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Regulating Arbitration

David L. Noll*

Enabled by Supreme Court decisions that grant contract drafters broad authority over the procedures used to resolve legal claims, agreements to arbitrate have proliferated in consumer and employment contracts. As arbitration has spread, so have demands for Congress and federal administrative agencies to regulate it. But when does arbitration warrant regulation through new legislation and administrative action? The most prominent policy arguments for regulating arbitration focus on its effects on consumer welfare and democratic governance. By and large, the standard policy arguments for regulating arbitration do not grapple with arbitration's effects on specific regulatory statutes.

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This Article explains arbitration's effects on the implementation and enforcement of federal regulatory statutes and argues that controlling these effects should be a central focus of efforts to regulate arbitration through new legislation and agency action. In hundreds of statutes, Congress has created financial incentives for private litigants to enforce its laws. The enactment of incentives for private civil litigation allows litigants to assert claims that would be too expensive to prosecute under ordinary procedural rules, and, more importantly, allows Congress to calibrate enforcement of federal law. By establishing stronger incentives for private enforcement of a statute—e.g., provisions that shift attorneys' fees to successful plaintiffs and provide enhanced damages—Congress drives enforcement of the statute. By providing weaker incentives, Congress directs enforcement elsewhere.

Arbitration can dramatically alter the returns from enforcement of statutes with incentives for private civil litigation. In doing so, it may subvert or completely undermine congressional efforts to mobilize and calibrate private enforcement of federal law. These "enforcement effects" threaten Congress's ability to accomplish substantive regulatory objectives through private civil litigation but have received only passing attention in discussions about the policy response to arbitration. To illustrate how greater attention to them would impact efforts to regulate arbitration, the Article analyzes the Consumer Financial Protection Bureau's proposed arbitration regulation under § 1028 of the Dodd-Frank Act and shows how it falls short of ensuring that certain consumer financial protection laws administered by the agency are enforced in the manner and to the extent contemplated by Congress.

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INTRODUCTION

In recent years, policymakers in Congress and federal administrative agencies have begun to perform a fundamentally new function: regulating arbitration agreements and other "procedural contracts" that govern the forum and procedures for resolving legal claims.[1] As a recent series of front-page articles in the *New York Times* describe, "simple arbitration clauses" in "contracts that most employees and consumers do not even read" have brought about a "privatization of the justice system."[2] According to the *Times*, the rise of arbitration signals "that tens of millions of Americans have lost a fundamental right: their day in court."[3] In response, Congress has prohibited arbitration or limited the circumstances in which agreements to arbitrate are enforced through the Dodd-Frank Act,[4] annual appropriations bills,[5] and other

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1. In describing the use of contract to define dispute resolution procedure as "procedural contracting," this Article follows Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 593–94 (2005) (describing the practice as "Contract Procedure"). The scholarly literature has yet to settle on a standard terminology. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1329, 1331–32 (2012) (terming the use of contract to define public court procedure "party rulemaking"); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 509 (2011) (using "contract procedure" to describe the same phenomenon as Professor Bone). The broader phenomenon of procedure designed by contract has been described as "private procedural ordering." *See, e.g.*, Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 723–24 (2011); Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485, 486–87 (2016).

2. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System*,*"* N.Y. TIMES, Nov. 2, 2015, at A1 [hereinafter Silver-Greenberg & Corkery, *Privatization*]; *see also* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1; Michael Corkery & Jessica Silver-Greenberg, *When Scripture Is the Rule of Law*, N.Y. TIMES, Nov. 3, 2015, at A1.

3. Silver-Greenberg & Corkery, *Privatization*, *supra* note 2, at A1.

4. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376 (2010) (codified in Titles 7, 12, and 25 of the U.S. Code) (authorizing Securities Exchange Commission to regulate broker-dealers' use of arbitration in customer agreements); *id.* § 1028 (authorizing Consumer Financial Protection Bureau to regulate consumer financial companies'

legislation.[6] Administrative agencies including the National Labor Relations Board,[7] Securities Exchange Commission,[8] and Centers for Medicare & Medicaid Services[9] have followed course.[10] But even as Congress and administrative agencies have regulated arbitration in specific contexts, courts have routinely enforced other types of arbitration agreements.[11]

The wave of legislation and administrative action targeting arbitration and the inconsistent regulation of agreements to arbitrate under existing law shine light on an uncertainty surrounding the policy rationale for regulating arbitration. If enforcing agreements to arbitrate is desirable in some circumstances, why should Congress and administrative agencies regulate the use of arbitration in others? The question remains important even as Donald Trump takes office with Congress under unified Republican control. Although the pro-business faction of the Republican Party is likely to take a strongly deregulatory approach toward arbitration, administrative agencies that have

use of arbitration); *id.* § 1057(d) (prohibiting arbitration of certain whistleblower claims created by Dodd-Frank); *id.* § 1414 (prohibiting use of arbitration clauses in residential mortgage contracts).

5. *See, e.g.*, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 8097, 129 Stat. 2242 (2015) (barring defense contractors from mandating arbitration of certain claims for sexual assault and sexual harassment); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 8100, 128 Stat. 2130 (2014) (same).

6. *See, e.g.*, Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 210(a), 122 Stat. 923, 1357 (2008) ("Any livestock or poultry contract that contains a provision requiring the use of arbitration to resolve any controversy that may arise under the contract shall contain a provision that allows a producer or grower, prior to entering the contract to decline to be bound by the arbitration provision.").

7. *See* D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012) (finding that a contractual provision that bars any form of aggregate litigation or dispute resolution violates employees' right to engage in concerted action under the National Labor Relations Act), *enforcement denied*, D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 364 (5th Cir. 2013), *adhered to on reconsideration*, Murphy Oil USA, Inc., 361 N.L.R.B. 1 (2014).

8. *See* Steven Davidoff Solomon, *Carlyle Readies an Unfriendly I.P.O. for Shareholders*, N.Y. TIMES (Jan. 18, 2012), http://dealbook.nytimes.com/2012/01/18/carlyle-readies-an-unfriendly-i-p-o-for-shareholders [https://perma.cc/S4KH-3EAG] (describing SEC's response to Carlyle Group's attempt to require arbitration of all shareholder derivative claims via its partnership agreement).

9. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016) (to be codified at 42 C.F.R. pts. 405, 431, 447, 482–83, 485, 488–89) (barring long-term care facilities from entering into an agreement for binding arbitration with a resident or their representative until after a dispute arises between the parties).

10. *See* Fair Pay and Safe Workplaces, Exec. Order No. 13673, 79 Fed. Reg. 45,309, 45,314 (Aug. 5, 2014) (directing federal contracting officers to ensure that covered contractors do not require arbitration of employees' claims for sexual assault, sexual harassment, and violations of Title VII of the Civil Rights Act of 1964); *see also* Kenneth R. Harney, *Fannie Follows Freddie in Banning Mandatory Arbitration*, WASH. POST, Oct. 9, 2004, at F01 (describing Fannie Mae policy barring mandatory arbitration clauses in mortgages Fannie Mae purchased and mortgage-backed securities it guaranteed); Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions From Arbitration Proceedings, 57 Fed. Reg. 52,655, 52,659 (Nov. 4, 1992) (excluding class action litigation from scope of mandatory investor-broker-dealer arbitration under National Association of Securities Dealers (now Financial Industry Regulatory Authority) rules).

11. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (enforcing standard form arbitration clause in DIRECTV's customer agreement).

undertaken to regulate arbitration are insulated from presidential control or have acted through forms of administrative policymaking that, by design, are difficult to modify.[12] Furthermore, unified party control of the federal government has tended, as a historical matter, to be short-lived.[13] Thus, coalitions that are more likely to support regulating arbitration could come to power as soon as 2018.

Legal scholars have long warned that arbitration harms consumers and employees and has troubling implications for constitutional governance.[14] These "contract" and "governance" critiques focus on arbitration's general characteristics as a system for resolving legal claims. The critiques posit that arbitration effects illegitimate wealth transfers from consumers and employees to corporations that mandate arbitration of legal disputes, and allows firms to "delete rights that are granted through democratic processes."[15] Many such critiques rely on contested claims about the efficiency of competing dispute resolution systems and the role of courts in democratic society.[16] By and large, the critiques do not grapple with arbitration's effects on specific regulatory regimes such as the Civil Rights Act or the Fair Credit Reporting Act that are implemented through private civil litigation.

This Article aims to introduce these enforcement effects to the debate over the policy response to arbitration. The Article explains how arbitration affects the implementation of statutes that are enforced through private civil litigation. Prescriptively, it argues that controlling these effects should be a central focus of federal policymakers' efforts to regulate arbitration.

The starting point is to appreciate the extent of Congress's reliance on private civil litigation to implement federal law. In hundreds of statutes, Congress has created financial incentives for private litigants and their attorneys to prosecute violations of federal law.[17] Enhanced damages provisions, attorneys' fee-shifting rules, and other incentives to sue make it possible for litigants to assert claims that, in the absence of such incentives, would be too expensive to litigate under ordinary procedural rules. More importantly, the enactment of such incentives permits Congress to *calibrate* enforcement of different federal statutes.[18] By including strong incentives for private civil litigation in a statute—say, treble damages, an attorneys' fee-shifting provision, and substantive rights that lend themselves to

12. *See, e.g.*, *supra* note 7 (NLRB's regulation of collective action waivers); *infra* note 114 (CFPB's proposed arbitration rule).

13. *See, e.g.*, DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002, at 1 (2d ed. 2005).

14. *See infra* notes 98–117 and accompanying text.

15. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 16 (2013).

16. *See infra* notes 113–116, 137–140 and accompanying text.

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

18. *See infra* text accompanying notes 204–205.

aggregation[19]—Congress drives private enforcement of that statute. Weak incentives for private enforcement—or no incentives at all—implicitly direct enforcement elsewhere.

To calibrate private enforcement through incentives for private litigation, lawmakers must be able to anticipate the returns from enforcing specific statutes. Arbitration can dramatically alter those returns by changing rules of evidence, the availability of aggregation, burdens of production and proof, and other features of the dispute resolution process. When arbitration does this, it can undermine congressional efforts to mobilize and calibrate enforcement of federal law.

Consider the anti-discrimination regime created by Title VII of the Civil Rights Act of 1964.[20] The last major amendments to Title VII were enacted in 1991.[21] In enacting the 1991 amendments, lawmakers recognized that the "effectiveness of civil rights protections" depends on plaintiffs' ability to "find and retain competent counsel to handle their claims."[22] As one congressional witness testified, financial incentives to represent plaintiffs prosecuting job discrimination claims were "a fuel that makes the machinery of adjudication work. If the fuel runs out, the machinery does not function and civil rights do not have the effect of protecting people whose interests are at stake."[23] To the extent that arbitration weakens the incentive structures Congress sought to establish for attorneys to represent job discrimination plaintiffs, it undermines the 1991 Act's objective of building a bar of attorneys willing and able to represent plaintiffs' pressing job discrimination claims.

The policy case for regulating such effects is straightforward: arbitration threatens the viability and effectiveness of private enforcement as a means of implementing statutory policy. It follows that, if Congress wishes to accomplish substantive regulatory goals through civil litigation, it must anticipate and regulate the effects of arbitration. For their part, administrative agencies are frequently charged with ensuring that statutes they administer are implemented effectively.[24] Just as arbitration may threaten congressional

19. *See, e.g.*, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)–(d) (2012) (providing that it shall be unlawful to participate in a pattern of racketeering conspiracy or conspire to participate in a pattern of racketeering conspiracy); *id.* § 1964(c) (providing that a person harmed by a violation of section 1962 "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"). For caselaw recognizing that RICO's substantive provisions lend themselves to aggregation via Federal Rule of Civil Procedure 23, see, for example, *In re* U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 112 (2d Cir. 2013); Klay v. Humana, Inc., 382 F.3d 1241, 1246 (11th Cir. 2004).

20. *See generally* 42 U.S.C. §§ 2000e–e–17 (2012).

21. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amending scattered sections of 42 U.S.C.). Since the 1991 amendments, the Civil Rights Act has been further amended by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (amending 42 U.S.C. § 2000e–5 and 42 U.S.C. § 2000e–5 note).

22. H.R. REP. NO. 102-40, at 18, 75 (1991) (quoting testimony of Professor Charles Silver).

23. *Id.* at 75.

24. *See infra* notes 252–253.

efforts to accomplish regulatory goals through civil litigation, it can implicate an agency's obligation to ensure a statute it administers is implemented successfully.[25]

This Article terms arbitration's effects on the implementation of a statute "enforcement effects." It contends that enforcement effects warrant greater attention than they have received in debates over the policy response to arbitration and efforts to regulate arbitration through legislation and agency action. Recognizing these effects does not preclude policymakers from regulating arbitration for other reasons, such as its general welfare implications. However, greater attention to enforcement effects would affect the forms of arbitration that policymakers focus on and the policy response to arbitration. Thus, the Article aims to offer a systematic account of arbitration's enforcement effects and to show why they warrant attention in federal policymakers' efforts to regulate arbitration. In doing so, the Article links debates over arbitration to the literature on public regulation and Congress's use of private civil litigation as a tool for implementing statutory policy.[26] This analysis in turn highlights the complicated (and often adversarial) relationship between procedural contracting and public regulatory policy.

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25. This Article assumes that an administrative agency has an adequate statutory basis to regulate forms of arbitration that undermine the implementation of statutory policy through private civil litigation. An express statutory directive to regulate arbitration, such as section 1028 of the Dodd-Frank Act, 12 U.S.C. § 5518 (2012), unquestionably supplies such a basis. Whether other types of delegations, such as a direction to enforce a substantive statutory right, authorize an agency to regulate arbitration is more controversial. *Compare* Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015) (holding that the National Labor Relations Board may not regulate arbitral collective action waivers on ground that they conflict with section 7 of the National Labor Relations Act), *cert. granted*, 2017 WL 125666 (Jan. 13, 2017), *with* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016) (holding that it can), *cert. granted*, No. 16-285, 2017 WL 125664 (Jan. 13, 2017). I take up the question in a working paper entitled *Who Regulates Arbitration?*

26. The literature on public regulation is too large to summarize easily. The best general introductions remain STEPHEN G. BREYER, REGULATION AND ITS REFORM (1982), and ALFRED E. KAHN, THE ECONOMICS OF REGULATION (MIT 1988) (1970). For recent work on the use of civil litigation as a tool for implementing statutory policy, see, for example, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071 (2011); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982). The literature on civil litigation as a tool of policy implementation intersects with another closely related literature on the relationship between public and private enforcement and the use of bureaucratic authority to rationalize private enforcement. *See, e.g.*, Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016); David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) [hereinafter Freeman Engstrom, *Gatekeepers*]; Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014); Mathew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005).

Part I provides an overview of the treatment of agreements to arbitrate under current Supreme Court doctrine, explains the problem that arbitration presents for policymakers in Congress and federal administrative agencies, and considers some of the difficulties with basing new legislation and administrative regulation on the welfare and governance harms that are the focus of the leading critiques of arbitration in the scholarly literature. Part II explains how arbitration affects the implementation of statutory policy through private civil litigation and develops the case for making enforcement effects a central focus of congressional and agency efforts to regulate arbitration. Having developed the policy case for regulating arbitration's enforcement effects, Part III illustrates how greater attention to them would impact current efforts to regulate arbitration. In section 1028 of the Dodd-Frank Act, Congress directed the newly created Consumer Financial Protection Bureau to study consumer financial companies' use of pre-dispute arbitration agreements and to regulate arbitration "in the public interest and for the protection of consumers."[27] The Bureau's effort to implement section 1028 is perhaps the most important ongoing effort to regulate arbitration at the federal level, but it has been hindered by foundational uncertainty about the policy rationale for regulating arbitration. As Part III shows, understanding arbitration's enforcement effects would help remove this uncertainty and bring greater focus to the Bureau's project; focusing on enforcement effects also suggests the need for additional regulatory interventions designed to ensure that the statutes the Bureau administers are enforced as Congress intended.

I.
THE PROBLEM OF ARBITRATION

Arbitration became a problem for Congress and federal administrative agencies because of a series of Supreme Court decisions that increased contract drafters' control over the procedures used to resolve legal claims. This Part summarizes the evolution of the Supreme Court's doctrine on arbitration and related forms of procedural contracting, as well as the challenges that arbitration presents for federal policymakers. Part I.A outlines the Court's treatment of arbitration agreements and forum selection clauses and the benefits the Court's doctrine seeks to capture by enforcing procedural contracts according to their terms. Part I.B introduces the leading critiques of the Court's doctrine—that arbitration harms consumers, employees, and the very idea of constitutional government—and outlines the difficulties with basing regulation on those harms.

27. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028(b), 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C. § 5518(b) (2012)).

A. The Supreme Court's View: All Benefit, No Cost

1. The Court's Current Doctrine

The Court's current embrace of arbitration originates in decisions from the 1970s that abandoned the common law ouster doctrine in disputes over the enforceability of forum selection clauses. The ouster doctrine held that a private contract could not oust a court of jurisdiction conferred by law.[28] It followed that, while a contract could establish a court's authority to act on the parties,[29] it could not define an exclusive forum for litigation and thereby preclude other courts from exercising lawful jurisdiction.[30]

In the 1972 case of *The Bremen*, the Fifth Circuit invoked the ouster doctrine in refusing to enforce a forum selection clause that required any claims related to the transportation of an oil rig from Louisiana to Italy to be litigated in London.[31] Reviewing the Fifth Circuit's decision, the Supreme Court characterized the ouster doctrine as a "vestigial legal fiction" that had "little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets."[32] Having repudiated the ouster doctrine, the Court had little trouble enforcing the forum selection clause, which "sought to provide for a neutral forum for the resolution of any disputes."[33] In the Court's view, the agreement to litigate in London was enforceable because it eliminated the "uncertainties" inherent in "international trade."[34]

Once the Court accepted that a forum selection clause could prevent a court from exercising jurisdiction, it was a short step to specifically enforcing a pre-dispute agreement to arbitrate legal claims as an alternative to litigating the claims in court. In 1974, the Court in *Scherk v. Alberto-Culver Co.* enforced an arbitration clause that required claims related to the sale of three cosmetics companies incorporated in Germany and Liechtenstein to be arbitrated before the International Chamber of Commerce in France.[35] Justice Potter Stewart's

28. *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982–83 & n.9 (2d Cir. 1942) (surveying development of the doctrine in English courts).

29. *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964) ("[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.").

30. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11–12 (1972).

31. *See In re* Unterweser Reederei, GmbH, 428 F.2d 888, 893 (5th Cir. 1970). The underlying transaction in *The Bremen* was a contract to tow a drilling barge from Venice, Louisiana to Ravenna, Italy. The barge was damaged in a storm, leading, inevitably, to litigation over the tower's fault. *See id.* at 889.

32. *The Bremen*, 407 U.S. at 12.

33. *Id.* at 13.

34. *Id.* at 13–14.

35. 417 U.S. 506, 520–21 (1974). The plaintiff in *Scherk*, Alberto-Culver Co., was a U.S. company that purchased the cosmetic companies as part of an effort to expand its overseas operations. The defendant, Scherk, was a German citizen and resident of Switzerland who sold the German and Liechtensteinian companies to Alberto-Culver.

opinion described an arbitration clause as "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."[36]

In 1983, the Court held in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* that a federal district court could adjudicate a petition to compel arbitration even though a state court was considering the claims that the petitioner sought to arbitrate.[37] Writing for the Court, Justice William Brennan explained that a "liberal federal policy favoring arbitration agreements" weighed in favor of allowing the district court to adjudicate the petition.[38] As evidence of such a "policy," Justice Brennan pointed to Section 2 of the Federal Arbitration Act (FAA), a 1925 statute that generally requires written arbitration agreements to be enforced.[39]

The FAA is a barebones statute. It was originally enacted to reverse doctrines (grounded in ouster concerns) holding that an agreement to arbitrate could not be specifically enforced and that either party to an arbitration agreement could unilaterally revoke it before an award was rendered.[40] In reversing these doctrines, the Act aimed to align federal court practice with practice in states that specifically enforced agreements to arbitrate.[41] Despite the FAA's modest ambitions, the Court in the years since *Moses H. Cone* has invoked the FAA and the "liberal federal policy favoring arbitration agreements"[42] to establish an elaborate federal common law of arbitration.[43]

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36. *Id.* at 519.

37. 460 U.S. 1, 4 (1983).

38. *Id.* at 24.

39. Section 2 provides in full: "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." 9 U.S.C. § 2 (2012).

40. *See* Southland Corp. v. Keating, 465 U.S. 1, 32 (1984) (O'Connor, J., concurring) (collecting sources showing that common law "hostility" to arbitration "was reflected in two different doctrines: 'revocability,' which allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made, and 'invalidity' or 'unenforceability,' equivalent rules that flatly denied any remedy for the failure to honor an arbitration agreement"). The language of FAA § 2—providing that covered agreements to arbitrate "shall be valid, irrevocable, and enforceable"—specifically addresses these common law doctrines. *See* 9 U.S.C. § 2 (2012).

41. IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 122–33 (1992); *accord* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1946–48 (2014); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 301 (2015).

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

43. *Id.* at 24–25. For recognition of the common law character of the Court's arbitration doctrine, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J.

The cornerstone of that law is the requirement that agreements to arbitrate must be enforced "according to their terms."[44] That requirement applies to all claims, common law or statutory, unless (1) a "contrary congressional command" exempts a category of claims from arbitration[45] or (2) an "inherent conflict" between arbitration and a federal statute's objectives makes arbitration an inappropriate means of enforcing statutory rights.[46] Agreements to arbitrate are enforceable even if the parties who agreed to them had "unequal bargaining power."[47] An arbitration agreement's effects on the economics of litigation and settlement do not affect its enforceability so long as the agreement does not violate an express statutory command.

The last point is the central teaching of the Court's 2013 decision in *American Express Co. v. Italian Colors Restaurant*.[48] There, the Court ordered enforcement of an arbitration agreement that barred small merchants from bringing any type of group or collective action to challenge a provision of American Express's merchant agreement as a violation of the Sherman Antitrust Act.[49] The merchants urged that the agreement could not be enforced because the "cost of individually arbitrating a federal statutory claim exceeds the potential recovery,"[50] but the Court declined to adopt a rule to this effect. Justice Antonin Scalia's opinion reasoned that the Sherman Act's treble damages and attorneys' fee provisions reflected Congress's decision "to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice."[51] But recognizing a rule requiring that it be "economically feasible" to pursue statutory claims would be

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1215, 1260 (2001) ("[T]he Supreme Court has construed the FAA broadly, with a breadth sweeping well beyond the statute's plain meaning and the probable expectations of its framers in 1925.").

44. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013). The phrase, which is now a stock feature of Supreme Court opinions, first appeared in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989). Chief Justice William Rehnquist's opinion for the Court stated: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476.

45. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226–27 (1987).

46. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

47. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340, 346–47 (2011) (rejecting the claim that a clause in a non-negotiated consumer contract required heightened scrutiny because "the times in which consumer contracts were anything other than adhesive are long past").

48. 133 S. Ct. 2304 (2013).

49. *Id.* at 2312. American Express's arbitration clause specifically barred class actions and provided that "[c]laims . . . may not be joined or consolidated . . . unless . . . agreed to in writing by all parties." *In re* Am. Express Merchs. Litig., 667 F.3d 204, 209–10 (2d. Cir. 2012). The merchants' suit targeted the merchant agreement's "Honor All Cards" provision. Merchants objected to being forced to accept American Express *credit* cards, which involve higher costs than American Express's traditional charge card. The merchants contended that the merchant agreement's "honor all cards" provision was an unlawful product tie, which was prohibited by the Sherman Act's prohibition on contracts in restraint of trade.

50. *Italian Colors*, 133 S. Ct. at 2307.

51. *Id.* at 2309.

"irrational," Justice Scalia wrote, because "[n]o legislation pursues its purposes at all costs."[52]

When the FAA was enacted in 1925, it was understood to rest on Congress's power to regulate Article III courts.[53] The Supreme Court, however, has interpreted Section 2 to apply "to the limits" of Congress's modern commerce power[54] and to preempt any state or regulation that conflicts with the "liberal federal policy favoring arbitration" or "stand[s] as an obstacle to the accomplishment of the FAA's objectives."[55] The practical effect of these holdings is to federalize the treatment of agreements to arbitrate.[56] A party seeking to enforce an arbitration agreement can generally contend that the agreement falls within Section 2's scope and that the FAA displaces state law that conflicts with the policies the Court attributes to the Act.[57]

Since the Court's arbitration jurisprudence evolved out of caselaw on forum selection clauses, it is unsurprising that the Court takes much the same stance toward such clauses as it does toward agreements to arbitrate. In 2013, a unanimous Court held in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas* that a "valid" forum selection clause "ordinarily" must be enforced according to its terms; only "extraordinary circumstances unrelated to the convenience of the parties" permit litigation in a

52. *See id.* at 2309, 2311 n.4.

53. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275 (1926) (FAA "rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts"). Cohen drafted the FAA and was the principal lobbyist who supported it in Congress. Aragaki, *supra* note 41, at 1947–48. Cohen's belief that the FAA rested on Congress's power to regulate the federal courts reflected the scope of the commerce power at the time of the FAA's 1925 enactment. Prior to *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Commerce Clause was thought to reach only "the use of the facilities of interstate commerce," Hammer v. Dagenhart, 247 U.S. 251, 269–71 (1918), as opposed to intra-state activities that had predictable effects on interstate markets. Before the invention of modern Commerce Clause doctrine, there was no viable constitutional theory through which the FAA could preempt inconsistent state law. *But see* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 104–08 (2002) (collecting historical evidence that supports the Court's current interpretation of the Act and arguing that interpretation was plausible under pre-New Deal Commerce Clause doctrine).

54. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995).

55. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 343 (2011).

56. *See generally* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5 (2004) (critiquing the federalization of arbitration law effected by Southland v. Keating, 465 U.S. 1 (1984), and subsequent decisions).

57. The Court's arbitration jurisprudence can thus be seen as an example of what Professors Issacharoff and Sharkey term "backdoor federalization"—"the emergence of partial federalization of areas historically governed by state law." *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353 (2006). For a recent example of the FAA's extraordinary preemptive power, see DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (holding that a contractual reference to "California law" also includes the Supreme Court's entire FAA jurisprudence, preempting California courts from interpreting a contractual reference to "California law" to refer to California law in isolation).

forum other than the one selected by contract.[58] That rule applies regardless of whether the clause requires litigation in a federal district court (in which case the clause is enforced through a motion to transfer venue[59]) or specifies a state or foreign tribunal as the site for litigation (requiring dismissal for *forum non conveniens*[60]). In light of precedent holding that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry,"[61] and foreign courts' willingness to apply local law to transnational disputes,[62] *Atlantic Marine* permits parties to transnational transactions to contract out of U.S. law, at least to the extent it is enforced through private civil litigation.

The legal status of procedural contracts that specify procedures for litigation in public court is less certain, in part because major commercial actors have not adopted contractual provisions governing public court procedure outside a cluster of well-understood areas such as forum-selection and choice-of-law.[63] Yet the attitude toward contractual control of dispute resolution procedure that informs the Court's arbitration and forum-selection cases also informs the Court's approach to personal jurisdiction,[64] cognovit notes,[65] and forms of contracting that implicitly affect dispute resolution procedure.[66] In all these areas, the animating impulse is that procedural contracts are presumptively enforceable according to their terms.

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58. 134 S. Ct. 568, 574, 581 (2013). On the "validity" limitation, see Stephen E. Sachs, *Five Questions After* Atlantic Marine, 66 HASTINGS L.J. 761, 766–70 (2015).

59. *Atlantic Marine*, 134 S. Ct. at 579.

60. *Id.* at 580.

61. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981).

62. *See* Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1113 (2015) (cataloging cases where "foreign courts [followed] choice-of-law rules to apply . . . stricter (and thus more plaintiff-friendly) law" that went beyond the requirements of U.S. law); *see also* Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012) (describing spillover effects for global regulation that follow from the application of EU law in transnational cases).

63. *See* David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 390–91 (2014); *see also* W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1889 (2015).

64. *See, e.g.*, J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (reasoning that a state's exercise of jurisdiction to adjudicate "requires some act by which the defendant 'purposefully avails itself of the privilege of conducting activities within the forum State,'" such as "explicit consent," "[p]resence within a State at the time suit commences," or "incorporation"); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–73 (1985) (stating that the due process requirement of "fair warning" is satisfied "if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities.") (internal citations omitted).

65. *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187–88 (1972) (upholding Ohio statute that permitted party to consent to the entry of judgment ex ante).

66. *See generally* Resnik, *supra* note 1 (discussing efforts to promote alternative dispute resolution, consents to judgments and vacatur of judgment, and broader uses of contract to define dispute resolution procedure).

2. The Upside of Contracting for Procedure

As Justice Sandra O'Connor candidly observed, the Supreme Court "has abandoned all pretense of ascertaining congressional intent" when interpreting the Federal Arbitration Act.[67] Instead, what Justice O'Connor called the "edifice" built by the Court's FAA decisions expressly seeks to capture a cluster of functional benefits.[68] As the Court's doctrine expanded to include more types of contracts, the benefits that the Court attributed to procedural contracting similarly expanded.

Initially, the Court stressed arbitration's capacity to prevent duplicative litigation and prevent inter-governmental conflicts that result from parallel litigation in different fora.[69] In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the seminal 1985 decision that first required arbitration of a federal statutory claim, the Court was presented with a dispute between a Japanese car manufacturer and a Puerto Rican car dealership.[70] Litigation in either Japan or Puerto Rico would have been inconvenient for one of the parties, so there was no "natural" forum for litigation. Moreover, parallel proceedings in both Japan and Puerto Rico threatened inconsistent and possibly conflicting rulings. In an opinion enforcing an arbitration clause that required all disputes to be arbitrated by the Japan Commercial Arbitration Association, Justice Harry Blackmun stressed arbitration's ability to head off such conflicts.[71] If arbitration were to perform this function, Justice Blackmun reasoned, national courts would need to "shake off" their "understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal."[72]

Within two years of *Mitsubishi*, the Court in *Shearson/American Express Inc. v. McMahon* invoked the decision to require arbitration of a purely domestic dispute between an investor and her securities broker under federal securities laws.[73] Where the Court in *Mitsubishi* had stressed arbitration's ability to prevent inter-governmental conflicts, it now trumpeted its "current strong endorsement" of arbitration as a fair and efficient method of dispute resolution.[74]

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67. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

68. *See id.*

69. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 69–73 (2014). For a useful account of the problems of parallel litigation, see generally Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237 (2010).

70. 473 U.S. 614, 616–18 (1985).

71. *Id.* at 617.

72. *Id.* at 638–39 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

73. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987).

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

An implicit premise of *McMahon* and subsequent decisions that enforced arbitration agreements was that enforcing such agreements according to their terms would have positive implications for economic welfare. A party who does not value a particular procedural entitlement—say, the right to liberal discovery under the Federal Rules of Civil Procedure[75]—can trade it for an entitlement the party values more—say, a cheaper iPhone. Enforcing arbitration agreements allows parties to enter into welfare-maximizing arrangements.[76] Enforcing arbitration agreements thus improves social welfare for the reasons that enforcing contracts is usually thought to do so.[77]

In adopting this contractual approach to the design of dispute resolution procedure, the Court tacitly accepted that arbitration permits parties to achieve the due process ideal of procedure tailored to the stakes of disputes that are likely to arise between the contracting parties.[78] Consider the arbitration clause at issue in the 2011 case of *AT&T Mobility LLC v. Concepcion*.[79] The clause

75. *See* FED. R. CIV. P. 26(b)(2) (providing that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case").

76. For cases invoking this joint welfare argument, see, for example, Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 581 (2013) ("[E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system."); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991) ("[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

77. *See generally* Benjamin E. Hermalin et al., *Contract Law* § 2.2.1, *in* 1 HANDBOOK OF LAW AND ECONOMICS 18 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

78. *See, e.g.*, Brief for U.S. Chamber of Commerce as Amicus Curiae Supporting Petitioner at 12–13, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893) (stressing that arbitration is the only cost-effective means of resolving disputes over "minor charges or adjustments to monthly bills"). The idea that the constitutional process that is "due" depends on the stakes of disputes emerged in a line of Supreme Court decisions from the 1970s that rejected due process challenges to administrative adjudication schemes that departed from the common law model of public court adjudication. After flirting with the idea that agency adjudication must track the common law model in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court in a series of decisions by Justices Lewis F. Powell and Byron White adopted the view that the process due to a person deprived of life, liberty, or property depends on the nature of the interests at stake and the costs and benefits of competing procedural arrangements. As expressed in the leading case, costs and benefits of alternative procedural arrangements are to be evaluated by analyzing three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Only where the benefits of an alternative procedure outweighed its costs was a particular procedure required as a matter of constitutional due process. *See id.* For a critical account of this line of jurisprudence, see generally Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). For analysis of how other procedural interventions share the improvised quality associated with arbitration, see Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. (forthcoming 2017) (manuscript at 10–14).

79. 563 U.S. 333 (2011).

provided that AT&T would pay cell phone customers' filing fees, the arbitrator's fees, double the attorneys' fees of successful claimants, and a bounty to ensure that consumers had an incentive to assert small-value claims.[80] In so doing, the clause eliminated essentially all barriers to individual consumer arbitration. The quid pro quo for this largesse was that consumers lost access to any form of joinder or aggregate litigation, and with it, the ability to free ride on class action litigation to enforce rights against AT&T.[81] The Supreme Court not only concluded that the parties were entitled to make this choice, but that FAA Section 2 preempted a California doctrine that held the clause unconscionable because it cutoff the only practical mechanism for consumers to seek relief for corporate wrongdoing.[82] "The point of affording parties discretion in designing arbitration processes," Justice Scalia wrote, "is to allow for efficient, streamlined procedures tailored to the type of dispute."[83]

Building on the possibilities of procedural tailoring, the Court has also emphasized arbitration's capacity to overcome perceived pathologies of civil litigation in the United States.[84] In 2010, Justice Samuel Alito wrote for the majority in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* that, compared to litigation, arbitration involves "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[85] The image of arbitration that Justice Alito put forward was incompatible with class litigation and class arbitration, which the Court described as involving high costs, high stakes, and drawn out proceedings. Thus, the *Stolt-Nielson* Court concluded that, where the parties agree merely to

80. *See id.* at 337.

81. *Id.*; *see* David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649, 664–65 (2012).

82. The California doctrine—described in *Concepcion* as the *Discover Bank* "rule"—held that an arbitration agreement that prohibited all forms of collective litigation or arbitration was unconscionable if it appeared in a context where consumers' damages were predictably small, necessitating the cost-spreading provided by aggregate litigation. *See* Discover Bank v. Superior Court, 36 Cal. 4th 148, 162–63 (2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

83. *Concepcion*, 563 U.S. at 344.

84. A rich and contested literature argues that civil litigation in the United States is unnecessarily expensive, slow, and contentious, particularly when judged from a comparative perspective. Notable works include KAGAN, *supra* note 26; THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002); ANDREW P. MORRISS ET AL., REGULATION BY LITIGATION (2009); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665 (1998); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

85. 559 U.S. 662, 685 (2010). The opinion's assertion that "arbitration" entails a single form of dispute resolution with identifiable characteristics is naïve at best. As the Court has elsewhere recognized, arbitration encompasses many forms of dispute resolution. Some are simple and streamlined. Others, such as investor-state arbitration before the International Centre for Settlement of Investment Disputes, decidedly are not. *See generally* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989) ("There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.").

"arbitrate," they do not authorize the arbitrator to conduct class proceedings.[86] The view of arbitration as a solution to the problem of high-stakes, high-cost litigation reappeared in *Concepcion*[87] and *American Express Co. v. Italian Colors Restaurant*,[88] both of which enforced arbitration clauses that barred class actions and other types of aggregate litigation. Class proceedings, the Court reasoned in *Concepcion*, would sacrifice "the principal advantage of arbitration—its informality—and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment."[89]

Although the Court's doctrine has repeatedly stressed the benefits of arbitration, that doctrine makes no serious effort to identify or police arbitration's costs.[90] Since first recognizing the "liberal federal policy favoring arbitration agreements" in 1983,[91] the Court has not granted certiorari in a single case challenging arbitration as a violation of due process, the jury trial right, or Article III.[92] The Court has rejected the suggestion that "unequal bargaining power" affects the enforceability of an agreement to arbitrate.[93] It has repeatedly rejected claims that arbitration conflicts with the "remedial and deterrent function[s]" of federal statutes, reasoning that arbitration is "simply another forum in which to resolve the dispute,"[94] one that is adequate if "the prospective litigant effectively may vindicate its statutory cause of action."[95] And *American Express v. Italian Colors* rejected lower courts' efforts to give teeth to the "effective vindication" concept, holding that the concept only prohibits formal waivers of statutory rights and "perhaps" filing fees "that are so high as to make access to the forum impracticable."[96]

In short, the Court likes arbitration. Under the Court's current FAA jurisprudence, the only significant limitation on a contract drafter's ability to

86. 559 U.S. at 685. *But see* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013) (recognizing arbitrator's authority to conduct class proceedings where parties agree that correct interpretation of the arbitration agreement is a question for the arbitrator and the contract implicitly authorizes class proceedings by giving arbitrators all powers of a court).

87. *Concepcion*, 563 U.S. at 343–44.

88. 133 S. Ct. 2304, 2311 (2013).

89. *Concepcion*, 563 U.S. at 348.

90. For a revealing example of the Court's current stance, see Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012), summarily holding that wrongful death claims against a nursing home that allegedly provided grossly sub-standard care were subject to arbitration because mentally diminished patients "agreed" to fine-print arbitration clauses when they checked into the facility.

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

92. *See* Data Appendix (on file with *California Law Review*).

93. *See supra* note 47 and accompanying text.

94. Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880 (4th Cir. 1996) (discussing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

95. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). For decisions finding that arbitration permitted the effective vindication of statutory rights notwithstanding substantial changes to the procedures through which those claims are resolved, see, for example, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273–74 (2009); *Gilmer*, 500 U.S. at 28.

96. *Italian Colors*, 133 S. Ct. at 2310–11.

mandate arbitration is that the agreement to arbitrate must preserve remedies and attorneys' fee-shifting rules expressly recognized by law. If there are problems with arbitration, they are not apparent from reading the Court's majority opinions.[97]

B. The Standard Critiques and Their Limits

Of course, the view that arbitration has no costs cannot be correct. Enforcing arbitration agreements and related procedural contracts gives rise to an array of costs that the Court's doctrine makes little effort to police. This Article's central contribution is to identify a set of costs that have not been systematically analyzed in prior legal scholarship and to explain why controlling those effects should be a priority for congressional and agency policymakers who undertake to regulate arbitration. Before turning to those costs, it will be helpful to consider two other costs that have generated extensive literatures.

1. The Contract Critique

Perhaps the most prominent critique of the Court's arbitration jurisprudence focuses on its contract law foundations. The Court's arbitration

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97. Justice Scalia's February 2016 death raises the question whether the post-Scalia Court will take a different approach to arbitration. As the Court has expanded the FAA's scope and the extent of deference afforded to procedural choices in agreements to arbitrate, liberal Justices have objected to the doctrine's displacement of public courts, bias in favor of powerful economic actors, and displacement of state authority. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 478 (2015) (Ginsburg, J., dissenting) (contending that the Court's conclusion that the FAA controls questions of contract interpretation "has again expanded the scope of the FAA, further degrading the rights of consumers and further insulating already powerful economic entities from liability for unlawful acts"); Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2785 (2010) (Stevens, J., dissenting) (contending that, by extending the "severability" doctrine to delegation clauses that require an arbitrator to decide the validity of an agreement to arbitrate, "the Court has unwisely extended a 'fantastic' and likely erroneous decision"). Nonetheless, Trump's surprise election and the likelihood that he will appoint one or more conservatives to the Supreme Court all but eliminates the possibility that a new coalition of liberal Justices will form to overrule or limit the Court's pro-arbitration decisions. Advocates seeking to destabilize the Court's jurisprudence might make arguments designed to appeal to a cross-ideological coalition of Justices. Justice Clarence Thomas, for example, has expressed skepticism about the Court's conclusion that state laws which conflict with the FAA's "purposes and objectives" are pre-empted. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352–53 (2011) (Thomas, J., concurring). Conceivably, he might join with a group of liberal Justices if the Court were asked to limit decisions such as *Concepcion*, which relied on freewheeling preemption analysis to find state arbitration laws preempted.

But the basic elements of the Court's arbitration jurisprudence—including the "liberal federal policy favoring arbitration agreements," the principle that FAA § 2 preempts inconsistent state law, and the conclusion that statutory rights are arbitrable—are both well-established and recognized in decisions written or joined by Democratic appointees. For example, Justice Stephen Breyer wrote for a 7-2 majority in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), which adopted an expansive reading of the FAA's "commerce" element. Given the entrenchment of these precedents and their support among the Court's liberal Justices, changes in the Court's FAA jurisprudence are more likely at its edges than its core. *See generally* Samuel Estreicher & David L. Noll, *Justice Scalia's Impact on Federal Arbitration Law*, N.Y.L.J., May 13, 2016, at 3.

jurisprudence is premised on the assumption that agreements to arbitrate are genuinely agreements, and that enforcing these agreements will improve contracting parties' welfare for the same reasons that enforcing contracts usually does.[98] However, critics question both premises. This "Contract Critique" begins with the observation that many arbitration agreements—perhaps the majority—are contained in boilerplate terms and conditions attached to consumer and employment contracts.[99] In contrast to more sophisticated parties, individuals who "agree" to arbitrate in consumer and employment contracts are unlikely to appreciate that they have done so, either because they are rationally indifferent to boilerplate terms and conditions[100] or because they misapprehend the importance of those terms, perhaps as a result of the drafter's intentional obfuscation.[101] Even when the agreement to arbitrate is salient, individuals asked to "agree" to arbitrate may have no practical choice but to do so. In its 2015 arbitration study, the Consumer Financial Protection Bureau found that seven of the eight largest facilities-based mobile wireless providers, covering 99.9 percent of subscribers, required arbitration in their customer agreements.[102] Thus, consumers have practically no choice but to arbitrate should they desire mobile service. Similarly, in industries such as investment banking where essentially all firms insist on arbitration of employment claims, a prospective employee's "choice" to arbitrate may be equivalent to choosing whether to be employed.[103]

98. Carefully developed versions of the critique appear in, for example, RADIN, *supra* note 15; Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 129 (2011) (quoting Arthur Leff to the effect that the boilerplate dispute resolution terms in AT&T Mobility's cellular customer agreement are a "thing," not a "contract," and contending that "if the 'thing' had quality control problems, the law ought to regulate it").

99. *See, e.g.*, Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880 (2008) (finding, in a sample of consumer and non-consumer contracts issued by "companies with significant market shares or name recognition," that arbitration clauses are predominantly used in standard form consumer contracts); Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS 55, 62 (2004) (finding, based on a sample of consumer contracts in thirty-seven industries, that fifty-seven of 161 sampled businesses mandated arbitration, and that the prevalence of arbitration clauses was highest in the financial services industry and lowest in the food and entertainment contracts). *See also* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at 7 (Mar. 2015), https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015 [https://perma.cc/M6VU-3NDF] [hereinafter CFPB FINAL REPORT] (finding that 15.8 percent of issuers in a sample of credit card agreements, covering 53.0 percent of credit card loans outstanding, used arbitration clauses).

100. *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

101. *See generally* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012).

102. CFPB FINAL REPORT, *supra* note 99, at 26.

103. *See* Maureen Sherry, *Why Aren't Women Doing Better on Wall Street?*, N.Y. TIMES, Jan. 24, 2016, at SR6 (noting most Wall Street employees must sign a "U4" form mandating arbitration of

The Contract Critique contends that where agreements to arbitrate are not salient or negotiated, there is no reason to presume that they will have positive welfare implications for society as a whole.[104] Contract drafters instead will use their control over dispute resolution terms to secure a private benefit—reduced exposure to legal costs—regardless of whether doing so has positive or negative welfare effects.[105] Defenders of arbitration respond that reduced legal costs inure to the benefit of consumers and employees, because corporations that mandate arbitration will pass on cost savings in the form of lower prices or improved products.[106] But empirical evidence of a "price effect" from mandatory arbitration provisions is scarce.[107] And Professor Oren Bar-Gill shows that drafters of consumer contracts have powerful incentives to exploit consumers' biases in order to obscure the true price of products, a move with a variety of negative welfare implications.[108]

Firms that successfully minimize legal costs through welfare-reducing dispute resolution terms enjoy a competitive advantage over less sophisticated competitors. The Contract Critique therefore predicts that a procedural race-to-the-bottom will develop as firms copy one another's procedural boilerplate.[109] The available empirical evidence tends to support this prediction. For example, the Consumer Financial Protection Bureau's finding that "seven of the eight largest facilities-based mobile wireless providers . . . used arbitration clauses in their 2014 customer agreements" suggests a procedural race-to-the-bottom,[110] given that those agreements universally reduce the scope of discovery, bar class

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all employment-related claims, and arguing that mandatory arbitration has contributed to a culture of sexism at Wall Street banks).

104. *See* RADIN, *supra* note 15, at 41.

105. *See id.*

106. *See, e.g.*, Peter B. Rutledge, *Whither Arbitration*, 6 GEO. J.L. & PUB. POL'Y 549, 579–80 (2008); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–57 (2006) ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers.").

107. For some of the existing empirical evidence, see Rutledge, *supra* note 106, at 580 (noting "anecdotes" which "suggest both that arbitration does yield economic benefits to [consumers and employees] and that the absence of pre-dispute arbitration would eliminate these economic gains"); Steven E. Abraham & Paula B. Voos, *The Ramifications of the* Gilmer *Decision for Firm Profitability*, 4 EMP. RTS. & EMP. POL'Y J. 341, 362–63 (2000) (finding that shareholder returns for securities firms increased 1 to 4 percent after the Supreme Court ruled that employers could mandate arbitration of employment disputes in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). *Cf.* CFPB FINAL REPORT, *supra* note 99, at 15–16 (finding no statistically significant price effects when credit card issuers ceased mandating arbitration pursuant to settlement in *Ross v. Bank of America, N.A. (USA)*, 524 F.3d 217 (2d Cir. 2008)).

108. *See* BAR-GILL, *supra* note 101, at 17–23.

109. *See* RADIN, *supra* note 15, at 41 ("[F]irms will copy boilerplate from other firms, which will often lead just as surely to identical boilerplate occupying the territory in which a consumer is participating.").

110. CFPB FINAL REPORT, *supra* note 99, at 7.

actions, and generally limit opportunities to hold carriers liable for wrongdoing.[111]

The Contract Critique posits that an arbitration clause should not be enforced where there are reasons to doubt that it has positive welfare effects.[112] A strong signal that a clause does not have positive welfare effects is the fact that its design was not constrained by bargaining or competition.

Here, however, the critique encounters a serious problem. Under real-world conditions, it is difficult to separate clauses that have positive welfare effects from those that do not. Commentators writing from a law-and-economics perspective are deeply divided over whether enforcing arbitration clauses and other contract terms governing dispute resolution procedure is economically efficient.[113] Administrative agencies charged with regulating arbitration maintain they cannot do so. In its recent arbitration rulemaking, the Consumer Financial Protection Bureau reported that the "data and methodologies available to the Bureau" did not allow it to determine whether incentives to comply with the law were "weaker than economically efficient levels" when companies were permitted to use arbitration.[114]

More fundamentally, there is a disconnect between the Contract Critique's reasons for viewing contractual boilerplate with suspicion and the prescription that boilerplate *dispute resolution* terms not be enforced. The same contracting dynamics that allow firms to impose procedures for resolving legal claims[115]

111. *See, e.g.*, *Wireless Customer Agreement* § 2.1–2, AT&T, https://m.att.com/shopmobile/legal/terms.wirelessCustomerAgreement.html [https://perma.cc/W7XY-WGFK] (last visited Feb. 15, 2016); *Verizon Wireless Customer Agreement*, VERIZON WIRELESS, https://www.verizonwireless.com/legal/notices/customer-agreement [https://perma.cc/Q964-JPLM] (last visited Feb. 15, 2016).

112. For example, Radin maintains that "rights deletion" boilerplate "should be declared invalid in toto, and recipients should instead be governed by the background legal default rules" that govern the resolution of civil claims. RADIN, *supra* note 15, at 213. In addition to urging courts to treat boilerplate as a contractual nullity, she urges the recognition of a new tort for "intentional deprivation of basic legal rights." *Id.* at 111. Quoting Arthur Allen Leff to the effect that "those pieces of paper which pass between the parties" do not qualify as 'contracts,'" Resnik seems to share Radin's basic stance, though she does offers fewer concrete policy prescriptions. *See* Resnik, *supra* note 98, at 129. Others suggest that arbitration clauses in consumer and employment contracts, or those that limit collective remedies should be subject to "exacting judicial scrutiny," Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 180 (2006), not be enforced at all, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 701 (1996), or be enforced only if a consumer gives the type of informed consent required for a medical procedure, William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75, 128 (2002).

113. *Compare, e.g.*, Ware, *supra* note 106, at 253 ("enforcement [of adhesive arbitration agreements] is socially desirable and . . . it benefits most consumers, employees, and other adhering parties"), *with* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 52, 56–57 (2008) ("[D]ata on credit card choice and use show that consumer mistakes [about adhesive contract terms, among them arbitration clauses,] cost hundreds of dollars a year per consumer. . . . The aggregate costs are staggering.").

114. Arbitration Agreements, 81 Fed. Reg. 32,830, 32,899 (proposed May 24, 2016).

115. RADIN, *supra* note 15, at 18.

also allow firms to impose boilerplate governing "remedies, withdrawal rights, disclosure rules, interpretation rules, restitution rules, risk of loss provisions, limitations on sellers' right to cure, rules relating to notices and communications, interest for late payments, grace periods, and much more."[116] If a lack of strong bargaining and competition is the problem, the Contract Critique seems to call into question much of this boilerplate, not just boilerplate governing dispute resolution procedure. But boilerplate writ large is an essential part of modern commerce, notwithstanding its uncomfortable fit within classical Anglo-American contract theory.[117]

Thus, while the Contract Critique raises important concerns about the basis for enforcing agreements to arbitrate, the remedy that follows from those concerns raises still more questions. The disconnect between the contracting dynamics that allow firms to mandate arbitration and the Contract Critique's policy prescriptions raises the question whether policymakers working in discrete substantive areas should undertake to regulate what, at bottom, are trans-substantive problems of contract law. The disconnect also raises the question whether there is something special about contractual control of *dispute resolution procedure* that warrants regulatory scrutiny, even if standard-form contracting is an indispensable feature of modern commerce. The Contract Critique does not answer these questions.

2. The Governance Critique

It is here that the "Governance Critique" enters the picture.[118] This critique posits that, apart from its effects on economic welfare, arbitration

116. Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 894–95 (2014).

117. *See id.* at 892–901.

118. The critique is developed in greatest depth in the work of Judith Resnik, who has authored a series of overlapping articles lamenting the decline of public adjudication, and the work of Margaret Radin, whose ambitious monograph, RADIN, *supra* note 15, bridges the contract and governance critiques. *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) [hereinafter Resnik, *Diffusing*]; Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014) [hereinafter Resnik, *Requiem*]; Resnik, *supra* note 98; Judith Resnik, *Courts: In and Out of Sight, Site, and Cite: The Norman Shachoy Lecture*, 53 VILL. L. REV. 771 (2008). For other works developing the governance critique, see, for example, David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 437–38 (2011) (arguing that Court's interpretation of FAA violates "nondelegation" doctrine); Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1193 (2008) (contending that "arbitration implicates serious structural values underpinning Article III"); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 100 (1997) (arguing that the Court's interpretation of FAA violates Article III, Seventh Amendment, and Fifth and Fourteenth Amendment Due Process Clauses). *See also* Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 83 (1992) (examining the extent to which "constitutional rights exist in arbitration").

degrades the quality of constitutional governance through changes that it makes to the way legal claims are resolved.

One set of changes concerns the transparency of legal proceedings. First Amendment doctrine recognizes a qualified right of access to both criminal[119] and civil proceedings.[120] Access allows for monitoring of decisionmakers,[121] furthers "understanding [of] the system in general and its workings in a particular case,"[122] contributes to the "appearance of justice,"[123] allows citizens to observe and contribute to the development of legal norms,[124] contributes to a working system of precedent,[125] and reveals information used "to identify social problems and devise public solutions."[126] Insofar as arbitration is "private and confidential,"[127] it generates none of these public goods.[128]

Another set of changes worked by arbitration involves the fairness of the dispute resolution process. Article III contemplates that cases and controversies will be decided by judges with "structural guarantees of judicial independence such as life tenure and stable (and sufficient) pay,"[129] but assurances of arbitrators' independence are far weaker.[130] Devices such as notice pleading, liberal discovery, and liberal joinder seek to equalize litigants' ability to prove their claims and defenses,[131] but arbitration clauses in consumer and

119. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603–04 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).

120. *See, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1067 (3d Cir. 1984); *In re* Iowa Freedom of Info. Council, 724 F.2d 658, 661 (8th Cir. 1983).

121. *Richmond Newspapers*, 448 U.S. at 572.

122. *Id.*

123. *Id.* at 574 (quoting Levine v. United States, 362 U.S. 610, 616 (1960)).

124. Resnik, *Requiem*, *supra* note 118, at 1836–37.

125. Davis & Hershkoff, *supra* note 1, at 540.

126. *Id.* at 544.

127. *See* Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 372 (2013).

128. For classic accounts of how adjudication generates public goods as well resolving the parties' dispute, see generally William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975).

129. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1705 (2012).

130. *See* 9 U.S.C. § 10(a) (2012) (authorizing vacatur of arbitral award where, for example, "the award was procured by corruption, fraud, or undue means" or "there was evident partiality or corruption in the arbitrators"). *See generally* George L. Blum, *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators—Commercial, Business, Or Real Estate Transactions*, 67 A.L.R. 5th 179 (2009) (summarizing situations in which arbitrator's bias or conflict of interest affects finality of arbitral award).

131. *See, e.g.*, FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 236 (4th ed. 1992) (observing that the Federal Rules' combination of liberal pleading standards and liberal discovery "makes possible the prosecution and defense of actions that would be impossible without it"). For a general account of procedural devices that aim to ensure that cases are presented by equally equipped litigants, see William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1873–83 (2002). On the recent changes in federal pleading standards, see generally David L. Noll, *The*

employment contracts often eliminate those devices.[132] This could result in biased dispute resolution procedure. Instead of reflecting the interests of a broad cross section of users of the civil justice system, arbitral procedure tilts in favor of the corporate actors that design it.

According to the Governance Critique, degradations in openness, independence, and equality caused by arbitration threaten the viability of democratic self-government. As the public is excluded from adjudication in open, public proceedings, citizens lose the ability to perform the monitoring, learning, and advocacy functions that litigation facilitates in classical accounts of the liberal state.[133] Further, the practical immunity from liability that arbitration offers to corporations threatens the polity's ability to establish standards of conduct through democratic processes. In the extreme, democratically enacted laws become mere defaults, effective only until self-interested firms "delete" them through boilerplate.[134]

The Governance Critique's basic policy prescription is that arbitration be disabled or made more like litigation.[135] That prescription, however, is in tension with American law's longstanding recognition that most rights may be waived, often through extraordinarily casual actions.[136] It is also in tension with bodies of law that leverage privacy and confidentiality to accomplish other governmental ends. For example, the same First Amendment doctrine that establishes a right of public access to judicial proceedings recognizes that proceedings may be closed to, say, protect trade secrets,[137] promote

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Indeterminacy of Iqbal, 99 GEO. L.J. 117 (2010); Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016).

132. *See supra* note 99.

133. *See* Resnik, *Requiem*, *supra* note 118, at 1836–37. For a book-length defense of litigation in open, public fora, see ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION (forthcoming 2017).

134. *See* RADIN, *supra* note 15, at 16.

135. For example, Prof. Judith Resnik's important, recent contribution suggests the Supreme Court's arbitration jurisprudence creates "an unconstitutional system" insofar as it fails to guarantee "egalitarian dispute resolution mechanisms" and to "facilitate debates about both procedures and governing norms." Resnik, *Diffusing*, *supra* note 118, at 2804–05. In earlier work, Resnik suggests that just as constitutional doctrine sought to preserve values of open access, equality, and public participation as adjudication moved to administrative adjudication schemes necessary to resolve the mass of claims created by modern entitlement statutes, it should strive to protect these values in arbitration, too. *See* Resnik, *Requiem*, *supra* note 118, at 1815 ("[W]hether by trial or through other procedures, what *is* needed for democratic governance is public information about disputes, the processes that produce their resolutions, and the power (public and private) that shapes the mechanisms and outcomes.").

136. *See, e.g.*, FED. R. CIV. P. 38 (right to jury trial waived if written demand not served and filed within fourteen days of last pleading directed at jury-triable issue). For the general principle that civil trial rights are subject to waiver, see, for example, D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972) (right to hearing); Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (jury trial right). *See generally* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 768–79 (1997) (discussing contexts in which waiver of trial and notice rights are permitted).

137. Standard & Poor's Corp. v. Commodity Exch., Inc., 541 F. Supp. 1273 (S.D.N.Y. 1982).

settlement,[138] and protect the identity of sensitive witnesses.[139] As the Second Circuit described in a recent decision, the extent of public access that is required as a constitutional matter depends on "whether the place and process have historically been open to the public," and the extent to which "public access plays a significant positive role in the functioning of the particular process in question."[140] This "experience and logic" test implies that some proceedings may constitutionally be closed to the public to advance government regulatory objectives—a conclusion that is difficult to reconcile with claims that dispute resolution must occur in open, public fora.

II.
ARBITRATION AND THE IMPLEMENTATION OF STATUTORY POLICY

Thinking about arbitration stands at a crossroads. As the prior Part explains, the Supreme Court's embrace of arbitration is said to be premised on the belief that arbitration permits parties to minimize dispute resolution costs, develop innovative forms of dispute resolution procedure, and avoid the pathologies of civil litigation in the United States. Critics respond that dispute resolution procedure defined by contract will harm consumers and employees and, ultimately, degrade the quality of constitutional government. Interestingly, the consequences predicted by the Court are not logically incompatible with those predicted by arbitration's critics. It is possible, for example, that forms of dispute resolution procedure defined by contract will systematically favor corporate interests *and* address the perceived pathologies of litigation in the United States.

Against the backdrop of this debate, this Part returns to the task for congressional and agency policymakers who undertake to regulate arbitration. It introduces a separate set of consequences caused by the spread of arbitration that have not been systematically analyzed in prior scholarship—arbitration's effects on the implementation of statutory policy—and develops the argument for making these effects a central focus of efforts to regulate arbitration through new federal legislation and administrative action.

Part II.A and Part II.B provide theoretical and empirical background. They describe Congress's use of civil litigation to implement statutory policy, the obstacles Congress must overcome to successfully mobilize private enforcement of a federal statute, and the manner in which Congress calibrates private enforcement by enacting different packages of incentives for enforcement of different statutes. Part II.C explains how arbitration affects the implementation of statutory policy through civil litigation. Part II.D explains

138. Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371 (8th Cir. 1990).
139. *In re* Cincinnati Enquirer, 94 F.3d 198 (6th Cir. 1996).
140. N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 297 n.13 (2d Cir. 2012) (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986)) (internal punctuation omitted).

the policy case for controlling these effects through legislation, and Part II.E outlines some regulatory strategies for doing so.

A. Regulating Through Civil Litigation

To understand arbitration's implications for the implementation of statutory policy, some background is necessary. As is familiar, simply enacting a statute is rarely sufficient to change regulated actors' behavior in the manner intended by Congress.[141] As Representative John Sherman expressed during congressional debates on the Fourteenth Amendment, a law without an enforcement mechanism is "dead letter."[142] Whether Congress seeks to correct a market failure, change social preferences, or root out invidious forms of discrimination, some means of coercive enforcement is usually needed to accomplish regulatory objectives. In political science accounts of the public policy process, the process of translating statutory directives into action—of *implementing* statutory norms—is referred to as "policy implementation."[143]

Responding to concerns that private litigation does too little to protect the public interest,[144] New Deal statutes often provided for implementation by creating a freestanding administrative agency and authorizing the agency to elaborate statutory policy and police compliance.[145] Although the number of

141. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19 (1990) (noting the "many types of behavior that police officers and judges have been unable to stop, ranging from tax evasion to drunk driving and drug abuse").

142. CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865). *But see* TYLER, *supra* note 141 (establishing that the perceived legitimacy of legal regulation contributes importantly to regulated actors' compliance with legal norms).

143. *See* Robert T. Nakamura, *The Textbook Policy Process and Implementation Research*, 7 POL. STUD. REV. 142, 143 (1987); Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 POL. STUD. J. 538, 538 (1980). Within the public policy literature, the textbook model of policy implementation, in which implementation follows the creation of a policy, has fallen out of favor as a descriptive model of the policy process. As Nakamura emphasizes, the textbook model continues to exercise considerable influence on politicians' and bureaucrats' thinking and is "consistent with the democratic norms that underlie public action"—namely, that significant policy decisions be made in the first instance by Congress. *See* Nakamura, *supra* at 144. The textbook model also captures dividing lines among Congress, agencies, the executive, and the judiciary that are central to modern separation-of-powers doctrine. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 733–34 (1986) ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.").

144. For a classic statement, see JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 6 (1938) ("The individual's whim, his lack of financial ability to prosecute his claim, could not be made the determinants of the social policy . . . government thus had to assume the initiative . . . .").

145. *See, e.g.*, National Labor Relations Act, Pub. L. No. 74-198, §§ 3(a), 6(a), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69) (creating National Labor Relations Board and vesting it with authority "to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this Act"); Securities Exchange Act of 1934, Pub. L. No. 73-291, § 4(a), 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–qq) (establishing Securities Exchange Commission and charging Commission with elaborating and enforcing securities laws).

such agencies increased dramatically over the twentieth century,[146] enforcement by administrative agencies and criminal prosecutors has never been sufficient to accomplish all of Congress's regulatory objectives. As Senator Edward Kennedy (D-MA) expressed during debates on the Civil Rights Attorney's Fees Act of 1976: "Long experience has demonstrated that government enforcement alone cannot accomplish" compliance with "major Federal civil rights laws."[147]

To address this enforcement deficit without creating a European-style public bureaucracy, Congress has long relied on civil litigation by private litigants—private statutory enforcement—to supplement or completely replace administrative and criminal enforcement.[148] Private enforcement "frees individuals from total dependence on collective bureaucratic remedies and gives them a personal role and stake in the administration of justice."[149] If a sufficient number of litigants enforce statutory rights, regulated actors will anticipate that violating the law will lead to civil liability and modify their conduct to reduce or completely eliminate their legal exposure.[150] In this way, private enforcement leads regulated actors to internalize statutory norms through the same mechanism the common law has long used to enforce rights of contract, property, and tort.[151]

In addition to reducing the need for new public bureaucracies, private enforcement permits lawmakers to manage two forms of risk that originate in the U.S. separation of powers system.[152] The first of these risks results from changes in Congress's preferences, a phenomenon termed "legislative drift."[153] Successfully implementing a statute through agency or criminal enforcement depends importantly on the cooperation of future Congresses. An agency

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146. For historical surveys of the growth of the federal administrative state, see, for example, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986). For a listing of current agencies and departments, see OFFICE OF THE FED. REGISTER, THE UNITED STATES GOVERNMENT MANUAL v–x (2013) (listing some 400 agencies and departments that have published legislative rules in the *Federal Register*).

147. 122 CONG. REC. 31,472 (1976); *see also id.* at 33,313 ("Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens." (statement of Sen. John V. Tunney (D-CA)).

148. *See generally* Burbank, Farhang & Kritzer, *supra* note 26 (discussing aspects of American culture, history, and political institutions that have contributed to development of private enforcement in the United States).

149. Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 198 (1987).

150. *See* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 7–8 (1975).

151. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 315–18 (8th ed. 2011) (describing the common law model).

152. This discussion builds on FARHANG, *supra* note 26, at 19–59, and Fiorina, *supra* note 26.

153. Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503 (1989) (coining the term).

cannot implement a statute if appropriations committees do not allocate the agency money it needs to do its work or if the Senate fails to confirm high-level agency personnel.[154] Nor can the agency implement a statute if lawmakers overwhelm the agency with other responsibilities[155] or tie up its personnel with investigations and oversight.[156]

There are many reasons lawmakers might undermine implementation of a statute in this manner. Congressional elections may give rise to new governing coalitions in the House and Senate that oppose legislation enacted by prior Congresses.[157] Even when Congress's membership is stable, lawmakers who once supported a regulatory program may come to oppose it.[158] Notably, lawmakers can thwart the implementation of existing statutes without having to pass legislation. For example, a minority of Senators might delay the implementation of a regulatory program by refusing to confirm an agency head.[159]

Private statutory enforcement mitigates this problem. If Congress enacts a private right of action and a sufficient number of private litigants litigate perceived violations of a statute, the statute will be enforced unless and until it is repealed.[160] To be sure, later Congresses might repeal a private right of action or make it more difficult to enforce rights created by a statute—for

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154. *See generally* RICHARD F. FENNO, JR., THE POWER OF THE PURSE: APPROPRIATIONS POLITICS IN CONGRESS (1966); JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE (1953).

155. *See, e.g.*, Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* BROOKINGS INST., CAN THE GOVERNMENT GOVERN? 267, 314–18 (John E. Chubb & Paul E. Peterson eds., 1989) (chronicling ambitious and frequently unachievable tasks that Congress assigned to the Environmental Protection Agency in the 1970s and 1980s).

156. A current example is provided by House Republicans' unrelenting efforts to uncover evidence of ideological discrimination at the Internal Revenue Service (and evidence of a cover-up in response to the House's investigations). *See* Martin Lobel, *The IRS Is in Crisis and the Tax Community Needs to Help*, TAX NOTES (Dec. 14, 2015), http://www.taxnotes.com/featured-article/irs-crisis-and-tax-community-needs-help [https://perma.cc/6TVS-4YA3].

157. Perhaps the most prominent current example is House Republicans' opposition to the Patient Protection and Affordable Care Act. *See* OFFICE OF THE PRESS SEC'Y, VETO MESSAGE FROM THE PRESIDENT—H.R. 3762 (2016), https://www.whitehouse.gov/the-press-office/2016/01/08/veto-message-president-hr-3762 [https://perma.cc/9SCN-347Y] (vetoing budget resolution that would have repealed the Affordable Care Act). On the political dynamics of Republican lawmakers' opposition to the Act, see Michael Henderson & D. Sunshine Hillygus, *The Dynamics of Health Care Opinion, 2008–2010: Partisanship, Self-Interest, and Racial Resentment*, 36 J. HEALTH POL. POL'Y & L. 945 (2011).

158. *See* Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111, 114–15 (1992) (developing hypothesis that politicians are "empty vessels—they possess no policy anchors of their own and therefore are tossed about on the policy sea by contemporaneously prevailing breezes and currents").

159. *See* BETSY PALMER, CONG. RESEARCH SERV., EVOLUTION OF THE SENATE'S ROLE IN THE NOMINATION AND CONFIRMATION PROCESS: A BRIEF HISTORY 5 (2009) (describing the tradition of "senatorial courtesy," through which "Senators from the home state of a nominee and also of the party of the President can block a nomination to a federal office within their state merely by objecting to it").

160. *See* FARHANG, *supra* note 26, at 33.

example, by changing the plaintiff's burden of proof or establishing new defenses to liability.[161] But the many veto points in the federal legislative process,[162] combined with interest groups' aversion to losing entitlements enacted into law,[163] make repealing *any* federal statute a difficult undertaking, much less one that authorizes victims of statutory violations to enforce their own rights. For example, the basic features of the Sherman Antitrust Act's cause of action have remained unchanged since 1890.[164] Similarly, the Civil Rights Act's cause of action for job discrimination has been in place since 1964.[165] In the most comprehensive empirical study of Congress's use of private statutory enforcement, political scientist Sean Farhang found *no* case from 1887 to 2004 wherein Congress repealed a statutory attorneys' fee-shifting provision and damages enhancements, two provisions that are common in statutes seeking to encourage private statutory enforcement.[166] When such

161. *See, e.g.*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 21D(a)(4)(b)(4), 109 Stat. 737, 747 (codified at 15 U.S.C. § 78u-4(b)(4) (2012)). (amending the Securities Exchange Act to require that the plaintiff in covered securities actions "have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages").

162. *See* ELLEN M. IMMERGUT, HEALTH POLITICS: INTERESTS AND INSTITUTIONS IN WESTERN EUROPE 27–28 (1992) (developing veto points theory of the legislative process, according to which the probability of a proposal becoming law is inversely related to the number of veto points it must overcome). For applications of veto point theory to Congress, see generally William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

163. *See* Burbank & Farhang, *supra* note 26, at 1564–65 (noting how the psychological phenomenon of loss aversion contributes to the difficulty of repealing existing procedural entitlements).

164. The Act of July 2, 1890, ch. 647, 26 Stat. 209, provided:

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

As amended, the Act currently provides:

> Except as provided in subsection (b) [relating to foreign states and instrumentalities], any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (2012).

165. *See* 42 U.S.C. § 2000e-5(b) (2012). As discussed below, Congress provided additional remedies for successful job discrimination plaintiffs in the Civil Right Act of 1991. *See infra* text accompanying notes 211–215. Before that, the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending scattered sections of 42 U.S.C.), revamped the enforcement powers of the Equal Employment Opportunity Commission, granting the Commission authority to conduct litigation in federal court and removing state and local governments' exemption from Title VII.

166. FARHANG, *supra* note 26, at 66. For an explanation of how these provisions encourage private statutory enforcement, see *infra* text accompanying notes 215–219.

provisions exited the U.S. Code, Farhang found, it was because the larger statute they appeared within was repealed, expired, or invalidated.[167]

At the same time that private enforcement allows lawmakers to manage legislative drift, it also provides a way of managing risks associated with public bureaucratic enforcement. Bureaucratic enforcement creates a principal-agent relationship between the enacting congressional coalition and the agency charged with administering statute: the agency is entrusted with interpreting and enforcing statutory policy through its enforcement decisions.[168] Like any agent in a principal-agent relationship, an administrative agency charged with implementing a statute may carry out the wishes of its principal—Congress—unfaithfully.

The period in which Clarence Thomas served as chair of the Equal Employment Opportunity Commission provides a striking example.[169] During Thomas's tenure in the 1980s, congressional Democrats held a series of oversight hearings to investigate claims that Thomas was "undermin[ing] the mission of the agency" through his enforcement policies.[170] The chair of the House Subcommittee on Employment and Housing, Rep. Tom Lantos (D-CA), complained that there was "not much point in passing good laws if, in the implementation of the legislation," congressional goals were "undermined, eroded, or sabotaged."[171] Democrats' complaints crystallized in a report issued by the Congressional Black Caucus when President George H.W. Bush nominated Thomas to his current seat on the U.S. Supreme Court.[172] The report complained that "Thomas consistently advocated narrow interpretations of civil rights [precedents], including repeated refusals to seek the full range of remedies against discrimination provided by statute and by case law."[173] As Chair of the EEOC, the report charged, "Thomas was so reluctant to bring class

167. FARHANG, *supra* note 26, at 66.

168. *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243 (1987). For a classic judicial statement of these functions, see Skidmore v. Swift & Co., 323 U.S. 134, 137–38 (1944).

169. Thomas served as chair of the EEOC from May 6, 1982, to March 8, 1990. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CLARENCE THOMAS, https://www.eeoc.gov/eeoc/history/35th/bios/clarencethomas.html [https://perma.cc/28UR-TS6C] (last visited Dec. 28, 2016).

170. *Equal Employment Opportunity Commission Policies Regarding Goals and Timetables in Litigation Remedies: Hearings Before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. & Labor*, 99th Cong. 2 (1986). *See also Processing of EEO Complaints in the Federal Sector: Problems and Solutions: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 100th Cong. (1987) [hereinafter 1987 Hearings]; *Oversight Hearings on the Federal Enforcement of Equal Employment Opportunity Laws: Hearings Before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. & Labor*, 98th Cong. (1983). For discussion of the hearings, see Sean Farhang, *Legislative-Executive Conflict and Private Statutory Litigation in the United States: Evidence from Labor, Civil Rights, and Environmental Law*, 37 LAW & SOC. INQUIRY 657, 670 (2012).

171. 1987 Hearings, *supra* note 170, at 2.

172. CONG. BLACK CAUCUS FOUND., IN OPPOSITION TO CLARENCE THOMAS: WHERE WE MUST STAND AND WHY (1991), *reprinted in* 22 BLACK SCHOLAR 126 (1992).

173. *Id.* at 127 (emphasis omitted).

and systemic cases that Congress had to earmark EEOC funds specifically for that type[] of enforcement and threaten to cut the budget of the chair and members of the EEOC" to ensure cases were brought.[174]

From the perspective of civil rights advocates in Congress, Thomas's stewardship of the EEOC exemplified the problem of bureaucratic "drift" (the agency's preferences diverge from Congress's) and "slack" (the agency fails to discharge its duties faithfully).[175] Agency officials charged with enforcing a statute may be hostile to the statute's objectives, focused on other priorities, or simply lazy or incompetent. Any of these developments may prevent a "good law" from being implemented successfully.

Authorizing private enforcement again provides a partial solution.[176] By replacing bureaucrats on the public payroll with front-line enforcers who are faithful to the objectives of the enacting coalition—or supplementing public enforcement with private enforcement—Congress addresses the risk that officials like Chairman Thomas will undermine enforcement. Even if private litigants are incapable of enforcing the law to the full extent contemplated by the enacting coalition, private enforcement may keep agency enforcers honest by, say, exposing violations and lines of inquiry that the agency fails to pursue.[177]

Problems of bureaucratic drift are likely to be more pronounced when different political parties control Congress and the bureaucracy.[178] Thus, it is unsurprising that an empirical analysis of Congress's statutory output shows that lawmakers approach public enforcement and private civil litigation as substitutes and make greater use of private enforcement under divided government. In *The Litigation State*, Farhang found, based on statistical analysis of every attorneys' fee-shifting provision and damages enhancement that Congress enacted from 1887 to 2004, that a move from unified government to divided government increased the likelihood of Congress enacting a private enforcement provision by 93 percent.[179] As the ideological distance between the median member of Congress and the President increased,

174. *Id.*

175. *See, e.g.*, Horn & Shepsle, *supra* note 153, at 502–03 (describing causes of agency drift); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 231 (1990) (describing causes of agency slack and describing the phenomenon as "shirking"). McCubbins et al., *supra* note 168, is generally credited with introducing the problems to the political-theory literature.

176. *See* FARHANG, *supra* note 26, at 34–37.

177. For a classic account of the checking function performed by private litigation, see, for example, Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982). *See also* Clopton, *supra* note 26; Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

178. *See* FARHANG, *supra* note 26, at 61–68.

179. *Id.* at 77. For Farhang's data sources and statistical methodology, see *id.* at 82–84.

the likelihood that Congress would enact a private enforcement regime increased.[180]

Private enforcement is a bipartisan tool. Since Congress first enacted a statute with incentives for civil litigation in 1870,[181] congresses controlled by Democrats have enacted private enforcement provisions more frequently than those controlled by Republicans.[182] But Farhang found "no support" for the hypothesis that private enforcement regimes are a tool used only by Democratic lawmakers.[183] To the contrary, every twentieth-century Congress enacted statutes with incentives for civil litigation.[184] Among the private enforcement measures supported by Republican legislators are those in the Taft-Hartley Act,[185] the Racketeer Influenced and Corrupt Organizations Act,[186] and the "Partial Birth Abortion" Ban Act of 2003.[187] Today, private enforcement regimes cover the waterfront of federal regulation, and can be found in statutes covering property, civil rights, consumer protection, banking, the environment, trade regulation, and more.[188]

Of course, Congress may not constitutionally authorize private litigants to establish authoritative statutory policy in precisely the same manner as a public administrative agency that is authorized to engage in rulemaking and adjudication.[189] And regardless of the *frontline enforcer*'s fealty to the

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180. *Id.* at 78 (noting that an increase of one standard deviation in ideological difference between the President and the median member of Congress "translates into an increase of 80 percent in predicted enactments" of statutes with provisions that facilitated private enforcement).

181. The Civil Rights Enforcement Act of 1870, ch. 114, 16 Stat. 140, 141, provided that if "any person, by force, bribery, threats, intimidation, or other unlawful means" obstructs a citizen from voting, "such person shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just."

182. *See* FARHANG, *supra* note 26, at 80 (reporting that in one statistical model, an increase of 15 percent in Democrats' margin of control of Congress was associated with a 24 percent increase of the enactment of statues with private enforcement provisions, and, in a second model, a 26 percent increase).

183. *Id.*

184. *Id.* at 66.

185. 29 U.S.C. § 187 (2012) (providing that an employer injured by certain secondary boycotts may recover "the damages by him sustained and the cost of the suit"). The Taft-Hartley Act was vetoed by President Harry Truman. It became law when bi-partisan super-majorities of the House and Senate overrode Truman's veto. *See* William S. White, *Bill Curbing Labor Becomes Law as Senate Overrides Veto, 68-25; Unions to Fight for Quick Repeal*, N.Y. TIMES, June 23, 1947, at A1.

186. 18 U.S.C. § 1964(c) (2012) (providing that a person injured by a pattern of racketeering activity may recover "threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee").

187. *Id.* § 1531(c) (providing a private right of action for the married father or maternal grandparents of a fetus terminated through a covered procedure to recover "appropriate relief," including "money damages for all injuries, psychological and physical, occasioned" and "statutory damages equal to three times the cost of the partial-birth abortion").

188. *See* FARHANG, *supra* note 26, at 67 tbl.3.1.

189. Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (2012), establishes a procedure through which agencies may enact "legislative" rules that have the "force and effect of law," Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979), and the Supreme Court has held that an

objectives of the enacting Congress, the *judiciary*'s preferences may diverge from those of the coalition that enacts a statute. All the same, private litigants shape judicial interpretation through strategic case selection,[190] and the risk of judicial drift is present regardless of whether the frontline enforcer is an agency or private litigant. Private enforcement thus allows lawmakers to move statutory implementation closer to the enacting coalition's preferences, even if complete alignment remains an ideal that may never be realized in practice.[191]

B. Private Statutory Enforcement and the Market for Lawyers

In theory, statutory rights could be enforced by litigants representing themselves or by legal services organizations representing clients for free. But the complexity of the law and court procedure places *pro se* litigants at a distinct disadvantage to those who are represented by counsel,[192] and for complicated historical reasons, legal services organizations devote most of their resources to representing individuals in disputes that are not governed by private enforcement regimes.[193] Thus, when Congress chooses to implement statutory policy through private civil litigation, it depends to a large extent on the services of attorneys in the private sector.

Private attorneys must be paid, however, and there is no guarantee that the returns from private statutory enforcement will equal or exceed those from other areas of practice. Successfully implementing a statute through private enforcement requires Congress to persuade attorneys to represent clients bringing claims under the statute, and to forego other uses of their time and

agency charged with administering a statute may establish binding administrative policy through case-by-case adjudication when Congress explicitly or implicitly delegates regulatory authority to the agency. *See* United States v. Mead Corp., 533 U.S. 218, 227–28 (2001). By contrast, *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), invalidated a statute that gave the force of law to labor agreements negotiated by coal producers and labor unions as an impermissible delegation of Congress's lawmaking power and described the statute as "legislative delegation in its most obnoxious form."

190. For two case studies, see JO BECKER, FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY (2014), and MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–50 (1987).

191. *See* FARHANG, *supra* note 26, at 52–54.

192. *See, e.g.*, D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 928 (2013) (finding, in a study of housing-court litigants, that an offer of representation "caused substantively large and statistically significant alterations in possession outcomes that favor occupants" compared to litigants that received "unbundled" legal services).

193. *See* ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2015, at 3 (noting that according to data provided to the Legal Services Corporation, "LSC programs provided services in 757,983 cases and served 1,895,361 people in households. . . . The largest category of cases was family law cases (32.0%) following by housing (28%), income maintenance (11.3%) and consumer (10.7%)"). *See also* FARHANG, *supra* note 26, at 190–96 (describing civil rights advocates' turn to private lawyers in the 1980s, following drop-off in activity by civil legal service organizations).

resources. Congress achieves this goal by creating financial incentives for civil litigation.

As an example, consider the Credit Repair Organizations Act (CROA).[194] The Act targets firms that purport to "repair" consumer credit reports, a legal impossibility under the Fair Credit Reporting Act of 1970.[195] It does so by making it unlawful for a "credit repair organization" to make false or misleading statements regarding its services.[196] Enforcement authority is divided among private litigants, the Federal Trade Commission, and state attorneys general,[197] though public enforcement has historically been sporadic.[198]

To mobilize private enforcement of a statute such as the CROA, lawmakers must first ensure that individuals are aware of their rights under it. This poses a problem, because an individual who purchases a "credit repair" service is unlikely to appreciate that Congress has legislated on the topic—or that there is such a thing as federal consumer-protection legislation. Effective enforcement thus depends on a more knowledgeable agent identifying violations and acting on behalf of claimants.[199] In the United States, the most likely candidate is an attorney.

Lawmakers also must overcome the problem of "negative value" rights.[200] If a plaintiff's damages were the cost of a bogus credit repair service, few plaintiffs would be able to afford to sue, as the cost of the lawsuit would exceed the potential recovery.[201] Even if an attorney acts on behalf of individuals who

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194. 15 U.S.C. §§ 1679–1679j (2012).

195. The 1970 Act expressly permits national credit bureaus to report information about a consumer's debts for seven years, information about bankruptcies for ten years, and reports of judgments and liens indefinitely. *Id.* § 1681c(a). The only lawful way a credit report can be "repaired" is by correcting incorrect information on the report or persuading a creditor to withdraw derogatory information. *See* FED. TRADE COMM'N, CREDIT REPAIR: HOW TO HELP YOURSELF (2012), https://www.consumer.ftc.gov/articles/pdf-0034-credit-repair.pdf [https://perma.cc/K6V3-JFEA].

196. 15 U.S.C. § 1679b(a)(1) (2012). A "credit repair organization" is defined as a person who uses an instrumentality of interstate commerce to sell a service for the purpose of "improving any consumer's credit record, credit history, or credit rating." *Id.* § 1679(a)(3)(A)(i).

197. *See id.* §§ 1679g–1679h.

198. *See Oversight of Telemarketing Practices and the Credit Repair Organizations Act (CROA): Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 110th Cong. 8 (2007) (prepared testimony of Lydia B. Parnes, Director, Bureau of Consumer Protection, Federal Trade Commission) (reporting that Federal Trade Commission, federal law enforcement agencies, and state law enforcement agencies brought 104 total actions to enforce CROA in the first eleven years of its existence).

199. *See* Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection*, 167 J. INSTITUTIONAL & THEORETICAL ECON. 56, 64–69 (2011).

200. The "negative value" term refers to the expected value of litigating a claim. In the standard economic model of litigation and settlement, the expected judgment (J) multiplied by the likelihood of success (P) is less than the cost of litigation (C): $P * J < C$. *See* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 34 (2003).

201. When considering CROA, Congress heard testimony that one credit repair organization charged $650 for "repair" of a consumer credit report. *See Credit Repair Organizations Act (H.R. 458): Hearing Before the Subcomm. on Consumer Affairs & Coinage of the H. Comm. on Banking,*

purchase bogus credit repair services and costs of litigation do not overwhelm the potential recovery, someone must finance the litigation and assume the risk of non-payment if the lawsuit fails. Again, the most likely candidate is an attorney. Through a no-win, no contingent-fee agreement, an attorney provides a form of litigation financing to clients she represents.[202]

Two of the above obstacles to successful private enforcement—the problem of negative value rights and the necessity of litigation financing—reflect distinctive features of the U.S. market for legal services. As Professor Gillian Hadfield explains in a noted series of articles, the absence of well-funded legal services organizations, a constrained supply of attorneys, and the American rule of attorneys' fees combine to create a "market for lawyers" that is characterized by two forms of competition.[203] At the same time that attorneys compete for the opportunity to represent lucrative clients, *clients* compete with one another for legal representation. Under the American rule, representation is skewed toward clients with the greatest ability to pay—"repeat players" who have the capital and incentive to pay for legal services on an hourly-fee basis, and "one shotters" with high-value claims that support an attractive contingency fee.[204]

When competition for legal representation is taken into account, it becomes clear that to successfully mobilize private enforcement of a statute, it is not enough for Congress to overcome the problem of negative value rights.

Fin., & Urban Affairs, 100th Cong. 3 (1988) (statement of Kenneth P. Walton, Federal Bureau of Investigation). If a consumer paid $100/hour for legal representation, an enforcement action would have to conclude within less than a day for the litigation to earn a positive return.

202. *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 90 (2010). *But cf.* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1293 (2011) (outlining conceptual differences between contingent-fee representation and third-party litigation financing).

203. *See* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129 (2010); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000); *see also* David L. Noll, *The Effect of Contingency Fees and Statutory Fee-Shifting*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 170 (Samuel Estreicher & Joy Radice eds., 2016) (considering whether contingency fees and statutory fee-shifting generally ensure access to justice given the market for legal representation and tentatively concluding that they do not).

204. On the skew toward repeat players, see Hadfield, *Price of Law*, *supra* note 203, at 961–92. On plaintiffs' attorneys' choice of clients and the influence of total returns from representation, see HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 11 (2004). Kritzer observes that from the standpoint of an attorney working on a contingency-fee basis, "a single case represents an investment of the lawyer's time and resources in the hopes of a return. . . . While the lawyer's goal is to achieve a positive return on every 'investment,' the reality is that some investments yield positive returns while others don't." *Id.* The distinction between "repeat players" who have an incentive to litigate for favorable legal precedent and "one-shotters" who seek to maximize their recovery in individual cases originates in Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–98 (1974).

Congress must also make enforcement of the statute an attractive use of an attorney's time and resources compared to other areas in which the attorney might practice.

A stylized example illustrates the task for lawmakers. Suppose that *L*, an attorney in private practice, has the choice of representing three clients. *A* wishes to litigate a breach of contract claim. *B* wishes to prosecute a claim for copyright infringement. *C*, just fired by her employer, wishes to sue for employment discrimination. To simplify, assume that each claim is governed by federal law and has a 100 percent likelihood of success on the merits. Also assume that, because of time constraints, *L* can represent only one client. Consider three scenarios:

Scenario 1. *No Incentives to Sue.* To begin, assume that Congress has not enacted any incentives to sue; that employment discrimination plaintiffs can recover only back pay; and that the costs and payoffs from litigating the three claims are as stated in Table 1. Table 1's final column, "Attorney profit," shows the amount that *L* can expect to recover if he represents *A*, *B*, or *C*, pays the costs of litigation out of pocket, and contracts for a standard one-third contingent fee. (The numbers are fictional.)

Table 1 (figures in '000)

	Actual damages	**Cost of litigation**	**Net recovery (loss)**	**Attorney profit (loss)**
Contract (*A*)	100	10	90	30
Copyright (*B*)	50	10	40	13.3
Employment discrimination (*C*)	5	10	(5)	(5)

In this scenario, *C* has little hope of persuading *L* to represent her. *A*'s breach of contract claim and *B*'s copyright claim both have a positive expected return. The expected return from representing *C* is negative. If *L* represents *C*, he will lose money whatever the outcome of the litigation.

Scenario 2. *Compensatory Damages Only.* Next, suppose that Congress becomes aware that employment discrimination claims have a negative value and, in an effort to correct the problem, enacts a provision that permits successful employment discrimination plaintiffs to recover compensatory damages for pain and suffering. The enactment of this provision changes the expected returns from representing *A*, *B*, and *C* as follows; changes from Scenario 1 are highlighted in the bolded box.

Table 2

	Actual damages	**Pain and suffering**	**Cost of litigation**	**Net recovery**	**Attorney's profit**
Contract	100	0	10	90	30
Copyright	50	0	10	40	13.3
Employment discrimination	5	60	10	55	18.3

By authorizing compensatory damages, Congress in this scenario has successfully addressed the negative value problem that prevented *C* from securing representation in Scenario 1. *L*, however, will *still* prefer to represent *A* over *C*, because the $30,000 return from prosecuting *A*'s breach-of-contract claim is $11,700 greater than the $18,300 return from prosecuting *C*'s employment discrimination claim.

Scenario 3. *Compensatory and Punitive Damages.* Suppose that lawmakers become aware of *this* problem and enact yet another incentive to litigate employment discrimination claims. The new provision provides that, in addition to recovering compensatory damages for pain and suffering, a successful plaintiff may recover punitive damages upon showing that an employer was indifferent to workplace discrimination. The enactment of this provision changes *L*'s expected payoffs from representing *A*, *B*, and *C* as follows. Again, changes from the prior scenario are highlighted in the bolded box.

Table 3

	Actual damages	**Pain and suffering**	**Punitive damages**	**Cost of litigation**	**Net recovery**	**Attorney's profit**
Contract	100	0	0	10	90	30
Copyright	50	0	0	10	40	13.3
Employment discrimination	5	60	50	10	105	35

As in Scenario 2, Congress here has overcome the negative value problem that prevents *C* from securing representation in Scenario 1. In addition, Congress has increased the *relative* attractiveness of prosecuting employment discrimination claims so that *L* will choose to represent *C* over *A* and *B*. With punitive damages available, *L*'s return from litigating *C*'s employment discrimination claim, $35,000, now exceeds the return from litigating A's breach of contract claim by $5,000 and the return from litigating *B*'s copyright claim by $21,700.

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The actual market for legal services is considerably more complex than this stylized example.[205] Yet the dynamic illustrated by the example, aggregated across millions of attorney-client interactions, importantly shapes attorneys' decisions to prosecute claims for violations of federal regulatory

205. Among other things, clients' ability to secure representation depends on the choices of millions of attorneys and law firms, not a single attorney. Attorneys and firms cannot switch practice areas without cost. And attorneys' choice of practice areas and clients to represent may be influenced by non-economic considerations. *See generally* Luis Garicano & Thomas N. Hubbard, *Specialization, Firms, and Markets: The Division of Labor Within and Between Law Firms*, 25 J.L. ECON. & ORG. 339 (2009); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985).

statutes. As Congress increases incentives for prosecuting statutory claims, those incentives make it possible both to pay for litigation from the expected judgment *and* to increase the attractiveness of prosecuting statutory violations compared to other potential uses of attorneys' resources. Attorneys can only be expected to focus on enforcement of a statute when the returns from doing so eclipse the returns from other potential areas of practice.

Lawmakers know this. Hundreds of statutes establish incentives for private civil litigation that have the effect—and often, the expressly stated purpose—of encouraging attorneys to concentrate their practice in statutory enforcement.[206] Consider the Civil Rights Act of 1964, whose evolution mirrors the above example. When first enacted in 1964, the Civil Rights Act limited successful plaintiffs to equitable remedies because of lawmakers' fears that Southern juries would refuse to enforce the law if defendants could claim a right to trial by jury.[207] A first generation of enforcement, spearheaded by the NAACP and other civil rights groups, led to greater employment opportunities for African Americans, particularly in the Deep South.[208] But as enforcement waned during the Reagan administration, civil rights proponents in Congress began to fear that the back pay, injunctive relief, and attorneys' fees available under the 1964 Act provided too little incentive for private attorneys to represent job discrimination claimants. A 1990 Report of the House Committee on Education and Labor argued that "the inability of discrimination victims to be made whole for their losses discourages such victims from seeking to vindicate their civil rights."[209] This "deficiency in Title VII's remedial scheme" hindered Congress's objective "of encouraging citizens to act as private attorneys general to enforce the statute."[210]

The Civil Rights Act of 1991, precipitated by a string of Supreme Court decisions that narrowed the scope of civil rights protections, responded to the

206. *See* FARHANG, *supra* note 26, at 66 (identifying 275 plaintiffs' fee shifts and 104 damages enhancements, for a total of 379 litigation incentives, enacted between 1870 and 2004). As explained below, *infra* text accompanying notes 215–19, fee shifts and damages enhancements are not the full universe of incentives for civil litigation that Congress can enact.

207. The 1964 Act provided that a court "may enjoin the respondent from engaging in [the charged] unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (1964) (codified at 42 U.S.C. § 2000e-5(g) (1970)). On drafters' fears of Southern jury nullification, see BRIAN K. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 55 (1997).

208. In 1960, minority workers were underrepresented compared to their share of the workforce in office and managerial positions by 78.5 percent. By 1980, the percentage had shrunk to 56.7 percent. H.R. REP. NO. 101-644, at 8 (1990) (reprinting findings presented by Professor Al Blumrosen).

209. *Id.* at 39.

210. *Id.*; *see also* S. REP. NO. 101-315, at 30 (1990) (arguing that under the 1964 Act's damages provisions, "victims of intentional discrimination may not recover for the very real effects of discrimination; and thus victims of intentional discrimination are discouraged from seeking to vindicate their civil rights").

perceived inadequacy of incentives for private litigation under the original Civil Rights Act.[211] In addition to back pay, injunctive relief, and attorneys' fees, the 1991 Act granted compensatory and punitive damages to successful plaintiffs.[212] In enacting the 1991 Act's expanded damages provisions, lawmakers expressly sought to encourage private attorneys to represent employment discrimination plaintiffs. The House Report on the 1991 Act described financial incentives to sue "as a fuel that makes the machinery of adjudication work."[213] Quoting testimony of Professor Charles Silver, the report observed: "If the fuel runs out, the machinery does not function and civil rights do not have the effect of protecting people whose interests are at stake."[214]

Looking beyond the specific example of the Civil Rights Act, one can identify at least five categories of statutory incentives to sue:

1. *Damage definitions* define the kinds of damages—economic loss, pain and suffering, emotional distress, etc.—that a plaintiff who proves a statutory violation may recover.[215]
2. *Damage multipliers* such as the Sherman Act's treble damages provisions permit the successful plaintiff to recover a multiple of her actual damages.[216]
3. *Statutory damages provisions* provide a guaranteed minimum amount of damages upon proof that a statute was violated, regardless of the amount of harm the plaintiff actually suffered.[217]
4. *Fee-shifting provisions* modify the default American rule of attorneys' fees, usually by requiring the defendant to pay a

211. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amending scattered sections of 42 U.S.C.). *See generally* Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994).

212. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981a).

213. H.R. REP. NO. 102-40(I), at 75 (1991). The report was issued jointly by the Committee on Education and Labor and the Committee on the Judiciary.

214. *Id.*

215. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(1) (2012) (providing that where a complaining party establishes the defendant engaged in intentional discrimination, that party "may recover compensatory and punitive damages . . . in addition to any [injunctive and declaratory] relief authorized by section 706(g) of the Civil Rights Act of 1964").

216. *See, e.g.*, Clayton Act, 15 U.S.C. § 15(a) (2012) (providing that a person injured "by reason of anything forbidden in the antitrust laws" may recover treble damages); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c)–(d) (2012) (same; injuries caused by a pattern of racketeering activity or conspiracy to violate RICO's substantive provisions).

217. *See, e.g.*, Copyright Act, 17 U.S.C. § 504(c) (2012) (providing statutory damages "of not less than $750 or more than $30,000 as the court considers just" for copyright infringement); Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A)(i) (2012) (providing damages of "not be less than $200 nor greater than $2,000" for violations of the act); *id.* § 1640(a)(2)(B) (establishing a separate damages scheme for class actions and capping damages at "the lesser of $1,000,000 or 1 per centum of the net worth of the creditor").

prevailing plaintiff's attorneys' fees and costs.[218]

5. The *definition of statutory rights* can facilitate aggregation by, for example, omitting elements such as individual reliance. In doing so, the definition of statutory rights makes it easier for an attorney to bundle claims into a package that is worth litigating.[219]

It is the rare statute that makes use of *all* of these incentives for civil litigation. Rather, by enacting stronger or weaker combinations of incentives to sue, Congress performs a task analogous to that of a prosecuting agency setting its enforcement priorities.[220] Different packages of incentives to sue reflect Congress's judgment about the importance (or lack thereof) of private enforcement to enforce different statutory rights.

There is, however, an important difference between the way that Congress expresses its enforcement priorities and the way that an agency or prosecutor does so. Prosecutor's offices and administrative agencies typically set broad-scale enforcement priorities and then prosecute individual cases that the office believes advance those priorities.[221] Congress, by contrast, creates incentives for litigation of particular types of statutory claims that in turn influence attorneys' decisions to represent (or decline to represent) clients asserting those claims. Despite the fact that Congress structures incentives for private attorneys

218. *See, e.g.*, Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988(b) (2012) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . ."); Credit Repair Organizations Act, 15 U.S.C. § 1679g(a)(3) (2012) (providing that in "any successful action to enforce any liability" under the act, the plaintiff may recover "the costs of the action, together with reasonable attorneys' fees"). On the American rule, see generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

219. *See* Basic Inc. v. Levinson, 485 U.S. 224, 424 (1988) (establishing a presumption that individuals who purchase securities in an efficient market rely on the integrity of the market price, because "[r]equiring proof of individualized reliance from each member of the proposed plaintiff class [in a securities fraud action] effectively would have prevented respondents from proceeding with a class action"). For analysis of how legislators can structure substantive rights to facilitate or prevent aggregation in class action litigation, see Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633 (2000).

220. For sophisticated recent accounts of how prosecutorial discretion functions in modern prosecutor's offices and administrative agencies, see Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); William H. Simon, *The Organization of Prosecutorial Discretion*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY (Maximo Langer & David Sklansky eds., forthcoming 2017), http://ssrn.com/abstract=2836662 [https://perma.cc/8VJ4-RXJ9]. *See also* Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972) (examining the Department of Justice's exercise of discretion in handling referrals for criminal prosecution from federal departments and agencies).

221. *See* Cox & Rodríguez, *supra* note 220, at 176–85 (discussing the Obama administration's Deferred Action for Parents of Americans (DAPA) and Deferred Action for Childhood Arrivals (DACA) programs). For the debate over whether DAPA and DACA are legislative rules that could only be promulgated via the Administrative Procedure Act's notice-and-comment procedures, see Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

rather than selecting particular cases for prosecution, its choices affect the universe of litigated cases no less than a prosecutor's office or agency's choice of enforcement priorities does. Farhang found that the enactment of expanded damages provisions in the 1991 Civil Rights Act "brought about a statistically and substantively significant increase in Title VII charges" filed with the Equal Employment Opportunity Commission (a precondition to filing an employment discrimination claim), increasing aggregate charge filings by 58 percent.[222] As this finding suggests, stronger incentives to sue—say, treble damages, punitive damages, and substantive rights that lend themselves to aggregation—drive enforcement of a statute. Weaker incentives encourage attorneys to practice in other areas. In short, by enacting incentives for private civil litigation, Congress creates and regulates markets for the enforcement of its own laws.

C. The Impact of Arbitration

Until this point, this Part's account of Congress's use of civil litigation to implement statutory policy has assumed that claims are resolved under a stable set of procedural rules such as those provided in the Federal Rules of Civil Procedure. When dispute resolution procedure is stable, lawmakers can anticipate, if imperfectly, the effect of creating or modifying incentives for private statutory enforcement. For example, if the average expected return to an attorney from representing an employment discrimination plaintiff is $50,000 and Congress seeks to increase private enforcement of the employment discrimination laws, it can increase the damages available to successful plaintiffs (and indirectly, their attorneys) as it did in the 1991 Civil Rights Act.[223]

Once civil procedure may be designed by contract, the assumption of procedural stability that underpins Congress's ability to intervene at the margin in the market for private enforcement no longer holds. Just as *Congress* may influence attorneys' choice of clients to represent and claims to prosecute by establishing incentives for civil litigation, *contract drafters* employed by repeat-player defendants can do so by modifying the forum and procedures through which claims are resolved. Procedural contracting works at cross-purposes with congressional efforts to mobilize private enforcement when drafters use their authority over dispute resolution procedure to discourage forms of claiming that Congress sought to encourage.

1. How Arbitration Influences the Economics of Private Enforcement

How is arbitration able to influence the market for private enforcement without violating the Supreme Court's arbitration jurisprudence? The Court's

222. FARHANG, *supra* note 26, at 201. For a description of the EEOC charge filing process, see SAMUEL ESTREICHER & DAVID L. NOLL, LEGISLATION AND THE REGULATORY STATE 53–55 (2015).

223. *See supra* text accompanying notes 213–14.

jurisprudence requires an arbitration agreement to honor remedies and attorneys' fee rules that are expressly recognized by law.[224] But contract designers are free to make other procedural choices—changing the forum for dispute resolution, limiting discovery, or prohibiting joinder or aggregation, for example—that can dramatically influence the returns from litigation.[225] According to the Court's opinion in *American Express v. Italian Colors*, the economic consequences of these other changes are irrelevant to an arbitration agreement's enforceability so long as the agreement does not violate an express congressional command.[226]

It is widely recognized that, by changing the forum and procedures for dispute resolution, an arbitration agreement can recreate the negative value problem illustrated in Scenario 1, above.[227] In *Italian Colors*, for example, the prohibition of all forms of aggregate litigation in American Express's arbitration agreement transformed a claim that had a large expected value when litigated in federal district court into one that, plaintiffs averred, was not economically feasible to assert in arbitration.[228] However, the ability to recreate the problem of negative value rights is simply an extreme example of arbitration's more general ability to influence attorneys' selection of cases for litigation in a way that conflicts with Congress's objectives regarding private enforcement.

Consider a variation on the example from the preceding Section:

Scenario 4. *Compensatory and Punitive Damages and Contractual Control of Forum.* Suppose that *C*'s employment agreement contains a provision that requires all claims to be litigated in a court known for long pre-trial delays.[229] Since time is money, the cost of litigating *C*'s employment discrimination claim increases from $10,000 to $30,000. This changes the payoffs from representing *A*, *B*, and *C* as follows:

224. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997).

225. *See Italian Colors*, 133 S. Ct. at 2308–09.

226. *Id.* at 2309 ("Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational."). For an example of the same principle in a case involving a forum selection clause, see Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595–96 (1991) (rejecting plaintiffs' argument that a forum selection clause that required litigation in Florida violated 46 U.S.C. § 183(c)'s prohibition on contracts of carriage that "lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction," because Florida courts were courts of competent jurisdiction).

227. *See, e.g.*, RADIN, *supra* note 15, at 7 ("[P]eople injured through the fault of a business they deal with are precluded by the company's paperwork from holding the company legally accountable."); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3066 (2015) (arbitration clauses permit contract drafters "to frustrate or altogether eliminate claiming in any forum").

228. *See* 133 S. Ct. at 2308.

229. Thanks to Zach Clopton for suggesting this example.

Table 4

	Actual damages	**Pain and suffering**	**Punitive damages**	**Cost of litigation**	**Net recovery**	**Attorney's profit**
Contract (*A*)	100	0	0	10	90	30
Copyright (*B*)	50	0	0	10	40	13.3
Employment discrimination (*C*)	5	60	50	30	85	28.3

In this scenario, *L* will still earn a substantial return if he represents *C*. Yet the employment agreement has altered the *relative* returns from representing *A*, *B*, and *C* such that *L* will no longer choose to represent *C*. Because of the increased cost of litigation, the expected return from prosecuting the employment discrimination claim is now $1,700 *less* than the expected return from prosecuting the breach-of-contract claim.[230]

A contract's ability to influence attorneys' selection of clients in this manner does not depend on the specific procedural choices that it makes. Whether the contract changes filing fees, the forum for dispute resolution, the availability or scope of discovery, the availability of class actions, or some other feature of the dispute resolution process, it will influence attorneys' choice of clients if it decreases the returns from prosecuting an identifiable category of claims so as to make those claims less attractive for attorneys choosing clients to represent. For example, the same result would obtain in the above example if the contract increased the cost of litigation by prohibiting the use of particular forms of evidence, or requiring mediation before filing suit, provided those provisions increased the cost of asserting an employment discrimination claim by $20,000. It also does not matter whether the contract selects litigation or arbitration as the forum for adjudication. As the Court's decision in *Scherk* teaches, an agreement to arbitrate is simply "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."[231]

Aggregated across many contracts, the dynamic illustrated in this example can result in a misallocation of enforcement resources from the perspective of Congresses that enacted statutes with incentives for private civil litigation. As enforcement is diverted from areas that Congress would have expected to be a focus of private enforcement, those statutes are enforced less. Assuming attorneys do not leave the practice of law, they can be expected to shift their attention to other practice areas that offer higher returns, which were not necessarily an object of congressional concern.

230. Again, it bears emphasis that the actual market for legal services is considerably more complex than this stylized example. *See supra* note 205.

231. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

2. An Example: Arbitration and the Food Class Action

The dynamic described in the prior Section potentially explains one of the most curious recent developments in recent class action practice: the rise of the "food class action."[232] Beginning around 2010, attorneys began to file a large number of putative class actions challenging the labeling of mass-market foods and beverages.[233] Such actions typically allege that a label's use of terms such as "all natural," "organic," or "yummy" is unlawful because the label does not comply with Food and Drug Administration regulations.[234] Litigation is concentrated in the Northern District of California, where the district court and Court of Appeals for the Ninth Circuit have developed a substantial body of precedent on theories of liability, class certification, federal preemption, and other matters.[235]

The sudden appearance of the food class action does not appear to be the result of real-world events. The United States experiences periodic outbreaks of food-borne illness, but the frequency and severity of outbreaks does not appear to have changed significantly over the past decade.[236] Nor is the food class action explained by legal developments. The last major amendments to the Food, Drug, and Cosmetics Act, in 2007, focused on fees for prescription drugs

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232. *See generally* Anthony J. Anscombe & Mary Elizabeth Buckley, *Is the 'Food Court' Losing Steam? An Update on Food and Beverage Consumer Class Actions in the Northern District of California*, 15 Class Action Litig. Rep. (BNA) 776 (2014); Vanessa Blum, *Welcome to Food Court*, RECORDER, Mar. 1, 2013; Scott A. Elder & Jenny A. Mendelsohn, *All You Can Eat: Food and Beverage Class Actions in 2014*, 15 Class Action Litig. Rep. (BNA) 1145 (Oct. 10, 2014). *See also* U.S. CHAMBER INST. FOR LEGAL REFORM, THE NEW LAWSUIT ECOSYSTEM: TRENDS, TARGETS AND PLAYERS 88–100 (Oct. 2013), http://www.instituteforlegalreform.com/research/the-new-lawsuit-ecosystem--trends-targets-and-players [https://perma.cc/NEY5-VBM3] [hereinafter CHAMBER REPORT] (purporting to document the liability theories and law firms involved in "litigation abuse of most concern to the business community").

233. *See* CHAMBER REPORT, *supra* note 232, at 89.

234. *See id.* at 92. Although the federal Food, Drug, and Cosmetics Act does not contain a private right of action for violations of FDA labeling requirements, California's Sherman law incorporates federal labeling requirements by reference, and California's Unfair Competition Law and Consumer Legal Remedies Act contain private rights of action through which violations of the Sherman law may be enforced. *See* CAL. BUS. & PROF. CODE § 17203 (2016); CAL. CIV. CODE § 1780 (2016).

235. *See, e.g.*, Reid v. Johnson & Johnson, 780 F.3d 952 (9th Cir. 2015) (Article III standing, federal preemption, primary jurisdiction); Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753 (9th Cir. 2015) (federal preemption, primary jurisdiction); *In re* ConAgra Foods, Inc., 302 F.R.D. 537 (C.D. Cal. 2014) (class certification); Ivie v. Kraft Foods Glob., Inc., 961 F. Supp. 2d 1033 (N.D. Cal. 2013) (preemption, statutory standing); Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d 889 (N.D. Cal. 2012) (preemption, primary jurisdiction, scope of California Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Laws).

236. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, LIST OF SELECTED MULTISTATE FOODBORNE OUTBREAK INVESTIGATIONS, http://www.cdc.gov/foodsafety/outbreaks/multistate-outbreaks/outbreaks-list.html [https://perma.cc/C9GG-QPC5] (last updated Mar. 9, 2017).

and medical devices.[237] Prior to the 2007 amendments, the last amendments to the Act became law in 1997.[238]

The rise of the food class action *does* coincide with a period in which traditional consumer class actions became significantly more difficult to prosecute in part because of the increasing use of arbitration. The early 2000s saw an explosion in the use of mandatory arbitration clauses in consumer contracts, including contracts used by perennial targets of class action litigation such as cellular telephone service providers and banks.[239] By 2010, it was becoming clear that arbitral class action waivers would likely be enforced according to their terms—a development that led commentators to predict the "death" of the consumer class action.[240] Once the Supreme Court's pro-arbitration position solidified in *AT&T Mobility v. Concepcion*[241] and *American Express v. Italian Colors*,[242] courts dismissed a large number of putative consumer class actions in favor of individual arbitration.[243]

Food manufacturers cannot easily mandate arbitration, because they do not contract directly with the consumers who purchase their products.[244] Although the question warrants empirical study, the temporal proximity between the arbitration-induced "death" of the traditional consumer class

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237. *See* Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, 121 Stat. 823 (2007) (codified in scattered sections of 21 U.S.C.).

238. Food and Drug Administration Modernization Act of 1997, Pub L. No. 105-115, 111 Stat. 2296 (1997) (codified in scattered sections of 21 U.S.C.).

239. *See* Demaine & Hensler, *supra* note 99, at 62–64 (finding significant use of arbitration clauses in contracts for financial products, cellular telephone service, and transportation services in 2004 survey).

240. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."). For "death of class action" predictions, see, for example, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000). *But see* Elizabeth J. Cabraser, *The Class Abides: Class Actions and the "Roberts Court,"* 48 AKRON L. REV. 757 (2015); Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. (forthcoming 2017), https://ssrn.com/abstract=2881484 [https://perma.cc/M6LQ-AW6Z].

241. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that FAA preempted California rule that required the availability of class actions as a check against corporate wrongdoing).

242. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (holding that FAA required enforcement of arbitral class action waiver that made it economically infeasible to assert a Sherman Act claim).

243. *See* Silver-Greenberg & Gebeloff, *supra* note 2 (reporting that, in a sample of 1,179 putative class actions filed between 2010 and 2014 that were subject to a motion to compel arbitration, judges required arbitration eighty percent of the time).

244. In one well-known case, General Mills attempted to work around the absence of a direct contractual relationship with consumers by securing contractual "assent" to arbitration through social media interactions. The company reversed course when the stratagem became public and General Mills was "excoriated by consumers on Facebook and Twitter." *See* Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. TIMES, Apr. 20, 2014, at A17.

action, on the one hand, and the rise of the arbitration-proof food class action, on the other, is striking. A plausible hypothesis is that, as arbitration deterred attorneys from filing traditional consumer class actions, they switched their focus to the breakfast table.

D. The Policy Case for Regulating Arbitration's Effects on the Implementation of Statutory Policy

The prior Section shows how arbitration can disrupt or completely undermine congressional efforts to mobilize and calibrate private enforcement of federal law. But why should congressional and agency policymakers focus on these "enforcement effects" when undertaking to regulate arbitration, as this Article contends?

Starting with Congress, suppose that a bipartisan coalition of lawmakers becomes concerned with for-profit "universities" that promise to teach students the secrets of real-estate investing only to provide an education that confers no discernable advantage in the job market.[245] To combat this novel type of fraud, Congress enacts a statute, The Real-Estate University Market Protection Act, that makes it unlawful for a company that offers educational services to make false or misleading statements about students' employment prospects. The Department of Education does not have sufficient funding to enforce the "TRUMP Act" nor can Congress appropriate new funds for the Department in the current political climate, so the statute creates a private right of action for victims of what it terms "real-estate university fraud." Under that cause of action, a plaintiff who fails to secure employment after attending a real-estate university that made false or misleading statements regarding graduates' employment prospects may recover tuition paid to the institution, attorneys' fees, and costs.

With no job and a large debt to the university that defrauded her, a plaintiff seeking to vindicate her rights under the new statute depends on a law firm financing litigation. But arbitration, if left unregulated, could easily reduce incentives for firms to represent clients asserting TRUMP Act claims to a point where they are no longer an attractive investment. By, say, imposing high filing fees and requiring arbitration in a distant forum, a university-designed arbitration agreement could increase the upfront cost of prosecuting violations of the statute such that other uses of a law firm's resources offer higher returns.[246] By barring claimants and their attorneys from sharing information

245. The example is loosely based on *People of the State of New York v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409 (N.Y. App. Div. 2016). For a revealing account of the Trump University fiasco, see Christopher Lewis Peterson, *Trump University and Presidential Impeachment*, (Working Paper, Sept. 27, 2016), https://ssrn.com/abstract=2841306 [https://perma.cc/2PVU-EK9P].

246. *See* Duran v. J. Haas Grp., LLC, 531 Fed. App'x 146 (2d Cir. 2013) (enforcing arbitration clause that required New York plaintiff allegedly defrauded by defendant to travel to Maricopa County, Arizona, to challenge validity of arbitration clause).

and aggregating claims, an arbitration clause could eliminate plaintiffs' economies of scale in cases of systemic wrongdoing.[247] By requiring arbitration before a provider with financial ties to the education industry, a clause could reduce the likelihood that plaintiffs will prevail on the merits, perhaps substantially.[248] In this way, failing to anticipate the effects of arbitration when enacting a new statute can lead to a failure to implement the statute successfully.

Arbitration may also have similar effects on *existing* statutory schemes that are enforced through private civil litigation—and there are many such schemes. However, this phenomenon will not necessarily have purchase for members of Congress because of changes in Congress's membership and lawmakers' preferences. For example, given that he does not think "the enlightened wisdom of the collective" is generally a persuasive basis for regulation,[249] Senator Ted Cruz (R-TX) would likely not be troubled if, say, arbitration decreases incentives for private attorneys to prosecute employment discrimination claims below the level contemplated by the Civil Rights Act of 1991.

Arbitration's effects on the implementation of existing statutes will nonetheless have purchase for lawmakers when the policy preferences of the governing congressional coalition coincide with those of Congresses that passed earlier legislation enforced through private litigation. Senator Cruz may not care about arbitration's effects on implementation of the Civil Rights Act, but those effects are salient to the coalition that enacted the 1991 Act and would matter to a new, pro-civil-rights coalition that came to power. If it is unrealistic to expect the current Congress to police arbitration's effects on implementation of all statutory regimes enacted by earlier Congresses, the expectation is reasonable with respect to statutory regimes that advance the policy preferences of the governing coalition.[250]

For administrative agencies, the policy case for regulating arbitration's enforcement effects is somewhat different. As a legal matter, an agency cannot

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247. *See generally* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) (observing that American Express's arbitration provision "prevents [plaintiff] from informally arranging with other merchants to produce a common expert report").

248. *See* Silver-Greenberg & Corkery, *supra* note 2 (collecting anecdotal evidence of such effects). *See also* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63 (2015) (surveying prior empirical research, analyzing the extent of repeat-player effects in a dataset of AAA consumer arbitrations, and concluding that "elite corporations outperform their one-shot counterparts on win rates and damage payments").

249. *See* R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 635 (1996).

250. This Article does not consider the separate question of how regulating arbitration makes its way onto the congressional agenda, a development often thought to depend on a policy entrepreneur taking the initiative to advance a policy proposal when political conditions are right. *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (1984).

disregard policy objectives defined by law.[251] To the contrary, legislation that charges an agency with administering a statute often directs the agency to ensure that the statute is "carried out" or "implemented" effectively.[252] Some are charged with regulating evasion or circumvention of statutory policy.[253] If agency officials are executing their statutory duties faithfully, the question is why, in a world of constrained resources and competing priorities, regulating arbitration's enforcement effects is an attractive use of agency resources.[254]

The answer depends among other things on the specific agency at issue, the tasks that Congress has assigned to it, the agency's enforcement priorities, and the scale of arbitration's impacts on private enforcement. In general, however, the loss of a mechanism of statutory enforcement that is contemplated by law is a big deal because it affects regulated actors' incentives to comply with the statute the agency administers. Regulating uses of arbitration that eliminate or disable private statutory enforcement is an attractive use of agency resources because it is likely to have a greater deterrence payoff than more targeted regulatory actions.[255] Where private enforcement is a key mechanism

251. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

252. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(a), 124 Stat. 1376, 1980 (2010) (codified at 12 U.S.C. § 5512(a) (2012)) ("The [Consumer Financial Protection] Bureau is authorized to exercise its authorities under Federal consumer financial law *to administer, enforce, and otherwise implement* the provisions of Federal consumer financial law.") (emphasis added); National Labor Relations Act, 29 U.S.C. § 156 (2012) ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary *to carry out* the provisions of this subchapter.") (emphasis added); Securities Exchange Act of 1934, 15 U.S.C. § 78w(a)(1) (2012) ("The [Securities Exchange] Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible . . . .").

253. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(b)(1), 124 Stat. 1376, 1980 (2010) (codified at 12 U.S.C. § 5512(b)(1) (2012)) ("The [CFPB] Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."); Bank Holding Company Act, 12 U.S.C. § 1844(b) (2012) ("The [Federal Reserve] Board is authorized to issue such regulations and orders, including regulations and orders relating to the capital requirements for bank holding companies, as may be necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof.").

254. *See generally* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013) (surveying the environment that policymakers generally work within, the limitations it imposes on new policy, and legal scholars' tendency to ignore those limitations).

255. The Department of Education's proposed borrower defense rule illustrates the point. In the proposed rule, the Department found that restrictions on class action litigation in Corinthian Colleges' arbitration agreement prevented private litigants from successfully exposing the for-profit college's multi-year scheme to defraud students. The Department concluded that if private class actions that were dismissed in favor of individual arbitration had been allowed to proceed in court, those actions would have compelled Corinthian to provide financial relief to students and to change its corporate practices before it entered bankruptcy. Based in part on the Corinthian experience, the Department

for enforcing the mandate of a statute an agency administers, regulating arbitration is a necessary and valuable use of the agency's resources.

In this respect, it is relevant that some agencies have expressly acknowledged the role that private enforcement plays in statutory schemes they administer. During legislative hearings on the Private Securities Litigation Reform Act, for example, former SEC Chairman Arthur Levitt, Jr. testified that the Commission had "long maintained that private actions provide valuable and necessary additional deterrence . . . thereby supplementing the Commission's own enforcement activities."[256] Levitt's testimony on this point hardly broke new ground. In *J.I. Case Co. v. Borak*, the Supreme Court said, speaking about section 14(a) of the Exchange Act, that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action";[257] the Court and Commission soon generalized the point to the securities laws writ large.[258]

E. How to Regulate Arbitration?

If lawmakers such as those in the preceding Section's example appreciate arbitration's potential to undermine the implementation of statutory policy, there remains the practical question of how to control these effects.

The simplest strategy—amending the FAA to bar arbitration of statutory claims—is also the most problematic. The Court's FAA jurisprudence affects a wide range of interest groups. Basic legislative-process theory teaches that because of this broad impact, cross-cutting amendments to the FAA are unlikely to navigate the many veto-gates in the federal legislative process.[259] Nor is an amendment prohibiting arbitration of all statutory claims necessarily desirable as a policy matter. If arbitration is likely to have substantial, negative effects on the implementation of some statutes, its effects on other statutes are likely to be small or non-existent.[260] By their nature, cross-cutting amendments

concluded that an industry-wide ban on arbitral class action waivers "would promote direct relief to borrowers from the party responsible for [financial] injury, encourage schools' self-corrective actions, and, by both these actions, lessen the amount of financial risk to the taxpayer in discharging loans" through the agency's loan discharge program. In this way, regulating arbitration would further the agency's legal obligation to ensure that the federal direct loan program was administered in a manner that protected the interests of the United States. *See* Student Assistance General Provisions, 81 Fed. Reg. 39,330, 39,380–81 (proposed June 16, 2016) (citing Higher Education Act § 454(a)(6); 20 U.S.C. § 1087(d)(a)(6)).

256. *Oversight Hearing on Securities Litigation Abuses: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 105th Cong. (1997) (statement of Arthur Levitt, Jr., Chairman, Securities and Exchange Commission).

257. 377 U.S. 426, 432 (1964).

258. Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1314 & n.51 (2008).

259. *See supra* note 162.

260. *Cf.* Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. (forthcoming 2017) (manuscript at 32) (noting that the Supreme Court's current arbitration jurisprudence "is largely

cannot distinguish between statutes that are heavily impacted by arbitration and those that are not. Thus, cross-cutting statutory amendments cannot target regulation at areas where arbitration's costs exceed its benefits.

The more natural strategy, then, is to regulate arbitration in specific regulatory domains. Here, three basic strategies are available.

1. *Disable procedural contracting entirely*. Following the model of Dodd-Frank section 1414,[261] which bars mandatory arbitration provisions in mortgage loan contracts, a regulatory designer might mandate that claims be resolved in court according to procedures established by law. This approach avoids the need to assess particular contracts after the fact and provides a strong guaranty that procedural contracting does not interfere with the implementation of statutory policy. At the same time, it completely forecloses firms from devising more efficient forms of dispute resolution procedure by contract, a potential concern when, for example, courts are not equipped to handle a large volume of claims under a new statute.

2. *Design standards*. Following the model of the Brussels I regulation on jurisdiction and enforcement of judgments,[262] a regulatory designer might regulate specific contract terms such as those governing filing fees and the forum in which claims are litigated or arbitrated. This approach seeks to control terms that disrupt the enforcement environment that Congress sought to create in passing statutes with incentives for private civil litigation, while leaving space for parties to capture the benefits of designing dispute resolution procedure by contract. An obvious problem is that this approach invites a game of regulatory whack-a-mole: as specific terms are regulated, firms that have strong incentives to minimize their exposure to private statutory enforcement

transsubstantive," and that this trans-substantivity impedes "domain-specific judgments" about regulating arbitration), http://ssrn.com/abstract=2837535 [https://perma.cc/FUX6-BMM9].

261. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1414(a), 124 Stat. 1376, 2151 (2010) (codified at 12 U.S.C. § 1639c(e)(1) (2012)) ("No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.").

262. Council Regulation 44/2001, 2000 O.J. (L 12) 1 (EC). The Brussels regulation governs jurisdiction and enforcement of judgments in "civil and commercial matters whatever the nature of the court of tribunal." *Id.* ¶ 7. It establishes special jurisdictional rules for insurance, consumer, and employment contracts, which are designed to ensure that the "weaker party" has access to an accessible forum for resolving disputes. *Id.* ¶ 13. A consumer, for example, may bring a claim against a defendant in the state in which the defendant is domiciled or the consumer's home forum. A firm may bring proceedings *against* a consumer only in the consumer's country of domicile. *Id.* arts. 15–16. A separate EC directive, Council Directive 93/13/EEC, 1993 O.J. (L 95) 29 (EC), governs arbitration clauses in consumer contracts. Under it, pre-dispute arbitration clauses are presumptively unenforceable. *See* Justinas Jarusevicius, *Consumer Arbitration—Will The Two Different Worlds Across The Ocean Converge?*, KLUWER ARB. BLOG (Feb. 25, 2016), http://kluwerarbitrationblog.com/2016/02/25/consumer-arbitration-will-the-two-different-worlds-across-the-ocean-converge [https://perma.cc/5VZC-H3SM].

can be expected to add new, unregulated terms that have the same practical effects as regulated ones.

3. *Performance standards*. To address this possibility, a regulatory designer may also subject procedural contracts to a performance standard that ties a procedural contract's enforceability to its *effects* on the costs and returns from private enforcement.[263] A partial and relatively underdeveloped model is provided by 46 U.S.C. App. § 183c, a provision that formerly governed limitations on liability in maritime transactions.[264] That section prohibited contractual provisions that "lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for [personal injury or death], or the measure of damages therefor." Although the Supreme Court interpreted section 183c narrowly,[265] a provision modeled on it could be drafted to account for a broad range of effects on the economics of asserting statutory claims.

Following this approach, a statute might direct an agency to benchmark the costs and benefits of asserting claims in a presumptively adequate forum, such as the U.S. District Court for the Southern District of New York. To determine whether a given procedural contract is enforceable, a court or agency would compare the anticipated returns from asserting a statutory claim using the procedures defined by the contract with the returns from claiming in the presumptively adequate forum. If the returns differed by more than a specified amount—say, 50 percent—the procedural contract would not be enforced.

Whichever of these strategies lawmakers follow, any serious effort to regulate arbitration's effects on the implementation of a statute must address *all* forms of procedural contracting, and not simply arbitration. As explained above, a procedural contract's ability to disrupt the market for private enforcement of a statute does not depend on the particular procedural choices it makes. The economic effects of mandating arbitration can be equivalent to those of, for example, requiring litigation in an inconvenient forum or requiring parties to engage in mediation before filing suit.[266] To prevent regulatory whack-a-mole, regulation must extend to all forms of procedural contracting.

There are two further issues. The first involves the temporal perspective for regulation. Legal controls on procedural contracting can operate ex ante, through pre-market restrictions on regulated actors' use of procedural contracts, or ex post, through design and performance standards that are applied by a

263. *See generally* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015) (surveying use of performance-based standards in consumer law and advocating for greater use of such standards based on their adaptability to unforeseen changes in regulated activity).

264. Former section 183c has been superseded by 46 U.S.C. § 30509 (2012). *See* Pub. L. No. 109-304, § 6(c), 120 Stat. 1514 (2006).

265. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991).

266. *See supra* text accompanying notes 230–31.

court or agency.[267] The choice of temporal perspective will depend on lawmakers' assessment of the dangers that procedural contracting generally poses in an area and the need for case-by-case assessment of specific contracts.[268] Where there is strong evidence that procedural contracting has harmful effects without generating countervailing benefits, as Congress concluded in Dodd-Frank section 1414, limitations on market entry are an attractive regulatory strategy. Where such evidence does not exist, ex post regulation is more attractive.

Second, lawmakers in Congress must decide whether to establish standards for procedural contracts by law or delegate authority to regulate procedural contracting to an administrative agency.[269] This choice implicates familiar tradeoffs between legislative and administrative policymaking. Establishing standards by law avoids the risk of agency drift and slack but involves high information and decision costs for lawmakers who must research, draft, and negotiate specific controls on procedural contracting.[270] Legislating also disables lawmakers from "punting" the specifics of regulatory design to an agency[271] and significantly reduces the likelihood that regulation will be updated in response to new information and changes in regulated actors' behavior.[272]

Delegating authority to regulate procedural contracts to an administrative agency theoretically provides a solution to the problem of regulatory obsolescence and allows lawmakers to take advantage of information and

267. *Compare* Securities Act Rule, 17 C.F.R. § 230.461 (2016) (describing conditions in which Securities Exchange Commission will accelerate effective date of an issuer's registration statement during the initial offering process), *with* FINRA, RULE 12204(d) (2008), http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4110 [https://perma.cc/8QWU-FKQD] (specifying conditions in which a FINRA member may enforce an arbitration agreement against a member of a certified or putative class action).

268. *See generally* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 235–56 (6th ed. 2016); Charles D. Kolstad et al., *Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?*, 80 AM. ECON. REV. 888 (1990).

269. *Compare* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028, 124 Stat. 1376, 2003–04 (2010) (codified at 12 U.S.C. § 5518 (2012)) (authorizing Consumer Financial Protection Bureau to regulate consumer financial companies' use of mandatory arbitration provisions), *with id.* § 1414(a) (codified at 12 U.S.C. 1639c(e) (2012)) (prohibiting mandatory arbitration clauses in mortgage contracts). On the general tradeoffs between legislating and delegating, see generally DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATE PROCESS (1991); RANDALL B. RIPLEY & GRACE A. FRANKLIN, POLICY IMPLEMENTATION AND BUREAUCRACY (2d. ed. 1986); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003); Fiorina, *supra* note 26.

270. *See* EPSTEIN & O'HALLORAN, *supra* note 269, at 47–49.

271. *See generally* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION (1990).

272. As Terry Moe observes, "Whatever is formalized will tend to endure." Moe, *supra* note 175, at 240. For theoretical explanations of the stickiness of U.S. legislation, see sources cited *supra* note 162.

analysis that is not available to Congress.[273] But doing so prolongs the regulatory process and entrusts the design of regulation to an agency that may carry out the task imperfectly. Agencies may lack the technical competence and capacity to regulate procedural contracting effectively, lack the will to do so, or be susceptible to influence from actors who do not share Congress's goals.[274] If congressional civil rights backers were dissatisfied with Clarence Thomas's enforcement decisions as chair of the EEOC, they would be loath to give a modern Chairman Thomas authority over procedural contracts that determine the attractiveness of litigation to enforce the Civil Rights Act.[275]

III.
REGULATING ARBITRATION IN CONSUMER FINANCIAL CONTRACTS

The burden of this Article to this point has been to explain how arbitration affects the implementation of statutory policy through private civil litigation and to develop the policy case for controlling arbitration's effects on the enforcement of particular statutes. As the prior Parts explain, Supreme Court doctrine enforcing arbitration agreements and other procedural contracts is based upon contracting's potential to encourage procedural innovation, address pathologies of civil litigation in the United States, and prevent inter-governmental conflicts that arise from litigation that proceeds in multiple fora. But arbitration can also undermine incentive structures Congress deliberately created to encourage private litigants and their attorneys to prosecute violations of federal law. When arbitration has this effect, it interferes with the implementation of statutory policy—a phenomenon that this Article argues warrants the attention of congressional and agency policymakers.

Arbitration's effects on the implementation of statutory policy have played at most a minor role in existing efforts to regulate arbitration through federal legislation and agency action. To provide a concrete picture of how focusing on the implementation of statutory policy would affect federal policymaking, this Part considers the most important ongoing effort to regulate arbitration, the Consumer Financial Protection Bureau's proposed restriction of arbitral class action waivers under section 1028 of the Dodd-Frank Act. The Bureau's rulemaking represents the first sustained effort to regulate arbitration since the extent of the Supreme Court's preference for arbitration became clear in cases such as *AT&T Mobility LLC v. Concepcion*.[276] Although Donald Trump's surprise victory in the November 2016 presidential election threw the

273. *See generally* Deacon, *supra* note 260 (explaining the high level trade-offs implicated by agency regulation of arbitration and arguing for greater agency regulation under certain conditions).

274. *See* Freeman Engstrom, *Gatekeepers*, *supra* note 26, at 663–84.

275. Thanks to Steve Burbank for suggesting the example.

276. 563 U.S. 333 (2011). *See supra* text accompanying notes 79–83.

future of the CFPB's arbitration rule into doubt,[277] the Bureau's experience implementing section 1028 holds valuable lessons for other policymakers who undertake to regulate arbitration, regardless of whether the rule takes effect in its current form or is revised or abandoned. Part III.A describes section 1028's origins and the task that Congress assigned to the Bureau in it. The remainder of this Part describes the Bureau's efforts to implement section 1028 (Part III.B) and explains how focusing specifically on the implementation of statutory policy through civil litigation would impact the Bureau's widely watched rulemaking (Part III.C).

A. The Task for the CFPB

A signature legislative accomplishment of President Obama's first term, Dodd-Frank was enacted in response to the 2008 financial crisis and became law in July 2010.[278] The Act undertook far-reaching reforms of federal financial regulation. Among them, Dodd-Frank made the CFPB the primary agency responsible for the enforcement of federal consumer financial laws.[279] Dodd-Frank directs the CFPB "to implement and, where applicable, enforce" seventeen enumerated consumer-protection laws, including the Fair Credit Reporting Act, Truth in Lending Act, and several statutes governing open-ended loans (i.e., credit cards) and home mortgage lending.[280]

Dodd-Frank contains four provisions that restrict the use of mandatory arbitration or authorize an agency to regulate arbitration.[281] The most important

277. *See generally* David L. Noll, *The CFPB's Arbitration Rule: The Road Ahead*, *in* PROCEEDINGS OF THE NYU 69TH ANNUAL CONFERENCE ON LABOR: MEDIATION AND ARBITRATION OF EMPLOYMENT AND CONSUMER DISPUTES (forthcoming 2017), https://ssrn.com/abstract=2873866 [https://perma.cc/R9W9-5BQ6] (explaining that the greatest threats to the CFPB's arbitration rule come from the Trump administration's changes to the CFPB's leadership and amendments to the Dodd-Frank Act in the 115th Congress).

278. For overviews of Dodd-Frank's reforms, see, for example, DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (*UNINTENDED*) CONSEQUENCES 99–100 (2011); John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1029–36 (2012).

279. As Dodd-Frank's architects envisioned it, the CFPB would avoid the conflicts of interest that contributed to lax law enforcement in the years prior to the 2008 financial crisis. *See* Bar-Gill & Warren, *supra* note 113, at 90 & n.293 (describing conflicts between effective consumer protection and the Federal Reserve Board's policy of "maintaining the stability of the financial system" and the Office of the Office of the Comptroller of the Currency's mission of "[e]nsuring a Safe and Sound National Banking System for All Americans") (internal quotation marks omitted). The precise conflict that the CFPB addresses is bank regulators' tendency to prioritize bank profitability—and with it, the stability of the banking system—over consumer protection goals. *Id.*

280. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1002(12), 124 Stat. 1376, 1957 (2010) (codified at 12 U.S.C. § 5481(12) (2012)).

281. *See id.* § 1028 (authorizing Consumer Financial Protection Bureau to regulate consumer financial companies' use of mandatory pre-dispute arbitration); *id.* § 1057(d) (codified at 12 U.S.C. § 5518 (2012)) (barring arbitration of certain whistleblower claims); *id.* § 1414 (codified at 12 U.S.C. § 1639c (2012)) (barring use of arbitration clauses in residential mortgage contracts); *id.* § 921 (codified

of these, section 1028, directs the CFPB to "conduct a study of . . . the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."[282] If the Bureau finds that "conditions or limitations" on the use of arbitration are "in the public interest and for the protection of consumers," it is authorized to impose such conditions or limitations by regulation.[283]

Section 1028 originated in a Treasury Department whitepaper released at the end of the financial crisis in June 2009.[284] The whitepaper, which is thought to have been influenced by then-Professor Elizabeth Warren,[285] observed that "consumers do not know that they often waive their rights to trial when signing form contracts in taking out a loan, and that a private party dependent on large firms for their business will decide the case without offering the right to appeal or a public review of decisions."[286] It proposed that the CFPB, then known as the Consumer Financial Protection Agency, study the use of mandatory arbitration clauses and regulate such clauses if they did not promote "fair adjudication and effective redress."[287] As enacted, section 1028 took substantially the same form that the whitepaper proposed.[288]

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at 15 U.S.C. 78o (2012)) (authorizing Securities Exchange Commission to regulate broker-dealers' use of mandatory arbitration agreements).

282. *Id.* § 1028(a) (codified at 12 U.S.C. § 5518(a) (2012)).

283. *Id.* § 1028(b) (codified at 12 U.S.C. § 5518(b) (2012)).

284. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION (2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf [https://perma.cc/5KKU-TF9B].

285. *See* SKEEL, *supra* note 278, at 50–51.

286. FINANCIAL REGULATORY REFORM, *supra* note 284, at 62.

287. *Id.*

288. Section 1028 first appeared in the House as section 4208 of H.R. 4173, 111th Cong. (2010). The bill originally authorized the CFPB Director to "prohibit or impose conditions or limitations" on pre-dispute arbitration agreements upon finding that "such a prohibition or imposition of conditions or limitations are in the public interest and for the protection of consumers," and provided that any such prohibition, condition, or limitation would take effect 180 days after publication of the Bureau's regulation. During House negotiations on the bill, a new provision that preserved consumers' authority to enter into an arbitration agreement after a dispute arose was added to section 1028. *Id.* In the Senate, the bill containing section 1028 was referred to the Committee on Banking, Housing, and Urban Affairs, then chaired by Senator Christopher J. Dodd (D-CT). 156 CONG. REC. S49 (daily ed. Jan. 20, 2010). The Committee amended the House version of section 1028 to require the CFPB to conduct a study of pre-dispute arbitration agreements, specified that the Bureau's arbitration regulation must "be consistent with the study," and reported the bill with stylistic amendments. S. 3217, 111th Cong. (2010). The amended provision passed both the House and Senate after a conference committee reconciled other differences in the House and Senate versions of the Dodd-Frank Act. *See* 156 CONG. REC. S5932 (daily ed. July 15, 2010). President Obama signed the Act into law on July 21, 2010. 156 CONG. REC. D838 (2010).

B. The Proposed Arbitration Regulations

Deep uncertainty about the policy rationale for regulating arbitration has complicated the Bureau's implementation of section 1028. Guided only by the direction to regulate arbitration "in the public interest and for the protection of consumers,"[289] the Bureau and parties seeking to influence its rulemaking have fallen back on familiar arguments about the generic advantages and disadvantages of arbitration and class action litigation. The Bureau has largely overlooked arbitration's effects on the implementation of the specific statutes it administers.

The Bureau's section 1028 implementation formally began in April 2012 when it issued a "Request for Information" seeking comments "to help [it] identify the appropriate scope, methods, and sources of data" for its section 1028 study.[290] In response to the Request for Information, commentators suggested the Bureau study a bewildering array of topics. They included: "the savings, in both time and money, that arbitration agreements generate for state and federal courts"[291]; "the benefits and costs to consumers, businesses and society as a whole of individual arbitration as compared with both individual litigation and class action litigation"[292]; "whether class actions provide meaningful benefits to the individual class members as compared with individual arbitration in terms of outcomes, duration, costs, ease of access and consumer satisfaction"[293]; and, most ambitiously, the "impact of forced arbitration on the development, interpretation, and application of the rule of law."[294] Many of those subjects do not lend themselves to empirical study.[295] More importantly, neither the Request for Information nor the comments submitted in response to it suggested that the Bureau study arbitration's effects on specific statutes the Bureau administers.[296] That omission is striking because

289. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028(b), 124 Stat. 1376, 2004 (2010) (codified at 12 U.S.C. § 5518(b) (2012)).

290. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25,148, 25,149 (Apr. 27, 2012).

291. Letter from Dillon Shea, Regulatory Affairs Counsel, Nat'l Ass'n of Fed. Credit Unions, to Monica Jackson, Office of the Exec. Sec'y, Bureau of Consumer Fin. Prot. 2 (June 22, 2012) (on file with *California Law Review*).

292. Letter from Nessa Feddis, Vice President & Senior Counsel, Ctr. for Regulatory Compliance, Am. Bankers Ass'n et al., to Monica Jackson, Office of the Exec. Sec'y, Consumer Fin. Prot. Bureau 4 (June 22, 2012) (on file with *California Law Review*).

293. *Id.* at 3.

294. Letter from Lisa Gilbert, Acting Dir., Pub. Citizen, Cong. Watch Div. et al., to Monica Jackson, Office of the Exec. Sec'y, Consumer Fin. Prot. Bureau 12 (June 23, 2012) (on file with *California Law Review*).

295. For example, a leading contemporary theorist of the rule of the law describes it as "essentially contested concept." Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 137 (2004). In light of the multiple, conflicting meanings theorists ascribe to the rule of law, it is questionable whether the Bureau could develop a reliable empirical measure of it—much less one that accounted for the marginal effects of arbitration!

296. A number of commentators did suggest that the Bureau study arbitration's general tendency to suppress claiming under regulatory statutes. *See, e.g.*, Gilbert, *supra* note 294, at 11

as detailed below several of those statues seek rather obviously to catalyze private enforcement through carefully calibrated incentives for private civil litigation.[297]

The Bureau's sprawling section 1028 study—documented in two reports released in December 2013 and March 2015[298]—does not reflect any greater certainty about the policy rationale for regulating arbitration. The preliminary report presented findings on the incidence and content of mandatory arbitration clauses used in credit card, checking account, payday loan, and prepaid card contracts; the number of claims that consumers asserted against providers of these products in proceedings before the American Arbitration Association;[299] the basic characteristics of claims that consumers asserted in arbitration; and the number of claims asserted in small claims court, which arbitration clauses typically carve-out from the parties' obligation to arbitrate.[300]

The preliminary report's central finding was that while consumer financial companies regularly mandated arbitration, consumers rarely used arbitration to enforce legal rights. During the two-year period the Bureau studied, just over 50 percent of outstanding credit card loans were covered by a cardholder agreement that mandated arbitration[301]—a percentage artificially suppressed by a settlement in which four credit card issuers that previously required arbitration ceased doing so to resolve antitrust claims.[302] Consumers initiated an average of only 415 arbitrations per year, 47 percent of which were

("Does forcing consumers to arbitrate . . . claims individually, provide a way for financial services companies to avoid compensating consumers for injuries and allow them to evade compliance with state and federal statutes?"); Letter from Eric M. Gutiérrez, Legislative & Pub. Policy Dir., Nat'l Emp't Lawyers Ass'n, to Monica Jackson, Office of the Exec. Sec'y, Consumer Fin. Prot. Bureau 2 (June 16, 2012) (citing David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012), a law review article that does not present original empirical findings, for the proposition that "forced arbitration has led to the suppression of legitimate claims") (on file with *California Law Review*).

297. *See infra* text accompanying notes 327–77.

298. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE (2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [https://perma.cc/SSA2-VTKD] [hereinafter CFPB PRELIMINARY REPORT]; CFPB FINAL REPORT, *supra* note 99.

299. The Bureau chose to study AAA arbitrations because it could not obtain case-level data from JAMS, the second-largest provider of arbitration services in the United States, and "the AAA was and remains the largest administrator of consumer arbitration in the United States." CFPB PRELIMINARY REPORT, *supra* note 298, at 59.

300. *See id.* at 19–28, 62–70, 124–28.

301. *Id.* at 24.

302. *See* Final Judgment and Order of Dismissal, Ross v. Bank of America, N.A., (USA), No. 05-CV-7116 (WHP), 2006 WL 2685082 (S.D.N.Y. July 22, 2010). The *Ross* settlement applied to Bank of America, JPMorgan Chase, Capital One, and HSBC. *Id.* If those four credit card issuers had required arbitration during the CFPB's study period, the percentage of outstanding loans subject to mandatory arbitration would have risen to greater than 93 percent. *See* CFPB PRELIMINARY REPORT, *supra* note 298, at 22–23.

filed *pro se*.[303] Thus, the Bureau found, a $564 billion market generated slightly more than 200 claims with the AAA in which plaintiffs were represented by counsel per year.[304]

These findings revealed the extent to which arbitration suppressed the assertion of claims within the consumer financial services space, but the Bureau did not report findings that linked that development to enforcement of the specific statutes it administers. The Bureau did not attempt to articulate the nature or extent of enforcement contemplated by the statutes it administers. It did not attempt to measure the market for private enforcement or the extent of compliance with those statutes in the real world—the ultimate measure of statutory implementation.[305] Although the Bureau captured data on the nature of the claims that plaintiffs asserted in arbitration,[306] it did not disaggregate its findings by the statutes plaintiffs sought to enforce.[307]

The Bureau's final report, issued in March 2015, echoed the preliminary report's findings on the incidence of arbitration clauses in consumer contracts and the number of claims asserted within company-designed arbitration systems.[308] The final report expanded the initial report's coverage to include private student loans and auto loans in addition to the four product markets covered in the initial study (credit cards, checking accounts, etc.).[309] In the final tally, an average of 616 individual AAA cases were filed per year, and consumers were represented by counsel in slightly over 60 percent of AAA arbitrations.[310] While the final report included some additional data on the claims filed in arbitration, such as the last discernable amount the plaintiff demanded, the Bureau again did not report the number of claims asserted under the specific statutes it administers.

The aspect of the report that sheds the most light on arbitration's effects on the implementation of statutes the Bureau administers presents summary data on class settlements with consumer financial companies. Those settlements resulted from class litigation in public court and would not have occurred if the defendant financial company had successfully moved to compel arbitration under an arbitration clause that contained a class action waiver. Thus, the settlements give a sense of what is lost in moving from a world where

303. *Id.* at 13.

304. *See id.* at 13–14, 122 n.310.

305. For more on the difficulties of measuring legal compliance and the challenges those difficulties pose for measuring the implementation of regulatory policy, see Christine Parker & Vibeke Nielsen, *The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism*, 5 ANN. REV. L. & SOC. SCI. 45 (2009); David L. Noll, *Contract Procedure, Regulatory Breakdown* (unpublished manuscript on file with author).

306. CFPB PRELIMINARY REPORT, *supra* note 298, at 141–42.

307. *See id.*

308. CFPB FINAL REPORT, *supra* note 99, at 9–10.

309. *Id.* at 7.

310. *Id.* at 11–12.

public court class litigation is available to one in which the availability of public court class litigation and settlement is controlled by the defendant.

Based on its review of 419 "consumer financial class action settlements finalized in federal district courts from 2008 through 2012," the Bureau found that class settlements generated $2 billion in monetary relief, $1.1 billion of which was earmarked specifically for class members.[311] In contrast to the findings on claims filed in arbitration, the Bureau disaggregated class settlements based on the statutes plaintiffs sought to enforce.[312] The most popular by far was the Fair Debt Collection Procedures Act.[313]

In May 2016 the Bureau published a notice of proposed rulemaking that outlined the regulations that it intended to issue under section 1028.[314] The proposed rule applies broadly to companies that provide consumer financial services and imposes two new conditions on the use of arbitration. First, the rule "prohibit[s] providers from using a pre-dispute arbitration agreement to block consumer class actions in court and would require providers to insert language into their arbitration agreements reflecting this limitation."[315] Second, the proposed rule "require[s] providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral proceedings to the Bureau."[316] The rule's restrictions on arbitral class action waivers, referred to here as the "proposed class action rule," has generated the most controversy and is most relevant to the subject of this Article. The remainder of this Part accordingly focuses on those restrictions.

The Bureau explained in the proposed rule that its decision to regulate arbitral class action waivers rested on five findings drawn from the arbitration study. Those findings are:

1. "The evidence is inconclusive on whether individual arbitration conducted during the Study period is superior or inferior to individual litigation in terms of remediating consumer harm."
2. "[I]ndividual dispute resolution is insufficient as the sole mechanism available to consumers to enforce contracts and the laws applicable to consumer financial products and services."
3. "[C]lass actions provide a more effective means of securing relief for large numbers of consumers affected by common legally questionable practices and for changing companies' potentially harmful behaviors."

311. *Id.* at 4.
312. *Compare id.* at 19–28, *with id.* at 13.
313. *Id.*
314. Arbitration Agreements, *supra* note 114.
315. *Id.* at 32,830.
316. *Id.*

4. "[A]rbitration agreements block many class action claims that are filed and discourage the filing of others."
5. "[P]ublic enforcement does not obviate the need for a private class action mechanism."[317]

The Bureau argued that the proposed class action rule restored "an important means of relief and accountability"[318] for consumers harmed by violations of the law, leveled the "playing field between "providers that concentrate on compliance and providers that choose to adopt arbitration agreements to insulate themselves from being held to account,"[319] and would generally "improve the functioning of consumer financial markets."[320] Accordingly, the Bureau concluded that the rule is in the public interest and for the protection of consumers.

C. From "Optimal" Enforcement to Congressionally Mandated Enforcement

The CFPB's proposed class action rule is premised on the assumption that the task for the agency is to identify the form (or forms) of dispute resolution that is optimal in a loosely economic sense. The Bureau's explanation of the rule assumes there is an optimal level of enforcement across the industries that the Bureau regulates and the statutes the Bureau administers. The Bureau finds, based on its "knowledge and expertise," that the combination of individual dispute resolution and public enforcement results in enforcement that is below the "economically efficient levels."[321] Of the regulatory interventions available to the Bureau, barring the use of arbitral class action waivers to block class actions filed in court is the "most effective" means of bringing enforcement up to economically efficient levels.[322]

Another contrasting way of understanding Congress's direction to the Bureau in section 1028—one this Article advocates—posits that in addition to considering the generic desirability of litigation and arbitration as means of resolving disputes, the agency is also responsible for ensuring that arbitration and related forms of procedural contracting do not undermine implementation of statutes that are enforced through private civil litigation.[323] On this approach, the crucial question is whether consumer financial companies' procedural

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317. *Id.* at 32,855.
318. *Id.* at 32,861.
319. *Id.* at 32,865.
320. *Id.*
321. *Id.* at 32,899.
322. *See id.* at 32,899 n.544.
323. The CFPB's authority to regulate forms of procedural contracting other than arbitration derives from section 1022 of the Dodd-Frank Act, 12 U.S.C. § 5512 (2012). The specific authorization to regulate arbitration in section 1028 was necessitated by Supreme Court cases stating that the Federal Arbitration Act requires an arbitration agreement to be enforced absent a "contrary congressional command." CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012). There is no statutory background rule equivalent to the FAA that dictates enforcement of non-arbitral procedural contracts.

contracting reduces or eliminates incentives for attorneys to represent clients asserting claims under regulatory statutes that the CFPB administers. The yardstick is not economic efficiency, but congressional expectations about private enforcement that are reflected in law.

From this perspective, the proposed rule is a step in the right direction. As the rule describes, consumers face severe collective action problems in enforcing statutory and common law rights in a procedural environment designed by firms with strong incentives to discourage the assertion of those rights.[324] Furthermore, although certain federal consumer protection laws pre-dated the rise of modern class-action litigation,[325] many were enacted on the assumption that class litigation would be available to enforce statutory rights.[326] All other things being equal, the requirement that covered providers be subject to class litigation under generally applicable procedural rules established by the Supreme Court and state legislatures tends to ensure that private enforcement will occur in the manner Congress anticipated when enacting consumer financial protection statutes with incentives for private civil litigation. In this sense, the bar on arbitral class action waivers represents a reasonable default rule governing private enforcement of CFPB-administered statutes.

Nevertheless, the proposed rule overlooks important differences in the type of enforcement contemplated by those statutes. Although some statutes that the CFPB administers contemplate robust private enforcement, others contemplate weak private enforcement or no private enforcement at all. The rule does not distinguish among statutes based on the type of private enforcement they contemplate. This results in regulation that, judged from the standpoint of Congress's expectations about private enforcement, is simultaneously too weak and too strong: where a statute contemplates robust private enforcement, a mere bar on arbitral class action waivers is inadequate to ensure that such enforcement occurs; on the other hand, where a statute contemplates weak private enforcement, the bar on class action waivers may not be needed to ensure that the statute is enforced in the manner that Congress contemplated. To illustrate, this Section considers three statutes administered by the CFPB—the Fair Credit Reporting Act (FCRA), Truth in Lending Act (TILA), and Fair Credit Billing Act (FCBA)—that together show the spectrum

324. Arbitration Agreements, *supra* note 114, at 32,921.

325. *See infra* text accompanying notes 364–67 (discussing the Truth in Lending Act).

326. Much of the framework of federal consumer-protection law was first enacted in the 1960s and 1970s. *See, e.g.*, Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x (2012)); Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. §§ 1692–1692p). In 1979, the Supreme Court held, following courts of appeals decisions to the same effect, that "[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the Rules established for that purpose [viz., the Federal Rules of Civil Procedure], class relief is appropriate in civil actions brought in federal court. . . ." Califano v. Yamasaki, 442 U.S. 682, 700 (1979).

of approaches that Congress has taken toward private enforcement of federal consumer protection law.

1. Fair Credit Reporting Act

Toward the pro-private-enforcement end of the spectrum lies the FCRA.[327] Originally enacted in 1970, the FCRA regulates credit reporting agencies and the process through which consumer credit reports are compiled, disseminated, and used. Among other measures, the Act gives consumers the right to access credit reports and credit scores,[328] makes it unlawful for any person to submit false information for inclusion in a credit report,[329] and requires credit bureaus to correct or delete inaccurate information.[330]

Two-and-a-half decades after it was enacted, Congress overhauled the FCRA's enforcement framework in the Consumer Credit Reporting Reform Act of 1996.[331] Under the original FCRA, consumers were limited to recovering actual damages caused by violations—a design choice that lawmakers came to believe led to inadequate enforcement of the act.[332] The key entrepreneurs behind the 1996 Act were Senators Alan Dixon (D-IL) and Richard H. Bryan (D-NV). In the 102nd Congress, Senators Dixon and Bryan served, respectively, as chair and member of the Senate subcommittee on consumer and regulatory affairs.[333]

In October 1991 the subcommittee held a hearing on the FCRA to hear testimony from "consumer groups and others who argue that the current law is ineffective."[334] Consumers, local government officials, and an attorney from the Federal Trade Commission (FTC) testified that, with the advent of computerized credit reporting, credit reports prepared by national credit bureaus had become filled with errors, and that it was difficult or impossible for consumers to correct mistakes. Senator John Chaffee (R-RI) cited press

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

328. 15 U.S.C. § 1681g (2012).

329. *Id.* § 1681s-2.

330. *Id.* § 1681i.

331. Pub. L. No. 104-208, §§ 2401–2422, 110 Stat. 3009-426 (1996) (amending scattered sections of 15 U.S.C.).

332. *See infra* text accompanying notes 341–42.

333. The 102d Congress ran from January 3, 1991 to January 3, 1993. Statistical Abstract of the United States 1994, at 281 (114th ed. 1994). On Bryan's role, see Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 139–41 (2009).

334. This was the literal, published title of the hearing. *See Consumer Groups and Others Who Argue that the Current Law Is Ineffective with Problems of Inaccuracy, Consumer Privacy, and Not Keeping Pace with Technological Developments in the Industry: Hearing Before the Subcomm. on Consumer and Regulatory Affairs, S. Comm. on Banking, Hous., and Urban Affairs*, 102d Cong. (1991) [hereinafter *Consumer Groups and Others*]. *See also Fair Credit Reporting Act: Hearing Before the Subcomm. on Consumer Affairs & Coinage of the H. Comm. on Banking, Fin. & Urban Affairs*, 102d Cong. (1991) (hearing eliciting industry views).

accounts reporting that "one out of every five credit reports contain [sic] 'major' mistakes."[335]

These mistakes had serious repercussions for consumers. A Department of Defense speechwriter, Eugene N. Wolfe, submitted written testimony that he had been denied credit and forced to take out a high-interest car loan because credit bureaus' software confused him with another Eugene Wolfe.[336] An assistant professor of medicine at Georgetown University complained that he was prevented from purchasing a house after a bankruptcy erroneously appeared on his credit record and Equifax refused to correct the error.[337]

A central focus of the hearing was the inadequate remedies available to consumers whose credit reports contained errors. The town clerk of Norwich, Vermont, whose property tax records were misreported in the credit bureaus' files, testified:

> In my office, if a lawyer finds a mistake and points it out to me . . . I am expected to fix it. These credit reporting industry firms simply do not seem to have the same accountability when they make mistakes or errors. . . . Perhaps a fine might encourage some accountability, or a little more accuracy, and maybe this cost could be used to help defray the cost of lower credit reports.[338]

US PIRG, a consumer advocacy group, complained in written testimony that "[t]he statute's standards for liability," including the requirement of proving actual damages, were "too high" to provide a workable remedy to consumers.[339] The group advised:

> The most effective way to ensure compliance with the FCRA is to allow consumers a minimum damage recovery of $1,000. A minimum damage provision has been a very effective means to promote compliance with consumer protection laws by encouraging private attorneys general to enforce such laws.[340]

In a revealing exchange, Senator Dixon pressed FTC attorney Kathleen Buffon to describe current administrative enforcement of the FCRA. Buffon reported that the FTC devoted "20 professional people, maximum" to enforcement of *all* federal credit laws, and that the Commission brought an average of two enforcement actions per year.[341] Senator Dixon was incredulous that an industry whose errors affected an estimated three million consumers per year was subject to so little public oversight. Buffon responded it was not the role of the agency to engage in case-by-case retail enforcement: "The amount

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335. *Consumer Groups and Others*, *supra* note 334 at 6.
336. *Id.* at 151–54.
337. *Id.* at 5.
338. *Id.* at 131.
339. *Id.*
340. *Id.* at 132 (quoting Letter of Joanne Faulkner to Rep. Rick Lehman 89 (Oct. 26, 1989)).
341. *Id.* at 23–24.

of time that would be involved is simply phenomenal."[342] Pressed to identify a workable mechanism for ensuring that credit bureaus honored their statutory obligations, Buffon stated: "I wish I had a magic solution . . . [I]f Mr. Wolfe has sufficient rights and the law has sufficient teeth, I think the credit bureaus and the creditors will pay attention."[343] Dixon mused: "You would rather do it that way and maybe provide some kind of damages or something if there's a continuation of an erroneous course? . . . Of course, I guess we can create something that will create more legal mischief in the country with everybody suing and trying to get money damages and putting a lot of additional lawyers to work."[344]

On the same day as the October 1991 hearing, Senator Bryan introduced a bill to modernize the FCRA.[345] Five years later,[346] the Bryan bill eventually was enacted, with amendments, as the Consumer Credit Reporting Act of 1996.[347] In final form, the 1996 Act provided statutory and punitive damages for willful FCRA violations,[348] created a cause of action through which credit bureaus could prosecute perpetrators of identity theft,[349] and included a new attorneys' fees provision that authorized courts to award fees to successful plaintiffs and directed courts to award attorneys' fees against parties that filed pleadings "in bad faith or for purposes of harassment."[350] In addition to these incentives for private enforcement, the 1996 Act authorized the FTC, for the first time, to bring civil actions against companies that engaged in systematic violations of the FCRA.[351]

The text of these provisions and context in which they were enacted suggest that Congress in the 1996 Act sought to encourage robust private enforcement of the FCRA.[352] The combination of easily aggregated substantive rights, statutory and punitive damages, and an attorneys' fee-shifting provision

342. *Id.* at 22.

343. *Id.* at 28.

344. *Id.* at 27–28.

345. S. 1853, 102d Cong. (1991).

346. *See* Scheuerman, *supra* note 333, at 139–40.

347. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2410, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 15 U.S.C.).

348. 15 U.S.C. § 1681n(a)(1)–(2) (2012).

349. *Id.* § 1681n(b) ("Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.").

350. *Id.* § 1681n(c); *see also id.* § 1681n(a)(3) (authorizing courts to award the costs of the action together with reasonable attorneys' fees in a successful action to enforce liability under this section).

351. *Id.* § 1681s(a)(2). *See generally* Peter P. Swire, *The Consumer Credit Reporting Reform Act and the Future of Electronic Commerce Law*, 1 ELECTRONIC BANKING L. & COM. RPT. 4 (1996) (summarizing background to 1996 Act and changes that it made).

352. *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 953 (7th Cir. 2006) (observing that violations of the FCRA result in high potential liability because of "the legislative decision to authorize awards as high as $1,000 per person" per violation in the 1996 Act).

in a statute that imposes no ceiling on the aggregate damages that may be awarded against a defendant is one of the most potent packages of incentives for private enforcement available to Congress. Indeed, commentators have argued that Congress could not possibly have intended the remedial scheme created by the 1996 Act because the availability of statutory damages in cases of systematic wrongdoing exposes defendants to eye-popping liability.[353] Whether or not these commentators are correct—and courts have tended to reject the argument that the FCRA does not mean what it says[354]—it is clear that the 1996 Act seeks to encourage very strong private enforcement.

The CFPB's proposed rule takes a step toward ensuring that such enforcement occurs. In requiring that consumer financial companies be amenable to class litigation, the rule prevents firms from discouraging FCRA enforcement by restricting attorneys' ability to bundle claims into an aggregate that is worth litigating. But there is irony in the proposed rule's attention to *class* litigation, given Congress's choice in the 1996 Act to provided minimum statutory damages for violations of the FCRA. The standard rationale for including a minimum damages provision in a statute is to enable *individual* litigation that would not be possible under ordinary procedural rules, yet the proposed rule does nothing to ensure the viability of such actions.

Even focusing on aggregate litigation, the rule's protections for private enforcement are incomplete. A firm that expects to be a defendant in actions asserting FCRA violations could reduce the likelihood that a court will grant class certification by, say, obligating parties to participate in mediation before filing suit.[355] By prohibiting non-class forms of aggregation in arbitration and

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353. Scheuerman, *supra* note 333, at 111 ("Statutory Damages + Class Action = Unintended Consequences").

354. *See, e.g.*, *Murray*, 434 F.3d at 953–54 (reversing district court's denial of motion to certify FCRA class action because defendant "would face a potential liability in the billions of dollars for purely technical violations of the FCRA" and stating that "[w]hile a statute remains on the books . . . it must be enforced rather than subverted"); Chakejian v. Equifax Info. Servs. LLC, 256 F.R.D. 492, 502 (E.D. Pa. 2009) (quoting *Murray*, 434 F.3d at 954) ("[D]amages under the FCRA were instituted by Congress, and therefore, while the statute remained on the books, 'it must be enforced rather than subverted.'"). *But see* Vasquez-Torres v. McGrath's Publick Fish House, Inc., No. CV 07-1332 AHM (CWx), 2007 WL 4812289, at *7 (C.D. Cal. Oct. 12, 2007) (declining to certify FCRA class action "because the potential damages are wildly disproportionate to the harm and would ruin [the defendant]").

355. This would produce differences among claimants that destroyed the commonality needed for class certification under Fed. R. Civ. P. 23. For a valuable theoretical account of the ways in which corporations can use contracting to undermine the commonality necessary to class certification, see Shay Lavie, *The Malleability of Collective Litigation*, 88 NOTRE DAME L. REV. 697 (2012). Professor Lavie quotes a defense attorney's advice to potential class action defendants:

> Remember, class actions thrive on similarity. . . . If you can make changes that introduce significant variability, you can limit your risk of class actions. So look for ways to modify the material terms of the contract. . . . Change the wording. Move paragraphs around. There is almost never just one way to say something. . . . [M]ix it up a little. If you do this correctly, you can limit class action liability . . . .

Id. at 718 (quoting ROB HERRINGTON, VERDICT FOR THE DEFENSE: FIGHTING JACKPOT JUSTICE WITH FIREWALL DEFENSE STRATEGIES 113–14 (2011)).

litigation, a firm could prevent attorneys from filing large cases that are not amenable to class certification. By selecting a forum that does not recognize class actions as the exclusive forum for litigation,[356] the drafter of a credit agreement can effectively bar class action litigation without violating the Bureau's proposed rule.[357] A drafter might even require litigation of federal claims in state or foreign courts, a choice that *Atlantic Marine* seemingly approves.[358]

These shortcomings illustrate the need for regulatory designers to regulate all forms of procedural contracting if they wish to avoid a game of regulatory whack-a-mole. They also point to the need for stronger controls on procedural contracting in areas where Congress has sought to catalyze robust private enforcement. Requiring claims to be litigated in public court or subjecting procedural contracts to the type of performance standard described in Part II are the most obvious means of doing so.[359]

2. *Truth in Lending Act*

Toward the middle of the spectrum of congressional approaches to private enforcement is TILA.[360] First enacted in 1968, TILA regulates the extension of consumer credit through credit cards and mortgage loans. The statute works primarily through disclosure requirements. For example, section 1631 requires credit card issuers to disclose a card's annual percentage rate and finance charges in a form prescribed by the CFPB.[361]

TILA is divided into four parts that govern "credit transactions," "credit advertising and limits on credit fees," "credit billing," and "consumer leases." Part B contains a private right of action, 15 U.S.C. § 1640, which provides statutory damages for violations of the Act. The right of action applies to "any creditor who fails to comply with any requirement imposed under this part,"[362] and is cross-referenced in other parts of the statute.[363]

When TILA was first enacted, the statute did not address the possibility that litigants would seek large damage awards by aggregating claims for

356. *See* Casey v. Merck & Co., 722 S.E.2d 842, 846 (Va. 2012) ("Virginia jurisprudence does not recognize class actions.").

357. In the 1990s, America Online used this strategy to combat class litigation. *See* Koch v. Am. Online, Inc., 139 F. Supp. 2d 690, 691 (D. Md. 2000).

358. *See supra* notes 58–62 and accompanying text.

359. *See supra* text accompanying note 261.

360. Pub. L. No. 90-321, tit. 1, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1665e).

361. *See* 15 U.S.C. § 1631 (2012). For trenchant criticism of this approach, see generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

362. 15 U.S.C. § 1640(a) (2012).

363. *See, e.g.*, 15 U.S.C. § 1667d(a) (2012) (governing violations of the Consumer Leasing Act of 1976).

statutory damages in a Rule 23 class action.[364] In a 1972 case, *Ratner v. Chemical Bank New York Trust Co.*, District Judge Marvin Frankel denied a motion for certification of a TILA claim based on the fear that certification would result in "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation."[365] Although some courts disagreed with this analysis, others that considered motions for certification of TILA claims followed course.[366] In 1974, 1976, and 1980, Congress amended TILA to address the question of damages that could be awarded in class actions.[367]

As amended, section 1640 creates a reticulated scheme of penalties under which the extent of a defendant's liability turns on the substantive statutory provision the defendant violated, the type of action a plaintiff files (individual vs. class action), and the court's assessment of the seriousness of the violation. Section 1640 generally provides that in individual actions, the creditor is liable to the consumer for actual damages, attorneys' fees and costs, and statutory damages of $200 to $5,000.[368] It establishes a separate damages scheme for class actions in which statutory damages are not available and total damages are capped at the lesser of $1 million or 1 percent of the defendant's net worth.[369] As expressed in a 1976 report of the Senate Committee on Banking, Housing and Urban Affairs, the objective of this scheme is to establish a "workable structure for private enforcement," one that provides "a significant deterrent," while "limit[ing] the exposure of creditors to vast judgments whose size would depend on the number of members that happened to fall within the class."[370] Congress in other words sought to encourage Goldilocks private enforcement: not too strong, not too weak, but just right.

Ensuring that such enforcement occurs is more challenging than ensuring vigorous, FCRA-style enforcement. In practical terms, Congress sought to ensure the viability of individual actions and to create modest incentives for class action enforcement, without exposing defendants to crushing liability or

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364. *See* Joseph A. Dworetzky, Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418, 423 (1977) ("The legislative history of the TIL Act makes no mention of the class action; apparently, the drafters simply failed to consider it.").

365. 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

366. *See* CHARLES ALAN WRIGHT ET AL., 7B FEDERAL PRACTICE & PROCEDURE § 1804 (3d ed. 2016).

367. *See* Pub. L. No. 93-495, § 408(a), 88 Stat. 1518 (1974); Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4, 90 Stat. 257, 260–61; Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 615(a)(1), 94 Stat. 168, 180 (1980).

368. 15 U.S.C. § 1640(a)(1)(A), (a)(2) (2012).

369. *Id.* § 1640(a)(1)(b).

370. S. REP. NO. 94-590, at 8 (1976).

encouraging the massive plaintiff-side investments characteristic of securities litigation and mass torts.[371]

As with the FCRA, the CFPB's proposed rule does nothing to ensure the viability of individual TILA claims in arbitration. That decision reflects the Bureau's finding across the statues it administers that it is uncertain whether individual arbitration or individual litigation is a superior mechanism for remediating consumer harm.[372] Nonetheless, the subject warrants further study in light of anecdotal and systematic evidence of arbitration's effects on the returns from individual claiming.[373]

With respect to collective enforcement, the rule again does not anticipate contractual provisions other than arbitral class action waivers that can affect the returns from private statutory enforcement. As a result, the rule practically invites circumvention through novel forms of procedural contracting.

In light of Congress's attempt to provide "just enough" private enforcement, the best regulatory strategy for ensuring that the TILA is enforced in the manner contemplated by law is probably a performance standard that ties a procedural contract's enforceability to anticipated returns from statutory enforcement. Such a standard stops short of mandating that claims be resolved in a particular procedural system and gives contract drafters considerable discretion to adapt dispute resolution procedure to their circumstances. At the same time, the proposed standard recognizes that seemingly minor contractual changes can influence the returns from private statutory enforcement, and regulates those effects to ensure that they do not undermine implementation of the statute through private civil litigation.

3. Fair Credit Billing Act

At the other end of the private enforcement spectrum is the Fair Credit Billing Act.[374] The FCBA, enacted in 1974, seeks to ensure that credit card companies address errors in consumers' bills. To that end, the Act establishes a procedure through which consumers can report billing errors to credit card companies and sets out a creditor's responsibilities when notified of an error.[375]

371. *See generally* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 52–85 (2015) (describing the origins and development of modern plaintiff-side class action law firms).

372. *See supra* text accompanying note 317.

373. For anecdotes, see Silver-Greenberg & Corkery, *Privatization*, *supra* note 2, at A1. For systematic analysis of arbitration's effects on individual claiming focused on employment claims, see, for example, Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (2003).

374. Pub. L. No. 93-495, 88 Stat. 1517 (1974) (codified as amended at 15 U.S.C. §§ 1666–1666j).

375. *See* 15 U.S.C. § 1666(a) (2012).

The FCBA contains none of the statutory incentives for private civil litigation that Congress ordinarily employs to catalyze private statutory enforcement. The Act does not expressly contemplate aggregation. It does not provide for attorneys' fees, statutory damages, or enhanced damages. Instead, section 1666(e) provides that a creditor who fails to comply with the requirements of the act "*forfeits* any right to collect from the obligor" the amount in dispute and then goes on to limit the amount of the forfeiture to $50.[376] This remedy only makes sense within the context of small-stakes, one-on-litigation. A billing error might affect many individuals, but the fact that the creditor forfeits the amount in dispute rather than paying it in damages would likely preclude a class representative from recovering attorneys' fees under the common fund doctrine.[377] Congress may well have expected that section 1666(e) would be applied without consumers needing to resort to adversarial litigation.

With respect to the FCBA, the Bureau's proposed rule appears to go further in the direction of encouraging private enforcement than Congress ever contemplated. The statute creates a right to be enforced in one-on-one proceedings. Under the proposed rule, consumer finance companies are barred from restricting the availability of class actions. Considerations of administrative convenience justify the Bureau's across-the-board approach in its initial rulemaking. Nevertheless, the example shows that attention to the kind and extent of private enforcement contemplated by law is not a one-way ratchet that points inexorably to more restrictive regulation.

CONCLUSION

Long before the rise of Twitter, Rep. John Dingell (D-MI) famously quipped: "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time."[378] As Supreme Court doctrine has hardened around the position that arbitration agreements and other procedural contracts must be enforced "according to their terms,"[379] congressional and agency policymakers for the first time in a generation are considering the procedures through which civil claims are adjudicated. In doing so, policymakers do not work by designing dispute resolution systems from the ground up, but by regulating procedural choices made by contract. Because those choices can dramatically affect substantive regulatory policy, regulating them has become an integral aspect of the general project of federal regulation.

376. *Id.* § 1666(e) (emphasis added).

377. *See* 5 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS 190–91 (5th ed. 2015) ("[A]ctivities that create monetary payments outside of a court's jurisdiction . . . generally do not trigger a right to a common fund fee award.").

378. *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983).

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

This Article has explained how arbitration affects the implementation of statutes that are enforced through private civil litigation, and the policy case for regulating these effects through legislation and administrative action attuned to arbitration's effects on the implementation of specific statutes. In hundreds of statutes, Congress has created financial incentives for civil litigation to encourage private litigants and their attorneys to enforce the law. Whether these statutes succeed in accomplishing their objectives depends crucially on incentives for prosecuting statutory claims, but arbitration can disrupt or completely undermine incentive structures Congress created to encourage private enforcement. By focusing on these dynamics, policymakers address a serious social cost from contracting over dispute resolution procedure. They also help to preserve an enforcement mechanism that is central to the modern regulatory state.