequently, she objects that consumers should have more information and choice regarding adhesive arbitration agreements. *See, e.g., id.* at 3052 (referring to “rarely read and little-understood provisions in contracts of adhesion subject to scant public scrutiny or regulatory oversight”); *id.* at 3092 (objecting to cell phone, credit card, and other mass-market consumer contracts because the signer “often has no other choice”). The difficulty with this point as a legal proposition is that the FAA’s “equal footing” concept preempts any doctrine requiring this additional choice or information for the enforceability of arbitration agreements. *See Doctor’s Assocs.,*

implies that arbitration can be a charade because the drafting party “possibly intend[s]” to reduce claimant statutory rights to “mere nullities.”¹⁶² She also accuses the corporate drafters of “procedural gamesmanship” in taking undue advantage of consumers¹⁶³ and employing improper “strategic gambits” to this end.¹⁶⁴

In keeping with her philosophical preference, Glover strongly hints that merchants promulgating arbitration agreements have little entitlement to their own freedom of contract. Glover observes with disapproval that contract drafters use “arbitration agreements to tilt the rules of dispute resolution in their favor.”¹⁶⁵ She also contends that corporate drafters who favor their own interests in arbitration “appear[] to be at odds with the Court’s jurisprudence on the matter.”¹⁶⁶

Glover cites various cases that she contends support her position about restrictions on corporate freedom of contract. None of the cases she mentions, however, preclude a drafting party from naturally favoring its own interests in arbitration. The decisions she cites actually prohibit arbitration agreements revocable for fraud, unconscionability, or clear violations of fundamental public policy concerns, or where the arbitration would be prohibitively expensive.¹⁶⁷ A corporate drafter’s mere “tilting” of a proposed contract and thereby favoring its own interests does not support an FAA basis for contract revocation. Instead, the merchant’s drafting choices are a garden-variety example of a party legitimately exercising its freedom of contract to maximize its economic position to achieve the most favorable, permissible outcome—which is a bedrock policy for *both* sides to any prospective contract.¹⁶⁸

In her objections to arbitration, Glover travels more so into the realm of economics, social policy, and politics. Glover states, “In

Inc. v. Casarotto, 517 U.S. 681, 687 (1996). No doubt also exists that Glover believes that arbitration is inferior to litigation (especially by way of class actions) as a means for granting relief to consumers. Glover, *supra* note 1, at 3074 (ruing the “near-total disappearance of the class action device”). The legal problem with this stance is that the FAA pre-empts any doctrine that arbitration is inferior to litigation. See *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 741 F.3d 1162, 1165-67 (10th Cir. 2014) (citing Supreme Court decisions favoring the use of arbitration).

162. Glover, *supra* note 1, at 3057.

163. *Id.* at 3081.

164. *Id.* at 3082-83.

165. *Id.* at 3064 n.54.

166. *Id.* at 3064-65 n.54.

167. *Id.* at 3065 n.54.

168. See *supra* note 62 and accompanying text.

fact, the Court's FAA jurisprudence creates a political dynamic that systematically favors large corporations, the 'winners' in the Court's arbitration jurisprudence, over those who enter into arbitration agreements (the 'losers')."¹⁶⁹ With these comments, Glover has revealed her chief concern with modern day arbitration: a generalized objection that corporations should not fare better than consumers in arbitration. This criticism has no legal traction because "objections to arbitration . . . in general" contradict the strong "federal policy favoring arbitration" embodied in the FAA and are therefore without merit.¹⁷⁰

Her objections on social grounds are also unpersuasive. Glover's unmistakable preference for consumers over corporations in the long run is unlikely to benefit consumers. As the Seventh Circuit has observed, when courts unduly take sides with consumers over corporations, courts can only destabilize the institution of contract, increase risk, and make parties worse off:

169. Glover, *supra* note 1, at 3088-89.

170. See *Brookdale Senior Living, Inc. v. Stacy*, 27 F. Supp. 3d 776, 788 (E.D. Ky. 2014) (accepting these general principles); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) ("[G]eneralized attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,' and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" (quoting *Roriguez de Quijas v. Shearson/Am. Express, Inc.* 490 U.S. 477, 481 (1989))); 14 *Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). Absent a constitutional issue, judicial policy concerns about the wisdom of arbitration are not a proper legal basis to challenge legislation passed by Congress. *Id.*

In the Court's latest arbitration decision, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), dissenting Justices Ginsburg and Sotomayor strongly denounced current arbitration practices: "Because consumers lack bargaining power to change the terms of consumer adhesion contracts *ex ante*, '[t]he providers [have] won the power to impose a mandatory, no-opt-out system in their own private 'courts' designed to preclude aggregate litigation.'" *DIRECTV, Inc.*, 136 S. Ct. at 477 (Ginsburg & Sotomayor, JJ., dissenting) (quoting Judith Resnik, *Fairness in Numbers: A Concept on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 133 (2011)). The dissenting opinion also disagreed with the result and reasoning in *Concepcion*: "There, as here, the Court misread the FAA to deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts." *Id.* at 476. Both arguments held little appeal for the Court's majority, which said that "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act." *Id.* at 468. By necessary implication, the majority in *Direct TV* also rejected the dissent's view that corporate drafters of arbitration agreements have created "their own private courts"—which is the essence of Glover's arbitration critique.

The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of legal decisions. Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because [the other side] will demand compensation for bearing onerous terms.¹⁷¹

Therefore, a court or a legislature should be skeptical about adopting Glover's critique of modern arbitration law and procedure.

VI. THE LIMITS OF FREEDOM OF CONTRACT: MAINTAINING THE INTEGRITY OF THE ARBITRAL PROCESS

In arguing that *Italian Colors* improperly approved a "reductionist" theory of freedom of contract, Glover contends parties may now prescribe "any set of procedures, no matter how onerous to the arbitration of claims."¹⁷² Glover repeatedly mentions that the Court has adopted a "pure" version of freedom of contract under the FAA.¹⁷³

The cases do not support—as a legal doctrine—that freedom of contract is enforceable in a "pure" or absolutist fashion. As explained below, the state of the law is that "freedom of contract has its limits."¹⁷⁴ This last quote aligns with established Supreme Court precedent. For many years, the Supreme Court has accepted as a general proposition that "freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses."¹⁷⁵

171. *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 282 (7th Cir. 1992).

172. Glover, *supra* note 1, at 3057; *see also id.* at 3081 ("Any procedural limitation, no matter how draconian, apparently is fair game under the FAA after *Italian Colors*.").

173. *Id.* at 3070. For Glover's other references to a regime of "pure freedom of contract," *see id.* at 3068, 3070-71, 3074, 3083 n.28.

174. *See infra* note 189 and accompanying text.

175. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937). The *West Coast* Court also said:

The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

The true rule is that private parties may neither override FAA proscriptions nor ignore the requirement for fundamental arbitral fairness within the limits of the FAA.¹⁷⁶ The statutory rule is that arbitration agreements are on an “equal footing with all other contracts”¹⁷⁷ such that the FAA will allow a claimant to challenge an agreement revocable on general grounds, such as (but not limited to) fraud, duress, and unconscionability.¹⁷⁸ As part of this rule, the law accepts some key defenses, mentioned below, that can overturn an arbitration agreement.

A. Implied Incorporation of the FAA

Under the theory that statutes relevant to a contract are implicit terms of the agreement, courts incorporate the FAA into arbitration agreements by implication of law.¹⁷⁹ The parties may not transgress the FAA in determining the rules of the proceeding. To do so would go beyond the “hard bargaining” that freedom of contract principles indicate is impermissible.¹⁸⁰ Thus, the private party has substantial protection against procedures conflicting with mandatory FAA

176. On appeal, courts review only whether the arbitrator acted within his powers and not whether he did so correctly. Because the parties contracted for the selection of the arbitrator in a private dispute-resolution setting, they must generally accept the consequences of their choices. *See Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070-71 (2013); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960); *Moncharsh v. Heily & Blase*, 832 P.2d 899, 904 (Cal. 1992). A different approach “opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time consuming judicial review.’” *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

177. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

178. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010). One argument that has little, if any, chance of success is that private arbitration proceedings violate due process. Numerous courts have held that the state action element of a due process claim is absent in private arbitration cases. *See Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1190-91 (11th Cir. 1995) (citing Supreme Court decisions).

179. *See WILLISTON & LORD, supra* note 68, § 57:24 (“In statutory arbitration, the terms of the statute are by implication a part of the arbitration agreement.”); *see also Costello v. Grundon*, 651 F.3d 614, 640 (7th Cir. 2011) (noting that relevant laws are implied contract terms).

180. *See supra* notes 66-69 and accompanying text.

ground rules (in contrast to where the FAA grants parties the discretion to select the procedures).¹⁸¹

One such implied term is that the agreement may not waive or modify the FAA grounds for a party to pursue vacatur of an award.¹⁸² Notably, the FAA gives great importance to fair play during the proceedings. 9 U.S.C. § 10 provides that a party can have the following grounds for vacatur of an award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.¹⁸³

These specific grounds for vacatur rebut the contention that private arbitration agreements are subject to “only the most superficial judicial review.”¹⁸⁴ The FAA permits vacatur in a wide swath of factual scenarios, with most of those grounds pertaining to how the arbitrator conducts the hearing, including whether the arbitrator was fatally biased or guilty of misconduct.¹⁸⁵ Furthermore, contrary to the assertion that “[A]ny procedural limitation, no matter how draconian, apparently is fair game under the FAA after *Italian Colors*,”¹⁸⁶ these vacatur grounds show the FAA’s significant emphasis on fair play. As another commentator has observed, “[J]udicial supervision [is available in] exceptional circumstances that reflected distinctly unprofessional adjudicatory conduct [and] significant procedural

181. “[T]he FAA lets parties tailor . . . many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law.” *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (citations omitted).

182. *See In re Wal-Mart Wage & Hour Emp’t. Practices Litig.*, 737 F.3d 1262, 1267 (9th Cir. 2013) (“Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract.”).

183. 9 U.S.C. § 10(a) (2012).

184. Glover, *supra* note 1, at 3077-78.

185. *See* 9 U.S.C. § 10(a).

186. *See* Glover *supra* note 1, at 3081.

failings.”¹⁸⁷ Similarly, a number of courts have disapproved an agreement that waives the claimant’s right to appeal the arbitration decision.¹⁸⁸ Again, as stated by the Second Circuit, “freedom to contract . . . has its limits,” and the parties may not “eviscerate” the “careful balance” that the FAA has prescribed between encouraging arbitration and monitoring its basic fairness.¹⁸⁹

B. Implied Covenant of Good Faith and Fair Dealing

An important common law safeguard exists against unfair arbitration agreements. The implied (and non-waivable) covenant of good faith and fair dealing applies to every contract and “emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”¹⁹⁰

In *Hooters of America, Inc. v. Phillips*,¹⁹¹ the contract allowed Hooters the right to prescribe the arbitration rules and procedures. The Fourth Circuit found that “Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft

187. CARBONNEAU, *supra* note 17, at 326. The vacatur remedy protects the complaining party against “[e]xceptional circumstances of extreme adjudicatory unfairness, profound arbitrator incompetence . . . [or where arbitrators] exceed their powers, or ignore the parties’ fundamental adjudicatory rights or, possibly, the material content of the arbitration agreement.” *Id.* at 516. Case law is to the same effect. See *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997). Section 10(a)(3) of the FAA contains a “fundamental fairness” standard whereby “an arbitrator ‘must give each of the parties to the dispute an adequate opportunity to present its evidence and argument.’” *Id.* (quoting *Hoteles Condado Beach v. Union De Tronquistas Local 90*, 763 F.3d 34, 39 (1st Cir. 1985)); *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 663-64 (9th Cir. 2012) (stating that the FAA vacatur is “designed to preserve due process” (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003))); see also *McMahan & Co. v. Dunn Newfund I, Ltd.*, 656 N.Y.S.2d 620, 621 (App. Div. 1997) (“[D]ue process in arbitration means satisfying ‘minimal requirements of fairness.’” (quoting *Ficek v. S. Pac. Co.*, 338 F.2d 655, 657 (9th Cir. 1964))). While Glover makes an oblique reference that the right of appeal is “limited,” Glover, *supra* note 1, at 3069 n.71, she fails to mention the grounds for vacatur or the equal footing doctrine.

188. *Hoelt v. MVL Grp., Inc.*, 343 F.3d 57, 64 (2d Cir. 2003), *overruled on other grounds* by *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 128 (2008). *But see Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 931 (10th Cir. 2001) (allowing parties to opt out of judicial review).

189. *Hoelt*, 343 F.3d at 63-64.

190. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

191. 173 F.3d 933 (4th Cir. 1999).

arbitration rules and to do so in good faith.”¹⁹² Some examples of the improper rules were the merchant had complete control of the selection of the arbitrator panel and the merchant had no requirement to file a responsive pleading to the complaint or to notify the claimant of the merchant’s defenses.¹⁹³ In a related topic, this implied covenant governs a merchant’s ability to make unilateral post-agreement changes in the contract’s existing arbitration procedures.¹⁹⁴

C. Public Policy as a Restraint

Under the FAA, a court may not enforce a contract that is illegal or contrary to public policy.¹⁹⁵ An arbitration award stemming from an improper agreement may “be vacated if it contravenes a public policy that is ‘explicit,’ ‘well defined,’ and ‘dominant.’”¹⁹⁶ At the same time, the public policy doctrine is narrowly construed and must be “ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”¹⁹⁷

Importantly, courts have ruled that the aggrieved party may raise the public policy defense only at the arbitration award-enforcement phase and not at the arbitration-enforcement phase of the proceedings.¹⁹⁸ The reason is that it would be speculative and wasteful of time and other resources for the court system to intervene

192. *Id.* at 938.

193. *Id.*

194. *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1105 (C.D. Cal. 2015).

195. *E.g.*, *W.R. Grace & Co. v. Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983). Glover does mention the term “public policy” in three brief references but does not explain it as an important restraint on arbitral agreements. *See Glover, supra* note 1, at 3059 n.24, 3064-65 n.54.

196. *See Nat’l Ass’n of Gov’t Emp.’s v. Nat’l Emergency Med. Servs. Ass’n*, 84 F. Supp. 3d 43, 49-50 (D. Mass. 2015) (quoting *W.R. Grace & Co.*, 461 U.S. at 766) (excellent summary). Some jurisdictions reject the public-policy defense in state proceedings because the local arbitration statute has no such grounds. *Warbington Constr., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 857-58 (Tenn. Ct. App. 2001) (citing Supreme Court decisions).

197. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 44 (1987); *see also Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1212 (9th Cir. 1989).

198. *See Escobar v. Celebration Cruise Operator, Inc.*, 805 F.3d 1279, 1290 (11th Cir. 2015) (a party seeking to oppose arbitration cannot raise a public policy defense at the arbitration-enforcement stage); *see also supra* notes 125-27 and accompanying text (similar analysis).

prematurely and rule on matters that the arbitrator might later apply himself on the limits of arbitration.¹⁹⁹

The Supreme Court observed in *United Paperworkers International Union v. Misco, Inc.*²⁰⁰ that a non-exclusive example of a statute referencing such a fundamental public policy is Title VII of the Civil Rights Act of 1964. Relying on *Misco*, a number of courts construing the FAA have shown their adherence to the traditional restraints—“While there are sound reasons for requiring parties to adhere to the procedures governing arbitration, it is also well-established that a court may not enforce a contract that is . . . contrary to public policy.”²⁰¹

Some lower federal courts have recognized a public policy defense to the enforcement of arbitration agreements commonly called the “effective vindication of rights.” Under this principle, a number of circuits have revised or struck down arbitration agreements where they interfered with the recovery of statutorily authorized damages.²⁰² The effective “vindication” theory is a narrow exception to the central mandate of the FAA; it requires the party opposing arbitration to prove that costs unique to arbitration are so high as to foreclose access to the arbitral forum.²⁰³

The Supreme Court considers the “effective vindication” doctrine to be based on dicta; the Supreme Court has never upheld such a claim on the merits.²⁰⁴ In any event, the Court has devised its own “effective vindication” principle that appropriately supports the right of a litigant to pursue a statutory claim. The Court has ruled that if a prospective litigant may effectively vindicate a statutory cause of action before the arbitrator, then the statutory claim being arbitrated “[w]ill continue to serve both its remedial and deterrent function.”²⁰⁵

199. *Lindo v. NCL Bahamas, Ltd.*, 652 F.3d 1257, 1268, 1279, 1284 (11th Cir. 2011).

200. *Misco*, 484 U.S. at 43.

201. *E.g.*, *Visiting Nurse Ass’n of Florida v. Jupiter Med. Center, Inc.*, 154 So. 3d 1115, 1128 (Fla. 2014) (quoting *I.U.B.A.C. Local Union No. 31 v. Anastasi Bros.*, 600 F. Supp. 92, 94 (S.D. Fla. 1984)).

202. *See Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487 (2d Cir. 2013) (citing cases where the agreement infringed a party’s ability to seek Sherman Act treble damages or Title VII of the Civil Rights statute punitive damages).

203. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-91 (2000) (dictum).

204. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

205. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

The Court also has ruled that the right to invoke a statutory claim does not carry a guarantee that a litigant would have an affordable procedural path to vindicating every claim.²⁰⁶ For the Court to endorse such a supposed guarantee runs counter to the FAA's basic policy—which is to encourage arbitration and to discourage litigation.²⁰⁷ A system that devotes undue attention to small-dollar claims and gives them class action status is a system based on inefficiency for the parties and the courts and, therefore, violates the FAA's policy in favor of arbitration.²⁰⁸

Another important point made too infrequently is that where courts accept the effective vindication of rights doctrine, it applies only to the costs unique to the arbitration and not all costs pertaining to the *litigation*. Such permissible costs, where recognized, are limited to large arbitration costs concerning the costs of access to an arbitral forum. These costs are about the price of arbitral admission: “payment of filing fees, arbitrators’ costs, and other arbitration expenses.”²⁰⁹ Thus, given the constraints of the FAA, the *Italian*

206. *Italian Colors*, 133 S. Ct. at 2310. For a full discussion of the *Italian Colors* Court's discussion of the vindication of rights doctrine in anti-trust cases, see *supra* Part I.

207. *Id.* at 2312 n.5.

208. *Id.* at 2312. Glover's argument for class action coverage of small-dollar claims and the procedural “morass” such claims would necessarily create cannot be squared with her argument that the primary FAA value should be efficiency in arbitration. *Id.*; see Glover, *supra* note 1, at 3074 (advocating this efficiency argument).

The Court's refusal to endorse the plaintiffs' expansive version of the effective vindication of rights also accords with the accountability strand of freedom of contract. By enforcing an unambiguous class-action waiver, the Court was enforcing the bargain that the parties actually made versus the bargain that the plaintiffs preferred after the time of contract execution. Put another way, the Court faithfully implemented the rule that freedom of contract confines courts to their judicial function and dictates that they should not rewrite contracts to make them more equitable or to reallocate the rights and obligations the parties have accepted under their agreement. See *supra* notes 55-59 and accompanying text (citing principles).

209. In *Italian Colors*, the court below inappropriately considered not just the costs of the arbitration but also putative litigation expenses, such as the high-dollar expert witness fees. *In re Am. Express Merchs. Litig.*, 681 F.3d 139, 147 (2d Cir. 2012) (Jacobs, C.J., dissenting) (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 84 (2000)) (Annex Order Denying Rehearing En Banc); see also Glover, *supra* note 1, at 3071 (including expert witness fees as part of the claimant's proposed recovery).

Colors Court has sufficiently supported an “effective vindication” of rights doctrine.²¹⁰

D. The Use of Established Arbitral Protocols

Glover greatly fears that industry has employed, and will continue to employ, onerous anti-consumer arbitration procedures in the wake of *Italian Colors*.²¹¹ The chance of this fear being realized is extremely small. The reason is that the great majority of U.S. arbitration proceedings use the carefully drafted due process protocols of the two leading providers of arbitration services, American Arbitration Association (AAA) and JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.).²¹² For example, the AAA’s Consumer Due Process Protocol states that the consumer is entitled to a “fundamentally-fair arbitration hearing,” to

210. *Italian Colors*, 133 S. Ct. at 2310-12 (making this contention). Much of the commentary on *Italian Colors* takes a pro-claimant stance without a careful balancing of both claimant and merchant interests. *E.g.*, Leslie, *supra* note 18, at 329 (excoriating courts for enforcing “anti-plaintiff terms in arbitration clauses”); Canis, *supra* note 18, at 130 (advocating that “the Court should favor the consumer, rather than the corporation, when and if a case involving a [clickwrap agreement]” is brought); Robert Ward, Note, *Divide and Conquer: How the Supreme Court Used the Federal Arbitration Act to Threaten Statutory Rights and the Need to Clarify the Effective Vindication Rule*, 39 SETON HALL LEGIS. J. 149, 151 (2015) (stating “the possibility for abuse in adhesion contracts is seemingly limitless, as a multitude of potential claimants may be left without avenues to vindicate their rights, and commercial entities may effectively insulate themselves from liability through creatively constructed agreements”).

211. See Glover, *supra* note 1, at 3092 (“By allowing the exercise of private power over legal obligations to occur this way, contract drafters are able to retain a concentrated, nearly singular focus on hassle-free reduction of legal obligations”); see also *id.* (“In allowing arbitration to expand with so few restraints, we have arguably privatized both the public realm and the substantive law into oblivion.”).

212. The AAA has due process protocols for consumer cases, employment cases, and healthcare cases. Kristen M. Blankley, *Lying, Stealing and Cheating: The Role of Arbitrators as Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 446 n.26 (2014). The AAA is the leading provider of dispute resolution services in the United States. THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 1:9 (2015).

Empirically, Glover’s contention is unsupported that arbitration is marked by “disappearing claims.” Compare Glover, *supra* note 1, at 3058, with *Consumer Arbitration Statistics*, AM. ARB. ASS’N, <https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat> [<https://perma.cc/37YQ-GZYP>] (last visited Mar. 26, 2016) (reflecting that the AAA processed 17,188 consumer arbitration cases in 2015 and 17,368 cases in 2014).

include “adequate notice of hearings and an opportunity to be heard and to present relevant evidence.”²¹³ Another protection for consumers is that “[c]onsumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, [while] bearing in mind the expedited nature of arbitration.”²¹⁴ Although unmentioned by Glover, these protocols help ensure fairness to both sides in arbitral proceedings.²¹⁵ As stated by Christopher Drahozal, “[i]t is hard to square the AAA’s enforcement of the Consumer Due Process Protocol with the suggestion that arbitration providers are systematically biased in favor of businesses.”²¹⁶

The evidence indicates almost all arbitration clauses will satisfy a due process protocol. Before it accepts a case, the AAA is effective

213. AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 3 (1998), https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [<https://perma.cc/2747-LJCP>].

214. *See id.*

215. Courts have commented favorably on these protocols. *See, e.g.*, *Merit Ins. v. Leatherby Ins.*, 714 F.2d 673, 680 (7th Cir. 1983) (stating “great respect” for the AAA’s protocols).

216. Drahozal, *supra* note 3. A significant number of commentators have cited the established benefits of arbitration. *See* Sternlight, *supra* note 3, at 1312 n.16, wherein she amasses this commentary on the plus side of arbitration:

See, e.g., Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 840 (2008) (“The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees”); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (“A properly designed arbitration system . . . can do a better job of delivering accessible justice for average claimants than a litigation-based approach.”); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30 (1998) (urging that because mediation and arbitration are “generally much less expensive than litigation, [these processes may] bring justice within the reach of many to whom it is currently denied”); Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 ABA J. OF LAB & EMP. L. 411, 417-18 (2010) (suggesting arbitration is more accessible to lower paid workers than litigation); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water and Constructing a New Sink in the Process*, 2 U. PA. J. LAB & EMP. L. 73, 75-76 (1999) (arguing that while imperfect, mandatory arbitration is superior to litigation from perspective of both employees and employers).

While Professor Sternlight does cite the studies just mentioned, she also disagrees that courts have properly applied the FAA. *See* Sternlight, *supra* note 3, at 1310 (commenting adversely on Supreme Court case law).

in identifying and responding to clauses that contain protocol violations.²¹⁷ Although these rules and procedures in the abstract “do not have the force of law,”²¹⁸ once the claimant and respondent adopt these rules, the parties are bound by them (nothing else appearing).²¹⁹ In fact, the AAA strongly adheres to its protocols by refusing to administer arbitrations where a party wishes to violate the AAA guidelines.²²⁰

Another unexpected feature of various corporate arbitration agreements is a generous recovery for claimants—and sometimes even where the claimant does not formally prevail. The opponents of the Court’s FAA precedents (including Glover) frequently fail to mention this industrial practice. An excellent example is AT&T’s standard arbitration clause, which provides:

For any non-frivolous claim that does not exceed \$75,000, AT&T will pay all costs of the arbitration. Moreover, in arbitration you are entitled to recover attorneys’ fees from AT&T to at least the same extent as you would be in court.

In addition, under certain circumstances (as explained below), AT&T will pay you more than the amount of the arbitrator’s award and will pay your attorney (if any) twice his or her reasonable attorneys’ fees if the arbitrator awards you an amount that is greater than what AT&T has offered you to settle the dispute.²²¹

217. Drahozal, *supra* note 3.

218. *Merit Ins.*, 714 F.2d at 680.

219. *See* *Reeves Bros. v. Capital-Mercury Shirt Corp.*, 962 F. Supp. 408, 411 (S.D.N.Y. 1997); *see also* *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1073-74 (9th Cir. 2013) (“Virtually every circuit to have considered the issue has determined that incorporation of the [AAA’s] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”); Steven C. Bennett, *Conflicts Between Arbitration Agreements and Rules*, 15 CARDOZO J. CONFLICT RESOL. 221, 225 (2013) (“Arbitration agreements commonly incorporate by reference the rules of an arbitration sponsoring organization, and such incorporation by reference is typically enforced.”).

220. *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 294 (2012) (explaining that AAA is generally effective at identifying and responding to companies’ violations of AAA due process protocols); *see also* Drahozal, *supra* note 3 (reaching a similar conclusion). By adopting these protocols, and including other clauses consistent with those protocols, the parties are also accepting a legitimate restriction on their freedom of contract.

221. *DataConnect Pass Plan / Session Based Wireless Data Services Agreement*, AT&T, § 3.1, <http://www.att.com/legal/terms.sessionBasedWirelessDataServicesAgreement.html#arbAgree> [<https://perma.cc/43J2-PHRM>] (last visited Mar. 26, 2016).

Thus, if the claimant prevails, he or she could receive compensation well in excess of its actual losses.

Even if the claimant loses the case in arbitration, he or she can still obtain a hefty financial recovery from AT&T, which is counter-intuitive. Why should the winner pay far in excess of the claimant's losses, or pay the claimant certain costs, where the claimant loses the case? AT&T is using sound business judgment in this scenario. Many companies maintain their viability because they get repeat business to a significant extent from satisfied customers.²²² It would impair AT&T's ability to maintain a solid customer base if its customers believed that the binding arbitration process stacks the deck against the claimant. Glover mentions none of these positive aspects of arbitration clauses for consumers and other claimants.²²³

Lastly, the concern is misplaced that *Italian Colors* has incentivized corporations to modify their standard agreements to include forfeiture-heavy, adhesive arbitration clauses.²²⁴ As one experienced practitioner points out, corporations ordinarily employ a cost-benefit analysis and act cautiously in modifying standard contract clauses:

It is also a mistake to assert that corporate America will uniformly modify contracts to include arbitration. Making changes to an existing contract is not simple or costless. Corporate defendants make such changes cautiously and the marketplace can be a discipline on contract changes. In

222. For other major corporations with similar arbitral terms, see, e.g., AM. EXPRESS, GREEN CARD CARDMEMBER AGREEMENT (Dec. 31, 2015), <https://web.aexp-static.com/us/content/pdf/cardmember-agreements/green/AmericanExpressGreenCard.pdf> [<https://perma.cc/GJ8S-8V74>]; *Microsoft Services Agreement*, MICROSOFT (June 4, 2015), <https://www.microsoft.com/en-us/servicesagreement/> [<https://perma.cc/T948-5GCF>]; *Legal Terms*, TOYOTA, <http://www.toyota.com/support/legal-terms> [<https://perma.cc/73KS-CPC4>] (last updated Jan. 1, 2016).

223. Some commentators ascribe to corporate parties a more cynical view of these claimant-friendly clauses. These commentators imply that these clauses are merely a device to preclude class action suits because claimants typically do not pursue small-dollar cases. See Charles Gibbs, Note, *Consumer Class Actions After AT&T v. Concepcion: Why the Federal Arbitration Act Should Not Be Used to Deny Effective Relief to Small-Value Claimants*, 2012 U. ILL. L. REV. 1345, 1345 (2012) ("Because class-action suits are often the only efficient means of pursuing dispute resolution for small value claimants, these clauses serve to deter small-value claimants from seeking any redress."). While a possibility exists that some companies have this ulterior motive, no evidence exists that all corporations act in such an insincere way.

224. See Glover, *supra* note 1, at 3091-92 (arguing that *Italian Colors* "creates an incentive for entities to self-deregulate through private contract" and that "[i]n allowing arbitration to expand with so few restraints, [the Court] has arguably privatized both the public realm and the substantive law into oblivion").

other words, corporations may decide not to include an arbitration clause for marketing reasons or may decide not to amend their contracts because amendment may have a marketing impact.²²⁵

No empirical studies support the argument that *Italian Colors*—or cases beforehand—have encouraged corporations to devise heavily adhesive agreements to carry out a plan to eviscerate consumer rights.²²⁶

VII. *ITALIAN COLORS*: A “SUBTLE BUT DEFINITIVE” ABANDONMENT OF PRECEDENT OR A LOGICAL EVOLUTION OF ARBITRATION DOCTRINE?

What is Glover’s evidence for the assertion that in *Italian Colors*, “the Supreme Court subtly, but definitively,” accomplished a fundamental theoretical shift in its conception of arbitration?²²⁷ Her main argument is that the *Italian Colors* Court never explicitly acknowledged that the FAA allows the parties to use streamlined proceedings tailored to the type of dispute.²²⁸ For Glover, this omission in the Court’s opinion means the Court “effectuated a subtle, but quite significant shift in lawmaking power.”²²⁹

225. Gregory C. Cook, *Why American Express v. Italian Colors Does Not Matter and Coordinated Pursuit of Aggregate Claims May Be a Viable Option After Concepcion*, 46 U. MICH. J.L. REFORM CAVEAT 104, 109 (2012).

226. Two commentators note that there was an outcry by some observers against the *Concepcion* decision, whereby the critics erroneously predicted “that most or all businesses [would] begin using arbitration clauses.” Rutledge & Drahozal, *supra* note 36, at 972. They further predict that there will be a similar absence of a tsunami adding such clauses after *Italian Colors*. *Id.* at 963.

227. Glover, *supra* note 1, at 3052.

228. *Id.* at 3071 (arguing the case had “no mention” of “efficient, streamlined procedures” (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011))).

229. *Id.* at 3074. Glover’s theory is questionable that a mere omission of a concept in a judicial opinion can rise to the level of a “fundamental” change of doctrine, especially when *Italian Colors* did not expressly overrule or restrict prior relevant Supreme Court opinions. A judicial opinion is precedent only for those issues it discusses. *See, e.g., Nat’l Cable Television Ass’n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) (“When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises.” (citing *Webster v. Fall*, 266 U.S. 507, 511 (1925))). Silence in an opinion “[is] just that—silence.” *Helf v. Chevron U.S.A. Inc.*, 361 P.3d 63, 77 (Utah 2015).

Italian Colors never directly addressed, and the parties never raised, whether prior cases are correct regarding the weight of the policy for streamlined proceedings and the current viability of the normative and descriptive premises for arbitration. Given the absence of this issue from the Court’s analysis, *Italian Colors*

In point of fact, no such omission occurred. The *Italian Colors* Court did indeed specifically mention the policy to enhance efficiency in arbitral disputes. The Court expressly commented that imposing a class action remedy in the face of a waiver of that procedure contradicts the efficiency of arbitration:

[Class arbitration] . . . would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. *Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure.*²³⁰

In her unqualified endorsement of aggregate procedures,²³¹ Glover neither cites the above passage nor mentions the inefficiencies of class actions as an FAA remedy.

lends no support to Glover's thesis that the Court has "definitively abandoned" prior case law on these points and has "cemented" a new doctrine. On a similar basis, courts rarely accept the argument that a court has overruled a precedent *sub silentio*, *Williams v. Whitley*, 994 F.2d 226, 235 (5th Cir. 1993), or by implication. *Levine v. Heffernan*, 864 F.2d 457, 461 (7th Cir. 1988).

230. *Am. Express Co., v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (emphasis added). Courts have acknowledged other "downsides" of class actions, such as the "enhanced risk of costly error." *See, e.g., Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744-45 (7th Cir. 2008) (also noting the conflict between the class members being mainly interested in relief for the class and their lawyers being mainly interested in their fees).

The Supreme Court has noted multiple benefits associated with bilateral arbitration: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); *see also* *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). The Supreme Court also has observed that class arbitration, as compared with bilateral arbitration, "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348-49 (also noting that "class arbitration *requires* procedural formality" and finding it unlikely that Congress intended "to leave the disposition of these procedural requirements to an arbitrator"). Moreover, "class arbitration greatly increases risks to defendants" due to arbitration's lack of multilayered review and the high stakes involved when an entire class's claims are aggregated into one action. *Id.* at 350. Glover offers no rebuttal to these points.

231. *See* Glover, *supra* note 1, at 3066-67 n.66 (criticizing the Court for its "hostility to class arbitration"). Empirically, Glover's contention is unsupported that arbitration is marked by "disappearing claims." *Compare* Glover, *supra* note 1, at

The *Italian Colors* decision is a logical and incremental extension of the principles in *AT&T Mobility LLC v. Concepcion*.²³² The *Concepcion* Court held that the FAA preempts California's case-law rule permitting an unconscionability defense that allows the consumer to bypass a class-action waiver to an arbitration clause.²³³ Further, the *Concepcion* Court held that state courts may not automatically base a finding of unconscionability on the value of class arbitration to litigants with "small-dollar claims."²³⁴ In so ruling, *Concepcion* "makes . . . clear that freedom of contract is now the law of the land."²³⁵ The *Italian Colors* Court, expressly applying *Concepcion*, sensibly took the reasoning one step further. The *Italian Colors* Court held that "an arbitration agreement may not be invalidated based on individualized proof that what the plaintiffs have waived—the right to class arbitration—is so valuable that, without it, the costs of pursuing their claims are prohibitive."²³⁶

Ultimately, the *Italian Colors* Court's reasoning and conclusion falls comfortably within the traditional doctrine of freedom of contract. The Court recognized the autonomy of the parties to select the contract terms and the accountability of those parties and their need to stand by their agreements. In this respect, *Italian Colors* relied on the bedrock FAA principle that "the overarching principle [is] that arbitration is a matter of contract;" therefore, "courts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify with whom [the parties] choose to arbitrate their disputes,' and 'the rules under which that arbitration will be conducted.'"²³⁷ Here, the "with whom" reference above applied undeniably to the arbitrators required by the agreement.

While the Court accepted that freedom of contract was not absolute, *Italian Colors* deemed the respondent's public policy argument unpersuasive. The Court rejected the suggestion that plaintiffs with a small-dollar claim that could go unvindicated were entitled to a judge-made remedy beyond what Congress intended was

3058, with *Consumer Arbitration Statistics*, *supra* note 212 (AAA processed 17,188 consumer arbitration cases in 2015 and 17,368 cases in 2014).

232. *Concepcion*, 563 U.S. 333 (2011); *see also* *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 217 (Cal. 2013) (similar argument).

233. *See Concepcion*, 563 U.S. at 352.

234. *Id.* at 351-52.

235. Hiro Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1957 (2014).

236. *Sonic Calabasas A, Inc.*, 311 P.3d at 235 (Chin, J., dissenting in part).

237. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citations omitted).

needed to enforce the antitrust statutes.²³⁸ This ruling comported with consistent case law that courts should strictly cabin the public policy objection to those policies that are explicit, well-defined, and dominant.²³⁹ Because the *Italian Colors* Court properly enforced the parties' stated intent for a class-action waiver, as allowed by public policy, *Italian Colors* is a logical confirmation, and not the repudiation, of FAA policies and freedom of contract.

A final observation is that by emphasizing standard notions of freedom of contract principles and by noting that arbitration is a matter of contract, the *Italian Colors* Court reaffirmed what some commentators call the "contractual approach to arbitration."²⁴⁰ This approach stems from the explicit text of § 2 of the FAA, which "compels courts to enforce arbitration agreements 'save upon such grounds as exist at law or in equity for the revocation of any contract,'" which determination expressly adopts some state contract law.²⁴¹ Indeed, the contemporary legislative history to the first version of the FAA in 1924 further confirms this observation.²⁴² Accordingly, Glover's view that "the Court's increasing embrace of pure freedom of contract in the arbitration setting is reminiscent of *Lochner*-era due process jurisprudence" is rhetoric rather than reality.²⁴³

238. *Id.* at 2309-10.

239. *See supra* notes 196-97 and accompanying text.

240. *See* Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1001 (1996).

241. *Id.* at 1009 (quoting 9 U.S.C. § 2 (1994)).

242. "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 same footing as other contracts, where it belongs." H.R. REP. NO. 96, at 1 (1924) (quoted in Ware, *supra* note 240, at 1004 n.14).

243. Glover, *supra* note 1, at 3083 n.128. The statement is hyperbole for several reasons. First, Glover again levels her criticism about "pure freedom of contract" in the face of statute and case law, which accepts numerous limits on freedom of contract to ensure fair play in the proceedings. *See supra* Part VI. Second, the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1908), was an outgrowth of an era where the Supreme Court imposed its own social and economic version of the state's police power through an overbroad version of freedom of contract and substantive due process when the Court invalidated a New York law setting maximum hours for bakery employees. The Supreme Court overruled *Lochner* to this extent in 1937. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392-98 (1937).

The Court's overstepping its bounds in 1908 has little resemblance to the Court's jurisprudence interpreting the FAA with its strict adherence to the contractual approach. The difference here is that in *Lochner*, where the Court

CONCLUSION

Ranging beyond a critique of Glover's article, this paper has made a number of contributions to the literature regarding arbitration and freedom of contract. From a descriptive and normative perspective, the Supreme Court has got it right about these two doctrines. The true picture of the courts' arbitration decisions is judicial adherence to traditional concepts of freedom of contract regarding party autonomy and party accountability (including the established limits on that freedom). This adherence to traditional freedom of contract principles is in keeping with the command of the FAA that "arbitration is a matter of contract."²⁴⁴

Glover's thesis attempts to substitute her judgment for that of consumers on whether modern day arbitration agreements are fair and reasonable. The parties are entitled to implement their own view of freedom of contract even if an outside observer, such as Glover, might view the agreement as undesirable from the consumer's perspective. While many arbitration agreements do strongly favor the drafter, it must not be overlooked that freedom of contract can co-exist with hard bargaining—which the courts say should be encouraged and not discouraged. In this manner, courts allow both the individual parties and society overall to reap the documented benefits of the arbitral system.

This Article also has shown the courts' fulfillment of the FAA's objectives to allow parties broad rights to customize arbitral procedures. As a proper counterweight, however, courts will disapprove of agreements that either override FAA proscriptions or ignore the requirement for fundamental arbitral fairness within the limits of the FAA. Lastly, this Article has shown the appropriate development of the law through such cases as *Mitsubishi* and *Concepcion* and how they logically culminated in the holdings of *Italian Colors*. Therefore, it would be erroneous to conclude that the

interpreted the Constitution to *overturn* a state statute in the Court's excessive zeal to substitute its judgment for the New York state legislature. In its FAA cases the Court has *upheld* the intent of Congress to enforce arbitration agreements wherever possible.

244. See *supra* notes 29, 76-77 and accompanying text. The Court's demonstrated adherence to traditional freedom of contract principles blunts the criticism of a number of commentators arguing that the Court has failed to follow the established role of contractual assent in FAA cases. See, e.g., Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1406-07, 1415 (1996).

Court's recent FAA jurisprudence has resulted in disappearing claims and the erosion of the substantive law.