

Florida Law Review

Founded 1948

VOLUME 68

SEPTEMBER 2016

NUMBER 5

THE CENTRIST CASE AGAINST CURRENT (CONSERVATIVE) ARBITRATION LAW

*Stephen J. Ware**

Abstract

In *The Politics of Arbitration Law and Centrist Proposals for Reform*, I explained how issues surrounding consumer and other adhesive arbitration agreements became divisive along predictable political lines (progressives vs. conservatives) and proposed an intermediate (or centrist) position to resolve those issues. However, *The Politics of Arbitration Law* did not argue the case for my proposals. It left those arguments for this Article, which makes the case against current (conservative) arbitration law, and a third article, which will make the case against progressive proposals to reform arbitration law. In other words, this Article stands out from the many other articles critiquing current arbitration law because this Article's critique comes from a centrist, rather than progressive, perspective. For that reason, this Article's critique may be more likely than progressive critiques to gain traction with lawmakers.

| | |
|--|------|
| INTRODUCTION | 1228 |
| I. THE CASE FOR THE CENTRIST POSITION OVER THE CONSERVATIVE POSITIONS | 1233 |
| A. <i>Overview</i> | 1233 |
| B. <i>Use Contract Defenses to Protect the Right to Litigate Like Other Rights: Reject the Separability Doctrine</i> | 1234 |
| 1. The Separability Doctrine | 1234 |
| 2. The Case against the Separability Doctrine | 1239 |
| 3. The Separability Doctrine is not Merely a Default Rule or Presumption | 1241 |
| 4. The Separability Doctrine's Application to Forum-Selection Clauses Distinguished | 1244 |
| 5. The Separability Doctrine in International Transactions Distinguished | 1245 |

* Professor of Law, University of Kansas School of Law.

- 6. The Downsides of Repealing the Separability Doctrine.....1248
- C. *Vacate Legally Erroneous Arbitration Awards on Mandatory-Law Claims*.....1248
 - 1. Legally Erroneous Decisions by the Initial Adjudicator1249
 - 2. The Anomaly Only Exists with Respect to Mandatory-Law Claims Arising out of Pre-Dispute Arbitration Agreements (Settlement Agreements vs. Exculpatory Clauses).....1255
- D. *Enforce Arbitral Class Waivers No More or Less Than Non-Arbitral Class Waivers*1259
 - 1. Class Waivers and the Black-Letter Law of *Concepcion* and *Amex*1260
 - a. *AT&T Mobility LLC v. Concepcion*1260
 - b. *American Express Co. v. Italian Colors Restaurant*1264
 - 2. Arbitration Law Should Not Be a Combatant in the “Holy War” over Class Actions.....1266
- II. CONGRUITY AND GOOD POLICY: A THEORY OF “ARBITRATION” AS USED IN THE FAA1271
 - A. *Relatively Uncontroversial Topics on Which Courts Enforce Adhesive Arbitration Agreements More Broadly than Other Adhesion Contracts*1271
 - B. *A Theory of “Arbitration” as Used in the FAA: Almost Concepcion*.....1275
- CONCLUSION.....1278
- APPENDIX1279

INTRODUCTION

The basic principle advanced in this Article is congruity. Arbitration law should be congruous with non-arbitration law. Specifically, adhesive arbitration agreements should be as enforceable as other adhesion contracts, neither more nor less so. While conforming arbitration law to other law is generally good policy, this congruity principle should not be taken to the extreme. In a few respects, adhesive arbitration agreements should be more enforceable than other adhesion contracts. These exceptions are necessary to preserve “arbitration” as that term is used in

governing law—primarily, the Federal Arbitration Act (FAA)¹—and in ordinary speech.

In the United States, litigation is the default process of dispute resolution; that is, parties can contract into alternative processes of dispute resolution (such as arbitration), but if they do not, then each party retains the right to have the dispute resolved in litigation. Thus, to contract out of the litigation default and into arbitration is to trade away the right to litigate.

In *The Politics of Arbitration Law and Centrist Proposals for Reform*,² I placed on a continuum five positions on the level of consent courts should require to enforce arbitration agreements.³ The continuum labels these positions as the Very Progressive Position, the Moderately Progressive Position, the Centrist Position, the Moderately Conservative Position, and the Very Conservative Position.⁴ Each position differs regarding the level of consent required for the enforcement of arbitration agreements. The continuum, as a whole, reflects the political divide that has developed between progressives and conservatives regarding arbitration law.

Generally, conservatives support and progressives oppose the law's current position strongly enforcing adhesive arbitration agreements.⁵ Until 1984, adhesive arbitration agreements were generally unenforceable.⁶ However, from 1984 to 2006, the U.S. Supreme Court decided many cases that changed the law to result in routine enforcement of adhesive arbitration agreements.⁷ The Court's pro-enforcement majorities nearly always included Justices appointed by Democratic presidents.⁸ These majorities, although creating dramatic changes in arbitration law, were not extreme in the political context of that era.⁹ Since then, however, the political center on consumer law has moved somewhat to the left while the Supreme Court's decisions on adhesive arbitration law have moved further

1. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16 (2012)).

2. Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711 (2016).

3. *Id.* at 725–26.

4. *Id.*

5. *Id.* at 713–14.

6. STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION §§ 2.13–.14 (3d ed. 2016).

7. *Id.* §§ 2.27–.28.

8. The one significant exception to this, and perhaps a precursor to the Court's recent partisan or ideological arbitration voting, was a consumer arbitration case, *Green Tree Fin. Corp. v. Alabama v. Randolph*, 531 U.S. 79 (2000), in which the pro-enforcement majority consisted of five Republican-appointedes while the four dissenters consisted of the two Democratic-appointedes then on the Court plus Justice Stevens and Justice Souter, who was appointed by the first President Bush. Ware, *supra* note 2, at 721 & nn.49–54.

9. Ware, *supra* note 2, at 722.

right, resulting in governing decisions that overly diverge from the political mainstream.¹⁰ That divergence would be reduced, or even eliminated, if this Article's centrist approach¹¹ was adopted.

As noted above, in *The Politics of Arbitration Law* I placed on a continuum five positions regarding the level of consent courts should require to enforce arbitration agreements.¹² The Very Progressive Position would require post-dispute consent for all individuals' arbitration agreements and the Moderately Progressive Position would enforce pre-dispute arbitration agreements only when those agreements are not adhesive.¹³ So neither Progressive Position would enforce any adhesive arbitration agreements formed by individuals, such as consumers and employees. In contrast, the Centrist Position I advocate defends arbitration law's use of contract law's low standards of consent, which result in enforcement of most adhesive contract terms, including most adhesive arbitration agreements.¹⁴ Further to the right, both Conservative Positions not only use contract law's low standards of consent, but also apply the separability doctrine, which prevents courts from hearing defenses to contract enforcement.¹⁵ The difference between the two Conservative Positions is that while the Moderately Conservative Position, like positions to its left, subjects arbitration agreements to the same limits as general contract law, the Very Conservative Position exempts arbitration agreements from limits relating to appealing legally erroneous decisions and to class waivers.¹⁶

The Politics of Arbitration Law took the Centrist Position, arguing that adhesive arbitration agreements should be as enforceable as other adhesive contracts.¹⁷ The Centrist Position rejects current law's conservative-supported anomalies in which courts enforce adhesive arbitration agreements more broadly than other adhesive contracts.¹⁸ This Article makes the arguments against those anomalies.

Part I critiques current, conservative-supported arbitration law for failing, in three important and controversial respects, to conform to the principle that adhesive arbitration agreements should be no more enforceable than other adhesive contracts. Current law enforces adhesive arbitration agreements more broadly than other adhesive contracts in

10. *Id.* at 723.

11. *See infra* Appendix.

12. *See supra* notes 2–3 and accompanying text.

13. Ware, *supra* note 2, at 734.

14. *Id.* at 738–39.

15. *Id.* at 743.

16. *Id.*

17. *Id.* at 751.

18. *Id.*

three controversial respects: the separability doctrine, correction of legally erroneous decisions, and class waivers.

First, current law applies the separability doctrine, which prevents courts from hearing defenses to contract enforcement, such as misrepresentation and duress, when the contract at issue has an arbitration clause.¹⁹ This Article opposes the separability doctrine and contends that courts should be available to hear defenses to the enforcement of arbitration clauses and to the contracts containing such clauses. The right to litigate is particularly important in the United States.²⁰ Under the separability doctrine, however, courts hold that a party trades away her right to litigate by assenting to a contract that was induced by misrepresentation, duress, or other grounds constituting a legally-recognized defense to contract enforcement.²¹ Thus, this Article's Centrist Position rejects the separability doctrine, arguing instead that contract defenses should protect the right to litigate as fully as they protect other rights that can be traded away by adhesion contracts.

Second, current law enforces arbitration agreements that trade away the right to appeal,²² resulting in little judicial review of arbitrators' decisions, even arbitrators' erroneous rulings on questions of law. Courts occasionally vacate an arbitrator's award on the ground that the arbitrator exhibited a "manifest disregard of law,"²³ but "manifest disregard" requires much more than an error of law—it requires proof the arbitrator

19. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

20. The judiciary and litigation have long played a larger role in the United States than in other democracies. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 13 (2001) (“[V]iewed in comparative perspective, the United States is distinctive It is especially inclined to authorize and encourage the use of adversarial litigation to . . . resolve disputes.”); *id.* at 16 (“Adversarial legalism gives the United States the most politically and socially responsive court system in the world. . . . [T]he judiciary and lawyers [are] more fully part of the governing process and more fully democratic in character.”); David Nelken, *Beyond Compare? Criticizing “The American Way of Law,”* 28 *LAW & SOC. INQUIRY* 799, 819 (2003) (“What we can be certain of is that in these other places lawyers are less central and litigation is allowed a much smaller role than in the United States.”).

21. See *Rent-A-Center*, 561 U.S. at 71.

22. See Christopher R. Drahozal, *Business Courts and the Future of Arbitration*, 10 *CARDOZO J. CONFLICT RESOL.* 491, 500 (2009) (“Arbitration typically does not have an appeals process, unless the parties agree by contract to create one. Courts review arbitration awards only on narrow, usually procedural, grounds, and the United States Supreme Court has curtailed the ability of parties to expand that review by contract.” (footnotes omitted)); Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 6 *Y.B. ON ARB. & MEDIATION* 59, 62–63 (2013) (“Arbitration awards are virtually unreviewable on the merits and are rarely vacated.”).

23. *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 208 (2d Cir. 2002) (quoting *Wilko v. Swan*, 346 U.S. 427, 436 (1953)).

knew the law and chose to ignore it—so vacatur on this ground is extremely rare. Courts apply this overly deferential standard of review even in instances where the arbitration agreement calls for de novo review.²⁴ In contrast, this Article proposes that an arbitrator’s legally erroneous decisions arising out of pre-dispute agreements to arbitrate should be subject to de novo review when the question is of mandatory, as opposed to default, law.

Third, following the Supreme Court’s 2011 *AT&T Mobility LLC v. Concepcion* decision,²⁵ courts generally enforce adhesive arbitral class waivers.²⁶ This holding has since extended to contract law, generally.²⁷ Arbitration law, however, is not centrally concerned with class actions, which came into being after the FAA.²⁸ Thus, this Article proposes that arbitration law defer to other law in deciding whether class waivers are enforceable.

In sum, Part I of this Article discusses the three important and controversial ways current law enforces adhesive arbitration agreements more broadly than other adhesion contracts and argues that these exceptions should end. In contrast, Part II notes the relatively uncontroversial ways in which courts should continue to enforce adhesive arbitration agreements more broadly than other adhesion contracts. Under current law, adhesive arbitration agreements typically reduce discovery²⁹ and evidentiary rules.³⁰ The FAA also mandates enforcement of adhesive agreements providing for an arbitrator rather than a jury.³¹ Enforcing adhesive arbitration agreements more broadly than other adhesion contracts on these three topics—discovery, evidence, and jury—is

24. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

25. 563 U.S. 333 (2011).

26. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013); *Concepcion*, 563 U.S. at 351–52.

27. Compare *Grant v. Convergys Corp.*, No. 4:12-CV-496 (CEJ), 2013 WL 781898, at *5 (E.D. Mo. Mar. 1, 2013) (invalidating a non-arbitral class waiver), with *Mazurkiewicz v. Clayton Homes, Inc.*, 971 F. Supp. 2d 682, 692 (S.D. Tex. 2013) (enforcing a non-arbitral class waiver), *Birdsong v. AT&T Corp.*, No. C12-6175 TEH, 2013 WL 1120783, at *6 (N.D. Cal. Mar. 18, 2013) (enforcing a non-arbitral class waiver), *Killion v. KeHE Distribs.*, 885 F. Supp. 2d 874, 882, 884–85 (N.D. Ohio 2012) (enforcing a non-arbitral class waiver and citing *Concepcion* as support for the proposition that “collective actions may be waived”), and *Palmer v. Convergys Corp.*, No. 7:10-cv-145 (HL), 2012 WL 425256, at *7 (M.D. Ga. Feb. 9, 2012) (enforcing a non-arbitral class waiver).

28. Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922–1947*, 31 F.R.D. 307, 512 (1963) (“[O]n September 16, 1938, three months after the adjournment of its session, the [Federal Rules of Civil Procedure] went into operation.”).

29. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (finding lesser discovery in arbitration an insufficient reason to deny enforcement to adhesive employment arbitration agreement).

30. See *infra* notes 203–04 and accompanying text.

31. See *infra* note 206 and accompanying text.

necessary to distinguish arbitration from litigation, and is not troubling under the Centrist Position, which would subject arbitration agreements' provisions on these three topics to judicial policing through contract defenses such as unconscionability.

I. THE CASE FOR THE CENTRIST POSITION OVER THE CONSERVATIVE POSITIONS

This Part discusses the three important and controversial ways current law fails to conform to the principle that adhesive arbitration agreements should only be as enforceable as other adhesive contracts. This Part argues against these anomalies and thus for reforming arbitration law so it is more congruous with other law.

A. *Overview*

Current law enforces adhesive arbitration agreements more broadly than other adhesion contracts in three important and controversial respects:

- (1) while contract defenses (such as misrepresentation and duress) protect other rights that adhesion contracts can trade away, the separability doctrine removes contract defenses' protection from the main right traded away by an arbitration agreement—the right to litigate;
- (2) while courts do not enforce non-arbitration adhesion contracts prohibiting appeal, which trade away the right to correct legally erroneous decisions on mandatory-law claims, courts routinely enforce adhesive arbitration agreements that effectively trade away that right; and
- (3) while courts, at least before *Concepcion*, rarely enforced non-arbitration adhesion contracts purporting to trade away the right to participate in a class action, courts frequently enforce such “class waivers” in adhesive arbitration agreements.

In each of these respects, current law is more conservative than this Article's Centrist Position of making adhesive arbitration agreements only as enforceable as other adhesion contracts. Therefore, the centrist proposals in this Article include:

- (1) rejecting the separability doctrine, so contract defenses protect the right to litigate as fully as they protect other rights that adhesion contracts can trade away;

- (2) vacating arbitrators' legally erroneous decisions on mandatory-law claims when the award arises out of adhesive or other pre-dispute arbitration agreements; and
- (3) treating arbitral class waivers like other class waivers, so the right to participate in a class action is no more easily traded away in an adhesive arbitration agreement than in an adhesive non-arbitration agreement.

The following subsections of this Article address in turn the separability doctrine, legally erroneous decisions, and class waivers.

B. *Use Contract Defenses to Protect the Right to Litigate Like Other Rights: Reject the Separability Doctrine*

The first important and controversial way current law makes adhesive arbitration agreements more enforceable than other adhesion contracts is the separability doctrine, which prevents contract defenses from protecting the right to litigate.

1. The Separability Doctrine

When a party opposes enforcement of an arbitration clause on the ground that the contract containing that clause is voidable due to a contract-law defense—such as misrepresentation, duress, unconscionability, or illegality—the “separability doctrine” instructs courts to send the case to arbitration without first determining whether the facts prove the alleged defense.³² The separability doctrine, as reflected in the three Supreme Court decisions addressing it,³³ treats the arbitration clause as a separately enforceable agreement from the contract containing it: If the alleged defense is not focused on the arbitration clause in particular, then the court enforces that clause to require arbitration of whether the contract containing it is enforceable, as well as arbitration of the merits of the claims asserted by one party against the other.³⁴

For instance, suppose Consumer sues Lender alleging that a year after Lender contracted with and lent to Consumer, Lender violated the Fair Credit Reporting Act (FCRA)³⁵ by providing false information to a credit

32. Ware, *supra* note 2, at 741–43.

33. See *supra* text accompanying note 19.

34. Ware, *supra* note 2, at 743.

35. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x (2012)).

bureau.³⁶ Suppose Lender then moves to stay the case and compel arbitration of Consumer's claims based on the arbitration clause in the adhesion contract between Consumer and Lender. If Consumer opposes Lender's motion to compel on the ground that Lender's fraudulent misrepresentations induced Consumer to assent to the contract, the court will refuse to hear Consumer's misrepresentation defense.³⁷ Instead, the court will grant Lender's motion to compel arbitration of Consumer's FCRA claim, effectively telling Consumer to make her misrepresentation argument to the arbitrator.³⁸ If the arbitrator rejects Consumer's misrepresentation argument, then Consumer must arbitrate the merits of her FCRA claim or abandon it. Further, Consumer can only get judicial review of the arbitrator's decision on misrepresentation after the arbitrator's decision on the merits of her FCRA claim—by filing a motion to vacate the arbitration award.³⁹ Even if Consumer persuades the arbitrator that Lender's fraudulent misrepresentations induced her to assent to the contract, Consumer probably must nevertheless arbitrate the merits of her FCRA claim or abandon it.⁴⁰

36. See 15 U.S.C. § 1681s-2(b)(1); see, e.g., *Johnson v. MBNA Am. Bank, NA*, 357 F.3d 426, 428 (4th Cir. 2004) (holding a credit card company liable under FCRA for insufficiently investigating before reporting adverse information about a debtor to credit reporting agencies).

37. These hypothetical facts are the consumer-context equivalent of the facts in the landmark Supreme Court decision adopting the separability doctrine. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04. If *Prima Paint* had argued that there was fraud “directed to the arbitration clause itself,” then the making of the arbitration agreement would have been an issue, and *Prima Paint* would have been entitled to a trial on that issue, but the FAA “does not permit the federal court to consider claims of fraud in the inducement of the contract generally.” *Id.*

38. See *id.* at 406–07; WARE, *supra* note 6, §§ 2.19–21.

39. See 9 U.S.C. § 10 (2012).

40. The separability doctrine holds that the arbitrator's invalidation of the contract containing an arbitration clause does not invalidate the arbitration clause. See, e.g., William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 143 (1997) (“[T]he separability doctrine permits arbitrators to invalidate the main contract (e.g., for illegality or fraud in the inducement) without the risk that their decision will call into question the validity of the arbitration clause from which they derive their power.”); see also GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 68 (2d ed. 2001) (“Another possible consequence of the separability doctrine is that, if an arbitral tribunal or court concludes that the parties' entire underlying contract was void, that conclusion would not necessarily deprive the parties' arbitration agreement—and hence, in a Catch-22 turn, the arbitrators' award—of validity.”); Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 20–21 (2002) (“[S]eparability means that . . . a party's challenge to the validity of the underlying contract does not automatically deprive the arbitral tribunal of jurisdiction to resolve the parties' dispute concerning the challenged contract.”).

What the previous paragraph said about misrepresentation is also true of other contract defenses, such as mistake,⁴¹ duress,⁴² undue influence,⁴³ unconscionability,⁴⁴ frustration of purpose,⁴⁵ illegality,⁴⁶ and probably incapacity.⁴⁷ Suppose that instead of arguing Lender's misrepresentation induced her to enter into the contract containing the arbitration clause, Consumer argued that duress induced her—Lender pointed a gun at Consumer's head and said "sign the contract or I'll shoot you." Although no allegations that extreme have yet found their way into a reported case

41. See *Masco Corp. v. Zurich Am. Ins. Co.*, 382 F.3d 624, 629–30 (6th Cir. 2004); *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 528–29 (1st Cir. 1985). *But see* *Shoels v. Klebold*, 375 F.3d 1054, 1066 (10th Cir. 2004) (hearing the argument that the arbitration agreement was voidable due to mistake rather than sending the case to an arbitrator, without discussing the severability doctrine or *Prima Paint*).

42. See *SBRMCOA, LLC v. Bayside Resort, Inc.*, 707 F.3d 267, 274 (3d Cir. 2013) ("[T]he Condominium Association's coercion claim is arbitrable because it is a challenge to the validity (rather than the formation) of [the contract containing the arbitration clause.];" *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) ("[T]he defenses of unconscionability, duress, fraudulent inducement, and revocation . . . must specifically relate to the Arbitration Addendum itself, not the contract as a whole, if they are to defeat arbitration. Defenses that pertain to the entire installment contract can be arbitrated." (footnote omitted)); *Service Corp. Intern. v. Lopez*, 162 S.W.3d 801, 810 (Tex. App. 2005) ("Th[e] issue [of duress] relates to the contract as a whole and not solely the arbitration provision. It is therefore an issue to be decided in arbitration."). *But see* *Flannery v. Tri-State Div.*, 402 F. Supp. 2d 819, 825 (E.D. Mich. 2005) ("[P]laintiff's claim of duress challenges the existence of the contract itself, and therefore relates to all the clauses and provisions in it, including the arbitration clause. The argument that the arbitration clause is invalid and unenforceable, therefore, is not barred by the rule in *Prima Paint*.").

43. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 (5th Cir. 1981) (duress and undue influence); *Lake Erie Towing v. Walter*, No. 1:07-cv-02312, 2007 WL 2907496, at *7 (N.D. Ohio Oct. 3, 2007) ("The Defendants' Undue Influence Claim Challenges the Contract Generally and Therefore Belongs in Front of the Arbitrator, not the Court.").

44. Substantive unconscionability of contract terms other than the arbitration clause is an issue for the arbitrator. See *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726–27 (8th Cir. 2003). For cases holding that arbitrators, not courts, assess unconscionability of container contract, see *WARE*, *supra* note 6, § 2.25.

45. See *Unionmutual Stock Life Ins. Co.*, 774 F.2d at 528–29 ("[T]he arbitration clause is separable from the contract and is not rescinded by [defendant's] attempt to rescind the entire contract based on . . . frustration of purpose."); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1271 (7th Cir. 1976).

46. See *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 502–03 (2012) (noting that the arbitrator, rather than the court, determines questions as to whether an employee's non-competition agreement is void as against public policy); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442, 448–49 (2006).

47. Federal courts have split on the question of mental incapacity. Compare *Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (a court deciding defense of mental incapacity), with *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (an arbitrator deciding defense of mental incapacity). A related question is a minor's lack of capacity to contract. See *H & S Homes, L.L.C. v. McDonald*, 823 So. 2d 627, 630–31 (Ala. 2001) (allowing limited discovery on minority issue at time of motion to compel arbitration in the trial court); *Douglass v. Pflueger Haw., Inc.*, 135 P.3d 129, 138–39 (Haw. 2006).

on the separability doctrine, other duress allegations have, and courts have applied the separability doctrine to grant the motion to compel arbitration, effectively telling the party in Consumer's role to make her duress argument to the arbitrator.⁴⁸ These decisions are straightforward applications of the Supreme Court decisions adopting and articulating the separability doctrine. That doctrine calls for duress arguments, including those alleging contracts signed at gunpoint, to be arbitrated rather than litigated.⁴⁹

The same goes for arguments that the contract containing the arbitration clause is unconscionable. Unconscionability may be the most frequently asserted contract defense in the adhesion-contract context. Due to the separability doctrine, arbitrators, rather than courts, initially hear unconscionability arguments when a party to the arbitration agreement, such as Lender, requests that.⁵⁰

Suppose however, instead of arguing that the contract containing the arbitration clause is unconscionable, Consumer argues that the arbitration clause itself is unconscionable. Before 2010, a court likely would have heard and resolved that argument (rather than sending it to the arbitrator), and a large body of case law developed about which arbitration clauses were unconscionable.⁵¹ However, the Supreme Court's 2010 decision in *Rent-A-Center, West, Inc. v. Jackson*,⁵² enforced a clause that said:

[T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.⁵³

In *Rent-A-Center*, Jackson argued that the arbitration clause was unconscionable, so he should have been free to litigate, rather than arbitrate, his claims against Rent-A-Center.⁵⁴ The Supreme Court

48. See Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 121 (2007).

49. See *id.* at 121–22.

50. For cases holding that arbitrators, not courts, assess unconscionability of container contracts, see WARE, *supra* note 6, § 2.25.

51. See *id.*; Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008); Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 776 (2014); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194–96 (2004).

52. 561 U.S. 63 (2010).

53. *Id.* at 66.

54. *Id.*

rejected Jackson's argument on the ground that the just-quoted "delegation clause" constituted his agreement to arbitrate whether other portions of his arbitration clause were unconscionable.⁵⁵ By contrast, had Jackson argued that the delegation clause itself was unconscionable, the Supreme Court suggested a court, rather than an arbitrator, would hear that argument.⁵⁶ In other words, *Rent-A-Center* seems to treat the delegation clause as separable from the broader arbitration clause in much the same way as the separability doctrine treats an arbitration clause as separable from the still-broader container contract.⁵⁷ So in some cases current law provides that courts will not initially hear a defense to contract enforcement even when that defense focuses specifically on the arbitration clause itself rather than on the whole contract containing the arbitration clause. And stepping back from *Rent-A-Center* and delegation clauses to the longstanding, basic separability doctrine, courts generally will not initially hear a contract defense applying to the whole contract.⁵⁸

55. *Id.* at 73.

56. *See id.* at 72 ("[U]nless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator."). Few reported cases since *Rent-A-Center* address arguments that the delegation clause is unconscionable or otherwise unenforceable. Most of these enforce the delegation clause. *See Halliday v. Beneficial Fin. I, Inc.*, No. 2:12-CV-708, 2013 WL 693022, at *3, *6 (S.D. Ohio Feb. 26, 2013) ("Because the Court concludes that the delegation provision is not unconscionable, the threshold issue of whether the remainder of the arbitration clause is unconscionable is a matter for arbitration."); *Dean v. Draughons Junior Coll., Inc.*, 917 F. Supp. 2d 751, 763 (M.D. Tenn. 2013) (enforcing the delegation clause and sending to arbitration the issue of whether the arbitration agreement was enforceable); *Chung v. Nemer*, No. C12-4608 PJH, 2012 WL 5289414, at *2 (N.D. Cal. Oct. 25, 2012) (enforcing the delegation clause and granting the defendant's motion to compel arbitration); *Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621, 636 (Cal. Ct. App. 2014) (noting that "it will be for the arbitrator to consider the conscionability of the agreement as a whole" and rejecting the argument that delegation clause was unconscionable).

57. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1121 (2011) ("*Rent-A-Center* extended the separability principle by treating the arbitration agreement itself as entailing two separate contracts."); David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1058 n.181 (2012) ("[T]he Court conceptualized the delegation clause as an independent arbitration clause ('an agreement to arbitrate threshold issues concerning the arbitration agreement') within a broader contract to arbitrate (the Mutual Agreement to Arbitrate Claims).").

For cases applying *Rent-A-Center*, see, for example, *Momot v. Mastro*, 652 F.3d 982, 988 (9th Cir. 2011) (finding that language in an arbitration agreement providing that parties agree to arbitrate any dispute that "arises out of or relates to . . . the validity or application of any of the provisions of this Section 4" . . . constitutes "an agreement to arbitrate threshold issues concerning the arbitration agreement" under *Rent-A-Center*); *Hawkins v. Region's*, 944 F. Supp. 2d 528, 530-31 (N.D. Miss. 2013) ("The court recognizes that the Supreme Court's decision in *Jackson* might be regarded by some as creating a legal 'black hole' which inevitably sucks in disputes and sends them to arbitration (at least in cases involving a delegation clause).").

58. *See Ware*, *supra* note 2, at 742.

The separability doctrine, including *Rent-A-Center*'s extension of it to delegation clauses, is generally supported by conservatives—from the Republican-appointed Supreme Court Justices, who cast all five majority votes in *Rent-A-Center*;⁵⁹ to the Chamber of Commerce, which filed an amicus brief for *Rent-A-Center*;⁶⁰ to Republican members of Congress, who oppose the separability-repealing Arbitration Fairness Act (AFA).⁶¹ In contrast, progressives—including the co-sponsors of the AFA⁶² and the dissenters in *Rent-A-Center*⁶³—provide the bulk of the opposition to the separability doctrine. I have long opposed the separability doctrine⁶⁴ and continue to believe that courts should be able to initially hear defenses to the enforcement of arbitration clauses and to the contracts containing arbitration clauses. A proposed law reform to this effect, written as a rule the Consumer Financial Protection Bureau could enact, is in the Appendix.

2. The Case Against the Separability Doctrine

Before holding that a party has traded away her right to litigate, should the law require an enforceable contract or merely a contract that might or might not be enforceable? That is the question addressed by the separability doctrine, which requires only a contract, not necessarily an enforceable contract, to trade away the right to litigate and substitute arbitration for litigation.⁶⁵ If a contract defense, such as misrepresentation,⁶⁶ applies to an entire contract—to all of its clauses, including the arbitration clause—then that contract is not enforceable but is nevertheless sufficient under the separability doctrine to trade away the right to litigate.

59. *Rent-A-Center*, 561 U.S. at 64.

60. Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioner, *Rent-A-Center*, 561 U.S. 63 (2010) (No. 09-497), 2010 WL 783668.

61. H.R. 1844, 113th Cong. § 3 (2013); David Lazarus, *Bill Aims to Restore Consumers' Right to Sue*, L.A. TIMES (Oct. 18, 2011), <http://articles.latimes.com/2011/oct/18/business/la-fi-lazarus-20111018>.

62. H.R. 1844 (“The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.”).

63. Ware, *supra* note 2, at 720 (showing that dissenting Justices in *Rent-A-Center* were all appointed by Democratic presidents).

64. Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 128–38, 159–60 (1996).

65. Ware, *supra* note 2, at 743.

66. See discussion *infra* Subsection I.B.1.

In contrast, this Article argues that if a party who seeks to litigate a claim asserts a defense to the enforcement of her contract containing an arbitration clause, then a court should bar litigation of the claim only if the court concludes the elements of the defense are not present. In other words, only an *enforceable* contract should be enough to opt out of the litigation default and into arbitration. The courthouse door should be open to parties asserting defenses to enforcement of their contracts containing arbitration clauses and should be closed to them only if they formed an enforceable contract in which they agreed to arbitrate.

This conclusion rests on the importance in protecting parties' rights of both the litigation default and contract defenses. In the United States, access to the courts—the right to litigate—is basic to our system of government.⁶⁷ Making this right alienable through pre-dispute arbitration agreements is controversial, and rejected by those who hold the Very Progressive Position, including the many advocates of the Arbitration Fairness Act.⁶⁸ Even more controversial is making the right to litigate alienable through adhesive pre-dispute arbitration agreements, an approach rejected by both the Moderately and Very Progressive Positions.⁶⁹

In contrast to the two Progressive Positions, which either never enforce individuals' pre-dispute agreements to arbitrate or enforce only those to which the individual "non-adhesively" consented, the Centrist Position this Article advocates defends arbitration law's use of contract law's low standards of consent, which enforce most adhesive contract terms, including most adhesive arbitration clauses.⁷⁰ However contract law's standards of consent can properly be low only because they are supplemented by contract law's defenses. These defenses are contract law's main tools to soften the sometimes-harsh effects of those low consent standards.⁷¹ Thus, arbitration law can properly subject the right to litigate to contract law's low standards of consent only if arbitration law also protects that right with contract law's defenses. In other words, courts can properly enforce adhesive arbitration agreements only if the separability doctrine is repealed.⁷²

67. Ware, *supra* note 2, at 727.

68. *Id.* at 732–34.

69. *Id.* at 734–38.

70. *Id.* at 738–41.

71. See Ware, *supra* note 48, at 111.

72. For twenty years, I have advocated enforcing adhesive arbitration agreements, see Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 213 (1998) [hereinafter Ware, *Consumer*], and repealing the separability doctrine. See Ware, *supra* note 64, at 86.

As just argued, contract defenses are important and thoroughly interwoven with contract law's low "objective manifestation-of-assent" standards of consent, so separating the two, as the separability doctrine does, is unwise. They are two sides of the same coin. Contract scholars of the Right as well as of the Left recognize that the defenses are thoroughly interwoven with "manifestation-of-assent." As libertarian contracts scholar Randy Barnett puts it, contract defenses "describ[e] circumstances that, if proved to have existed, deprive the manifestation of assent of its normal moral, and therefore legal, significance."⁷³ In short, the separability doctrine deprives the right to litigate of the protection offered by contract law's defenses and thus enforces agreements (manifestations of assent) to alienate that right under circumstances that deprive the agreements of their normal *moral* significance and thus should also deprive the agreements of their *legal* significance. This, at bottom, is why the separability doctrine should be repealed.

3. The Separability Doctrine is Not Merely a Default Rule or Presumption

The strongest argument for the separability doctrine is that it is merely a default rule.⁷⁴ A default rule is a legal rule that governs in the absence of an enforceable contract term to the contrary.⁷⁵ For example, in a sale

73. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 318 (1986); see also JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.2 (6th ed. 2009) (stating that under circumstances of duress, "consent is real enough; the vice of it is that it was coerced in a manner that society brands as wrongful"); *id.* § 9.10(a) (describing broad categories of undue influence, one of which involves using "psychological position in an unfair manner to induce the subservient party to consent to an agreement to which the other party would not otherwise have consented"); Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 75 (2012) (noting that contract defenses such as mistake and incompetence "rest on the notion that the parties would not have consented had they known about the mistake or had the capacity to consent"); Franklin G. Snyder & Ann M. Mirabito, *The Death of Contracts*, 52 DUQ. L. REV. 345, 405 (2014) (describing "defenses said to go to the quality of the mutual assent . . . includ[ing] duress, undue influence, fraud, misrepresentation, nondisclosure, mutual mistake, and unilateral mistake, the presence of which will make a contract unenforceable due to lack of 'consent'").

74. See Richard E. Speidel, *International Commercial Arbitration: Implementing the New York Convention*, in EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 185, 260 n.284 (2006) (characterizing the separability doctrine as a "default rule"); Drahozal & Rutledge, *supra* note 57, at 1121 ("Separability permitted the development of a default rule for allocation of authority. Under that default rule, courts resolve challenges to the enforceability of arbitration agreements and arbitrators resolve challenges to the enforceability of the underlying substantive contract.").

75. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) ("Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them."); Yair Listokin, *The Meaning of*

of goods under the Uniform Commercial Code (UCC), the default rule is that the seller's place of business is the place for delivery of the goods, but the parties can opt out of that default with a contract term requiring delivery at some other location.⁷⁶

Default rules generally should, many argue, conform to what most contracting parties want, so fewer parties have to incur the costs of negotiating and drafting a contract term to replace the default rule.⁷⁷ Along these lines, defenders of the separability doctrine argue that most parties to contracts containing arbitration clauses would want arbitrators, rather than courts, to initially hear defenses to enforcement of those contracts. Thus, these separability-defenders argue, this should be the default rule, and if particular parties instead want courts to initially hear such defenses, then those parties can write that into their agreement and opt out of the default rule. For example, Professor Christopher Drahozal writes, “[S]o long as the parties have manifested assent to the main contract [containing an arbitration clause] (even if there may be a defense to enforcement), it is at least plausible to presume (i.e., to treat as a default) that they would want an arbitrator rather than a court to adjudicate that defense.”⁷⁸

This presumption, however, seems often unrealistic, especially in the context of consumer adhesion contracts, as in the FCRA example above. When sophisticated parties negotiate and draft a custom contract, they

Contractual Silence: A Field Experiment, 2 J. LEGAL ANALYSIS 397, 399 (2010) (“Contracts are inevitably incomplete. One of contract law’s primary roles consists of filling in the gaps of contracts with default rules.”); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1424 (2014) (“Contract law . . . provides the parties with numerous default rules that become part of their contracts unless the parties implicitly or explicitly reject them.”).

76. U.C.C. § 2-308 (AM. LAW INST. & UNIF. LAW COMM’N 2015).

77. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15 (1991) (“We treat corporate law as a standard-form contract, supplying terms most venturers would have chosen . . . [C]orporate law should contain the terms people would have negotiated, were the costs of negotiating at arm’s length for every contingency sufficiently low.”); Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 835–36 (1985) (“The ambition of the law governing the debtor-creditor relationship, including fraudulent conveyance law, should provide all the parties with the type of contract that they would have agreed to if they had had the time and money to bargain over all aspects of their deal.”); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (“Ideally, the preformulated rules supplied by the state should mimic the agreements contracting parties would reach were they costlessly to bargain out each detail of the transaction.”).

78. Christopher R. Drahozal, *Buckeye Check Cashing and the Separability Doctrine*, 1 Y.B. ON ARB. & MEDIATION 55, 87 n.155 (2011) (citing Alan Scott Rau, “*Separability*” in the *United States Supreme Court*, 1 STOCKHOLM INT’L ARB. REV. 1, 4 (2006) [hereinafter Rau, *Separability*]; Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of “Consent,”* 24 ARB. INT’L 199, 221 (2008) [hereinafter Rau, *Arbitral Jurisdiction*]).

may think about whether courts or arbitrators will, in a potential dispute that has not arisen yet, decide the parties' arguments that their contract was usurious, unconscionable, or induced by fraud or a gun to the head; those sophisticated parties might even want the arbitrator to decide those arguments. But it is doubtful the typical consumer borrower even notices the arbitration clause in her adhesion contract, let alone thinks through the division of authority between arbitrator and court in a potential dispute enough to have wants about what the arbitrator, as opposed to the court, should decide.⁷⁹ And if the typical consumer borrower did, at the time of contract formation, have a preference about who should decide whether the contract is usurious, unconscionable, or induced by fraud or a gun to the head, the borrower might well prefer the court, rather than arbitrator.

More fundamentally, the problem with the separability-is-just-a-good-default-presumption argument is that it treats the parties' signatures on (or other manifestations of assent to) a contract containing an arbitration clause as if they are the only legally relevant fact. The separability-is-just-a-good-default-presumption argument thus overlooks the other legally relevant fact: litigation is the default process of dispute resolution so, before signing, each party had a right to litigate any disputes that might arise between them and neither party had a right to arbitrate such disputes.⁸⁰ Therefore, courts cannot properly treat their signatures as breaking a tie between otherwise equally strong claims by litigation and arbitration to resolve their disputes.

Instead, the pre-signing claim of litigation to resolve their disputes is far stronger than the pre-signing claim of arbitration to resolve their disputes, so the question is whether the signatures are weighty enough to more than offset that very strong pre-signing presumption of litigation over arbitration. A signature induced by misrepresentation, duress, or other circumstances constituting a contract defense is simply not that weighty. That is, a signature under circumstances that "deprive [that] manifestation of assent of its normal moral . . . significance"⁸¹ is not weighty enough to more than offset the pre-signing litigation default and thus alienate the right to litigate. A signature or other manifestation of assent needs to be made in circumstances free of a contract defense to acquire moral significance sufficient to offset the pre-agreement litigation default and thus alienate the right to litigate. For example, almost no moral significance attaches to a signature obtained at gunpoint. Yet the separability-is-just-a-good-default-presumption argument presumes that a signature obtained at gunpoint retains much of a typical

79. See, e.g., *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407, 431–32 (S.D.N.Y. 2014) (noting that credit card arbitration clauses were not "visible or meaningful to consumers").

80. See *supra* notes 1–2, 20 and accompanying text.

81. See *Barnett*, *supra* note 73, at 318.

signature's moral significance. At the least, the separability-is-just-a-good-default-presumption argument requires a coherent and practical way for separability cases to distinguish signatures at gunpoint from more common contract-defense allegations that, if proven, drain less moral significance from the signature. No one has convincingly provided that argument.⁸²

4. The Separability Doctrine's Application to Forum-Selection Clauses Distinguished

Another argument for the separability doctrine begins with the assertion that it applies not only to arbitration clauses (agreements choosing arbitration over litigation) but also to forum-selection clauses (agreements choosing litigation in one jurisdiction over litigation in another jurisdiction). Here, assume all relevant jurisdictions and parties are within the United States, as a later subsection of this Article addresses the separability doctrine in the international arbitration context. To reiterate, the argument under consideration is that because the separability doctrine applies to contracts containing forum-selection clauses then it should also apply to contracts containing arbitration clauses. Supporting this argument is the fact that most courts have applied the separability doctrine to forum-selection clauses, thus holding that only the court named in the clause should resolve an argument that the contract containing that clause was fraudulently induced.⁸³ However, some of these cases are international,⁸⁴ and the rest seem to involve

82. The best argument along those lines is Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 499 n.221, 514 n.263 (2011) (distinguishing "a signature at gunpoint [which] can only mean that the arbitration clause [along with all the contract's other clauses] was induced by coercion," from a misrepresentation about a non-arbitration aspect of the main contract—"say, about a consulting business (as in *Prima Paint* itself) [which would not] be pertinent—transposable—to the arbitration agreement"). The problem with this argument is that, as Professor Rau acknowledges, "hornbook Contract law for the last century has treated misrepresentation as 'a defense that (if proven) makes all the terms of the contract unenforceable.'" *Id.* at 501 n.227. Professor Rau advocates an arbitration-only exception to this venerable contract law on misrepresentation, but such an arbitration-only exception seems unwise for two reasons: (1) it would be hard for courts to apply in practice (complexities avoided by a century of "hornbook contract law" are probably too complex to be worthwhile); and (2) it would deprive the right to litigate of some of the protection the misrepresentation defense provides other rights that parties can trade away by contract.

83. Drahozal, *supra* note 78, at 84 & n.145.

84. *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 301–02 (5th Cir. 1998) (holding "[o]nly when we can discern the [forum-selection] clause itself was obtained in contravention of the law will the federal courts disregard it and proceed to judge the merits" and basing the decision to uphold forum selection clause, in part, on international "comity concerns" (emphasis added)); *Haynsworth v. Lloyd's of London*, 121 F.3d 956, 963 (5th Cir. 1997) ("Fraud and overreaching must be specific to a forum selection clause in order to invalidate it.").

agreements between businesses,⁸⁵ as opposed to consumer or employment adhesion contracts.

The Eighth Circuit refused to apply the separability doctrine to a forum-selection clause. It held that “in a situation where a fiduciary relationship (such as between a commodities broker and its customer) is created by a contract tainted by fraud, the person defrauded can not be held to the contractual forum selection clause.”⁸⁶ The Eighth Circuit’s rejection of a separability doctrine for forum-selection clauses is sound for the same reasons given above for rejecting the separability doctrine for arbitration clauses. Moreover, trading away the right to litigate, as an arbitration agreement does, trades away a more fundamental right than merely trading away the right to litigate in one U.S. jurisdiction’s courts rather than in another’s. The fifty states’ courts are less different from each other than they are from arbitration. Therefore, the separability doctrine in forum-selection clauses is at best weak support for the separability doctrine in arbitration agreements.

5. The Separability Doctrine in International Transactions Distinguished

As explained above, the case against the separability doctrine is best understood by starting with the recognition that litigation is the default process of dispute resolution, so before contracting each party had a right to litigate and no right to arbitrate.⁸⁷ Only when starting with that pre-contracting baseline can one coherently ask whether an arbitration agreement, such as Consumer’s adhesive agreement with Lender in the FCRA example above, acquires enough moral significance from contract law’s low “manifestation of assent” standards to trade away Consumer’s right to litigate, or whether, as this Article contends, only agreements untainted by a contract defense acquire that level of moral significance.⁸⁸

85. Preferred Capital, Inc. v. Assocs. in Urology, 453 F.3d 718, 722 (6th Cir. 2006) (“Defendant here offers no evidence of fraud, misrepresentation, or overreaching on the part of Plaintiff . . . in inducing Defendant to agree to inclusion of the forum selection clause in the agreements.”); Moses v. Bus. Card Express, Inc., 929 F.2d 1131, 1138 (6th Cir. 1991) (“[It is] settled law that unless there is a showing that the alleged fraud or misrepresentation induced the party opposing a forum selection clause to agree to inclusion of that clause in the contract, a general claim of fraud or misrepresentation as to the entire contract does not affect the validity of the forum selection clause.”).

86. Farmland Indus., Inc. v. Frazier–Parrott Commodities, Inc., 806 F.2d 848, 851 (8th Cir. 1986).

87. See *supra* text accompanying notes 67–69; see also Henry S. Noyes, *If You (Re)build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 580–81 (2007) (describing the right to litigate as “fundamental, constitutional, and set forth in the Federal Rules of Civil Procedure”).

88. See *supra* text accompanying notes 36–40 (discussing an FCRA example) and notes 65–73 (discussing importance of contract defenses in ensuring agreements’ moral significance).

To my knowledge, no defense of the separability doctrine acknowledges:

- (1) Litigation is the default process of dispute resolution;
- (2) so each party has a pre-agreement right to litigate; and
- (3) the separability doctrine deprives the right to litigate of the protections afforded by contract law's defenses.

In other words, defenders of the separability doctrine do not begin with the litigation default and pre-agreement right to litigate before asking what process the law should require to trade away that right, as this Article contends they should.

Perhaps separability defenders do not start with the litigation default and pre-agreement right to litigate because many separability defenders often write on international arbitration.⁸⁹ In the more anarchic international environment, litigation is not the default process of dispute resolution to nearly the same degree as domestic litigation is the default process in the United States. The international arena lacks a government able to impose its courts' jurisdiction and judgments on all relevant parties, and cooperation among governments has not closed this gap. In other words, the pre-agreement "right to litigate" has less value in the international context because enforcement of courts' judgments across international borders tends to be less reliable than it is within the United States.⁹⁰ In

89. See *infra* notes 92–93.

90. While the U.S. Constitution requires each state's courts to give other states' courts' judgments "Full Faith and Credit," U.S. CONST. art. IV, § 1, no comparable treaty among nations exists. See Emilio Bettoni, *Recognition and Enforcement of Foreign Money Judgments Despite the Lack of Assets*, 10 N.Y.U. J.L. & BUS. 155, 157–58 (2013) ("Contrary to foreign arbitral awards, which are widely recognized and enforced . . . [t]he only attempt to create a multilateral convention on the recognition and enforcement of foreign money judgments on a global scale . . . failed to attract the required executions and ratifications"); Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 190 (1989) (noting the difficulty in recognizing and enforcing foreign judgments because these actions "depend on notions of comity and fairness that are often vaguely and inconsistently articulated"); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 48, 51–52 (2014) (explaining that a proposed Hague Convention on Jurisdiction and Foreign Judgments has thus far "proved impossible to enact," and although work continues, "there is no guarantee that the project would be successful"); Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 152 (2013) ("[T]he absence of an international enforceability regime for foreign judgments leaves a void in the realm of private international law that sits in stark contrast to the well-established mechanism for enforcing foreign arbitral awards.").

short, international arbitration is less subordinate to international litigation than domestic arbitration is to domestic litigation.

If the international arena lacks a strong pre-agreement right to litigate in a court with power to compel the other party to comply with the court's judgments, then perhaps the only legally relevant fact in an international case is the parties' agreement to arbitrate, so the separability-is-just-a-good-default-presumption argument has more force internationally than it does in the domestic U.S. context.⁹¹ Furthermore, the types of parties typically forming international arbitration agreements—governments and large businesses—may generally protect themselves from the conduct that would give rise to a contract defense better than the individuals who often form domestic arbitration agreements. For example, individuals seem more vulnerable to undue influence, unconscionability, duress, and misrepresentation than governments and large businesses because governments and large businesses seem harder than ordinary individuals to bully and trick.⁹²

For these reasons, the case for the separability doctrine is stronger in the international context than in the domestic U.S. context. So it is understandable that the most eloquent advocates of the separability doctrine tend to be those who have written extensively on international arbitration.⁹³ Their arguments apply less to the domestic U.S. context,

91. See *supra* text accompanying notes 78–80.

92. See Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 21 (2003) ("There is less of a need for protection of clients in international commercial arbitration because the parties are almost without exception international business entities. There are no personal injury victims, no civil rights claimants, and no criminal defendants. As participants in the global marketplace, the consumers of international commercial arbitration presumably have significant financial resources and are sophisticated." (footnotes omitted)); see also Jacob R. Schaffer, Note, *Rescuing the International Arbitral Model: Identifying the Problem in Natural Resources Trade and Development*, 114 W. VA. L. REV. 309, 318–19 (2011) (stating that many of the companies seeking arbitration in international business are large companies).

93. See Rau, *Separability*, *supra* note 78; Rau, *Arbitral Jurisdiction*, *supra* note 78; see also STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 18, 22 (1987); John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1116, 1119 (2003); Drahozal & Rutledge, *supra* note 57, at 1121; William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133, 143 (1997); Smit, *supra* note 40, at 22–23; Speidel, *supra* note 74, at 260 & n.284. By contrast, scholars criticizing the separability doctrine tend to have written more on domestic than international arbitration. See Kenneth R. Davis, *A Model for Arbitration Law: Autonomy, Cooperation and Curtailment of State Power*, 26 FORDHAM URB. L.J. 167, 195–96 (1999); Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 826–28 (2003); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1391, 1456–58 (1991).

especially the domestic U.S. context of adhesive arbitration agreements (which no other nation enforces at all⁹⁴) enforced against consumers, employees, and other individuals. In short, the persuasiveness of the case against the separability doctrine grows with the importance of (1) the right to litigate and (2) the protection provided by contract law's defenses to enforcement. Each of these factors is generally less important in the international context than in the domestic context, especially the domestic adhesive context.

6. The Downsides of Repealing the Separability Doctrine

Repealing the separability doctrine would have downsides. A non-separability rule would have a court available to resolve contract defenses before an arbitrator resolves the merits of the claims. This would allow a party to add an extra procedural step (litigating contract defenses) that would generally make getting to arbitration of the cases' merits slower and costlier than it is under the separability doctrine, which resolves in one forum both contract defenses and the merits of cases.⁹⁵ In addition, a non-separability rule would often have a court resolving issues intertwined with the merits of the case that will go to the arbitrator if the court finds no defense.⁹⁶ In short, repealing the separability doctrine will have downsides. However, ensuring that courts do not compel arbitration unless the parties have formed an enforceable contract requiring arbitration is worth bearing those downsides.

C. *Vacate Legally Erroneous Arbitration Awards on Mandatory-Law Claims*

After contract defenses (the separability doctrine), the second important and controversial topic on which current law enforces adhesive arbitration agreements more broadly than other adhesion contracts relates to the adjudicator's (court's or arbitrator's) errors of law.

94. Jean R. Sternlight, *Consumer Arbitration*, in EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 127, 138–40 (2006); Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 U. MIAMI L. REV. 865, 865 (2002).

95. The non-separability procedure would allow a party who expects to lose in arbitration to delay arbitration by fabricating an allegation that the container contract is unenforceable. See *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590 (7th Cir. 2001) (“[I]t is easy to cry fraud.”); W. MICHAEL REISMAN ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION* 540 (1997) (“[I]t is all too easy for a party seeking to derail an arbitration at its inception to claim that the main agreement was or had become invalid.”). Perhaps parties who refuse to go to arbitration without a court's determination that the container contract is enforceable should, if they lose on that determination, be required to pay the other side's legal fees and costs. Additional sanctions might also be imposed. See FED. R. CIV. P. 11(c).

96. See Ware, *supra* note 48, at 114–17.

1. Legally Erroneous Decisions by the Initial Adjudicator

Consider a hypothetical adhesion contract that does not have an arbitration clause but rather provides that litigation of any disputes shall end with the trial court's judgment. In other words, the contract says the parties have no right to appeal. This hypothetical contract provision would be extremely unusual and probably unenforceable. Attorney Colter Paulson searched for cases involving such provisions and concluded that "[o]utside of the arbitration context, there are very few cases dealing with pre-dispute waivers of the right to appeal."⁹⁷ In fact, Paulson found only two cases since 1928, one of which he concluded "was simply a weak attempt to call a payment provision an appellate waiver and was rejected as such."⁹⁸ The other case involved an agreement that was not truly pre-dispute,⁹⁹ let alone pre-dispute and adhesive. Therefore, it seems no reported case since 1928 involves a truly pre-dispute contract provision prohibiting appeal.

The longstanding absence of cases involving pre-dispute agreements prohibiting appeal suggests that such agreements are extremely unusual. Their unusualness may be entirely due to party choice; perhaps parties place great importance on the right to appeal, so they do not agree to give it up. However, arbitration in the United States rarely provides a right to appeal—appellate panels of arbitrators are very rare¹⁰⁰—and many parties nevertheless agree to arbitrate. So the fact that very few parties form non-arbitration agreements prohibiting appeal suggests not that parties oppose such agreements, but rather that parties do not believe that courts would enforce such agreements.

Why would agreements not to appeal be unenforceable? Why would it be so outlandish to enforce a pre-dispute contract term—even an

97. Colter L. Paulson, *Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure*, 45 ARIZ. ST. L.J. 471, 492 (2013).

98. *Id.* at 492–93, 493 n.109.

99. *See* *Burke v. Burke*, 662 S.E.2d 622, 623, 627 (Va. Ct. App. 2008); Paulson, *supra* note 97, at 493 n.108. The agreement in *Burke* was a property settlement agreement, in anticipation of divorce, between spouses who had already separated. *Burke*, 662 S.E.2d at 623. The wife's lawyer drafted the agreement, and the husband was himself a lawyer. *Id.* While the Virginia Court of Appeals enforced the agreement's prohibition on appeal, this does not suggest it would have enforced such a prohibition in a truly pre-dispute agreement, let alone an adhesive pre-dispute agreement. *See id.* at 627. The *Burke* agreement was post-dispute in the sense that the parties had decided to divorce and the agreement—as the name property settlement agreement suggests—was more in the nature of a settlement agreement and received the high level of consent typically received by settlement agreements. *See id.* at 623. It was not formed until examined by a lawyer for each side. *Id.*

100. Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 710 (2001) ("[A]rbitration does not ordinarily provide a right to appeal. Although parties could, by contract, agree to an appellate arbitral tribunal, such agreements are exceedingly rare.").

adhesive contract term—prohibiting appeal? After all, what is really so important about appellate review? The primary purpose of appellate review relates to law rather than facts. Trial courts find facts and apply law to those facts.¹⁰¹ The primary purpose of appellate review is to ensure that the trial court correctly applied the law to whatever facts the trial court found, as opposed to policing the accuracy of the trial court’s fact-finding, which is merely a secondary purpose of appellate review.¹⁰² While appellate courts usually give significant deference to trial courts’ factual findings, reversing only those that are “clearly erroneous,” appellate courts give no deference to trial courts’ legal rulings and thus give rulings of law de novo review.¹⁰³ So the typical appeal of a trial court’s decision centers on the appellant’s argument that the trial court made an error of law.¹⁰⁴

101. Martha S. Davis & Stevan Alan Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 536 n.393 (1986) (“[T]he trial court’s function is application of law to fact.”).

102. Irene M. Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL. 1109, 1141 (2012) (“The near-exclusive focus on legal issues at the appellate level suggests that the legal system of the United States primarily values appellate review for its role in lawmaking. . . . [The system] devote[s] fewer appellate resources to this review for factual errors.” (citing KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 36 (1930))); Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 707 (2013) (“Error correction is the other traditional function of appeals courts. Generally, in American courts, the error-correction function is limited to issues of law, and trial court decisions of fact are rarely reviewed.” (citing *McAllister v. United States*, 348 U.S. 19, 20 (1954))).

103. Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 7–8 (“The decisions in the first category—questions of law—are reviewed ‘de novo’ by the appellate court, meaning that the appellate court is not required or expected to give any deference to the trial court. . . . In contrast to legal conclusions, factual determinations by the trial court are reviewed deferentially. Appellate review of factual findings by the district court is limited to whether those findings are ‘clearly erroneous,’ a very high bar to reverse a trial judge’s factual findings.” (footnotes omitted)); David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 77 (2003) (“Traditionally, questions of law are reviewed de novo and questions of fact are reviewable only on a clearly erroneous basis.”); Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1831 (2013) (“Appellate courts review questions of law de novo In contrast, appellate courts defer to trial court fact-finding” (citing J. ERIC SMITHBURN, *APPELLATE REVIEW OF TRIAL COURT DECISIONS* 8 (2009))); Leandra Lederman, *(Un)appealing Deference to the Tax Court*, 63 DUKE L.J. 1833, 1886 (2014) (“Federal Rule of Civil Procedure 52(a)(6) governs the standard of review of findings of fact in district court bench trials; Rule 52(a)(6) states that ‘[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.’ The standard of review on legal issues appealed from the district courts is de novo.” (alteration in original) (footnotes omitted)).

104. Anderson, *supra* note 103, at 8 (“The key point is that the standard of review constrains the appellate court to defer to the trial court’s findings of fact, meaning that the appeal is primarily

Therefore, a contract clause prohibiting appeal would effectively trade away the right to correct legally erroneous trial court decisions. Trial courts sometimes make errors of law, and when that occurs a contract clause prohibiting appeal would be the parties' consent to enforcement of that legally erroneous decision. Enforcing such a clause in a contract formed pre-dispute is, as noted above, virtually unheard of, and the notion of enforcing such a clause in an adhesion contract is even more outlandish.

By contrast, courts routinely enforce such clauses in adhesive arbitration agreements. That is, courts routinely enforce adhesive arbitration agreements that trade away the right to correct legally erroneous decisions by the initial adjudicator, the arbitrator. In fact, most every arbitration agreement does this. Most every arbitration agreement trades away the right to correct legally erroneous decisions by the initial adjudicator, as there is generally no right to correct legally erroneous arbitration awards. As noted above, appellate panels of arbitrators are very rare.¹⁰⁵ And while trial courts' legal rulings receive de novo review from appellate courts,¹⁰⁶ arbitrators' legal rulings almost never receive de novo review from courts and usually receive no review at all.¹⁰⁷ As the Supreme Court acknowledges, arbitration's "absence of multilayered review makes it more likely that errors will go uncorrected."¹⁰⁸ Courts occasionally vacate an award on the ground that the arbitrator manifestly disregarded the law, but "manifest disregard" requires much more than an error of law—it requires proof the arbitrator knew the law and chose

an appeal of legal issues, not a new trial of the whole case."); Déirdre Dwyer, *(Why) Are Civil and Criminal Expert Evidence Different?*, 43 TULSA L. REV. 381, 387 (2007) ("Appeal is usually on the basis of error of law rather than fact."); Peter J. Kocoras, *The Proper Appellate Standard of Review for Probable Cause to Issue a Search Warrant*, 42 DEPAUL L. REV. 1413, 1418 (1993) ("At the time of the appeal, the factual record has been constructed by the district court and settled for purposes of appellate review, enabling appellate judges to 'devote their primary attention to legal issues.'" (footnote omitted)); Lynne Liberato & Kent Rutter, *Evaluating Appeals by the Numbers*, 66 TEX. B.J. 768, 770 (2003) ("In appeals following jury trials, the most valid generalization is that issues of law succeed, and issues of fact and challenges to trial procedure do not. An appeal is strongest when the alleged errors are errors of law, and it is generally good strategy to emphasize those issues in the brief."); Ten Cate, *supra* note 102.

105. *See supra* note 100 and accompanying text.

106. *See supra* note 103 and accompanying text.

107. *See supra* note 22 and accompanying text.

108. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also* *Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1011 (10th Cir. 1994) ("Arbitration provides neither the procedural protections nor the assurance of the proper application of substantive law offered by the judicial system.").

to ignore it¹⁰⁹—so vacatur on this ground is “extremely rare.”¹¹⁰

Even when arbitration agreements say courts shall provide de novo review of the arbitrator’s legal rulings, courts nevertheless should refuse to provide de novo review, according to the Supreme Court’s 2008 decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*¹¹¹ The *Hall Street* Court refused to enforce a post-dispute arbitration agreement providing that

‘[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.’¹¹²

109. Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*, 14 CARDOZO J. CONFLICT RESOL. 593, 604 (2013) (“Most courts agree that manifest disregard applies only in exceptional circumstances; it does not refer to mere error by arbitrators on the law or questionable arbitrator interpretations of the contract. The classical formulation is that it pertains to a situation in which the arbitrators describe the applicable law cogently and knowledgeably and then deliberately ignore it in reaching their determination.” (footnote omitted)). The manifest-disregard doctrine applies “when the arbitrators ‘knew the law and explicitly disregarded it.’ This is the predominant definition of the manifest disregard standard.” Kenneth R. Davis, *The End of an Error: Replacing “Manifest Disregard” With a New Framework for Reviewing Arbitration Awards*, 60 CLEV. ST. L. REV. 87, 95 (2012) (footnote omitted) (quoting *Hicks v. Cadle Co.*, 355 F. App’x. 186, 197 (10th Cir. 2009)). The Supreme Court’s *Hall Street* decision “brought into question whether the . . . Court, by implication, abolished the manifest disregard standard. The Court, however, did not decide this issue.” *Id.* at 91. “While several of the circuits uphold the use of the manifest disregard doctrine, each of these circuits has a slightly different definition for manifest disregard, and all of these interpretations seem a bit narrower than the interpretations that existed before *Hall Street*.” Weathers P. Bolt, Note, *Much Ado About Nothing: The Effect of Manifest Disregard on Arbitration Agreement Decisions*, 63 ALA. L. REV. 161, 167 (2011).

110. S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 189–90 (2012) (“It is extremely rare for a party to establish a manifest disregard of law As a practical matter, claims of manifest disregard of law very seldom result in the setting aside of an award.”); see Bolt, *supra* note 109, at 174 (“[M]anifest disregard is the most common ground for appeal of an arbitral ruling, yet it is remarkably unsuccessful.”); Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143, 164 (2013) (“[M]anifest-disregard review is effectively a dead letter, whether one is in state or federal court.”); Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 16 (2014) (“The [manifest disregard] standard has been described . . . as a ‘virtually insurmountable’ hurdle, and even courts recognize the limited utility of the doctrine.” (footnote omitted)).

111. 552 U.S. 576, 584–85 (2008).

112. *Id.* at 579 (alteration in original).

The Supreme Court decided against enforcing such agreements, which the Court characterized as attempts to expand the grounds for vacatur beyond those listed in the Federal Arbitration Act.¹¹³ The *Hall Street* Court stated that the FAA's four grounds for vacatur are "exclusive," so courts should not enforce contractually created grounds for vacatur.¹¹⁴ The Court viewed the FAA's provisions on confirmation and vacatur of arbitration awards "as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."¹¹⁵ Any other reading of the FAA, *Hall Street* said, "opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,' and bring arbitration theory to grief in postarbitration process."¹¹⁶

While refusal to enforce agreements providing for judicial vacatur of legally erroneous arbitration awards is yet another problematic¹¹⁷ arbitration ruling by the post-2006 Supreme Court, especially its conservative Justices,¹¹⁸ the broader reluctance of courts to engage in close review of arbitrators' legal rulings is longstanding. For well over a century, courts have reviewed arbitration awards very deferentially and thus have confirmed and enforced, rather than vacated, most of them, including awards in which the arbitrator may have made an error of law.¹¹⁹ Before the FAA, the general rule for judicial review of arbitration awards was: "If the award is within the [arbitration agreement], and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."¹²⁰ On this point of law, little has changed, as the FAA's grounds

113. *Id.* at 586–87.

114. *Id.* at 582 & n.4, 584.

115. *Id.* at 588.

116. *Id.* (alteration in original) (citations omitted) (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

117. Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 92–96 (2014).

118. *Hall Street* had five Republican appointees in the majority (Scalia, Roberts, Souter, Thomas, Alito) and only one Democratic appointee (Ginsburg). *Hall Street*, 552 U.S. at 578.

119. Ware, *supra* note 117, at 69.

120. *Burchell v. Marsh*, 58 U.S. 344, 349 (1854); *see also In re Curtis*, 30 A. 769, 772 (Conn. 1894) (ruling that courts refuse to set aside an arbitration award "except for partiality and corruption in the arbitrators, mistakes on their own principles, or fraud or misbehavior in the parties"); *Sherfy v. Graham*, 72 Ill. 158, 159–60 (1874) (stating that arbitrators, "by the submission, become judges, by the choice of the parties, both of the law and the fact, and from their decision there is no appeal or review, of any decision made by them within the scope of their powers, unless it be for fraud, partiality or misconduct."); *Pulliam v. Pensoneau*, 33 Ill. 374, 378

for vacating awards are narrow and do not include “error of law” by the arbitrator.¹²¹ With *Hall Street* holding that the FAA’s grounds for vacatur are “exclusive,”¹²² there is every reason to believe that courts will continue to confirm arbitration awards without determining whether they correctly apply the law or rest on errors of law.¹²³

In effect then, an arbitration agreement trades away the right to correct legally erroneous decisions by the initial adjudicator (the arbitrator).¹²⁴ Current law routinely enforces such agreements, even when they are part of adhesion contracts.¹²⁵ In this respect, current law enforces adhesive arbitration agreements more broadly than it enforces other adhesion contracts.¹²⁶ Current law enforces adhesive arbitration agreements, but not other adhesion contracts, that purport to trade away the right to correct legally erroneous decisions by the initial adjudicator.¹²⁷

If the arbitrator’s error of law resulted in the arbitration award denying a claim that would have prevailed under a correct decision of law, then the arbitration agreement had the effect of negating that claim. In that situation, a claim that would have won, but for a pre-dispute contract clause, in fact loses because that clause is enforced. Thus, the arbitration clause had the same effect as an enforceable exculpatory clause—a pre-dispute contract clause negating a claim that might later occur. However, exculpatory clauses are generally not enforced with respect to most claims arising out of tort or statutory law.¹²⁸ In particular, courts are especially unlikely to enforce exculpatory clauses to negate claims arising out of areas of law (such as consumer, employment, labor,

(1864) (stating that the decision of the arbitrator is conclusive on the parties, and a mistake in either law or fact is not usually corrected).

121. 9 U.S.C. § 10 (2012) (omitting “error of law” from listed grounds for vacatur); Jay E. Grenig, *After the Arbitration Award: Not Always Final and Binding*, 25 MARQ. SPORTS L. REV. 65, 99 (2014) (“Review of an arbitration award is limited. A court may vacate an arbitrator’s decision only in very unusual circumstances.”); Benjamin A. Griffith, Comment, *Contractual Expansion of Judicial Review of Arbitration Awards in Missouri After Hall Street and Cable Connection*, 58 ST. LOUIS U. L.J. 265, 277 (2013) (“Congress established narrow grounds for judicial review of arbitration awards under § 10 of the FAA. The language of § 10 has been interpreted to not allow review of arbitral awards for errors of law or fact. As a result, if the arbitral award does not violate one of the four provisions of § 10, the reviewing court is required by the FAA to confirm it.” (footnotes omitted)).

122. *Hall Street*, 552 U.S. at 584.

123. Ware, *supra* note 117, at 92–96.

124. Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 201 (“By contracting to arbitrate, parties are essentially contracting out of the right to appeal.”).

125. See discussion *supra* Subsections I.B.1, I.C.1.

126. See Ware, *supra* note 2, at 751.

127. *Id.* at 746–48. An arbitration agreement basically consents to enforcement of the arbitrator’s legally erroneous decisions. See *supra* notes 105–10 and accompanying text.

128. Ware, *supra* note 2, at 728.

securities, and franchise law) designed to override contract terms (“mandatory-law claims”).¹²⁹

With respect to mandatory-law claims, current arbitration law is anomalous. Combining enforcement of adhesive agreements to arbitrate statutory and other mandatory-law claims with judicial review that is too deferential to identify and vacate legally erroneous arbitration awards results in enforcement of adhesion contracts to negate claims that could not be negated directly with exculpatory clauses because courts would not enforce them. In this important and controversial respect, arbitration law enforces adhesion contracts more broadly than other law does. Arbitration law enforces effectively exculpatory clauses when other law would not enforce an exculpatory clause. Thus, arbitration law has a lower standard of consent than other law because, while other law requires post-dispute consent (a settlement agreement¹³⁰) to negate a mandatory-law claim, arbitration law tolerates pre-dispute consent, even adhesive consent, to negate a mandatory-law claim.

While enforcing contracts trading away purportedly mandatory-law claims, and thus transforming those ostensibly mandatory rules into default rules,¹³¹ appeals to my general preference for default rather than mandatory law, I nevertheless believe those of us who are against mandatory law should seek to repeal it directly.¹³² To be consistent with non-arbitration law generally, arbitration law must stop allowing pre-dispute arbitration clauses to have the effect of enforceable exculpatory clauses in circumstances in which non-arbitration exculpatory clauses would be unenforceable. If mandatory laws are to be repealed, that should be accomplished by the legislatures that enacted them, not by adhesive arbitration agreements.

2. The Anomaly Only Exists with Respect to Mandatory-Law Claims Arising out of Pre-Dispute Arbitration Agreements (Settlement Agreements vs. Exculpatory Clauses)

The anomaly of current law enforcing adhesive arbitration agreements, but not other adhesion contracts that trade away the right to

129. *Id.*

130. *Id.*

131. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 710 (1999).

132. Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 88, 117 n.93 (2006) (“As an aside, I feel compelled to add that I oppose much of the mandatory law enacted since the FAA so I am sort of pleased that arbitration now allows parties to opt out of such law. But I believe candor and logical consistency require those of us who oppose mandatory law to seek to repeal it outright, not to use arbitration to make an end run around it.”).

correct legally erroneous decisions by the initial adjudicator, is an anomaly only with respect to legally erroneous decisions on questions of mandatory (as opposed to default) rules of law.

As noted above, a default rule is a legal rule that governs in the absence of an enforceable contract term to the contrary.¹³³ For example, in a sale of goods under the UCC, the default rule is that the seller's place of business is the place for delivery of the goods, but the parties can opt out of that default with a contract term requiring delivery at some other location.¹³⁴ If the parties' contract does not specify a place for delivery but has an arbitration clause, then the contract allows the arbitrator to determine the place for delivery. If the arbitrator does not correctly apply the UCC and concludes the place of delivery is somewhere other than the seller's place of business, the arbitrator has made a legally erroneous ruling, but one to which the parties should be held because the parties' contract delegated their lawmaking discretion over default rules to their agent, the arbitrator.¹³⁵ Just as the parties would be held to a pre-dispute contract term in which they expressly chose someplace other than the seller's place as their place for delivery, they should be held to a pre-dispute contract term giving their arbitrator the power to choose someplace other than the seller's place as their place for delivery, even if the arbitrator exercised that power by making an error of law.¹³⁶

In contrast, if the arbitrator erroneously decides an issue of mandatory law then the parties should not be held to the arbitrator's decision, even if the parties' pre-dispute contract (including the arbitration clause) authorized and supported that decision. Many statutes and regulations in consumer, employment, and other areas of law prohibit enforcement of various contract terms.¹³⁷ In other words, these laws restrict freedom of contract. They prohibit parties from producing certain results by contract. For example, if the relevant statute prohibits interest rates above 24%, then the parties may not lawfully contract for 36% interest.¹³⁸ But

133. Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 733 (1993).

134. U.C.C. § 2-308 (AM. LAW INST. & UNIF. LAW COMM'N 2015).

135. See *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) ("In the main, an arbitrator acts as the parties' agent and as their delegate may do anything the parties may do directly.").

136. This freedom to make privatized default law allows parties to develop legal rules different from, and perhaps better than, the government rules of law they are exiting.

137. *Ware*, *supra* note 2, at 716–17.

138. See *Beltz v. Dings*, 6 P.3d 424, 430 (Kan. Ct. App. 2000) (refusing to enforce a contract for a deed between two individuals with a 1% interest rate per month because it exceeded the state's allowable maximum annual rate of 10.33%); *NV One, LLC v. Potomac Realty Capital, LLC*, 84 A.3d 800, 806 (R.I. 2014) (refusing to enforce a contract with 23.17% interest rate because Rhode Island's usury statute prohibits rates above 21%).

suppose their contract does require 36% interest and an arbitration award enforces that requirement. The arbitrator has erred on an issue of mandatory law. If a trial court made that error of law, then an appellate court would presumably reverse the trial court's judgment to correct the error. Further, as noted above, an adhesion contract purporting to trade away the right to correct the legally erroneous trial court decision would be unenforceable.¹³⁹ Similarly, an adhesive arbitration agreement should be unenforceable to the extent it would prevent courts from correcting the arbitrator's error of enforcing a 36% interest rate, or any other arbitrator errors on questions of mandatory law.

This anomaly of enforcing adhesive arbitration agreements, but not other adhesion contracts trading away the right to correct legally erroneous decisions on mandatory law, was not a significant issue before the 1980s, because courts of that era generally did not enforce pre-dispute agreements to arbitrate claims arising under mandatory law. Courts largely limited pre-1980s arbitration to disputes governed by the default rules of contract and commercial law.¹⁴⁰ A pre-1980s arbitration award on a mandatory-law claim was apparently pretty rare and would generally only occur as a result of a post-dispute agreement to arbitrate.

Distinguishing between pre- and post-dispute agreements regarding mandatory law is crucial. While, as noted above, a pre-dispute agreement negating a mandatory law claim is an exculpatory clause, a post-dispute agreement negating a mandatory law claim is a settlement agreement. Courts routinely enforce settlement agreements to negate mandatory-law claims—even unsophisticated or vulnerable parties' settlement agreements to negate mandatory-law claims—outside the arbitration law context.¹⁴¹ Courts enforce “legally erroneous” settlement agreements by routinely enforcing settlement agreements without asking whether their terms are similar to the result a court would have reached had the case not settled.¹⁴² As post-dispute arbitration agreements are a type of settlement agreement, by enforcing legally erroneous arbitration awards arising out of *post-dispute* arbitration agreements, pre-1980s law

139. See discussion *supra* Subsection I.C.1.

140. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting). In this era, arbitration was used “almost entirely in either the area of labor disputes or in ‘ordinary disputes between merchants as to questions of fact.’” *Id.* at 650 (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)). Arbitrators in these two contexts hear almost nothing but breach-of-contract claims. In the labor context, a union or employee asserts breach of a collective bargaining agreement. In the commercial context, merchants allege breach of contracts for the sale of goods and raise “questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like.” *Id.* at 646 n.11.

141. *Ware*, *supra* note 2, at 727–29.

142. *Ware*, *supra* note 117, at 64–66.

enforced arbitration agreements and non-arbitration agreements similarly with respect to post-dispute agreements to resolve a dispute on terms quite different from those a court would have chosen.¹⁴³

Pre-1980s law was also generally consistent across arbitration and non-arbitration agreements in not enforcing *pre-dispute* agreements, let alone adhesive agreements, trading away the right to appeal legally erroneous decisions on mandatory law.¹⁴⁴ This changed from 1985 to 1991, when the Supreme Court decided cases in which it enforced pre-dispute agreements to arbitrate several important mandatory-law claims (antitrust, securities, and employment discrimination),¹⁴⁵ but retained deferential judicial review of arbitration awards, even those involving mandatory-law claims. This created the anomaly of enforcing pre-dispute arbitration agreements—even adhesive pre-dispute arbitration agreements—trading away the right to appeal legally erroneous decisions on mandatory law, while denying enforcement of pre-dispute *non-arbitration* agreements trading away the right to appeal legally erroneous decisions on mandatory law. This anomaly should be fixed for the sake of the law’s internal coherence,¹⁴⁶ regardless of one’s beliefs about the frequency with which arbitrators make legally erroneous decisions on mandatory law.¹⁴⁷

One way to fix this anomaly would be to reverse or override the Court’s 1985–1991 decisions enforcing pre-dispute agreements to arbitrate mandatory-law claims. This “turn back the clock” approach is part of the Very Progressive Position, which would not enforce pre-dispute arbitration agreements by individuals.¹⁴⁸ This approach is overbroad because it would deny individuals the freedom to form enforceable pre-dispute agreements to arbitrate claims arising under default rules of law, and because even individuals’ pre-dispute agreements to arbitrate claims arising under mandatory rules of law

143. *See id.* at 58.

144. *See id.*

145. The important cases were: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act and RICO); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (employment discrimination). Their predecessor was *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), but it stood alone for over a decade and seemed narrowly confined to the special concerns of international cases.

146. *See Ware, supra* note 132, at 117.

147. *See* Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 LOY. L.A. L. REV. 187, 194 (2006) (“‘[H]ow often’ do arbitrators not follow the law? The empirical evidence on this point—which consists of case analyses, surveys of arbitrators, and reversal rates of arbitration awards and court decisions—is varied but ultimately inconclusive.” (footnote omitted)).

148. *Ware, supra* note 2, at 733–34.

should be enforced so long as arbitrators' rulings on mandatory law are adequately policed by judicial review.

Rather than the Very Progressive Position's overbroad approach of returning to pre-1980s law, a better tailored (and more centrist) way to fix the anomaly of uncorrected, legally erroneous decisions on mandatory law is to start correcting them. Courts could give de novo review to arbitrators' decisions on questions of mandatory law. I have long supported this¹⁴⁹ and propose the following law reform, whether enacted by Congress, the CFPB, or perhaps the Supreme Court¹⁵⁰:

In addition to other grounds for vacating arbitration awards, a state or federal court shall vacate an award arising out of an agreement providing for arbitration of any future dispute between the parties where the award was based on the arbitrators' error of law and, at the time of their most recent agreement submitting the controversy to arbitration, the parties could not have formed an enforceable contract to avoid such law.¹⁵¹

The final clause—"at the time of their most recent agreement submitting the controversy to arbitration, the parties could not have formed an enforceable contract to avoid such law"¹⁵²—ensures that only awards arising out of *pre-dispute* agreements to arbitrate would be subject to de novo review, and ensures that de novo review would apply only to questions of mandatory, not default, law. This rule would fix the anomaly of enforcing pre-dispute arbitration agreements, even adhesive arbitration agreements, but not other pre-dispute contracts trading away the right to appeal legally erroneous decisions. This rule would make arbitration agreements as enforceable as other agreements, but not more so.

D. *Enforce Arbitral Class Waivers No More or Less Than Non-Arbitral Class Waivers*

In addition to contract defenses (the separability doctrine) and vacating legally erroneous decisions on mandatory law, the third important and controversial topic on which current law enforces adhesive arbitration agreements more broadly than other adhesion contracts is "class waivers," that is, contract terms trading away (not technically

149. Ware, *supra* note 131, at 727.

150. This centrist proposal might be the best resolution of tension between the FAA and at least federal law creating mandatory-law rights, i.e., rights purportedly inalienable pre-dispute.

151. Ware, *supra* note 2, at 752.

152. *Id.*

“waiving”¹⁵³) the right to be part of a class action. This Section first analyzes the law governing class waivers and then suggests that arbitration law should refrain from taking a side in the ongoing policy battles over class actions.

1. Class Waivers and the Black-Letter Law of *Concepcion* and *Amex*

The following Sections analyze the black-letter law governing class waivers by discussing the two important cases in which the Supreme Court made this law. The first deals with arbitration law’s relationship to state law, while the second deals with arbitration law’s relationship to federal law.

a. *AT&T Mobility LLC v. Concepcion*

Before 2011, courts were split on the enforceability of class waivers in arbitration agreements (“arbitral class waivers”). Some courts enforced them to preclude both litigation and classwide arbitration, thus leaving only individual arbitration to resolve claims covered by an arbitration agreement with a class waiver.¹⁵⁴ In contrast, other courts refused, often

153. See Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 205 (2004).

One can alienate one’s rights in two ways: in exchange for consideration or in the absence of consideration. To put it another way, one can trade away one’s rights, or one can give away one’s rights. In some legal contexts, such as contract law, the term “waiver” is often used to refer only to *giving* away one’s rights. Standard accounts of contract law, for example, carefully distinguish the “waiver” of contractual rights, which does not require consideration, from the “modification” of contractual rights, which does.

Id. at 169 n.16. For this reason, “class waiver” is a misleading term to the extent “waiver” implies alienating a right for nothing in return; if the alienating occurs through a contract term, then it is better understood as a trade than a waiver.

154. See, e.g., *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877–78 (11th Cir. 2005); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *Borrero v. Travelers Indem. Co.*, No. CIV S-10-322 KJM, 2010 WL 4054114, at *2 (E.D. Cal. Oct. 15, 2010); *Green v. SuperShuttle Int’l, Inc.*, No. 09-2129 ADM/JJG, 2010 WL 3702592, at *3 (D. Minn. Sept. 13, 2010), *rev’d in part on other grounds*, 653 F.3d 766 (2011); *Johnson v. Carmax, Inc.*, No. 3:10-CV-213, 2010 WL 2802478, at *3–4 (E.D. Va. July 14, 2010); *Jackson v. Payday Loan Store of Ill., Inc.*, No. 09 C 4189, 2010 WL 1031590, at *5 (N.D. Ill. Mar. 17, 2010); *Sanders v. Comcast Cable Holdings, LLC*, No. 3:07-cv-918-J-33HTS, 2008 WL 150479, at *10 (M.D. Fla. Jan. 14, 2008); *Deaton v. Overstock.com, Inc.*, No. 07-cv-643-JPG, 2007 WL 4569874, at *3 (S.D. Ill. Dec. 27, 2007); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998); *Maiorano v. Prof’l Cmty. Mgmt., Inc.*, No. B220127, 2010 WL 3786721, at *2 (Cal. Ct. App. Sept. 30, 2010); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253–54 (Colo. App. 2001); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1260–61 (Del. Super. Ct. 2001); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005); *Gras v.*

on unconscionability grounds, to enforce many arbitral class waivers.¹⁵⁵ For instance, in *Discover Bank v. Superior Court*,¹⁵⁶ the California Supreme Court said:

We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.” Under these circumstances, such waivers are unconscionable under California law and should not be enforced.¹⁵⁷

The California Supreme Court’s quote from a California statute prohibiting exculpatory clauses is telling. The strongest argument against class waivers is that they are often effectively exculpatory clauses. This

Assoc. First Capital Corp., 786 A.2d 886, 892 (N.J. Super. Ct. App. Div. 2001); *Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448, 449 (N.Y. App. Div. 2003); *Strand v. U.S. Bank Nat’l Ass’n ND*, 693 N.W.2d 918, 926 (N.D. 2005); *Autonation USA Corp. v. Leroy*, 105 S.W.3d 190, 202 (Tex. App. 2003); *Bandler v. Charter One Bank*, No. 451-7-03 Rdcv, 2010 WL 3617115, 11–12 (Super. Ct. Vt. 2010), *rev’d*, 59 A.3d 157 (Vt. 2012); *see also* UTAH CODE ANN. § 70C-4-105(1) (West 2015) (stating that “a creditor may contract with the debtor of an open-end consumer credit contract for a waiver by the debtor of the right to initiate or participate in a class action related to the open-end consumer credit contract”).

155. *See, e.g.*, *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086–87 (9th Cir. 2010); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003); *Jones v. DirecTV, Inc.*, 667 F. Supp. 2d 1379, 1382 (N.D. Ga. 2009); *Knepp v. Credit Acceptance Corp.*, 229 B.R. 821, 842 (Bankr. N.D. Ala. 1999); *Leonard v. Terminix Int’l Co.*, 854 So. 2d 529, 539 (Ala. 2002); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000), *abrogated in part on other grounds by* *Concepcion*, 563 U.S. 333; *Cohen v. DirecTV, Inc.*, 48 Cal. Rptr. 3d 813, 815–16 (Ct. App. 2006), *abrogated by* *Concepcion*, 563 U.S. 333; *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229, 243 (Ct. App. 2005); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 820 (Ill. App. Ct. 2005); *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005); *Muhammad v. Cty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 100 (N.J. 2006), *superseded by statute*, 9 U.S.C. § 9 (2012), *as recognized in* *Homa v. Am. Express Co.*, 494 F. App’x 191 (2012); *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866–67 (Ohio 1998); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 283 (W. Va. 2002).

156. 113 P.3d 1100 (Cal. 2005).

157. *Id.* at 87 (alteration in original) (citation omitted).

argument can be made as a matter of doctrine (class waivers are unenforceable when they have exculpatory effect) or as a matter of policy (class waivers should be unenforceable when they have exculpatory effect).

The Supreme Court rejected the doctrinal version of this argument in *AT&T Mobility LLC v. Concepcion*.¹⁵⁸ The *Concepcion* decision held that the just-quoted “*Discover Bank* rule is preempted by the FAA.”¹⁵⁹ *Concepcion* involved a federal court’s application of the *Discover Bank* rule to hold unconscionable an arbitration clause in a consumer’s cell-phone contract.¹⁶⁰ The U.S. Court of Appeals for the Ninth Circuit held that the FAA did not preempt the *Discover Bank* rule, because that rule was simply “a refinement of the unconscionability analysis applicable to contracts generally in California”¹⁶¹ and thus fell within the savings clause at the end of FAA § 2, which states that 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.”¹⁶²

The Supreme Court’s majority, consisting entirely of Republican-appointed Justices, disagreed.¹⁶³ It said, “The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”¹⁶⁴ The Court’s reasoning relied on the premise that an important purpose of the FAA was to enforce agreements in which parties choose the more streamlined process (arbitration) over the more elaborate process (litigation). *Concepcion* suggested that the FAA would preempt (hypothetical) state law deeming unconscionable arbitration agreements lacking “judicially monitored discovery,”¹⁶⁵ “adherence to the Federal Rules of Evidence,”¹⁶⁶ or “arbitration-by-jury”¹⁶⁷ because requiring arbitration to include these aspects of litigation would effectively convert the more streamlined process into the more elaborate process. Thus, it would no longer be “arbitration,” as those who enacted

158. 563 U.S. 333 (2011).

159. *Id.* at 352.

160. *Id.* at 336–38.

161. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009) (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)).

162. 9 U.S.C. § 2 (2012).

163. Four Justices joined the opinion, with Justice Clarence Thomas concurring in the result and expressing a view to the Right of the other four Republican appointees. *See Concepcion*, 563 U.S. at 354 (Thomas, J., concurring) (stating that FAA § 2 “does not include all defenses applicable to any contract but rather some subset of those defenses”).

164. *Id.* at 344.

165. *Id.*

166. *Id.*

167. *Id.* at 349 n.7.

the FAA envisioned that process.¹⁶⁸ Similarly, the Court said, “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹⁶⁹

In all this, *Concepcion* built on an earlier anti-class-arbitration decision, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹⁷⁰ which also had a majority consisting entirely of the Court’s five Republican-appointedes.¹⁷¹ Quoting *Stolt*, the *Concepcion* Court said:

“[C]hanges brought about by the shift from bilateral arbitration to class-action arbitration” are “fundamental.” . . . The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. . . .

Second, class arbitration *requires* procedural formality. The [American Arbitration Association’s] rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. . . .

. . . [I]t is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. . . .

. . . We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.¹⁷²

168. The *Concepcion* Court said that “[p]arties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.” *Id.* at 351 (citation omitted).

169. *Id.* at 344.

170. 559 U.S. 662 (2010).

171. *Id.* at 665.

172. *Concepcion*, 563 U.S. at 347–51 (citation omitted) (quoting *Stolt*, 559 U.S. at 686).

In sum, the conservative Justices comprising the majorities in *Stolt* and *Concepcion* see “bilateral” arbitration—the simple type of arbitration contemplated by the FAA—as the norm and see class arbitration as a strange process that a few parties might choose, but which should not be imposed on parties who have agreed to arbitrate without specifically addressing class arbitration. And *Concepcion* strongly suggests that courts may not consider it a strike against the enforceability of an arbitration agreement that the agreement provides only for arbitration and not for class arbitration, even if that has exculpatory effect. *Concepcion* reads the FAA as preempting state law—even state law categorized as “unconscionability” or some other ground for the revocation of any contract—that “[r]equir[es] the availability of classwide arbitration.”¹⁷³

b. *American Express Co. v. Italian Colors Restaurant*

While *Concepcion* was a case of federal law (the FAA) preempting state law that otherwise would have invalidated an adhesive arbitral class

If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank*, class arbitration is a “relatively recent development.”

Id. at 349 (citations omitted).

173. *Id.* at 344; see also 9 U.S.C. § 3 (2012); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Shortly after *Concepcion*, the Supreme Court vacated the judgments of lower courts that had found arbitration agreement class waivers unconscionable and had then permitted class litigation. See *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 141 (2d Cir. 2010) (concluding that the arbitration agreement was unconscionable and that, under *Stolt*, the court could not force class arbitration when the arbitration agreement was silent), *vacated sub nom. Affiliated Comput. Servs., Inc. v. Fensterstock*, 564 U.S. 1001 (2011); *Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 24 (Mo. 2010) (striking a consumer title loan class arbitration waiver and the arbitration agreement requiring arbitration on an individual basis, leaving the consumer with the option of bringing a class action in court), *vacated*, 563 U.S. 971 (2011). For post-*Concepcion* cases, see *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 606 (4th Cir. 2013) (“[*Concepcion*] prohibited courts from altering otherwise valid arbitration agreements by applying the doctrine of unconscionability to eliminate a term barring classwide procedures.”); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012) (noting that the FAA preempts Washington state law invalidating class-action waivers as substantively unconscionable).

waiver, the 2013 case of *American Express Co. v. Italian Colors Restaurant*¹⁷⁴ was the FAA trumping other federal law that would have invalidated an adhesive arbitral class waiver. Plaintiffs in *Amex* brought antitrust class litigation despite an arbitral class waiver in their agreements with the defendant.¹⁷⁵ While the district court dismissed the suits and ordered individual arbitrations, the U.S. Court of Appeals for the Second Circuit reversed, based in part on a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be “at least several hundred thousand dollars, and might exceed \$1 million,” while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled.¹⁷⁶ The Second Circuit stated that because “the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable.”¹⁷⁷

In short, the Second Circuit held that the class waiver was effectively an exculpatory clause and for that reason should not be enforced. Unlike the California Supreme Court in *Discover Bank*, the Second Circuit in *Amex* did not point to a statute prohibiting exculpatory clauses. However, the doctrine on which the Second Circuit relied—the judicially created doctrine invalidating arbitration clauses that prevent effective vindication of federal statutory rights—is substantively similar.¹⁷⁸ While this “effective vindication” doctrine invalidating arbitration clauses with exculpatory effect shares much in common with the unconscionability doctrine, it is distinct because it is based not on state law but rather on the fact that federal antitrust law is weakened by enforcement of arbitral class waivers.¹⁷⁹ In other words, the Second Circuit perceived tension among federal statutes and resolved that tension in favor of the antitrust statutes (the Sherman and Clayton Acts) and against the FAA.

In contrast, the Supreme Court’s now-familiar five-Justice conservative majority resolved this tension in favor of the FAA and against the antitrust statutes. In reversing the Second Circuit’s decision, the Supreme Court in *Amex* said:

[T]he 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. The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory

174. 133 S. Ct. 2304 (2013).

175. *Id.* at 2308.

176. *Id.*

177. *In re Am. Express Merchants’ Litig.*, 634 F.3d 187, 199 (2d Cir. 2011).

178. *See WARE*, *supra* note 6, at 76.

179. *Id.* at 76–77.

remedy than did federal law before its adoption of the class action for legal relief in 1938. Or, to put it differently, the individual suit that was considered adequate to assure “effective vindication” of a federal right before adoption of class-action procedures did not suddenly become “ineffective vindication” upon their adoption.¹⁸⁰

In this passage, the Supreme Court does not dispute that the class waiver was effectively an exculpatory clause. And as a matter of doctrine (as distinguished from policy) *Amex* makes a plausible, perhaps even strong, argument for enforcing the class waiver despite its exculpatory effect. In sum, *Concepcion* and *Amex* indicate that courts will generally enforce even exculpatory adhesive arbitral class waivers until a statute, regulation, or new Supreme Court majority tells them not to.

2. Arbitration Law Should Not Be a Combatant in the “Holy War” over Class Actions

Before *Concepcion* and *Amex*, courts rarely enforced class waivers in non-arbitration adhesion contracts (“non-arbitral class waivers”).¹⁸¹ *Concepcion* and *Amex* made adhesive arbitration agreements more enforceable than other adhesion contracts with respect to class waivers.¹⁸²

180. *American Express*, 133 S. Ct. at 2311 (emphasis omitted) (citations omitted).

181. *Compare* Martrano v. Quizno’s Franchise Co., No. 08-0932, 2009 WL 1704469, at *21 (W.D. Pa. June 15, 2009) (invalidating a non-arbitral class waiver), *In re* Yahoo! Litig., 251 F.R.D. 459, 469–70 (C.D. Cal. 2008) (refusing to hold a non-arbitral class waiver enforceable as a matter of law in a commercial case and denying a motion for summary judgment pending “more developed evidentiary record”), *Elhilu v. Quizno’s Franchising Co.*, No. 2:06-cv-07855-FMC-CTx, 2008 U.S. Dist. LEXIS 109435, at *15 (C.D. Cal. Apr. 3, 2008) (invalidating a non-arbitral class waiver), *and* *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001) (invalidating a non-arbitral class waiver), *with* *Bonanno v. Quizno’s Franchise Co.*, No. 06-cv-02358-CMA-KLM, 2009 WL 1068744, at *22 (D. Colo. Apr. 20, 2009) (enforcing a non-arbitral class waiver).

Some courts did enforce forum-selection clauses choosing a forum that did not permit class actions. *See, e.g.*, *Koch v. Am. Online, Inc.*, 139 F. Supp. 2d 690, 695 (D. Md. 2000) (concluding that the unavailability of class actions in Virginia is an insufficient reason to refuse to enforce Virginia forum-selection clause); *Forrest v. Verizon Commc’ns, Inc.*, 805 A.2d 1007, 1012 (D.C. 2002); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (per curiam); *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 464–65 (Md. 1997).

182. *See* Peter B. Rutledge & Christopher Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 964 (2014) (“Unlike arbitral class waivers, nonarbitral class waivers likely remain subject to state unconscionability challenges.”); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 389 (2011) (“The [*Concepcion*] Court majority could . . . [have struck] down the arbitration provision [with its class waiver], paving the way for a class action in court. Had there been a class-action waiver without the arbitration provision, that would presumably have been the result.”); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 782–84

Concepcion and *Amex* allowed businesses to do with adhesive arbitration agreements what other adhesion contracts generally could not do: contain enforceable pre-dispute class waivers.

Since *Concepcion* and *Amex*, however, most courts faced with adhesive non-arbitral class waivers seem to be enforcing them.¹⁸³ This change suggests the Supreme Court's enforcement of adhesive arbitral class waivers is encouraging courts to enforce non-arbitral class waivers—which, before *Concepcion* and *Amex*, they would not have. This seems to be an example of the tail wagging the dog. Rather than arbitration law (the tail) influencing law on class actions, including waivers of them (the dog), arbitration law on class waivers should defer to non-arbitration law on class waivers.¹⁸⁴ If non-arbitration law on class actions should be changed, then it should be changed directly (whether by case law, statute, or regulation) rather than through arbitration law influencing it.

Class actions have been controversial since they first proliferated in the 1970s—a time when Professor Arthur Miller described a “holy war” in which one side saw the class action as a knight in shining armor, while the other side saw it as a “Frankenstein” monster.¹⁸⁵ Not much has

(2012) (discussing cases upholding class action waivers based on FAA preemption even if state law would invalidate such waivers); *U.S. Supreme Court Issues Significant New Decision Regarding Class Action Litigation*, WILSON SONSINI GOODRICH & ROSATI (Apr. 28, 2011), https://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/pdfsearch/wsgralert_class_action_litigation.htm (“While class waivers outside of arbitration agreements are likely not valid in California and many other states, [*Concepcion*] provides powerful ammunition to companies that would prefer to resolve claims through individual arbitration rather than through the court system” (footnote omitted)).

183. *Compare* Grant v. Convergys Corp., No. 4:12-CV-496 (CEJ), 2013 WL 781898, at *5 (E.D. Mo. Mar. 1, 2013) (invalidating a non-arbitral class waiver), *with* Mazurkiewicz v. Clayton Homes, Inc., 971 F. Supp. 2d 682, 694 (S.D. Tex. 2013) (enforcing a non-arbitral class waiver), *Birdsong v. AT&T Corp.*, No. C12-6175 TEH, 2013 WL 1120783, at *6 (N.D. Cal. Mar. 18, 2013) (enforcing a non-arbitral class waiver), *Killion v. KeHE*, 885 F. Supp. 2d 874, 882, 885 (N.D. Ohio 2012) (enforcing a non-arbitral class waiver), *and* *Palmer v. Convergys Corp.*, No. 7:10-cv-145 (HL), 2012 WL 425256, at *7 (M.D. Ga. Feb. 9, 2012) (enforcing a non-arbitral class waiver).

184. *See supra* note 181.

185. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 665 (1979). *See also* DEBORAH HENSLER ET AL., CLASS ACTION DILEMMAS 35 (2000) (describing efforts in the 1990s to revise Rule 23, and finding that “[a]lthough the experiences of the 1980s and 1990s had brought new ingredients to the debate over damage class actions, the thousands of pages of comment and testimony on the Advisory Committee’s proposals echo the three decades of controversy that preceded its efforts to revise Rule 23”); JAY TIDMARSH & ROGER H. TRANSGURD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 531 (1998) (“No other federal rule of civil procedure has generated as much debate, or as much division, as Rule 23.”); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT’L

changed throughout several decades of this “holy war,” and this war is not likely to end anytime soon. As Professor Deborah Hensler et al. explain, whether the benefits of class actions outweigh their costs “is a deeply political question, implicating fundamental beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society. . . . [T]his political question is . . . unlikely to be resolved soon.”¹⁸⁶

Those who dislike class actions presumably appreciate *Concepcion* and *Amex* for enforcing class waivers that likely reduce class actions, while defenders of class actions criticize *Concepcion* and *Amex* for the same reason.¹⁸⁷ In short, debate over *Concepcion* and *Amex* enforcing

L. 179, 180 (2001) (describing the debate on class actions, and noting that “[t]oday there is again a sense that monsters are loose in the land,” where courts are overrun with class action litigation); Edward F. Sherman, *Decline & Fall*, ABA J., June 2007, at 51, http://www.abajournal.com/magazine/article/decline_fall/ (“The rise and fall of consumer class actions is a cycle that began in 1966 when the scope of Rule 23 of the Federal Rules of Civil Procedure was expanded to allow class action suits for damages. . . . [I]n addition to causing consternation in the business sector, the increase in class actions ignited an intense debate over whether the social benefits of class actions outweigh their costs.”).

186. See HENSLER ET AL., *supra* note 185, at 471–72.

187. Some scholars suggest that *Concepcion* and *Amex* enable adhesion contracts’ class waivers to virtually end consumer (and perhaps employment) class actions. See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012); Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 458–62 (2014); Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 377 (2005) (arguing that “collective action waiver[s]” have the potential to “bar the majority of class actions as we know them”); Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682, 1688 (2014); Marc J. Mandich, Comment, *AT&T v. Concepcion: The End of the Modern Consumer Class*, 14 LOY. J. PUB. INT. L. 205, 206 (2012); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704–05, 727 (2012) [hereinafter Sternlight, *Tsunami*] (“Thus, *Concepcion* has caused a tsunami wave that is threatening to eliminate many consumers’ and employees’ abilities to enforce their substantive rights by participating in class actions.”); *id.* at 725 (“We should not allow companies to shortcut the legislative process by using arbitration to abolish class actions.”); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 88–89 (2012) [hereinafter Sternlight, *Mandatory Binding*]; Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, SFGATE (Nov. 7, 2010, 4:00 AM), <http://www.sfgate.com/opinion/article/Supreme-Court-case-could-end-class-action-suits-3246898.php>; Ian Millhiser, *Supreme Court Nukes Consumers’ Rights in Most Pro-Corporate Decision Since Citizens United*, THINKPROGRESS: JUSTICE (Apr. 27, 2011, 3:40 PM), <http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/>. *But see* Rutledge & Drahozal, *supra* note 182, at 961 (“Our central finding is consistent across both samples of franchise agreements: the predicted tsunami of arbitral class waivers has not occurred.”). Perhaps to some extent non-class action alternatives for consumer plaintiffs can or will produce something very similar to the class action. See Myriam E. Gilles, *Procedure in Eclipse: Group-Based Adjudication in a Post-Concepcion Era*, 56 ST. LOUIS U. L.J. 1203, 1220–28 (2012) (discussing

class waivers may be little more than a rather predictable application of the broader debate about class actions. So the battle over class waivers may be as intractable as the broader “holy war” over class actions.¹⁸⁸ And arbitration law is caught in the crossfire.

Rather than remain in the crossfire of the battle over class waivers, arbitration law should leave the battlefield and be a non-combatant to protect itself from further injury. Rather than join the anti-class-action army (as *Concepcion* and *Amex* arguably did) or join the pro-class-action army (as the Arbitration Fairness Act proposes¹⁸⁹), arbitration law should be neutral on class actions and class waivers. Arbitration law is not the body of law that should decide whether class waivers are enforceable.

That is because arbitration law is not centrally concerned with class actions, which are part of the law of civil procedure. Debates over class actions are traditionally and appropriately held in the context of proposed amendments to the federal and state rules of civil procedure.¹⁹⁰ The fact that Congress enacted arbitration law’s dominant statute, the FAA, before the 1938 adoption of the Federal Rules of Civil Procedure,¹⁹¹ which was well before the Federal Rules’ 1966 revision of Rule 23 blessing class actions, confirms arbitration law’s separateness from these debates.¹⁹² More recently, Congress has continued its practice of enacting statutes addressing class actions without addressing arbitration law.¹⁹³ State legislatures have even addressed the enforceability of class waivers: Utah permits their enforcement, while California opposes their enforcement.¹⁹⁴

the use of alternative avenues for claimants to seek redress in light of the decline in class action remedies); Gilles & Sebok, *supra*, at 468, 473; David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. & REFORM 1151, 1153 (2013).

188. See Miller, *supra* note 185, at 664.

189. See H.R. 1844, 113th Cong. (2013).

190. See, e.g., Sternlight, *Tsunami*, *supra* note 187, at 720 & n.85.

191. See Chandler, *supra* note 28, at 348, 512; Mandich, *supra* note 187, at 210.

192. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 238 (1987) (describing the 1966 revisions to Rule 23).

193. See, e.g., Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.) (limiting, among other things, the number of lawsuits an individual can serve as a class representative, establishing rules for the appointment of the lead plaintiff, and prohibiting class representatives from receiving special compensation); Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.) (allowing defendants to remove a larger number of class action lawsuits to federal court and increasing judicial scrutiny on so-called “coupon settlements,” where class members receive a coupon for discounts from the settling defendant).

194. Compare UTAH CODE ANN. § 70C-3-104 (West 2015) (“[A] creditor may contract with the debtor of a closed-end consumer contract for a waiver by the debtor of the right to initiate or participate in a class action related to the closed-end consumer contract.”), with CAL. CIV. CODE § 1751 (West 2016) (“Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.”).

Finally, outside of arbitration law, courts have created case law precedent by deciding whether to enforce non-arbitral class waivers.¹⁹⁵ Thus, we have three non-arbitration-law fora—amendments to rules of civil procedure, statutes, and case law—in which to make law about class actions generally and class waivers specifically. Any or all of these fora are better suited to making that law than is arbitration law.

Accordingly, arbitration law should be agnostic about class waivers and should defer to these other bodies of law. This Article’s centrist proposal does exactly that. The proposal in the Appendix states that if any arbitration “agreement requires claims to be brought on an individual, rather than class, basis then such requirement shall be as enforceable as such a requirement in a non-arbitration agreement would be under similar circumstances.”¹⁹⁶ This does not say that arbitral class waivers should or should not be enforceable. It says that arbitration law should follow other law on the circumstances in which they are enforceable. In short, it says arbitration law should defer to other law in deciding whether a class waiver is enforceable.

Of course, if an arbitral class waiver is not enforced the question arises whether the dispute will go to class arbitration or class litigation. Class arbitration might be bad for the reasons stated in *Stolt and Concepcion*,¹⁹⁷ such as concern about entrusting an arbitrator “with ensuring that third parties’ due process rights are satisfied.”¹⁹⁸ For these reasons, courts might readily enforce arbitration agreements saying that if the class waiver is unenforceable then the arbitration clause is cancelled, so the parties will litigate rather than arbitrate.¹⁹⁹ In fact, after striking down class waivers, courts might even send parties to class litigation rather than class arbitration, unless the arbitration agreement specifically says that if the court invalidates the class waiver, the rest of the arbitration agreement survives. In sum, striking down arbitral class waivers does not have to yield much, if any, class arbitration. Arbitration law can retreat to the sidelines of the class action wars, by adopting a neutral position on class waivers, without producing whatever practical problems class arbitration creates.

195. See *infra* Part II.

196. See *infra* Appendix.

197. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348–49 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685–87 (2010).

198. *Concepcion*, 563 U.S. at 350.

199. See, e.g., *Litman v. Cellco P’ship*, 655 F.3d 225, 228 (3d Cir. 2011) (quoting the arbitration agreement between Verizon and Verizon customers as follows: “IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS . . . IS DEEMED UNENFORCEABLE, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY”) This would avoid the fear that “when courts hold class-arbitration waivers unconscionable, they are essentially turning individual arbitration clauses into class arbitration clauses, changing the fundamental nature of what the parties agreed to.” *Drahozal & Rutledge*, *supra* note 57, at 1168.

II. CONGRUITY AND GOOD POLICY: A THEORY OF “ARBITRATION” AS USED IN THE FAA

Section I of this Article advanced the principle of congruity. Arbitration law should be congruous with non-arbitration law. Adhesive arbitration agreements should be as enforceable as other adhesion contracts. However, this principle of congruity should not be taken to the extreme. In a few relatively uncontroversial ways, adhesive arbitration agreements should remain more enforceable than other adhesion contracts. These exceptions to the congruity principle are good policy and necessary to preserve “arbitration” as that term is used in governing law, including the FAA, and ordinary speech.

A. Relatively Uncontroversial Topics on Which Courts Enforce Adhesive Arbitration Agreements More Broadly than Other Adhesion Contracts

While the three topics Section I discusses—contract defenses (the separability doctrine), correcting legally erroneous arbitration awards, and class waivers—are examples of law enforcing adhesive arbitration agreements more broadly than other adhesion contracts, they are not the only such examples. They are the controversial examples. They are controversial because, on these topics, good policy counsels for treating adhesive arbitration agreements like other adhesion contracts—for conforming arbitration law to non-arbitration law. To put it another way, contract defenses (the separability doctrine), correcting legally erroneous decisions of mandatory law, and class waivers are topics on which arbitration should not be permitted to compete with litigation. As Professor Chris Drahozal and I wrote:

[A]rbitration and litigation are substitutes for each other. Providers of arbitration services—individual arbitrators and administering institutions like the American Arbitration Association—compete with providers of litigation services—courts established by state governments and the federal government—as if they are selling competing products on a store shelf.²⁰⁰

This competition between arbitration and litigation should not extend to contract defenses, correcting legally erroneous decisions of mandatory law, or class waivers. The law should not permit arbitration to attract customers with the sales pitch, “Buy our product to avoid contract defenses and costly class actions, while negating consumers’ and employees’ statutory rights!”

200. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 433 (2010).

In contrast, the law should permit arbitration to attract customers with the sales pitch, “Buy our product so you can, within wide limits, select your adjudicator and procedural rules.” Arbitration allows parties more freedom to select their adjudicators—the arbitrator(s)—than litigation, where the law largely confines parties to the adjudicators—the judge or jury—the court system selects.²⁰¹ Also, arbitration allows parties to depart from the rules of civil procedure and evidence that would be imposed on them in litigation.²⁰² Parties often choose arbitral rules that tend to have less elaborate discovery than in litigation²⁰³ and less elaborate rules of evidence than in litigation.²⁰⁴ So by forming an

201. Of course, parties in litigation have some role in selecting their adjudicators, for example, forum shopping of various sorts and peremptory challenges of jurors.

202. WARE, *supra* note 6, § 2.35.

203. *Id.* § 2.36(d); John Wilkinson, *Arbitration Contract Clauses: A Potential Key to a Cost-Effective Process*, DISP. RESOL. MAG., Fall 2009, at 9, 9 (many parties are expanding their arbitration clauses to “place meaningful limits on discovery”). Many arbitration agreements incorporate the rules of an arbitration organization, such as the American Arbitration Association. These rules typically do not grant the parties rights to broad discovery but rather grant the arbitrator wide discretion in authorizing discovery. *See, e.g.*, AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 19–20 (2013). Professor Hensler and Professor Linda Demaine conducted a study of consumer arbitration clauses and found:

Seventeen of the clauses (32.7%) discuss discovery, and eleven (21.2%) discuss evidentiary standards. In most instances, these clauses alert consumers that discovery may be limited and evidentiary standards may be relaxed by comparison to litigation. Twelve of the clauses that address discovery convey that discovery may or will be limited. Three state that no discovery will be allowed. The remaining two specify that local discovery rules will apply.

Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 68 (2004).

204. WARE, *supra* note 6, § 2.37(c). Rules of evidence are historically intertwined with the jury. ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 82–84, 243–60 (2001). Thus, it is no surprise that arbitration (without a jury) tends to have less elaborate rules of evidence than those used in jury trials. *See* AM. ARBITRATION ASS’N, *supra* note 203, at 23 (“The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.”); Stanley Weinstein, *An Arbitrator’s Wish List*, 58 DISP. RESOL. J. 54, 57 (2003) (“[I]n most arbitration proceedings witnesses can be asked leading questions and testify as to hearsay evidence.”); Sanford F. Young, *Conventional Wisdoms or Mistakes: The Complaint and the Response*, 76 N.Y. ST. B. ASS’N J., 28, 29 (2004) (“[R]ules of evidence are generally only loosely applied, with hearsay statements (including affidavits) and documents usually freely admitted.”). Arbitrators’ general liberality in accepting evidence is due in part to the fact that “refusing to hear evidence pertinent and material to the controversy” is one of the few grounds for vacating the arbitration award, 9 U.S.C. § 10(a)(3) (2012), while hearing evidence that would not be admissible in court is not a ground for vacatur. *Bowles Fin. Grp., Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013–14 (10th Cir. 1994) (refusing to vacate the award won by a lawyer who introduced evidence that would not have been admissible in litigation); *WHD, L.P. v. Mayflower Capital, LLC*, 673 S.E.2d 168, 2009

arbitration agreement, parties trade away their rights to a jury and, in many arbitration agreements, also trade away some rights to discovery and to particular rules of evidence.²⁰⁵

In all these respects, courts generally seem to enforce adhesive arbitration agreements more broadly than they enforce other adhesion contracts. For example, the FAA requires enforcement of adhesive agreements providing for an arbitrator, rather than a jury, in circumstances under which at least some courts would not enforce an adhesive non-arbitration agreement's clause requiring a bench trial (before a judge) rather than a jury trial.²⁰⁶ And arbitration law generally

WL 368335, at *5 (N.C. App. 2009) (unpublished table decision) (refusing to vacate an arbitration award where the arbitrator may have relied on evidence that would not have been admissible in litigation). The study conducted by Professors Hensler and Professor Demaine found 21.2% of studied consumer arbitration clauses

discuss evidentiary standards. In most instances, these clauses alert consumers that . . . evidentiary standards may be relaxed by comparison to litigation. . . .

Three of the clauses that address evidentiary issues state explicitly that neither federal nor state procedural or evidentiary rules will apply, and another two state that evidentiary standards in arbitration may be less rigorous than in court. Three provide that either the Federal Rules of Evidence or state and local rules of evidence will apply. The remaining three convey partial evidentiary guidelines for the arbitration—for example, by stating that the arbitrator may compel the attendance of witnesses and the production of documents at the hearing.

Demaine & Hensler, *supra* note 203, at 68.

205. See *supra* notes 165–67, 202–04 and accompanying text.

206. *Ware*, *supra* note 117, at 81. A few states do not enforce adhesive or other pre-dispute contracts requiring a bench trial rather than jury trial, but most do. Compare N.C. GEN. STAT. § 22B-10 (2015) (“Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate . . .”), *Grafton Partners, L.P. v. Superior Court*, 116 P.3d 479, 492 (Cal. 2005) (holding that a pre-dispute agreement that any lawsuit between parties would be adjudicated in a court trial, and not by jury trial, was unenforceable), and *Bank S., N.A. v. Howard*, 444 S.E.2d 799, 800 (Ga. 1994) (holding that “pre-litigation contractual waivers of the right to trial by jury are not enforceable”), with *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132–33 (Tex. 2004) (“[N]early every state court that has considered the issue has held that parties may agree to waive their right to trial by jury in certain future disputes, including the supreme courts in Alabama, Connecticut, Missouri, Nevada, and Rhode Island. The same is true of federal courts. . . . We believe this overwhelming weight of authority is correct.” (footnotes omitted)). However, some of the courts that do enforce jury-waiver clauses require them to satisfy a higher standard of consent than the contract-law standards of consent in arbitration law. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 673–74; *Ware*, *supra* note 153, at 197–205 (“In sum, contract-law standards are generally used for the waiver of constitutional rights in property-deprivation cases, forum-selection cases, and consent-to jurisdiction cases, as well as in arbitration cases. Case law governing jury-waiver clauses stands out because of its failure to apply contract-law standards of consent and its requirement that consent be ‘knowing.’”).

enforces adhesive arbitration agreements effectively reducing discovery²⁰⁷ and evidentiary rules,²⁰⁸ whereas research revealed no case enforcing an adhesive non-arbitration agreement reducing discovery²⁰⁹ or evidentiary rules.²¹⁰

This disparity between arbitration and litigation should not be troubling if, as under the Centrist Position, courts can police arbitration agreements for unconscionability. If an adhesive arbitration agreement's choice of arbitrator, discovery limitations, or evidence rules is

207. See *supra* note 203 and accompanying text; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (finding lesser discovery in arbitration an insufficient reason to deny enforcement of an adhesive employment arbitration agreement).

208. See *supra* note 204 and accompanying text.

209. During litigation, Federal Rule of Civil Procedure Rule 29 allows the parties to “stipulate that . . . other procedures governing or limiting discovery be modified.” FED. R. CIV. P. 29. But research revealed no authority for enforcing pre-dispute, let alone adhesive, non-arbitration agreements purportedly reducing discovery. See, e.g., Thornburg, *supra* note 124, at 202–03 (discussing post-dispute, but not pre-dispute, agreements to limit discovery); Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1573 (2013) (“No cases have authoritatively addressed whether ex ante contractual provisions limiting the scope of discovery or the presentation of evidence in the event of a dispute are enforceable.”). Some commentators refer to the possibility “the parties agree ahead of the dispute to . . . limit discovery” without discussing whether such an agreement would be enforced. Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1482 (2013); see also Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 746–47 (2011) (citing only an unpublished draft by Kapeliuk & Klement for the proposition that “[a]t the discovery phase, contracts typically limit rather than expand discovery”).

210. Courts enforce some post-dispute agreements (often called stipulations) on evidentiary matters. See, e.g., *Tupman Thurlow Co. v. S.S. Cap Castillo*, 490 F.2d 302, 309 (2d Cir. 1974) (“[T]he parties stipulated that the contents of the USDA file would be admissible, and these documents were contained in that file. Therefore, the documents are admissible.”). However, research revealed no examples of courts enforcing pre-dispute agreements, let alone as part of an adhesion contract, to alter the rules of evidence. See Henry S. Noyes, *supra* note 87, at 607–08. Although Professor Noyes writes that “ex ante contracts to alter the rules of evidence are enforceable,” he cites a criminal case in which the agreement to alter the rules of evidence was post-dispute in the sense that the criminal defendant had already been arrested and charged. Noyes, *supra* note 87, at 607 (citing *United States v. Mezzanatto*, 513 U.S. 196, 198, 208 n.5 (1995)). For older cases that support waiver of evidentiary rules through contract, see Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 139 (1932). Professor David H. Taylor & Sara M. Cliffe wrote that “a contract may specify that evidence in the form of hearsay that would otherwise be admissible pursuant to a hearsay exception would be inadmissible unless the declarant were unavailable to testify.” David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Influence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1086 n.5 (2002) (citing John Kobayashi, *Too Little, Too Late: Use and Abuse of Innocuous Yet Dangerous Evidentiary Doctrines*, in 2 ALI-ABA COURSE OF STUDY: TRIAL EVIDENCE, CIVIL PRACTICE, AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1127, 1141–45 (1991)). I have not located the Kobayashi source, and note that Ms. Cliffe and Professor Taylor do not assert that the “contract” avoiding a hearsay exception was or can be a pre-dispute, let alone adhesive, contract.

unconscionable then it will not be enforced.²¹¹ With that safeguard, arbitration should be allowed to compete against litigation by offering different adjudicators and different procedural rules on discovery and evidence.

B. *A Theory of “Arbitration” as Used in the FAA: Almost Conception*

This view of good arbitration policy is similar to the Supreme Court’s interpretation of the FAA in *Concepcion*, except perhaps on the issue central to *Concepcion*: class waivers. *Concepcion* interprets FAA § 2 which says:

A written provision in any maritime transaction or 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, save upon such grounds as exist at law or in equity for the revocation of any contract.²¹²

Concepcion said:

Although [FAA] § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives. . . .

211. See, e.g., *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005) (holding that limited discovery “could significantly prejudice employees or applicants”); *Domingo v. Ameriquest Mortg. Co.*, 70 F. App’x 919, 920 (9th Cir. 2003) (finding unconscionability based in part on discovery limitations); *Murray v. United Food & Commercial Workers Int’l Union*, 289 F.3d 297, 303 (4th Cir. 2002) (refusing to enforce, and finding unconscionable, an employment arbitration agreement where, though the parties ostensibly engaged in an alternate strike method to select the single arbitrator from a list of prospective arbitrators, they were to exercise these alternate strikes from a list of arbitrators provided by the employer); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–41 (4th Cir. 1999) (deciding under duty of good faith and fair dealing, rather than unconscionability); *Lucey v. FedEx Ground Package Sys., Inc.*, 2007 U.S. Dist. LEXIS 77454, at *35–36 (D.N.J. Oct. 18, 2007) (finding the arbitration provision unconscionable in part because of a provision “virtually eliminating discovery”), *rev’d in part on other grounds*, 305 F. App’x 875 (3d Cir. 2009); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859, 861 (Mo. 2006) (holding unconscionable a provision stating that “[t]he arbitrator shall be selected by the President of the Homebuilders Association of Greater St. Louis” (emphasis omitted)); see also *Ostrov v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 545–47 (E.D. Pa. 2006) (refusing to enforce a nursing home arbitration contract limiting depositions to defendant’s expert witnesses); *Geiger v. Ryan’s Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 996, 999 (S.D. Ind. 2001) (holding an arbitration provision as void where it only allowed one deposition as of right); *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 601, 614 (D.S.C. 1998) (holding just one deposition was a “severe discovery limitation[.]”); *Jara v. JPMorgan Chase Bank, N.A.*, 2012 Cal. App. LEXIS 5569, at *9 (Cal. Ct. App. July 30, 2012) (“The limitation of discovery [to two depositions] also renders the agreement substantively unconscionable.”).

212. 9 U.S.C. § 2 (2012).

. . . The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

. . . .

The point of affording parties discretion in designing arbitration processes is to allow efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field

. . . Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.²¹³

In these passages, *Concepcion* interprets the FAA's use of the word "arbitration" to refer to a streamlined form of binding adjudication.²¹⁴ So interpreted, the FAA prohibits states from holding unconscionable the very procedures that do the streamlining—(1) less discovery, (2) fewer evidentiary rules, (3) no jury, and (4) no class actions—because that would hold unconscionable the very process the FAA commands courts to enforce.

Contrary to *Concepcion*, some argue that FAA § 2's savings clause—enforcing arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract"—merely prohibits states from discriminating against arbitration agreements²¹⁵ and thus allows states to hold unenforceable whatever arbitration agreement provisions the state wants, if the state also holds the same provisions unenforceable

213. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–45, 351 (citations omitted).

214. *Id.* at 344–46.

215. *E.g.*, Brief *Amici Curiae* of Distinguished Law Professors in Support of Petitioner, *Concepcion*, 563 U.S. 333, (No. 09-893), at 7–8 ("Section 2 thus created what is essentially an 'equal protection clause' for contract provisions, such that arbitration agreements would be treated at least as well as all other contracts." (quoting Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 43 (2006))); Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1265–66 (2011).

when they appear in non-arbitration agreements.²¹⁶ However, *Concepcion* correctly interprets FAA § 2's use of the word "arbitration" to make § 2 more than just a prohibition against discriminating against arbitration agreements. "Arbitration" is widely understood to mean a form of binding adjudication²¹⁷ that is not litigation. However, if a state could hold unconscionable any agreement for binding adjudication that does not use the same procedural and evidentiary rules as litigation and the same trier of fact (jury) as litigation, then the so-called "arbitration" left enforceable in that state would be too close to litigation to qualify as "arbitration" as that term is used in FAA § 2. The only significant difference between this so-called "arbitration" and litigation would be that the parties would select and pay for the "judge" conducting the jury trial under the same rules of procedure and evidence that a governmentally selected and paid judge in litigation would use. So § 2 must be interpreted to prevent states from holding unconscionable agreements to use a form of binding adjudication that differs from litigation more profoundly than merely selecting and paying for the judge.

How much more profoundly? A form of binding adjudication that significantly differs from litigation by having (1) less discovery, (2) fewer evidentiary rules, and (3) no jury should be different enough to qualify as

216. The California Supreme Court adopted this reasoning in its holding overturned by *Concepcion*. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112–13 (Cal. 2005); see also Brief *Amici Curiae* of Distinguished Law Professors, *supra* note 215, at 8 n.2 ("For example, a state-law rule requiring particularized notice (e.g., minimum font size, boldface type) for jury-trial waivers in any contract would fall within Section 2's savings clause because it would be 'grounds . . . for the revocation of any contract.'" (alteration in original) (quoting 9 U.S.C. § 2)).

217. "'Adjudication' refers to the process by which final, authoritative decisions are rendered by a neutral third party who enters the controversy without previous knowledge of the dispute." ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 21 (4th ed. 2006). "The traditional model of arbitration is precisely that of the 'private tribunal'—private individuals, chosen voluntarily by the parties to a dispute in preference to the 'official' courts, and given power to hear and 'judge' their 'case.'" *Id.* at 599; see also 2 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1743 (2009) (describing "the adjudicative character of international arbitration, in which the arbitrators are obligated to decide the parties' dispute impartially and objectively, based upon the law and the evidence the parties present"); 1 IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW* § 2.6.1, at 2:37 n.1 (1994) ("Arbitration is a form of adjudication because the parties participate in the decisional process by presenting evidence and reasoned arguments to an arbitrator whose final decision should be responsive to the dispute as presented."); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) ("[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected [disputing] party a peculiar form of participation in decision, that of presenting proofs and reasoned arguments for a decision in his favor.").

“arbitration,”²¹⁸ and thus immune from characterization as per se unconscionable or otherwise unenforceable. *Concepcion*’s interpretation of FAA § 2 adds a fourth difference required to be different enough to qualify as “arbitration”: (4) no class actions. As stated above, this conclusion of *Concepcion* is plausible as an interpretation of the FAA, but, as a matter of policy, I think the enforceability of arbitral class waivers ought to conform to non-arbitration law on class waivers. In contrast, arbitration law ought to continue departing from non-arbitration law by enforcing agreements to use (compared to litigation) less discovery, fewer evidentiary rules, and no jury.

CONCLUSION

Current law enforces adhesive arbitration agreements more broadly than other adhesion contracts in three important and controversial respects: contract defenses (the separability doctrine), correction of legally erroneous decisions, and class waivers. In contrast, this Article’s Centrist Position proposes changes that will on these three topics make adhesive arbitration agreements only as enforceable as other adhesion contracts. The Centrist Position, however, allows arbitration to maintain its relatively uncontroversial distinctions from litigation by enforcing arbitration agreements more broadly than non-arbitration agreements with respect to jury waivers and rules of discovery and evidence. Adoption of the Centrist Position will thus make arbitration law more congruous with non-arbitration law while still maintaining arbitration’s essential distinctions from litigation.

218. The combined (federal and state) U. S. court system’s distinctive adjudicator—the civil jury—is connected to its distinctive procedures. The United States is the only major nation to make extensive use of jury trials in civil cases. *See, e.g.*, RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 193–94 n.1 (1996) (referring to the abolition of the civil jury as “a course that the rest of the civilized world took long ago”); KONRAD ZWEIGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 267 (Tony Weir, trans. 1977); Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT’L L. & COM. REG. 357, 389 (2002); Ware, *Consumer*, *supra* note 72, at 868 (“The civil jury impacts nearly every aspect of civil litigation in the United States. To give just three examples, the civil jury bears a large share of responsibility for: (1) the cost and intrusiveness of U.S. discovery; (2) the theatrics of U.S. trials; and (3) the complexity of U.S. evidence law.”).

APPENDIX

A. *Proposed CFPB Rule*

1. Notwithstanding any law or agreement to the contrary:
 - a. An agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties is enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.
 - b. Whether such agreement or ground exists shall, on request of a party to such alleged agreement, be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.
 - c. If such agreement requires claims to be brought on an individual, rather than class, basis then such requirement shall be as enforceable as such a requirement in a non-arbitration agreement would be under similar circumstances.

2. In addition to other grounds for vacating arbitration awards, a state or federal court shall vacate an award arising out of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties where the award was based on the arbitrators' error of law and, at the time of their most recent agreement submitting the controversy to arbitration, the parties could not have formed an enforceable contract to avoid such law.

Comment: This proposal is intended to overrule (with respect to agreements within the Bureau's jurisdiction) the holding or possible implications of the following cases:

1. *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967).
2. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).
3. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).
4. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

5. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
6. Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010).
7. American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).