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### Arbitration: Creature of Contract, Pillar of Procedure

Hiro Aragaki

*UC Hastings College of the Law*, aragaki@uchastings.edu

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ARBITRATION:  
CREATURE OF CONTRACT, PILLAR OF PROCEDURE  
By  
Hiro N. Aragaki\*

INTRODUCTION

In 2003, Thomas Carbonneau wrote that “freedom of contract . . . is at the very core of how the law regulates arbitration,” and he referred to this as “Contract’s Empire.”<sup>1</sup> I think Carbonneau is right and that, if anything, arbitration law has moved even further since then in the direction of contract.

Contract is the principal lens through which we understand and debate arbitration law and policy today. This is at least in part due to the overwhelmingly contractarian inspiration behind the U.S. Supreme Court’s arbitration jurisprudence. As but one example, consider the following frequently-cited passage from *Volt Information Sciences v. Leland Stanford, Jr. University*:<sup>2</sup>

[T]he FAA’s primary purpose [is to] ensur[e] that private agreements to arbitrate are enforced according to their terms. Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. . . . By permitting the courts to “rigorously enforce” such agreements according to their terms, we give effect to the contractual rights and expectations of the parties. . . .<sup>3</sup>

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\* Hiro Aragaki is Professor of Law at Loyola Law School in Los Angeles, California. Many thanks to Symposium participants and to Alexandra Natapoff, Georgene Vairo and Adam Zimmerman for their valuable input.

<sup>1</sup> Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT’L L. 1189, 1192-93 (2003); accord Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333-34 (describing the Court’s arbitration jurisprudence as predicated on a “blind commitment to freedom of contract”).

<sup>2</sup> This passage has helped justify numerous key decisions from the Court and lower courts. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010).

<sup>3</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (citations omitted); accord *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate.”).

It cannot be underestimated the extent to which the law—and in particular pronouncements from the nation’s highest court—shape our understanding of and attitudes toward arbitration.<sup>4</sup>

Whether or not they take their cue from the Court, commentators likewise betray a contract-based model of arbitration when they emphasize values such as autonomy and freedom of choice. For example, Thomas Stipanowich argues that “the central and primary value of arbitration is not speed, or economy, or privacy, or neutral expertise, but rather the ability of users to make key process choices to suit their particular needs.”<sup>5</sup> Ed Brunet argues that “[i]n a state such as ours characterized by the respect for individual liberty, courts should enforce customized agreements to arbitrate and the legislature should regulate minimally.”<sup>6</sup> Stephen Ware contends that because “‘autonomy . . . [i]s the value that transcends these other values,’” it is “arbitration’s essential virtue.”<sup>7</sup>

The oft-quoted phrase that arbitration is a “creature of contract”<sup>8</sup> is both progeny and progenitor of these and similar ideas about arbitration and arbitration law. It’s such an irresistible phrase! How many scholars or judges have tried to work it into their law review articles or judicial opinions? The problem is that catchy phrases like this exert a great deal of unconscious power on our imagination. They open up certain avenues for how we conceive of arbitration practice and arbitration law, and they foreclose others. So we need to be extremely careful how we use them.

My goal in this Symposium contribution is to get us to stop and think twice before invoking the mantra that “arbitration is a creature of contract.” The problem as I see it is that the phrase functions ideologically<sup>9</sup>—that is, it makes a claim that appears entirely legitimate but for that reason has the potential to mask negative consequences that we would otherwise consider unjustified. Thus, on one level it is difficult to disagree with the propositional content of the mantra because, unlike litigation, arbitration almost by

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<sup>4</sup> See, e.g., Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 10-14 (2000) (noting how law can influence social norms); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 923, 958-59 (1996) (same).

<sup>5</sup> See, e.g., Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 ILL. L. REV. 1, 51 (2010).

<sup>6</sup> EDWARD BRUNET, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 5 (2006).

<sup>7</sup> Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 92 (2014) (quoting Stephen Ware, *Comments of Professor Stephen Ware*, in EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 327, 339 (2006)).

<sup>8</sup> See, e.g., *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008); 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 10.9.1 (1994); Thomas Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. L. J. 383, 387-88 (2009).

<sup>9</sup> I am referring in particular to a post-Marxist sense of the term “ideology.” See, e.g., FRANKFURT INSTITUTE FOR SOCIAL RESEARCH, *ASPECTS OF SOCIOLOGY* 190-191, 198 (John Viertel trans., 1973) (describing ideology as expressive of something rational or true about a state of affairs but also “false because it is not the whole truth of that state of affairs”); 1 ANTONIO GRAMSCI, *PRISON NOTEBOOKS* 155-56 (Joseph A. Buttigieg & Antonio Callari trans., 1992) (describing the related concept of hegemony as a form of domination legitimized by ideas of the ruling classes that are not imposed from above but that rather enjoy widespread acceptance).

definition has to begin with a voluntary agreement.<sup>10</sup> But this truth, coupled with the phrase's sing-song quality, blinds us to the fact that the phrase actually goes one step further. Wittingly or not, it helps justify a normative vision of arbitration's essential nature as a matter of unfettered choice, and of arbitration law's preeminent purpose as interfering with those choices in the least intrusive way possible.

But of course arbitration is not just a contract; it is also a procedure whose design and regulation must be informed in important ways by procedural norms. Those norms, in turn, often find themselves in tension with the *laissez-faire* and private ordering values that are most commonly associated with a regime of contract. Each time we refer to arbitration as a "creature of contract," we help resolve those tensions mechanistically in favor of those values.

In the following, I offer six reasons to question the factual and normative persuasiveness of the expression that arbitration is a "creature of contract."

## I. THE HISTORY OF ARBITRATION AND THE FEDERAL ARBITRATION ACT

We more readily assimilate arbitration to contract than to procedure in part because of the dominant understanding of how arbitration originally evolved. On that account, self-regulating associations such as merchant guilds created arbitral tribunals out of a desire to resolve disputes in their own fashion and according to their own norms, away from public scrutiny and the shadow of the law.<sup>11</sup> The distinctive feature of arbitration practice thereby comes to be seen as the exercise of choice—in particular, a choice to opt-out of the mandatory procedural (and even substantive) law otherwise enforceable through the courts.<sup>12</sup> The distinctive purpose of arbitration *law*, similarly, comes to be seen as protecting those free choices.

The historiography of the Federal Arbitration Act (FAA) largely tracks this choice- or contract-based view of arbitration.<sup>13</sup> For example, the Court has often described the statute's "preeminent" or "primary" purpose in terms of "overcom[ing] courts' refusals to enforce agreements to arbitrate" and to "enforce private agreements into which parties had entered."<sup>14</sup> Scholars have likewise contended that the FAA was

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<sup>10</sup> There are of course exceptions, such as mandatory, court-annexed arbitration. *See generally* Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1.

<sup>11</sup> *See* JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 101 (1983); Katherine Van Wezel Stone, *Rustic Justice*, 77 N.C. L. REV. 931, 936 (1999).

<sup>12</sup> *See, e.g.*, Michael Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1237 (2011) (arguing that religious arbitration tribunals further the autonomy of religious groups by allowing them to adjudicate and enforce disputes according to religious norms rather than public law).

<sup>13</sup> *See* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1945-52 (2014).

<sup>14</sup> *See* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

designed to “further a vision of voluntarism, delegation, and self-regulation within the business and commercial communities”<sup>15</sup> and “itself explicitly enacted the contractual approach to arbitration law.”<sup>16</sup> These appeals to history and “the way things always were” have helped position modern arbitration law as a type of contractual or commercial (rather than procedural) reform—that is, as part of a campaign to place arbitration agreements on the “same footing as other contracts, where [they] belong[.]”<sup>17</sup>

The trouble is that this account of the history of arbitration and arbitration law tells only one-half of the story. The flipside is that arbitration also developed as a response to longstanding procedural and substantive shortcomings of the courts, especially in commercial matters. For example, if a dispute arose between itinerant traders at a medieval fair, arbitration was practically the only adjudicative procedure available for obtaining an enforceable judgment before the fair was disbanded.<sup>18</sup> And because courts were largely unfamiliar with commercial law and practice in England, in such cases arbitration afforded the only real way to get a fair and accurate adjudication on the merits.<sup>19</sup> On the alternative account, therefore, merchants resorted to arbitration not so much because they wanted more creative options or more opportunities for the exercise of choice; instead, they did so because they needed a sound procedural alternative to the default of litigation in crown courts.

The push for modern U.S. arbitration law reform in the early twentieth century was just as consistent—if not more so—with this alternative, procedure-based narrative.<sup>20</sup> The courts circa 1920 were widely perceived as unable to deliver justice. Remember this was a time before the Federal Rules of Civil Procedure and the widespread adoption of procedural rulemaking by the courts. Procedural codes of the day were highly technical and complex, creating a situation in which cases were often won or lost on procedural technicalities rather than on the merits.<sup>21</sup> Lawyers compounded the problem: In their zeal

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<sup>15</sup> Van Wezel Stone, *supra* note 11, at 936.

<sup>16</sup> Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington and Haagen)*, 29 MCGEORGE L. REV. 195, 197 (1998); see also Paul F. Kirgis, *Judicial Review and the Limits of Arbitral Authority: Lessons from the Law of Contract*, 81 ST. JOHN’S L. REV. 99, 100 (2007) (arguing that what the author calls the “contractarian model” of arbitration was originally “put forward early in the twentieth century by proponents [such as Julius Henry Cohen] who emphasized the advantages of arbitration in commercial matters”).

<sup>17</sup> GEORGE S. GRAHAM, TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION, H.R. REP. NO. 68-96, at 1-2 (1924).

<sup>18</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*33.

<sup>19</sup> See 2 JOHN LORD CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND: FROM THE NORMAN CONQUEST TILL THE DEATH OF LORD MANSFIELD 403 (1849) (“Mercantile questions were so ignorantly treated when they came to Westminster Hall that they were usually settled by private arbitration among the merchants themselves.”); JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 21-22 (2006).

<sup>20</sup> See generally Aragaki, *supra* note 13.

<sup>21</sup> E.g., THOMAS W. SHELTON, SPIRIT OF THE COURTS 93 (1918); Edward J. McDermott, *Delays and Reversals on Technical Grounds*, 7 PROC. AM. POL. SCI. ASS’N 97, 104 (1910); Clarence R. Wilson, *Some Suggestions as to Technicality and Delay in the Law*, 1 GEO. L.J. 20, 20 (1912).

to win, they approached civil procedure as a kind of sport or “game of hide and seek to bedevil an opponent, confuse the jury, [and] trip the judge.”<sup>22</sup>

Merchants established arbitration associations and programs because they sought an alternative to the intolerable delay and injustice of courtroom procedure. Private ordering was an important means of achieving this goal, not least of which because legislative and judicial reform appeared well out of reach at the time the FAA was enacted.<sup>23</sup> But the goal was never a process that elevated efficiency and freedom of choice above all else, including fairness, legitimacy, or procedural integrity. Instead, the overriding goal was to achieve a process that was qualitatively superior to what could be obtained through public litigation. Thus, William Ransom, a former judge in New York and later head of the state’s Public Services Commission observed that “[b]usiness men go to arbitration to avoid legal [*i.e.*, judicial] procedure and not legal principles.”<sup>24</sup> The New York City Bar Association’s Special Committee on Arbitration declared: “In large measure commercial arbitration is based upon procedural superiorities which that system has or is claimed to have over our established system for the administration of justice.”<sup>25</sup> And in Congress, Charles Bernheimer testified that the entire point of choosing arbitration was to “obtain[] substantial justice on the precise point on which a decision is sought, rather than, as often happens in court procedure because of the necessary application of general rules, obtaining a decision based on technical points with which [parties] had no concern whatever.”<sup>26</sup>

The upshot is that the history of arbitration in general, and the history of the FAA in particular, have been shaped just as much by ideals of procedure as by ideals of contract.<sup>27</sup> The point is not that freedom of contract was insignificant; rather, it is that we

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<sup>22</sup> Thomas W. Shelton, *The Press and the Administration of Justice*, 9 A.B.A. J. 9, 9 (1923). Roscoe Pound famously referred to this as the “sporting theory of justice.” Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 404-06 (1906).

<sup>23</sup> See BERKELEY REYNOLDS DAVIDS, MONTGOMERY’S MANUAL OF FEDERAL JURISDICTION AND PROCEDURE 276 (3d ed. 1927) (noting in 1927 that “[e]fforts have been made to secure an adoption of the reformed procedure, but without success,” and that “unification in respect of the form of action and proceedings therein is not to be anticipated, apparently, in the immediate future.”).

<sup>24</sup> William L. Ransom, *The Layman’s Demand for Improved Judicial Machinery*, 73 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 149 (1917).

<sup>25</sup> *Model Arbitration Statute Offered*, 10 J. AM. JUDICATURE SOC’Y 122, 123 (1926).

<sup>26</sup> Charles L. Bernheimer, *The Advantages of Arbitration Procedure*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 100 (1926); see also U.S. DEPT. OF COMM., TRADE ASSOCIATION ACTIVITIES 98 (1923) (“[A]rbitration affords a means for decision upon the merits . . . [with] less chance of the result to turn upon some technicality or some rule of which neither party had knowledge.”); FRANCES KELLOR, ARBITRATION IN ACTION: A CODE FOR CIVIL, COMMERCIAL, AND INDUSTRIAL ARBITRATIONS 4 (1941) (“Arbitration . . . goes deep into the causes, sifts the facts and, unhampered by legal technicalities, sees that justice is administered.”); M. M. B., *Arbitration Under the Modern Statutes*, 23 MICH. L. REV. 882, 886 (1924) (“For those who want . . . controversies settled on their real merits, there is nothing that equals this ‘short-cut to substantial justice.’”).

<sup>27</sup> For instance, Julius Henry Cohen, the principal drafter of the New York Arbitration Law on which the FAA was based, frequently justified the need for modern arbitration law reform on freedom of contract grounds. See Aragaki, *supra* note 13, at 1948.

place undue importance on that theme each time we model arbitration after contract without also emphasizing that it is—and for centuries has been—a model of procedure.

As a final matter it bears noting that the expression, “arbitration is a creature of contract,” does not occur in the legislative history of the FAA or (as far as I have been able to ascertain) in legal or lay publications about arbitration from the period. The earliest occurrence of the expression appears to be Justice Brennan’s concurrence in *United Steelworkers of America v. American Manufacturing Co.*,<sup>28</sup> in which it was remarked in passing that,

To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is “arbitrable” is inescapably for the court.<sup>29</sup>

The relatively recent provenance of the phrase is telling. Along with my other work in this area,<sup>30</sup> it suggests that the contractual paradigm lacks the historical pedigree that it is so often assumed to have.

## II. CONTRACT AND VOLUNTARY CHOICE ARE NOT THE SAME

Part of the reason why the expression that arbitration is a “creature of contract” is so compelling is that it seems eminently true. Arbitration is voluntary: You have to choose it in order to do it. There are also very few mandatory rules in arbitration, which means that parties have wide scope to tailor their process as they see fit. But the fact that arbitration involves a great deal of voluntarism or choice is not the same as saying that arbitration is essentially contractual.

Contract is not just another word for free choice. There is no need for a contract if parties stand by their choices when their performance comes due or if, failing that, they have other means of ensuring compliance such as by structuring simultaneous transfers or by invoking extra-legal sanctions. Contract’s value added is that it reflects not just a bare

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<sup>28</sup> *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

<sup>29</sup> *Id.* at 570-71 (Brennan, J., concurring). A review of the briefing in the case reveals that the expression did not originate in one of the advocates or *amici*. Prior to *United Steelworkers*, there are scattered references to arbitrators or arbitral tribunals being creatures of contracts. For example, in *Green-Boots Construction Co. v. State Highway Commission*, 25 P.2d 783 (Okla. 1933), the Supreme Court of Oklahoma described (in *dictum*) a “board of arbitration” as “creature of contract rather than a commission created by law with specific duties provided by statute.” *Id.* at 788. And in a case brought to the Scottish Court of Session in 1836, the defendant’s representative was reported to have argued that, “[h]aving no public functions, or natural jurisdiction, the arbiter is the mere creature of the contract under which he acts. However limited or imperfect that contract may appear to him, the arbiter has no authority to extend it . . . .” *Robertson v. Brown* (1836) 9 Scot. Jurist 117, 118 (CSIH). But I have not been able to find any similar reference to arbitration itself being a creature of contract prior to 1960.

<sup>30</sup> See Aragaki, *supra* note 13, at 1962-90 (arguing that the “contract model” of the FAA is a “late twentieth-century invention”).

choice but also a legally binding promise to make good on that choice into the future.<sup>31</sup> A contract freely entered years or decades earlier will be enforced even though one party no longer chooses to be bound by it, which is to say that contract law tramples over *that* party's choice all the time.<sup>32</sup> It also tramples over the other party's choice through doctrines that frustrate enforcement, such as mistake, impracticability, the statute of frauds, capacity, and implied duties. Those doctrines, moreover, are themselves not a "matter of consent"<sup>33</sup> because they are mandatory rules that the parties may not set aside by agreement. The upshot is that if our goal is to promote freedom of choice, it is at least debatable whether we might not accomplish that goal just as well or better without contracts at all.<sup>34</sup>

Not only are contract and contract law not coextensive with consent and voluntary action, they also have no unique purchase on them. Consent plays an important part in many areas of the law other than contract. The doctrine of waiver, which is applicable in a wide variety of settings outside contract law, is a form of consent.<sup>35</sup> The conveyance of property is typically a "matter of consent, not coercion"<sup>36</sup> in the sense that, with limited exceptions such as escheat, forfeiture, and eminent domain, one's property cannot be conveyed without one's consent. Yet conveyancing happens without need of a contract all the time.<sup>37</sup> Consent has also historically played a central role in the law of

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<sup>31</sup> CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981) (arguing, *inter alia*, that "since a contract is first of all a promise, the contract must be kept because a promise must be kept"); STEPHEN A. SMITH, *CONTRACT THEORY* 258 (2004) (arguing that contracts "restrict individual autonomy" by allowing "a private individual [to] legally restrict the future freedom of another").

<sup>32</sup> For further discussion, see Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote "Autonomy"?*, 91 *IND. L.J.* 1146 (2016). The classic statement of this position from the turn of the last century is Morris Cohen's. See Morris R. Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553 (1933).

<sup>33</sup> See *supra* text accompanying note 3.

<sup>34</sup> See, e.g., SMITH, *supra* note 31; Mark Pettit, *Freedom, Freedom of Contract, and the 'Rise and Fall,'* 79 *B.U. L. REV.* 263 (1999).

<sup>35</sup> See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 235 (1973) (noting that "consent" can often amount to a "waiver"); *Vinson v. True*, 436 F.3d 412, 417-18 (4th Cir. 2005) (treating a defendant's informed consent to being represented by counsel who had a conflict of interest as tantamount to a waiver of the defendant's Sixth Amendment rights); Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 *L. & CONTEMP. PROBS.* 167, 170 (2004) (describing consent as a means of waiving the jury trial right"); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 *HASTINGS L.J.* 693, 711 (2006) ("Consent and waiver might be seen as flip sides of the same coin.").

<sup>36</sup> See *supra* text accompanying note 3.

<sup>37</sup> See 4 *TIFFANY REAL PROPERTY* § 984, Westlaw (database updated Sept. 2015) ("A conveyance is not, properly speaking, a contract, though it is usually the result of agreement, and a consideration is consequently not necessary to its validity."); 7 *JOSEPH M. PERILLO, CORBIN ON CONTRACTS* § 28.33 (rev. ed. 2002) ("A deed of conveyance is a conveyance, not an executory contract, although it may contain covenants."). Likewise, when goods and money exchange hands simultaneously, there is a sale of goods



procedure.<sup>38</sup> For example, although a court's jurisdiction over the person of the defendant<sup>39</sup> is grounded in "traditional notions of fair play and substantial justice,"<sup>40</sup> as a practical matter the inquiry turns almost entirely on the defendant's voluntary choices<sup>41</sup>—choices such as where she takes up residence,<sup>42</sup> where she chooses to travel,<sup>43</sup> where she chooses to solicit business,<sup>44</sup> where she chooses to enter an appearance,<sup>45</sup> and whether she stipulates in advance to personal jurisdiction.<sup>46</sup> Yet few would be willing to claim that the doctrine of personal jurisdiction is a "creature of contract."

Even mandatory rules—often considered the antithesis of freedom of choice because they take the structure of what H.L.A. Hart described as "orders backed by threats"<sup>47</sup>—do, in fact, promote the freedom of choice of some by restricting the freedom of others. For example, antidiscrimination law places a variety of restrictions on the types of arrangements that employers can enter into with employees. But it is precisely by limiting employers' choices in these ways that antidiscrimination law expands the

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but not necessarily a contract. See BRIAN A. BLUM & AMY C. BUSHAW, *CONTRACTS: CASES, DISCUSSION, AND PROBLEMS* 18 (2d ed. 2008) ("If no future commitment is made, the law of contract, which is concerned with the enforcement of promises, has no role to play in the relationship.").

<sup>38</sup> See, e.g., Lon L. Fuller, *The Role of Contract in the Ordering Processes of Society Generally*, in KENNETH I. WINSTON, *PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 169, 178 (1981).

<sup>39</sup> Personal jurisdiction over the *plaintiff*, on the other hand, appears entirely a matter of consent. Cf. *Adam v. Saenger*, 303 US 59, 67-68 (1938) (holding that a state statute conferring personal jurisdiction over an out-of-state cross-defendant did not violate the Fourteenth Amendment because the cross-defendant, who was also the plaintiff, had voluntarily submitted to the court's jurisdiction by filing suit).

<sup>40</sup> *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted).

<sup>41</sup> *But see generally* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 BOSTON COLL. L. REV. 529 (1991) (arguing that consent cannot explain or justify the exercise of personal jurisdiction).

<sup>42</sup> *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

<sup>43</sup> *Burnham v. Superior Court of California*, 495 U.S. 604, 614 n.3 (1990) ("It is held to be a principle of the common law that any non-resident defendant voluntarily coming within the jurisdiction may be served with process, and compelled to answer." (quotation omitted)).

<sup>44</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76, 484 (1985) (holding that an out-of-state seller who "purposefully" and without "economic duress or disadvantage" directs commercial activities in another forum is subject to personal jurisdiction in that forum because "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed")

<sup>45</sup> *Pennoyer*, 95 U.S. at 733.

<sup>46</sup> E.g., *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) ("[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.").

<sup>47</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 28 (2d ed. 1994).

choices available to employees, who are typically unable to stand up for themselves or bargain on a level playing field.<sup>48</sup>

If our goal is to promote freedom of choice, therefore, we need not essentialize arbitration as a contract or draw normative imperatives about what arbitration's "contractual nature"<sup>49</sup> requires for arbitration law or policy. We can achieve this goal equally well by acknowledging arbitration's dual citizenship in the worlds of contract and procedure.

### III. CONSENT IS NOT WHAT MAKES ARBITRATION UNIQUE

This brings me to my third point: Some people take the phrase, "arbitration is a creature of contract" to mean that consent is what makes arbitration distinctive—at least as against the default of litigation. But the dichotomy between arbitration and consent on the one hand, and litigation and mandatory rules on the other, is itself misleading.

Litigation affords abundant opportunities for consent that we typically overlook.<sup>50</sup> Many of the rules of litigation are mere defaults around which parties are free to contract in any number of ways with minimal oversight by the courts. Good examples are rules relating to venue, statutes of limitations, joinder, and discovery.<sup>51</sup> The Federal Rules of Civil Procedure, for example, give parties a great deal of autonomy to craft a discovery plan that is tailored to their dispute.<sup>52</sup> Indeed one might say that the rules don't just

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<sup>48</sup> Todd D. Rakoff, *Is "Freedom From Contract" Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 483-84; Pettit, *supra* note 34, at 281-82.

<sup>49</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010).

<sup>50</sup> *Accord supra* notes 38-46 and accompanying text.

<sup>51</sup> *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1342-52 (2012). Scott Dodson has recently made a compelling case that, because of "party subordination" to the law, parties do not actually have the right to alter such rules unless otherwise authorized by the legislature, and thus that courts may—indeed sometimes must—disregard any such alterations. *See generally* Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1 (2014). But he recognizes nonetheless that parties purport to customize procedure all the time and that courts almost uniformly defer to that customization, resulting in what he describes as "[e]xtreme forms . . . of party control" over the litigation process. *Id.* at 3-4.

<sup>52</sup> *See* FED. R. CIV. P. 29. The 1993 Amendments to Rule 29 reflect this policy:

This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc. . . . Under the revised rule, the litigants ordinarily are not required to obtain the court's approval of these stipulations.

FED. R. CIV. P. 29 advisory committee notes to 1993 amendments.

tolerate consent in this context; the spirit behind the rules is really to outsource the discovery process as much as possible to private ordering.<sup>53</sup>

Think also about the rules of evidence. We tend to assume that arbitration affords more freedom of choice because the rules of evidence are not binding, leaving parties free to choose whatever evidentiary standards they wish to apply. But in fact the same is largely true in litigation, since parties can agree in advance not to raise evidentiary objections or simply choose not to do so when questionable evidence is introduced.<sup>54</sup> It is true that once this explicit or implicit coordination breaks down, litigants will have little choice but to resolve evidentiary disputes using applicable rules of evidence while parties to an arbitration will not necessarily be bound by *those* rules of evidence. But at the end of the day, parties in arbitration will have just as little choice in the matter because, absent such coordination, a resolution of those evidentiary disputes will inevitably be imposed on them by the arbitrator.

The upshot is that values such as consent, freedom of choice, and autonomy are alive and well in litigation, too. It is hardly surprising, therefore, that the common law adversarial process has traditionally distinguished itself from its civil-law counterpart as a party-driven rather than judge-driven process that values things like participation and autonomy.<sup>55</sup> Yet in procedural law and policymaking, this has never stopped party consent from yielding in any number of appropriate circumstances to considerations about fair, efficient, or legitimate procedure.<sup>56</sup> In the arbitration context, by contrast, this is far less common.<sup>57</sup>

At the same time, much that happens in arbitration is not a matter of mutual consent at all. Instead, it is more often than not a function of the rights accorded to each party by applicable law, regulation, institutional rules, or the arbitrator's discretion—rights about which the other party has little or no say. For example, if the parties cannot agree upon a process for the selection of an arbitrator, the FAA and most state statutes give courts the power to appoint an arbitrator who may not comport with either party's actual preferences.<sup>58</sup> In securities arbitration, parties may not contract around certain

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<sup>53</sup> See Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RESOL. 49, 56 (“The entire tenor of the rules is structured to favor party-driven discovery, with courts becoming involved only to the extent the target of the discovery chooses to fight a request.”).

<sup>54</sup> Bone, *supra* note 51, at 1349-50; Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 472-75 (2007).

<sup>55</sup> Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1213-14 (2005); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 324-30 (1997); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 259-64 (2004).

<sup>56</sup> See Dodson, *supra* note 51, at 4-6 (describing situations in which courts have overridden the parties' express or implied modification of procedural rules).

<sup>57</sup> A notable counterexample here may be *Hall Street Associates, Inc. v. Mattel*, 552 U.S. 576 (2008).

<sup>58</sup> See 9 U.S.C. § 5 (2012); REVISED UNIF. ARBITRATION ACT § 11(a) (UNIF. LAW COMM'N 2000). Provider rules reserve the same prerogative to administering institutions. See, e.g., AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-12(b), -(c) (2013), [https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG\\_004130&\\_afLoop=198977583](https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afLoop=198977583)

procedural entitlements such as minimal discovery and published awards.<sup>59</sup> And let's not forget that arbitrators make determinations over the objection of one party all the time, from preliminary matters of procedure all the way to the final award. In other words, the entire point of an adjudicative process like arbitration is to make rights-based determinations about who may bind or compel whom. If arbitration were truly consensual to the core it would no longer be arbitration; it would be mediation.

#### IV. AUTONOMY MAY BE OVERRATED

Fourth, it turns out that when left to their own devices, human beings often make astonishingly bad choices.<sup>60</sup> In fact, some of us find the prospect of choice so paralyzing that we prefer not to choose at all, and as a result delegate important choices to others.<sup>61</sup> But if that's so, it is difficult to see why we should entrust the institution of arbitration (and arbitration law more generally) to a regime of private ordering through contract. More top-down regulation by state actors (or horizontal "nudging" by private providers)<sup>62</sup> might produce better informed, more effective, and therefore more desirable outcomes than what the parties could orchestrate on their own from the ground up.

A good example here is the debate over *Hall Street Associates v. Mattel*,<sup>63</sup> a case in which the Supreme Court was asked to determine whether private parties could contract around the vacatur grounds in section 10 of the FAA. Section 10 provides for arbitral awards to be set aside for procedural defects having nothing to do with the legal merits, such as when the arbitrator refuses "to hear evidence pertinent and material to the controversy" or decides a matter not submitted to her by the parties.<sup>64</sup> The issue in *Hall*

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<sup>59</sup> *Code of Arbitration Procedure for Customer Disputes*, FIN. INDUS. REGULATORY AUTH., rr. 12506, 12507, 12904, [http://finra.complinet.com/en/display/display\\_viewall.html?rbid=2403&element\\_id=4096&record\\_id=5174&filtered\\_tag](http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4096&record_id=5174&filtered_tag) (last visited May 25, 2016).

<sup>60</sup> See, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1167-70 (2003) (arguing that individual choice is often "irrational" in the sense of producing worse outcomes than centralized decisionmaking); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 555-62 (2002) (describing the potential for making bad decisions due to overconfidence, failure to consider alternatives, and dependence on heuristics).

<sup>61</sup> See Clark Freshman, *Yes, and: Core Concerns, Internal Mindfulness, and External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 NEV. L.J. 365, 388-89 (2009).

<sup>62</sup> Examples of nudging would be the promulgation by institutional providers of procedural models or templates that could assist parties in making better choices. See Thomas Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 307-08, 318 (2014).

<sup>63</sup> 552 U.S. 576 (2008).

<sup>64</sup> 9 U.S.C. § 10(a)(3), (a)(4).

*Street* was whether private parties could contract for additional grounds that would effectively require federal courts to review and vacate arbitral awards for, *inter alia*, substantive legal errors.

Even before the case was decided, Professor Carbonneau warned that parties who entered into such agreements were actually “*mistaken* in their choice of arbitration” because they were inadvertently “thwart[ing] the arbitral process by cluttering it with uselessly intricate provisions for arbitration.”<sup>65</sup> Stipanowich, too, believes that agreements to expand judicial review of arbitral awards reflect “wrong” or “questionable” choices, in large part because they end up compromising important process values such as finality.<sup>66</sup> What’s more, he believes they are symptomatic of a larger problem that is not confined to the mandatory binding arbitration context. Apparently even sophisticated business users routinely fail to make informed, reflective choices when drafting arbitration clauses.<sup>67</sup> Worse, they all too readily abdicate their prerogative to choose—supposedly one of the chief advantages of arbitration—to outside counsel who typically conduct arbitration just like litigation, such as by stipulating to the use of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, taking protracted discovery, and filing extensive pre-hearing motions.<sup>68</sup> This is the thrust of Stipanowich’s claim that arbitration is becoming the “new litigation”—which of course is not meant to be a compliment.<sup>69</sup>

If unbridled freedom of contract runs a significant risk of producing a less functional, less effective, and possibly less just arbitral process because humans are either poor or reluctant choosers, why do we persist in extolling arbitration’s uniquely contractual nature? What do we lose by drawing attention to the other side of the equation—namely, that in order to stay true to its adjudicative function, arbitration must also answer to process norms even where they trump the parties’ (often sub-optimal) choices?

## V. CONTRACT IS AN IMPOVERISHED FRAMEWORK FOR ARBITRATION LAW AND POLICY

Fifth, viewing arbitration primarily through the lens of contract leads to a little bit of a square-peg-in-a-round-hole phenomenon. Contract is at best an awkward conceptual rubric for thinking about many of the procedural issues that arise in arbitration practice and that have become the subject of recent controversy. Consider cases like *AT&T Mobility v. Concepcion*<sup>70</sup> and *American Express v. Italian Colors*.<sup>71</sup> The core issue in

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<sup>65</sup> See Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT’L ARB. 213, 258 (2005) (emphasis added).

<sup>66</sup> Stipanowich, *supra* note 8, at 425-26, 436.

<sup>67</sup> *Id.* at 386; Stipanowich, *supra* note 62, at 309.

<sup>68</sup> Stipanowich, *supra* note 8, at 386-88; Stipanowich, *supra* note 62, at 309, 314-16.

<sup>69</sup> See generally Stipanowich, *supra* note 5.

<sup>70</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

these cases—that is, whether classwide relief is important enough that it should be non-waivable in certain circumstances—sounds in procedure much more so than contract. From a policy perspective at least, the issue opens up questions about the costs and benefits of representative claiming, which in turn implicate further questions about the relative importance of process values such as substantive justice, procedural efficiency, and arbitration’s institutional legitimacy far more than contractual values such as mutual assent and consideration. Mutual assent and consideration may be important values affecting the enforceability of contracts, but neither is particularly helpful in settling the policy question of whether even class waivers obtained through a *quid pro quo* and a perfect meeting of the minds should nonetheless be refused enforcement.<sup>72</sup> Answering that question requires weighing the countervailing considerations about what makes for just, efficient, and legitimate procedure.<sup>73</sup>

But because of the empire of contract in this arena together with the doctrine of FAA preemption (itself inspired by what I have elsewhere referred to as the “contract model” of the FAA),<sup>74</sup> we are disabled from engaging in this analysis head-on and out in the open.<sup>75</sup> For example, in *Concepcion*, the Court relied on FAA preemption to side-step California Supreme Court precedent declaring class arbitration waivers in adhesion contracts to be unconscionable. The Court justified enforcing the waiver by giving freedom of contract the supremacy of federal law. Starting from the premise that “the ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms,’”<sup>76</sup> it concluded simply that state law may not upset the intention of the parties expressed in the waiver no matter how compelling the policies in favor of a universal right to seek classwide relief.<sup>77</sup> In this way, FAA preemption allows the Court to avoid engaging those countervailing procedural policies entirely.

To the degree those procedural considerations manage to see the light of day, they typically do so in a way that either has no legal or precedential value, such as in

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<sup>71</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

<sup>72</sup> Of course, the lack of mutual assent certainly is itself an important policy argument against enforcement. Adhesion contracts present the classic example. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 82-98 (2013). The point is just that even where mutual assent is uncontroverted, it is a further question whether the contract should be denied enforcement on public policy grounds. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981).

<sup>73</sup> This is reflected in the public policy defense to the enforcement of contracts, which requires courts to weigh, *inter alia*, the parties’ justified expectations against “the strength of that policy as manifested by legislation or judicial decisions.” RESTATEMENT (SECOND) OF CONTRACTS § 178(2)-(3).

<sup>74</sup> Aragaki, *supra* note 13, at 1945-46.

<sup>75</sup> This is because FAA preemption essentially immunizes arbitration agreements from the contract defense of public policy. Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1229 (2011); cf. Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1281-82 (2011).

<sup>76</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

<sup>77</sup> *Id.* at 351.

dissenting opinions or public commentary,<sup>78</sup> or in a way that must first be translated into the language of contract. For a particularly dramatic example of the latter, consider the infamous case of *Hooters v. Phillips*.<sup>79</sup> There, an employee brought a sexual harassment claim under Title VII. The district court denied Hooters' motion to compel arbitration because it held that the clause was unconscionable for a number of reasons. Among other things, the clause: (a) required the employee to provide notice of her claim but did not require the employer to answer or provide notice of its defenses; (b) required only the employee to provide notice of the witnesses she intended to call at the hearing; and (c) provided for a tripartite panel in which the chairperson and the employee's party-appointed arbitrator had to be selected from a list of arbitrators maintained by the employer, while the employer was free to select whomever it wished as its wing arbitrator—even its own managers.<sup>80</sup>

*Hooters* was essentially a case about procedural unfairness in arbitration rather than about contractual unfairness caused by things like asymmetric bargaining power or the diminished quality of consent. Experts, for instance, denounced the Hooters program because it “so deviated from *minimum due process standards* that the [American Arbitration] Association would refuse to arbitrate under those rules”<sup>81</sup> and because it “violate[d] fundamental concepts of fairness . . . and the integrity of the arbitration process.”<sup>82</sup> But because the law sees arbitration as entirely contractual, only common law contract defenses may be used to deny enforcement of arbitration clauses. In other words, the court could not deny Hooters's motion to compel for the simple reason that the arbitration clause flew in the face of basic norms of fair procedure. Instead, it had to reason (rather circuitously) that by promulgating such “egregiously unfair” rules, Hooters had “*materially breached* the arbitration agreement,” which in turn warranted discharging Ms. Phillips of her duty to arbitrate.<sup>83</sup>

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<sup>78</sup> For example, in his dissent in *Concepcion*, Justice Breyer observed that although the majority focused on the disadvantages of classwide relief,

class proceedings [also] have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. . . . What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim? . . . Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California's to make?

*Id.* at 365-66 (Breyer, J., dissenting). It fell to Justice Kagan to raise similar concerns in her dissent in *Italian Colors*. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314-20 (2013) (Kagan, J., dissenting).

<sup>79</sup> *Hooters v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

<sup>80</sup> *Id.* at 938-39.

<sup>81</sup> *Id.* at 939 (emphasis added) (describing testimony of George Friedman, Senior Vice President of the American Arbitration Association).

<sup>82</sup> *Id.* (emphasis added) (quoting Brief for National Academy of Arbitrators as Amicus Curiae in Support of Defendant & Third Party Plaintiff-Appellee at 3, *Hooters*, 173 F.3d 933 (No. 98-1459), 1998 WL 34098102).

<sup>83</sup> *Id.* at 938 (emphasis added).

From a legal realist perspective, the court's conclusion was undoubtedly influenced by concerns about fair procedure. The problem is that instead of engaging with those concerns directly and creating precedent about the type of procedures that will violate due process in arbitration, the court had to recast things in a way that would establish grounds for rescission of contract. This was harder than the court was willing to admit. First, Hooters had not literally breached the arbitration clause because it retained the discretion to promulgate and revise the rules governing arbitration.<sup>84</sup> It was in breach only by virtue of having breached the duty of good faith and fair dealing, which is implied as a matter of law regardless of either party's actual consent.<sup>85</sup> But the court glossed over this point and failed to consider any evidence about what good faith actually required in the context of the particular agreement at issue—for example, whether Hooters' one-sided procedures ran athwart the parties' "agreed common purpose" or the very "spirit of the bargain."<sup>86</sup> Second, even if Hooters' breach of the covenant of good faith were clear, was that breach so material and total as to warrant altogether discharging Ms. Phillips of her agreement to arbitrate? This question, in turn, implicates further issues<sup>87</sup> that are not reducible to procedural inadequacy or unfairness alone. And even if the contractual rubric ultimately yields the correct result in egregious cases such as *Hooters*, it is imperfect and will likely prove both over- and under-inclusive in cases where the procedural issues are more nuanced. It's a bit like trying to eat soup with a fork: You may manage to catch a piece of carrot here or a chunk of meat there, but you're not really getting the job done.

The unconscionability doctrine may provide a marginally superior conceptual apparatus in cases like *Hooters* because substantive unconscionability allows courts to opine on factors that go to the substantive fairness of the arbitral bargain, such as inadequate discovery, limitations on remedies, lack of substantive merits review, and unreasonable costs and fees.<sup>88</sup> But even unconscionability is an awkward doctrine for policing procedure. Unconscionability is not the same as unfairness due to superior bargaining power;<sup>89</sup> rather, it denotes something more akin to "oppression"—a bargain that "no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."<sup>90</sup> Thus, when courts use the doctrine to oversee procedural fairness in more routine ways, they attract the not-so-unjustified criticism that they are either committing reversible error or—worse—deliberately manipulating the doctrine in order to conceal their own unjustified hostility toward

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<sup>84</sup> *See id.* at 936.

<sup>85</sup> RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

<sup>86</sup> *Id.* § 205 cmts. a, d.

<sup>87</sup> *See id.* §§ 241 (whether failure of performance is material), 242 (whether contractual duties are discharged).

<sup>88</sup> *See, e.g.,* *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 682-89 (Cal. 2000).

<sup>89</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (quoting Uniform Commercial Code § 2-302, cmt. 1).

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



arbitration.<sup>91</sup> And because procedural unconscionability must also be shown, where it is entirely lacking it is quite possible that a court will uphold the arbitration clause no matter how substantively unconscionable its terms.<sup>92</sup>

## VI. POLITICS

Sixth, the law can no longer afford to sideline questions about procedural adequacy and fairness in arbitration. The battleground in the debate over arbitration is shifting. Arbitration has evolved to a point where it is now a *de facto* surrogate for the courts in civil matters.<sup>93</sup> The real issue today is not whether parties should or should not be entitled to submit certain disputes to the arbitral forum, but rather whether they should or should not be able to agree to certain *procedures* in arbitration.<sup>94</sup> Prominent examples from recent cases include waivers of classwide relief, excessive limits on discovery, high fees, and other procedural shortcomings deemed to frustrate the effective vindication of substantive rights.<sup>95</sup> Take the recent and controversial trilogy of articles on mandatory arbitration by the *New York Times*.<sup>96</sup> These articles focus not so much on the lack of consent to *ex ante* arbitration agreements as on perceived deficiencies in arbitration procedure.

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<sup>91</sup> Cf. Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. ON ARB. & MEDIATION 39, 59-62 (2013) (collecting sources).

<sup>92</sup> See, e.g., *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1166 (N.D. Cal. 2012) (finding that “because both procedural and substantive unconscionability must be present and the court found above that the arbitration agreement was not procedurally unconscionable, Mr. Mance’s unconscionability argument fails”).

<sup>93</sup> Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 8 (1997).

<sup>94</sup> The early FAA preemption cases, for instance, typically involved state statutes that restricted the submission of certain matters to arbitration. As these “first generation” cases gained more traction and it became clear that states could no longer mandate the availability of a judicial forum even for claims of a quasi-public character, state legislatures began shifting their focus toward “second generation” statutes that sought to regulate the arbitration process. On the distinction between “first” and “second” generation cases, see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 395, 415 (2004). Later FAA preemption cases such as *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), fall into the “second generation” category. See Aragaki, *Equal Opportunity for Arbitration*, *supra* note 75, at 1201.

<sup>95</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

<sup>96</sup> Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1, [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES, Nov. 1, 2015, at A1, <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES, Nov. 2, 2015, at A1, <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

A sophisticated approach to this issue requires a theory about what procedures are essential and non-negotiable, either for purposes of realizing arbitration's benefits, for promoting its distinctiveness vis-à-vis other dispute resolution processes such as litigation or mediation, or for ensuring its legitimacy as an adjudicative process. To retort that the parties have freely agreed to such a process—or, in what is the same thing, that arbitration is a “creature of contract”—does not begin to answer this normative challenge.

## CONCLUSION

*Man does not speak because he thinks; he thinks because he speaks.  
Or rather, speaking is no different than thinking: to speak is to think.*

Octavio Paz<sup>97</sup>

Let me first be clear about what I am *not* arguing. I am not saying that contract and associated values are unimportant in the arbitration area. I am also not saying that we need to choose between contract and procedure. It's not a zero sum game: We can be equally committed to the idea of arbitration as a contract and arbitration as a procedure. All I am saying is that we need to pay greater attention to procedure than we have so far—in the way we conceptualize arbitration, in the way we debate arbitration law and what the FAA should or should not be taken to require, and in the practical and policy arguments we make for reform.

And so as irresistible as the phrase is, we cannot afford to continue speaking about arbitration and arbitration law as if they were exclusively matters of contract. If Octavio Paz is correct that “to speak is to think,” we must actually start uttering a different phrase if we truly wish to expand our horizons in a way that includes arbitration's procedural pedigree.

The theme of this Symposium is “The Politics of Arbitration.” Politics, as we all know, has much to do with how we frame things. Campaign slogans are a good example. Consider the influence of the expression, “It's the Economy, Stupid!” from Bill Clinton's 1992 presidential bid,<sup>98</sup> widely considered to be one of the most effective slogans in our nation's history. The expression that “arbitration is a creature of contract,” too, is a kind of slogan in the politics of arbitration. It would be naïve to think that slogans are merely descriptive claims. For they also have the power to shape our understanding of the real issues at stake and to inspire progress or mobilize reform.

It is with this ideological power of slogans in mind that I propose we begin referring to arbitration as a “pillar of procedure.” *Oxford Dictionaries* defines “pillar” as

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<sup>97</sup> OCTAVIO PAZ, *ALTERNATING CURRENT* 49 (Helen R. Lane, trans., 1973).

<sup>98</sup> See Michael Kelly, *Democrat Fights Perceptions of Bush Gain*, N.Y. TIMES, Oct. 31, 1992, at 1, 6, <http://www.nytimes.com/1992/10/31/us/1992-campaign-democrats-clinton-bush-compete-be-champion-change-democrat-fights.html>.

“a person or thing regarded as reliably providing essential support for something.”<sup>99</sup> Common synonyms for “pillar” include: “stalwart,” “mainstay,” “bastion,” “rock,” “leading light,” “backbone,” “upholder,” and “champion.”<sup>100</sup> To say that arbitration is a pillar of procedure is to say that arbitration can and should be an exemplar of good procedure, as it was in the 1920s and as it has been for the better part of history.

Remember that arbitration predates public courts of law. In late eighteenth century England, business disputes filed in court were routinely either referred to arbitration or, if they proceeded to a trial, were heard by a panel of expert arbitrators rather than a lay jury. During this time, Chancery also referred cases that required sophisticated fact-finding to arbitral tribunals.<sup>101</sup> Revolutionary changes to English civil procedure in the nineteenth century were modeled in part on the simplicity and flexibility of arbitration procedure, and there was tremendous cooperation during this period between the commercial courts and private arbitration bodies.<sup>102</sup> Arbitration today has lost this long and rich history of being something of a pillar of procedure. I think we need to reclaim that legacy if we really want to meet the challenges raised by arbitration’s modern-day critics.

And if it is true that arbitration is now unavoidably ensnared in politics, what better way to begin doing that than by repositioning or reframing arbitration? The problem with describing arbitration as a “creature of contract” *tout court* is that it gives the impression to critics that arbitration law and policy are organized exclusively around free market values and, by extension, corporate interests. By contrast, describing arbitration as both a creature of contract and a “pillar of procedure” helps critics and supporters alike to avoid losing sight of the fact that arbitration is also an adjudicative procedure that must be committed to the fair and reasoned presentation and consideration of facts and norms<sup>103</sup> with the aim of securing a just and legitimate decision on the merits.

So let’s resist the urge to describe arbitration as a “creature of contract.” It’s an unnecessary and potentially very misleading gesture. If we must use the expression at all, what better than to temper it by giving equal airtime to arbitration’s other half? For arbitration is not just a creature of contract; it is also a “pillar of procedure.”

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<sup>99</sup> *Pillar*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/pillar](http://www.oxforddictionaries.com/us/definition/american_english/pillar) (last visited May 25, 2016).

<sup>100</sup> *Id.*

<sup>101</sup> James Oldham, *On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury*, 71 OHIO ST. L.J. 1031, 1033-36 (2010); see also Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 HIST. J. 137, 139-41 (1993).

<sup>102</sup> SAMUEL ROSENBAUM, A REPORT ON COMMERCIAL ARBITRATION IN ENGLAND 48-53 (1916) (describing the creation of the Commercial Court in the King’s Bench Division in London as embodying “the central principle of commercial arbitration” and noting that private arbitration was also flourishing in this period).

<sup>103</sup> See generally Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).