

# RECONCILING FAULT LINES IN ARBITRATION AND REDEFINING ARBITRATION THROUGH THE BROADER LENS OF PROCEDURE

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## INTRODUCTION

Professor Jean Sternlight has written about the need for examining the integrated nature and relationship between alternative dispute resolution (ADR) and civil procedure.<sup>1</sup> ADR and civil procedure are integrated in practice, but unfortunately, these two fields are commonly viewed and studied separately in the legal academy.<sup>2</sup> When one takes an integrated approach in studying the fields of civil procedure and ADR, common, underlying themes come to light, and this integrated approach can broaden our understanding of procedural justice and the multiple purposes of our justice system.<sup>3</sup> Similarly, Professor Deborah Hensler and Damira Khatam, as part of this symposium volume, have written a persuasive article demonstrating the value of examining different domains of arbitration in a more comprehensive, broad manner.<sup>4</sup>

Inspired by Professor Sternlight's work and the symposium contribution of Professor Hensler and Damira Khatam, this article examines arbitration law through a broader framework—the framework of procedure. The main thesis of this article is that one can develop a better understanding of arbitration law by viewing arbitration as part of a broader, procedural framework for dispute resolution. The first section of this article explores a problematic tension in arbitration cases from the Supreme Court of the United States. As explained below, from case-to-case and sometimes even within a case, the Supreme Court flip-flops in its conceptualization of arbitration. However, as explained in the second part of this article, one can easily resolve this tension in the Supreme Court's arbitration decisions by situating arbitration law within a broader procedural framework. The final part of this article stresses the importance of analyzing arbitration through a broader procedural lens. There are several lessons about arbitration that one can observe by focusing on the procedural nature of arbitration. For example, by examining the role of procedure in a legal system and examining the differences between substance-specific and transsubstantive models of procedural regulation, one can learn important lessons about arbitration law. An exploration of arbitration through a broader lens of procedure suggests ways to improve arbitration law and redefine the meaning of arbitration in our laws. This Article proposes that courts should interpret the meaning of arbitration under the Federal Arbitration Act by using a definition of arbitration that incorporates procedural principles.

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<sup>1</sup> Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 681 (2005).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 710, 716.

<sup>4</sup> See Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 381 (2018).

## I. THE FAULT LINES IN THE SUPREME COURT'S ARBITRATION CASES

There is significant tension in arbitration law because the Supreme Court of the United States has been inconsistent in its treatment or conceptualization of arbitration. The Court in some cases conceptualizes the enforcement of an arbitration agreement as a substantive right. Yet, in other cases, the Court appears to re-conceptualize the enforcement of an arbitration agreement in an entirely different manner, as a procedural right. The Court has even vacillated between its different views of arbitration within the same case.

A. *The Supreme Court Sometimes Conceptualizes the Enforcement of An Arbitration Agreement as a Substantive Right*

In a series of preemption decisions spanning over several decades, the Supreme Court has repeatedly treated the enforcement of an arbitration agreement as a substantive right. In its landmark decision of *Southland Corp. v. Keating* in 1984, which involved state court proceedings in a franchise dispute, the applicable state law guaranteed a judicial forum for the resolution of franchise disputes.<sup>5</sup> As a result of this state law, state courts refused to enforce arbitration agreements in connection with alleged violations of state franchise laws.<sup>6</sup> The Supreme Court, however, held that the Federal Arbitration Act (FAA)<sup>7</sup> applies in state court proceedings and preempted state laws banning arbitration, and as a result, the arbitration agreements at issue were fully enforceable under the FAA with respect to the franchise disputes.<sup>8</sup> In order to reach its preemption conclusion, the Supreme Court in *Southland* characterized the enforcement of arbitration agreements pursuant to the FAA as “a substantive rule applicable in state as well as federal courts.”<sup>9</sup>

As textual support for its *Southland* holding, the Court selectively focused on certain language from section two of the FAA,<sup>10</sup> which generally states that an arbitration agreement is fully binding.<sup>11</sup> By narrowly focusing on this particular language of the statute, and ignoring the rest of the statute, the Court claimed to discover only two limitations regarding the enforceability of an arbitration agreement under the FAA: first, the agreement to arbitrate must be part of a contract involving interstate commerce, and second, arbitration agreements

<sup>5</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 5–6 (1984).

<sup>6</sup> *Id.* at 5.

<sup>7</sup> 9 U.S.C. §§ 1–2 (2012).

<sup>8</sup> *Southland*, 465 U.S. at 16.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 10–16.

<sup>11</sup> 9 U.S.C. § 2 (“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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

may be revocable upon generally-applicable grounds for the revocation of any contract, such as fraud or unconscionability.<sup>12</sup> By narrowly focusing on this part of the statute and by claiming to see only two restrictions, which did not impact the issue at hand, the Court hastily jumped to its conclusion that the FAA contains no limits regarding its application in state courts, and thus, the FAA applies in state courts.<sup>13</sup> In conceptualizing the enforcement of an arbitration agreement as a substantive right, the Court also cited the plenary authority of Congress, pursuant to the Commerce Clause of the United States Constitution.<sup>14</sup> The Court explained that the FAA “rests on the authority of Congress to enact substantive rules under the Commerce Clause.”<sup>15</sup> Thus, the enforcement of an arbitration agreement pursuant to the FAA is a substantive right, which state courts must respect pursuant to the Supremacy Clause of the Constitution.<sup>16</sup> In the decades following the *Southland* decision, the Supreme Court relied on *Southland* in several cases to hold that one’s right to enforce an arbitration agreement, as a substantive right under federal law, overrides conflicting state laws.<sup>17</sup>

*B. The Supreme Court Sometimes Conceptualizes the Enforcement of An Arbitration Agreement as a Procedural Right*

Interspersed among the Supreme Court’s rulings characterizing the FAA as substantive law are other, conflicting Supreme Court decisions treating the

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<sup>12</sup> *Southland*, 465 U.S. at 10–11 (“We discern *only two* limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act.” (emphasis added)). There are other requirements or limitations in Section 2 of the FAA, which the Court conveniently overlooked in *Southland* and in future cases. According to 9 U.S.C. § 2, the FAA’s coverage is limited to written provisions in a contract “to settle by arbitration a controversy thereafter arising out of such contract.” Statutory claims, such as the ones at issue in *Southland*, do not necessarily arise out of a contract, and thus, the FAA should not apply to such claims. The FAA was originally designed for commercial, contractual disputes, not statutory claims. Unfortunately, the Supreme Court has overlooked this important limitation in the text of the statute.

<sup>13</sup> *Southland*, 465 U.S. at 16.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 11–16.

<sup>17</sup> For example, in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012), the Court addressed a state court’s refusal to enforce an arbitration agreement because of a state law forbidding the use of arbitration agreements in connection with wrongful death claims against nursing homes. Relying on the principle established in *Southland* that both “[s]tate and federal courts must enforce the [FAA],” the Court in *Marmet* easily concluded that the right to enforce arbitration agreements pursuant to the FAA overrides the conflicting state law banning arbitration. *Id.* at 530, 533. Similarly, in *Perry v. Thomas*, 482 U.S. 483, 489 (1987), the Court described the FAA as “a body of federal substantive law . . . enforceable in both state and federal courts,” and the Court held that the FAA preempts a state law forbidding arbitration in wage disputes. In several other cases, the Court has relied on the substantive nature of the FAA to apply the FAA in a state court proceeding in order to oust state law. *See, e.g., Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421 (2017).

FAA as procedural law. The year after the Court decided *Southland*, the Court issued a landmark decision characterizing the enforcement of an arbitration agreement as procedural. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court explained that through an agreement to arbitrate, “a party does not forgo the substantive rights afforded by [a] statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>18</sup> In *Mitsubishi*, the Court treated the enforcement of an arbitration agreement as a procedural right, with no impact on substantive rights. As explained by the Court in *Mitsubishi*, when parties agree to arbitrate, the parties are merely “trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”<sup>19</sup> Similarly, in *Scherk v. Alberto-Culver Co.*, the Court characterized an agreement to arbitrate as a procedural tool to resolve the rights of the parties under substantive law: “An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.”<sup>20</sup> Also, in *EEOC v. Waffle House, Inc.*, the Supreme Court was careful to emphasize that the enforcement of an arbitration agreement “only determines the choice of forum” for resolving a dispute about one’s substantive rights.<sup>21</sup> Thus, in a series of several cases spanning decades, the Court has conceptualized the enforcement of an arbitration agreement as procedural in nature.<sup>22</sup>

As the above examples illustrate, the Supreme Court has vacillated in its treatment of arbitration from case-to-case, and there is both a procedural and substantive strand of arbitration decisions from the Court. From the 1980s to present day, the Court has intermittently treated the enforcement of an arbitration agreement as a substantive right, as in *Southland*, *Perry*, and *Marmet*. However, interspersed among this substantive line of cases are other cases, like *Mitsubishi*, *Scherk*, and *Waffle House*, where the Supreme Court has embraced the enforcement of an arbitration agreement as a mere procedural tool to define or determine substantive rights, without impacting substantive rights.

### C. Explaining the Court’s Inconsistent Conceptualization of Arbitration

How can one explain the Court’s flip-flopping treatment of arbitration over the years? A cynical explanation is that the Court, primarily since the 1980s, has been expanding the FAA beyond its original, intended coverage, perhaps as

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<sup>18</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

<sup>19</sup> *Id.*

<sup>20</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

<sup>21</sup> *EEOC v. Waffle House*, 534 U.S. 279, 295 n.10 (2002) (emphasis added).

<sup>22</sup> See also *Vaden v. Discover Bank*, 556 U.S. 49 (2009) (conceptualizing the enforcement of an arbitration agreement as merely a procedural tool or a process geared towards the resolution of an underlying merits dispute, which is the focus of the inquiry regarding subject matter jurisdiction under the FAA).

a way to alleviate overcrowded judicial dockets and limit access to courts.<sup>23</sup> To help support the expansion of the FAA, it appears that the Court will flip-flop and utilize either characterization regarding the enforcement of an arbitration clause—be it procedural or substantive—so long as that characterization allows the Court to reach its ultimate goal of expanding the FAA in that particular case. For example, in some of the Court’s procedural cases like *Mitsubishi*, the Court expanded the FAA beyond contractual disputes to cover statutory claims of a public nature.<sup>24</sup> Before this period of expansion, the FAA was historically used to facilitate the arbitration of contractual claims, not statutory claims.<sup>25</sup> However, in a series of decisions such as *Mitsubishi* and *Shearson/Am. Express, Inc. v. McMahon*, it became clear that the Court sought to expand the FAA beyond contractual claims to cover statutory claims.<sup>26</sup> To help justify the expansion of the FAA regarding the arbitrability of statutory claims, it was important for the Court to treat the enforcement of arbitration agreements as a procedural right. It was important in these cases regarding arbitrability for the Court to portray the FAA as broadly-applicable procedural law of a transsubstantive nature. In other words, to make this new pill regarding the arbitrability of statutory claims easier to swallow, the Court sugarcoated the enforcement of an arbitration agreement as merely procedural and as having no impact on substantive rights.<sup>27</sup> The Court’s procedural characterization in *Mitsubishi* and similar cases, in other words, may help convey a sentiment such as the following: there is no need to worry about expanding the FAA beyond contractual claims to cover the resolution of statutory claims because arbitration is merely procedural; enforcing an arbitration agreement will not impact important statutory or substantive rights, like securities or civil rights claims, because arbitration is merely a neutral process to resolve such claims.

However, in other cases where there is a state law potentially curtailing the use of arbitration, where the Court desired to justify the expansion of the FAA into the states, the Court recasts the enforcement of an arbitration agreement as a substantive right, which thereby enables the Court to hold that the state law is preempted.<sup>28</sup> Thus, one possible explanation of the Court’s flip-flopping treat-

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<sup>23</sup> IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION, 172 (1992) (“One cannot immerse oneself in the arbitration cases without coming to the conclusion that a major force driving the Court is docket-clearing pure and simple.”).

<sup>24</sup> *Mitsubishi*, 473 U.S. at 627–28.

<sup>25</sup> IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

<sup>26</sup> *Mitsubishi*, 473 U.S. at 627–28; *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

<sup>27</sup> *Mitsubishi*, 473 U.S. at 628 (“[A] party does not forgo the substantive rights afforded by [a] statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”); see also *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 314 n.10 (2002) (“We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum.”).

<sup>28</sup> See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

ment of arbitration is that the Court appears to engage in a chameleon-like reconceptualization of arbitration depending on whether the particular conceptualization assists the Court in justifying its ultimate conclusion, which is typically a judicial re-writing or expansion of the scope of arbitration law in furtherance of a court-manufactured policy in favor of arbitration.

The Supreme Court's conflicting and tortured treatment of arbitration is in full view in its decision of *Preston v. Ferrer*.<sup>29</sup> In *Preston*, a California law granted a state commissioner exclusive jurisdiction to resolve disputes arising under California's laws regarding talent agents.<sup>30</sup> In holding that the FAA preempts the state law granting exclusive jurisdiction to the state commissioner, the Court in *Preston* quoted from and relied on its *Southland* decision to demonstrate that the FAA, as a substantive law applicable in both state and federal courts, preempts state laws undermining this substantive right to enforce an arbitration agreement.<sup>31</sup> The *Southland* strand conceives the enforcement of an arbitration agreement as a substantive right under federal law,<sup>32</sup> and *Preston* relied on this strand of arbitration law to justify the expansive displacement of state law that occurs in *Preston*.<sup>33</sup>

The Supreme Court's displacement of state law in *Preston* is breathtaking in scope. The underlying dispute at issue involved a state law concern unique to California: the licensing of talent agents in California's entertainment industry.<sup>34</sup> To carry out and enforce these state rights, and resolve disputes regarding these state-created rights, California bestowed a state agency with the exclusive jurisdiction to hear these special disputes.<sup>35</sup> States should have sovereign authority to control the procedures by which their very own state-created rights are enforced, and federal intrusion on how a state chooses to enforce its own state-created rights raises serious federalism concerns.<sup>36</sup> As a result of the *Preston* case, which flows from the Court's substantive conceptualization of the enforcement of arbitration agreements in *Southland*, states can no longer design and require specialized administrative tribunals with exclusive jurisdiction to implement fundamental state policies and resolve disputes arising solely under state law. This *Preston* case reflects and is based on the view that the enforcement of an arbitration clause is a substantive right created by Congress under the FAA.

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<sup>29</sup> *Preston v. Ferrer*, 552 U.S. 346 (2008).

<sup>30</sup> *Id.* at 351.

<sup>31</sup> *Id.* at 353.

<sup>32</sup> *Southland*, 465 U.S. at 16.

<sup>33</sup> *Preston*, 552 U.S. at 353.

<sup>34</sup> *Id.* at 354–55.

<sup>35</sup> *Id.* at 351.

<sup>36</sup> *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (“[T]he procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control,” and states have broad, exclusive powers to adopt any procedure for the enforcement of rights, as long as the procedure “satisfies the constitutional requirements of reasonable notice and opportunity to be heard.”).

However, at the same time while embracing the substantive view of arbitration to displace the state law, the *Preston* Court is careful to highlight the procedural nature of arbitration:

[The enforceability of an arbitration agreement] presents *precisely and only* a question concerning the forum in which the parties' dispute will be heard. . . . So here, [the plaintiff, who must arbitrate,] relinquishes no substantive rights the [California Talent Agencies Act] or other California law may accord him.<sup>37</sup>

In other words, while relying on the substantive conceptualization of the enforcement of an arbitration agreement to justify preemption of state law, the *Preston* Court simultaneously stresses that the enforcement of an arbitration agreement is procedural in nature because an arbitration agreement does not set forth any rules of decision or rules regulating life outside of the legal system. Instead, an arbitration agreement simply identifies the method, forum, or process for enforcing substantive rights and resolving substantive disputes.<sup>38</sup>

Why did the Court in *Preston* go out of its way to highlight the procedural nature of arbitration, while at the same time treating arbitration as substantive in other parts of its opinion? Perhaps the Court was aware that its ruling would raise serious federalism concerns and result in a severe displacement of state law granting exclusive jurisdiction to a state administrative agency, and to help alleviate such federalism concerns, the Court was careful to emphasize that only procedures were being changed and the parties' substantive rights under state law would not be impacted. The Court's characterization of arbitration as procedural in nature suggests that an arbitration tribunal would be fully competent to hear and resolve the claims at issue without impacting the substantive rights of the parties. Perhaps, to alleviate concerns arising from the severe displacement of state law, the Court in *Preston* relied on the procedural nature of arbitration to suggest that the same outcome should occur regardless of whether the case is heard in an arbitral forum or before a special state commissioner. It is almost as if the Court in *Preston* attempted to gloss over the serious federalism concerns arising from its substantive treatment of arbitration by simultaneously highlighting the procedural nature of arbitration.

In sum, there is significant tension in the Supreme Court's conceptualization of arbitration. In some cases, the enforcement of an arbitration agreement is treated as a substantive right, and in other cases, or even within the same case, the Court stresses that the enforcement of an arbitration agreement is procedural in nature.

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<sup>37</sup> *Preston*, 552 U.S. at 359 (emphasis added) (citation omitted).

<sup>38</sup> *Id.*

## II. RESOLVING THE TENSION IN THE SUPREME COURT'S ARBITRATION DECISIONS BY SITUATING ARBITRATION WITHIN A BROADER PROCEDURAL FRAMEWORK

As demonstrated above, the Supreme Court has been inconsistent in its conceptualization of arbitration agreement enforcement.<sup>39</sup> How should this tension in arbitration law be resolved? One can easily resolve this tension in the Supreme Court's arbitration decisions by properly situating arbitration law within a broader procedural framework. When arbitration is properly viewed as part of a broader procedural framework for resolving disputes, it becomes clear that the substantive treatment of arbitration in the Supreme Court's *Southland* decision is flawed.

The history of the FAA's enactment, which demonstrates that the FAA was part of a larger movement for improving the administration of justice and reforming the judicial system, helps confirm the procedural nature of arbitration.<sup>40</sup> During the early 1900s, the federal court system was broken, confusing, hypertechnical, and overwhelmed, necessitating a movement for procedural reform developed to cope with the problems plaguing the judicial system.<sup>41</sup> There was a strong desire to reform procedures to make the resolution of disputes more efficient and streamlined; the FAA's enactment was part of this broader movement for procedural reform and improving the administration of justice.<sup>42</sup> Viewing the FAA within its broader context of a larger movement of procedural reform, both in the courts and in arbitration, helps one see more clearly the procedural nature of the FAA, contrary to the Supreme Court's treatment of arbitration in the *Southland* case.

In addition to the history of the FAA's enactment as part of a broader movement of procedural reform, the text of the FAA, the original understanding of the FAA, constitutional concerns, and the concept of arbitration all demonstrate that the enforcement of an arbitration agreement should be treated as procedural in nature. The late Professor Ian Macneil, in his ground-breaking book, *American Arbitration Law: Reformation, Nationalization, Internationalization*, already conclusively and thoroughly confirmed that the Supreme Court's holding in *Southland* is deeply flawed because the FAA is procedural.<sup>43</sup> Professor Macneil's key arguments are summarized below.

In his landmark book, Professor Macneil observed that the FAA is a fully integrated, unitary statute designed to facilitate the different stages of arbitration—the FAA addresses the beginning of an arbitration proceeding, the arbitration proceeding itself, as well as post-award issues.<sup>44</sup> The Supreme Court in

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<sup>39</sup> See *supra* Part I.

<sup>40</sup> SZALAI, *supra* note 25, at 166–79.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See generally MACNEIL, *supra* note 23.

<sup>44</sup> *Id.* at 105–07.

*Southland* reached its flawed holding by narrowly focusing on one section of the statute.<sup>45</sup> However, when one properly considers the entire statute as a comprehensive, unitary framework designed to facilitate all stages of commercial arbitration, it becomes immediately apparent that the FAA is a statute applicable solely in federal courts because the FAA is filled with references to the federal courts.<sup>46</sup> The fully integrated nature of the FAA and the FAA's explicit references to federal courts make clear that, as a textual matter, *Southland* is wrongly decided; the FAA was never intended to be a substantive law applicable in state courts.<sup>47</sup>

Furthermore, at the time of the FAA's enactment during the 1920s, the universal understanding of arbitration law was that it was procedural law.<sup>48</sup> As recognized in a House Report,

[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.<sup>49</sup>

Also, as explained above in the discussion regarding *Preston*, the FAA raises serious federalism concerns because of its displacement of state law.<sup>50</sup> As a result of *Southland*'s flawed conceptualization of arbitration as a substantive right and the Supreme Court's decision in *Preston*, states have lost their sovereign authority to design exclusive, specialized, unique administrative tribunals to implement fundamental state policies and resolve disputes arising solely under state law.<sup>51</sup>

Furthermore, the concept or definition of arbitration helps demonstrate the procedural nature of arbitration. Why do parties arbitrate? No one arbitrates in the abstract. Arbitration should be conceptualized as a bundle of procedures

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<sup>45</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 10–16 (1984).

<sup>46</sup> *See, e.g.*, 9 U.S.C. § 4 (2012) (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court. . . .”); 9 U.S.C. § 7 (“[I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person. . . .”); 9 U.S.C. § 10 (“In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award. . . .”).

<sup>47</sup> MACNEIL, *supra* note 23, 105–07.

<sup>48</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286–89 (1995) (Thomas, J., dissenting).

<sup>49</sup> H.R. REP. NO. 68–96, at 1 (1924); MACNEIL, *supra* note 23, at 117.

<sup>50</sup> *See supra* notes 34–41 and accompanying text; *see generally* *Preston v. Ferrer*, 552 U.S. 346 (2008).

<sup>51</sup> Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 115–18, 136–37 (2015) (stating FAA's preemptive impact on state administrative schemes violates constitutional guarantees of federalism).

used to resolve a dispute; arbitration occurs in connection with an underlying dispute to be resolved, as recognized by the Supreme Court's procedural treatment of arbitration in *Vaden v. Discover Bank*.<sup>52</sup> Arbitration is a procedural tool to enforce or resolve disputes about substantive rights, but arbitration itself does not define one's substantive rights.<sup>53</sup> Arbitration law does not regulate or impact one's conduct outside of the context of resolving a dispute.<sup>54</sup> The very notion of arbitration, as a method or bundle of procedures to enforce or resolve disputes about substantive rights, reinforces the procedural nature of arbitration.

The vacillation and inconsistencies of the Supreme Court in conceptualizing arbitration also help confirm that something is amiss with the Court's holding in *Southland*. Although the Court has held in several cases that the enforcement of an arbitration agreement is a substantive right,<sup>55</sup> the Court in other cases cannot avoid admitting or facing the reality that arbitration is procedural, not substantive law. For example, in *Vaden v. Discover Bank*, the Court held that federal courts must look through to the underlying merits dispute to determine whether the federal court has subject matter jurisdiction to enforce an arbitration agreement.<sup>56</sup> This "look through" approach adopted in *Vaden* recognizes the reality that the enforcement of an arbitration agreement is merely a procedural tool or a process designed to resolve the underlying merits dispute between the parties. If the enforcement of an arbitration clause were truly a substantive right, as the erroneous *Southland* decision holds,<sup>57</sup> then the enforcement of an arbitration clause would automatically give rise to federal question subject matter jurisdiction. Normally, a substantive right arising under federal law would automatically create federal question subject matter jurisdiction.<sup>58</sup> However, as demonstrated in *Vaden*, federal courts do not have automatic subject matter jurisdiction to enforce an arbitration agreement; instead, the Supreme Court in *Vaden* recognized that courts must "look through" and examine the underlying merits dispute to be resolved in arbitration in order to determine whether the court has jurisdiction to enforce this critical federal substan-

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<sup>52</sup> *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009); see also *infra* notes 63–69 and accompanying text.

<sup>53</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) ("We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum."); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.")

<sup>54</sup> *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (suggesting that the difference between substantive laws and procedural laws involves rules that substantially impact "primary decisions respecting human conduct" outside the context of dispute resolution and rules that shape the conduct of dispute resolution).

<sup>55</sup> See *supra* Section I.A.

<sup>56</sup> *Vaden*, 556 U.S. at 62.

<sup>57</sup> See *supra* notes 8–19 and accompanying text.

<sup>58</sup> *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908).

tive right.<sup>59</sup> Confronted with this problem of a substantive law that fails to give rise to federal question jurisdiction, the Court in *Vaden* and in other cases has been forced to bluntly admit that the FAA is “something of an anomaly” in the entire field of federal subject matter jurisdiction.<sup>60</sup> The Court glosses over the dissonance of a purported substantive federal right failing to give rise to subject matter jurisdiction by labeling and dismissing the problem as an “anomaly.”<sup>61</sup> In other words, the Supreme Court acknowledges that its treatment of arbitration as a substantive right creates a major aberration and problem in the field of subject matter jurisdiction, yet, dismisses its flawed treatment with an “is-what-it-is” attitude with no further explanation or attempt to reconcile the jurisdictional problem.

However, instead of quickly dismissing the FAA’s jurisdictional issue as an inexplicable aberration that fails to comport with the rest of subject matter jurisdiction, the better resolution of this jurisdictional puzzle is that the enforcement of an arbitration clause is not a substantive federal right. Instead, the FAA is a procedural law. Properly recognized as a procedural law, the FAA does not give rise to federal question jurisdiction. No matter how many times the Court relies on the substantive nature of arbitration to preempt and displace state law, the Court, from time to time, must uncomfortably confront the inescapable reality that the enforcement of an arbitration agreement is merely procedural.<sup>62</sup> The flip-flopping nature of the Court’s characterization of arbitration and the Court’s inability to explain the “anomaly” involving the jurisdictional problems created by the Court’s substantive characterization emphasize the Court’s erroneous treatment of arbitration as a federal substantive right.

In sum, the Court’s conceptualization of the enforcement of an arbitration agreement as a federal substantive right is highly problematic in light of the history of the FAA’s enactment as part of a broader movement of procedural reform, the text of the FAA, the meaning of arbitration, and serious federalism and jurisdictional problems. Properly viewing the FAA through a procedural lens resolves this tension in arbitration law. The enforcement of an arbitration clause involves procedural, not substantive, law.

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<sup>59</sup> *Vaden*, 556 U.S. at 62 (“The text of § 4 drives our conclusion that a federal court should determine its jurisdiction by ‘looking through’ a § 4 petition to the parties’ underlying substantive controversy.”).

<sup>60</sup> *Id.* at 59; *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) (“The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976 ed., Supp. V) or otherwise.”).

<sup>61</sup> *Vaden*, 556 U.S. at 59.

<sup>62</sup> See *supra* Section I.B.

### III. REDEFINING ARBITRATION BY EXAMINING ARBITRATION THROUGH A PROCEDURAL LENS

As explained above in Part II, despite the Court's inconsistent and flawed conceptualizations of arbitration, the enforcement of an arbitration agreement should be viewed as procedural. What ramifications flow from this principle that arbitration is procedural in nature? Exploring arbitration through a broader lens of procedure suggests ways to improve arbitration law and redefine arbitration. Viewing arbitration as procedural demonstrates that the Supreme Court's landmark decision in *Southland* is wrongly decided; clarifies the role of arbitration as an integrated part of our broader legal system; sharpens policy debates about the future of arbitration law; and suggests a way to redefine arbitration in our laws.

#### A. *States Should Be Free to Experiment in Regulating Arbitration Because Southland is Wrongly Decided*

Because the enforcement of an arbitration clause is procedural in nature, the Supreme Court's decisions in *Southland* and its progeny are seriously flawed.<sup>63</sup> States should be free to decide for themselves whether and under what conditions an arbitration clause is fully enforceable.<sup>64</sup> The fact that an arbitration agreement may not be fully enforceable under state law, while the same clause would be fully enforceable under the FAA in federal court, is not problematic. To paraphrase the Supreme Court in *Mitsubishi*, an agreement to arbitrate is just a change in forum and procedures.<sup>65</sup> Litigating instead of arbitrating a dispute would involve differences in process costs and procedures, to be sure, but switching fora would not be the end of the world. Having different fora for the resolution of disputes is inherent in the nature of our federalist system. Forum shopping and having disputes resolved pursuant to different procedural rules already occurs in the United States' judicial systems when parties, without an arbitration clause, forum shop among different state court systems or when parties desire to remain in state court and intentionally craft their complaints to avoid triggering subject matter jurisdiction in federal court. The fact that one government entity would be willing to enforce an arbitration clause, a procedural question, while another government entity would not enforce the same clause, should not impact the substantive rights of parties. When arbitration is properly understood and treated as procedural law, such acknowledg-

<sup>63</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 14–16 (1984).

<sup>64</sup> PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 82–85, 121 (2013) (sacrificing the uniformity values of *Southland* would promote federalism values in the regulation of arbitration).

<sup>65</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

ment of the procedural nature of arbitration should free states to experiment with regulating arbitration in different ways.

*B. Arbitration is an Integrated Part of Our Broader Legal System*

Understanding that arbitration is procedural, and that the FAA's enactment was part of a broader movement for procedural reform highlights the role of arbitration within our broader legal system. The push for the FAA and the push for a uniform set of rules for the federal court system in the early decades of the twentieth century were part of the same larger movement for procedural reform, and these procedural developments grew out of the broken court system of the early 1900s.<sup>66</sup> This background helps stress the role of the FAA and arbitration as an integrated part of our broader legal system.<sup>67</sup> The private systems of arbitration supported by the FAA serve as a safety valve for an overburdened, broken court system.<sup>68</sup> Also, arbitration serves as a competitive, contrasting foil to the traditional court system. If the courts are not functioning well, parties can take their disputes to private arbitration, and procedural innovations in arbitration can influence the reform of court procedures.<sup>69</sup> In other words, viewing arbitration as part of a broader movement for procedural reform helps reveal that different systems of dispute resolution are interrelated, and a robust system of arbitration can be healthy for a smoothly functioning court system.<sup>70</sup>

*C. Improving and Redefining Arbitration*

*1. The Transsubstantive Nature of Modern Arbitration Law*

Understanding that arbitration is procedural in nature sharpens policy debates about arbitration, which suggests ways to improve and redefine arbitration under the FAA. Today, as a result of the Supreme Court's expansive interpretations of the FAA, the FAA is a broadly applicable procedural law of a transsubstantive nature, and this final section of the Article explores the ramifications of such a procedural law.

The FAA, which is textually limited to written provisions in a contract to arbitrate disputes arising out of the contract,<sup>71</sup> was originally designed to cover contractual disputes between merchants of relatively co-equal bargaining pow-

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<sup>66</sup> SZALAI, *supra* note 25, at 166–73.

<sup>67</sup> Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 130–34.

<sup>68</sup> *Id.* at 132.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 134.

<sup>71</sup> 9 U.S.C. § 2 (2012) (written provisions in a contract “to settle by arbitration a controversy thereafter arising out of such contract” are fully enforceable).

er.<sup>72</sup> The FAA's legislative history helps demonstrate that the statute was not designed for take-it-or-leave-it arbitration agreements imposed by a stronger party on a weaker party.<sup>73</sup> By the very terms of the statute, which is limited to disputes arising out of a contract, the FAA was never intended to cover statutory claims or tort claims that could be asserted without reference to a contract.<sup>74</sup> Properly limited to contractual, commercial disputes, the FAA, as originally enacted, embodied a type of substance-specific model of procedural regulation.

However, in a series of cases, beginning in the international context in the 1970s and expanding to the domestic context in the 1980s, the Supreme Court transformed the FAA into a transsubstantive procedural statute and broadly expanded the FAA to cover virtually every area of non-criminal law.<sup>75</sup> Ignoring the clear text of the FAA, the Supreme Court has created a default rule that every possible claim, statutory or non-statutory, is now subject to the FAA's coverage, unless Congress clearly provides otherwise.<sup>76</sup> Moreover, courts today routinely apply the FAA to complex statutory claims, sexual battery claims, and wrongful death claims—claims that can be stated without reference to a contract and that were never intended to be covered by the statute as originally enacted.<sup>77</sup> Furthermore, employment disputes were never intended to be cov-

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<sup>72</sup> *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7 (1924) (statement of Charles L. Bernheimer, Chairman, Committee on Arbitration, Chamber of Commerce of the State of New York) (FAA designed for disputes such as one between a seller of a carload of potatoes from Wyoming and a dealer from New Jersey); *see also id.* at 30–31 (statement of Wilson J. Vance, Secretary, New Jersey Chamber of Commerce) (arbitration legislation would help reduce “business litigation” and encourage “business men” to settle their “business differences”); *id.* at 41 (“If business men desire to submit their disputes to speedy and expert decision, why should they not be enabled to do so?”). The statute was designed for merchants who could bargain for the inclusion of an arbitration agreement as part of their transactions with one another, and a prototypical dispute covered by the FAA would be a commercial dispute about the quality of shipped goods between merchants in different states.

<sup>73</sup> *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9–11 (1923) (statement of W.H.H. Piatt).

<sup>74</sup> 9 U.S.C. § 2 (FAA covers written provisions in a contract “to settle by arbitration a controversy thereafter arising out of such contract”).

<sup>75</sup> *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (FAA covers all types of statutory claims, including civil rights claims, unless Congress specifically exempts a particular statutory claim from arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11, 519–20 (1974).

<sup>76</sup> *Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 626–28; *Scherk*, 417 U.S. at 519–20.

<sup>77</sup> *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532–34 (2012) (wrongful death claims); *In re Online Travel Co.*, 953 F. Supp. 2d 713, 720–21 (N.D. Tex. 2013) (antitrust claims); *Anderson v. Waffle House, Inc.*, 920 F. Supp. 2d at 687, 695 (E.D. La. 2013) (employee's claims for sexual harassment and assault); *IFMG Sec., Inc. v. Sewell*, No. 13-10-00235-CV, 2011 WL 5515528, at \*3 (Tex. App. Nov. 10, 2011) (employee's claims for sexual harassment, assault, and battery).

ered by the FAA,<sup>78</sup> but in 2001, the Supreme Court expanded the statute to cover employment disputes.<sup>79</sup> The Supreme Court has broadly expanded the FAA far beyond its original intent so that the statute applies to all types of disputes.

With the increasing, expansive coverage of the FAA, the Supreme Court has fully transformed the FAA from a substance-specific procedural law covering contractual, commercial disputes into a transsubstantive procedural law covering all types of disputes.<sup>80</sup> Scholars have debated the virtues of substance-specific versus transsubstantive models of procedural regulation.<sup>81</sup> Although substance-specificity in procedural rules can lead to more tailored procedures designed to better implement the policies of each area of substantive law, substance-specificity can lead to greater complexity in procedural law and wrangling over which body of procedural law controls.<sup>82</sup> A universal, transsubstantive model of procedural law, with its simplicity and flexibility, has its own inherent appeal and has dominated the modern federal civil procedure system through the “one-size-fits-all” Federal Rules of Civil Procedure. Perhaps, the Supreme Court’s decisions expanding the coverage of the FAA to all types of disputes was influenced, at least in part, by the norm of transsubstantivity found in the governing Federal Rules of Civil Procedure.

How does the substance-specific vs. transsubstantive debate apply in the context of the FAA? In other words, in developing and improving arbitration law for the future, should the current transsubstantive norm continue to apply in arbitration law, or should arbitration law become more substance-specific? There is no easy answer to this policy choice. A reasonable proposal to reform the FAA is to move away from the transsubstantive nature of the FAA by de-

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<sup>78</sup> SZALAI, *supra* note 25, at 191–92 (examining historical evidence demonstrating that the FAA was never intended to apply to employment disputes).

<sup>79</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

<sup>80</sup> Arbitration rules set forth in a particular agreement or developed by an arbitration institution can be, and often are, substance-specific. For example, the American Arbitration Association has rules designed for employment disputes and a separate set of rules designed for construction disputes. AM. ARBITRATION ASS’N., *EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURE* (2016); AM. ARBITRATION ASS’N., *CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES* (2016). Although particular arbitration rules used in an arbitration proceeding may be focused and substance-specific, the FAA procedural law regulating and facilitating the use of arbitration has grown to be transsubstantive and applies broadly to every type of arbitration proceeding, such as consumer, employment, construction, or complex commercial arbitration proceedings.

<sup>81</sup> See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2067–68 (1989); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin’s New-Old Procedure as a Possible Antidote to Dreyfuss’s “Tolstoy Problem,”* 46 FLA. L. REV. 57, 78 (1994); Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 377 (2010) (“I have argued for three decades that the underlying transsubstantive philosophy of the Federal Rules of Civil Procedure is flawed.”).

<sup>82</sup> Carrington, *supra* note 81, at 2081.

veloping more substance-specific arbitration law as well as different rules for distinctive settings or uses of arbitration. For example, to be more protective of consumer and employee rights, a rational proposal would be to better tailor arbitration law to implement the policies of consumer protection statutes and employment statutes. One could develop heightened standards of meaningful consent for consumer and employment arbitration agreements. Another reform could involve increasing the level of judicial review for statutory claims involving consumer and employment disputes. To the contrary, perhaps the FAA could become very substance-specific and be limited solely to contractual disputes between merchants, as originally intended, and be amended to exclude consumer, employment, and statutory claims from its coverage.<sup>83</sup>

## 2. Risks of a Transsubstantive Model of Arbitration Law

Although the simplicity of a transsubstantive model of procedure is appealing, there is a risk that a universal procedural rule may be applied in a harsh, inflexible, and unfair manner. For example, in the field of federal civil procedure governing the courts, the Supreme Court's landmark pleading decisions in *Ashcroft v. Iqbal* and *Bell Atlantic Corp. v. Twombly* have made some people question the continued wisdom of transsubstantive procedural rules.<sup>84</sup> In *Iqbal* and *Twombly*, the Supreme Court interpreted the federal pleading standard as requiring that there must be sufficient factual allegations in a plaintiff's complaint to make a claim "plausible."<sup>85</sup> Several scholars believe this standard of plausibility pleading represents a departure from a more liberal system of notice pleading adopted in the Federal Rules of Civil Procedure of 1938.<sup>86</sup> Plausibility pleading has been criticized as an improper, judicially created, more heightened form of detailed pleading not required by the Federal Rules.<sup>87</sup> In the wake of *Iqbal* and *Twombly*, commentators have criticized the impact of the plausibility pleading standards in cases where defendants are likely to be in exclusive possession of evidence of wrongdoing, such as civil rights and employment discrimination cases, and commentators have also called into ques-

<sup>83</sup> See, e.g., Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).

<sup>84</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>85</sup> *Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at 557.

<sup>86</sup> Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 17 (2008) ("The *Twombly* holding marks a significant retreat from the concept of notice pleading and certainly the end of notice pleading as envisioned by the drafters of the Federal Rules."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432 (2008) (Supreme Court's plausibility standard is "quite at odds with the Court's position heretofore" and is a "break from the Court's previous embrace of notice pleading.").

<sup>87</sup> Spencer, *supra* note 86, at 433.

tion the values of transsubstantive procedures in light of the harsh, disparate impact of the new pleading standard on certain types of substantive cases.<sup>88</sup>

As demonstrated by the Supreme Court's controversial *Twombly* and *Iqbal* decisions, there is a risk that "one-size-fits-all" universal procedural rules are not nuanced enough and can be applied in a harsh, unfair manner to undermine the enforcement of substantive laws. Similarly, consider the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*,<sup>89</sup> where the Court announced a seemingly transsubstantive procedural law under the FAA, which could have a harsh, disparate impact on certain types of cases. *Rent-A-Center* involved a delegation clause, by which the parties to an arbitration agreement delegated to an arbitrator the authority to resolve issues about the formation and enforceability of an arbitration agreement.<sup>90</sup> The Supreme Court in *Rent-A-Center* held that challenges to an arbitration agreement do not invalidate a narrow, specific delegation clause within an arbitration agreement.<sup>91</sup> As a result, an arbitrator will resolve challenges to the enforcement of an arbitration clause, and if an arbitration agreement contains arguably unconscionable terms, an arbitrator instead of a court will determine whether the arbitration agreement is enforceable.<sup>92</sup> It seems that the Court's holding in *Rent-A-Center*, although transsubstantive on its face and applicable to all types of cases, could have a harsh, disparate impact on consumer and employment cases. When two sophisticated parties have relatively equal bargaining power, they may negotiate the terms of an arbitration clause, and with such meaningful consent, it is unlikely that one party would be harmed by an unfair, harsh clause. In other words, the *Rent-A-Center* holding may have less of an impact on two sophisticated parties who negotiate and consent to all of the details of an arbitration agreement. However, in the consumer and employment context, where meaningful consent is often lacking, there may be harsh terms in the arbitration agreement drafted by a stronger corporate party, and under the *Rent-A-Center* decision, an arbitrator—instead of a court—will determine the enforceability of the arbitration agreement if the arbitration agreement contains a delegation clause.<sup>93</sup> Consumers and employees are

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<sup>88</sup> See, e.g., Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 570 (2010) ("We have to recognize the disparate impact of transsubstantive procedure on civil rights and discrimination claims."); Scott Foster, Note, *Breaking the Transsubstantive Pleading Mold: Public Interest Environmental Litigation After Ashcroft v. Iqbal*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 885, 885–86 (2011) (explaining that the transsubstantive plausibility pleading standard is inappropriate for public interest environmental litigation).

<sup>89</sup> *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010).

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

<sup>91</sup> *Id.* at 72.

<sup>92</sup> See, e.g., *Lloyd v. BRSI, LLC*, No. CIV-15-964-M, 2016 WL 234861, at \*2 (W.D. Okla. Jan. 19, 2016) (enforcing a delegation clause in arbitration agreement); *Williams v. Omainsky*, No. 15-0123-WS-N, 2015 WL 8056142, at \*6 (S.D. Ala. Dec. 3, 2015) (enforcing a delegation clause in arbitration agreement).

<sup>93</sup> See *Lloyd*, 2016 WL 234861, at \*2; *Williams*, 2015 WL 8056142, at \*6.

the parties who are more likely to be involved with challenges to harsh terms of a one-sided arbitration clause since sophisticated parties with bargaining power are probably more likely to have the ability to protect themselves in negotiating an arbitration agreement.

Vulnerable consumers or employees would likely benefit from the broader procedural protections available in court when litigating the issue of an arbitration clause's enforceability, as opposed to having an arbitrator resolve the issue. For example, broader discovery would likely be available in court and allow parties to conduct depositions or engage in other discovery regarding the making of an arbitration agreement. Also, by having courts decide these threshold issues of whether a valid agreement exists in the consumer and employment context, a body of published and publicly available decisions will develop regarding the enforceability and fairness of certain provisions in an arbitration clause. These judicial decisions would generally be subject to appellate review, which could promote consistency in the judicial decisions. Furthermore, in the consumer and employment settings, when a court enforces a delegation clause such that an arbitrator will resolve the enforceability of harsh terms in an arbitration clause, such decisions may undermine public confidence in the judicial system. An injured victim of discrimination or a consumer who has been cheated may feel that the courts have harshly shut the door because the courts will not hear the underlying dispute and to add insult to injury, the courts will not even strike down an obviously harsh or unfair arbitration provision. Instead, it would be up to the arbitrator to review the harsh provision and perhaps merely sever the harsh provision from the rest of the arbitration clause. The "one-size-fits-all" rule regarding delegation clauses created by the Supreme Court's *Rent-A-Center* decision, although transsubstantive on its face, would appear to have a harsher impact in certain types of cases.

Another example of the harshness of a transsubstantive arbitration law involves judicial vacatur of arbitral awards. Historically, the grounds for judicial vacatur of an arbitral award have been very narrow and courts have sometimes described this level of review as the narrowest review known in American law.<sup>94</sup> When the FAA was first enacted during the 1920s, this narrow level of review may have been appropriate for contractual disputes about the quality of goods shipped between two merchants of relatively co-equal bargaining power who understood the finality of arbitration and willingly consented to this system. However, with the Supreme Court's transsubstantive expansion of the FAA, critical statutory claims of public interest, such as civil rights claims, are now captured under the finality of arbitration developed for contractual disputes, and instead of a one-size-fits-all arbitration law, a rational argument

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<sup>94</sup> *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 123 (1st Cir. 2008) ("A federal court's review of an arbitrator's decision, however, is extremely narrow and exceedingly deferential. Indeed, it is among the narrowest known in the law." (citations omitted) (internal quotation marks omitted)).

could be made for a more substance-specific arbitration law with increased judicial review of arbitral awards involving consumer or employment claims.

3. *Redefining the Meaning of Arbitration under the FAA Through the Lens of Procedure*

Although reasonable arguments could be advanced for a more substance-specific model of arbitration law, the track record of arbitration reform in Congress is not encouraging for any substantial legislative reforms of America's arbitration laws.<sup>95</sup> It is unlikely that significant reforms to arbitration law will take place any time soon, and it looks like a transsubstantive model of arbitration law may be here to stay for the foreseeable future. Thus, if the United States legal system must continue with a transsubstantive model of arbitration law, what are the ramifications?

If America's arbitration laws remain transsubstantive, it is important that the procedural law embodied in the FAA be flexible enough so that the FAA would be applied in a fair manner and not undermine the policies and enforcement of substantive rights. Although the relationship between substance and procedure is complex, at least one major goal or value of procedural law that has been advanced over time is that procedural law should be subordinate to the goals of substantive justice.<sup>96</sup> Procedural rules can be justified by "their effectiveness in making easier and surer the application of the principles of substantive law."<sup>97</sup> There is a strong view that procedural rules should be supportive of substantive rights and not frustrate the enforcement of substantive rights.<sup>98</sup> To help justify the legal system in the public's eye, an individual's rights should not be undermined by the flawed procedural enforcement of those rights.

The Supreme Court has already recognized to some degree in its arbitration cases that procedural law should be subordinate to substantive law. In its landmark case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court issued one of its strongest statements about the procedural nature of arbitration.<sup>99</sup> In holding that complex statutory antitrust claims are arbitrable under the FAA, the Court characterized arbitration agreements as a type of forum selection clause setting forth "not only the situs of suit but also the procedure to be used in resolving the dispute."<sup>100</sup> In addressing concerns that an arbitration tribunal would not be adequate to handle complex claims or implement the

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<sup>95</sup> Several bills, called the Arbitration Fairness Act, have been introduced in Congress over the years in order to amend the FAA, but the bills have died out in committee. *See, e.g.*, Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013); Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013).

<sup>96</sup> *See, e.g.*, Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938).

<sup>97</sup> Charles E. Clark, *Procedural Fundamentals*, 1 CONN. B.J. 67, 68 (1927).

<sup>98</sup> Clark, *supra* note 96, at 304; Clark, *supra* note 97, at 67–68; *see also* Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 602 (1926).

<sup>99</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>100</sup> *Id.* at 630 (citation omitted).

goals of antitrust law, the Court made the following critical statement: “And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal antitrust] statute will continue to serve both its remedial and deterrent function.”<sup>101</sup> This statement in *Mitsubishi*, which sets forth what has been called the “effective vindication” doctrine, recognizes the normative principle that arbitration, or procedural law in general, should not undermine substantive law.

It is important to recognize the context in which the Court proclaimed the effective vindication doctrine. The FAA was originally intended to apply only to commercial, contractual disputes arising out of a contract.<sup>102</sup> Statutory rights, which do not arise out of a contract, were not intended to be covered by the statute. In *Mitsubishi*, and in a series of other cases, the Court expanded the scope of the FAA to cover statutory claims.<sup>103</sup> Thus, in *Mitsubishi*, the Court was breaking into new territory and expanding the FAA, and to alleviate concerns about this expansion to complex statutory claims, the Court announced the effective vindication doctrine.<sup>104</sup> The Court was in effect saying that there is no need to worry about the expansion of the FAA; arbitration of statutory claims is entirely appropriate. By announcing the effective vindication doctrine, the Court recognized a parameter or limit to arbitration: arbitration of statutory claims will not be allowed if the arbitration process undermines the enforcement of substantive laws. The effective vindication doctrine was announced or recognized in the particular context of this case to help justify the Court’s judicial expansion of the FAA to cover statutory claims.

Since the announcement of the effective vindication doctrine in 1986 in *Mitsubishi*, lower courts have used the effective vindication doctrine to monitor the fairness of arbitration agreements and strike down harsh, one-sided provisions in such agreements. For example, in the case of *Gourley v. Yellow Transp., LLC*, the arbitration agreement contained three separate harsh terms, which frustrated the ability of employees to assert sexual harassment claims.<sup>105</sup> At the front end, the agreement imposed excessive fees on the plaintiffs who could not afford to pay.<sup>106</sup> The district court, citing precedent that arbitration agreements cannot prevent parties from effectively vindicating their rights, held that the excessive fees would prevent the parties from fully enforcing their rights.<sup>107</sup> Similarly, in the middle, the agreement restricted the arbitration hearing to one day, with the possibility of two days for “unusual circumstances and

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<sup>101</sup> *Id.* at 637.

<sup>102</sup> See *supra* notes 71–76 and accompanying text.

<sup>103</sup> *Id.*

<sup>104</sup> Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 56 n.176 (2014).

<sup>105</sup> *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001).

<sup>106</sup> *Id.* at 1203–04.

<sup>107</sup> *Id.*

good cause shown.”<sup>108</sup> Because of the complexity of the case, the district court found that the one or two-day limitation for hearings made the arbitral forum inadequate for the plaintiffs to vindicate their rights.<sup>109</sup> Furthermore, at the back end, the agreement prohibited the plaintiffs from submitting post-hearing evidence, which would prevent the plaintiffs from vindicating their right to the statutory award of attorneys’ fees in cases arising under federal civil rights laws.<sup>110</sup> In sum, for all three stages of the arbitration proceeding, the beginning, middle, and end, the arbitration clause at issue contained harsh, one-sided terms that prevented the plaintiffs from effectively vindicating their rights, and the district court easily concluded that the arbitration agreement was not enforceable.<sup>111</sup>

Although the effective vindication doctrine was a well-established and useful principle of arbitration law for decades following the Supreme Court’s decision in *Mitsubishi* in 1985, the Supreme Court unfortunately undermined the effective vindication doctrine, designating it to be mere dicta, in the 2013 case of *American Express Co. v. Italian Colors Restaurant*.<sup>112</sup> In this case, merchants filed a class action lawsuit in court to challenge certain credit card fees of American Express as violations of federal antitrust law.<sup>113</sup> In response to the lawsuit, American Express asked the court to compel each merchant to arbitrate individually pursuant to arbitration clauses in the contracts between the merchants and American Express.<sup>114</sup> The arbitration clauses contained class-action waivers forbidding the merchants from proceeding collectively as a class.<sup>115</sup> However, if each merchant had to bring individual proceedings, the costs of proving the antitrust claims through expert witnesses could reach more than \$1 million, which would easily exceed a potential individual recovery of perhaps \$40,000.<sup>116</sup> In other words, if forced to bring individual arbitration proceedings, the merchants could not effectively vindicate their rights. The appellate court held that the arbitration agreements were not enforceable because the agreements prevented the plaintiffs from effectively vindicating their rights.<sup>117</sup>

In a majority opinion written by Justice Scalia, the Supreme Court held that under the FAA, courts may not invalidate arbitration agreements on the grounds that the agreements do not permit collective or class claims.<sup>118</sup> Reasoning that arbitration agreements must be enforced as written pursuant to the

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<sup>108</sup> *Id.* at 1204.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1204–05.

<sup>111</sup> *Id.* at 1205.

<sup>112</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

<sup>113</sup> *Id.* at 2308.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 2309–10.

FAA, the Court found that the class-action waiver was fully enforceable.<sup>119</sup> Turning to a discussion of the antitrust laws, the Court explained that the antitrust laws do not prevent class-action waivers, and in fact, the federal antitrust laws were enacted decades before the modern class-action rule was even adopted, which suggests that the individual resolution of antitrust claims is not problematic.<sup>120</sup> In the final section of the majority opinion, the Court addressed and dismissed arguments about the effective vindication doctrine.<sup>121</sup>

Regarding the effective vindication doctrine, the majority quickly dismissed the doctrine as “judge-made” and mere “dictum” originating in the *Mitsubishi* case.<sup>122</sup> The majority described the doctrine as designed to “prevent ‘prospective waiver of a party’s right to pursue statutory remedies.’”<sup>123</sup> With such a definition of the effective vindication doctrine, the majority opined that the doctrine would invalidate “a provision in an arbitration agreement forbidding the assertion of certain statutory rights.”<sup>124</sup> Also, the doctrine “would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”<sup>125</sup> However, according to the majority, the high cost of “*proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>126</sup> As a result, the effective vindication doctrine did not apply in this case. Even though the class-action waiver would make it economically irrational for anyone to bring individual antitrust claims, because a rational person would not spend \$1 million to recover \$40,000, the class-action waiver was fully enforceable.<sup>127</sup>

Justice Kagan, joined by Justices Ginsburg and Breyer, wrote a dissent.<sup>128</sup> Justice Kagan explained that the effective vindication doctrine, instead of being mere dictum, was critical to the holding of *Mitsubishi*: “We held [in *Mitsubishi*] that federal statutory claims are subject to arbitration ‘*so long as*’ the claimant ‘effectively may vindicate its [rights] in the arbitral forum.’ The rule thus served as an essential condition of the decision’s holding.”<sup>129</sup> Also, pursuant to this doctrine, Justice Kagan argued that the class-action waiver in this case is not enforceable. Justice Kagan explained that an explicit exculpatory clause barring the assertion of a federal claim would clearly be unenforceable as an improper prospective waiver of one’s rights.<sup>130</sup> However, as observed by Jus-

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<sup>119</sup> *Id.* at 2309.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2310–12.

<sup>122</sup> *Id.* at 2310.

<sup>123</sup> *Id.* (emphasis omitted).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 2310–11.

<sup>126</sup> *Id.* at 2311.

<sup>127</sup> *Id.* at 2308, 2310, 2312.

<sup>128</sup> *Id.* at 2313.

<sup>129</sup> *Id.* at 2317 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

<sup>130</sup> *Id.* at 2314.

tice Kagan, there are several other ways a stronger party can in effect bring about the same immunity and frustrate the vindication of one's rights throughout the different stages of an arbitration proceeding:

On the *front end*: The agreement might set outlandish filing fees or establish an absurd (e.g., one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum. On the *back end*: The agreement might remove the arbitrator's authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the *middle*: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability—say, by prohibiting any economic testimony (good luck proving an antitrust claim without that!). Or else the agreement might appoint as an arbitrator an obviously biased person—say, the CEO of Amex. The possibilities are endless—all less direct than an express exculpatory clause, but no less fatal.<sup>131</sup>

Instead of being limited to just prospective waivers of the right to pursue or assert a claim from the very beginning, Justice Kagan treated the effective vindication doctrine as broadly applicable to a variety of different arbitration stages.<sup>132</sup> With this broader, more comprehensive view of the effective vindication doctrine, Justice Kagan believed that the class-action waiver at issue, which forced the merchants to bring individual claims, made the assertion of antitrust claims cost-prohibitive, and thus the arbitration clause did not allow the parties to vindicate their statutory rights.<sup>133</sup>

There is a tension between the majority's and dissent's view of the effective vindication doctrine. In addition to dismissing the doctrine as “judge-made” “dictum,” the majority appeared to suggest a narrow, restricted view of the doctrine. The majority suggested the doctrine applies in one or perhaps two situations: “prospective waiver[s]” of the right to sue (as opposed to procedural provisions that made it more costly to prove a claim), and “perhaps” prohibitive upfront “filing and administrative fees.”<sup>134</sup> Lower courts, taking their cue from

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<sup>131</sup> *Id.* (emphasis added).

<sup>132</sup> *Id.* at 2317–18 (stating that “[the effective vindication doctrine] covers the world of other provisions a clever drafter might devise to scuttle even the most meritorious federal claims” and providing several examples of harsh provisions).

<sup>133</sup> *Id.* at 2320.

<sup>134</sup> *Id.* at 2310–11. Justice Scalia mentioned “filing and administrative fees,” which probably includes the fee to initiate an arbitration before an arbitration association and covers the administrative services provided by the arbitration association. *See* AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2016). (“Administrative Fees: The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do *not* cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.”) (emphasis added). In his definition of the effective vindication doctrine, Justice Scalia noticeably did not mention the fees or expenses of arbitrators, who may receive hourly or daily rates. An arbitrator's fees would, of course, vary depending on the complexity of the case and how much evidence or testimony a party wishes to present; arbitrators' fees would vary with the difficulty and time in presenting and

the majority's restrictive, weakened view of the effective vindication doctrine, are also taking a narrow view of the doctrine in the wake of *American Express*.<sup>135</sup> The dissent in *American Express*, on the other hand, adopted a more comprehensive, robust, and flexible definition of the effective vindication doctrine. The dissent recognized that the doctrine would apply to any provision that prevents the vindication of one's rights, regardless of whether the provision restricts access to the proceeding from the front end or very beginning, makes the proceeding itself an inadequate forum, or restricts the grant of certain relief at the back end.<sup>136</sup>

Justice Kagan's broader view of the effective vindication is more appropriate for arbitration law than the stringent, limited view adopted by the majority. As mentioned above, lower courts for several decades prior to the *American Express* decision have applied the effective vindication doctrine to strike down harsh provisions involving all stages of an arbitration proceeding, regardless of whether the provision impacts the beginning, middle, or end of a proceeding.<sup>137</sup> Justice Kagan's broader, more comprehensive, robust view of the effective vindication doctrine represents a more realistic view of procedure as having the ability to impact the resolution of a dispute at any stage of a proceeding.<sup>138</sup> Ka-

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proving a case. Based on Justice Scalia's narrow view of the effective vindication doctrine, which applies to prospective waivers of the right to sue and not provisions giving rise to high, variable costs associated with proving a more complex case, an argument could be made that high arbitrator's fees are not covered by Justice Scalia's crimped, weakened view of the effective vindication doctrine, since arbitrator's fees are likely to vary depending on the complexity of proving a particular case. In other words, Justice Scalia's choice of terms, "administrative and filing fees," may have been intended to exclude arbitrator's fees from the coverage of the effective vindication dictum, but this is not clear. Litigants and lower courts have not, as of yet, explicitly relied on this aspect of Justice Scalia's opinion and the difference between "filing fees" and arbitrator's fees to hold that the effective vindication doctrine does not apply to excessive arbitrator's fees. *But see* *Byrd v. SunTrust Bank*, No. 2:12-CV-02314-JPM-cgc, 2013 WL 3816714, at \*18 (W.D. Tenn. July 22, 2013) ("[The Supreme Court's *American Express* decision] appears to make it more difficult for Plaintiffs to show that the Arbitration Clause is unenforceable due to high fees associated with arbitration.").

<sup>135</sup> *Sierra v. Cruise Ships Catering & Servs. Int'l, N.V.*, 631 F. App'x 714, 718 (11th Cir. 2015) (relying on *American Express*'s treatment of the effective vindication doctrine as dictum to reject the application of the doctrine); *Torres v. CleanNet, U.S.A., Inc.*, 90 F. Supp. 3d 369, 378 (E.D. Pa. 2015) (relying on *American Express*'s treatment of the effective vindication doctrine as dictum to find that the doctrine does not apply when the underlying merits claims are based on state law); *Mercado v. Doctors Med. Ctr. of Modesto, Inc.*, No. F064478, 2013 WL 3892990, at \*6, \*7 (Cal. Ct. App. July 26, 2013) (finding that the *American Express* decision "narrowed the ability of courts to invalidate arbitration agreements on the ground they inhibit or preclude vindication of statutory rights" and "cast[s] doubt on the continued validity" of older FAA decisions).

<sup>136</sup> *Am. Express*, 133 S. Ct. at 2314.

<sup>137</sup> See *supra* notes 94–100 and accompanying text.

<sup>138</sup> The landmark *Erie* doctrine from procedural law provides an interesting parallel and recognizes the principle that procedure, at any stage of a proceeding, may impact the resolution of a dispute. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The *Erie* doctrine and the effective vindication doctrine are of course different doctrines. The effective vindication doctrine

gan's more expansive view of the effective vindication doctrine is also important to help justify the fairness of arbitration proceedings as a legitimate, appropriate method for resolving disputes and for furthering the policies and enforcement of substantive law. It has been recognized that transsubstantive procedural rules should embody flexibility, so that such procedural rules may be fairly applied across a wide range of disputes.<sup>139</sup> Because the FAA is transsubstantive procedural law, Justice Kagan's more flexible, broader view of the effective vindication doctrine would help place courts in a better position to police or monitor arbitration agreements to ensure that a harshly designed arbitration proceeding does not interfere or undermine the enforcement of substantive rights. If a judge completely rejects the effective vindication or applies a weakened version of the doctrine because it is mere dicta, it will become more difficult for courts to monitor arbitration clauses for fundamental fairness. Or if a judge adopts a narrow view of the effective vindication doctrine as only applying to explicit exculpatory clauses, a judge may be unwilling to invalidate harsh procedural terms, such as a limitation on testimony or damages. Especially in the setting of consumer and employment disputes, where meaningful consent is not likely to exist, a robust form of the effective vindication doctrine can, at least, help level the playing field to some degree by providing some assurance of a minimal degree of fairness in the proceedings.

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focuses on the appropriateness of an arbitral tribunal for the enforcement of substantive law. The *Erie* doctrine is instead motivated by concerns about forum shopping due to differences in procedures between state and federal court. However, *Erie* decisions to some degree reflect a concern that certain procedures are burdensome; *Erie* and its progeny recognize the possibility that some procedures could be so game-changing or burdensome that they encourage forum shopping. Like Justice Kagan's view of the effective vindication doctrine as applying to all stages of an arbitration proceeding, *Erie* decisions reflect the reality that procedures could be burdensome or game-changing at any stage of a lawsuit. For example, the *Erie* doctrine has been applied to requirements about the posting of security and statute of limitations issues at the front end of litigation proceedings, issues regarding burden of proof and expert witness testimony during the middle of the litigation proceedings, and limitations on remedies at the end of proceedings. *See, e.g.*, *Gavin v. Club Holdings, LLC*, No. 15-175-RGA, 2016 WL 1298964 (D. Del. Mar. 31, 2016) (applying *Erie* in connection with state law regarding statute of limitations); *Buchwald v. Renco Grp.*, 539 B.R. 31 (S.D.N.Y. 2015) (applying *Erie* to limitation on damages); *First Coast Energy, L.L.P. v. Mid-Continent Cas. Co.*, 286 F.R.D. 630, 632 (M.D. Fla. 2012) (applying *Erie* to requirements about posting of security bond); *Burke v. Air Serv. Int'l, Inc.*, 775 F. Supp. 2d 13, 15 (D.D.C. 2011) (applying *Erie* and finding that state rule regarding expert witness testimony would "impose[] a significant hurdle"); *S. Union Co. v. Liberty Mut. Ins. Co.*, 581 F. Supp. 2d 120, 123, 124 (D. Mass. 2008) (applying *Erie* to burden of proof issues); *Ilro Prods., Ltd. v. Music Fair Enters., Inc.*, 94 F.R.D. 76, 83 (S.D.N.Y. 1982) (applying *Erie* to requirements about posting of security bond). The *Erie* doctrine, and its applicability to all stages of litigation, acknowledges the notion that procedures can have an impact at any stage of dispute resolution, a notion that is more consistent with Justice Kagan's comprehensive view of the effective vindication doctrine than Justice Scalia's more limited view.

<sup>139</sup> Carrington, *supra* note 81, at 2081 (explaining flexibility and generalism are guiding principles for transsubstantive rulemaking).

Moving forward, how should arbitration law treat the effective vindication doctrine? Contrary to the majority's opinion in *American Express*, the doctrine is not mere dictum. As pointed out by Justice Kagan in dissent, the effective vindication doctrine formed a critical part of the holding in *Mitsubishi*.<sup>140</sup> Furthermore, the effective vindication doctrine is more than just a part of the holding of *Mitsubishi*; one can argue that the effective vindication doctrine predates *Mitsubishi* and is enshrined within the FAA as part of the definition of the arbitration. Procedural law, as a general rule, should be subordinate to, and not interfere with, substantive rights. Similarly, as a procedural law, the FAA should embody the effective vindication doctrine and not interfere with substantive rights in any manner. Courts should recognize that a broad and flexible effective vindication doctrine is a critical component of the definition of arbitration under the FAA.

Although articulated and acknowledged by the Supreme Court in *Mitsubishi*, the effective vindication doctrine arguably has always been a part of the FAA. The concept of effective vindication should be inherent in the very meaning or definition of arbitration. Arbitration under the FAA embodies the concept of the effective vindication doctrine. Consider the alternative, under which the effective doctrine does not exist and is not embodied in the FAA. Under such an alternative, the federal statute would support agreements that in name appear to be a promise to arbitrate, but in practice, operate to suppress claims or frustrate the resolution of claims. For example, suppose a purported arbitration agreement sets forth a ridiculously short one-day statute of limitations. Such an agreement should not even be defined as arbitration under the FAA, and as such, should not be enforceable under the FAA. A court refusing to apply the effective vindication doctrine to this example because of the narrow reading given by the *American Express* majority, whereby the doctrine would only apply to prospective waivers of the right to bring a claim, would be elevating form over substance. By labelling the effective vindication doctrine to be mere dicta, the majority in *American Express* is in effect saying the statute provides for the enforcement of written provisions to arbitrate, pursuant to rules that do not allow parties to effectively vindicate their rights. If the effective vindication doctrine does not exist, as suggested by the majority's treatment of the doctrine as dictum in *American Express*, the FAA would mandate the enforcement of arbitration provisions that suppress claims and do not allow parties to effectively vindicate their rights. The enforcement of such written provisions providing de facto immunity would be absurd, and the effective vindication doctrine should be inherent in the very meaning or definition of arbitration under the statute. Furthermore, by including the concept of effective vindication in the very definition of arbitration under the FAA, one avoids the

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<sup>140</sup> *Am. Express*, 133 S. Ct. at 2317 (“We held [in *Mitsubishi*] that federal statutory claims are subject to arbitration ‘so long as’ the claimant ‘effectively may vindicate its [rights] in the arbitral forum.’ The rule thus served as an essential condition of the decision’s holding.”) (citation omitted).

problems associated with applying state law doctrines of unconscionability, which may vary.<sup>141</sup> To borrow a concept from the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, where the Court opined about the "fundamental attributes" of arbitration, a fundamental attribute of arbitration should be its ability to resolve disputes in good faith through an effective process for the vindication of one's rights.<sup>142</sup> If an arbitration agreement contains harsh terms that set forth an ineffective process and that frustrate the ability to vindicate one's rights, such an agreement should not be considered arbitration under the FAA.

#### CONCLUSION

By understanding the procedural nature of arbitration law, and borrowing general principles of procedural law, such as the subordinate role of procedural law within a legal system, one can thus redefine the concept of arbitration under the FAA.

The Supreme Court's conceptualization of arbitration has been inconsistent, and significant problems have arisen from the Supreme Court's treatment of arbitration as a substantive right. Viewing the enforcement of an arbitration clause as a substantive right obscures the true nature of arbitration law and can hinder its proper development and role in our legal system. Viewing the enforcement of an arbitration clause as a substantive right disturbs the proper balance and role of arbitration within our legal system, and such a flawed view can threaten to steamroll over other rights. Framing the enforcement of an arbitration clause as a substantive federal right creates or helps reinforce an impression that there is a prevailing, absolute right to enforce arbitration clauses as written, at all costs, even if meaningful consent is lacking from weaker parties, even if harsh, unfair terms exist within an arbitration clause, and even if enforcement results in an unconstitutional displacement of state's rights. Treating arbitration law as a substantive right has led to the abuse of the arbitration process and negative impressions of arbitration in society.<sup>143</sup>

However, as demonstrated by the procedural understanding of arbitration, arbitration serves an invaluable, integrated role in our legal system and in our

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<sup>141</sup> Compare *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 780 (9th Cir. 2002) (invalidating arbitration clause under California unconscionability doctrine), with *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 (5th Cir. 2004) (enforcing the identical arbitration clause under Texas unconscionability doctrine). By including the effective vindication doctrine as part of the definition of arbitration under the FAA, the doctrine would provide greater protection for parties and apply in all cases where the FAA governs. See *Torres v. CleanNet, U.S.A., Inc.*, 90 F. Supp. 3d 369, 378 (E.D. Pa. 2015) (holding that the effective vindication doctrine does not apply to state law claims).

<sup>142</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

<sup>143</sup> See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [https://perma.cc/C4VR-ASD7].

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democratic society. Understanding arbitration as procedural in nature allows one to see arbitration in a clearer, truer light and helps restore arbitration to its proper role as supportive of one's substantive rights. Well-established frameworks, considerations, or values developed for procedural law can be applied to arbitration law to better understand and analyze arbitration doctrines, such as the effective vindication doctrine. If we are able to peel away the substantive mask created by the Court's *Southland* decision, which is flawed and misleading, and if we instead recognize that the enforcement of an arbitration agreement is procedural at its core, such a reconceptualization of arbitration within a procedural framework allows one to focus more appropriately on arbitration law, its role in society, and how it functions so it can be improved.

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