YOU'VE GOT YOURSELF A DEAL! OR DO YOU?: HOW THE EXPANSION OF THE FEDERAL ARBITRATION ACT TRIGGERS THE NEW *LOCHNER* ERA

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Arbitration is perceived as a transparent, inexpensive, and quick alternative to litigation.[1] Aggrieved parties utilize arbitration more frequently than traditional litigation because its convenience[2] ultimately leads to an overall decongestion of the courts' resources.[3] As arbitration became a normalized avenue for alternative dispute resolution, courts increasingly saw the presence of arbitration awards in litigation.[4] However, courts often altered or revoked arbitration awards due to their "jealousy" of arbitration proceedings and its accompanying impact on litigation that would "oust" courts from "their [own] jurisdiction."[5] As such, Congress enacted the Arbitration Act in 1925,[6] which was later codified in 1947 as the Federal Arbitration Act (FAA),[7] to respond to the demand for arbitration and to provide guidance for courts.[8]

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[1] *See* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 433 (2008).

[2] *See, e.g.*, Jean Murray, *Arbitration vs. Litigation: What's the Difference?*, THE BALANCE, https://www.thebalancemoney.com/arbitration-vs-litigation-what-is-the-difference-398747#:~:text=In%20many%20cases%2C%20arbitration%20is,money%20for%20the%20two%20parties (last updated Oct. 26, 2021) (explaining how arbitration often takes "several months instead of years").

[3] Fabio Núñez del Prado, *The Fallacy of Consent: Should Arbitration Be a Creature of Contract?*, 35 EMORY INT'L L. REV. 219, 222 (2021).

[4] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013) (explaining that requiring litigating hurdles prior to enforcement of arbitrations to determine the parties' "legal requirements for success" would run contrary and "destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure"); *see also* Timothy G. Nelson & Lea Haber Kuck, *US Courts Gain Prominence as 'Anchor' Forum for Enforcing International Arbitration Awards*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Jan. 26, 2021), https://www.skadden.com/insights/publications/2021/01/2021-insights/litigation-controversy/us-courts-gain-prominence-as-anchor-forum (stating that "[a] growing number of cases in which private parties are seeking enforcement of very large arbitration awards are percolating through the U.S. courts").

[5] H.R. REP. NO. 68–96, at 1–2 (1924).

[6] Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16).

[7] 9 U.S.C. § 1 note (Construction).

[8] *See id.* note (Purpose).

Important to this discussion is recognizing that arbitration agreements are binding and must be treated the same as court judgments.[9] However, court proceedings are vastly different than arbitration proceedings.[10] First, unlike court proceedings that consist of a judge or a jury, arbitrations have a panel or a single arbitrator that analyzes legal issues.[11] Additionally, arbitration proceedings are conducted privately, while courts are public.[12] Parties have gravitated towards including arbitration provisions in contracts because of its perceived similarity to litigation.[13] However, arbitration has drawbacks that impact both the arbitration claim and any related claims arising from the arbitration itself.[14]

Including an arbitration provision in a contract allows the contracting parties to pre-select rules that apply when a dispute arises.[15] However, no such provision exists in court proceedings.[16] If a dispute arises within a court's jurisdiction, the aggrieved party can choose to pursue a lawsuit—though the same choice does not exist in arbitration.[17] It is no wonder that arbitration has grown so effortlessly because parties can easily include arbitration provisions, such as curtailing discovery and how to submit evidence, that mandate rules when a dispute arises between or among parties.[18] Arguably, arbitration

[9] 65 CONG. REC. 1931 (1924).

[10] *See What is the Difference Between Arbitration and Litigation?*, HENDERSHOT COWART P.C. (Mar. 24, 2021), https://www.hchlawyers.com/blog/2021/march/what-is-the-difference-between-arbitration-and-l/#:~:text=In%20litigation%2C%20the%20trial%20judge,field%20of%20law%20or%20industry.

[11] *See Learn About Arbitration*, FINRA, https://www.finra.org/arbitration-mediation/learn-about-arbitration (last visited Dec. 28, 2022).

[12] Gold Coast Mall, Inc. v. Larmar Corp., 468 A.2d 91, 95 (Md. 1983).

[13] Martha Neil, *Litigation Over Arbitration*, 91 A.B.A. J. 50, 52 (2005).

[14] *See id.*

[15] *See infra* Part I.C.

[16] *See, e.g.*, *Litigation vs. Arbitration: Which is the Right Process for Hotel Disputes?*, PERRY GRP. INT'L (May 17, 2017), https://www.perrygroup.com/litigation-arbitration-dispute/#:~:text=A%20major%20downside%20to%20litigation,the%20case%20can%20be%20achieved.

[17] *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ (explaining how "it is common for employees to be presented with terms of employment that include both a clause that obligates them to arbitrate all disputes they might have with their employer and one that prohibits them from pursuing their claims in a class or collective action in court").

[18] Neil, *supra* note 13, at 51.

is favored by parties and courts alike because it is quick and cost-effective compared to its litigation counterpart.[19] The quick growth of arbitration[20] and the Court's judicial favoritism towards the FAA[21] suggest that arbitration is here to stay.

Notably, the dissent in *Epic Systems Corporation v. Lewis* warned that the *Lochner* era is back.[22] In that case, several similarly-situated employees joined together to assert a claim that their "employers . . . underpaid them."[23] However, to avoid such a claim from even reaching the courts, "their employers required [employees] to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind."[24] The question before the Court was: "[d]oes the Federal Arbitration Act (Arbitration Act or FAA), 9 U. S. C. § 1 *et seq.*, permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA)?"[25] The majority responded in the affirmative, which led to broadening the FAA beyond its intended purpose.[26] The dissent gravely warned that "[t]he inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[27] Not too long ago, the Supreme Court similarly undermined States' police powers and prioritized economic freedoms over conflicting fundamental rights.[28] Therefore, a parallel exists between the *Lochner* era caselaw and the expansion of the FAA.

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[19] *Id.*

[20] Donald R. Philbin, Jr. & Audrey Lynn Maness, *Alternative Dispute Resolution*, 40 TEX. TECH L. REV. 445, 446–47 (2008).

[21] *See* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 58–59 (2015).

[22] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018).

[23] *Id.* at 1633 (Ginsburg, J., dissenting).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1646.

[28] *See* Lochner v. New York, 198 U.S. 45, 57, 60, 64 (1905) ("It seems to us that the real object and purpose [of the laws] were simply to regulate the hours of labor between the master and his employees . . . , in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees.").

Arbitration is perceived to have a positive impact in the legal community,[29] but arbitration has negatively expanded too far.[30] Congress enacted the FAA to provide guidance to the courts when enforcing certain arbitration agreements.[31] However, the Court's recent interpretation of the FAA effectively curtails state courts from interfering in arbitration proceedings altogether.[32] Rather than arbitration proceedings coexisting alongside litigation, arbitration instead strips state courts from analyzing other statutory claims that may stem from the same set of facts in the arbitration dispute.[33] The Court has similarly interpreted the *Lochner* era cases to greatly reduce state court involvement.[34] In the *Lochner* era, states were unable to assert police powers against the Court's recognized fundamental right to freely contract.[35] The Court's interpretation of the FAA in modern caselaw likewise suggests there is a fundamental right to freely contract arbitration provisions.[36] Consequently, the FAA mirrors the *Lochner* era cases in the sense that both encourage economic rights, reduce state court power, and deter overall court regulation.[37]

This Note is divided into three sections. Part I focuses on the history of arbitration that led Congress to enact the Arbitration Act and its later codified version, the Federal Arbitration Act. Additionally, Part I explains how both the Arbitration Act and the FAA were incorrectly interpreted and expanded by the Court. Part II discusses the history of *Lochner* and the once-considered fundamental economic

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[29] *See generally* Charles L. Bernheimer, *The Advantages of Arbitration Procedure*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 98 (1926) (describing positive impacts of arbitration, including "sav[ing] time, trouble and money not only to the disputants but to the state as well").

[30] *See* Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void ab Initio Contracts*, 86 MARQ. L. REV. 581, 581–84 (2002).

[31] JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R44960, MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 1 (2017).

[32] *See* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1918 (2022).

[33] *See* SHIMABUKURO & STAMAN, *supra* note 31, at 5–11.

[34] *See* Joshua Waimberg, *Lochner v. New York: Fundamental Rights and Economic Liberty*, NAT'L CONST. CTR. (Oct. 26, 2015), https://constitutioncenter.org/blog/lochner-v-new-york-fundamental-rights-and-economic-liberty.

[35] *See id.*

[36] *See Viking River Cruises, Inc.*, 142 S. Ct. at 1918–19 (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010)).

[37] *See id.*

right of the freedom to contract.[38] During this era, courts regularly disfavored state or federal government intrusion mainly to preserve an individual's right to freely contract.[39] The conflict between the freedom to contract and other fundamental liberties led to the end of the *Lochner* era.[40] When making this transition, the Court recognized that, within the Fourteenth Amendment to the U.S. Constitution, there are "zones of privacy" where substantive due process rights exist and are deemed fundamental.[41] Moreover, issues contained in zones of privacy involve autonomy, marriage, and family, and each are subject to heightened strict scrutiny.[42] Nonfundamental rights, otherwise known as economic rights, are subject only to a rational basis review.[43]

Part III connects the rationale behind the Court's expansion of the FAA to the Court's expansion of *Lochner*. Here, this Note argues that the issues seen in *Lochner*-era decisions are not solely unique to that era because similar issues linger in the current arbitration realm. Today, comparable mistakes described in arbitration proceedings are putting other statutory rights and claims at risk in the same way the *Lochner*-era courts stripped away fundamental rights. As such, this Note argues that the Court's incorrect promotion of arbitration incorrectly interprets and expands the FAA and resultantly infringes on other substantive rights mirroring effects of the *Lochner* era. Additionally, the greatest similarity between *Lochner*-era caselaw and current arbitration provisions is the unequal bargaining power and disparity between the parties.[44] Thus, the current Court's judicial

[38] *See* Lochner v. New York, 198 U.S. 45, 64 (1905).

[39] *E.g.*, *id.*; *see also* SCOTT W. GAYLORD ET AL., FEDERAL CONSTITUTIONAL LAW: VOLUME V: THE FOURTEENTH AMENDMENT 78 (2d. ed. 2017).

[40] *See* GAYLORD ET AL., *supra* note 39, at 97.

[41] Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

[42] *Id.* at 480–86; Loving v. Virginia, 388 U.S. 1 (1967); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Troxel v. Granville, 530 U.S. 57 (2000); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702 (1997).

[43] GAYLORD ET AL., *supra* note 39, at 103; Adam Shelton, *The Rational Basis Test: The Story Continues*, INST. FOR JUST. (Apr. 2, 2021), https://ij.org/cje-post/the-rational-basis-test-the-story-continues/.

[44] *See* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. STATE UNIV. L. REV. 99, 99, 112–13 (2006).

favoritism towards the FAA[45] only encourages the conclusion that arbitration is the new *Lochner* era.

I. THE HISTORY OF THE FEDERAL ARBITRATION ACT

A. The Growing Demand of Arbitration and the Courts' Unwillingness to Enforce Arbitration Pushed Congress to Enact the FAA

Arbitration agreements existed in the United States long before Congress enacted the Arbitration Act.[46] In fact, arbitration dates back to English law and entered our legal system through common law.[47] Historically, courts were not fond of arbitration existing alongside litigation.[48] In English law, courts rarely recognized arbitration agreements.[49] Likewise, courts in the United States adopted similar resentments towards arbitration and refused to enforce arbitration awards.[50] American courts often declined to acknowledge arbitration due to the growing "jealous[y]" and fear of courts being "ousted" from the legal environment.[51] Therefore, the mere existence of arbitration in the legal community did not necessarily mean courts favored such a system.

Seeing the need for legislative action to create consistency across the courts, the topic of arbitration reached Congress.[52] The Congressional Record illustrated the arguments in favor of arbitration.[53] For example, House Representative George S. Graham of Pennsylvania argued that there was "a great demand" for arbitration agreements and implementing such legislative policy would correct the "anachronism in our law."[54] Representative Graham further explained that the purpose of the Act would be to enforce arbitration agreements

[45] *See id.* at 131–32; *see also* Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RSRV. L. REV. 91, 102–07 (2012).

[46] Szalai, *supra* note 1, at 414.

[47] *See id.* at 434 n.189.

[48] *See id.* at 401 n.8, 434 n.189.

[49] H.R. REP. NO. 68–96, at 1–2 (1924).

[50] *Id.*

[51] *See* 65 CONG. REC. 1931 (1924) (statement of Rep. George S. Graham).

[52] *See* Szalai, *supra* note 1, at 401–02.

[53] 65 CONG. REC. 1931 (1924).

[54] *Id.* (statement of Rep. George S. Graham).

specifically in commercial and admiralty contracts.[55] Importantly, the record conveyed that the Act sought to create a remedy for the breach of contract without creating additional rights.[56] Thus, the Act was not an attempt to place arbitration in its own realm, but rather, it was introduced as a means of remedying existing contract law. The Act passed in both chambers,[57] was later codified into the FAA,[58] and made agreements to arbitrate "valid . . . and enforceable."[59]

Congress provided a vague definition of maritime commerce as an attempt to disclose the types of transactions that would have been impacted by the FAA.[60] The FAA describes "maritime transactions" as "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce."[61] The statute clarifies that arbitration extends to foreign disputes because commerce encompasses transactions between and among the states as well as between any state and a foreign nation.[62] The language that highlights arbitration domestically and internationally sets the stage for *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, where the Court held that parties can be bound to foreign arbitration agreements.[63]

Section 1 of the FAA explains that arbitration also includes certain disputes outside of the listed maritime transactions if they "would be embraced within admiralty jurisdiction."[64] However, the last part of the statute states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[65] The former statement indicates that though the FAA appears to apply to various contracts, the FAA is also limited in its reach to certain

[55] *Id.*

[56] *Id.*

[57] H.R. Res. 646, 68th Cong. (1925) (enacted).

[58] 9 U.S.C. §§ 1–16.

[59] 9 U.S.C. § 2.

[60] *See* 9 U.S.C. § 1.

[61] *Id.*

[62] *Id.*

[63] 473 U.S. 614, 616, 639–40 (1985).

[64] § 1.

[65] *Id.*

foreign and interstate contracts.[66] Yet, the present-day interpretation of the FAA permits arbitration provisions to exist beyond its confines.[67]

Section 2 states that arbitration provisions are "valid . . . and enforceable" in maritime commercial contracts.[68] If there is any evidence that indicates the transaction is to be settled by arbitration, the parties will be bound to that arbitration agreement.[69] This statute exposes problems related to state sovereignty because arbitration agreements can hale a state into court for disputes arising from commercial activities.[70] However, states also have inherent sovereign immunity under the Constitution where arbitration cannot hale the state into court, unless sovereign immunity is waived.[71] Accordingly, "[t]here are major differences between the common law and civil law approaches" that conflict with arbitration.[72]

Issues related to res judicata and estoppel also arise with respect to the language of § 2.[73] Res judicata states that parties are barred "from litigating the same dispute again, once a final judgment has been rendered by a competent court."[74] Similarly, estoppel is a legal principle where one is prevented "from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as true."[75] Arbitration tribunals are unsure if res judicata or estoppel that apply to previous court judgments bind and impact future arbitration awards.[76] For example, the findings of a court in one case may impact the facts and legal issues of a future and stemming arbitration proceeding.[77] Additionally, a greater problem

[66] *See id.*

[67] *See id.*; *see also* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1921–22 (2022).

[68] 9 U.S.C. § 2.

[69] *See id.*

[70] *Sovereign Immunity from Jurisdiction in International Arbitration*, ACERIS LAW (Feb. 18, 2020), https://www.acerislaw.com/sovereign-immunity-from-jurisdiction-in-international-arbitration/.

[71] *Id.*

[72] Camille Jojo, Res Judicata *and Issue Estoppel in Arbitration: Procedural or Substantive Law?*, NORTON ROSE FULBRIGHT (May 2016), https://www.nortonrosefulbright.com/en-us/knowledge/publications/16cd03ce/emres-judicataem-and-issue-estoppel-in-arbitration.

[73] *See id.*

[74] *Id.*

[75] Legal Information Institute, *Estoppel*, CORNELL L. SCH., https://www.law.cornell.edu/wex/estoppel (last visited Dec. 28, 2022).

[76] *See* Jojo, *supra* note 72.

[77] *Id.*

exists in international arbitration because one jurisdiction may not have res judicata principles in its laws while another jurisdiction may have codified res judicata, resulting in conflicting law.[78] If the arbitration takes place in a jurisdiction where res judicata is not recognized, yet the previous court judgment resolved a central issue that impacts the existing arbitration, uncertainty remains for whether the arbitration proceeding should still apply res judicata.[79] If the arbitration applies res judicata through common law principles, then the case is barred from being litigated again because the previous court resolved the central issue.[80]

Important to this discussion is § 3, which introduces the procedure of staying a pending lawsuit when an issue in the case is subject to arbitration proceedings.[81] Here, the statute explains that if a suit is pending in court but is also subjected to an arbitration agreement, the pending suit, upon "application of one of the parties," will be stayed in court until the arbitration dispute is resolved.[82] This statute seems to indicate that, in terms of hierarchy, arbitration agreements have priority over court proceedings. The statute explains that the arbitration dispute is to be resolved first, followed by the pending suit.[83] However, contrary to the modern-day court interpretation of the FAA, no language in the statute explicitly or implicitly prevents courts from intervening in arbitration proceedings altogether.[84]

Section 4 describes the consequences parties may face for failing to arbitrate pursuant to an arbitration agreement.[85] If the parties' written agreement determines that the parties voluntarily agreed to resolve any potential disputes via arbitration, and a party fails to submit to arbitration, the aggrieved party can "petition any United States District Court which[] . . . would have jurisdiction" to resolve the dispute.[86] Interestingly, this statute proposes the option of court

[78] *Id.* (explaining that "the location of the seat of an arbitration is significant in that it determines the procedural rules which govern an arbitration (incorporating any mandatory local laws applicable to arbitration)").

[79] *See id.*

[80] *Id.*

[81] 9 U.S.C. § 3.

[82] *Id.*

[83] *Id.*

[84] *See id.*

[85] 9 U.S.C. § 4.

[86] *Id.*

intervention if a party petitions for a remedy.[87] Modern-day FAA interpretations have driven federal courts out of arbitration because of jurisdictional limitations.[88] Yet, this statute does permit a party to petition the court to compel arbitration, incidentally contradicting current court holdings that dissuade courts from engaging.[89] Section 5 describes the selection process for an arbitrator if the arbitration agreement does not set forth specific terms for appointing an arbitrator.[90] If the agreement's arbitration provision does not include a section describing how to select an arbitrator, the court can appoint one.[91] This is another example where the FAA encourages court involvement and suggests that the judiciary can, to an extent, act as a moderator in arbitration. However, modern-day courts reduce or outright reject general federal court intervention.[92]

Section 9 of the FAA discusses confirmation of arbitration awards and judgments.[93] This provision explains that if an award has not been vacated or modified within one year after determination of the arbitration award, the award can be applied to a court for confirmation in accordance with the parties' arbitration agreement.[94] This section generates conflicting law because in certain circumstances courts may refuse to recognize arbitration awards, such as when the court finds the arbitrator exceeded their authority.[95] There are various caselaw examples where courts have utilized their discretionary power to vacate an arbitration award under certain circumstances.[96] Clearly, there is a problem with this type of court intervention because modifying or vacating an award directly impacts the validity of § 9 and the FAA in its entirety. The result of this legislation that permits courts to either confirm or reject an award is likely the reason Congress enacted the FAA, and courts were eager to draw some

[87] *See id.*

[88] *See* Badgerow v. Walters, 142 S. Ct. 1310, 1314 (2022).

[89] § 4.

[90] 9 U.S.C. § 5.

[91] *Id.*

[92] *See Badgerow*, 142 S. Ct. at 1314.

[93] 9 U.S.C. § 9.

[94] *Id.*

[95] *See, e.g.*, St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood Loc. 6, 715 F.2d 405, 407–09 (8th Cir. 1983); Bacardi Corp. v. Congreso de Uniones Industriales, 692 F.2d 210, 214 (1st Cir. 1982).

[96] *See, e.g.*, *St. Louis Theatrical Co.*, 715 F.2d at 409; *see also Bacardi Corp.*, 692 F.2d at 214.

boundaries between courts and arbitrators.[97] That boundary is reflected in the Court holding that arbitration is to be treated no different than other contracts in order to yield consistent results.[98] However, recent interpretations of the FAA led to states being burdened and individuals feeling deterred from pursuing separate but related statutory claims.[99]

B. The FAA Expands and Reduces State Power by Preempting States from Arbitration Proceedings

The Court holding that the FAA is a creature of contract often subjects arbitration to state contract law.[100] The FAA itself also "leaves room for states to enact some rules affecting arbitration"[101] and has also been interpreted to discourage state courts from interfering with arbitration proceedings.[102] However, state courts often find themselves in a position where the FAA does not fully preempt state courts from analyzing arbitration claims because arbitration is rooted in state contract law.[103] For example, the agreement central to the legal issue in *Morgan v. Sanford Brown Institute* was "subject to state-law contract principles."[104] Moreover, "[i]t is hornbook law that state law governs contract-based disputes unless preempted by a federal statute."[105] It might then be impossible, and rather unfair, for state courts to be removed from overseeing an area of law where they have historically grounded influence.

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[97] 65 CONG. REC. 1931 (1924) (statement of Rep. William Graham).

[98] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

[99] *See* Jake R. Butwin, *Supreme Court Limits Federal Court Jurisdiction to Vacate or Confirm Arbitration Awards*, NAT'L L. REV. (Apr. 27, 2022), https://www.natlawreview.com/article/supreme-court-limits-federal-court-jurisdiction-to-vacate-or-confirm-arbitration; *see also* Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1192 (2021).

[100] *See AT&T Mobility LLC*, 563 U.S. at 339–40; Mount Diablo Med. Ctr. v. Health Net of California, Inc., 124 Cal. Rptr. 2d 607, 610–11 (2002).

[101] *Mount Diablo Med. Ctr.*, 124 Cal. Rptr. 2d at 611.

[102] *See* Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 748 F.3d 708, 715–17 (6th Cir. 2014).

[103] *See* Morgan v. Sanford Brown Inst., 225 N.J. 289, 295 (2016).

[104] *Id.* at 308.

[105] *See State Courts and the Federalization of Arbitration Law*, *supra* note 99, at 1192.

Arbitration is rooted in state contract law, and state courts are responsible for governing disputes arising under contracts.[106] Contract law states that "[a]n enforceable agreement requires mutual assent, a meeting of the minds based on a common understanding of the contract terms."[107] The Court reiterated that the agreement at issue in the *Sanford* case "failed to explain in some sufficiently broad way or otherwise that arbitration was a substitute for having disputes and legal claims resolved before a judge or jury."[108] Additionally, the "minimal knowledge of the meaning of arbitration was necessary for the student plaintiffs to give informed assent to arbitration and to waive their rights to pursue relief in a judicial forum."[109] Further, "[w]ithout such assent, an arbitration agreement was not formed."[110] This case is a great example that courts can, and often do, analyze legal issues in arbitration proceedings based on state contract law principles.

Situations have arisen since the Court held that the FAA is a creature of contract law, and states have jurisdiction over contract law claims.[111] However, the Court has also held that state courts must not interfere with FAA proceedings except in a few distinct circumstances.[112] The Court's contradictory holdings seem to somewhat recognize state rights but simultaneously strips those rights away when reviewing arbitration proceedings.[113] Consequently, there continues to be a grey area with limited guidance when state courts analyze issues in pending litigation with an existing and related arbitration proceeding.

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[106] *Id.*; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

[107] *Morgan*, 225 N.J. at 308.

[108] *Id.* at 311–12.

[109] *Id.* at 312.

[110] *Id.*

[111] *See id.* at 295 (noting the underlying formation of the arbitration agreement is rooted in state contract law).

[112] *See* Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 748 F.3d 708, 717–18 (6th Cir. 2014).

[113] *See* First Options of Chicago, Inc., v. Kaplan, 514 U.S. 938, 943 (1995) (recognizing "arbitration is simply a matter of contract between the parties" but that the scope of judicial review of arbitration awards and proceedings is limited).

There have been various instances where state laws conflict with the FAA.[114] Based on the Supremacy Clause, it naturally follows that where a state law conflicts with federal law, the state law must be preempted.[115] However, the FAA does not necessarily have the final say for all state court matters, particularly matters that do not involve the arbitration dispute but another area of law.[116] For example, in *Mount Diablo Medical Center v. Health Net of California, Inc.*, the parties entered into an arbitration agreement that contained a choice-of-law provision.[117] Here, state law permitted "the court to refuse to enforce a contractual arbitration provision if arbitration threatens to produce a result that may conflict with the outcome of related litigation not subject to arbitration."[118] The court further explained that the analysis follows contract law in which "the starting point in the interpretation of the choice-of-law clause, like any contractual provision, is with the language of the contract itself."[119] While the rules of the Supremacy Clause articulate that where a state law conflicts with the FAA, the state law must be preempted,[120] this language alone clearly does not imply that the state must avoid interfering with arbitration disputes altogether.

The enactment of the FAA imposed three different burdens on state courts.[121] First, the Court's modern interpretation of the FAA diminishes state authority.[122] A "stark divide exists between the state and federal judicial systems on the importance of ensuring private

[114] *E.g.*, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1424–25 (2017) (noting state law contradicted the FAA by singling out "arbitration agreements for disfavored treatment," contradicting the FAA's requirement that "courts place arbitration agreements 'on equal footing with all other contracts'" (quoting DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 54 (2015)).

[115] *See id.* at 1426; U.S. CONST. art. VI, cl. 2.

[116] Jennifer Trieshman, *Horizontal Uniformity and Vertical Chaos: State Choice of Law Clauses and Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 161, 165, 167, 171 (2005); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476–79 (1989).

[117] 124 Cal. Rptr. 2d 607, 609 (2002).

[118] *Id.* at 610.

[119] *Id.* at 614.

[120] Brian Farkas, *Arbitration at the Supreme Court: The FAA from RGB to ACB*, 42 CARDOZO L. REV. 2927, 2931 (2021); U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

[121] *State Courts and the Federalization of Arbitration Law*, *supra* note 99, at 1191.

[122] *Id.*

litigants' access to a judicial forum."[123] "State courts often view themselves as the last and best barrier between federal interests and fundamental policies enshrined in state constitutions" because state and federal courts have "divergent priorities" in areas like arbitration.[124] While the "Constitution guarantees due process," the Constitution "does not mandate or even favor access to a public judicial forum."[125] Rather, state constitutions provide the "individual right of access to courts" and "mandate availability of a remedy for legal injuries."[126] Yet, when the Court held that state courts have no role in FAA proceedings, the Court burdened the state's interest in protecting the individual's right to access the courts generally.[127]

Second, the FAA displaces state courts in contract law.[128] As discussed, one of the main responsibilities of state courts is to develop contract law.[129] Court decisions such as *AT&T Mobility LLC v. Concepcion* have held that state courts must treat arbitration judgments on equal footing to other contracts and refrain from disturbing arbitration awards, which certainly impacts the role of state courts.[130] States are not only rarely able to disturb arbitration awards,[131] but states are also unable to develop arbitration law as states would normally do with contract law.[132]

Third, the "FAA preemption decisions have limited states' options for regulating various social and economic phenomena."[133] The limited avenues states can pursue are through their "institutions and citizenries."[134] "[N]onjudicial branches of state government," such as "state attorneys general may step in to rectify judicial underenforcement of

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1192.

[127] *See* Alyssa S. King, *Arbitration and the Federal Balance*, 94 IND. L.J. 1447, 1454–55 (2019).

[128] *State Courts and the Federalization of Arbitration Law*, *supra* note 99, at 1192.

[129] *Id.*

[130] *See* 563 U.S. 333, 350–51 (2011).

[131] *See generally* King, *supra* note 127, at 1450 (discussing state courts' "two main hurdles" to overrule an arbitration award).

[132] *Id.*; *State Courts and the Federalization of Arbitration Law*, *supra* note 99, at 1192–93.

[133] *State Courts and the Federalization of Arbitration Law*, *supra* note 99, at 1193.

[134] *Id.*

state contract regulations."[135] However, this option is costly and ineffective in successfully monitoring "states' remedial aims."[136] Importantly, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[137] Rather, courts have held that, in accordance with "Congress's principal purpose of ensuring that private arbitration agreements are enforced according to their terms, . . . the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"[138] Thus, it is possible that the FAA can coexist with state law, but through a series of decisions, the current Court has hindered state powers and disallowed state courts from having much of a role in arbitration.[139]

C. Consent and Judges—The Heart of Contract Law But Missing in Arbitration

The Court suggests that arbitration is a creature of contract.[140] Moreover, the equal footing principle suggests that arbitration is to be enforced like any other contract.[141] However, contracts are different than arbitration namely because consent is often missing in arbitration.[142]

Contract formation requires three elements: (1) offer; (2) acceptance; and (3) consideration.[143] All three elements of contract law are centered on mutual assent between the parties or a "meeting of the minds."[144] The Court has made it clear that arbitration is a

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[135] *Id.*

[136] *Id.*

[137] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

[138] *Id.* at 478 (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)).

[139] *See* Southland Corp. v. Keating, 465 U.S. 1, 18–19 (1984); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350–52 (2011); *Volt Info. Scis., Inc.*, 489 U.S. at 480–83 (Brennan, J., dissenting) (arguing that the Court declined to review the general holding that the FAA "requires courts to enforce arbitration agreements in contracts involving interstate commerce").

[140] *AT&T Mobility LLC*, 563 U.S. at 339.

[141] *See* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 954 (1999).

[142] *Id.* at 962.

[143] *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981) (explaining the requirement of "mutual assent in the exchange").

[144] *Id.* at cmt. c.

creature of contract, and "consent is the cornerstone of arbitration."[145] However, it does not necessarily follow that parties always voluntarily consent to arbitration provisions.[146]

Arbitration typically contains imputed consent rather than actual knowledge.[147] For example, courts usually mandate actual knowledge rather than imputed knowledge in "waiver and choice-of-forum" questions.[148] In waiver, a party "relinquish[es] . . . a known right with both knowledge of its existence and an intention to relinquish it."[149] Moreover, in choice-of-forum issues, parties pre-select the forum, even if a separate forum would be a more suitable option.[150] Courts are wary of parties' forum shopping, but also recognize that parties had actual knowledge to waive that right.[151] For instance, the Court in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.* explained that it favored agreeing to a forum from the outset because the choice-of-forum provision was an "indispensable element in international trade, commerce, and contracting."[152] Thus, there is a need for actual consent in choice-of-forum provisions because a party is voluntarily waiving its right to its own forum or a more suitable forum for the resolution of the dispute.[153]

On the other hand, imputed consent in arbitration may considered to be found "in the absence of actual consent."[154] Imputed consent is similar to constructive knowledge where "the knowledge of an agent is considered to be the knowledge of the principal, either as a matter of the duties of the special agent and principal or as a matter of public policy or of general liability for a supervisory

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[145] Núñez del Prado, *supra* note 3, at 221.

[146] *See id.* at 225 (explaining that consumers who wish to "evade" the arbitration provision in certain contracts are unable to do so).

[147] Stone, *supra* note 141, at 966.

[148] *Id.* at 967.

[149] *Id.*

[150] *See* Lavazza Premium Coffees Corp. v. Prime Line Distribs. Inc., 575 F. Supp. 3d 445, 465–66 (S.D.N.Y. 2021).

[151] *See e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628–31 (1985) (explaining that there is a "strong presumption in favor of . . . freely negotiated contractual choice-of-forum provisions").

[152] *Id.* at 630 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13–14 (1972)).

[153] *See Lavazza Premium Coffees Corp.*, 575 F. Supp. 3d at 465–66.

[154] Stone, *supra* note 141, at 966.

agent."[155] While actual knowledge is required for waiver in contract law, waiver works differently in arbitration.[156] Parties do not know which of their substantive rights are impacted until the arbitration clause is kicked into action.[157] For example, most corporations include arbitration provisions in their agreements.[158] As a consumer, one generally agrees to the company's terms when using social media platforms such as Facebook, Instagram, and Snapchat.[159] Similarly, a person easily accepts an arbitration clause when selecting the "I agree" to the terms set forth to utilize a car-sharing service such as Lyft and Uber.[160] Simply by signing terms and conditions for arbitration does not necessarily equate to understanding its consequences.[161]

Consider the standard employer/employee relationship. At the hiring stage, employees are not always voluntarily consenting to arbitration provisions in employment contracts.[162] Instead, employees are faced with the risk of losing a job by refusing to sign a contract with an arbitration provision.[163] There is an immediate concern that arises when parties are no longer voluntarily consenting to arbitration.[164] Even when there is no meeting of the minds, the result is mandatory arbitration.[165] If arbitration is mandatory, then arbitration cannot be an extension of contract law because contract law

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[155] *Imputed Knowledge*, BOUVIER LAW DICTIONARY (Law Dictionary Desk ed. 2012).

[156] *See* Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am., 97 F. App'x 462, 464 (5th Cir. 2004) (explaining how "waiver in this case depends on the conduct of the parties").

[157] Stone, *supra* note 141, at 968.

[158] *See* Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019).

[159] *See, e.g.*, *Snap Inc. Terms of Service*, SNAP INC., https://snap.com/en-US/terms#terms-us (last updated Nov. 15, 2021); *see also Terms of Use*, INSTAGRAM, https://help.instagram.com/581066165581870 (last updated July 26, 2022).

[160] *See, e.g.*, *Lyft Terms of Service*, LYFT, https://www.lyft.com/terms (last updated Dec. 12, 2022).

[161] *See Mandatory Arbitration Clauses are Everywhere but Aren't Really That Good for the Consumer*, N.C. CONSUMER COUNCIL (May 29, 2021), https://www.ncconsumer.org/news-articles-eg/mandatory-arbitration-clauses-are-everywhere-but-arent-good-for-the-consumer.html.

[162] *See* Janna Giesbrecht-McKee, Comment, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 WILLIAMETTE L. REV. 259, 268 (2014).

[163] Lisa Guerin, *What Will Happen if I Do Not Sign My Employer's Arbitration Agreement?*, EMPLOYMENTLAWFIRMS, https://www.employmentlawfirms.com/resources/what-will-happen-if-i-do-not-sign-my-employers-arbitrati (last visited Dec. 28, 2022).

[164] *See* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 103 (1996).

[165] *See* Giesbrecht-McKee, *supra* note 162, at 268–69.

emphasizes mutual assent.[166] Moreover, there is an unequal bargaining power that exists between the parties because the voluntariness, or mutual assent, that was the foundation in entering an agreement is destroyed.[167] However, Congress never intended to allow for binding arbitration if the contracts were between parties of unequal bargaining power.[168] Even if arbitration is considered a creature of contract, arbitration can reduce or even remove the option of relying on contract defenses.[169]

In contract law, there are several defenses, such as duress, mistake, lack of compliance with the Statute of Frauds, and fraud.[170] Similar defenses are not generally available in arbitration, such as unconscionability in mandatory arbitration,[171] because arbitrations are procedurally different than public court proceedings.[172] In contract law, courts have favored the "duty to read" standard.[173] A leading case on the "duty to read" standard is *Morales v. Sun Constructors, Inc.*, where the Court held that the failure to read, understand, or ask another to explain the arbitration agreement will not relieve the individual from the terms of the agreement.[174] However, an aggrieved party may be able to assert contract defenses against the duty to read standard such as unconscionability or duress.[175] Alarmingly, the same aggrieved individual in arbitration does not broadly have contract defenses at their disposal, signaling that arbitration hinders the individual's rights.[176]

A part of the unequal bargaining power can be seen in the drafting of the arbitration provisions itself. Parties often pre-determine

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[166] *See* In re North Mandalay Inv. Group, Inc., 391 B.R. 890, 893 (2008).

[167] *See* Giesbrecht-McKee, *supra* note 162, at 268.

[168] *See* H.R. REP. NO. 68–96, at 1–2 (1924).

[169] Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 HASTINGS L.J. 987, 1002–06 (2004); *see also* Stone, *supra* note 141.

[170] *Common Defenses in Breach of Contract Cases*, N.Y.C. BAR LEGAL REFERRAL SERV., https://www.nycbar.org/get-legal-help/article/business-and-corporate-law/contract-litigation/common-defenses-breach-contract-cases/ (last visited Dec. 28, 2022).

[171] Schneidereit, *supra* note 169, at 1002–06.

[172] *See What is the Difference Between Arbitration and Litigation?*, *supra* note 10.

[173] *See, e.g.*, Morales v. Sun Constructors, Inc., 541 F.3d 218, 221–22 (3d Cir. 2008).

[174] *Id.* at 222.

[175] Orit Gan, *Anti-Stereotyping Theory and Contract Law*, 42 HARV. J. L. & GENDER 83, 104–06 (2019).

[176] *See* Stone, *supra* note 141, at 948–49.

much of the procedural rules for the arbitration proceeding.[177] For example, parties can pre-select the number of arbitrators, the qualifications of the arbitrators, the amount of discovery, and deadlines—to name a few.[178] Some disputes enter arbitration proceedings with no court documents such as transcripts or filed records.[179] Moreover, the arbitrators themselves may be unfamiliar with the specific area of law and may not permit contract defenses.[180] Additionally, the arbitrator might find it difficult to resolve a complex issue in various legal areas or where the issue leads to conflicting laws and policies.[181]

The vital element in a dispute arising under contract law, but that is missing in an arbitration proceeding, is a judge.[182] Arbitration proceedings are privately held without court intervention and do not require that the arbitrator be a judge or attorney.[183] Thus, when an innocent party is haled into a private arbitration proceeding where there was likely unequal bargaining power, the weaker party is left defenseless and without court supervision. In a situation of unequal bargaining power, it is likely that the weaker parties were not even slightly aware of the arbitration provision, or its consequences, until there was a breach that kicks the provision into action.[184] Arbitration provisions were never meant to remove defenses or court involvement because the "FAA's 'policy favoring arbitration' is intended to put arbitration agreements on equal footing as other contracts."[185] Rather,

[177] Aric S. Bomsztyk, *Enforceability of Arbitration Clauses*, TOMLINSON BOMSZTYK RUSS (Jan. 14, 2019), https://www.tbr-law.com/blog/2019/january/enforceability-of-arbitration-clauses/.

[178] Wendy Miles, *International Arbitrator Appointment: One vs. Three, Lawyer vs. Nonlawyer*, DISP. RESOL. J., Aug.–Oct. 2022, at 36, 37; Kimberly M. Ruch-Alegant, *Markman: In Light of De Novo Review, Parties to Patent Infringement Litigation Should Consider the ADR Option*, 16 TEMP. ENV'T L. & TECH. J. 307, 319 (1998).

[179] *See* 8 WEST'S FED. ADMIN. PRAC. § 10776, Westlaw (database updated July 2022).

[180] *See* Frank E. Massengale & Karen Kaler Whitfield, *Arbitration: Be Careful What You Wish For*, 44 LA. BAR J. 120, 121–23 (1996).

[181] *See* Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 166 (2005).

[182] Vandenberg v. Super. Ct. of Sacramento Cnty., 982 P.2d 229, 240 (Cal. 1999).

[183] *Id.*; Thomas A. Telesca et al., *Must Arbitrators Follow the Law?*, 41 FRANCHISE L.J. 347, 348 (2022).

[184] Stone, *supra* note 141, at 968; *see also Mandatory Arbitration Clauses are Everywhere but Aren't Really That Good for the Consumer*, *supra* note 161.

[185] *See* Max B. Chester & Charles W. Niemann, *Supreme Court Makes it Easier to Establish a Waiver of Arbitration Through a Pursuit of Litigation*, FOLEY & LARDNER LLP

the history of the FAA demonstrates that modern-day courts have misinterpreted the heart of the FAA[186] with the FAA instead encroaching over other regulatory bodies.

II. THE RISE AND FALL OF THE *LOCHNER* ERA

The unique construct of the U.S. Constitution demands various interpretations. For example, the interpretation of the Constitution includes substantive rights under the Due Process Clause of "the Fifth and Fourteenth Amendments."[187] This Clause requires the government to provide sufficient justification for depriving an individual of life, liberty, or property[188] and the Court has interpreted the standard to include protection of certain unenumerated rights.[189] Moreover, the Court has interpreted this Clause in two distinct ways: "classical substantive due process" and "modern substantive due process."[190] Classical substantive due process and modern substantive due process greatly differ in the sense of what each considers to be a fundamental right under the concept of ordered liberty.[191]

Classical substantive due process began before the New Deal Settlement.[192] The leading case of this era is *Lochner v. New York*, where the Court emphasized the individual's contractual and economic rights.[193] Here, New York enacted a law that limited the working hours of bakeshop employees.[194] When invalidating the law, the Court emphasized that the freedom of master and employee to contract with each other in relation to their employment cannot be prohibited or interfered with without violating the Constitution.[195] The Court additionally held that a state may not regulate the mutually agreed-

(June 1, 2022), https://www.foley.com/en/insights/publications/2022/06/supreme-court-makes-it-easier-waiver-arbitration.

[186] *See* Am. Bankers Ins. Co. of Fla. v. Tellis, 192 So. 3d 386, 396–97 (Ala. 2015) (Moore, C.J., dissenting).

[187] Jeffrey R. Jones, *A Blank Check: The Ninth Circuit's Preclusion of Substantive Due Process Inquiry in Takings Cases*, 37 WILLAMETTE L. REV. 661, 662 (2001).

[188] *See* GAYLORD ET AL., *supra* note 40, at 77, 104.

[189] *See id.*; *e.g.*, Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997).

[190] GAYLORD ET AL., *supra* note 40, 77–78, 103–04.

[191] *Id.*

[192] *Id.* at 77.

[193] 198 U.S. 45, 57–58 (1905).

[194] *Id.* at 69.

[195] *Id.* at 64.

upon working hours of the employee.[196] Further, the Court reasoned that the freedom to contract derives from the Due Process Clause of the Fourteenth Amendment.[197] However, states also enjoy police powers flowing from the Tenth Amendment, which permits states to interfere with certain protected rights if the action at issue involves the health, safety, morals, or welfare of the public.[198] While states can, and often attempt to, implement their police power, states must provide a sufficiently important justification to intervene.[199] The purpose of the "sufficiently important justification" standard limits a state's police power so that the power is balanced against Fourteenth Amendment protections.[200] In *Lochner*, the Court held that the state's act, which limited the work hours of bakers, did not concern the health, safety, morals, or welfare of the public.[201] Rather, the state's law was an "arbitrary interference with the right of the individual to his personal liberty."[202] Thus, the *Lochner* Court promoted the fundamental right to freely contract over the health, safety, morals, and welfare of the public.[203] This interpretation hinted that economic rights were deemed to be so fundamental that states were unable to regulate or intervene in such matters.

A. Classical v. Modern Substantive Due Process: The Rise and Fall of the Lochner *Era*

The *Lochner* era encompasses cases where the Court granted great judicial deference to economic rights.[204] It was not until 32 years later where the Court indicated in *West Coast Hotel v. Parrish* that *Lochner* era policies would diminish in both power and presence.[205] Here, the state of Washington enacted legislation that would impose a "minimum wage[] for women and minors."[206] *West Coast Hotel* argued that the state's legislative act unconstitutionally interfered

[196] *Id.* at 61.

[197] *Id.* at 53 (citing Allgeyer v. Louisiana, 165 U.S. 578, 587–88 (1897)).

[198] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012).

[199] *Lochner*, 198 U.S at 62–63.

[200] *Id.* at 56.

[201] *Id.* at 56–58.

[202] *Id.* at 56.

[203] *Id.* at 64.

[204] GAYLORD ET AL., *supra* note 40, at 77–78.

[205] *Id.* at 88.

[206] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 386 (1937).

with the freedom to contract and contradicted with *Lochner*.[207] Moreover, the state did not have a sufficiently important justification to intervene with the protected economic right.[208] Surprisingly, the Court steered away from precedent and instead held that the state's act was constitutional.[209] *West Coast Hotel* further overturned *Lochner* and reasoned that "the Constitution does not speak of freedom of contract" but instead "speaks of liberty and prohibits the deprivation of liberty without due process of law."[210] Furthermore, the Court went on to describe at length that the Fourteenth Amendment prohibits actions that would harm the individual's health, safety, or general welfare.[211] As such, the Court established the rational basis review standard that concludes a state act is lawful if the act has a rational relationship to its subject and is adopted in the interests of the community.[212] Therefore, the Court upheld the state's minimum wage act as reasonably connected to its means to promote the employee's health, safety, and general welfare.[213]

After *West Coast Hotel*, the Court's emphasis began to shift from the freedom to contract in the *Lochner* era toward instead giving great judicial deference to government regulations of all kinds.[214] The Court not only reinforced the notion that economic rights were superseded by certain fundamental rights but also encouraged two different standards of review—rational basis review and strict scrutiny review.[215] These standards of review were another attempt for the Court to step away from the *Lochner* era and reduce the influence of economic rights.[216] For example, the Court in *Williamson v. Lee Optical of Oklahoma, Inc.* reviewed an Oklahoma law that made it unlawful for any person who did not have an optometrist license to fit lenses to the face of a person.[217] Notably, the Court stated that "it is for the legislature, not the courts, to balance the advantages

[207] *See id.* at 391–92, 392 n.1.

[208] *See id.* at 392–93.

[209] *Id.* at 395–96, 400.

[210] *Id.* at 391.

[211] *Id.*

[212] *Id.*

[213] *See id.* at 398–400.

[214] GAYLORD ET AL., *supra* note 40, at 97.

[215] *Id.* at 103–04.

[216] *Id.* at 97, 103–04.

[217] Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 485 (1955).

and disadvantages of the new requirement,"[218] and "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[219] Thus, the Court held that the state may regulate a business or business activity if there is a particular health and safety problem that the regulation attempts to rationally resolve.[220]

Similarly, in *United States v. Carolene Products Company*, the Court assessed whether the Filled Milk Act, which criminalized the shipment "of skimmed milk compounded with any fat or oil other than milk fat . . . to resemble milk or cream," was constitutional under the Commerce Clause.[221] The Court reviewed the Act under the rational basis test.[222] Uniquely, footnote four of this opinion suggests that a heightened scrutiny review is appropriate in cases where the legislation attempts to distort "political processes," or discriminates "against discrete or insular minorities."[223] Footnote four of this opinion suggests that the Court would continue to create a stark divide between fundamental and nonfundamental rights.

B. Lochner *Loses Both Its Status as a Fundamental Right Under the Concept of Ordered Liberty and Its Overall Influence on Courts*

The Court interpreted the substantive due process clause to protect both fundamental and nonfundamental rights.[224] Fundamental rights are those "implicit in the concept of ordered liberty"[225] and are objectively "rooted in this Nation's history and tradition."[226] However, it is not uncommon for the Court to also interpret a fundamental right that is not rooted in this nation's history and traditions because

[218] *Id.* at 487.

[219] *Id.* at 487–88.

[220] *Id.* at 488.

[221] 304 U.S. 144, 145–46 (1938).

[222] *Id.* at 152.

[223] *Id.* at 152 n.4.

[224] GAYLORD ET AL., *supra* note 40, at 103–04.

[225] Alexis M. Piazza, *The Right to Education After* Obergefell, 43 HARBINGER 62, 67 (2019) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

[226] *Id.* at 67.

the right was historically denied to a certain class of people.[227] Fundamental rights receive strict scrutiny review where the law in dispute is allegedly invalid, and the government has the burden to prove that the law is necessary and narrowly tailored to achieve a compelling government interest.[228] Moreover, fundamental rights include those that are explicitly enumerated in the Bill of Rights, though not all fundamental rights are expressly enumerated.[229] As such, fundamental rights can also be derived from both the Bill of Rights and the Fourteenth Amendment.[230]

On the other hand, nonfundamental rights, such as economic rights, receive a rational basis review.[231] As discussed in *United States v. Carolene Products Company*, judicial deference is given to government action implicating economic rights.[232] Thus, the rational basis test places the burden on the challenging party to prove that the government's regulation "is not rationally related to a conceivable, legitimate state interest."[233] Here, the Court sets the stage for fundamental rights subject to strict scrutiny and hints that the *Lochner* era's freedom to contract principle will not be included in this analysis.[234]

Over time, the Court has expanded fundamental rights and created an implicit right when it recognized individual autonomy.[235] In *Griswold v. Connecticut*, the state enacted a statute that criminalized the individual's use of contraceptives to prevent conception.[236] The Court, in its analysis, stated that there are "penumbras," or "zones of privacy," that are implicit within the fabric of the Constitution.[237]

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[227] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

[228] GAYLORD ET AL., *supra* note 40, at 104.

[229] Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring) (explaining that implied rights "exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments").

[230] *Id.* at 500 (Harlan, J., concurring).

[231] *See* GAYLORD ET AL., *supra* note 40, at 103 (explaining that "[r]ational basis review applies as the baseline to all governmental actions," such as a state's regulation of "manufacturing processes").

[232] *See* 304 U.S. 144, 152 (1938).

[233] GAYLORD ET AL., *supra* note 40, at 103 (cleaned up).

[234] *See* 304 U.S. at 152 n.4 ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . .").

[235] *See Griswold*, 381 U.S. at 484–85 (majority opinion).

[236] *Id.* at 480.

[237] *Id.* at 484.

Here, the Court reiterated that the zones of privacy extend to the marital bedroom and prohibited the government from regulating the use of contraception by married couples.[238] The Court later expanded *Griswold* to unmarried individuals in *Eisenstadt v. Baird*, where the State had criminalized unmarried individuals who obtained contraceptives but permitted licensed physicians to prescribe contraceptives to married persons.[239] The Court reasoned that both unmarried and married individuals have the right "to be free from unwanted governmental intrusion into matters so fundamentally affecting a person," such as choosing whether to have a child.[240]

The Court also expanded the zones of privacy to include marriage as a fundamental right.[241] The Court in *Loving v. Virginia* reviewed whether the Virginia statute that prevented marriages between interracial couples violated the Due Process Clause.[242] The Court disagreed with the lower court and, when invalidating the law, explicitly denounced their rationale in enforcing such legislation because "the State's . . . purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood.'"[243] Similarly, in *Obergefell v. Hodges*, the Court extended the fundamental right to marriage to same-sex couples.[244] The Court looked beyond the confines of this nation's rooted history and traditions because same-sex marriage historically was not deemed as a fundamental right.[245] Thus, *Loving* and *Obergefell* reinforced the notion that marriage, regardless of race and sex, is protected by substantive due process and considered to be an implicit fundamental right.[246]

The right to raise one's child is also an implicit fundamental right.[247] The Court has held that the liberty protected in the Due Process Clause includes the right of parents to decide the education of their own children.[248] In *Meyer v. Nebraska*, the Court ruled that

[238] *See id.* at 485–86.

[239] 405 U.S. 438, 440–42 (1972).

[240] *Id.* at 453.

[241] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[242] *Id.* at 2.

[243] *Id.* at 7, 12 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)).

[244] 576 U.S. 644, 665 (2015).

[245] *Id.* at 664–69.

[246] *Id.* at 665; s*ee also Loving*, 388 U.S. at 12.

[247] GAYLORD ET AL., *supra* note 40, at 135.

[248] *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

a state may not force or prohibit parents from choosing the education of their child.[249] Like *Meyer*, the Court in *Pierce v. Society of Sisters* explained that liberty in the Due Process Clause includes the right for parents to choose the upbringing of their children.[250] The Court reasoned that the right to rear a child, such as choosing their type of education, is a power that belongs to the parents—not the government.[251] Finally, the Court held in *Troxel v. Granville* "that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[252] By distinguishing fundamental rights from nonfundamental rights, the Court stepped away from the *Lochner* era.[253] However, the recent expansion of the FAA that promotes economic rights and reduces state intervention resurrects key elements of *Lochner* that puts existing fundamental rights at risk.[254]

III. THE NEW *LOCHNER* ERA

The Court's present-day interpretation of the FAA that prioritizes economic rights over other substantive rights suggests that the *Lochner* era is back.[255] In *Lochner*, the Court rationalized that parties should be free to set the contractual terms of their own agreements without outside interference.[256] Courts commonly saw situations where the economic freedom to contract was pitted against other substantive rights.[257] Similarly, the FAA extends to various contracts, such as employment and commercial, and the present-day interpretation of the FAA demonstrates that arbitration agreements are being prioritized over other statutory claims.[258]

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[249] *See id.*

[250] 268 U.S. 510, 534–35 (1925).

[251] *Id.*

[252] 530 U.S. 57, 66 (2000); *see also id.* at 80 (Thomas J., concurring).

[253] *See* Matthew Janowiak, Epic Sys. Corp. v. Lewis*: A Fatal Mistake for Employees*, 18 DEPAUL BUS. & COMM. L.J. 127, 133–134 (2021).

[254] *See id.* at 135.

[255] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018).

[256] Lochner v. New York, 198 U.S. 45, 53 (1905).

[257] Pamela S. Karlan, *Contracting the Thirteenth Amendment:* Hodges v. United States, 85 B.U. L. REV. 783, 802–03, 809 (2005).

[258] *See* Janowiak, *supra* note 253, at 149–50.

The spread of arbitration provisions in commercial and business contracts to employment and consumer contracts[259] is frightening for a few reasons. First, parties generally bargain and negotiate in a commercial and business scenario.[260] On the other hand, some parties, such as an employer and employee, are unlikely to have a "meeting of the minds" discussion when considering whether to add an arbitration provision in the employment contract because an employee is expected to accept the terms as received.[261] Second, the Supreme Court's jurisprudence suggests that arbitration is not leaving our legal system.[262] Although, that former statement alone does not mean that arbitration outright waives the possibility of raising separate but related statutory claims.[263] Instead, a parallel exists between *Lochner* and the Court's recent posture of expanding the FAA where we will continue to see this Court promoting economic rights while concurrently reducing the influence of other substantive rights.

A. The Previous Court Held that Arbitration is Here to Stay, But Separate Claims that Stem from the Arbitration Can Exist Alongside the Arbitration Award

Before the twenty-first century, the Court balanced the parties' interests under the FAA,[264] as well as other separate statutory claims.[265] For example, the Court analyzed in *Barrentine v. Arkansas-Best Freight Systems, Inc.* "whether an employee may bring an action in federal district court" under the Fair Labor Standards Act (FLSA) after unsuccessfully bringing a grievance under "his union's collective-bargaining agreement."[266] After reviewing FLSA's purpose, which is to "protect all covered workers from substandard wages and oppressive working hours" or improper working conditions, the Court held that "FLSA

[259] *Id.* at 147.

[260] *See id.* at 137.

[261] *See id.* at 136–37.

[262] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 737, 746 (1981); *see also* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 75–77 (1998).

[263] *See* cases cited *supra* note 262.

[264] *Gardner-Denver Co.*, 415 U.S. at 55, 57–59; *see also Barrentine*, 450 U.S. at 734–36, 740–44.

[265] *Gardner-Denver Co.*, 415 U.S. at 52–54; *Barrentine*, 450 U.S. at 737, 745–46.

[266] 450 U.S. at 729–30.

rights cannot be abridged by contract or otherwise waived."[267] Here, the FLSA created a pathway for "individual employees [to have] broad access to the courts."[268] Moreover, the Court emphasized that while a union may fairly represent the employee's interests on his wage claim, the individual employee may still have additional statutory claims that may not be "adequately protected" by the union.[269] Thus, an individual employee does not simply waive those statutory rights because of inadequate arbitration proceedings.[270] In other words, an arbitration proceeding may, and often does, include complex issues where the qualifications of a judge may be a stronger fit to fully analyze the related but separate statutory claim.[271] The failure of an arbitrator to assess such complex claims in arbitration does not mean that the individual waived the right to pursue those claims in separate litigation.[272]

FAA claims frequently do coexist alongside separate statutory claims in a single suit.[273] In *Alexander v. Gardner-Denver Company*, the Court examined the relationship, if any, between the FAA and Title VII of the Civil Rights Act of 1964, which ensures equal employment opportunities to people regardless of race, color, religion, sex, or national origin.[274] In particular, the Court reviewed "under what circumstances, if any, an employee's statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement."[275] While the FAA ensures the enforcement of arbitration agreements,[276] Congress also gives "private individuals a significant role in the enforcement process of Title VII."[277] Title VII "vest[s] federal courts with plenary powers to enforce the statutory requirements," and the Court stated that these types of

[267] *Id.* at 739–40.

[268] *Id.* at 740.

[269] *Id.* at 743.

[270] *Id.* at 742–45.

[271] *Id.* at 743.

[272] *See id.* at 742–45.

[273] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 49–50 (1974).

[274] *Id.* at 38.

[275] *Id.*

[276] 9 U.S.C. § 2.

[277] *Gardner-Denver Co.*, 415 U.S. at 45.

claims cannot be waived in an arbitration proceeding.[278] Therefore, a claim centered on the "contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination."[279] The Court also explained the importance of both Title VII and the FAA, explicitly reasoning that both rights are available to an employee.[280] Arbitrators are generally limited to the corners of the agreement itself, so while arbitrators do not get to resolve questions involving the statutory claim outside of the arbitration agreement, individuals have a protected right to pursue those statutory claims in court.[281]

Congress intended for federal courts to intervene in statutory claims because the courts are a final forum.[282] Though, by allowing courts to intervene when there are statutory claims, there is a possibility that a court's judgment might contradict the arbitration award.[283] However, the mere possibility of conflict between the arbitration award and the court's judgment does not in turn suggest that courts should stay out of arbitration proceedings altogether.[284] Courts have always been an avenue where aggrieved parties raise additional statutory claims[285] because even if an arbitrator were to adequately analyze all issues, those issues are nonetheless too complex for a traditional arbitration proceeding.[286] Again, arbitration is rooted in contract law because arbitrators look to the parties' intent and mutual assent.[287] If any evidence exists that points in favor of an agreement by the parties to submit to arbitration, then the arbitration clause is valid and will be enforced.[288] Thus, it does not really matter whether the aggrieved party has a separate statutory claim because the arbitration award will be confined to the provisions of the arbitration and the arbitrator will base the award on the clause itself.[289]

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[278] *Id.* at 47, 52.

[279] *Id.* at 52.

[280] *Id.* at 48–50.

[281] *Id.* at 53–54.

[282] *Id.* at 56–57.

[283] *See id.* at 53–54.

[284] *Id.*

[285] *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743, 745 (1981).

[286] *Id.* at 743–45.

[287] *See supra* Part I.B.

[288] 9 U.S.C. § 2.

[289] *Barrentine*, 450 U.S. at 745, 744.

B. Modern Caselaw Misconstrues the Heart of the FAA and Further Holds that Arbitration Exists in Its Own Realm

The Court's broad interpretation of the FAA resulted in judicial favoritism towards arbitration.[290] The parallel between *Lochner*'s freedom to contract and arbitration is that courts in both periods prioritized economic rights over conflicting fundamental rights.[291] Critically, the Court improperly favored arbitration "in order to facilitate streamlined arbitration proceedings."[292]

Arbitration often exists in domestic agreements, as well as international agreements.[293] The Court recently reviewed a foreign arbitration clause between the Japanese corporation of Mitsubishi Motors and the Puerto Rican corporation of Soler Chrysler-Plymouth, Inc. (Soler).[294] Due to slow automobile production, Mitsubishi Motors sued Soler in the U.S. District Court for the District of Puerto Rico to compel enforcement of the arbitration clause.[295] The Supreme Court was tasked with determining whether a U.S. court can enforce an agreement to arbitrate when the dispute arose from an international business arrangement.[296] The Court held that a U.S. court can enforce the foreign arbitration provision because the claim at issue arose from the Sherman Act and is pursuant to the terms of both the FAA and the Foreign Arbitral Awards.[297] As the Court explored Congress's intent to support its decision, it emphasized that Congress enacted the FAA to enforce private agreements.[298] Thus, the Court asserted that there was "no reason to "depart from the[] guidelines" that analyzed the intent of the parties to enter into arbitration.[299] The intent to enter arbitration agreements mirrors the analysis of the intent to enter a contract. It follows, then, that there may be additional statutory claims that stem from the same arbitration proceeding. However, as arbitration trickles into areas outside of its intended purpose and mixes

[290] Wilson, *supra* note 45, at 97.

[291] *See* Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of* Lochner v. New York, 1 N.Y.U. J. L. & LIBERTY 515, 519–20 (2005); Wilson, *supra* note 45, at 94.

[292] Wilson, *supra* note 45, at 96.

[293] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[294] *Id.* at 616–17.

[295] *Id.* at 617–19.

[296] *Id.* at 624.

[297] *See id.* at 625–26.

[298] *Id.*

[299] *Id.* at 626–27.

contract law claims and separate claims, there is a remaining question of whether the claims will be balanced against each other. The Court's present-day decisions suggest that arbitration will supersede the related statutory claims.[300] Yet, there was a time where the Court balanced the separate interests of aggrieved parties and reasoned that arbitration can stand alongside the related but separate statutory claims.[301]

Based on legislative reports[302] and the Court's split view on arbitration through the years,[303] the purpose of the FAA was never to trump other statutory claims existing in the same case.[304] Arbitration claims historically involved commercial and business disputes but have quickly transferred into other areas of law and created a world of aggregate arbitration.[305] As discussed, arbitration existed long before the FAA was enacted,[306] and the legislative reports make no indication that Congress anticipated the FAA to extend beyond the individual claimant.[307] Thus, the FAA does not necessarily provide a forum for aggregate arbitration claims because the FAA was created as a cost-effective and quick alternative to litigation.[308] Aggregate claims that do exist under the FAA run contrary to the purpose of arbitration because of their large number of named parties and claims in a single dispute.[309] Therefore, there is no purpose to have aggregate claims in an arbitration proceeding because those separate claims can be pursued in the courts.

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[300] *Compare id.* at 624–25, *with* Preston v. Ferrer, 552 U.S. 346, 349–50 (2008) (holding that "when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA").

[301] *See* cases cited *supra* note 262.

[302] *See, e.g.*, H.R. REP. NO. 117–270, at 3–4 (2022).

[303] *See supra* notes 293–304 and accompanying text.

[304] *See* Arbitration Act, Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §§ 1–16); Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration* Act, 78 NOTRE DAME L. REV. 101, 104 (2022).

[305] *See* H.R. REP. NO. 117-270, at 3–4 (2022).

[306] *See id.* at 7; Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. STATE L. REV. 155, 155 (1970).

[307] *See* David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 60–61 (2007).

[308] *Id.* at 61–62.

[309] *See generally id.* at 56–57 (discussing how absent claimants in arbitration contradict Congress's purpose in passing the FAA).

Similarly, the rising cost of arbitration seen today also contradicts Congress's purpose in enacting the FAA.[310] Congress reasoned that a private arbitration proceeding would not only yield a faster outcome because courts are backlogged, but the arbitration proceeding itself would be cheaper than a traditional court proceeding.[311] Thus, the allure of a cost-effective alternative likely was another reason Congress enacted the FAA, but quite the opposite exists today.

Arbitration proceedings unquestionably can cost more than traditional court proceedings.[312] Outside of paying for attorney's fees, parties are expected to front the hefty administrative fees for an arbitration proceeding.[313] A party has two types of costs in arbitration: administrative fees paid to the American Arbitration Association (AAA) and compensation fees paid to the arbitrators.[314] Moreover, there are additional fees, such as renting a hearing room or space and those associated with expert witnesses or producing discovery to the other party.[315] The standard filing fee to the AAA consists of two payments and are based on the amount of the claim itself.[316] For example, if the damage is less than $75,000, then the initial filing fee to the AAA is $925 and the final fee is $800—for a total amount of $1,850 that only constitutes the filing fees.[317] The initial filing fee is paid in full by the party that initiates the lawsuit and when a "counterclaim, or additional claim is filed."[318] The final fee is for all cases that are scheduled for a hearing.[319] On the other hand, the flexible fee schedule consists of three payments and is created to alleviate the cost of the initial filing where the costs are spread out through the course of

[310] *See id.* at 61, 64, 72–73.

[311] *Id.* at 59.

[312] *See, e.g.*, *id.* at 64, 72–73.

[313] *Commercial Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N 1 (May 1, 2018), https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf [hereinafter *Administrative Fee Schedules*].

[314] *Id.*

[315] *Id.* at 3; Michael A. Doornweerd & Andrew F. Merrick, *Strategies for Controlling Discovery Costs in Commercial Arbitration*, AM. BAR ASS'N 4 (2011), https://jenner.com/system/assets/publications/1692/original/CBL_Sum11_DoornweerdMerrick.pdf?1314629255; *Costs of Arbitration*, AM. ARB. ASS'N 2, https://www.adr.org/sites/default/files/document_repository/AAA228_Costs_of_Arbitration.pdf (last visited Dec. 28, 2022).

[316] *Administrative Fee Schedules*, *supra* note 313, at 1.

[317] *Id.*

[318] *Id.* at 2.

[319] *Id.*

arbitration.[320] Interestingly, the flexible fee schedule is not available to claims under $150,000.[321] If the case proceeds to a hearing, then the administrative costs in the flexible fee schedule become higher.[322]

In contrast, court fees are usually a one-time filing fee ranging from $100-200 based on the type of claim (small claims, district, or superior court).[323] Moreover, parties do not have to pay for judges but will usually receive a fee for a court-appointed mediator.[324] These fees are generally split by the parties, and the parties are free to choose their own mediator if they do not wish to move forward with the assigned mediator.[325] Finally, parties have the option to engage expert witnesses or any other discovery-based mechanisms to introduce evidence in the court procedure.[326] One of the main reasons behind enacting the FAA was that arbitration proceedings were meant to be an inexpensive route for parties to resolve their disputes.[327] Yet, the hefty price tag for administrative fees in arbitration today is clearly contrary to that intent.[328] "Congress understood arbitration to be something inherently prompt, inexpensive, and streamlined," but because arbitration has grown so far today, it is not uncommon for arbitration to be more costly than court.[329]

Notably, Congress never intended for the FAA to promote unequal bargaining power.[330] However, unequal bargaining power does

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[320] *Id.* at 1.

[321] *Id.*

[322] *Id.*

[323] *Arbitration: Not Necessarily a Better Option than Litigation*, BTLG ATT'YS AT LAW, https://www.btlg.us/News_and_Press/articles/arbitration.html (last visited Dec. 28, 2022).

[324] *See generally ADR in the Federal District Courts — District-by-District Summaries*, U.S. DEP'T OF JUST., https://www.justice.gov/archives/olp/file/827536/download (last updated Mar. 2016) (noting that each federal district court has its own mediator fee schedule).

[325] *Id.* For example, two districts in Alabama and the district of Alaska require parties to split fees, unless otherwise agreed or ordered by the court. *Id.* These same districts also allow for "private neutral" or "neutral evaluator[s]." *Id.*

[326] *See* H. Clifton Cobb, *Preparing for Mediation with Use of Evidence*, MILES MEDIATION & ARB. (Mar. 7, 2018), https://milesmediation.com/blog/preparing-for-mediation-with-use-of-evidence/.

[327] *See* Clancy & Stein, *supra* note 307, at 59.

[328] *Id.* at 62.

[329] *Id.* at 61.

[330] Michael G. Holcomb, *The Demise of the FAA's "Contract of Employment" Exception? — Gilmer v. Interstate/Johnson Lane Corp.*, 1992 J. DISP. RESOL. 213, 223 (1992).

exist in mandatory arbitration provisions.[331] These mandatory arbitration provisions are typically seen in employment contracts where employers will condition employment upon signing the agreement.[332] Thus, it is difficult for a court to rely on imputed consent (absence of actual consent) when there are mandatory provisions because there was no mutual assent between the negotiating parties.[333] Similarly, unequal bargaining power existed in the *Lochner* era in employment contracts.[334] It was not uncommon for courts to prohibit state interference in the contract between the "master and the servant."[335] Repeatedly, enforcing mandatory arbitration is equivalent to "yellow dog contracts" because the court readily enforced "unbargained-for agreements."[336]

C. The Court's Recent Expansion of the FAA Parallels Lochner*'s Expansion of the Fundamental Freedom to Contract, Creating the New* Lochner *Era*

The present-day Court disfavors parties pursuing separate statutory claims that are related to the arbitration.[337] The problems that existed in the *Lochner* era, such as economic rights superseding other substantive rights, exist today in arbitration.[338] A leading example is in *Epic Systems Corporation v. Lewis*, where the Court analyzed whether employers and employees can agree to arbitrate individually, or if employees can "always be permitted to bring their claims in class or collective actions," regardless of what was agreed upon with the employer.[339] In its analysis, the Court explored Congress's intent to

[331] Brian K. Van Engen, *Post-Gilmer Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 IOWA J. CORP. L. 391, 413, 413 n. 230 (1996) ("One of the most frequently heard criticisms of mandatory arbitration is that employees are offered contracts with mandatory arbitration clauses on a 'take-it-or-leave-it' basis.").

[332] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1633 (2018) (Ginsburg, J., dissenting).

[333] *See* Stone, *supra* note 141, at 966–67.

[334] *See* Lochner v. New York, 198 U.S. 45, 64 (describing the challenged law as attempting to regulate the hours of labor between master and servant).

[335] *Id.*

[336] *Epic Sys. Corp.*, 138 S. Ct. at 1648–49 (Ginsburg, J., dissenting).

[337] *See id.* at 1619 (majority opinion).

[338] *See id.* at 1633–35 (Ginsburg, J., dissenting) (explaining that although Congress intended to "place employers and employees on a more equal footing" by enacting the NLGA [Norris–LaGuardia Act] and NLRA, the FAA does not infringe on the NRLA's protections).

[339] *Id.* at 1619 (majority opinion).

enact the FAA, which was to require courts to enforce arbitration agreements.[340] The Court held that the terms of the FAA applied to individual proceedings.[341] Moreover, the Court reasoned that the FLSA and the National Labor Relations Act (NLRA) are inapplicable in this case because applying such statutes permits judges to pick between statutes that could overrule the FAA.[342] The Court asserted that if judges were able to pick and choose statutes that overrule the FAA, then the purpose of the FAA is diminished or removed altogether.[343] Thus, it appears that the current Court suggests the economic freedom to contract arbitration provisions supersedes a party's separate statutory claim.[344]

However, the FAA had the original purpose of "voluntarism, delegation, and self-regulation."[345] To reiterate, there is no requirement that arbitrators be judges or attorneys with any legal expertise.[346] Thus, the notion of self-regulation is imperative in arbitration because parties have the power to negotiate and set their own terms for the proceeding.[347] However, this "new" FAA that exists in our legal community creates situations where parties "arbitrate disputes that they did not intend to submit to arbitration, [and] their common law and state statutory defenses are removed" from the arbitration realm.[348] As arbitration shifted from dealing strictly with contractual disputes to public interest sectors, autonomy is of greater importance.[349] Autonomy in arbitration means that one can make choices without the influence or prevention by state actors and is considered a positive liberty.[350] On the other hand, mandatory arbitration, which typically removes

[340] *Id.* at 1621.

[341] *Id.* at 1619.

[342] *Id.* at 1624.

[343] *Id.*

[344] *See id.* at 1633 (Thomas, J., concurring) (writing separately to explain that the arbitration agreements must be enforced according to their terms because the "refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made" (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011) (Thomas, J., concurring)).

[345] Stone, *supra* note 141, at 936.

[346] *See id.* at 934–35, 1016.

[347] *See id.* at 942, 958.

[348] *Id.* at 955.

[349] *See* Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote ""Autonomy""?*, 91 IND. L.J. 1143, 1147–52 (2016).

[350] *See id.* at 1150.

consent, is a negative liberty.[351] Understanding default, or mandatory, arbitration as a self-regulation from the freedom from constraint as a positive liberty shows how imperative consent is in an agreement to include an arbitration provision.[352]

Caselaw such as *Epic Systems* discourages employees from pursuing separate claims as a condition to their employment.[353] As the Court indicated, it will not protect the individual's claim over an economic right.[354] Workers' advocates have, for example, turned to local and state governments to put pressure on contractors to restrict the use of arbitration provisions in contractor's agreements.[355] The result is that fewer individuals may forego pursuing those separate claims in the future altogether, and in turn courts will not have any means of regulating those separate claims.

The FAA, as compared to other statutory claims like those in the FLSA, tends to resemble procedural laws.[356] When the FAA was enacted, the Federal Rules of Civil Procedure (FRCP) did not exist.[357] Yet, both were part of the same movement that existed to simplify court procedures.[358] Both the FAA and the FRCP strove to "relieve overcrowded judicial dockets" and "provide for improved, efficient methods of resolving disputes."[359] Thus, by linking the FAA to the FRCP, the correct interpretation of the FAA consists of viewing the FAA as procedural law where its application belongs solely in federal courts.[360] When viewed as procedural law, there are clear issues with private arbitration because private arbitrations hinder the individual's

[351] *See id.* at 1157.

[352] *See id.* at 1148.

[353] *See* Matthew J. Kolodoski & Candace M. Groth, *The Future of Collective Employment Arbitration Part II: Apocalyptic Warnings,* Lochnerizing*, and the Right to Contract*, 24 TEX. J. C.L. & C.R. 1, 12 (2018); *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[354] *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. at 1632 (holding that "Congress has instructed that arbitration agreements like those before us must be enforced as written," notwithstanding the individual's claim under the NLRA).

[355] *See* Kolodoski & Groth *supra* note 353, at 17.

[356] *See* Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 118–19 (2016).

[357] *Id.* at 119.

[358] *Id.*

[359] *Id.*

[360] *See id.*

right to procedural due process since arbitration does not allow for class actions or public judicial processes.[361]

Importantly, arbitration is quickly transforming to the new *Lochner* era. Courts commonly treat arbitration as a creature of contract but are eliminating the essential elements that make up contract law.[362] In other words, arbitration is perceived as a contract at face value, but a party cannot assert defenses or rely on actual consent.[363] The notion that individuals often relinquished other statutory claims that stem from the same dispute in *Lochner*-era decisions is juxtaposed with issues in the arbitration realm.[364] Importantly, the Court continues to expand the FAA while simultaneously eliminating the influence of substantive due process rights.[365] The Court recently held in *Dobbs v. Jackson Women's Health Organization* that the Constitution does not confer a right to an abortion,[366] overturning *Roe v. Wade*[367] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[368] As a result, we are now likely going to see a stronger movement in favor of the economic freedom to contract. It will not be uncommon for courts to continue to expand the influence of the FAA by eliminating avenues for aggrieved parties to pursue separate statutory claims related to the claim existing in arbitration.[369]

Unfortunately, arbitration has expanded far beyond its intended purpose.[370] Congressional hearings,[371] as well as history,[372] demonstrate that arbitration had a different purpose at the time of enactment of

[361] *See* Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for ""We the People""*, 35 YALE L. & POL'Y REV. 271, 273, 292 (2016).

[362] *See* Burt Neuborne, *Ending* Lochner *Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 184–85 (2015).

[363] *See supra* text accompanying notes 169–75.

[364] *See id.*

[365] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[366] *Id.* at 2242.

[367] 410 U.S. 113 (1973).

[368] 505 U.S. 883 (1992).

[369] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (holding that "Congress has instructed that arbitration agreements . . . must be enforced as written," notwithstanding the individual's claim under the NLRA).

[370] *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 490–92 (1987) (holding that state contractual wage claims are subject to mandatory arbitration); Southland Corp. v. Keating, 465 U.S. 1, 16–17 (1984) (holding that compulsory arbitration clauses are judicially enforceable under the FAA even when under state law they are found unconscionable).

[371] *See* 65 CONG. REC. 1931 (1924).

[372] *See* Szalai, *supra* note 1, at 401–02.

the FAA compared to how the modern Court has interpreted the purpose of the FAA.[373] Consequently, arbitration has trickled into areas outside of its intended purpose and paved a path for economic rights to rise again. Furthermore, the FAA creates a burden on states because states are discouraged from claiming their police powers to justify a law.[374] Importantly, the post-*Lochner*-era courts continuously held that economic rights are not fundamental rights.[375] Arbitration resides in the same world as contract law,[376] which in essence involves economic rights. It was the same Court that held arbitration should be on "equal footing"[377] to other contracts that also stripped both contract law defenses and court intervention from such proceedings. There is no doubt that arbitration is here to stay, and due to its positive benefits, there is no reason to decrease the use of arbitration provisions in agreements. However, the Court has a responsibility to rectify their misinterpretation of the FAA, which continues to allow for unequal bargaining power between parties, reduce state court powers, and eliminate the parties' mutual manifestation of assent.[378] Otherwise, the once-eliminated *Lochner*-era's freedom-to-contract standard will only continue to undermine the judiciary and put other judicially-recognized fundamental, substantive rights at risk.

[373] *See, e.g.*, *Epic Sys. Corp.*, 138 S. Ct. 1612. In dissent, Justice Ginsburg provided an analysis of how the order to enforce the arbitration agreement in this case ran counter to the history of the FAA. *Id.* at 1642–43 (Ginsburg, J., dissenting).

[374] *See State Courts and the Federalization of Arbitration Law*, *supra* note 98, at 1184, 1191.

[375] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

[376] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

[377] *Id.*

[378] *See* Giesbrecht-McKee, *supra* note 162, at 267–69.