

## MASS ARBITRATION AND DEMOCRATIC LEGITIMACY

DAVID HORTON\*

BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW. By *Margaret Jane Radin*. Princeton University Press. 2013. Pp. 339. \$35.00.

*This Article reviews Margaret Jane Radin's dazzling new book, Boilerplate. Radin makes two central claims about the widespread use of adhesion contracts. First, she argues that the heavy saturation of fine print causes "normative degradation," the erosion of contract law's bedrock requirement of consent. Second, and more provocatively, she contends that the lockstep use of standard forms permits private actors to override the public laws and thus causes "democratic degradation." This Article uses developments in consumer and employment arbitration as a proving ground for Radin's democratic degradation thesis. Spurred on by the United States Supreme Court's interpretation of the Federal Arbitration Act (FAA), companies use their dominion over adhesive provisions to alter procedural rules on a massive scale. The issue of whether these terms are consensual is hotly contested. Yet no matter one's view of fine print generally, the Court's separability doctrine—a legal fiction that allows arbitrators to decide the very question of whether an arbitration clause is valid—drives a wedge between arbitration and contractual consent. Finally, after years of denying that arbitration affects substantive rights, in cases such as AT&T Mobility LLC v. Concepcion and American Express Co. v. Italian Colors Restaurant, the Court is shunting plaintiffs to an extrajudicial forum even when there is no dispute that doing so will deprive them of any remedy. Thus, through the expedient of printed or electronic words, corporations do precisely what Radin says: they "delete rights that are granted through democratic processes." (p. 16).*

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\* Acting Professor, University of California, Davis, School of Law (King Hall). Thanks to Margaret Jane Radin and Peter Linzer for helpful comments.

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## INTRODUCTION

In 1902, in *The Kensington*,<sup>1</sup> the United States Supreme Court invalidated a liability disclaimer on a steamship ticket.<sup>2</sup> Although the defendant had destroyed the passengers' luggage, it argued that the "small but legible type" on the ticket limited its legal responsibility to 250 francs.<sup>3</sup> The Court disagreed. For one, the Court noted that the defendant did not call this "exceptional stipulation[ ]" to the plaintiffs' attention.<sup>4</sup> Moreover, the Court reasoned that the plaintiffs' lack of consent was apparent from the provision itself, which was so "unjust" that it would "be deemed as wanting in the element of voluntary assent."<sup>5</sup> Three years later, the same Justices would constitutionalize freedom of contract in *Lochner v. New York*<sup>6</sup> when they held that a state law capping bakers' work hours violated the doctrine of economic substantive due process.<sup>7</sup> However, the laissez-faire zealotry that animated *Lochner* did not extend to self-serving, pre-printed forms. In fact, the Court in *The Kensington* took pains to avoid calling the text on the ticket a "contract."<sup>8</sup>

This chasm between standard forms and bargained-for deals persisted as the decades passed. By the middle of the

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1. 183 U.S. 263 (1902).  
2. *Id.* at 268–69.  
3. *Id.* at 265.  
4. *Id.*  
5. *Id.* at 268.  
6. 198 U.S. 45 (1905).  
7. *Id.* at 56–57.  
8. *The Kensington*, 183 U.S. at 267, 277.

twentieth century, there was burgeoning consensus that adhesion “contract” was an oxymoron: non-negotiable fine print did not reflect the parties’ agreement in any meaningful sense.<sup>9</sup> In an influential article, Arthur Allen Leff argued that the paperwork spawned by consumer transactions was as much a “thing” as the underlying goods, and thus deserved the same pervasive regulation.<sup>10</sup> Other scholars and judges saw a deeper problem. In their eyes, mass contracting, which bound numerous adherents in lockstep, was “the exercise of unofficial government.”<sup>11</sup> David Slawson drew upon administrative law to argue that standard form terms—like rules promulgated by unelected bureaucrats—were democratically illegitimate.<sup>12</sup> Cases like *Henningsen v. Bloomfield Motors, Inc.*<sup>13</sup> sounded similar concerns and subjected adhesion contracts to searching oversight.<sup>14</sup> And in 1975, the Iowa Supreme Court opined that enforcing a draconian clause in an insurance policy might be unconstitutional:

The concept that persons must obey public laws enacted by their own representatives does not offend a fundamental sense of justice: an inherent element of assent pervades the process. But the inevitable result of enforcing all provisions of the adhesion contract . . . would be an abdication of judicial responsibility in face of basic unfairness and a recognition that persons’ rights shall be controlled by private lawmakers without the consent, express or implied, of those affected.<sup>15</sup>

But then the pendulum swung violently in the other direction. In the late 1970s and early 1980s, voices in the

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9. See, e.g., KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

10. See Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 155 (1970) (“When things are too dangerous or too worthless the government *does* directly intervene.”).

11. Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931).

12. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 533 (1971).

13. 161 A.2d 69 (N.J. 1960).

14. *Id.* at 86 (“[S]tandardized contracts . . . are said to resemble a law rather than a meeting of the minds.”).

15. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 174 (Iowa 1975).

nascent field of law and economics challenged the idea that one-sided, adhesive provisions are “unfair.”<sup>16</sup> Reversing the polarity of Leff’s “contract as thing” analogy, these commentators argued that “harsh” clauses are no different than low-quality goods: they may be less favorable to adherents, but they are also less expensive.<sup>17</sup> Because drafters in competitive markets must disgorge their savings through lower prices and higher wages, it is entirely possible that most consumers and employees would actually *prefer* onerous but cheaper terms.<sup>18</sup> In addition, these scholars argued that drafters must cater to adherents’ interests, even if most adherents ignore the fine print. So long as some adherents compare rival forms, drafters—who cannot distinguish these elite “shoppers” from the uninformed masses—must offer everyone the same ideal terms.<sup>19</sup>

This sunny view of adhesion contracts sparked the “contract procedure” revolution.<sup>20</sup> In 1991, the Court held that a forum-selection clause benefited not just the cruise line that had drafted it (by limiting its litigation costs), but passengers (who paid “reduced fares”).<sup>21</sup> Citing similar rhetoric, the Court expanded the Federal Arbitration Act (FAA),<sup>22</sup> summarily rejecting any claim that adhesive arbitration provisions are non-consensual.<sup>23</sup> Lower courts enforced arbitration clauses

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16. See generally Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977) [hereinafter Schwartz, *Unconscionability*]; Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979) [hereinafter Schwartz & Wilde, *Imperfect Information I*]; Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983) [hereinafter Schwartz & Wilde, *Imperfect Information II*].

17. See, e.g., Schwartz, *Unconscionability*, *supra* note 16, at 1057–58.

18. See *id.* at 1072; see also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1210–11 (2003) (making this point more directly).

19. See, e.g., Schwartz & Wilde, *Imperfect Information II*, *supra* note 16, at 1414 (using the example of product warranties and concluding that “not every consumer must shop for warranties to make warranty markets responsive to consumer preferences”).

20. See, e.g., Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005).

21. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

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

23. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

that drafters had placed at the bottom of their shipping boxes<sup>24</sup> or inserted in their customers' monthly bills.<sup>25</sup> Banks, credit card issuers, retailers, franchisors, software licensors, computer manufacturers, communications companies, technology startups, brokerages, gyms, hospitals, and nursing homes began to lace their standard forms with dispute resolution provisions.<sup>26</sup> Instead of expressly stripping adherents of substantive rights, these companies tried to achieve that goal indirectly by rewriting procedural rules.

The stakes in this debate have only risen in the last two years as the Court has decided a series of controversial cases about the intersection of arbitration and class actions.<sup>27</sup> In sharp contrast to *The Kensington's* disapproval of liability-limiting fine print, the Court recently held in *AT&T Mobility LLC v. Concepcion*<sup>28</sup> that judges must enforce adhesive class arbitration waivers—denying consumers the ability to band together in a class action—even if small-value consumer protection claims will “slip through the legal system.”<sup>29</sup> Then, in June 2013, the Court took this approach to the next step in *American Express Co. v. Italian Colors Restaurant (Amex)*,<sup>30</sup> requiring plaintiffs to arbitrate federal antitrust claims on a bilateral basis even though the cost of doing so would eclipse any individual plaintiff's potential recovery.<sup>31</sup> More than ever, the Court seems steeled against the argument that form contracts are non-consensual. Indeed, as Justice Scalia casually observed in *Concepcion*, “the times in which consumer contracts were anything other than adhesive are long past.”<sup>32</sup>

Against this backdrop, Margaret Jane Radin's *Boilerplate* is a welcome attempt to rekindle radical skepticism of mass

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24. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997).

25. David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 623–24 (2010).

26. See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1631 (2005).

27. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *American Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) [hereinafter *Amex*]; *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

28. 131 S. Ct. 1740.

29. *Id.* at 1753.

30. 133 S. Ct. 2304.

31. See *id.* at 2311.

32. 131 S. Ct. at 1750.

contracting.<sup>33</sup> Radin organizes her dense and sprawling masterpiece around two central claims. First, she argues that the widespread use of standard forms causes “normative degradation”—the erosion of contract law’s bedrock requirement of consent. Second, and more provocatively, she echoes leftist courts and scholars from the 1970s and argues that the lockstep use of standard forms permits private actors to override the public laws and thus causes “democratic degradation.” To cure these maladies, she outlines a novel legal standard that links the validity of fine print to: (1) the quality of the adherent’s assent, (2) the nature of the rights affected, and (3) the provision’s frequency of use (pp. 155–58).

In this book review, I argue that the pervasiveness of arbitration clauses in consumer and employment contracts vividly illustrates the wear on democratic ideals that Radin describes. To be sure, accusations of democratic illegitimacy are usually the province of public law, where federal judges invalidate and interpret legislation, and bureaucrats enjoy broad discretion to add their own gloss to statutes.<sup>34</sup> But the core objection to these practices—that they permit unelected officials to rewrite the legislative blueprint<sup>35</sup>—has a shadowy analogue in mass arbitration. Companies invoke the FAA to alter procedural rules on a massive scale.<sup>36</sup> The issue of whether adhesive arbitration provisions are consensual is hotly contested. Yet, no matter one’s view of fine print generally, the Court’s separability doctrine—a legal fiction that allows arbitrators to decide the very question of whether an arbitration clause is valid—drives a wedge between arbitration and contractual consent.<sup>37</sup> Finally, after years of denying that arbitration affects substantive rights, the Court is now shunting plaintiffs to an extrajudicial forum even when there is no dispute that doing so will deprive them of any remedy. Thus, through the expedient of printed or electronic words, corporations do precisely what Radin says: they “delete rights that are granted through democratic processes” (p. 16).

A few qualifications are in order. First, *Boilerplate* is about

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33. MARGARET JANE RADIN, *BOILERPLATE* (2013). Radin is the Henry King Ransom Professor of Law at the University of Michigan.

34. See *infra* notes 71–75.

35. See, e.g., *Loving v. United States*, 517 U.S. 748, 758 (1996).

36. See *infra* Part II.

37. See *infra* Part II.A.2.

adhesion contracts generally, not just arbitration. Radin discusses a rogue's gallery of terms, from warranty disclaimers to exculpatory clauses to end-user license agreements. Also, one of her oeuvre's greatest strengths is its breadth. Radin displays her fluency in economics, philosophy, political science, and psychology, and discusses the role of advocates, agencies, disclosure, international law, emerging technology, and non-governmental organizations. Yet a veritable contracts All-Star team has already canvassed these aspects of *Boilerplate* in book reviews,<sup>38</sup> symposia,<sup>39</sup> and blog posts.<sup>40</sup> Thus, I will leave these issues for others. In addition, I am interested in the uneasy relationship between mass arbitration and democratic governance because I have struggled with it in previous articles.<sup>41</sup> And narrowing my focus stays true to the heart of Radin's work. *Boilerplate* mirrors the larger debate over form contracts in the way that it is pulled back, again and again, to the thorny entanglement of fine print and procedural rules.<sup>42</sup>

Second, I acknowledge that arbitration jurisprudence may seem like particularly inhospitable terrain for Radin's democratic degradation thesis. After all, the FAA is a federal

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38. Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. (forthcoming 2013) (book review) (Coase-Sandor Inst. For Law and Econ., Working Paper No. 640, 2013), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2255161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255161).

39. For instance, Radin presented an abridged version of *Boilerplate* at the thirty-second annual Sullivan Lecture at Capital University Law School. Margaret Jane Radin, *Reconsidering Boilerplate: Confronting Normative and Democratic Degradation*, 40 CAP. U. L. REV. 617 (2012). For a thoughtful response, see Andrew S. Gold, *Contracts With and Without Degradation*, 40 CAP. U. L. REV. 657 (2012).

40. See *infra* note 44.

41. See David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011) [hereinafter Horton, *Delegation*]; David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723 (2012) [hereinafter Horton, *Vindication of Rights*].

42. For instance, one of the best-known recent articles on adhesion contracts, Korobkin, *supra* note 18, uses the word "arbitration" 113 times. Similarly, unconscionability, the go-to defense for challenging boilerplate provisions, has little relevance outside of the arbitration milieu. See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1440–41 (2008). Likewise, Radin begins by emphasizing arbitration heavily. See RADIN, *supra* note 33, at xiv–8. Only once—when assessing the Court's recent FAA decisions regarding class actions—does she engage any particular body of law in detail. See *id.* at 130–38. Open *Boilerplate* to any page randomly, and one is as likely as not to find private procedural rulemaking under Radin's microscope.

statute designed to foster arbitration.<sup>43</sup> How is it undemocratic for businesses to accept Congress's invitation and funnel disputes outside of the court system?<sup>44</sup> The answer is that the FAA's current musculature is a product of the Court, not Congress. In 1925, lawmakers passed a procedural rule for federal courts that placed arbitration agreements "upon the same footing as other contracts" by making them specifically enforceable.<sup>45</sup> Today, the statute governs in state court,<sup>46</sup> preempts state law,<sup>47</sup> extends to the outer limits of the Commerce power,<sup>48</sup> applies to employment contracts<sup>49</sup> and federal statutory claims,<sup>50</sup> deems arbitration clauses to be separable from the agreements in which they are embedded,<sup>51</sup>

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43. See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (referring to the FAA as embodying a strong "federal policy favoring arbitration").

44. See, e.g., Brian Bix, *Boilerplate Symposium VI: Brian Bix on Democratic Degradation*, CONTRACTSPROFS BLOG (May 20, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-vi-brian-bix-on-democratic-degradation.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-vi-brian-bix-on-democratic-degradation.html) (critiquing Radin's democratic degradation thesis by citing the FAA as an example of how drafters' "ability to modify or waive . . . [litigation] rights is itself also the direct or indirect product of legislation"); Daniel Schwarcz, *Boilerplate Symposium VIII: Daniel Schwarcz on a Tort-Based Approach to Standard Form Contracts*, CONTRACTSPROFS BLOG (May 21, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-viii-.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-viii-.html) (making a similar argument about the FAA and democratic processes).

45. H.R. REP. NO. 96-68, at 1 (1924).

46. See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

47. See *id.* For vigorous criticism of the Court's conclusion that the FAA preempts state law, see generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 145 (1992) and David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS., nos. 1 & 2, 2004, at 5 (2004). But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002) (defending FAA preemption).

48. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74 (1995).

49. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); cf. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 3 (1923) ("It is not intended that this shall be an act referring to labor disputes[ ] at all.") (statement of W.H.H. Piatt).

50. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); cf. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) ("[Arbitration is] peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact . . . [but] not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.").

51. See *infra* text accompanying notes 107–10.



overrides class action rights,<sup>52</sup> and fills contractual gaps with pro-business default rules.<sup>53</sup> Although a few of these developments have flickers of support in the FAA's text and legislative history,<sup>54</sup> nobody seriously contends that the Court has been faithfully divining Congress's wishes.<sup>55</sup> Indeed, even sitting Justices have voted to expand the FAA while conceding that they were "abandon[ing] all pretense of ascertaining congressional intent" and "building instead, case by case, an edifice of [our] own creation."<sup>56</sup> Thus, the modern FAA—the one that has transformed the arbitration clause into a kind of covenant that runs with economic activity—lacks an authentic democratic pedigree.<sup>57</sup>

This book review contains two Parts. Part I summarizes *Boilerplate* and explains why it is essential reading for anyone interested in contract law's intractable problem. Part II takes

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52. See *infra* text accompanying notes 165–87.

53. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 147–50 (2012).

54. See, e.g., Drahozal, *supra* note 47, at 105–07 (mining the FAA's legislative history for support for the controversial notion that the statute preempts state law).

55. To the contrary, there is a rich literature documenting the Court's domineering influence on the FAA. See generally Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91 (2012).

56. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring). Similarly, Justices Thomas and Scalia, who initially opposed the FAA's encroachment upon state law, now vote to expand the statute's preemptive sweep. See David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1041 (2012); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

57. And in any event, even if the Court had stayed true to the statute's original design, our legal system limits the ability of companies to wield legislative power. The non-delegation doctrine bars lawmakers from giving non-state actors the discretion to make law absent certain safeguards. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1437 (2003). At the very least, then, the Court's arbitration imperialism raises questions about the borders between public and private power. See generally Horton, *Delegation*, *supra* note 41.

the torch from Radin and uses the FAA as a case study in democratic degradation. Focusing on *Concepcion* and its recently-decided sister case, *Amex*, it shows how the FAA allows private parties to amend the public laws.

## I. BOILERPLATE

*Boilerplate* begins with the classic fairy-tale incantation: “[o]nce upon a time” (p. 4). It does so because Radin opens by describing two friends bargaining until they reach an acceptable price for the sale of a used bicycle. This, Radin explains, is a contract from “World A.” (p. 3). In this ideal universe, contracts are forged through negotiation, culminate in mutual agreement, and leave each party with their full arsenal of rights and remedies.

However, we inhabit “World B”—“the world of boilerplate” (p. 9). When we visit websites, download software, unseal packages, purchase tickets, receive junk mail, fill out paperwork, open bank accounts, apply for credit cards, and sign up for phone, Internet, or cable service, we enter into “agreements” of which we are dimly aware. Radin contends that this causes both normative and democratic degradation.

### A. Normative Degradation

Radin argues that our legal system’s tendency to regard fine print as “contractual” does violence to important values. She starts by emphasizing the primacy of agreement to the institution of contract (p. 19). She notes that when a court enforces a deal, it brings state power to bear on private actors, holding them to their promises and reallocating their rights and property (p. 19). She contends that this practice is justified by the voluntariness of the parties’ exchange (p. 55). But because form terms are often not consensual, she claims that they cause normative degradation: the decay of contract’s moral foundation (p. 19).

Consent is a slippery concept, and so Radin takes pains to develop a concrete working definition. She describes various situations in which the law might interpret a party’s words or conduct to signal their agreement. At the top of this pyramid are the rare contexts in which a party makes a decision after full information and time to deliberate (“informed consent”) (p.

21). At the bottom are choices marred by coercion or trickery (“false consent”) or utter lack of awareness that anything is happening (“sheer ignorance”) (pp. 21–23). In the middle is a vast gray area where one party enjoys a clear-eyed view of possible risks and benefits, while the other does not (“problematic consent”) (pp. 23–28). Many common contracting rituals—for instance, computer users’ reflexively clicking “I agree” when presented with a pop-up box full of text—fall into this final, fiercely contested sphere (p. 24).

Is a clause supported by problematic consent “contractual”? Radin rejects several well-known efforts to answer this question in the affirmative. She begins with Karl Llewellyn’s claim that adherents give “specific” consent to the “broad type of the transaction” and “blanket” consent to “any not unreasonable” terms within the contractual shell (pp. 82–83).<sup>58</sup> She notes that Randy Barnett has likewise argued that individuals can agree to unknown terms that are not “radically unexpected” (p. 84).<sup>59</sup> She points out two pragmatic problems with these approaches. First, phrases like “not unreasonable” and “radically unexpected” provide little guidance for courts (pp. 84–85). Second, to the extent that these are subjective standards, they invite manipulation. If adherents gradually become aware that firms pepper the boilerplate with exploitative clauses, those clauses will no longer be startling or unanticipated. Rather than discouraging drafter overreaching, these approaches reward it (p. 85).

Next, Radin evaluates the assertion that the consent required for adhesion contracts mirrors the consent required for other contracts (p. 86). As every first-year law student learns, the test for contract formation is objective. Rather than plumbing the parties’ minds, courts ask whether a reasonable person in the offeror’s position would regard the offeree’s words or conduct as an acceptance.<sup>60</sup> Perhaps this black-letter rule legitimates boilerplate. Even if an adherent signs paperwork without reading it, all that matters is that she has placed a symbol on the page that a drafter can reasonably construe as signaling her agreement. However, Radin sees more nuances.

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58. LLEWELLYN, *supra* note 9, at 370.

59. Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 638 (2002).

60. *See, e.g.*, OLIVER WENDELL HOLMES, *THE COMMON LAW* 242 (Mark DeWolfe Howe ed., 1963).

She contends that whether a party has manifested assent depends heavily on context. A handshake or a nod may be the equivalent of saying “I accept” among longtime trading partners, but not necessarily between strangers. As Radin puts it, “‘Yeah, right,’ uttered in a certain tone of voice, does not mean ‘Yes, that’s true’” (p. 86). Thus, it is not clear that the quotidian triggers for “agreement” in adhesion contracts—pressing a button or failing to return a product by a certain date—have “a fully socially accepted meaning” (p. 90).

Finally, Radin addresses law and economics. This methodology, which has almost single-handedly normalized adhesion contracting, stands on two pillars. The first is the contract-as-product thesis: the idea that “the terms that come with a product are part of the product itself” (p. 99) (emphasis omitted). Recall that this idea originated with Arthur Allen Leff, who argued that conceptualizing adhesion contracts as “things” would liberate them from freedom of contract ideology and make regulation more palatable.<sup>61</sup> Yet in the last two decades, conservative courts and scholars have used this metaphor as a kind of jujitsu against complaints that adhesive terms are non-consensual. If form terms are attributes of the underlying goods, then it would be incongruous to require that customers read or understand them. After all, judges do not insist that consumers affirmatively agree to every individual component of merchandise. For instance, when we buy a computer, our acceptance of the overall transaction extends to the size of its screen, the speed of its processors, and its battery life.<sup>62</sup> Why should the law treat the length of its warranty or its arbitration clause differently?<sup>63</sup>

The second cornerstone of economic theory is the proposition that harsh terms allow drafters to lower prices and raise wages. To be sure, the actual amount of money that firms must pass to consumers and employees fluctuates with the dynamics of each market. But questioning *whether* drafters must forfeit some of their savings from harsh terms “is inconsistent with basic economics.”<sup>64</sup> In turn, this reveals a

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61. See *supra* note 10.

62. See Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 933 (2006).

63. See *id.*

64. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*,

way in which one-sided fine print arguably *is* consensual. Even if an adherent does not read or understand the boilerplate, she probably would prefer to have extra money in her pocket rather than retaining all of her rights in the exceedingly unlikely event of litigation. As a result, even if she never actually consented to pro-drafter terms, she would have done so if informed and given the choice.

Recently, behavioral economics has challenged this tidy story, and Radin weaves this literature into her first rejoinder. These arguments will be familiar to anyone who has tracked the adhesion contract literature in the last decade. A growing body of social science research has debunked the idea that individuals are rational interest-maximizers (pp. 103–08). Instead of coolly comparing costs and benefits, people systematically underestimate the probability that they will suffer certain kinds of harm. As a result, even in the unlikely event that an adherent reads *and* understands what a boilerplate clause accomplishes, “he still would be very unlikely to take it seriously” (p. 103). For this reason, widespread use of a particular term might reflect a “lemons equilibrium”: a situation in which buyers cannot gauge quality *ex ante*, pushing sellers to offer low-quality goods at low prices.<sup>65</sup>

But the behavioral critique only goes so far. It does not confront one of the most powerful and intuitive conclusions of the neoclassical model: that adherents might *prefer* “the economy class, not the first class terms” (p. 150). Indeed, even if the market pushes drafters toward a lemons equilibrium, there is a plausible argument that this is the best result. It hardly strains the imagination to think that most people would rather pay less or earn more than preserve their access to courts.

One of Radin’s most ingenious points is responsive. She notes that even by its own logic, economic theory has a disquieting implication—it gives drafters the ability to eliminate adherents’ rights in return for cash. In a memorable phrase, she describes this power as “private eminent domain” (p. 15). As she points out, the law generally does not allow one party to “take” another’s rights, even in return for

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5 J. AM. ARB. 251, 255–56 (2006).

65. See George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489–91 (1970).

compensation (p. 15).

Likewise, giving drafters this prerogative flouts the conventional understanding of property rules and liability rules. In a celebrated article, Guido Calabresi and Douglas Melamed proposed that property rules, which allow owners to choose whether or not to transfer an entitlement, are more efficient than liability rules, which permit third parties to invade an owner's rights and then pay damages.<sup>66</sup> Calabresi and Melamed grounded the superiority of property rules in the fact that they permit individuals to value their own rights, rather than delegating this task to error-prone courts. Yet, as Radin explains, the economic view of boilerplate gives drafters carte blanche to transform rights that should be protected by property rules into rights that are only protected by liability rules. For instance, drafters can condemn access to courts, the ability to bring or participate in a class action, and other entitlements. Because drafters determine the amount paid for the relinquishment of these rights, this practice—the collapse of property rules into liability rules—cannot be squared with the idea that individuals can value their own entitlements more accurately than any other institution or entity (pp. 75–76).

In sum, Radin reveals how far contract law has drifted from its moorings. A contract is grounded in agreement, but many “contracts” are consensual only in the most tenuous way. However, as I discuss next, she then uses her normative degradation arguments as the springboard for a more audacious assertion.

### *B. Democratic Degradation*

The second branch of Radin's thesis is both more ambitious and less developed. She seeks to reinvigorate the claim, once fashionable in the 1970s, that standard forms allow private actors to override the legal regime crafted by the government. She argues that because mass contracting replaces “the law of the state with the ‘law’ of the firm,” it undermines our commitment to representative democracy (p. 16).

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66. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–11 (1972).

Radin makes two main points. First, she claims that right-  
eviscerating adhesion contracts erode the distinction between  
public and private ordering. Although she admits that these  
two spheres are not separate, water-tight containers, she  
argues that certain functions are quintessentially  
governmental. One of the polity's core tasks is to preserve the  
institution of contract itself. The state does this, in part, by  
permitting private actors to seek relief in court for unfulfilled  
promises. But standard forms prevent the government from  
playing this role. By placing hurdles in the way of aggrieved  
parties, boilerplate erases "the infrastructure that makes  
contractual private ordering possible" and therefore "us[es]  
contract to destroy the underlying basis of contract" (p. 36)  
(emphasis omitted).

Second, Radin asserts that mass contracting corrodes the  
political process. She notes that legislative rights stem from  
vigorous debate and reflect compromise between affected  
constituencies. The ease with which drafters can delete these  
rights makes the rituals of democratic governance seem like  
nothing more than "an ironic form of kabuki theater" (p. 40).  
Radin acknowledges that public lawmaking is hardly perfect,  
but regards its private counterpart with even greater  
skepticism. After all, statutes are supposed to serve the  
common good, but "[b]oilerplate schemes by their nature are in  
the interest of a firm and its marketing strategy and profits" (p.  
94).

Radin recognizes that she must overcome two powerful  
objections. For one, she considers the tension between her  
claim and public choice theory. A core tenet of public choice  
theory is that there is nothing sacrosanct about democratically-  
enacted laws. Statutes are not the product of starry-eyed soul-  
searching about what is best for the nation; instead, they arise  
from the clash of self-interested actors in the marketplace.<sup>67</sup>  
Politicians "sell" public laws to lobbyists in return for  
concessions that increase their likelihood of reelection. As  
Radin admits, public choice theory knocks legislation off its  
pedestal by casting the output of the democratic process "in  
exactly the same terms . . . [as] the purchase of contractual  
obligations" (p. 44). Seen this way, boilerplate is no more

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67. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 650 (1998).

sinister than statutes passed by rent-seeking politicians. In fact, the widespread displacement of public law by private law can be an ingenious solution to cumbersome, intrusive regulation.

Radin responds by arguing that the law reform power of mass contracting creates perverse incentives (p. 41). Legislation often solves coordination problems by requiring stakeholders to make sacrifices in return for the greater benefits of acting in concert. To use a simple example, even people who prefer to drive on the left side of the road are better off if the state requires everyone to drive on the right. More to the point, rules like the fair use exception to copyright protection can be seen as balancing every firm's need to protect its own information with its desire to access information that belongs to others. But adhesion contracting allows companies to make these legislative bargains and then defect from them. For instance, through fine print, a copyright holder can "cancel[ ] fair use and other user rights" (p. 172). Because shared compromise is the lifeblood of public lawmaking, this loophole threatens the integrity of the rule of law.

In addition, Radin concedes that boilerplate may not be analogous to traditional legislation. To live in a jurisdiction is to be bound by its laws. Conversely, one can always decide not to buy a particular product or service that comes encumbered with nasty terms. Yet Radin sticks to her guns. She distinguishes between representative democracy, which "at least give[s] us a voice," and mass contracting, which does not (p. 40). In addition, she pushes back against the notion that exit from boilerplate is as easy as it might seem. To "vote with their feet," adherents would first need to be aware of what they are voting against. But few, if any, consumers and employees have a concrete sense of what the fine print says, or how it might affect them, or even *that* it might impact their rights. Likewise, liability-limiting provisions spread rapidly from trade to trade and supplier to supplier. As a result, it is often impossible to obtain the practical necessities of modern life without subjecting oneself to "boilerplate rights deletion schemes" (p. 40).

For these reasons, Radin concludes that democratic degradation is "equally serious" as normative degradation (p. 16). To engage in commerce is to relinquish rights that have been created by the democratic process.



### C. Solutions

Radin suggests that the validity of fine print terms should hinge on (1) the quality of the adherent's consent, (2) the nature of the right affected, and (3) "the extent of social dissemination of the rights deletion" (p. 155).<sup>68</sup> This rule has two bright-line elements. First, because agreement is essential to contract formation, the total absence of consent, standing alone, should scuttle a transaction. Second, some rights are inalienable: for instance, one cannot sell one's freedom from physical assault or discrimination based on race, sex, disability, or national origin. Accordingly, a contract that purports to waive one of these privileges should be invalid without regard to the other parameters of the deal. Radin acknowledges that the lion's share of cases will fall between these poles. In those instances, she urges judges to balance the level of assent and the rights at issue with the ubiquity of the particular provision. This third prong reflects the fact that the friction between mass contracting and democracy intensifies "as the number of people who are subjected to the firm's alternative legal universe increases" (p. 178).

Unfortunately, Radin does not explain how her proposal would improve upon existing regulation. Courts largely rely on the unconscionability defense to police adhesive clauses.<sup>69</sup> This famously amorphous rule empowers judges to nullify terms that are both procedurally unconscionable (hidden in fine print and offered on a take-it-or-leave-it basis by a party with bargaining power) and substantively unconscionable ("unreasonably favorable" to the drafter).<sup>70</sup> Radin criticizes unconscionability as a "wild card doctrine" that invites "many discretionary judgment calls" and is thus "extremely

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68. Radin also urges courts to create a tort of intentional deprivation of legal rights to punish overreaching drafters (pp. 197–216). For reasons stated earlier, *supra* text accompanying notes 38–39, I will leave it to others to address this argument.

69. As I discuss *infra* Part II.B., courts in the arbitration context also rely on the vindication of rights doctrine. Although the contours of this federal common law rule are unclear—especially after *Amex*—it is a kind of pure substantive unconscionability that protects federal statutory claims. *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) (opining that a plaintiff might be able to invalidate an arbitration clause by showing that arbitral fees blocked her access to the forum).

70. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

unpredictable” (p. 129). But just like unconscionability, her balancing test weighs the contracting process (the quality of assent) and the term’s substantive impact (the right affected). Moreover, given the play in these joints, she freely admits that “[m]ost cases that come before courts will be less than clear-cut and require a pragmatic judgment” (p. 181). Therefore, it is unclear how her suggestion would constrain judicial liberty or cause less uncertainty.

At the same time, her proposal contains a striking innovation: under her third prong, courts should factor the popularity of a particular clause *against* the clause. For law and economics aficionados, the analysis would run the other way: widespread adoption of a specific term suggests that it is optimal. Indeed, if a clause struck the perfect balance between risk and price, one would expect it to thrive. Nevertheless, Radin includes this “social dissemination” element because it “directs us to recognize democratic degradation and the undermining of the rule of law” (p. 186). For Radin, the evils of boilerplate transcend the occasional lack of consent or the stray forfeiture of rights; rather, rampant adhesion contracting raises systemic concerns about who makes law and how they do it. And by arguing that drafters should bear additional burdens to justify widely-used provisions—those that are most like private legislation—she ties her proposal directly to her democratic degradation claim. In the next Part, I take a closer look at this argument.

## II. MASS ARBITRATION AND DEMOCRATIC LEGITIMACY

Concerns about democratic legitimacy are common in constitutional law, administrative law, statutory interpretation, and civil procedure. Each of these spheres involves a practice that gives unelected officials dominion over legislation passed by the people’s chosen representatives. For instance, judicial review of statutes for constitutionality is controversial because it permits courts to strike down laws generated by majoritarian processes.<sup>71</sup> Textualists assert that judges cannot rely on legislative history when construing statutes because committee reports and floor debates never

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71. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962).

pass through bicameralism and presentment.<sup>72</sup> Congressional delegation to agencies is problematic because there is no direct “electoral link between the public and the bureaucracy.”<sup>73</sup> And the Rules Enabling Act (at least formally) forbids the Federal Rules of Civil Procedure from altering “any substantive right”<sup>74</sup> to allay objections about the Advisory Committee wielding “legislative power.”<sup>75</sup>

Although similar arguments were common in contract law four decades ago,<sup>76</sup> they have now all but vanished.<sup>77</sup> This is puzzling for two reasons. First, the ability of firms to dictate widely applicable rules has risen with the tide of fine print. Indeed, consumer contracts in the telecommunications, financial services, and credit card industries—as well as employment agreements in many sectors—are saturated with dispute resolution provisions.<sup>78</sup> Even a single company can alter the procedural landscape on a scale that rivals traditional legislation. For instance, AT&T’s wireless service class

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72. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 31–35 (Amy Gutmann ed., 1997).

73. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001); see also DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 10 (1993).

74. 28 U.S.C. § 2072 (2006).

75. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1073 & n.260 (1982) (quoting Letter from Sen. Albert B. Cummins to Chief Justice William Howard Taft (Dec. 17, 1923)); see also Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1311–12 (2006).

76. See *supra* notes 12–15.

77. For a rare exception, see Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 861–63 (2010) (arguing that a consumer’s assent to adhesive terms is analogous to a voter’s assent to be bound by future laws enacted by a chosen representative).

78. See, e.g., Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 143–50 (2010) (noting high rates of arbitration clauses and class arbitration waivers in credit card and wireless service contracts); 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, 880–83 (2008) (finding similar results in the credit, telecommunications, and financial services industries). *But see* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 17–18 (finding that although 95 percent of the dollar value of outstanding credit card loans is subject an arbitration clause, only a minority of very large credit card issuers use such clauses).

arbitration waiver binds 107 million consumers,<sup>79</sup> more than the combined populations of California, New York, Texas, and Florida.<sup>80</sup> Accordingly, “[i]f by making law we mean imposing officially enforceable duties or creating or restricting officially enforceable rights,”<sup>81</sup> then companies probably make more “law” each day by projecting arbitration across the economy than Congress makes in a year.

Second, the lockstep use of adhesive terms has the potential to be more troubling than other allegedly undemocratic practices. Judicial review and non-textual statutory interpretation empower courts—agents of the state that are sworn to advance the public good.<sup>82</sup> Likewise, delegation aggrandizes members of the executive branch, who are, at least in theory, responsive to the President;<sup>83</sup> and the Rules Advisory Committee consists of experts whose work must be vetted by Congress.<sup>84</sup> In sharp contrast, the widespread use of boilerplate benefits private parties who invariably “select regulation that provides them with maximum benefits without considering the effect on . . . the public.”<sup>85</sup>

For these reasons, Radin’s effort to breathe new life into the idea that mass contracting is unearned governance

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79. See, e.g., *AT&T Company Information*, AT&T, <http://www.att.com/gen/investor-relations?pid=5711> (last visited Nov. 30, 2013).

80. See, e.g., *State & County QuickFacts: California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Sept. 1, 2013); *State & County QuickFacts: New York*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Sept. 1, 2013); *State & County QuickFacts: Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Sept. 1, 2013); *State & County QuickFacts: Florida*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12000.html> (last visited Sept. 1, 2013).

81. Slawson, *supra* note 12, at 530.

82. See, e.g., David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659 (1986).

83. See generally Kagan, *supra* note 73.

84. See, e.g., Paul D. Carrington, *Politics and Civil Procedural Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 657 (2010) (noting that the rulemaking process “ensures the rigorous scrutiny and public review essential to establish [its] credibility and legitimacy”) (quoting *To Speak with One Clear Voice: The Executive Committee’s Role in the Judiciary*, THE THIRD BRANCH (U.S. Courts, Wash., D.C.), Dec. 2009, [http://www.uscourts.gov/news/TheThirdBranch/09-12-01/To\\_Speak\\_with\\_One\\_Clear\\_Voice\\_The\\_Executive\\_Committee\\_s\\_Role\\_in\\_the\\_Judiciary.aspx](http://www.uscourts.gov/news/TheThirdBranch/09-12-01/To_Speak_with_One_Clear_Voice_The_Executive_Committee_s_Role_in_the_Judiciary.aspx) (interviewing Chief Judge Anthony J. Scirica, Chair, Executive Committee of the Judicial Conference of the United States)).

85. Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1428 (2000).

deserves to be taken seriously. In this Part, I use the Court's FAA docket to illustrate this point.

### A. *Consent*

The main difference between contract law and fields that are more preoccupied with lawmaking pedigree is the role of consent. Of course, the absence of consent is also the root of any purported democratic deficit. At an abstract level, decisions by Congress embody the consent of the governed; thus, an institution like judicial review is controversial because it muffles the voices of voters as expressed through their elected representatives.<sup>86</sup> In contract law, though, consent is much more immediate. Agreements are a type of hyper-direct democracy that allows us to customize our surrounding legal landscape. For that reason, the law vests contractual consent with tremendous force. If it is present, it bleaches transfers that would otherwise be tainted. When we act voluntarily, there are few limits: we can transfer assets for pennies on the dollar or relinquish cherished rights. Thus, because consent is so potent and floats so close to the surface in the realm of contracting, Radin's democratic degradation claim is parasitic on her normative degradation claim. To show that fine print is an exercise in illicit governance, she first must prove that it is non-consensual.

In this section, I explain why Radin's normative degradation claim is particularly strong in the arbitration context. Courts generally presume that arbitration clauses are binding even when an adherent's assent to them is either extremely problematic or utterly lacking.<sup>87</sup> Moreover, although the unconscionability doctrine can shield adherents from terms that are likely non-consensual, drafters have found ways to eliminate this layer of judicial review. Through an arbitration-specific rule called the separability doctrine, they have been able to delegate the very question of whether the arbitration clause is valid to the arbitrator.

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86. See, e.g., Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1256–59 (2009).

87. See *infra* notes 100–04.

### 1. Consent Generally

Proving that adhesion contracts are non-consensual is no easy task. For one, consent is an “essentially contested concept,” a term of art that lacks a generally accepted meaning.<sup>88</sup> For some, contractual consent is a mental state that the law detects through external signals. Radin subscribes to this view. She explains that the concept is slippery because it “depends on processes internal to a person, but it must be observed by others who cannot fully know those processes” (p. 23). Yet some commentators want to exorcise the hazy specter of subjectivity and adopt a wholly objective definition of contractual consent. For instance, esteemed arbitration scholar Alan Rau bemoans the “quaint” notion “that a weaker party’s acquiescence in market power can only be legitimated by some transcendent insight or internal transformation.”<sup>89</sup> Likewise, in a thoughtful article, Joshua Fairfield cites the benefits of standardization in high-volume consumer transactions and argues that subjective “contractual consent is a transaction cost to be minimized, not a good to be maximized.”<sup>90</sup> Thus, Radin faces the daunting task not just of defending consent, but defending a particularly full-bodied kind of consent.

Moreover, one could respond to Radin’s insistence on robust consent by asking: consent to *what*? The idea of consent, floating and untethered, is meaningless. People do not consent in the abstract; instead, they consent to *something*. Seen the right way, most adhesion contracts are anchored in voluntary, knowing agreement. Even the most impenetrable legalese exists within the tidy borders of a larger transaction. A consumer may not know what AT&T’s 1,639 word arbitration

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88. W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1956) (introducing the idea of an “essentially contested concept”).

89. Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435, 522 (2011).

90. Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1405–09 (2009). Likewise, the economic view of form contracts places no value on subjective agreement as an intrinsic good. Consider *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992 (7th Cir. 2008), a recent Seventh Circuit opinion in which the plaintiff argued that it did not assent to an inconspicuous jury trial waiver. Chief Judge Easterbrook dismissed that concern by noting that “onerous terms just lead to lower prices.” *Id.* at 993. That may (or may not) be true, but as a response to the plaintiff’s argument, it is a jarring non-sequitur.

clause means,<sup>91</sup> but she fully understood that she signed up for wireless service. And once we are satisfied that an adherent intended to be bound by the contractual husk, we can use the unconscionability doctrine to regulate the contractual minutiae. Indeed, unconscionability helps us pinpoint terms that have not obtained “specific” assent and are “unreasonable” (in Llewellyn’s terminology),<sup>92</sup> or are “unknown” and “radically unexpected” (under Barnett’s approach),<sup>93</sup> or to which no “manifestation of . . . consent[ ] was ever given” (under the objective theory of contracts).<sup>94</sup> Unconscionability may be a clumsy tool, but it helps harmonize mass contracting and contractual consent.

Finally, one might emphasize the heavy burden of proof that Radin’s democratic degradation claim must carry. Arguably, Radin must do more than merely show that adhesion contracts lack contractual consent. Perhaps her ambitious thesis—which seeks to repair the link between the polity and the laws it must obey—must take the next step and demonstrate that adhesion contracts are *less* consensual than statutes. After all, even if we have little dominion over fine print, do we really have any greater influence over Congress?<sup>95</sup> At the very least, in both spheres, “knowing and attentive participation . . . is all but notional.”<sup>96</sup> Thus, the claim that private lawmaking is “less” consensual than its public counterpart begins to sound like an argument that one particle or minute fraction is smaller than another.

Despite these obstacles, Radin’s thesis resonates deeply when trained on the FAA. Recall that most courts and scholars advocate a two-tiered approach of requiring informed consent to the broad transaction and then policing the fine print

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91. *How Do I Resolve Disputes with AT&T?*, WIRELESS CUSTOMER AGREEMENT, <http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#howDoIResolveDisputesWithAtt> (last visited Sept. 3, 2013).

92. LLEWELLYN, *supra* note 9, at 370.

93. Barnett, *supra* note 59, at 636–38.

94. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965).

95. Rau, *supra* note 89, at 522.

96. *Id.* at 522. *See, e.g.*, Gold, *supra* note 39, at 667–71 (arguing that even most members of Congress neither read nor understand the laws they enact); Barnes, *supra* note 77, at 869–71 (analogizing between voting for a candidate who will then enact unknown legislation in the future and selecting a company that will then promulgate unknown fine print terms).

through the unconscionability doctrine.<sup>97</sup> In a well-known passage, Randy Barnett has explained the logic of bootstrapping an adherent's agreement to the fine print from her agreement to the overall deal:

Suppose I say to my dearest friend, "Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you." Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later?<sup>98</sup>

Barnett is correct that it is not "categorically impossible" to agree to undefined future obligations: the proverbial "blank check." But agreeing to perform an unknown task for a "dear[ ] friend" is not remotely comparable to agreeing to settle disputes against a company under rules promulgated by the company. Moreover, in Barnett's excerpt—as well as Karl Llewellyn's original example of "blanket assent" versus "specific assent"—an adherent enters into a transaction fully aware that it comes encumbered with boilerplate.<sup>99</sup> Yet thanks to the rolling contract—a byproduct of the arbitration revolution—judges routinely enforce arbitration clauses in emails,<sup>100</sup> bill stuffers,<sup>101</sup> and shipping boxes.<sup>102</sup> The problem here is not what Radin calls "problematic consent" (adherents ignoring fine print) (pp. 23–24). The problem is what Radin refers to as "sheer ignorance": these adherents are often not aware that *there is* fine print (pp. 21–22). Moreover, these clandestine "agreements" to arbitrate usually become effective unless the recipient closes her account<sup>103</sup> or returns a product for which she has already paid.<sup>104</sup> Unlike clicking "I agree,"

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97. See *supra* notes 58–59.

98. Barnett, *supra* note 59, at 636.

99. LLEWELLYN, *supra* note 9, at 370.

100. See *Hancock v. Am. Tel. & Tel. Co., Inc.*, 701 F.3d 1248, 1259 (10th Cir. 2012).

101. See, e.g., *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 826 (S.D. Miss. 2001).

102. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

103. See, e.g., *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 919 (N.D. Tex. 2000).

104. See *Hill*, 105 F.3d at 1148.



which at least superficially signals acceptance of *something*, there is no reason for adherents to think that engaging in this conduct means *contracting*. As Radin points out, to be coherent, contract law cannot just revolve around consent—it “must also be based on nonconsent” (p. 20). A switch that does not turn off is not a switch at all.

In addition, companies have begun to “contract around” the unconscionability doctrine, thereby obviating the prophylactic second prong of the “blanket assent” approach. Consider the use of opt-out clauses. Courts usually hold that the fact that adherents have a short window to reject an arbitration provision is fatal to a finding of procedural unconscionability.<sup>105</sup> These conclusions are dubious. The opt-out period is part of the boilerplate. It is no more likely to be read, understood, or acted upon than any other fine print term. For instance, the Ninth Circuit recently cited an opt-out clause to hold that an arbitration provision in a student loan was not procedurally unconscionable, even though no student had ever taken advantage of the clause.<sup>106</sup> Such opinions evidence the growing divide between external manifestations of assent and genuine assent. What the “contract” says about the contracting process controls how judges conceptualize the actual contracting process. By capitalizing on this disjunction, companies can move their arbitration clauses from the suspect category of problematic consent (where they will be tested for substantive unconscionability) into the safe harbor of informed consent (where they will not be).

But because Radin’s democratic degradation claim is so bold, it arguably requires a substantial malfunction—some deviation from consent that transcends particular cases and is enshrined in the superstructure of the law. As I explain next, the Court’s FAA jurisprudence contains precisely such a rule: the separability doctrine.

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105. See, e.g., *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1073 (9th Cir. 2007); *Clerk v. First Bank of Del.*, 735 F. Supp. 2d 170, 183 (E.D. Pa. 2010) (collecting authority).

106. *Kilgore v. KeyBank, Nat’l Ass’n*, 673 F.3d 947, 964 (9th Cir. 2012), *aff’d*, *Kilgore v. KeyBank, Nat’l Ass’n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc) (affirming original three-judge panel’s finding of no procedural unconscionability).

## 2. Arbitration and Consent: the Separability Doctrine

The separability doctrine is a legal fiction that deems arbitration provisions to be their own independent mini-contracts nestled with overarching “container” contracts.<sup>107</sup> As a result, when a party argues that the container contract is invalid under a defense such as fraud, mistake, or duress, the standalone agreement to arbitrate kicks in, and the arbitrator decides that claim.<sup>108</sup> On the other hand, courts retain jurisdiction to decide challenges to the arbitration clause itself, such as arguments that specific arbitral rules and processes are unconscionable.<sup>109</sup> Thus, a party who truthfully alleges that she was tricked or coerced into agreeing to the container contract—or even that the container contract violates public policy—still ends up in arbitration.<sup>110</sup>

Defenders of the separability doctrine make two main points. First, they cite pragmatic concerns to justify making arbitration clauses their own sovereign agreements. Suppose we treated arbitration clauses as mere provisions within the container contract, and an arbitrator ruled that a container contract was invalid. The result would be a mind-bending circle in which the arbitrator’s ruling invalidates the arbitration clause and therefore eviscerates her own power to decide the matter.<sup>111</sup> Thus, separability exists to prevent “the conceptual horror of an arbitral decision of contract invalidity that ‘calls into question the validity of the arbitration clause from which [the arbitrators] derive their power.’”<sup>112</sup> Second, separability facilitates dispute resolution by minimizing court involvement

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107. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967) (creating this rule by allowing an arbitrator to decide the merits of a party’s fraud in the inducement challenge to the validity of the contract that contained the arbitration provision); cf. *Nitro-Lift Tech., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (explaining that the validity of an arbitration clause “is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide”).

108. See *Prima Paint Corp.*, 388 U.S. at 402–04.

109. See *id.*

110. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448–49 (2006).

111. Alan Scott Rau, “*The Arbitrability Question Itself*,” 10 AM. REV. INT’L ARB. 287, 341 (1999) [hereinafter “*Arbitrability Question*”].

112. *Id.* (alteration in original) (quoting William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 19, 53 (1998)).

in cases where the parties may have agreed to arbitrate. For this reason, “every modern regime of arbitration” includes some version of the doctrine.<sup>113</sup>

Although separability arose in the context of commercial transactions between sophisticated parties,<sup>114</sup> the Court has never exempted adhesion contracts from its strictures. Yet it is not clear that separability should govern consumer and employment contracts. As noted, most scholars view the doctrine as “a grudging departure from strict logic in the interest of ‘practice’ and ‘necessity.’”<sup>115</sup> By dividing arbitration clauses from the container contract, separability prevents an arbitrator’s ruling that the container contract is invalid from simultaneously destroying her authority to make any such ruling. But that only makes sense if a party is likely to seek rescission of the container contract. The overwhelming majority of lawsuits by individuals against companies are for statutory violations that do not affect the sanctity of the container contract. In these cases, there is no danger of an arbitrator undercutting her own authority. Moreover, although separability’s sympathizers often cite its prevalence among modern arbitral regimes, many of these countries have banned arbitration clauses in adhesion contracts.<sup>116</sup>

Nevertheless, in several inspired articles, Alan Rau has offered a more sophisticated account of separability that better aligns it with contractual consent.<sup>117</sup> Rau first debunks the Court’s description of separability as distinguishing between “challenges specifically [to] the validity of the agreement to arbitrate,” which are for courts, and “challenges [to] the contract as a whole,” which are for arbitrators.<sup>118</sup> Rau explains that certain allegations—that a party is a minor, or lacks mental capacity, or had her signature forged, or never assented to the deal at all—are directed at the container contract, but

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113. Alan Scott Rau, *Everything You Really Need to Know About “Separability” in Seventeen Simple Propositions*, 14 AM. REV. INT’L ARB. 1, 81–82 (2003) [hereinafter “*Separability*”].

114. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397–99 (1967).

115. “*Separability*,” *supra* note 113, at 82.

116. See Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT’L L. REV. 81, 94–99 (2012).

117. See “*Arbitrability Question*,” *supra* note 111; “*Separability*,” *supra* note 113.

118. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–45 (2006).

also undermine the arbitration clause.<sup>119</sup> Rau argues that courts, not arbitrators, should decide these assertions, because their essence is that a party did not “agree[ ] to *anything*.”<sup>120</sup> However, Rau then goes further and defends the strands of separability that permit the arbitrator to decide defenses to the container contract such as fraud, duress, and mistake. According to Rau, separability is a default rule that takes the existence of an arbitration clause as evidence that the parties intended to arbitrate all disputes, including those relating to the validity of the container contract.<sup>121</sup> Rau claims that this allocation of authority is consistent with what most parties would want, since it allows them to harness “the practical advantages of one-stop adjudication.”<sup>122</sup> Thus, because Rau views separability as no less consensual than other default rules, such as implied warranties, he contends that it “is grounded on the existence of an agreement to arbitrate,” with “agreement” defined the same way it is “use[d] . . . every day in the realm of contract.”<sup>123</sup>

Recent events have made the relationship between separability and contractual consent even more important. In the mid-2000s, frustrated with the high volume of decisions

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119. See “*Separability*,” *supra* note 113, at 14–15.

120. *Id.* at 14–15 (emphasis in original) (quoting Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213, 253 n.173 (1996)). Judges have not always been capable of this analytic dexterity. See, e.g., *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471–72 (5th Cir. 2002) (mandating arbitration despite district court’s conclusion that adherent lacked mental capacity). However, for my purposes, Rau’s reading of the separability doctrine has an important payoff: it prevents drafters from requiring adherents to arbitrate complaints that they never agreed to a transaction in the first place. Consider most major retailers’ websites, which provide that anyone who visits the site has automatically accepted terms and conditions (including an agreement to arbitrate). Consumers cannot see the boilerplate (including the clause that deems entering the site to be assent to its provisions) until after they have entered the site. For instance, in a migraine-inducing passage, Overstock.com informs consumers who have *already* accessed its website: “Entering the Site will constitute your acceptance of these Terms and Conditions. If you do not agree to abide by these terms, please do not enter the Site.” *Terms and Conditions*, OVERSTOCK.COM, [https://help.overstock.com/app/answers/detail/a\\_id/63](https://help.overstock.com/app/answers/detail/a_id/63) (last visited Feb. 8, 2013). Under the cartoonish way the Court has often described separability, an arbitrator would resolve an adherent’s claim that she visited the site once and never saw the Terms and Conditions.

121. See “*Separability*,” *supra* note 113, at 33–35.

122. *Id.* at 34 (internal quotation marks omitted) (quoting *Harbour Assurance Co. (U.K.) v. Kansa Gen. Int’l Ins. Co.*, [1992] Q.B. 81 at 85–86 (J. Steyn) (Eng.)).

123. *Id.* at 8, 15.

striking down adhesive arbitration provisions, companies attempted to end-run the rule that allows judges (rather than arbitrators) to resolve unconscionability challenges. They did this through “delegation clauses”: language empowering arbitrators to decide the very question of whether the arbitration clause is unconscionable.<sup>124</sup> The Court had previously opined in disputes between commercial enterprises that delegation clauses were permissible if there was “clear and unmistakable evidence” that the parties intended the arbitrator to determine whether the arbitration provision was valid.<sup>125</sup> Yet when companies attempted to extend this principle to adhesion contracts, lower courts balked.<sup>126</sup> These judges explained that it would be perverse to find that an adherent “clearly and unmistakably” agreed to have an arbitrator hear an unconscionability challenge. After all, the thrust of such a claim is that the adherent never “meaningfully assent[ed]” to arbitration in the first instance.<sup>127</sup>

However, in its 2010 opinion in *Rent-A-Center, West, Inc. v. Jackson*,<sup>128</sup> the Court saw the issue through a different prism. A company required its employees, as a condition of employment, to sign an arbitration agreement that included a delegation clause, restricted discovery, and saddled employees with paying half of the arbitrator’s fees.<sup>129</sup> An employee sought to bring his federal civil rights lawsuit in court, arguing that the discovery caps and fee-splitting term made the arbitration clause unconscionable.<sup>130</sup> The Court began by recasting the delegation clause as a micro-arbitration provision: (1) a contract to arbitrate whether the arbitration clause is valid; (2) inside the agreement to arbitrate the lawsuit’s merits; (3) under the umbrella of the container contract.<sup>131</sup> Doubling down on separability, the Court reasoned that just as an arbitration clause precludes judicial oversight of a container contract, a delegation provision prohibits courts from evaluating whether

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124. See, e.g., *Jackson v. Rent-A-Ctr. W., Inc.*, 581 F.3d 912, 917 (9th Cir. 2009); *Auwah v. Coverall N. Am., Inc.*, 554 F.3d 7, 10 (1st Cir. 2009).

125. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

126. See, e.g., *Jackson*, 581 F.3d at 917; *Auwah*, 554 F.3d at 10–13.

127. *Jackson*, 581 F.3d at 917.

128. 130 S. Ct. 2772 (2010).

129. *Id.* at 2775, 2779–80.

130. See *id.* at 2775.

131. *Id.* at 2777–78.

an arbitration clause is enforceable.<sup>132</sup> That is, when a contract includes a delegation clause, arbitrators must resolve every dispute between the parties—including the issue of whether the arbitration clause is unconscionable—with the razor-thin exception of “challenges [to] the *particular sentences* that delegate such claims to the arbitrator.”<sup>133</sup> Under this test, it did not matter that the employee had contended that the discovery caps and fee-splitting provision made it harder for him to arbitrate his race discrimination complaint.<sup>134</sup> Because these arguments did not pertain to the exceedingly narrow issue of whether the delegation clause was unconscionable, they were reserved for the arbitrator.<sup>135</sup>

*Rent-A-Center* lays the groundwork for the kind of systemic failure of consent that is capable of sustaining Radin’s democratic degradation thesis. Recall that one of unconscionability’s vital purposes is to weed out terms that “fall outside the ‘circle of assent.’”<sup>136</sup> Every attempt to harmonize mass contracting with consent assumes that such a mechanism exists.<sup>137</sup> As a result, fine print is not contractual; rather, it aspires to be contractual. Indeed, it blossoms into a binding agreement only when it is fundamentally fair. By erecting an artificial wall between the agreement to arbitrate the merits and the delegation clause, *Rent-A-Center* gives dispute resolution terms a dignity that other adhesive clauses lack. When a consumer or employee tries to invoke the unconscionability defense to avoid being sent to an extrajudicial forum, *Rent-A-Center* deposits her into that very forum. Didn’t agree to arbitrate? Tell it to the arbitrator.

Here one might object that *Rent-A-Center* can be aligned with contractual consent because nothing stops the arbitrator from striking down the agreement to arbitrate the merits. After all, discovery limitations, cost-sharing provisions, and other

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132. *Id.* at 2778–79.

133. *Id.* at 2787 (Stevens, J., dissenting).

134. *See id.* at 2780.

135. *See id.* at 2780–81.

136. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Cal. Ct. App. 1982); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”).

137. *See supra* notes 92–94.

harsh terms do not become bulletproof in the extrajudicial forum. Consumers and employees do not forfeit their rights to contend that the agreement to arbitrate the merits is unconscionable, but simply address that argument to a different tribunal. Even under *Rent-A-Center*, a judge always remains available to entertain the argument that an adherent did not agree to the delegation clause itself—in other words, the claim that it would be unconscionable to arbitrate the issue of whether the arbitration clause is unconscionable.

But there are two problems with this surgical division of arbitration clauses into smaller, self-contained, autonomous agreements. The first is its spectacular formalism. Fine print is clear and unmistakable evidence of the parties' intent only if one inserts scare quotes around the words "parties" and "intent." In fact, allowing drafters to fashion "agreement" out of whole cloth leads to an absurd result. Many consumer and employment agreements incorporate the commercial or employment dispute resolution procedures of a major arbitral provider, such as the American Arbitration Association (AAA). In turn, these rules permit the arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."<sup>138</sup> According to some courts, these passing references to the AAA rules are de facto delegation clauses.<sup>139</sup> As a result, many standard forms "clearly and unmistakably" allow the arbitrator to decide whether the arbitration clause is unconscionable even though they say nothing whatsoever about the issue.<sup>140</sup>

Second, *Rent-A-Center* overlooks the degree to which terms rise and fall together. When part of an arbitration clause is unconscionable, courts must decide whether to sever the unfair provisions and compel arbitration or strike down the entire arbitration provision. The rough rule of thumb is that the existence of more than one unfair term is fatal to the

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138. AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 6(a) (Oct. 1, 2013), available at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_004103&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_004103&RevisionSelectionMethod=LatestReleased); *id.* at 7(a).

139. *E.g.*, *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed. Cir. 2006); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332–33 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

140. *See supra* note 139.

overarching agreement to arbitrate.<sup>141</sup> Even after *Rent-A-Center*, it is possible that an arbitrator could cite numerous one-sided provisions as a reason to annul the entire agreement to arbitrate—including the delegation clause. In turn, this would cause the very conundrum that the separability doctrine supposedly prevents: “an arbitral decision . . . that ‘calls into question the validity of the arbitration clause from which [the arbitrators] derive their power.’”<sup>142</sup> Or perhaps *Rent-A-Center* is dead serious that delegation clauses stand alone. Of course, if this were the case, courts also could not deem a delegation clause to be infected with the flaws of a manifestly unbalanced agreement to arbitrate the merits. And as a result, consumers and employees who never meaningfully consented to a sham dispute resolution regime would still end up in its jaws.

In sum, adhesive arbitration clauses richly deserve their status as Exhibit A in Radin’s normative degradation case. Indeed, there is no better example of “what consent is *not*” than mass arbitration (p. 20). And as I discuss next, companies use their unchecked sway over fine print to rewrite the public laws.

### B. Rights

Radin argues that mass contracting is undemocratic because it replaces state-created rules “with a governance scheme that is more favorable to the firm” (p. 33). Yet a hostile reader might object that Radin too often assumes that the loss of *any* state-created entitlement, including procedural privileges, such as access to a jury, a judicial forum, or the class action mechanism, is intrinsically troubling. It may be, as Radin repeatedly asserts, that “most people don’t know what arbitration is” and that arbitrators “are widely believed to be more favorable to businesses” (p. 4). But the glowing question

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141. See, e.g., *Lhotka v. Geographic Expeditions, Inc.*, 104 Cal. Rptr. 3d 844, 853 (Ct. App. 2010); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003); *Manfredi v. Blue Cross & Blue Shield of Kan. City*, 340 S.W.3d 126, 135 (Mo. Ct. App. 2011); *Smith v. D.R. Horton, Inc.*, 742 S.E.2d 37, 41 (S.C. Ct. App. 2013). *But cf.* Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 893–94 (2011) (discussing remedies for unfair contract terms, including arbitration clauses).

142. “*Arbitrability Question*,” *supra* note 111, at 341 (second alteration in original) (quoting William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 19, 53 (1998)).



is precisely the one that Radin sidesteps: *When* does an arbitration clause or a class arbitration waiver eviscerate substantive rights? In this section, I show that deeper engagement with this issue actually supports, rather than undermines, Radin's thesis. The dark hallmark of the Court's recent FAA jurisprudence is to compel arbitration even when there is no dispute that doing so will eliminate statutory rights.

The relationship between arbitration and substantive rights has long been challenging. For the first six decades of the FAA's existence, the Court's approach was extremely cautious. Under what was known as the non-arbitrability doctrine, the Court exempted federal statutory claims from the FAA.<sup>143</sup> The premise behind this federal common law principle was that Congress did not intend to funnel public law causes of action into a forum that lacked full-bore discovery, rigorous evidentiary rules, and appellate rights, and therefore did not "provide an adequate substitute for a judicial proceeding."<sup>144</sup> As arbitration matured, though, these suspicions began to ring hollow. In the 1980s, the Court reversed course, declaring in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* that arbitration was simply a faster and cheaper version of litigation:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>145</sup>

Critically, however, *Mitsubishi Motors* did not disown the macro-principle that had driven the non-arbitrability rule: the

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143. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435–38 (1953). Lower courts invoked the non-arbitrability rule more frequently. See, e.g., *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968); Horton, *Vindication of Rights*, *supra* note 41, at 730–33.

144. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222–23 (1985); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 42, 59–60 (1974) (reasoning that Congress could not have intended Title VII plaintiffs to resolve their claims in a forum where "discovery, compulsory process, cross-examination, and testimony under oath[] are often severely limited or unavailable").

145. 473 U.S. 614, 628 (1985).

need to keep arbitration outcome-neutral.<sup>146</sup> Indeed, the Court replaced the non-arbitrability doctrine with the vindication of rights rule: a fact-specific test that invalidates arbitration clauses when plaintiffs prove that particular arbitral features—usually filing costs or arbitrator’s fees—thwart the exercise of their federal statutory rights.<sup>147</sup> Likewise, because the FAA expressly makes arbitration clauses vulnerable to traditional contract defenses, lower courts shielded state statutory claims from drafter overreaching by liberally invoking the unconscionability doctrine.<sup>148</sup> To maintain the parity between arbitration and litigation as equally hospitable venues for substantive rights, judges struck down terms within arbitration clauses that chose distant venues,<sup>149</sup> severely restricted discovery,<sup>150</sup> reduced statutes of limitations,<sup>151</sup> saddled plaintiffs with hefty costs,<sup>152</sup> and eliminated the right to recover attorney’s fees or remedies.<sup>153</sup>

In *Discover Bank v. Superior Court*,<sup>154</sup> the California Supreme Court extended this logic and held that a class arbitration waiver was unconscionable where a credit card company had allegedly cheated its customers out of roughly thirty-dollars each.<sup>155</sup> The state high court explained that because no plaintiff will pursue a low-value claim on an individual basis, the class arbitration waiver was a “get out of jail free card” for corporate liability.<sup>156</sup> Soon dozens of courts followed suit, refusing to enforce class arbitration waivers under the vindication of rights doctrine where the cost of litigating a federal statutory claim dwarfed any individual

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146. *See id.* at 637 n.19.

147. *See, e.g.*, *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000).

148. *See, e.g.*, David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012).

149. *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1285, 1293 (9th Cir. 2006) (en banc).

150. *See, e.g.*, *Estate of Ruszala v. Brookdale Living Cmty., Inc.*, 1 A.3d 806, 821–22 (N.J. Super. Ct. App. Div. 2010).

151. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894–95 (9th Cir. 2002).

152. *See, e.g.*, *McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1274 (Pa. Super. Ct. 2004).

153. *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 45–48, 52 (1st Cir. 2006).

154. 113 P.3d 1100 (Cal. 2005).

155. *Id.* at 1104.

156. *Id.* at 1108 (quoting *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002)).

plaintiff's potential recovery,<sup>157</sup> or the unconscionability defense in cases involving numerous small-dollar violations of state statutes.<sup>158</sup>

But drafters soon realized that they held the keys to their own deliverance. If judges were concerned that class arbitration waivers eliminate incentives to prosecute minor grievances, then drafters could cure this defect themselves. Taking a page from legislatures, which encourage the assertion of particular claims through fee-shifting or treble damage awards, several companies amended their class arbitration waivers to provide bonuses for plaintiffs to arbitrate on an individual basis.<sup>159</sup> The leader of this pack was AT&T, which promised to pay \$7,500 and double attorneys' fees for any plaintiff who recovered more in individual arbitration than AT&T's last settlement offer.<sup>160</sup>

This self-proclaimed "pro-consumer" class arbitration waiver reveals just how complex the nexus of contract and rights has become.<sup>161</sup> To be sure, the clause virtually guarantees that AT&T will fully compensate any plaintiff with a legitimate complaint. Also, given the fact that aggregate proceedings are notorious for lining the pockets of plaintiffs' lawyers—not plaintiffs—there is a colorable argument that consumers are better off under AT&T's contract than if they retained their class action rights. But then again, AT&T's rewards for individual arbitration seem like empty largesse because "consumers must spread their attention 'thinly across thousands of transactions and the management of hundreds of possessions,'"<sup>162</sup> and very few will take advantage of the generous terms. Indeed, although AT&T had over 70 million

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157. See, e.g., *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 319 (2d Cir. 2009), *vacated*, 130 S. Ct. 2401 (2010); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007).

158. See, e.g., *Homa v. Am. Express Co.*, 558 F.3d 225, 231 n.2, 233 (3d Cir. 2009); see also Horton, *Vindication of Rights*, *supra* note 41, at 743 n.122 (collecting cases).

159. See Horton, *supra* note 41, at 463–64.

160. See Horton, *Delegation*, *supra* note 25, at 654–55.

161. AT&T Mobility LLC's Motion To Compel Arbitration & To Dismiss Action at 3, *Francis v. AT&T Inc.*, No. 2:07-CV-14921 (E.D. Mich. Jan. 25, 2008), 2008 WL 393982.

162. Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1675 (2006) (quoting E. SCOTT MAYNES, CONSUMER PROBLEMS IN MKT. ECONS., ENCYC. OF THE CONSUMER MOVEMENT 158, 163 (1997)).

wireless customers between 2003 and 2008, a mere 180 initiated arbitration.<sup>163</sup> Thus, there can be no doubt that the class-arbitration waiver insulates AT&T from claims brought by all but the most hyper-vigilant of consumers and, therefore, slashes its liability exposure to the bone. For that reason, the Ninth Circuit invoked *Discover Bank* and held that AT&T's provision was unconscionable as applied to a small-dollar class action for violating a state consumer protection statute.<sup>164</sup>

The Court granted certiorari and held in *AT&T Mobility LLC v. Concepcion*, that the FAA preempts *Discover Bank*.<sup>165</sup> Speaking through Justice Scalia, the Court began by explaining that the central purpose of the FAA was to foster "streamlined proceedings."<sup>166</sup> The Court then reasoned that the California Supreme Court's use of the unconscionability doctrine to mandate class procedures in arbitration impaired this goal. Compared to traditional two-party arbitration, class arbitration is slower, more formal, and "greatly increases risks to defendants."<sup>167</sup> Accordingly, the Court concluded with a paragraph the importance of which would be difficult to exaggerate:

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. *But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.* Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of \$7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer.<sup>168</sup>

That passage is at war with itself. On the one hand, most

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163. See *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009).

164. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 (9th Cir. 2009).

165. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011). The Court had foreshadowed *Concepcion* by holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776–77 (2010), that class arbitration is so different than traditional, two-party arbitration that arbitrators cannot find that parties have agreed to it when the arbitration clause is "silent" on the issue.

166. *AT&T Mobility LLC*, 131 S. Ct. at 1748.

167. *Id.* at 1752.

168. *Id.* at 1753 (emphasis added) (citation omitted).

courts have focused on the italicized portion and concluded that *Concepcion* announces a categorical rule: the FAA preempts any state law claim that requires procedures that are “incompatible with arbitration.”<sup>169</sup> These judges have ordered arbitration despite concrete evidence that state statutory claims will not survive their transplant to the extrajudicial forum.<sup>170</sup> These doomed lawsuits include not only low-value class actions, but also requests for public injunctive relief (which arbitrators cannot oversee)<sup>171</sup> and “pattern or practice” employment discrimination claims (which require aggregate proof).<sup>172</sup> Notably, under this reading *Concepcion* applies to arbitration clauses *generally*, even those that do not contain class action waivers. The *mere existence* of an arbitration provision—long trumpeted as benign—is now fatal to a variety of democratically-created substantive rights.

On the other hand, the critical paragraph from *Concepcion* can be construed narrowly. As noted, the AT&T class arbitration waiver was extraordinary: it lit the path for willing plaintiffs to arbitrate on an individual basis. Indeed, the Court emphasized that fact, pointing out that any AT&T customer’s small-dollar claim “was most unlikely to go unresolved.”<sup>173</sup> Thus, commentators, including Myriam Gilles and Gary Friedman (as well as myself), have suggested that *Concepcion* should be limited to contracts that offer AT&T-style incentives for individual arbitration.<sup>174</sup> Recently, this more modest

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169. *Id.* at 1747 (internal quotation marks omitted). Similarly, other judges have construed *Concepcion* as dramatically enlarging the FAA’s preemptive sweep. See *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013) (holding that the FAA preempts Montana’s requirement that adhesion contracts be consistent with consumers’ reasonable expectations because *Concepcion* makes clear that “the FAA’s purpose is to give preference (instead of mere equality) to arbitration provisions”).

170. See *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 (9th Cir. 2012); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207–08 (11th Cir. 2011); see also *Litman v. Celco P’ship*, 655 F.3d 225, 227–29 (3d Cir. 2011) (compelling individual arbitration of state consumer protection claims of roughly one dollar per consumer).

171. *Kilgore v. KeyBank, Nat’l. Ass’n*, 673 F.3d 947, 958 (9th Cir. 2012), *overruled on other grounds by*, 718 F.3d 1052, (9th Cir. 2013) (en banc).

172. *Karp v. CIGNA Healthcare, Inc.*, 882 F. Supp. 2d 199 (D. Mass. 2012).

173. *AT&T Mobility LLC*, 131 S. Ct. at 1753.

174. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 642 & n.92 (2012); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1268–73 (2013).

understanding of *Concepcion* has gained momentum, as several courts have invalidated class arbitration waivers when a plaintiff proves that “she lacks the ability to pursue a claim against the defendant in individual arbitration.”<sup>175</sup>

However, the Court’s June 2013 decision in *Amex*<sup>176</sup> upped the ante in this debate considerably. Recall that when faced with federal statutory claims, courts used the vindication of rights doctrine (a creature of federal common law), rather than the unconscionability defense (a state contract principle) to strike down class arbitration waivers.<sup>177</sup> In *Amex*, a group of merchants who accept American Express cards attempted to bring a class action against the lending giant for violating the Sherman and Clayton Acts.<sup>178</sup> The contract between American Express and the merchants contained a class-arbitration waiver and a confidentiality provision that encompassed “all testimony, filings, documents and any information relating to or presented during the arbitration proceedings . . . .”<sup>179</sup> In the district court, the plaintiffs established that pursuing the case on a non-class basis would be a kamikaze act: the expert fees alone could exceed \$1 million, but any individual merchant’s potential recovery—even if trebled—was no more than \$40,000.<sup>180</sup> Citing the fact that these lawsuits would either be aggregated or abandoned, the Second Circuit invalidated the class-action waiver under the vindication of rights doctrine.<sup>181</sup> As the Second Circuit noted, the problem was not merely the class-action waiver. It was also the confidentiality provision, which made it impossible for the plaintiffs to engage in creative cost-reduction efforts, such as pooling resources or sharing a

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175. *Feeney v. Dell Inc.*, 465 Mass. 470, 502 (2013), *abrogated by* *Machado v. System4 LLC*, 466 Mass. 1004 (2013) (finding that courts can still deem class arbitration waivers to be unconscionable “where the claims are complex, the damages are demonstrably small and the arbitration agreement does not feature the safeguards found in the *Concepcion* agreement”); *Brown v. Super. Ct.*, 157 Cal. Rptr. 3d 779 (Cal. Ct. App. 2013) (holding that *Concepcion* does not apply to representative claims under the state Labor Code Private Attorneys General Act of 2004), *review granted and opinion superseded by*, 307 P.3d 877 (Cal. 2013).

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

177. *See supra* text accompanying notes 147–48.

178. *See Amex*, 133 S. Ct. at 2308.

179. *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 318 (2d Cir. 2009), *vacated*, *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

180. *Id.* at 317.

181. *Id.* at 315–16.

single expert report.<sup>182</sup> Thus, the Second Circuit concluded that the plaintiffs’ “claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration . . . .”<sup>183</sup>

The Supreme Court reversed.<sup>184</sup> In a disingenuous move, sure to cause confusion in lower courts, Justice Scalia’s majority opinion went out of its way to call the vindication of rights doctrine “dictum.”<sup>185</sup> The Court then explained that even if the vindication of rights doctrine does exist, it is *not* about whether the shift from a judicial to an arbitral forum makes it more difficult for a plaintiff to succeed. Instead, any such rule shields only the narrower “right to pursue” statutory causes of action:

[The vindication of rights doctrine] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access . . . . But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.<sup>186</sup>

Not surprisingly, the plaintiffs did not fall within the newly-pinched scope of the (possibly mythical) vindication of rights doctrine. Indeed, despite the class arbitration waiver, they had every “right to pursue” their cost-prohibitive federal antitrust claims in individual arbitration.<sup>187</sup>

Yet *Amex*’s hostility to class actions is not the end of the story. Like *Concepcion*, where the contours of the Court’s holding were hard to discern through the fog of results-oriented

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182. *Id.* at 317–18.

183. *Id.* at 319. The Second Circuit then reconsidered the matter in light of *Stolt Nielsen*, and again after *Concepcion*, but did not reach a different conclusion. See *In re Am. Express Merchs.’ Litig.*, 634 F.3d 187, 200 (2d Cir. 2011); *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 213 (2012). It then denied rehearing *en banc*, with five judges dissenting. *In re Am. Express Merchs.’ Litig.*, 681 F.3d 139, 143 (2d Cir. 2012).

184. *Amex*, 133 S. Ct. 2304 (2013).

185. *Id.* at 2310.

186. *Id.* at 2310–11 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

187. *Id.* at 2312.

reasoning, *Amex* concluded with a passage that implies that the vindication of rights doctrine does not survive *even in individual arbitration*:

The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.<sup>188</sup>

If the Second Circuit's rubric in *Amex* imposes an unwieldy "superstructure" and "preliminary . . . hurdle" that would "destroy the prospect of speedy resolution,"<sup>189</sup> what about non-class action-based challenges to hefty filing or arbitrator's fees? Every time a plaintiff argues that arbitration is unduly expensive, a judge must probe the plaintiff's financial resources, the possibility of recouping expenses, and the amount of any potential recovery.<sup>190</sup> Indeed, the vindication of rights doctrine instructs judges to undertake precisely the kind of threshold inquiry that *Amex* rejects: "a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims."<sup>191</sup> Likewise, stepping back and looking at the opinion more broadly, how does a plaintiff who cannot afford to arbitrate differ from the *Amex* plaintiffs? Whether the

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188. *Id.*

189. *Id.*

190. *See Horton, Vindication of Rights*, *supra* note 41, at 730–46.

191. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001); *cf. Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 663 (6th Cir. 2003) (adopting an approach that differs from *Bradford* "by looking to the possible 'chilling effect' of the [arbitral costs] on similarly situated potential litigants, as opposed to its effect merely on the actual plaintiff in any given case").



impediment is the lack of the class-action mechanism or some other expense, it does not eradicate the “right to pursue” a statutory claim.<sup>192</sup> It may be exceedingly unwise to attempt to prosecute such a lawsuit—it may even be economic suicide—but the right is there for the taking.

*Boilerplate* highlights why courts must not read *Amex* so broadly. Recall that Radin urges courts and policymakers to pay greater attention to the nature of the right that an adhesive provision purports to waive (p. 155). As she points out, not all entitlements are fungible. Indeed, some are market inalienable and therefore “cannot be relinquished for pay . . . no matter what level of consent exists” (p. 160). Most federal statutory rights fit this description. For instance, a venerable line of authority holds that parties cannot prospectively relinquish their ability to sue under the Sherman and Clayton Acts.<sup>193</sup> This rule stems from the single most widely accepted rationale for making objects or rights inalienable: to prevent negative externalities.<sup>194</sup> Because antitrust laws preserve the competitiveness of markets, the contractual surrender of inchoate antitrust claims “would have [an] impact, not simply between the parties, but upon the public as well.”<sup>195</sup> Moreover, there is a pragmatic reason to forbid the waiver of future antitrust claims. The very point of an antitrust allegation is that a company is a monopolist. A firm with excessive market power could not just extract supra-competitive prices, but also insist on harsh terms, including the relinquishment of the right to sue for antitrust violations.<sup>196</sup> Thus, as Justice Kagan’s energetic *Amex* dissent notes, Justice Scalia’s majority opinion

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192. *Am. Express*, 133 S. Ct. at 2310–11 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

193. See, e.g., *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 896 n.27 (3d Cir. 1975); *Redel’s Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967); *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 250 (7th Cir. 1995); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955).

194. See Horton, *Vindication of Rights*, *supra* note 41, at 753–55. Likewise, leading rationales for inalienability in other contexts—such as preventing negative externalities and correcting informational asymmetries—underlie the rule against the prospective waiver of securities and civil rights claims. See *id.* at 750–54.

195. *Fox Midwest Theaters*, 221 F.2d at 180.

196. During oral argument, both Justice Alito and Justice Kagan asked about this connection. See Transcript of Oral Argument at 13, 17–18, *Amex*, 133 S. Ct. 2304 (No. 12-133), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-133.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf).

does not seriously dispute that the Court would refuse to enforce an *express* waiver of future antitrust claims.<sup>197</sup> Yet that cannot be the end of the rule: only the most hammer-handed corporate lawyer would insert an express waiver. Instead, any drafter with an iota of common sense would try to obtain that result through the back door by stacking the procedural deck in her client's favor.<sup>198</sup> Accordingly, for a rule against prospective waivers of federal statutory rights to have any teeth, it must apply to arbitration provisions that are the functional equivalent of an exculpatory clause. That is exactly the purpose the vindication of rights doctrine has long served.<sup>199</sup> And that is why, notwithstanding *Amex's* coyness about the rule's existence, it has long been—and must continue to be—a fixture in the federal law of arbitrability.<sup>200</sup>

Moreover, like *Concepcion*, where the Court's sweeping declarations rest precariously atop unusual facts, *Amex* may not be capable of supporting the pro-business Justices' desire to stamp out the class action entirely. Recall that American Express's arbitration clause not only forbade class actions, but also prohibited plaintiffs from consolidating claims or otherwise cooperating.<sup>201</sup> During oral argument, several Justices suggested that these features were problematic because they prevented the plaintiffs from engaging in the kind of creative, low-cost presentation of their individual cases that arbitration supposedly facilitates.<sup>202</sup> In the majority opinion,

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197. *Amex*, 133 S. Ct. at 2313 (Kagan, J., dissenting) (“Start with an uncontroversial proposition: We would refuse to enforce an exculpatory clause insulating a company from antitrust liability—say, ‘[m]erchants may bring no Sherman Act claims’—even if that clause were contained in an arbitration agreement.”); *cf. id.* at 2310 (majority opinion of Scalia, J.) (opining that if the vindication of rights doctrine exists, it “would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights”).

198. *Cf. id.* at 2314 (Kagan, J., dissenting) (“If the rule were limited to baldly exculpatory provisions, however, a monopolist could devise numerous ways around it.”).

199. See Horton, *Vindication of Rights*, *supra* note 41, at 730–46.

200. Despite Justice Scalia's description of the vindication of rights doctrine as “originat[ing] as dictum in *Mitsubishi Motors*,” *Amex*, 133 S. Ct. at 2310, the principle that courts need not compel arbitration when a plaintiff cannot vindicate her federal statutory rights is much older. As noted, the vindication of rights doctrine is the modern manifestation of the non-arbitrability doctrine, which exempted federal statutory claims from arbitration based on the (now defunct) premise that plaintiffs could not get a fair shake outside of the court system. See *supra* text accompanying notes 143–47.

201. See *supra* text accompanying note 179.

202. See Transcript of Oral Argument at 22–25, 30–31, 53–54, *Amex*, 133 S. Ct.

Justice Scalia attempts to hurdle these concerns by insisting that the American Express contract does *not* contain these features:

The dissent also says that the agreement bars other forms of cost sharing . . . that could provide effective vindication. *Petitioners denied that, and that is not what the Court of Appeals decision under review here held.* It held that, because other forms of cost sharing were not economically feasible . . . the class-action waiver was unenforceable . . . . That is the conclusion we reject.<sup>203</sup>

*Amex* therefore prohibits courts from finding that the class-action device is necessary when “other forms of cost sharing” *are* available. Conversely, *Amex* does not address whether judges can nullify class arbitration waivers in stricter arbitration clauses: those that include confidentiality provisions, bar joinder or consolidation of claims, or deny statutorily mandated reimbursement for fees or costs to prevailing plaintiffs. Arguably, this leaves a window open for lower courts to find that class arbitration waivers coupled with other stringent provisions violate either state unconscionability principles or the vindication of rights doctrine.

Nevertheless, despite this slender ray of light, *Amex* otherwise reinforces the claim-killing, class-action-swallowing reading of *Concepcion*. In a footnote, the Court explains that *Amex* and *Concepcion* “establish[ ] . . . that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”<sup>204</sup> This is a candid disavowal of the longstanding principle that the switch between a judicial and an arbitral forum must be outcome-neutral. (It also defines “low value” most curiously, in light of the case’s massive size and the fact that many *Amex* plaintiffs have tens of thousands of dollars on the line). In addition, it means that the Court has allowed drafters to engage in aggregate contracting—a practice that Radin persuasively argues is not “contracting” at all—while making every effort to

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2304 (No. 12-133), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-133.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf).

203. *Amex*, 133 S. Ct. at 2311 n.4 (2013) (emphasis added).

204. *Id.* at 2312 n.5.

deny adherents the ability to aggregate claims.<sup>205</sup> And most importantly, the casualties of this quiet revolution are, as Radin says, “rights . . . granted by legislatures” (p. 16). Congressionally created law is far from perfect, but it should not be so fragile that “erasing [it] only requires drafting boilerplate” (pg. 40).

## CONCLUSION

In the best way possible, the title of Radin’s book is at war with its contents. “Boilerplate” originally referred to the bulky steel sheets that were fashioned into steam boilers. It became a metaphor for unalterable text in the 1890s, when advertisements and syndicated columns were stamped in steel before printing (pp. xvi–xvii). Today, however, “boilerplate” has become synonymous with language in legal documents that is rote, dull, and formulaic.<sup>206</sup> Radin’s lucid portrait of contemporary fine print reveals a phenomenon that is anything but routine. I have built on her analysis to show how adhesive arbitration clauses push the boundaries of ex ante consent, eliminate ex post judicial oversight, and ultimately displace democratically-created rights. “Boilerplate” conjures an image of words fixed in metal, but Radin demonstrates that these

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205. Justice Scalia gestures toward a class-action specific counterargument that inverts Radin’s democratic degradation thesis. Because Congress passed the Sherman Act before it approved Rule 23, plaintiffs initially had no incentive to bring low-value but expensive antitrust claims. See Transcript of Oral Argument at 12, *Amex*, 133 S. Ct. 2304 (No. 12-133), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-133.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-133.pdf); *Amex*, 133 S. Ct. at 2311 n.4. Accordingly, Justice Scalia opines that perhaps it is the class-action device—and not the class arbitration waiver—that impermissibly alters substantive rights. See *id.* at 2309–10 (suggesting that an overly-robust interpretation of Rule 23 would violate the Rules Enabling Act). Scholars such as Martin Redish and the late Richard Nagareda have made similar points more elegantly. See generally MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009) (arguing that the class action is undemocratic because it flouts with principles of litigant autonomy); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011) (noting the difficulty of squaring the class action with the Rules Enabling Act). This is an exceedingly complex issue that is outside the scope of this Article. I will note, however, that allowing drafters to impose mass terms is really a kind of subsidy: bending the basics of contract law to facilitate the smooth operation of the modern economy. Permitting plaintiffs to aggregate claims stemming from adhesion contracts only seems fair: fire fighting fire.

206. See, e.g., BLACK’S LAW DICTIONARY 198 (9th ed. 2009).

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provisions might as well be organic: they adapt, they spread, and they are virulent.