

Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2015

Disappearing Claims and the Erosion of Substantive Law

J. Maria Glover
Georgetown University Law Center, mglover@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1409
http://ssrn.com/abstract=2534481

124 Yale L.J. 3052-3092 (2015)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

 Part of the Constitutional Law Commons, Courts Commons, Dispute Resolution and Arbitration Commons, Jurisprudence Commons, Litigation Commons, and the Public Law and Legal Theory Commons

THE YALE LAW JOURNAL

J. MARIA GLOVER

Disappearing Claims and the Erosion of Substantive Law

ABSTRACT. The Supreme Court's arbitration jurisprudence from the last five years represents the culmination of a three-decade-long expansion of the use of private arbitration as an alternative to court adjudication in the resolution of disputes of virtually every type of justiciable claim. Because privatizing disputes that would otherwise be public may well erode public confidence in public institutions and the judicial process, many observers have linked this decades-long privatization of dispute resolution to an erosion of the public realm. Here, I argue that the Court's recent arbitration jurisprudence undermines the substantive law itself.

While this shift from dispute resolution in courts—the public realm—to dispute resolution in arbitration—the private realm—initially undermined values and mechanisms of adjudication, the shift from public lawsuits to private arbitration now also threatens values and mechanisms of lawmaking. This new threat to the lawmaking function stems from a fundamental theoretical shift in the Court's arbitration jurisprudence, cemented in its 2013 decision in *American Express v. Italian Colors*. As this piece explains, in *Italian Colors*, the Supreme Court subtly, but definitively, abandoned its descriptive and normative premise that freedom of contract was justified in the arbitration context because it would result in more cost-effective procedures for resolving disputes, and, accordingly, enforcement of federal statutory regimes. In its place, the Court adopted a reductionist vision of arbitration as any set of private dispute resolution procedures chosen by the parties, no matter how onerous or inefficient, and it held that the Federal Arbitration Act required courts to enforce whatever terms the parties chose.

Particularly given a pronounced reliance in the United States upon private litigants to enforce statutory directives, the Court's recent arbitration jurisprudence now threatens the substantive law itself. Through private arbitration contracts, private parties can effectively rewrite substantive law by rendering a host of legal claims mere nullities. What's more, private parties can exercise this quasi-lawmaking power almost entirely outside of public view, through rarely read and little-understood provisions in contracts of adhesion subject to scant public scrutiny or regulatory oversight. The largely unchecked power of private entities to recalibrate their legal obligations, now recognized by the Court, leaves little to stop an erosion of substantive law.

AUTHOR. Associate Professor of Law, Georgetown University Law Center. I would like to thank Bert Huang, Justice Goodwin Liu, David Luban, David Super, Alan Trammell, David Vladeck and participants at the Columbia Law School Courts and the Legal Process Colloquium for insightful comments. I would also like to thank Elizabeth Chao and the editors of the *Yale Law Journal* for their careful work throughout the editing process. Emily Merki, Logan Dwyer, and TJ McCarrick provided excellent research assistance.



FEATURE CONTENTS

INTRODUCTION 3054

I. DISAPPEARING CLAIMS: THE SUPREME COURT'S NEW ARBITRATION REVOLUTION 3058

A. The Rise of Arbitration Agreements To Facilitate the Resolution of Disputes in Private Fora 3059

B. The Rise of Arbitration Agreements that Frustrate or Eliminate the Resolution of Claims in Any Forum 3064

1. The Shift from Arbitration as a Form of Streamlined Proceedings for Dispute Resolution to Solely a Matter of Contract 3068

2. The Supreme Court's Rejection of the "Effective Vindication" of Rights Principle 3072

II. THE SUPREME COURT'S ARBITRATION REVOLUTION AND THE EROSION OF THE SUBSTANTIVE LAW 3074

A. How the Court's Recent Arbitration Revolution Threatens Substantive Law 3076

B. Why the Supreme Court's Recent Arbitration Revolution and the Erosion of Substantive Law Are Likely Here To Stay 3083

CONCLUSION 3091

INTRODUCTION

The Supreme Court's recent arbitration jurisprudence represents the culmination of a three-decade-long expansion of the use of private arbitration as an alternative to court adjudication in the resolution of disputes of virtually every type of justiciable claim. As a result of this jurisprudence, cases that would otherwise proceed in the public realm—the courts—have been moved to a purely private realm, which is largely shielded from judicial and public scrutiny. Many observers have noted that this decades-long privatization of dispute resolution and attendant adjudicative mechanisms has led to both a loss of confidence in public adjudication and a loss of public adjudication itself—an erosion of the public realm. However, the Court's arbitration jurisprudence from the last five years—and particularly its 2013 decision in *American Express Co. v. Italian Colors Restaurant*[1]—does far more: it undermines the substantive law itself. Indeed, the Court's most recent arbitration jurisprudence has conferred upon private entities a more fundamental power, antecedent to the authority to adjust the mechanisms of *adjudication* used to enforce substantive law. This power is more akin to *lawmaking*. A private entity, through contractual arbitration provisions, can now significantly reduce or even remove its substantive legal obligations by eliminating claiming. That private contract drafter can, in effect, wield quasi-lawmaking power by rendering substantive law inapplicable to a great deal of its primary conduct. Given the central role of private enforcement to the achievement of legislative directives,[2] private entities can therefore use contractual arbitration provisions effectively to erode substantive law from the books, with the consequent erosion of both the private compensatory goals and public deterrent objectives of that law.

As an initial matter, one can situate the trend toward privatizing dispute resolution within a broader narrative about the erosion of the public realm in the world of litigation writ large. For years, scholars have traced, and alternatively lamented and lauded, the near-total disappearance of the trial, the most public feature of our civil litigation system.[3] There are myriad explanations for

1. 133 S. Ct. 2304 (2013).

2. *See, e.g.*, J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1146-1160 (2012) (describing Congress's pronounced reliance on private litigants to enforce statutes); SEAN FARHANG, THE LITIGATION STATE 3-5 (2010) (contending that intrabranch conflicts encourage Congress to effectuate its substantive aims through private enforcement of statutes).

3. *See, e.g.*, Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117 (2009); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); David Luban, *Settlements and the Erosion of*

the decline in trial rates,[4] but an undoubted descriptive consequence of the vanishing trial—and the corresponding rise of settlement as the dominant endgame in litigation—has been a decline in the transparency of case outcomes and often of the judicial and litigation processes behind those outcomes. Normatively, scholars have argued that the large-scale shift from trial to settlement has resulted in significant losses to the values of democratic participation,[5] legitimacy,[6] deterrence,[7] accuracy,[8] judicial independence,[9] egalitarianism,[10] transparency,[11] and peacekeeping.[12] Moreover, the confidentiality of private settlements frustrates public access and deprives future litigants of the benefits of precedential decision-making.[13] As I have discussed in prior work, the rise of settlement, unaccompanied by procedural change that would provide for robust pre-trial judicial assessment of the merits of claims, has resulted in fewer judicial pronouncements of law and judicial applications of law to facts.[14] Moreover, some have argued that this state of affairs diminishes public confidence in public institutions and leads to stagnation in public law.[15]

Similar arguments have been raised about the values lost when public proceedings and transparency are traded for the arguable convenience and efficiency of private dispute resolution through arbitration. First, privatizing disputes that would otherwise be public may well erode public confidence in public institutions and the judicial process by removing disputes from the public realm. Litigation proceedings in court enable public discussion of governmental and

the Public Realm, 83 GEO. L.J. 2619 (1995); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771 (2008).

4. *See, e.g.*, Galanter, *supra* note 3 at 477-81; J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1721-22 (2012).

5. *See, e.g.*, Fiss, *supra* note 3, at 1089-90; Luban, *supra* note 3, at 2625, 2634, 2639; Resnik, *supra* note 3, at 787, 806-07.

6. *See, e.g.*, Fiss, *supra* note 3, at 1089-90; Luban, *supra* note 3, at 2625, 2634; Resnik, *supra* note 3, at 806-07.

7. *See, e.g.*, Fiss, *supra* note 3, at 1084 (discussing the deterrent effect of the contempt power in relation to consent decrees); Resnik, *supra* note 3, at 805.

8. Fiss, *supra* note 3, at 1080-81; Luban, *supra* note 3, at 2639-40; Resnik, *supra* note 3, at 784.

9. Luban, *supra* note 3, at 2639; Resnik, *supra* note 3, at 787.

10. Fiss, *supra* note 3, at 1078; Resnik, *supra* note 3, at 807-08.

11. Luban, *supra* note 3, at 2625.

12. *Id.* at 2634.

13. *Id.* at 2622-25; *see also* Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004) ("[C]ourts too often rubber-stamp confidentiality orders presented to them.").

14. Glover, *supra* note 4, at 1724, 1738.

15. Luban, *supra* note 3, at 2622-23.

other public affairs; they provide checks against both unfairness to some litigants that may flourish behind closed doors[16] and potentially corrupt practices by attorneys, judicial officers, and litigants.[17] Second, and relatedly, privatizing dispute resolution may undermine the functioning of judicial institutions themselves by decreasing public and private investment in the courts.[18] Third, privatization threatens to impede public awareness of the substantive law, inasmuch as private proceedings frustrate the public's ability to understand the state of the law, how particular laws are interpreted, and how claims are pursued.[19]

There is, however, an additional consequence of the Supreme Court's recent arbitration jurisprudence: it threatens to diminish not just the public realm, but also the public law itself. Whereas the shift from dispute resolution in courts, the public realm, to dispute resolution in arbitration, the private realm, initially undermined the transparency and mechanisms of *adjudication*,

16. Brief for Appellee at 40, Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013) (No. 12-3859), 2013 WL 100597 ("Secret judicial arbitration for businesses can foster suspicion that the law and justice apply differently, with one set of rules (substantive and procedural) and secret justice for wealthy companies, and another set of rules for the rest."); *see also* Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time To Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 487, 490-91 (2006) ("Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs, [which is particularly problematic since] . . . [o]ne-shot participants cannot easily or inexpensively access information concerning arbitrator bias, misconduct, or conflicts of interest necessary for an informed selection of arbitrators.").

17. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286 (2d Cir. 2011); Brief for Appellee, *supra* note 16, at 40, *39-40 (citing Publicker Indus., Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984)); *see also* Resnik, *supra* note 3, at 804 ("Open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power.").

18. Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1801 (2014) ("[T]he rise of . . . outsourcing [dispute resolution] to private providers—wholeheartedly promoted by official voices of the federal judiciary—closes off public access by siting dispute resolution outside of the public sphere. Not only are potential claimants losing knowledge of alleged injuries and the modes of redress, but these new forms of dispute resolution undermine rationales for public and private investments in the lower federal courts.").

19. Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009) ("Privatizing the enforcement of statutory rights erodes those rights, as rights that are not enforced publicly vanish from the public's eye, making the public less educated about the laws governing society and probably less likely to recognize and correct the laws' violations."); *see also* Brief of Amicus Curiae Public Citizen, Inc. in Support of Plaintiff-Appellee, Delaware Coalition for Open Government, Inc. Urging Affirmance at 20, *Strine*, 733 F.3d 510 (No. 12-3859), 2013 WL 175551 ("[W]hen the public does not have access to proceedings in which statutory rights are adjudicated, that lack of understanding of how statutes are interpreted and applied stifles discourse on the utility of those statutes.").

the shift from public lawsuits to private arbitration now also threatens both the transparency and mechanisms of *lawmaking*. These newer threats to the lawmaking function were cemented in the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*.[20] In that case, the Court subtly, but definitively, made a fundamental theoretical shift in its conception of arbitration as a contract for procedures to achieve the efficient resolution of disputes to one of a contract for *any* set of procedures, no matter how onerous to the arbitration of claims. It thereby authorized private parties to use mandatory private arbitration clauses to construct procedural rules that have the foreseeable, indeed possibly intended, consequence of preventing certain claims from being asserted at all,[21] rendering those claims mere nullities. And the disappearance of claims will not be limited to individual would-be litigants, inasmuch as many of the legal claims that arise out of these contractual relationships inure not to a single individual, but to many or all of the various individual signers of the agreements. In other words, this jurisprudence does not merely affect the private disputes of two contracting parties; it diminishes the impact of substantive law on the conduct of contract drafters across wide swaths of the legal landscape. The Court's recent arbitration jurisprudence—one might say its recent arbitration revolution—thus threatens the values of public dispute resolution in a fundamentally new and more dramatic way. Through the procedural device of private arbitration, private parties have the quasi-lawmaking power to write substantive law largely off the books by precluding or severely impeding the assertion of various civil claims. And they can do so almost entirely outside of public view, through commercial (and sometimes confidential) contracts subject to virtually no public scrutiny or regulatory oversight.

This paper unfolds in three parts. Part I explains how the Supreme Court's recent arbitration jurisprudence constitutes a fundamental theoretical shift. In contrast to the Court's long-held vision of arbitration as a mechanism for achieving a cost-effective means of claim resolution outside of judicial fora, the Court has recast arbitration as a purely contractual mechanism through which private parties may craft provisions that provide them with effective immunity from substantive legal obligations. Indeed, given our regulatory system's heavy

20. 133 S. Ct. 2304 (2013).

21. *See, e.g.*, Sabbeth & Vladeck, *supra* note 19, at 803-04 (noting that a wide swath of claims—including Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act of 1938, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Civil Rights Act of 1991—were intended to be enforced by the judiciary but are now frequently required to be arbitrated, given the rise of arbitration agreements in contracts for employment and consumer goods). The Court's recent arbitration jurisprudence in general, and its decision in *Italian Colors*, 133 S. Ct. 2304, in particular, enables and even incentivizes contract drafters to craft their agreements in such a way that these and other statutory rights will go underenforced or unenforced entirely. *See infra* notes 93-103 and accompanying text.

reliance upon private enforcement of substantive law,[22] arbitration agreements can be used to render substantive law virtually inapplicable to the primary conduct of the drafter of that arbitration agreement. Part II analyzes the ways in which the Court's recent jurisprudence threatens conceptions of both the law-making function and the substantive law itself, raising fundamental questions about what private parties may do, and what publicly accountable bodies alone should do. Part II also explains how this method of legal reform is largely hidden from public view and, partly because of that lack of transparency, why the effects of the Court's recent arbitration jurisprudence are unlikely to be undone. Part III concludes that, currently, the power of private parties to control substantive legal obligations stands largely unchecked, leaving little to stop the erosion of substantive law.

I. DISAPPEARING CLAIMS: THE SUPREME COURT'S NEW ARBITRATION REVOLUTION

The Court's early arbitration jurisprudence ushered in a sea change in dispute resolution, moving vast swaths of cases from the public realm—the courts—to a private one—arbitration. Part I.A briefly traces this early rise of binding arbitration agreements, as sanctioned by the Supreme Court beginning in the 1980s. The vast expansion of privatized dispute resolution that came in the wake of this jurisprudence was revolutionary, particularly insofar as it led to a significant erosion of the public realm at the behest of private arbitration contracts. This change, however, was justified by two related and critical premises: first, that freedom of contract facilitated arbitration proceedings, and second, that arbitration proceedings constituted an efficient, cost-effective means for enforcing federal substantive law. Indeed, the Court had long suggested, if not expressly held, that this freedom of contract over the locus and mechanisms of adjudication did not stretch so far as to supersede substantive law.[23] In other words, if freedom of contract and the enforcement of substan-

22. *See* Glover, *supra* note 2, at 1147-60 (discussing the role of private litigants as primary enforcers of a host of legislative directives–for example, antitrust laws, securities law, civil rights laws – and the paucity of public enforcement of those same statutes).

23. When referring to substantive law in this piece, my focus is largely on statutory law for two reasons. First, the Court's recent arbitration jurisprudence represents a clear departure from its repeatedly-articulated reluctance to apply the Federal Arbitration Act in a way that would prevent the vindication of statutory claims. Second, the erosion of statutory law through private contract enabled by this recent jurisprudence puts squarely into focus questions regarding what private contracting parties may do and what public legislatures alone must do. This focus, however, does not exclude the reality that the Supreme Court's recent jurisprudence could also erode all substantive law—common law included—in unobserved and largely unobservable ways. *See infra* Part II.A.

tive rights through arbitration came into tension, then freedom of contract would yield. An arbitration contract that eliminated the enforcement of substantive law would not stand.[24]

As Part I.B describes, however, when freedom of contract and the enforcement of substantive rights through arbitration did come into inevitable tension, the Court resolved that tension in precisely the opposite way. In *American Express v. Italian Colors*, the Court essentially permitted, even incentivized, private parties drafting arbitration contracts to do so in a way that allowed them to reduce or even eliminate their obligations under substantive law.[25] In so doing, the Court has effectuated what one might call a second arbitration revolution: by handing this quasi-lawmaking power to private parties and by reducing substantive statutory rights to mere formalities – to little more than empty rights[26] – the Court has eroded the substantive law itself.

A. The Rise of Arbitration Agreements To Facilitate the Resolution of Disputes in Private Fora

The rise of binding arbitration clauses in private contracts has been well traced.[27] To summarize briefly, in response to a period of "hostility" by the federal courts[28] toward private arbitration agreements, Congress passed the Fed-

24. As the Court wrote in *Mitsubishi Motors*, if 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." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985).

25. *See infra* Part II.A..

26. Here I refer to the notion that rights without remedies ("*ubi jus ibi remedium*"), or effective remedies, are empty rights. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 20 (J.W. Gough ed., Basil Blackwell Oxford 1946) ("[W]here an appeal to the law and constituted judges lies open, but the remedy is denied by a manifest perverting of justice . . . to protect or indemnify the violence or injuries of some men or party of men, there it is hard to imagine anything but a state of war. For . . . it is still violence and injury, however coloured with the name, pretences, or forms of law . . . ."). To be clear, I argue that the "perverting of justice" along these lines is not "manifest," but is in fact deeply concealed. My view is that stealth perversion of justice is just as bad as manifest injustice, or perhaps in some ways worse, because manifest injustice can provoke a political backlash whereas stealth injustice does not. *See infra* Part II.

27. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 393-95 (2005); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1740-42 (2006); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1136-37 (2006).

28. Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 215 (2000).

eral Arbitration Act (FAA) in 1925, providing that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[29] Corporations and businesses in the United States did not initially use arbitration agreements to require employees, consumers, franchisees, or other parties typically understood to stand in weaker bargaining positions to resolve disputes through private arbitration, and the legislative history of the FAA indicates that the bill's supporters likely did not intend for it to cover such agreements, but rather to cover negotiated agreements between merchants.[30] Early Supreme Court jurisprudence on the issue likewise indicated that the Court would not apply arbitration clauses in contracts of adhesion against consumers and employees[31] — in other words, where parties to a given contract were differently and unequally situated vis-à-vis bargaining power.[32] In addition, the Court expressed hesitation about applying arbitration agreements when federal statutory rights were at issue.[33]

29. 9 U.S.C. § 2 (2012).

30. *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W.H.H. Piatt) (assuring Senator Sterling that the FAA was not intended to "be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it"); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV 183 (noting that Congress likely meant to exclude employment contracts under FAA section 1); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 (1997) at 76-77 (pointing out that the legislative history of the FAA makes clear that it was not intended to cover contracts of adhesion at all); Jean R. Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 U. KAN. L. REV. 273, 310-13 (1999) (noting that the FAA's legislative history reflects legislators' concern that arbitration not be imposed through non-negotiable contracts of adhesion in the employment or insurance context).

31. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 437-38 (1953).

32. *Id.* at 435 ("While a buyer and seller of securities, under some circumstances, may deal at arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor," and "[e]ven though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings."); *see also* Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520, 526 (9th Cir. 1986) (noting that a major "consideration at play in [*Wilko*] . . . was the bargaining posture of the parties"); Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc., 558 F.2d 831, 835 (7th Cir. 1977).

33. In *Wilko*, the Supreme Court held that claims under the Securities Act of 1933, 15 U.S.C. §§ 711-77aa (2012), were not subject to arbitration. *Wilko*, 346 U.S. at 433-34, 438 (finding that "in so far as the award in arbitration may be affected by legal requirements, statutes or common law, rather than by considerations of fairness, the provisions of the Securities Act control").

The Court changed its views quite dramatically in the 1980s, when it first issued its now oft-quoted proclamation that the FAA evidences a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[34] In a series of cases, the Supreme Court abandoned its prior skepticism regarding arbitration of federal claims and held that arbitration agreements could be enforced with respect to a broad range of federal statutes: against consumers seeking to vindicate federal antitrust laws,[35] investors seeking to vindicate the securities laws,[36] and employees seeking to vindicate federal anti-discrimination laws.[37] Since then, the Court has further expanded the FAA, holding that all federal statutory claims are arbitrable unless Congress has expressly provided to the contrary, which it has done in only the rarest of circumstances.[38] As a result of the Court's expansion of the FAA, arbitration agreements proliferated,[39] appearing in form contracts, mail inserts, shrink-wrap licenses,[40] and the like, and requiring consumers,

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

35. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628-29 (1985).

36. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989).

37. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991).

38. *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669-671 (2012) (refusing to read the Credit Repair Organization Act's nonwaiver provision, 15 U.S.C. § 1679f(a), as a "congressional command" that the FAA did not apply).

39. The actual form of arbitration clauses also has changed substantially during the last twenty years. While the FAA mandates that arbitration agreements be written, it does not require that they be signed to be enforceable. *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 57-59, 73-74 (2004) (focusing on industries that provided what the authors deemed "important purchases" [e.g. transactions that were expensive, such as automobile purchases], ongoing [e.g. long distance telephone service], or that had potentially large social impacts [e.g. health care services] and noting that, unsurprisingly, these industries began including arbitration agreements in documents that, while sent to consumers, were not of the types usually read or signed). U.S. businesses have included arbitration agreements in small print notices sent to consumers already bound to contracts, in envelope stuffers, *see, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir. 2003) (finding unconscionable an arbitration clause imposed on telephone consumers via envelope stuffers), in warranties contained in boxes, *see* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1151 (7th Cir. 1997) (upholding an arbitration clause imposed upon consumers via a warranty brochure in the computer box), on websites, *see, e.g.*, *Dell's Online Policies: U.S. Terms & Conditions of Sale*, DELL INC. (2015), http://www.dell.com/content/topics/global.aspx/policy/en/policy?c=us&l=en&s=gen&~section=012 [http://perma.cc/7A47-7GKTB], and in e-mail communications, *see, e.g.*, Campbell v. Gen. Dynamics Gov't Sys. Corp., 321 F. Supp. 2d 142, 149 (D. Mass. 2004) (finding e-mail notification insufficient to require employees to resolve disputes in binding arbitration).

40. *See, e.g.*, *Hill*, 105 F.3d at 1148.

employees, patients, and others to resolve any potential claims through private arbitration rather than through the courts.[41]

The Court's expansion of arbitrability rested on a particular conception of private arbitration as a cost-efficient, expeditious, and therefore effective procedural means of determining whether federal law had been violated. This critical premise—that arbitration served merely as an alternative mechanism for dispute proceedings and claim resolution, and thus that the freedom to craft arbitration contracts was simply a freedom to streamline adjudicative mechanisms—allowed the Court to justify arbitration of federal statutory claims as fully consistent with the enforcement of federal law.[42] This core concept of arbitration as an alternative forum for the resolution of claims appears in some form in virtually all of the Court's early cases expanding the scope of arbitrability. An illustrative case is *Mitsubishi Motors*, which held federal antitrust laws to be arbitrable by emphasizing that the "hallmarks of arbitration" included "streamlined proceedings and expeditious results" and "access to expertise" in the selection of arbitrators.[43] Parties "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of

41. *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 (2005) (noting that the U.S. Supreme Court has approved and even encouraged U.S. companies to use various forms of contracts to bind consumers and the like to binding arbitration).

42. Indeed, one could argue that the text of the Federal Arbitration Act itself so limits these contracts. Specifically, Section 2 of the FAA states that "a 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. . . ." 9 U.S.C. § 2 (emphasis added). The word "settle" suggests that contracts for arbitration are contracts for *resolving* disputes; the effect of the arbitration agreement is thus simply to change the forum in which a dispute is settled or resolved. To the extent a contract for arbitration frustrates or inhibits the resolving or settling of a dispute, that contract arguably falls outside the scope of FAA Section 2.

43. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985). Even before *Mitsubishi*, the Court focused on the streamlined, cost-effective nature of arbitration as a justification for broadening the scope of the FAA. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) (finding that arbitration presented an attractive alternative to "prolonged litigation"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 415 (1967) (recognizing these benefits of arbitration, though refusing to extend the FAA to cases of contractual fraud); Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 379 (1974) (emphasizing arbitrators' superior expertise in a particular industry as relevant to interpreting collective bargaining agreements); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960) (same). *But see* McDonald v. City of W. Branch, 466 U.S. 284, 290 (1984) (expressing concern that while an arbiter might be an expert in the "law of the shop," he was less familiar with the "law of the land").

arbitration."[44] In fact, the Court observed, "it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution."[45] It suggested that a forum-selection clause may be set aside if a party can show that "proceedings in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court."[46] Likewise, *Shearson/American Express, Inc. v. McMahon*, which expanded arbitration to the securities laws, justified the expansion on the ground that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."[47] Indeed, the Court rejected its prior skepticism of arbitration on the grounds that it had underestimated the efficacy of arbitration.

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 agreements as they see fit."[48] As the Court put it repeatedly, arbitration "is a matter of contract," and courts must therefore give effect to the parties' intent.[49] 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."[50] In other words, the Court believed that parties would contract for procedures that streamlined their disputes and resulted in more expeditious proceedings.

44. *Mitsubishi*, 473 U.S. at 628; *accord* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257, 269 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

45. *Mitsubishi*, 473 U.S. at 648 n.14.

46. *Id.* at 632 (internal quotation marks omitted).

47. 482 U.S. 220, 232 (1987).

48. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 458 (2003) (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

49. *See, e.g.*, *Volt Info. Scis.*, 489 U.S. at 485 (quoting Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 582 (1960)).

50. *Mitsubishi*, 473 U.S. at 633.

Normatively, the Court also believed that freedom of contract was essential for arbitration to realize its promise as an efficient dispute resolution mechanism because of the parties' need for procedural "adaptability."[51] As the Court noted in *Mitsubishi*, for example, competitors in the same industry could, if they thought it expeditious, agree to select an industry expert to arbitrate their claims.[52] More generally, parties could adopt procedural rules that were tailored to the nature, stakes, and substance of likely disputes.

The Court's willingness to subject federal statutory claims to private arbitral dispute resolution thus depended on two mutually reinforcing principles: *first*, that arbitration facilitated claim resolution and therefore was fully consistent with the effective enforcement of federal substantive law, and *second*, that parties' freedom to tailor procedures to their specific needs was consistent with—indeed, a necessary condition of—arbitration's effectiveness. As the Court put it in *Mitsubishi*, if parties used arbitration as a way to effectuate a "prospective waiver" of federal statutory rights, then the Court "would have little hesitation in condemning the agreement as against public policy."[53] In short, while the Court was comfortable with the notion that private arbitration would usher in an erosion of the public realm, it was unwilling to empower private parties with the ability to recalibrate the substantive law itself. The Court considered the freedom of contract that parties possessed vis-à-vis arbitration to extend only so far as was necessary to facilitate the resolution of federal claims, not so far as to effectively bar them.

B. The Rise of Arbitration Agreements that Frustrate or Eliminate the Resolution of Claims in Any Forum

These two underpinnings of the Court's arbitration jurisprudence—one, that arbitration is a matter of contract, and two, that arbitration contracts provide a means of efficiently determining whether substantive law has been violated—quickly came under strain. As the Court held arbitration to be permissible across a wide swath of claims, U.S. companies not only increased their usage of arbitration agreements to compel arbitration, but also began using these agreements to tilt the rules of the arbitral forum in their own favor.[54]

51. *Id.*

52. *Id.* ("[A]rbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. Moreover, 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 . . . .").

53. *Id.* at 637 n.19.

54. The fact that contract drafters were using arbitration agreements to tilt the rules of dispute resolution in their favor appeared to be at odds with the Court's jurisprudence on the mat-

This shift has meant establishing procedural rules that do not streamline arbitration, but, if anything, have made it more burdensome and difficult for parties to resolve their claims. For example, businesses have used arbitration agreements in (sometimes successful) efforts to shorten statutes of limitations,[55] restrict discovery,[56] require a claimant to file in a particular and perhaps

ter. *Mitsubishi*, 473 U.S. at 627 ("[C]ourts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." (internal quotation marks omitted)); *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) (reasoning that a party might "seek[] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive"); McDonald v. City of W. Branch, 466 U.S. 284, 291, (1984) (holding that arbitration agreements could not mandate enforcement of contractual rights in lieu of conflicting statutory rights); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 744 (1981) (same); Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (holding that arbitration agreements could not waive statutory rights altogether). In addition, lower courts using unconscionability doctrine frequently called out arbitration contract drafters on such practices. *See, e.g.*, Homa v. Am. Express Co., 558 F.3d 225, 233 (3d Cir. 2009) (holding that a party could not benefit from choice-of-law principles applying state law favorable to class arbitration waivers if the claims at issue were of such low value to preclude individual relief); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1219 (9th Cir. 2008) ("A clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable under Washington law for denying any meaningful remedy." (citing Scott v. Cingular Wireless, 160 Wash. 2d 843, 857 (2007)); Skirchak v. Dynamics Research Corp., 508 F.3d 49, 60 (1st Cir. 2007) (finding that a misrepresentation of a waiver in an arbitration agreement, whether intentional or not, was unconscionable under Massachusetts law); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 984 (9th Cir. 2007) (holding that where the party with "substantially greater bargaining power" misrepresented or pressured customers into signing arbitration agreements, those agreements were unconscionable under California law); Dale v. Comcast Corp., 498 F.3d 1216, 1223-24 (11th Cir. 2007) (holding that circumstances that could invalidate class action waivers included, but were not limited to "the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical [effect] on a company's ability to engage in unchecked market behavior, and related public policy concerns").

55. *Compare* D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 330 (D. Conn. 2011) (upholding arbitration clause in leasing agreement between nightclub and exotic dancers that shortened statute of limitations); *and* Wilks v. Pep Boys, 241 F. Supp. 2d 860, 863 (M.D. Tenn. 2003) (upholding agreement that waived equitable tolling of statute of limitations) *with* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (invaliding an employment clause that imposed a shortened statute of limitations on employees); *and* Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Cal. Ct. App. 1997) (holding shortened statute of limitations clause unconscionable).

56. Generally, arbitration clauses leave discovery to the arbitrator's discretion, but it is well recognized that discovery is less available in arbitration than in litigation. *See* Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (upholding limited discovery under the recognition that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and ex-

distant forum,[57] bar consumers or employees from recovering particular forms of relief,[58] and, most prominently, to preclude plaintiffs from joining together in aggregate litigation through class action waivers.[59] This last restriction on the use of aggregate proceedings in arbitration has consumed the bulk of the Supreme Court's attention in recent years, and through those cases the Court has revolutionized its approach to arbitration in a way that goes well beyond removing claims from public fora. Its new approach erodes substantive law itself by empowering private parties, through contract, to frustrate or altogether eliminate claiming in any forum, and thereby to rewrite the scope of their obligations under substantive law.

The Court's resolution of the particular issue of the enforceability of class action waivers is now well known. To summarize briefly, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[60] the Court took its first step by holding that arbitrators "exceeded their powers" under § 10(a) of the FAA by imposing class arbitration even though the parties' agreement was "silent" on the issue – a silence the Court interpreted as an absence of agreement on the availability of class arbitration procedures.[61] Then, two years later, in *AT&T Mobility LLC v. Concepcion*,[62] the Court held that the FAA preempts state laws that "condition[]

pedition'"); Sternlight, *supra* note 41, at 1641 n.51. A few courts have held unenforceable arbitration clauses that unduly limit access to essential documents and witnesses. *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 684 (Cal. 2000).

57. *Compare* Zaborowski v. MHN Gov't Servs., Inc., 936 F. Supp. 2d 1145, 1156 (N.D. Cal. 2013) (upholding forum selection clause that forced consultant-employees from Hawaii, Kentucky, and Nevada to undergo arbitration in San Francisco), *with* Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563, 565-67 (Cal. Ct. App. 1993) (refusing to enforce an arbitration clause imposed by a financing organization upon California consumers that required arbitration to be heard in Minneapolis, noting that, though such a procedure might be fair if applied to a business entity, it was not necessarily just when applied to consumers); *and* Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 571-75 (N.Y. App. Div. 1998) (finding unconscionable an arbitration agreement that required nationwide consumers to arbitrate claims in Chicago).

58. *See, e.g.*, Anderson v. Comcast Corp, 500 F.3d 66, 75 (1st Cir. 2007) (refusing to sever arbitration provision in consumer agreement prohibiting multiple damages); *cf.* Larry's United Super, Inc. v. Werries, 253 F.3d 1083, 1086-87 (8th Cir. 2001) (holding that validity of damages limitation in business arbitration agreement was for arbitrator to decide). *But see, e.g.*, *Circuit City,* 279 F.3d at 893-94 (finding unconscionable an arbitration provision imposed on employees in part because it limited the amount of damages and front and back pay).

59. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011); Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2005); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 864 (Cal. Ct. App. 2002).

60. 559 U.S. 662 (2010).

61. *Id.* at 699.

62. 131 S. Ct. at 1749.

the enforceability of arbitration agreements on the availability of classwide arbitration procedures." The Court specifically ruled that the FAA preempted California's *Discover Bank* rule, which prohibited class arbitration waivers in consumer contracts of adhesion, where likely disputes involved small amounts of damages and a party of superior bargaining power schemed to deliberately cheat consumers out of small sums of money.[63] The *coup de grace* was the Court's decision two terms ago in *American Express Co. v. Italian Colors Restaurant*.[64] In that case, the Court held that the parties' waiver of class arbitration procedures was enforceable under the FAA even though the plaintiffs' claims would be prohibitively expensive to bring on an individual basis.[65]

While the Court's anti-class arbitration stance is by now well understood and fiercely debated by scholars,[66] less well appreciated is the fundamental theoretical shift—one that extends well beyond the class action mechanism itself—that these more recent arbitration decisions reflect. This latest shift can be thought of as having two interrelated parts. First, the Court's substantive conception of arbitration as an expeditious, streamlined, and cost-effective dispute resolution process yielded to a reductionist view of arbitration as a contract for *any* form of private dispute resolution, whose procedures are entirely subject to the parties' bargaining, no matter how ineffective in resolving the parties' disputes those procedures may be and (virtually[67]) no matter what burdens they

63. *Id.* at 1744-46.

64. 133 S. Ct. 2304 (2013).

65. *Id.*

66. For examples of articles critical of the Supreme Court's hostility to class arbitration, see Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL'Y 73 (2011); David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 680 (2012); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011); and Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 726 (2012). For a contrary view, see Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 630 (2012), which claims that these "critics should be significantly mollified by the monitoring function" that state attorneys general might come to play in the absence of a class dispute resolution mechanism.

67. There are remnants of restrictions imposed by lower courts upon arbitration agreements of what scholars have deemed the "first-generation" sort—agreements that impose draconian conditions upon arbitration (such as requiring dispute resolution in a far-flung forum). *See, e.g.*, Arnold v. Goldstar Fin. Sys., Inc., 2002 U.S. Dist. LEXIS 15564, at *32-36 (N.D. Ill. Aug. 20, 2002) (finding an arbitration clause that would require financially distressed customers to travel from Illinois to Florida unenforceable); *see also* Cole v. Burns Int'l Sec. Servs., Inc., 105 F.3d 1465, 1482 (D.C. Cir. 1997) (holding similar provisions in an employee contract unenforceable). These restrictions frequently are imposed under state doctrines of unconscionability law. *See, e.g.*, Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1292-94 (9th Cir. 2006) (finding that an arbitration agreement that imposed unreasonable costs on a California fran-

may impose on one party or the other. Second, the Court's recent arbitration jurisprudence ushered in a fundamental shift in the normative prerogatives that had long underlain its 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 of obligations under substantive law.[68] Specifically, over the last five years, the Court jettisoned the notion, expressed in a number of prior opinions,[69] that arbitration contracts would be struck down if they impaired parties' ability to bring federal statutory claims. In so doing, the Court reduced federal substantive causes of action to mere formalities.

1. *The Shift from Arbitration as a Form of Streamlined Proceedings for Dispute Resolution to Solely a Matter of Contract*

Regarding the Court's substantive conception of arbitration, the Court's shift away from arbitration as a resolution-facilitative form of dispute resolution to arbitration as *pure* freedom of contract—freedom of contract divorced from the claim-facilitative function critical to the Court's earlier arbitration jurisprudence[70]—has its seeds in *Stolt-Nielsen* and *Concepcion*, but it culminated

chisee by requiring her to arbitrate her claims in Massachusetts might be unconscionable under California law and remanding to the district court); Willis v. Nationwide Debt Settlement Grp., 878 F. Supp. 2d 1208, 1220-21 (D. Or. 2012) (finding a forum selection provision requiring plaintiffs to bring their claims in California unconscionable under Oregon law); D.R. Horton, Inc. v. Green, 96 P.3d 1159 (Nev. 2004) (finding a penalty for refusing to arbitrate and fee-splitting provisions unconscionable under Nevada law); *see also* Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 271 (3d Cir. 2003) (refusing to sever numerous unconscionable provisions that violated Virgin Islands contract law). Whether such "first-generation" type clauses can be restricted in this way is arguably an open question, particularly after *AT&T Mobility v. Concepcion*. *See* Peter Coffman, *Pendulum Still Swinging on Consumer Arbitration Clauses*, THOMSON REUTERS NEWS & INSIGHTS (July 10, 2012), http://newsandinsight.thomsonreuters.com/Legal/Insight/2012/07_-_July/Pendulum_still_swinging_on_consumer_arbitration_clauses [https://perma.cc/AH7N-94RA?type=pdf] ("[A]ssuming that the arbitration clause is prominently displayed and substantively even-handed, it should be fine under *Concepcion*. It should not have to lean heavily in favor of the consumer and cases holding otherwise are likely unsound . . . . But, sound or unsound, such a clause may still be a lightning rod to lower courts, and most businesses would rather not be the test case.").

68. *See infra* note 92 and accompanying text.

69. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("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. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.").

70. *See supra* Part I.

in *Italian Colors*. In *Stolt-Nielsen*, the Court interpreted the parties' stipulation that the agreement was "silent" as an acknowledgement that the parties had not agreed to class arbitration procedures and then went on to hold that, absent explicit agreement to arbitrate on a classwide basis, parties could not be compelled to do so.[71] The Court's strained interpretation of the stipulation gave it a platform to reaffirm the contractual nature of arbitration as "a matter of consent, not coercion."[72] It also gave the Court an opportunity, in the guise of discussing the arbitrator's imposition of "policy choice[s]"[73] on unwilling parties, to set out the Court's own policy objections against class arbitration procedures.[74] Indeed, the Court suggested in a somewhat cryptic footnote that class arbitration was objectionable even in the context of "negative value" claims that would not be economical to bring without the benefit of a class procedure.[75] However, the uncoupling of freedom of contract and claim facilitation was not fully achieved in *Stolt-Nielsen*: it was a narrow decision that hinged on

71. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010). The Court went on at length about the ways in which class-wide proceedings were fundamentally at odds with the nature of arbitration:

> Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties . . . . Under the Class Rules [of the American Arbitration Association], 'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations 'shall not apply in class arbitrations,' . . . thus potentially frustrating the parties' assumptions when they agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well . . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, . . . even though the scope of judicial review is much more limited . . . . We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings. The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what 'procedural mode' was available to present AnimalFeeds' claims . . . . If the question were that simple, there would be no need to consider the parties' intent with respect to class arbitration. . . . But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties *agreed to authorize* class arbitration.
>
> *Id.* at 686-87 (internal citations omitted).

72. *Id.* at 681 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

73. *Id.* at 677.

74. *Id.* at 673-75, 686-87.

75. *Id.* at 675 n.7 (internal citation omitted).

the parties' stipulation,[76] and the Court appeared to leave open the possibility that class procedures could be presumed in arbitration pursuant to a background principle of state contract law.[77]

The Court took a further step toward a vision of arbitration as pure freedom of contract, regardless of whether arbitration served as an efficient mechanism for resolving claims, in *AT&T Mobility LLC v. Concepcion*.[78] Nonetheless, as a rhetorical matter, the Court continued to view freedom of contract and streamlined, efficient proceedings for resolving claims as mutually reinforcing, stating that "[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*."[79] And it reiterated that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."[80] Indeed, the Court continued to suggest that it was operating under a baseline presumption that the occurrence of some form of proceedings—even if these proceedings took place in the private realm of arbitration—was the purpose that private arbitration was intended to serve. But in holding that California's *Discover Bank* rule was preempted,[81] the Court suggested through its reasoning that freedom of contract would trump any interest that the parties had in facilitating streamlined proceedings, or any interest that the parties had in having any proceedings whatsoever. In response to the dissent's concern that the holding in *Concepcion* would prevent many plaintiffs from pursuing small-value claims,[82] the Court responded that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for *unrelated* reasons."[83] By dismissing as "unrelated" to the FAA the interest in facilitating the pursuit of small-value claims, the Court's dicta augured a shift in the Court's view of the FAA's policies as en-

76. The Court narrowed *Stolt-Nielson* to its facts in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069 (2013).

77. *Stolt-Nielsen*, 559 U.S. at 687 n.10 ("We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.").

78. 131 S. Ct. 1740 (2011).

79. *Id.* at 1748 (emphasis added).

80. *Id.* at 1749.

81. The *Discover Bank* rule prohibited class-action waivers in contracts of adhesion where "disputes between the contracting parties predictably involve small amounts of damages, and . . . it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." *Id.* at 1746 (quoting Discover Bank v. Superior Court, 36 Cal. 4th 148, 162-63 (2005)).

82. *Id.* at 1753 ("The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.").

83. *Id.* (emphasis added).

forcing the parties' contractual choices, regardless of whether they resulted in "efficient, streamlined procedures" or, quite to the contrary, procedures that were onerous to the point of effectively extinguishing claims.

In *Italian Colors*, the tension between freedom of contract and efficient claim-facilitating procedures reached its breaking point, and the Court resolved it squarely in favor of pure freedom of contract. The case came to the Court with a factual record demonstrating that because the parties had waived class arbitration procedures, it would be uneconomical for the vast majority of American Express's merchants to assert an individual antitrust claim.[84] The maximum value of the merchants' claims was approximately $12,850, or $38,500 after trebling, while the estimated cost of an antitrust economist's expert report was many times that amount—up to $1 million.[85] Consequently, far from being an "efficient, streamlined" arbitration procedure that facilitated the efficient resolution of disputes, the parties' arbitration made those claims wholly uneconomical to bring.[86] There would, under the arbitration contract at issue, be *no* proceedings.[87]

The Court's answer was that the FAA mandates that courts "rigorously enforce"[88] the parties' agreement as written, pure and simple, and that it was "[t]oo darn bad"[89] (in the words of Justice Kagan's dissent) that the procedures under that contract would, instead of facilitating the efficient resolution of claims, effectively preclude plaintiffs from bringing their claims. There was no mention—as there had been as recently as two years earlier in *Concepcion*—of the point that the FAA's purpose was to enforce the parties' agreement "so as to facilitate streamlined proceedings."[90] Nor was there any reprise of *Concepcion*'s statement that the "point" of contractual freedom "is to allow for efficient, streamlined procedures *tailored to the type of dispute*."[91] The Court in *Ital-*

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

85. *Id.* at 2308.

86. *See id.* at 2313 (Thomas, J., concurring) (noting that the claims might be "economically infeasible").

87. Such an effect would not be limited to antitrust claims. For instance, claims under the Fair Labor Standards Act (FLSA) systematically tend to generate low-value claims because of the nature of its protected class: wage and hour employees. *See* Philip L. Bartlett II, *Disparate Treatment: How Income Can Affect the Level of Employer Compliance with Employment Statutes*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 419, 474-75 & n.260 (2001). As a consequence, "mechanisms that facilitate the economics of claiming are required" to bring about private enforcement of the FLSA. Glover, *supra* note 2, at 1184 (2012).

88. *Italian Colors*, 133 S. Ct. at 2309.

89. *Id.* at 2313 (Kagan, J., dissenting).

90. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

91. *Id.* at 1749 (emphasis added).

ian Colors thus subtly but definitively abandoned its 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[92] and, accordingly, effective enforcement of the federal statutory regime. In its place, the Court adopted a reductionist vision of arbitration as *any* set of private dispute resolution procedures chosen by the parties, no matter how onerous or inefficient, and it held that the FAA required courts to enforce whatever terms the parties chose. The Court's decision therefore marked the end of arbitration as we know it. Its jurisprudence had fully evolved from one that had eroded the public realm to one that now also eroded the substantive law.

2. *The Supreme Court's Rejection of the "Effective Vindication" of Rights Principle*

The Supreme Court's decision in *Italian Colors* also effectuated a second, concomitant shift in its arbitration jurisprudence. In expanding the FAA to federal statutory claims, the Court had strongly suggested, if not squarely held, that the FAA's pro-arbitration policies would yield if they frustrated the "effective vindication"[93] of federal statutory rights. This was not stray dicta. The Court reiterated the point repeatedly in cases as recently as 2009.[94] Implicit in the Court's suggestion was that private dispute resolution procedures making

92. 9. U.S.C. § 2 (2012); *see also supra* note 43.

93. The "effective-vindication" principle was understood as a "narrow, but essential safety valve" for ensuring that the "FAA's broad policy in favor of arbitration does not eviscerate more specific federal statutory rights." Brief of Respondents at 13, Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (No. 12-133). Under the rule, arbitration agreements could not preclude statutory causes of action altogether. *Id.*

94. 14 Penn Plaza v. Pyett, 556 U.S. 247, 273 (2009); *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91-92 (2000) (stating that arbitration agreements are enforceable "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (same). Lower courts had explicitly applied this principle as well. Kristian v. Comcast Corp., 446 F.3d 25, 37 (1st Cir. 2006) ("Unless the arbitral forum provided by a given agreement provides for the fair and adequate enforcement of a party's statutory rights, the arbitral forum runs afoul of [the] presumption [that arbitration is an adequate judicial substitute] and loses its claim as a valid alternative to traditional litigation."); *see also In re* Am. Exp. Merchs.' Litig., 667 F.3d 204, 213 (2d Cir. 2012) (noting that "a vindication of statutory rights analysis[] is part of the federal substantive law of arbitrability"); Hadnot v. Bay, Ltd., 344 F.3d 474, 478 n.14 (5th Cir. 2003) (severing part of arbitration clause that proscribed damages available under the statutory scheme); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (holding that "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable" and language insulating employer from damages and equitable relief rendered clause unenforceable).

it effectively impracticable for plaintiffs to bring federal statutory claims would offend the underlying federal statutory regime.[95] Under the "effective vindication" view, a federal statutory cause of action is not merely a formal right, but rather a right that calls for resolution and, if appropriate, a remedy.[96] Because of the public interest in the enforcement of federal statutes, federal substantive law implicitly forbids private agreements with the effect of frustrating claims. As a result, harmonization of federal substantive law and the FAA requires that the FAA yield when the parties' arbitration agreement effectively prevents the vindication of federal statutory rights.

In *Italian Colors*, the Court all but eliminated this "effective vindication" principle. That principle, the Court said, had nothing to do with whether the parties' arbitration agreement left the plaintiff with a practical means to pursue a federal statutory claim. Rather, the Court emphasized, that principle forbids only "prospective waiver[s] of a party's *right to pursue* statutory remedies."[97] In practical terms, then, the only type of provision the Court would acknowledge as being covered by this prohibition was a naked exculpatory clause, which is a provision "forbidding the assertion of certain statutory rights."[98] The Court also said that the principle "would perhaps" cover filing and administrative fees that are so high as to make access to the arbitral forum impracticable.[99] But its equivocation on the latter point appeared to reflect at most a grudging acceptance of the Court's prior dictum to that effect in *Green Tree Financial Corp. v. Randolph*,[100] and possibly even a willingness to retreat from that dictum in the future.

The Court's evisceration of the "effective vindication" principle reflects a critical conceptual move. In abandoning the idea that arbitration agreements cannot impair parties' practical ability to bring federal statutory claims, the Court effectively reduced federal substantive causes of action to mere formalities. In the Court's words, federal statutes "do not guarantee an affordable procedural path to the vindication of every claim."[101] "[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute

95. *See supra* note 80 and accompanying text.

96. *See supra* note 26.

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

98. *Id.* at 2310-11.

99 *Id*. at 2310.

100. 531 U.S. 79, 90 (2000) (leaving open the possibility that "large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum," though it found the litigant had failed to produce enough evidence to render the arbitration clause at issue unenforceable).

101. *Italian Colors*, 133 S. Ct. at 2309.

the elimination of the *right to pursue* that remedy."[102] Here, the Court effectuated a subtle, but quite significant shift in lawmaking power. Specifically, in *Italian Colors*, the Court placed the power to craft potential plaintiffs' path to vindication of substantive rights, and by extension, power over the substantive law itself, not in the hands of public lawmaking bodies, but in the hands of private, would-be defendants.

Thus, in one fell swoop, *Italian Colors* obliterated the twin conceptual pillars that had served to justify the Court's expansion of the FAA to federal statutory rights over the preceding three decades. The FAA's policy of enforcing arbitration agreements "according to their terms" is no longer limited by the overriding purpose of facilitating more cost-efficient and streamlined proceedings, and hence more expeditious private enforcement of federal law.[103] Rather, the FAA now stands for pure procedural freedom of contract. And because the Court has now held that federal law provides mere formal rights, not procedural guarantees, the parties' arbitration procedures must be enforced even when they have the purpose and predictable effect of depriving a party of the realistic means to enforce federal law.

II. THE SUPREME COURT'S ARBITRATION REVOLUTION AND THE EROSION OF THE SUBSTANTIVE LAW

The Supreme Court's three-decade-long expansion of private arbitration has long been criticized for achieving what might be called an erosion in the public realm.[104] However, the Supreme Court's recent arbitration jurisprudence goes well beyond the oft-lamented transfer of the enforcement and development of substantive law from a public to a private forum. In fact, this jurisprudence stretches further than achieving what some have described as the near-total disappearance of the class action device.[105] Although the Court's jurispru-

102. *Id.* at 2309-11. There is, of course, a level of irony in the jurisprudence here: on the one hand, the Court's recent arbitration jurisprudence stands for the proposition that federal statutes can be reduced essentially to pure economic transactions, divorced from any policy that would favor vindicating the underlying statutory values (for instance, free competition, non-discrimination, etc.). On the other hand, in *Italian Colors*, the Court explicitly rejected all *economic* arguments that these arbitration clauses are in some cases indistinguishable from explicit ex ante waivers of statutory rights.

103. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011).

104. *See, e.g.*, *supra* notes 21-21 and accompanying text.

105. Brian Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 1616 (2015) (predicting that all businesses will eventually be able to shield themselves from class actions by using class action waivers); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (identifying class waivers as

dence has long been providing private entities with increased discretion to choose the means of enforcing substantive law, the decision in *Italian Colors* signaled a fundamental change. It gave these private entities a power antecedent to enforcement of substantive law—a power more akin to lawmaking itself: Corporations, through arbitration provisions in contracts, can render legal obligations virtually inapplicable to any of the primary conduct associated with those contractual arrangements. In short, corporations now have the power, through contract, effectively to negate substantive law.[106]

As the first part of this Section explains, the power of private parties to calibrate substantive legal obligations, now recognized by the Court, constitutes a significant step toward a largely unobserved and unobservable erosion of substantive law. Private parties can now use provisions in arbitration contracts to severely hinder or eliminate any claims against them under any number of federal statutes.[107] Particularly given the crucial role of private enforcement in the effectuation of substantive legislative directives,[108] the potential—and even the intent—of these contractual provisions is to erode these substantive laws from the books, with neither legislative repeal nor judicial imprimatur via statutory interpretation. Because this erosion of substantive law is frequently achieved

part of a "new set of tools powerful enough to imperil the very viability of class actions in many—actually, most—areas of the law").

106. To be sure, Congress contemplates some level of non-enforcement when it enacts statutes, and Congress legislates against the reality that some private litigants may, for one reason or another (including procedural costs), choose not to pursue their claims. Against the backdrop of the FAA, which was adopted to further streamline disputes and to make claiming more efficient and cost-effective, the private arbitration provisions sanctioned by the Court in *Italian Colors* turn that backdrop on its head. These private provisions in arbitration contracts—themselves creations not of any lawmaking body, but of private, would-be defendants—create a procedural backdrop of enforcement of substantive law precisely *opposite* that enacted by Congress.

107. Though the claims in *Italian Colors* arose under the Sherman Act, 133 S. Ct. at 2308, the breadth of the holding in that case was not limited to claims under that statute. *Id.* at 2309-11 (explaining that statutory rights may be preserved in name only: "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy"). That decision, combined with the Court's prior holding that arbitration agreements are enforceable even when federal statutory claims are involved, Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987) ("the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights"), means that private parties can achieve the frustration or elimination of claims against them across the panoply of federal statutes.

108. Glover, *supra* note 2, at 1146 (highlighting the importance of private enforcement as "a consequence of deliberate statutory design, and, further, of functional limitations of public regulatory bodies' ability to achieve regulatory objectives"). To be clear, to highlight private parties' primary role in the regulatory landscape is not to deny the existence of public enforcement but to acknowledge the relatively minimal level of enforcement achievable by constrained public agencies.

through trans-substantive, poorly-understood provisions in private contracts of adhesion, it is a particularly unobservable and politically unaccountable method of achieving legal reform.

Given the consequences of this jurisprudence for substantive law, the non-transparent way in which private entities can erode substantive law is troubling for an additional reason. As the second part of this Section explains, though one might expect a great deal of public outcry in response to this jurisprudence, there are a number of obstacles standing in the way of either meaningful public response or meaningful reform. As a result, the Supreme Court's recent arbitration revolution, and the erosion of the substantive law it enabled, is likely here to stay.

A. How the Court's Recent Arbitration Revolution Threatens Substantive Law

In the wake of the Supreme Court's recent arbitration jurisprudence, private parties have significant power to control the scope of their legal obligations, with the effect (and likely intent) of using arbitration agreements to eliminate claims against them. As a consequence, these private arbitration contracts, once understood as mechanisms for efficient resolution of disputes under substantive law, are now instruments in the erosion of that law. Moreover, because these ends are achieved through the use of little-noticed and little-understood procedural provisions in arbitration contracts, these private entities are largely able to hide the exercise of their significant power from the public.

Indeed, the Court's decision in *Italian Colors* dramatically undercuts two related principles: one, that the reworking of substantive law should be achieved by publicly accountable bodies, and two, that public disclosure and concomitant public scrutiny should accompany attempts to effectuate changes in substantive legal obligations. Regarding the former, the wholesale freedom-of-contract view cemented in *Italian Colors* means that companies or other potential defendants interested in limiting their obligations under various consumer protection laws, employment discrimination laws, antitrust laws, and securities laws, for instance, can effectively do so without lobbying Congress or relevant state legislatures for changes to those laws. They can do so even without achieving narrower interpretations of those laws in the courts. Instead, those entities can substantially alter, if not avoid, their legal obligations under any substantive legal regime[109] through contracts containing arbitration clauses that make it extraordinarily unlikely, if not nearly impossible, for the private

109. *See generally supra* note 67 (discussing that the Court's full-throated adoption of a freedom-of-contract interpretation of the FAA means that its opinion in *Italian Colors* is by no means limited to class action waivers).

enforcement apparatus established by those statutes to function.[110] As the Court's opinion in *Italian Colors* makes clear, such provisions are enforceable, period, and the fact that they may make it wholly impracticable for a plaintiff to vindicate its substantive rights is, as Justice Kagan put it in dissent, "too darn bad."[111]

Combine the broad freedom that private entities have been given to craft arbitration contracts as they see fit—regardless of whether the chosen provisions are consistent with the formerly stated arbitration goals of efficient, cost-effective dispute resolution—with the Court's effective reduction of substantive legal obligations to purely formal rights. The troubling reality created by this combination is one in which private corporations are able to achieve, through contract, a nearly *silent* reworking[112] of obligations under substantive law, wholly divorced from public, democratic processes typically associated with public lawmaking and changing.[113] Corporations with the know-how to draft sophisticated arbitration clauses can limit liability without fundraising, political contributions, advertising, petitioning Congress, or any of the normal activities of direct democratic reform. Moreover, because these private arbitration

110. *See* Glover, *supra* note 2, at 1209-10 (discussing Congress's explicit reliance on private litigants for the enforcement of various substantive laws). Of course, there remains the enfeebled but not dead backstop of unconscionability. There may be instances in which unconscionability doctrine could step in, without running afoul of *Concepcion*, to prohibit contractual provisions before such provisions went so far as to run afoul of *American Express* by, say, including statute-specific exculpation clauses.

111. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting).

112. The reworking of substantive law in this way is, as I note, *nearly* silent—nearly for two reasons. First, any reworking of substantive obligations is not totally silent inasmuch as the non-drafting party could (and sometimes would) note the presence of an arbitration clause in the contract. However, the mere presence of such a clause does little to reveal the larger gambit, which is for the contract drafter, in many cases, not to arbitrate disputes, but to eliminate disputes altogether. Second, the contract drafter's substantive legal obligations are not eliminated when arbitration is, in fact, cost-effective for aggrieved individuals who take their claims to arbitration. On that score, I leave to the side the open empirical question about whether there are meaningful differences between an arbitral forum and a court vis-à-vis the resolution of substantive rights in favor of the contract drafter. *See, e.g.*, Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BUS. WEEK (July 19, 2009), http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html [http://perma.cc/E3DL-YMU4] (reporting that the National Arbitration Forum agreed to get out of the credit-card arbitration business after settling lawsuits alleging increased bias towards major credit-card companies in credit card dispute resolution).

113. Moreover, short of a congressional sea change of opinion on the broader issue of whether the law should permit employee, consumer, franchise contracts, and the like to require arbitration and, in particular, one-on-one arbitration, corporations need not even make campaign contributions with the arbitration issue in mind.

contracts are now subject to only the most superficial judicial review,[114] the effect of these clauses in many cases—namely, to recalibrate the extent of a contract drafter's substantive legal obligations under various federal statutes—will not be revealed to the public through judicial opinions. *Italian Colors* is therefore nothing less than a recipe for self-deregulation—a Do-It-Yourself guide for private parties to achieve legal reform through private contracts[115] wholly outside the democratic process. Insofar as many of the chosen contractual provisions have the effect—and, as one would expect from a rational drafting party, the intention—of recalibrating the scope of potential liability under particular substantive statutes, that effect is now achievable with nary a ripple in the water of public consciousness.

Regarding the second principle—that public disclosure and concomitant public scrutiny should accompany attempts to effectuate changes in substantive legal obligations—the decision in *Italian Colors* is equally troubling. In a traditional democratic government, a citizen wanting to reduce or eliminate his or her legal obligations is usually required to do so both in a transparent way, and with the approval of governmental bodies tasked with writing or interpreting substantive laws. The most obvious way to do so is to lobby the legislature to amend or repeal the law that creates the obligation. For instance, many entities have successfully convinced state legislatures to repeal or to refrain from enacting substantive statutes viewed as unfriendly to business,[116] or to amend

114. *See* Federal Arbitration Act, 9 U.S.C. § 1 (2012); Oxford Health Plans v. Sutter, 133 S. Ct. 2064 (2013).

115. For purposes of this piece, I presume, as the Court did even in *Italian Colors*, that federal statutes are not rules around which private parties can contract. *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972) (arguing that inalienability rules properly account for the difficulty of valuing external costs to entitlements, whereas property and liability rules do not).

116. Just last year, businesses successfully lobbied the New York State Legislature to repeal part of the state's Wage Theft Prevention Act, N.Y. LAB. LAW § 195 (McKinney 2014), which formerly required businesses to issue a wage rate notice to employees in the beginning of each year. Governor Cuomo signed the reform, S. 5885-B, into law on December 29, 2014. *See New York Employers Relieved of Annual Wage Theft Prevention Act Notice Requirement*, NAT'L L. REV., Jan. 13, 2015, http://www.natlawreview.com/article/new-york-employers-relieved-annual-wage-theft-prevention-act-notice-requirement [http://perma.cc/YS5A-7EJE]. Lobbying efforts have been especially successful at achieving repeals of harmful legislation in the tax arena. For example, businesses in Michigan, including the state's chamber of commerce, effectuated the repeal of a sales tax on services within seventeen hours of its passage. Andrew Ironside, *Omen for Ohio? Michigan's Sales Tax on Service Repealed 17 Hours After Taking Effect*, INNOVATION OHIO (Mar. 11, 2013), http://innovationohio.org/2013/03/11/omen-for-ohio-michigans-sales-tax-on-service-repealed-17-hours-after-taking-effect [http://perma.cc/Z972-NNAV]; *Michigan Chamber Calls on Policymakers To Reject Sales Tax on Services*, MICH. CHAMBER (Dec. 12,

existing statutes to limit the extent of liability under them by adding, for instance, damages caps and the like.[117] However normatively troubling (or not) one finds such legal changes, they were ultimately brought about by traditional lawmaking bodies and achieved through processes that yielded public information both about these changes and about the parties responsible for effectuating them. Such transparency at least theoretically invites public scrutiny at the ballot box.

Alternatively, persons or entities dissatisfied with the contours of their obligations under substantive law, particularly insofar as those obligations arise from judge-made rules or judicial interpretations of a given statute or provi-

2014), http://michamber.mediaroom.com/index.php?s=19845&item=137208 [http://perma.cc/4MCZ-Y46W]. The Minnesota Chamber of Commerce lobbied successfully for the repeal of three sales taxes on business-to-business transactions. *Business Taxes Repealed!*, MINN. CHAMBER COMM. (Jan. 29, 2015), https://www.mnchamber.com/advocate/business-taxes-repealed [https://perma.cc/W459-3SGD]. And, finally, the North Carolina Chamber successfully lobbied for the repeal of a local privilege tax. *2014 NC Chamber Annual Report*, N.C. CHAMBER 7 (2014), http://ncchamber.net/wp-content/uploads/2014/12/NC-Chamber-14-01-Annual-Report-2014-LR.pdf [http://perma.cc/HFR6-LT8M]. Further, businesses across the country have achieved business-friendly legal reform through the lobbying efforts of statewide chambers of commerce—efforts that successfully prevented the passage of laws viewed as harmful to business. *See, e.g.*, *2014 Major Victories,* CAL. CHAMBER COMM., http://www.calchamber.com/AboutUs/Documents/2014-major-victories.pdf [http://perma.cc/28JB-YQ4S] (noting that SB 1381, a bill that would have tightened and created a private right of action for California labeling requirements, was defeated); *2014 Legislative Victories and Defeats for New Hampshire Business,* BUS. & INDUSTRY ASS'N N.H., http://www.biaofnh.com/newsroom/publications.aspx [http://perma.cc/2ZQR-QKB7] (noting that HB 1403, a bill that would have increased the state minimum wage, died in the Senate); *The Results: The 2013 Lobbying Report of the Texas Legislature 83rd Regular and Special Session*, TEX. ASS'N BUS. 10,(2013) http://www.txbiz.org/advocacy/publications.aspx [http://perma.cc/6BYP-Z5NF] (noting that three bills, HB 318, SB 118, and HB 451, that would have prevented employer access to employee company accounts for "suspicion of conduct contrary to company policy or criminal in nature," were defeated); *2014 Legislative Review*, ASS'N WASH. BUS. (2015), http://www.awb.org/2013voterecord [http://perma.cc/LT9Q-VQSR] (noting that 2SHB 2333, a bill that would have liberalized and imposed criminal liability for alleged anti-retaliation claims against employers, died in the Senate).

117. *See, e.g.*, VA. CODE ANN. § 8.01-581.15 (2014) (providing for a damages cap in medical malpractice actions); 23 OKLA. STAT. tit. 23, § 9.1(B)(2) (2014) (capping punitive damages at one hundred thousand dollars or the amount of actual damages); FAM. CT. ACT § 245(b) (McKinney 2014) (setting compensation caps, provided in N.Y. JUD. LAW § 35 (McKinney 2014), for lawyers who represent indigent children and adults); *NJBIA Legislative Successes*, N.J. BUS. & INDUSTRY ASS'N, http://www.njbia.org/issues-and-advocacy/legsuccess.aspx [http://perma.cc/7H2L-LR4Z] (noting that three bills, A-3050/S-2327, A3123/S-2326, A-3049/S-2328, strengthening corporations' ability to avoid state shareholder derivative suits, were signed into law). Other procedural limitations of liability, such as statutes of limitations, directly, and often intentionally, affect substantive rights. *See generally* Donna A. Boswell, Comment, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action*, 136 U. PA. L. REV. 1447 (1988).

sion, have typically found potential recourse through the courts. Indeed, litigants may argue for any number of things that would decrease their exposure to liability: for narrower interpretations of their obligations under particular statutes, interpretations of statutes that exclude particular enforcers from the litigation landscape,[118] and heightened standards of proof,[119] just to name a few.

Both of these avenues for recalibrating one's obligations under the substantive law—through either the legislative or judicial processes—occur openly, in terms of both public visibility and some measure of democratic accountability. Indeed, the Supreme Court recently highlighted the importance of transparency and public scrutiny in the democratic lawmaking process. Even in what is one of the (arguably) most pro-corporate decisions regarding the democratic process in years, the Court emphasized the importance of subjecting to public scrutiny attempts to effectuate substantive legal change through support of political candidates. In *Citizens United v. Federal Election Commission*,[120] the Court held that bans on independent corporate expenditures on political campaigns are unconstitutional, insofar as such spending is a form of protected speech under the First Amendment. The Court nevertheless made clear that public disclosures were crucial to such an unregulated campaign finance system. First, the Court noted, restricting corporate donations to political campaigns was a relic of a bygone age, of a pre-internet "system without adequate disclosure."[121] Since the informational world had changed, the Court reasoned, bans on con-

118. For example, the "Indirect Purchaser Rule" under federal antitrust law typically prevents indirect purchasers from bringing antitrust actions. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977). Some states have legislated around the rule to give indirect purchasers standing to sue. *See, e.g.*, ALA. CODE § 6-5-60(a) (1975); CAL. BUS. & PROF. CODE § 16750(a) (West 2008); D.C. CODE § 28-4509(a) (2011); 740 ILL. COMP. STAT. ANN. 10/7(2) (West 2010); MICH. COMP. LAWS § 445.778 (2009); MINN. STAT. § 325D.57 (2010); MISS. CODE ANN. § 75-21-9 (1972); N.M. STAT. ANN. § 57-1-3(A) (1978); S.D. CODIFIED LAWS § 37-1-33 (2011); WIS. STAT. § 133.18(1)(a) (2011).

119. Indeed, just this last term, Halliburton challenged a long-standing judicial interpretation of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5. Under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Court had held that investors in a class action could satisfy the reliance element of the Securities Exchange Act of 1934 by invoking a presumption that the price of stock traded in an efficient market. Halliburton challenged the validity and availability of this long-standing presumption, arguing instead that investors should be required to show that alleged misrepresentations had *actually* affected the stock price. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014). While the Court declined Halliburton's invitation to overrule *Basic's* presumption of reliance, it agreed with Halliburton that defendants must be afforded the opportunity to rebut the presumption of reliance prior to the class certification decision with evidence of a lack of price impact. *Id.* at 2414-17.

120. 558 U.S. 310 (2010).

121. *Id.* at 370.

tributions were no longer justifiable on such grounds. Second, the Court went on to discuss the importance of public disclosure of campaign contributions by corporate entities, emphasizing that "disclosure permits citizens . . . to react to the speech of corporate entities in a *proper way*. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[122] Indeed, since such transparency, at least when present,[123] helps enable the public to connect the dots between the legislative interests of given donors with particular legislators—in other words, to discern various entities' interests in effectuating particular legislative goals and/or legal change—the Court satisfied itself that any potential undue influence of such financial contributions on lawmakers or the lawmaking process would be blunted.[124]

The decision in *Italian Colors*, however, created a regime that enables and even incentivizes companies and other defendants to shroud private reform of substantive law in an extraordinarily non-transparent manner by using "merely" procedural provisions. Indeed, the only sort of provision that the Court in *Italian Colors* reaffirmed as unenforceable under the FAA was an explicit exculpatory clause. For instance, an arbitration contract would not survive judicial scrutiny were it to proclaim that "[X Corporation] shall not be liable under [federal statute]." Although such an explicit provision is not included, corporations may be able to achieve virtually the same effect through the procedural back door. *Any* procedural limitation, no matter how draconian, apparently is fair game under the FAA after *Italian Colors*. Indeed, after *Italian Colors*, it would be irrational for legal advisors *not* to insulate their corporate clients from private enforcement of substantive laws in the ways permitted under the Supreme Court's arbitration jurisprudence. And while there may still be limited room for states to limit procedural gamesmanship under unconscionability doctrine, unconscionability law is a highly imperfect tool, as I have explained

122. *Id.* at 371 (emphasis added).

123. I do not mean to overstate the point about transparency in campaign finance law, which by no means guarantees full transparency vis-à-vis the fingerprints behind particular legislation. *See, e.g.*, Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying*, 13 ELECTION L.J. 160 (2014) (noting that unfair and improper influence on legislation by lobbyists and new lobbying practices may call for new laws regulating lobbying and campaign finance activity).

124. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

elsewhere[125]—and it is even more so now in light of the constraints placed on it by the Court in *Concepcion*.[126]

One striking consequence of the Court's decision in *Italian Colors* is therefore that it not only facilitates legal reform through private contracts, but also encourages the reform to take place in such a way as to avoid the public and political spotlight. At least an express exculpatory provision might capture the public's attention were it to appear in an arbitration contract. Ironically, then, from a transparency perspective, precisely such an explicit exculpatory provision could capture the attention of someone signing an arbitration agreement and reveal a company's underlying strategic gambit—that the idea behind these arbitration clauses is not just to move dispute resolution to private fora, but in some instances, to eliminate the possibility of dispute resolution entirely. But if exculpation is buried in the fine print of a maze of difficult-to-understand procedural provisions, then the result is private legal reform largely removed from public scrutiny as well as judicial scrutiny.

Imagine what would have to occur if drafters of arbitration agreements that eliminate class actions for employment discrimination lawsuits were to pursue that reform through the democratic process. They would have to lobby Congress or promote relief in court or—less obviously, but still quite saliently—seek a change in Rule 23 of the Federal Rules of Civil Procedure. Because of the Court's recent arbitration revolution, none of that is necessary. The only paper

125. *See* Glover, *supra* note 4, at 1738 ("[U]nconscionability doctrine is an imperfect tool . . . in that it fails to capture the core concerns attendant to class action waivers.").

126. One exceptional, but notable, source of pushback against the Supreme Court's recent arbitration cases has come from the jurisprudence of Justice Goodwin Liu of the California Supreme Court. Liu has repeatedly narrowed the reach of the Supreme Court's decisions in *Concepcion* and *Italian Colors,* as applied to arbitration class action waivers. Most recently, Liu wrote for the court in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, No. 14-341, Jan. 20, 2015, upholding state law preclusion of waivers of group claims for penalties against an employer under California's Private Attorneys General Act (PAGA), on the basis that a PAGA lawsuit is not the kind of purely private dispute *Concepcion* found preempted by the Federal Arbitration Act. *Id.* at 149. In both *Iskanian* and an earlier putative employment class action, Liu distinguished *Italian Colors* as a case about the harmonization of the FAA with federal law—namely antitrust law—not preemption of state unconscionability rules. *Id.* at 141; Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 209 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014). In *Moreno*, Liu similarly limited *Concepcion's* reach to its own narrow language. Finding that "[s]tate-law rules that do not 'interfere[] with *fundamental attributes of arbitration*' do not implicate *Concepcion*'s limits on state unconscionability rules," Liu created a judicial rule that adhesive arbitration agreements compelling the surrender of certain procedural protections as a condition of employment must provide for an alternative accessible, affordable resolution of wage disputes. *Id.* at 206 (emphasis added). Such a limitation on adhesive contracts that does not get to such "fundamental attributes," Liu argued, is a permissible use of state unconscionability doctrine even after *Concepcion*. *Id*. at 206-07.

trail that corporations leave in their efforts to reduce or eliminate their legal obligations are fine-print contracts of adhesion, which are rarely read by the average consumer or employee, let alone understood as effectively exculpatory for the drafter. The provisions themselves hardly raise a specter of suspicion regarding the corporation's underlying strategic gambit to recalibrate the extent of liability and obligation under various substantive laws. Indeed, had *Italian Colors* allowed corporations to include contractual clauses that explicitly exculpated them from liability under particular laws, at least the public's attention might have been captured. To put the point slightly differently, the Supreme Court's prohibition on blatant exculpatory clauses does little good on this score: were contract drafters to include such explicit provisions, the strategic gambit of recalibrating substantive obligations would be quite obvious, and as such, more likely to incite public backlash. As it stands now, corporations can whittle down their potential liability almost as well with contractual arbitration clauses, and very few contract signers will be the wiser.

B. Why the Supreme Court's Recent Arbitration Revolution and the Erosion of Substantive Law Are Likely Here To Stay

If the Court's arbitration jurisprudence is, as I have contended, a recipe for self-deregulation, largely unchecked by democratic processes, then surely there would be public outcry at the Court's decisions and sustained efforts to undo the damage through statutory amendment.[127] After all, *Stolt-Nielsen*, *Concepcion*, and *Italian Colors* are not constitutional decisions;[128] they interpret the FAA, which Congress is free to change. But the public outcry over these decisions has been muted at best. Yes, there have been some congressional hearings. Yes, Senator Franken reintroduced (yet again) the Arbitration Fairness

127. Alternatively, some have contended that gaps in enforcement of substantive legal obligations could be filled by governmental entities. *See* Gilles & Friedman, *supra* note 66, at 660 ("[S]tate attorneys general—alone among public enforcers—have the ability to fill the void left by class actions, primarily through expanded use of the parens patriae powers that are currently on the books in most states. Parens patriae suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions."). However, as I have noted in prior work, government resources are quite limited, and both Congress and government agencies rely on private parties to serve as "attorneys general" in the enforcement apparatus for a number of substantive rights. *See* Glover, *supra* note 2, at 1151-52.

128. Of course, it might well be said that the Court's recent arbitration cases have a constitutional dimension. As others have argued, the Court's increasing embrace of pure freedom of contract in the arbitration setting is reminiscent of *Lochner*-era due process jurisprudence. *See* Sabbeth & Vladeck, *supra* note 19 at 807.

Act (this time, of 2013).[129] And yes, Congress did discuss the issue seriously during its debates on the Dodd-Frank Act, ultimately deciding to direct the Consumer Financial Protection Bureau (CFPB) to study the issue and to submit a report to back to Congress.[130] But by and large, there has been no serious legislative push to overturn the Court's arbitration jurisprudence. Why?

129. Arbitration Fairness Act, S. 878, 113th Cong. (2013). In fact, despite the Court's ever-broadening interpretations of the FAA in the years after *Wilko v. Swann*, 346 U.S. 427 (1953), interpretations which extended the reach of the Act to various sorts of contracts originally considered off-limits by the bill's signers, the FAA has never been amended. Moreover, the Arbitration Fairness Act (AFA), which constitutes the only attempt to amend the FAA and which has gone through various iterations over the course of the past six years, has never even garnered a single committee vote in either the House or Senate. Other attempts to reform arbitration have met with little more success. Based on a study by Thomas V. Burch, of the 139 bills introduced between 1995 and 2010 related to arbitration, almost all died in committee. Thomas V. Burch, *Regulating Mandatory Arbitration,* 2011 UTAH L. REV. 1309, 1332-33, 1355-76. The few that passed applied only to narrow categories of disputes. *See, e.g.*, Motor Vehicle Franchise Contract Dispute Resolution Process, 15 U.S.C. § 1226 (2012).

130. On March 10, 2015, the CFPB issued the final report of its Arbitration Study. *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROTECTION BUREAU (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [http://perma.cc/R5FX-RX64]. The report set forth a number of findings, including: (1) Arbitration agreements are pervasive, affecting eighty million consumers in the credit card market alone, *id.* at Section 2: How Prevalent Are Pre-Dispute Arbitration Clauses and What Are Their Main Features? 7, fn. 19; (2) approximately 90 percent of arbitration provisions studied expressly prohibit class arbitrations, *id.* at Preliminary 2013 Results 13; (3) arbitration clauses have not produced lower prices for consumers, *see id.* at Section 1: Introduction and Executive Summary 18; (4) consumer understanding of arbitration is minimal—three in four consumers did not know whether they were subject to an arbitration provision and less than seven percent of consumers realized that an arbitration provision meant that they could not sue their credit card issuer in court, *id.* at Section 3: What Do Consumers Understand About Dispute Resolution Systems? 22, 4. The report has generated calls by consumer groups for the CFPB to ban the use of mandatory arbitration agreements in contracts for consumer financial products. *See, e.g.*, Chris Morran, *In the Wake of Arbitration Report, Consumer Advocates Ask CFPB To Revoke Banks' "License To Steal,"* CONSUMERIST (March 10, 2015), http://consumerist.com/2015/03/10/in-wake-of-arbitration-report-consumer-advocates-ask-cfpb-to-revoke-banks-license-to-steal [http://perma.cc/BUJ5-CZYZ]. However, attacks on the CFPB's data began almost immediately after the issuance of the report. *See, e.g.*, Jonathan Lloyd, et al., *The CFPB's Final Report on Pre-Dispute Arbitration Clauses*, JDSUPRA BUS. ADVISOR (March 17, 2015), http://www.jdsupra.com/legalnews/the-cfpbs-final-report-on-pre-dispute-a-96733 [http://perma.cc/D8QZ-C2AV] (advising the consumer financial services industry to rebut the CFPB's findings by identifying flawed or missing data, and pointing out specific data points the CFPB did not "fully consider[]"). Moreover, there may be significant limits—legal and political—to the CFPB's ability to curtail the use of these agreements. For starters, there may be legal challenges to (1) the CFPB's enforcement and rulemaking authority prior to Director Rich Cordray's July 2013 Senate confirmation, *see The Consumer Financial Protection Bureau: Its Foundation, Authorities, and First Year of*

Divided government is, of course, part of the answer. With the Republicans in control of the House of Representatives, the odds of congressional passage of an amendment to the FAA are slim.[131] But part of the answer also lies in

Enforcement, GIBSON DUNN (June 5, 2013), http://www.gibsondunn.com/publications/pages/ConsumerFinancial-ProtectionBureau-Foundation-Authorities-First-Year-of-Enforcement.aspx#_ftn39 [http://perma.cc/N4Q9-BUT8] (observing that, under § 1022 of the Dodd-Frank Act, only a lawfully-appointed director "may prescribe rules, issue orders and guidance"); (2) the constitutional authority of the CFPB to issue rules exempting contracts from the Federal Arbitration Act, *see* Alan Kaplinsky, *CA Federal Court Rejects Challenge to CFPB's Constitutionality*, CFPB MONITOR (Jan. 15, 2014), http://www.cfpbmonitor.com/2014/01/15/ca-federal-court-rejects-challenge-to-cfpbs-constitutionality [http://perma.cc/9U2U-49LD] (noting such a challenge will only be ripe once the CFPB issues final rules banning or regulating arbitration provisions); or (3) the sufficiency of the CFPB's data itself, *see* Alison Frankel, *CFPB Arbitration Study a Powerful Vindication of Consumer Class Actions*, REUTERS (March 10, 2015), http://blogs.reuters.com/alison-frankel/2015/03/10/cfpb-arbitration-study-a-powerful-vindication-of-consumer-class-actions [http://perma.cc/AA6C-W5CW] (interviewing Ballard Spahr's Alan Kaplinsky, who criticized the data's failure to address either the number of non-settled class actions where plaintiffs recovered nothing or how much, in settled cases, individual class members actually recovered); Consumer Financial Services Group, *The CFPB's Final Arbitration Study: What's the Real Story?,* BALLARD SPAHR LLP (March 11, 2015), http://www.ballardspahr.com/alertspublications/legalalerts/2015-03-11-the-cfpbs-final-arbitration-study-whats-the-real-story.aspx [http://perma.cc/XWK4-GH6S] (arguing that, in fact, the CFPB's "study confirms that arbitration does benefit consumers" as a faster, more affordable form of dispute resolution). Moreover, ongoing political challenges to the CFPB's authority include a bill, introduced on March 5, 2015, to change the CFPB's single-director structure to a board with greater congressional oversight. Financial Product Safety Commission Act, H.R. 1266, 114th Cong. (2015).

131. All iterations of the Arbitration Fairness Act (AFA) in both chambers were proposed, and almost exclusively supported, by Democrats. *See* Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013) (proposed by Rep. Hank Johnson, D-GA-4, with no Republican co-sponsors); Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013) (proposed by Sen. Al Franken, D-MN, with twenty-three Democrats and one independent co-sponsoring); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011) (proposed by Rep. Hank Johnson, D-GA-4, with no Republican co-sponsors); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011) (proposed by Sen. Al Franken, D-MN, with sixteen Democrats and one independent co-sponsoring); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (proposed by Rep. Hank Johnson, D-GA-4; only one of 118 co-sponsors was a Republican); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009) (proposed by Sen. Russ Feingold, D-WI, with thirteen Democrats co-sponsoring); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007) (proposed by Rep. Hank Johnson, D-GA-4; 99 of 103 co-sponsors were Democrats),; Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007) (proposed by Sen. Russ Feingold, D-WI, with seven Democrats co-sponsoring). Moreover, Republican skepticism and outright hostility to the AFA has been well documented in committee hearings and in the media. *See, e.g.*, *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the S. Comm. On the Judiciary*, 113th Cong. 43-44 (2013), http://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg89563.pdf [http://perma.cc/M45G-6GN3] (prepared statements of Sens. Grassley and Hatch, both expressing their views that, even with class waivers, arbitration clauses would still be a superior alternative to

the brilliance of pursuing deregulatory reform through the interpretation of the FAA. As William Eskridge found in a landmark study, overriding the Court's statutory decisions is always a difficult business. Even "[t]he Supreme Court's most controversial statutory decisions are usually not overridden because there are strong interest group alignments on both sides of the issues, leaving the Court's decisions firmly intact."[132] But such overrides are virtually impossible if those critical of the Court's decision lack a concentrated political constituency ready to use its clout in the political process. This finding is wholly consistent with a longstanding political science literature recognizing that interest groups with a narrow focus are more politically influential than diffuse groups organized for the achievement of broad goals.[133] Interest groups with an expansive membership and a nebulous focus run the risk that potential members will decide to let someone else advocate for them, hoping to free ride on the efforts of more involved patrons of the group.[134] On the other hand, members of groups with fewer participants and a narrower focus have a greater individual stake in advocating for their goals, meaning that efficacy increases as focus narrows.[135]

These political realities mean that amending the FAA is an extremely difficult political task.[136] To begin with, arbitration is not the kind of thing that the

litigation); *Federal Arbitration Act: Is the Credit Card Industry Using It To Quash Legal Claims?: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 8 (2009), http://judiciary.house.gov/_files/hearings/printers/111th/111-39_49475.PDF [http://perma.cc/SJ8Q-WTS5] (statement of Rep. Darrell Issa, R-CA, opposing the AFA's supposed effort to "preempt[] the ability for companies to offer a contract and individuals to choose that contract"); Mike Sacks, *Arbitration Kickback: Supreme Court's Anti-Consumer Rulings Trigger Democratic Bills*, HUFFINGTON POST (Oct. 20, 2011), http://www.huffingtonpost.com/2011/10/20/arbitration-supreme-court-decisions-democratic-bills_n_1022207.html [http://perma.cc/TEP3-YEWY].

132. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 377 (1991).

133. The foundational text for this assertion is MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971), which began to dominate the discussion of interest groups in America around mid-1970. *See* Iain McLean, *The Divided Legacy of Mancur Olson*, 30 BRIT. J. POL. SCI. 651, 653 (2000).

134. OLSON, *supra* note 133 at 53-65 (discussing the different incentives for action at play in large interest groups with broad interests and smaller interest groups with one-issue goals).

135. *Id.*

136. There have been precious few amendments made to the FAA. *See* Burch, *supra* note 129, at 1334-35 (citing five exceptions where the FAA has been amended: Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, 15 U.S.C. § 1226 (2012) (exempting car dealers from the FAA); John Warner National Defense Authorization Act for Fiscal Year 2007, 10 U.S.C. § 987(f)(4) (2012) (exempting military personnel and their dependents); Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 197c (2012) (exempting parties to livestock and poultry contracts); "Franken Anti-Rape Amendment," Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118 § 8116, 123 Stat. 3409, 3455 (2012) (prohibiting

American public gets worked up about. Its political salience is extremely low. As the Court is fond of saying, arbitration is merely a shift in forum, from the courts to private arbitrators. In theory, it does not affect one's substantive rights; it merely dictates how and by whom those rights will be resolved. Moreover, the FAA is trans-substantive; it does not mention a single, specific substantive statute. And ever since the Court's expansion of the FAA to all federal and state-law claims, it does not relate specifically to any particular political constituency: it covers employees, consumers, and businesses alike, and it covers virtually all substantive legal claims. The fact that the FAA does not, on its face, target any particular group or substantive right means that the Court's arbitration cases were largely shunted to the less salient realm of "procedural" cases, which may have an enormous impact on substantive rights but do not garner the public attention that cases directly involving such rights often do.

The Court's pleading decisions (*Twombly*[137] and *Iqbal*[138]) and its more recent class-action decisions in *Wal-Mart v. Dukes*[139] and *Comcast v. Behrend*[140] are good examples of this phenomenon. As with the Court's arbitration jurisprudence, those decisions were met with hue and cry from some quarters,[141] but they ultimately encountered limited resistance in the democratically elected branches of government. Compare those cases, on the one hand, to cases that directly implicate the substantive rights of a specific group, on the other. In the

government contracts with employers from requiring arbitration of Title VII or sexual harassment claims); and Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2012) (giving the SEC authority to restrict or prohibit mandatory arbitration in the securities context)).

137. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

138. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

139. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

140. Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

141. *See, e.g.*, Myriam Gilles, *Procedure in Eclipse: Group-Based Adjudication in A Post*-Concepcion *Era*, 56 ST. LOUIS U. L.J. 1203, 1221-22 (2012); Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 NW. U. L. REV. COLLOQUY 34, 37 (2011), http://www.northwesternlawreview.org/online/how-goliath-won-future-implications-dukes-v-wal-mart [http://perma.cc/NM2G-E4YL] ("By redefining the class certification requirements for employment discrimination cases in two major areas . . . [this ruling] compromises employees' access to justice."); Resnik, *supra* note 66, at 93 ("*AT&T* and *Wal-Mart* insisted on disaggregation, devolution, and privatization . . . predicated on Justices' own impressionistic senses of both the costs and benefits of using particular procedures. Not much analyzed were constitutional stipulations of courts as constitutional entitlements available to everyone, including litigants of limited means, or the remarkable success courts have had in attracting a high level of demand for and in obtaining a significant amount of public and private investment in their services, or courts' role as contributors to democratic lawmaking."); Brian T. Fitzpatrick, Op-Ed, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON., Nov. 7, 2010, http://www.sfgate.com/opinion/article/Supreme-Court-case-could-end-class-action-suits-3246898.php [http://perma.cc/4GF5-A4C4].

wake of *Ledbetter v. Goodyear Tire & Rubber Co.*,[142] for example, which *explicitly* involved employment discrimination law—in particular, the equal pay provisions of the Civil Rights Act of 1964—public outcry over the decision was so great[143] that Congress enacted the Lilly Ledbetter Fair Pay Act of 2009 to provide that the statute of limitations for filing equal pay claims resets with each new paycheck affected by the employer's discriminatory action.[144] Likewise, the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*,[145] which allows closely held for-profit corporations to obtain religious exemption from providing employees with contraceptives, as mandated by the Affordable Care Act, has led to extraordinary public outcry.[146] It has even led to the introduction of Senate Bill 2578, the Protect Women's Health From Corporate Interference Act.[147]

In 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").[148] On the one hand, repeat-player large corporations and other commer-

142. 550 U.S. 618 (2007) (holding that the statute of limitations for presenting an equal-pay lawsuit begins on the date that the employer makes the initial discriminatory wage decision, not the date of the most recent paycheck).

143. *See, e.g.*, Editorial, *Injustice 5, Justice 4*, N.Y. TIMES, May 31, 2007, http://www.nytimes.com/2007/05/31/opinion/31thu1.html [http://perma.cc/5J65-4WVF] (noting that "[f]ortunately, Congress can amend the law to undo this damaging decision, but it should do so without delay.").

144. S. 181, 111th Cong., 123 Stat. 5 (2009).

145. 134 S. Ct. 2751 (2014).

146. Shortly after the *Hobby Lobby* decision was released, social networking sites like Twitter buzzed with the hashtag "#notmybossbusiness." Andrew Johnson & Molly Wharton, Hobby Lobby *Sparks Twitter Outrage on the Left*, NAT'L REV: CORNER (June 30, 2014, 1:15 PM), http://www.nationalreview.com/corner/381566/hobby-lobby-sparks-twitter-outrage-left-andrew-johnson-molly-wharton [http://perma.cc/WMB8-EYTJ]. Major media outlets warned that the Court's decision could easily jeopardize other substantive rights. *See, e.g.*, Jan Crawford, *Supreme Court's* Hobby Lobby *Decision Could Impact Millions of Women*, CBS NEWS (June 30, 2014), http://www.cbsnews.com/news/supreme-courts-hobby-lobby-decision-could-impact-millions-of-women [http://perma.cc/9FJ9-LU2V]; Emma Margolin, *How* Hobby Lobby *Will Reverberate Throughout the LGBT Community*, MSNBC (July 10, 2014), http://www.msnbc.com/msnbc/hobby-lobby-reverberate-throughout-lgbt-community [http://perma.cc/9SK5-ANNB]; Adam Serwer, *The Potential Horrors of* Hobby Lobby, MSNBC (July 18, 2014), http://www.msnbc.com/msnbc/hobby-lobby-potential-horrors [http://perma.cc/N4G7-DJCU]; Elizabeth Wydra, *Court Helps Companies, Not Humans*, CNN (June 30, 2014), http://www.cnn.com/2014/06/30/opinion/wydra-hobby-lobby-wins-court/index.html?iref=allsearch [http://perma.cc/TXW4-8YVK].

147. S. 2578, 113th Cong. (2014).

148. Eskridge, *supra* note 132, at 348 (discussing which groups are "winners" and "losers" in statutory interpretation battles at the Supreme Court).

cial contract drafters with substantial market power have a vested interest in drafting self-deregulatory clauses and in protecting the interpretation of the FAA that enables them to do so. On the other hand, the impact of those contracts is felt by many members of the public on a wide swath of issues, which actually renders any action by the public against these decisions difficult and unlikely.[149]

The testimony before Congress in hearings on the un-enacted Arbitration Fairness Act of 2007 (AFA) bears out this point. In their testimony, AFA opponents generally expressed blanket support for pre-dispute arbitration clauses. Specifically, their arguments coalesced around the following concentrated arguments and principles: (1) arbitration agreements are voluntary consumer contracts;[150] (2) arbitration is more efficient, flexible, and accessible than litigation;[151] (3) the "little-guy" more often than not prevails, be it through volun-

149. Even if, as Eskridge postulates, "losers" did have enough clout to petition Congress to change the FAA, there is a bias in favor of the status quo. Eskridge, *supra* note 132, at 377 ("The Supreme Court's most controversial statutory decisions are usually not overridden because there are strong interest group alignments on both sides of the issues, leaving the Court's decisions firmly intact.").

150. *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 2-4 (2011) (statement of Christopher R. Drahozal, John M. Rounds Professor of Law, University of Kansas School of Law), http://www.judiciary.senate.gov/imo/media/doc/11-10-13DrahozalTestimony.pdf [http://perma.cc/93QT-CN8V] [hereinafter Drahozal Testimony]; *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 3-4, 10-11 (2011) (statement of Victor E. Schwartz, U.S. Chamber Institute for Legal Reform), http://www.judiciary.senate.gov/imo/media/doc/11-10-13SchwartzTestimony.pdf [http://perma.cc/Z3S2-5U35] [hereinafter Schwartz Testimony]; *S. 1782: The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Const. of the S. Judiciary Committee*, 110th Cong. 2-3 (2007) (statement of Peter B. Rutledge, Associate Professor, Columbus Sch. of Law, Catholic Univ. of America), http://www.judiciary.senate.gov/imo/media/doc/Rutledge%20Testimony%20121207.pdf [http://perma.cc/SC8H-NMGT] [hereinafter Rutledge Testimony].

151. Drahozal Testimony, *supra* note 150, at 10-11; Schwartz Testimony, *supra* note 150, at 5-8; *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 4-14 (2013) (statement of Archis A. Parasharami, Partner, Mayer Brown LLP), http://www.judiciary.senate.gov/imo/media/doc/12-17-13ParasharamiTestimony.pdf [http://perma.cc/Z2YU-5PXQ] [hereinafter Parasharami Testimony]; *S. 1782: The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 110th Cong. 2-3 (2007) (statement of Richard Naimark, Senior Vice President, American Arbitration Association), http://www.judiciary.senate.gov/imo/media/doc/Naimark%20Testimony%20121207.pdf [http://perma.cc/DA6J-35JJ] [hereinafter Naimark Testimony]; *S. 1782: The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 110th Cong. 2-4 (2007) (statement of Mark A. De Bernardo, Executive Director and President, Council for Employment Law Equity), http://www.judiciary.senate.gov/imo/media/doc/de%20Bernardo%20Testimony%20121207.pdf [http://perma.cc/SED3-92QX] [hereinafter De Bernardo Testimony].

tary settlement or arbitration;[152] (4) the AFA would functionally abolish arbitration, imposing substantial costs on consumers, employers, employees, and businesses;[153] and (5) post-dispute arbitration agreements are an illusory alternative.[154] At bottom, this anti-AFA cohesion sprung from near-total support for the FAA's broad scope. As Richard Naimark of the American Arbitration Association testified, "[t]he FAA is a piece of omnibus [legislation] serving a very broad sphere of arbitration activity . . . . Modification would unnecessarily send a message of ambiguity and policy hostility to arbitration . . . ."[155]

In contrast, while some AFA supporters offered testimony opposing the use of mandatory, pre-dispute arbitration clauses across the board,[156] more often, reform advocacy splintered. For example, when the AFA died in committee,[157] subsequent efforts to amend the FAA contracted in scope—the Automobile Arbitration Fairness Act of 2008 sought only to prohibit mandatory arbitration provisions in leasing agreements between consumers and car dealerships,[158] and the Fairness in Nursing Home Arbitration Act of 2008 aimed to restrict only certain pre-dispute agreements between nursing homes and their residents.[159] Even those who testified in support of the AFA fractured into interest groups. For example, multiple witnesses limited their testimony to discrete subject areas—Tanya Solov of the North American Securities Administrators to securities;[160] Richard M. Alderman to automobile dealers and consumers;[161]

152. De Bernardo Testimony, *supra* note 151, at 3-4; Naimark Testimony, *supra* note 151 at 1; Parasharami Testimony, *supra* note 151, at 6-10; Rutledge Testimony, *supra* note 150, at 7; Schwartz Testimony, *supra* note 150, at 9-10.

153. De Bernardo Testimony, *supra* note 151, at 2; Parasharami Testimony, *supra* note 151 at 1-2; Rutledge Testimony, *supra* note 150, at 6; *see also* Drahozal Testimony, *supra* note 150, at 9-10; Naimark Testimony, *supra* note 151, at 9-10; Schwartz Testimony, *supra* note 150, at 4.

154. Parasharami Testimony, *supra* note 151, at 3, 15-16; Rutledge Testimony, *supra* note 150, at 9-10; Schwartz Testimony, *supra* note 150, at 12.

155. Naimark Testimony, *supra* note 151, at 3.

156. *See, e.g.*, *Arbitration: Is It Fair When Forced?: Hearing Before the S. Judiciary Comm.*, 112th Cong. 2-3, 28 (2011) (statement of F. Paul Bland, Senior Attorney, Public Justice), http://www.judiciary.senate.gov/imo/media/doc/11-10-13BlandTestimony.pdf [http://perma.cc/2APT-8BAT]; *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the S. Judiciary Comm.*, 113th Cong. 4–15 (2013) (statement of Vildan A. Teske, Partner, Crowder, Teske, Katz & Micko, PLLP), http://www.judiciary.senate.gov/imo/media/doc/12-17-13TeskeTestimony.pdf [http://perma.cc/8XDT-RYDH].

157. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007).

158. *See* H.R. 5312, 110th Cong. (2008).

159. *See* H.R. 6126, 110th Cong. (2008).

160. *See S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 13-14 (2007) (statement of Tanya

and Michael Foreman to employment discrimination.[162] Each witness, it seemed, sought to obtain specific exclusion from arbitration proceedings for his or her particular group, but not to address the larger problem that contract drafters were being given the ability to control closely the scope of their legal obligations under substantive law.

In conclusion, with very few exceptions, the FAA has remained unchanged by Congress since its introduction in 1925,[163] and recent efforts at legislative amendment show little promise. That fact renders the historical arc of the FAA somewhat astonishing, given that the scope of the FAA has nonetheless expanded significantly since its enactment. These dramatic and repeated changes to the FAA, however, have been rendered not by Congress, but by the Supreme Court.[164] As a consequence, any changes to the Court's recent arbitration jurisprudence, and its far-reaching implications for the substantive law, are unlikely to emanate from anywhere except perhaps a future—and different—Court. Until such time, it is likely that this erosion of substantive law will continue unabated.

CONCLUSION

The Supreme Court's recent arbitration revolution, and its decision in *Italian Colors* in particular, is troubling insofar as it permits and creates an incentive for entities to self-deregulate through private contract. The one remaining check on the power of these entities to self-deregulate, one would think, is the contractual counter-party. But this leaves a vast swath of the commercial landscape subject to this new deregulatory authority. Indeed, to suggest as a panacea an increase in public awareness of the effects of the Supreme Court's arbitration jurisprudence is likely folly. Even if the various potential signers of

Solov, Dir., Ill. Sec. Dept., Ill. Sec'y of State), http://www.gpo.gov/fdsys/pkg/CHRG-110shrg42605/pdf/CHRG-110shrg42605.pdf [http://perma.cc/EW72-GWRV].

161. *See id.* at 9-11 (statement of Richard M. Alderman, Associate Dean, Univ. of Houston Law Center).

162. *See Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed To Protect American Workers From Discrimination?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 81-94 (2009) (testimony of Michael Foreman, Dir., Civil Rights Appellate Clinic, Penn. State Univ. Dickinson Sch. of Law), http://www.gpo.gov/fdsys/pkg/CHRG-111shrg56089/pdf/CHRG-111shrg56089.pdf [http://perma.cc/RP7K-DQDP].

163. *See supra* note 136.

164. Such dramatic and repeated changes in statutory interpretation are troubling, even under the Supreme Court's own precedent. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (applying a super-strong version of stare decisis to statutory precedents—even those involving what the Court believed to be flawed interpretations—on the grounds that it should be Congress's place to overturn such bad precedents).

these contracts—consumers, employees, and the like—became aware of the larger deregulatory gambit, the very features of the arbitration cases and of the AFA that stymied public outcry and action remain in play. For one, these contracts run the gamut, from cell phone, credit card, and shareholder agreements to employment contracts in all sorts of industries, and thus, again, would *at best* gain the ire of extraordinarily diffuse segments of the population.[165] Along these lines, the signers of these contracts are comprised of individuals (and groups of individuals) who are at a relative disadvantage as a matter of financial or political power for purposes of effectuating change.

Further, potential signers of these sorts of agreements will often lack the incentive, or even the option, to reject these contracts. Any *individual* signer of any *individual* agreement has not just an interest in signing that contract—be it to get a job, to establish a credit history, or even to get a good deal on a cell phone—regardless of its terms, but also often has no other choice. In any given instance, for any particular person, the trade might, on a micro level, be a "good" one. 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, while contract signers are presented not with a question about whether corporations should be permitted to do this, but whether they need to take a particular job, to obtain a cell phone, or to open a credit card.

Indeed, the Supreme Court's arbitration revolution is even more troubling when one considers its distributional effects. Who is most at risk of corporations re-ordering their substantive legal obligations? It is the people with the least comparative leverage, the contractual counter-parties, who arguably should, but will not as a practical matter, serve as a check on this erosion of substantive law. Moreover, both the check of judicial supervision on arbitration agreements that erode substantive law, and the check on misconduct provided by substantive law itself, have been removed or eroded by the Court's recent arbitration revolution. In allowing arbitration to expand with so few restraints, we have arguably privatized both the public realm and the substantive law into oblivion.

165. *See supra* notes 133-136 and accompanying text.