
NOTE

Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act

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*A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.*¹

— Justice Holmes

INTRODUCTION

At the end of the eleventh century, an Englishman accused of theft might be tried by the ordeal of hot irons — forced to carry a scalding iron nine feet, then bandaged, and days later examined for festering wounds, evidence of his guilt before God.² By the end of the thirteenth century, ordeals had disappeared,³ but the accused thief might still elect trial by combat, proving his innocence by vanquishing his accuser in judicial duel.⁴ In the fourteenth century, the defendant was tried by jury, with judgment entrusted to a panel of twelve landholders either familiar with the crime or responsible for much of their own enquiry.⁵ At the end of the eighteenth century, the thief was still tried by jury, but jury trial now called for judgment by a panel unfamiliar with the dispute and informed of its details by evidence adduced at court.⁶ Today, theft in England is tried by jury or before a

¹ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

² JOHN BEAMES, A TRANSLATION OF GLANVILLE 283 n.1, 284-85 (1900); Paul R. Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 90, 93-95 (M.S. Arnold et al. eds., 1981); see also 2 JOHN HUDSON, OXFORD HISTORY OF THE LAWS OF ENGLAND 86 (2012); Thomas J. McSweeney, *Magna Carta and the Right to Trial by Jury*, in MAGNA CARTA: MUSE AND MENTOR 139, 143-45 (Randy J. Holland ed., 2014) (discussing the presentment process leading to trial by ordeal); Margaret H. Kerr et al., *Cold Water and Hot Iron: Trial by Ordeal in England*, 22 J. INTERDISC. HIST. 573, 581 (1992) (noting that the ordeal of cold water was the more common option for men accused of theft).

³ Hyams, *supra* note 2, at 123-24.

⁴ See JAMES BARR AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 51-55 (1913) (describing the treatment of theft); M.J. Russell, *Trial by Battle Procedure in Writs of Right and Criminal Appeals*, 51 LEGAL HIST. REV. 123, 129-34 (1983) (describing the formalities of waging battle, which, like trial by ordeal, followed a presentment process).

⁵ THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 16-17, 66-67 (1985).

⁶ *Id.* at 105, 108; see also Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 123-26 (2013) (describing the medieval jury as principally informed by evidence supplied by jurors, the early modern jury as principally informed by evidence adduced at court, and the modern jury as strictly limited to those unfamiliar with the dispute); *infra* note 69.

magistrate acting alone,⁷ and some in government have suggested that the jury trial be abolished entirely for thefts of small value.⁸

The procedural incidents of legal judgment have changed dramatically over the past ten centuries. The ordeals of the High Middle Ages are unrecognizable to modern eyes as formal methods of proof. But within each era, the essential meaning of legal judgment — the “living thought” justifying each form of trial — is the same.⁹ Judgment was, and is, the resolution of factual and legal disputes, the fair and final disposition of the controversy in accordance with common governing rules. This constant kernel of meaning has persisted for centuries. Although juries and magistrates have replaced God and fate as the agents of legal judgment, it was not the essence of the concept that changed, but rather society’s understanding of how best to preserve and give effect to it.¹⁰

The history of arbitration is less well-known than that of trial. But its path to the present day — evolving in form so as to keep constant in substance — is no different. Arbitration is, at its essence, a consensual, binding, and neutral process for dispute resolution before a third party. Arbitration takes this character from its earliest appearance in English common law, and it has not changed substantially since.

Disputes over the meaning of arbitration have long been unnecessary, as common-law doctrines made the process difficult to

⁷ See, e.g., Anti-social Behaviour, Crime and Policing Act 2014, c. 12, § 176(3) (defining shoplifting of under £200 as a summary offense triable before a magistrate, but also allowing adult defendants to elect a jury trial in Crown Court).

⁸ LOUISE CASEY, COMMISSIONER FOR VICTIMS AND WITNESSES: ANNUAL REPORT 2010–2011, at 6-7 (2011) (proposing, without success, that England and Wales abolish the “automatic right for a defendant to opt for a trial by jury for pretty crime cases”).

⁹ Ordeals and wager of battle were known in Latin as forms of *judicium dei*, the judgment of God. They were also referred to as *lex apparens*, the apparent law, with *lex* indicating “not the substantive law, but a mode of trial.” James B. Thayer, “*Law and Fact*” in *Jury Trials*, 4 HARV. L. REV. 147, 157 (1890); *id.* at 158-59. The term “trial” does not seem to have entered common usage until after the ordeals were abolished. It was then applied retroactively to the ordeal procedures that evidently fell within its meaning.

¹⁰ Cf. J.R. Pole, *Representation and Moral Agency in the Anglo-American Jury*, in THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW 101, 105 (John W. Cairns & Grant McLeod eds., 2002) (“[T]he changes to the modern from the medieval and early modern character of the jury have not conflicted with but rather, have enabled the jury to maintain crucial attributes of [its] essential role of representative moral agency.”). See generally J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 4-6 (4th ed. 2002) (describing how the concepts of law and fact diverged in the Norman period, while the goals in adjudicating them remained unchanged).

enforce for most of its history, and as courts exercised control over arbitration even after statutes made provision for specific performance. But at least in the United States, a shift in statutory arbitration has made defining the process newly urgent. Since the 1980s, the U.S. Supreme Court has increasingly used the Federal Arbitration Act (“FAA”) to displace any state contract law with a disparate impact on the enforceability of arbitration agreements. With no definition of arbitration in federal law, this risks reducing “arbitration” to a kind of preemptive magic word, capable of nullifying broad swaths of ordinary contract law wherever invoked, regardless of the term’s usage and meaning to the parties. Worse, if this shields from scrutiny an agreement so procedurally unjust as to favor one side, the very meaning of arbitration is turned on its head: The process is no longer associated with achieving consensual, binding, and neutral dispute resolution, but with thwarting it.

Federal courts have enabled this, misled by tendentious readings of the FAA that would make the enforcement of arbitration so paramount as to preclude the threshold question of whether arbitration is in fact at issue. Most circuits have now gone to some lengths to avoid clear and comprehensive definitions of arbitration. At times, they have done so even at the cost of legal consistency or logical coherence. This problem is easily resolved if courts simply breathe life back into the common-law definition of arbitration that already exists, and that has existed in relatively constant form since before the common law was first received.

This Note argues that the definition of arbitration is an indispensable threshold question in cases challenging the FAA’s applicability. Part I discusses the increasing federalization of U.S. arbitration and the resulting need for a clear, universal definition to draw the boundaries of federal law. Part II discusses historical definitions of arbitration up through the FAA’s enactment and suggests that a broad but consistent definition has persisted for centuries and remains available to federal courts today. This definition describes a dispute-resolution process that is necessarily (1) consensual, (2) binding, and (3) neutral. Part III evaluates contemporary federal courts’ practice of “definitional avoidance” and finds that federal courts have increasingly invoked limited definitions of arbitration, expressly or implicitly, where necessary to resolve specific disputes. Collectively, these definitions trace the outline of the existing common-law concept of arbitration, even as courts disclaim this outcome for fear of impeding the FAA. Part IV discusses the potential consequences of observing and engaging with a common-law

definition that treats arbitration as a process with objectively verifiable qualities. Such a definition is not only a logically necessary prerequisite to applying the FAA, but could also resolve several of the widely acknowledged procedural deficiencies associated with dispute-resolution mechanisms imposed under adhesive consumer and employment contracts.

I. THE DEFINITIONAL QUESTION

A. *The Federal Arbitration Act*

Before 1926, contracts providing for arbitration were subject to common-law doctrines that rendered arbitration agreements an almost illusory promise. Many American courts viewed predispute arbitration agreements as an effort to oust the courts of their jurisdiction and thereby deprive parties of an inherent right to judicial recourse.¹¹ To similar ends, courts often permitted the parties to arbitration agreements to revoke their earlier consent to arbitrate.¹² Although

¹¹ See, e.g., *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. 445, 451 (1874) (“In a civil case [a party] may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.”). The less charitable interpretation of the doctrine of ouster holds that the doctrine was a relic of early judges’ efforts to protect the income they earned from deciding cases. See *Scott v. Avery*, (1856) 25 L.J. (Ex.) 308 (H.L.) 313 (appeal taken from Eng.) (quoting Lord Campbell). This interpretation has a certain cynical appeal but does not appear well borne out by history. See 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1433 n.84 (1962) (“Legal writers, including Blackstone, said that the law favored arbitration. If the parties accompanied their agreement to arbitrate by a penal bond, the courts always enforced the penalty, until equity and statute prevented the enforcement of penalties. Compromise settlements have always been favored judicially. There are many rules of law the purpose of which is to discourage unnecessary litigation. And awards, once rendered, have always been judicially enforced. Judges and their work must always be criticized; but there are plenty of ignorant, irresponsible, and self-serving critics.”); *infra* notes 93–99 and accompanying text, Part II.B. Note also that the version of *Scott v. Avery* published in the English Reports reduced Lord Campbell’s criticism to a shorter, much less censorious statement. See *Scott v. Avery*, (1856) 10 Eng. Rep. 1121 (H.L.) 1138.

¹² 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1927 (1920) (“It follows from the revocability of the submission that a revocation by either party to the arbitration of the authority given by him to the arbitrators will invalidate any award made thereafter.”).

revocation constituted breach of the contract, the resulting damages were usually trivial.¹³

Opponents of these doctrines derided the courts' approach as reflecting an unfounded "judicial hostility to arbitration."¹⁴ Representatives of the business community were particularly critical, as merchants and manufacturers often preferred informal resolutions reached by specialized arbitrators or trade associations to the formalism and perceived unpredictability of trial.¹⁵ However, by at least the early twentieth century, judges themselves numbered amongst the most vocal critics of the common-law approach to arbitration,¹⁶ and the old doctrines began to erode.¹⁷ Finally, Congress responded with the Federal Arbitration Act, which was signed into law in 1925 and took effect the following year.¹⁸

¹³ Where one party revoked consent to arbitrate after the arbitration had begun, damages were generally limited to the cost of the incomplete proceeding. If the arbitration had not yet begun, the damages for breach were nominal. *Id.* ("The only redress for breach of an agreement to refer is an action for damages, and in such an action if arbitration has not been begun and no expenses incurred, only nominal damages can be recovered.").

¹⁴ *Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp. (Kulukundis)*, 126 F.2d 978, 985 (2d Cir. 1942); *see supra* note 11.

¹⁵ *See* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 970-73 (1999).

¹⁶ *Atl. Fruit Co. v. Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924); *President of Del. & Hudson Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258 (1872) ("[W]hen the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made abide by it . . .").

¹⁷ *See, e.g., Toledo S.S. Co. v. Zenith Transp. Co.*, 184 F. 391, 400 (6th Cir. 1911) (holding that the equitable principles underlying admiralty did not permit revocation of consent to arbitrate after the arbitrators resolved the question of fault but before they determined damages); *id.* at 397 ("In cases even at common law when the circumstances of the revocation were of such a character as to make the revocation unconscionable, the courts have held the rule of revocation inapplicable under the particular circumstances of the case."); *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 292 (N.Y. 1921) ("The ancient rule [of revocability], with its exceptions and refinements, was criticized by many judges as anomalous and unjust. It was followed with frequent protest, in deference to early precedents." (citations omitted)). Although calls for reform grew louder into the early twentieth century, judicial criticism of the doctrines disfavoring arbitration was manifest from at least the early nineteenth century. *See* Derek Roebuck, *The Myth of Judicial Jealousy*, 10 *ARB. INT'L* 395, 405 (1994).

¹⁸ The law was passed under the name United States Arbitration Act, but it is now known as the FAA.

The FAA supplanted “judicial hostility” to arbitration with statutory language ensuring enforcement of both the arbitration agreement and any ensuing arbitral award.¹⁹ With respect to the agreement, the FAA makes a written contract providing for arbitration “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁰ If parties sue on issues covered by an arbitration agreement, the FAA requires the court to stay judicial proceedings upon determination that “the issue involved . . . is referable to arbitration under such an agreement.”²¹ If either party refuses to comply with the agreement, the FAA empowers the adverse party to petition a district court to compel arbitration.²² If a district court denies a request to stay proceedings or compel arbitration, the petitioning party can pursue an interlocutory appeal.²³

With respect to the arbitral award, the FAA requires district courts to confirm valid awards if the arbitration agreement so provides.²⁴ The

¹⁹ The FAA’s passage was not entirely a watershed moment for statutory arbitration. In the six years prior, state law had already enabled specific performance of arbitration agreements in New York, New Jersey, Oregon, and Massachusetts. *Current Legislation*, 25 COLUM. L. REV. 822, 823 (1925). And for six decades after, the FAA remained inapplicable in state-court proceedings. See *infra* Part I.B.

²⁰ 9 U.S.C. § 2 (2012). The final clause is commonly called the “savings clause.”

²¹ *Id.* § 3 (2012). Referability to arbitration is commonly described as “arbitrability.” Arbitrability may be divided into procedural and substantive categories. The former concerns arbitral procedure and the satisfaction of conditions precedent to arbitration, disputes over which are arbitrable by default. The latter concerns the scope and validity of an arbitration agreement, disputes over which are resolved by courts unless the agreement specifies otherwise.

²² *Id.* § 4 (2012). Note, however, that the FAA does not provide federal-question jurisdiction. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.* (*Moses Cone*), 460 U.S. 1, 26 n.32 (1983) (“The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction . . .”).

²³ 9 U.S.C. § 16 (2012).

²⁴ *Id.* § 9 (2012). Where the arbitration agreement does not expressly provide for judicial confirmation of the arbitral award, some federal courts will nonetheless enter judgment under the FAA if they find it sufficiently clear that the parties intended the award to be binding in federal court. See, e.g., *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 930 (11th Cir. 1990) (allowing confirmation of an award described in the arbitration agreement as “final and binding,” and where the party challenging the award demonstrated “full participation in the arbitration process”); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 389-90 (7th Cir. 1981) (allowing confirmation of an award described in the arbitration agreement as “final and binding,” and where the underlying claims derived from a federal statute), *cert. denied*, 454 U.S. 838 (1981); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1273 (7th Cir. 1976) (allowing confirmation of an award governed by the

FAA also specifies the grounds for modifying or vacating an arbitral award. The award may be modified for clerical or other errors unrelated to the merits of the dispute.²⁵ Or it may be vacated for any of four procedural faults arising during the arbitration itself: (1) where the award resulted from “corruption, fraud, or undue means”; (2) where an arbitrator showed “evident partiality or corruption”; (3) where arbitrators committed procedural misconduct prejudicing either party; or (4) where arbitrators “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made.”²⁶

Notably, while the FAA ensures that the agreement and the award are both enforceable under federal law, it also enshrines an imbalance in the source of law governing the conditions for enforceability. After arbitration concludes with an award, the FAA itself provides the exclusive bases for challenging the award in court.²⁷ These bases

rules of the American Arbitration Association, which themselves allowed for confirmation of arbitral awards in federal court); *I/S Stavborg (O.H. Meling, Manager) v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 427 (2d Cir. 1974) (holding that an agreement's reference to a “final” arbitral award indicated that the award was intended to be enforced in either federal or state court, and finding that the parties' conduct indicated that federal court was satisfactory). *But see PVI, Inc. v. Ratiopharm GmbH*, 135 F.3d 1252, 1254 (8th Cir. 1998) (“If an award is ‘binding,’ the argument runs, it must necessarily be enforceable in a court of law. We agree. But we do not agree that the mere inclusion of the phrase ‘final and binding’ in an agreement to arbitrate makes the award enforceable under the FAA. . . . At common law, for instance, the existence of an arbitration award created for one of the parties an obligation to pay money, enforceable by the other party in an action of debt.”); *Oklahoma City Associates v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 793-94 (10th Cir. 1991) (“The clear import of [section 9] is that there is no federal court jurisdiction to confirm *under the FAA* where such jurisdiction has not been made a part of the arbitration agreement.”). Of course, to the extent final and binding resolution is a necessary characteristic of all arbitration, a rule rendering all such awards confirmable in federal court effectively nullifies the statutory requirement that the parties make an agreement to that effect. *See infra* notes 49–50 and accompanying text (defining arbitration in such terms).

²⁵ 9 U.S.C. § 11 (2012).

²⁶ *Id.* § 10 (2012).

²⁷ *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (“[Sections] 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification.”). Historically, many circuits also recognized “manifest disregard of the law” as an extra-statutory basis for vacating an arbitral award. Following the Supreme Court’s decision in *Hall Street*, it is unclear whether this remains good law. *See, e.g., Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) (“We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*.”). *But see Comedy Club, Inc. v. Improv W. Associates*, 553 F.3d 1277, 1290 (9th Cir. 2009) (concluding that “manifest disregard of the law remains a valid ground for vacatur” because it constitutes an example of arbitrators exceeding their power and therefore satisfies 9 U.S.C. § 10), *cert. denied* 558 U.S. 824 (2009).

derive from judicial interpretations of the FAA.²⁸ Before arbitration, however, the defenses to specific performance of an arbitration agreement rest on state contract law, without which the provisions of sections 2 through 4 are incomplete. Section 2 leaves validity of the agreement to the existing body of legal and equitable contract defenses, which — except in admiralty — necessarily derive from state law.²⁹ Sections 3 and 4 then empower district courts to stay federal proceedings and compel arbitration only if the contract is valid and the issue arbitrable — questions which implicate the state law of contract interpretation.³⁰

B. A Federal Common Law of Arbitration: Conflict Preemption

The role of state law in the FAA is a subject of ongoing dispute, the details of which exceed the scope of this Note.³¹ It suffices to observe

²⁸ See, e.g., *PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 991 (8th Cir. 1999) (“Consistent with the plain meaning of fraud and corruption, and with the limited scope of judicial review of arbitration awards, other circuits have uniformly construed the term undue means as requiring proof of intentional misconduct.”); *Pac. & Arctic Ry. & Nav. Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991) (adopting as a definition of fraud “the common law definition as modified by the Arbitration Act” so as to “requir[e] a greater level of improper conduct”); see also *Montez v. Prudential Sec., Inc.*, 260 F.3d 980, 983 (8th Cir. 2001) (offering examples of the circuit courts’ various tests for “evident partiality”).

²⁹ See *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”).

³⁰ See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ. (Volt)*, 489 U.S. 468, 474 (1989) (“[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review.”). Note, however, that federal courts apply a uniform federal rule to disputes regarding the scope of the arbitration agreement. *Volt*, 489 U.S. at 475-76. (“[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . , due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.”); *Moses Cone*, 460 U.S. 1, 24-25 (1983) (“The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

³¹ See generally Christopher Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153 (2014) (discussing the role of the unconscionability defense, the demise of which “has been overstated” since *Concepcion*); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J.

that state contract law plays a much-diminished role in arbitration today relative to the years immediately following the FAA's enactment. This is partly a result of the broader range of contracts now falling within the ambit of interstate commerce. A more complex economy, coupled with the Supreme Court's more expansive view of the Commerce Clause, makes it difficult to envision a purely intrastate contract significant enough to justify litigation over whether to compel arbitration.³² State contract law therefore interacts with the FAA more regularly, and to the extent it restricts arbitration the FAA would enforce, it is more regularly preempted.

At the same time, the diminished role of state contract law is also a function of the modern Supreme Court's more liberal views regarding the FAA's preemptive power. In 1967, the Court held that the FAA established a body of substantive federal law under the Commerce Clause rather than simply a set of procedural rules governing the behavior of federal courts.³³ In the mid-1980s, the Court then interpreted section 2 as equally binding on both federal and state courts, fully realizing the FAA's modern role as a basis for federal conflict preemption.³⁴

In the decades since, the Court has vastly restricted the ability of state law to prevent arbitration under the savings clause.³⁵ Where state

1217 (2013) (discussing the role of state contract defenses consistent with the purposes of the FAA).

³² See *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 275 (1995) ("The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) ("[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty." (internal quotation marks omitted)).

³³ *Prima Paint*, 388 U.S. at 404-05 (holding that the FAA applied to a case brought in federal court under diversity jurisdiction, with the Commerce Clause neutralizing any *Erie* concerns).

³⁴ *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) ("[S]ince the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction."); see also *Moses Cone*, 460 U.S. at 24.

³⁵ See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006) (summarizing and critiquing these developments); see also *In re Nexium (Esomeprazole) Antitrust Litig.*, 309 F.R.D. 107, 147 (D. Mass. 2015), as amended (Aug. 7, 2015) (listing judicial, administrative, academic, and professional authorities

law expressly prohibits arbitration of certain statutory claims, it is preempted.³⁶ Where state law imposes uniquely burdensome requirements on the form of a valid arbitration agreement, it is preempted.³⁷ Where state law “singles out” arbitration for unfavorable treatment under its statutory or common-law defenses to contracts — unconscionability,³⁸ public policy,³⁹ or reasonable expectations⁴⁰ — it is preempted.⁴¹

Yet despite this growth in the case law, it remains unclear what reasoning the courts must apply to resolve claims of FAA conflict preemption. The Supreme Court has held that the FAA preempts all state law inconsistent with the FAA’s “purposes and objectives.”⁴² But those purposes and objectives are not found within the FAA itself, and the Court has supplied various standards.⁴³ The result, in effect, is that the enforceability of an arbitration agreement under the FAA primarily depends not on the availability of state-law contract defenses, but on the continuing development of interstitial federal common law.⁴⁴

critical of the FAA as currently applied, and declaring that “no one thinks [the Supreme Court] got it right”).

³⁶ See, e.g., *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (invalidating a California law that “require[d] that litigants be provided a judicial forum for resolving wage disputes”).

³⁷ See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (invalidating a Montana statute that required certain arbitration clauses to be printed clearly on the front page of an agreement).

³⁸ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-42 (2011).

³⁹ See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203-04 (2012) (invalidating West Virginia’s bar on predispute agreements to arbitrate wrongful-death and personal-injury claims against nursing homes).

⁴⁰ See, e.g., *Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1160-61 (9th Cir. 2013) (applying an interpretation of *Concepcion*).

⁴¹ See *Casarotto*, 517 U.S. at 687 (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.” (citations omitted)).

⁴² *Concepcion*, 563 U.S. at 352 (“Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California’s *Discover Bank* rule is preempted by the FAA.” (citation and internal quotation marks omitted)).

⁴³ *Horton*, *supra* note 31, at 1261 (identifying as the FAA’s possible “purposes and objectives” (1) strictly enforcing arbitration agreements by their own terms, (2) actively promoting arbitration, or (3) treating arbitration agreements as any other contract).

⁴⁴ See generally Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197 (2006) (describing *Keating* as the genesis of a federal common law of arbitration based on

C. The Latent Threshold Question

When considering a challenged arbitration agreement, courts inevitably focus on the role of federal arbitration law in preempting state defenses to contracts. This is a necessary question. But attention to defenses obscures a more basic threshold question — namely whether there is, in the first instance, an agreement for *arbitration*, as opposed to an agreement for some other form of dispute resolution. Defenses are premature if the underlying action has yet to be established. If the contract does not contemplate arbitration, the FAA does not apply.

Arbitration is undefined in federal law. In their haste to serve the purposes and objectives of the FAA, federal courts rarely pause to consider a definition. The few that do often take pains to avoid defining arbitration except as necessary to resolve the dispute before them.⁴⁵ This then invites the possibility of federal courts compelling arbitration and using the FAA to invalidate otherwise applicable contract defenses without an underlying agreement to arbitrate. Notwithstanding the “liberal federal policy favoring arbitration agreements,”⁴⁶ this conflicts with bedrock Supreme Court precedent holding that parties cannot be forced into an arbitration they did not intend.⁴⁷

interpretation of the FAA). *Moses Cone* points to earlier examples of a developing federal common law of arbitration. See *supra* note 30. For a recent example, see *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469-71 (2015). There, the U.S. Supreme Court conducted *its own analysis* of California contract law to determine whether California courts would have applied California law in the same way if the disputed agreement had not been an agreement for arbitration. *Id.* Oddly, this use of the FAA leaves California courts — including the court to which *Imburgia* was remanded — with the power to disregard the Supreme Court’s decision if they believe its reading of California law was incorrect.

⁴⁵ See, e.g., *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985) (“At no time have the courts insisted on a rigid or formalistic approach to a definition of arbitration.”); *id.* at 456 (“Whether or not the agreement be deemed one to arbitrate, it is an enforceable contract to utilize a confidential advisory process . . .”).

⁴⁶ *Moses Cone*, 460 U.S. 1, 24 (1983).

⁴⁷ *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration.”); *Volt*, 489 U.S. 468, 478 (1989) (“While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered. Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement.” (citations and internal quotation marks omitted)); see also *infra* note 239

The lack of definitions in case law should not suggest that definitions are hard to come by. Arbitration is “[a] dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.”⁴⁸ Arbitration is “a contractual proceeding of common law origin by which the parties consent to submit the matter for determination to a neutral third party rather than to the tribunals provided by the ordinary processes of the law.”⁴⁹ Similar definitions appear in references over the course of the past century, the common thread being that arbitration is a third-party dispute-resolution process with certain broadly but objectively defined characteristics.⁵⁰ These characteristics describe a process that is necessarily (1) consensual, (2) binding, and (3) neutral.

Arbitration is consensual in much the same way as the other common means of alternative dispute resolution. Like negotiation, conciliation, or mediation — and unlike trial or administrative adjudication — arbitration cannot be compelled without both parties’

(discussing the limits of the “federal rule” described in *Moses Cone*).

⁴⁸ BLACK’S LAW DICTIONARY 125 (10th ed. 2014).

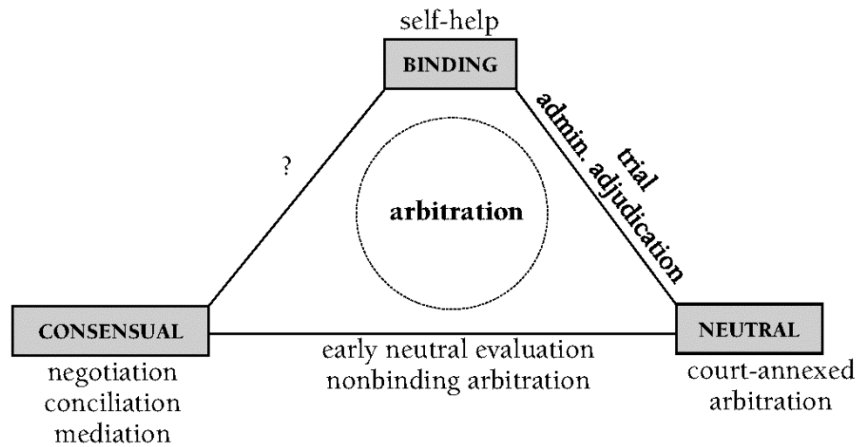
⁴⁹ 6 C.J.S. *Arbitration* § 1 (2014).

⁵⁰ See, e.g., 1 WEST’S ENCYCLOPEDIA OF AMERICAN LAW 228 (1998) (defining arbitration as “[t]he submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the [award]”); BLACK’S LAW DICTIONARY 105 (6th ed. 1990) (defining arbitration as “a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard,” and noting that “[w]here arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision”); BLACK’S LAW DICTIONARY 134-35 (4th ed. 1968) (defining arbitration as “the submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement” with “substitution of their award or decision for judgment of a court,” and defining an arbitrator as “a private, disinterested person . . . to whose decision (award) the litigants submit themselves”); BALLENTINE’S LAW DICTIONARY 99 (1930) (defining arbitration as “the submission of some disputed matter to selected persons, and the substitution of their decision or award for the judgment of the established tribunals of justice,” and defining arbitrators as “private, extraordinary judges” bearing the “duty to hear the evidence adduced by the parties, and to make a fair and impartial award in accordance with the terms of the submission”); 1 BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 225-30 (8th ed., 3d rev. ed. 1914) (citing cases collectively forming the same definition). Scholarly sources have also defined arbitration in these terms. See, e.g., Soia Mentschikoff, *The Significance of Arbitration — A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBLEMS 698, 699-700 (1952). Mentschikoff describes arbitration in more precise terms, but arguably according to the same essential procedural qualities. Mentschikoff also cites a fourth essential element of arbitration — its extrajudicial character — that is arguably encompassed by the consensual nature of the process.

prior consent, and its procedures derive solely from the parties' prior agreement.⁵¹ Unlike other forms of ADR, however, arbitration is not *only* consensual. Arbitration binds parties to a final disposition of the dispute regardless of the parties' acceptance of it. This final disposition is intended not as compromise justified by its voluntary acceptance, but rather as an adjudication, justified by its neutral resolution on the merits of the dispute. The binding nature of the process also distinguishes arbitration from mechanisms colloquially sharing its name, including "nonbinding arbitration" and "court-annexed arbitration," in which neutral arbiters propose or speculate on awards based on the merits, but in which the awards have no effect without further agreement between the parties.⁵²

⁵¹ Mediation may be court-ordered in some circumstances. It is mandatory in California child-custody disputes, for example. CAL. FAM. CODE § 3170(a) (2016); *In re Marriage of Economou*, 224 Cal. App. 3d 1466, 1487 (1990). But mediation is not mandatory in California in the typical civil action. *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536, 541 (2007) (describing mediation as having a fundamentally "voluntary nature"). Where it exists, mandatory pretrial mediation might be justified as part of the formal judicial process — a facet of trial — which is not itself inherently consensual. *See, e.g., In re Atlantic Pipe Corp.*, 304 F.3d 135, 144 (1st Cir. 2002) ("There may well be specific cases in which such a protocol is likely to conserve judicial resources without significantly burdening the objectors' rights to a full, fair, and speedy trial. Much depends on the idiosyncra[s]ies of the particular case and the details of the mediation order."); *id.* at 145 ("The fair and expeditious resolution of such cases often is helped along by creative solutions — solutions that simply are not available in the binary framework of traditional adversarial litigation.").

⁵² *See* BLACK'S LAW DICTIONARY 125-26 (10th ed. 2014) (describing arbitration as "[a]lso termed (redundantly) binding arbitration" (emphasis omitted)); *see also infra* note 73 (discussing the difference between revocable arbitration and nonbinding arbitration).



A **typology of dispute-resolution techniques**. Arbitration is consensual in that the parties must agree to the process. It is binding in that the disposition is imposed without a further act of agreement. It is neutral in that the disposition is rendered on the merits by an impartial third party. Other forms of dispute resolution share some but not necessarily all of these characteristics. For example, mediation is consensual; but it is not binding, as the disposition cannot be imposed; and it is not necessarily neutral, as the disposition need not be based on the relative merits of the parties' positions. "Court-annexed arbitration" is neutral but neither consensual nor binding, as the process is imposed by the courts and the disposition may be rejected. Neutral evaluation is both consensual and neutral, but nonbinding. Trial is both binding and neutral, but not necessarily consensual.

The question then is how consensual, how binding, and how neutral the process must be, as a threshold matter, for it fairly to be called an arbitration. This is not a novel concern. Achieving the proper procedural balance appears to be a defining dynamic in the history of arbitration, reflected in courts' shifting treatment of the process from the early common law into the modern statutory period. This dynamic entered American law with the rest of the common law, and tensions within it eventually laid the groundwork for the FAA itself.

At the same time, courts' reluctance to embrace a robust procedural definition of arbitration is not historically anomalous. The longstanding doctrines "disfavoring" arbitration effectively rendered definitional disputes irrelevant, as parties challenging arbitration had no need to question the procedural characteristics of their agreement when simply revoking consent sufficed to end the dispute. Common-law defenses to unjust arbitrations served similar ends as revocability

declined, as did the power of state contract law to constrain or invalidate certain disputed arbitration agreements.

The recent rise of a substantive federal law of arbitration, along with a federal common law governing the scope of conflict preemption, marks a break in the traditional dynamic. The threshold definitional question is now increasingly relevant. If state contract law ends where the objectives of the FAA begin, parties must be able to recognize not only the objectives of the FAA, but also the outer limits of arbitration itself. Since the 1980s, federal courts have confronted this question more regularly. Lacking guidance from the Supreme Court, they have reached differing conclusions, with most circuits offering only incomplete definitions.⁵³ The result is an unsustainable imbalance,

⁵³ Courts have also split as to the source of the law providing a definition of arbitration. The Ninth Circuit treats this as a question of state law to the extent the state definition does not conflict with the FAA. *Wasyf, Inc. v. First Bos. Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (including appraisal within the FAA because it constitutes arbitration under California law). The Fifth Circuit has adopted this view as well. *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062-63 (5th Cir. 1990) (excluding appraisal from the FAA because it does not constitute arbitration under Texas law); *see also* *Gen. Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 246 (5th Cir. 1998) (citing treatises, dictionaries, and the Louisiana Civil Code for a definition of arbitration as consensual, binding, and neutral, albeit without expressly identifying Louisiana law as controlling). The other circuits to have considered the question treat the definition of arbitration as a matter of federal law under the FAA. *See, e.g., Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135 (Bakoss)*, 707 F.3d 140, 143 (2d Cir. 2013) (analyzing the circuit split and rejecting the Ninth and Fifth Circuits' reasoning), *cert. denied*, 134 S. Ct. 155 (2013); *Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012) ("We agree with the First and Tenth Circuits that federal law should control the definition."). The Ninth Circuit has since called into doubt the continued validity of its earlier holding. *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat. Ass'n as Tr. for Trust No. 1 (Portland Gen. Elec.)*, 218 F.3d 1085, 1091-92 (9th Cir. 2000) (questioning, in concurrences written or joined by every judge on the panel, the reasoning in *Wasyf*). There also appears to be inconsistent precedent *within* the Ninth Circuit. *See infra* Part III.B.2. This Note assumes that a federal definition governs, at least in the absence of contractual language expressly incorporating state arbitration law. *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995) ("[T]he choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration."). This reflects the most recent circuit decisions and seems the result likeliest to prevail in the current Supreme Court, which has contributed substantially to the federalization of U.S. arbitration law and does not seem inclined to reverse course now. The arguments against this approach are compelling, but they exceed the scope of this Note and are well treated elsewhere. *See, e.g.,* Brief of Preemption and Federalism Law Professors as Amici Curiae Supporting Petitioner at 1, 20-23, *Bakoss*, 707 F.3d 140 (No. 12-1429), 2013 WL 3527816; IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION — NATIONALIZATION — INTERNATIONALIZATION 176 (1992) ("The trail of the [FAA] has led to an erosion of state power certainly never intended initially by Congress."); *id.* at 176-77

marked by the rapid growth of a federal common law governing FAA conflict preemption, but widespread disengagement from the common-law definition of arbitration itself. Federal courts appear prepared to invalidate increasingly broad swaths of state contract law, but not to define the scope of contracts affected. Absent a change in statute, a clearer and more vibrant definition of the underlying process is necessary to ensure that the specific performance of arbitration remains grounded in the parties' contractually defined intent. This definition of arbitration is already available. Courts need only use it.

II. A COMMON-LAW DEFINITION OF ARBITRATION

Arbitration's procedural balance — its consensual, binding, and neutral nature — was manifest from its early history, maintained by the common law, and eventually enshrined in the shift to statutory arbitration. However, this process unfolded more smoothly in England than in the United States, where courts' strict application of the ouster doctrine threatened to upend the traditional understanding of arbitration, spurring passage of the FAA. This history of judicial "hostility" to arbitration has come to dominate American jurisprudence, pushing aside the common-law definition in a way the FAA never intended, and encouraging federal courts to presume the statute's applicability without first considering the nature of the agreements before them.

A. *Early English Arbitration*

The antecedents of modern arbitration substantially predate English common law. Procedures now described as alternative dispute resolution — negotiated settlement, conciliation, mediation, and arbitration — were generally familiar to the Roman-era Britons, the Anglo-Saxons, and the Normans.⁵⁴ From these roots arose a

("Commercial arbitration is simply one of a number of forms of dispute resolution constituting an adjunct to the contract law and litigation systems of the states. . . . [T]his basic foundation of 'private' law remains the domain of the states."). Furthermore, even if the states controlled, their common-law definitions of arbitration would presumably be informed by the same history and logic as the federal common-law definition discussed here.

⁵⁴ DEREK ROEBUCK, *EARLY ENGLISH ARBITRATION* 46-54, 125-26, 182-87, 219-24 (2008) [hereinafter *EARLY ARBITRATION*]. *But see* Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 *YALE L.J.* 595, 597 (1928) (arguing that "[t]here is apparently no germ of arbitration in Anglo-Saxon law," but that the process developed from ecclesiastical courts, which were influenced by Roman and Greek traditions).

recognizable arbitration procedure with consensual, binding, and neutral elements.⁵⁵

Through at least the sixteenth century, the common law did not acknowledge formal procedural distinctions between arbitration and other forms of dispute resolution.⁵⁶ Backed by social and religious pressures,⁵⁷ courts encouraged parties to settle private disputes on their own terms, expecting that arbitrators would make creative use of the full range of dispute-resolution techniques to reach a disposition.⁵⁸ Nonetheless, procedural distinctions between these techniques crystallized from custom as the common law developed, with recognizably modern forms resulting.

Early mediation, like modern mediation, was defined by its consensual nature. Medieval lovedays, for example, offered a forum for resolving disputes by love rather than law, with the assistance of third-party mediators.⁵⁹ Both courts and Christian doctrine may have driven disputants to reconcile in this way, although the choice remained with the parties themselves.⁶⁰ A mediated settlement constituted the final

⁵⁵ Although the Normans themselves stressed the continuity between Anglo-Saxon and Norman law, it is unclear how much of the original Germanic practice was retained in the shift towards centralized courts of common law. FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 28-32 (1915). Certainly the language of arbitration — arbitrator, umpire, award — is entirely French in origin. See also *infra* note 70.

⁵⁶ DEREK ROEBUCK, *THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I* 3-5 (2015) [hereinafter *ELIZABETH I*]; DEREK ROEBUCK, *MEDIATION AND ARBITRATION IN THE MIDDLE AGES* 370 (2013) [hereinafter *MIDDLE AGES*] (“Of course, people then knew the difference between the concepts of mediation and arbitration[,] but the *process* they used did not keep them separate.”); *id.* at 52 (“Parties and communities well knew the difference between what we now separate into mediation and arbitration — and in practice now try to keep distinct. They also knew the difference between litigation and what we now call alternative dispute resolution. But they did not start from where we are.”).

⁵⁷ ROEBUCK, *MIDDLE AGES*, *supra* note 56, at 28-29; *id.* at 49 (“Though arbitration was the term most often used by lawyers and others to describe the whole range of dispute solving, the courts . . . were careful to insist on the distinctions when they were relevant.”).

⁵⁸ *Id.* at 39-40, 45, 396-97; see also *id.* at 48 (arguing that “the common process was for contending parties first to ask friends to mediate and then to arrange an arbitration if no settlement could be reached,” and suggesting that many arbitrations appearing in the Year Books were preceded by an unmentioned mediation).

⁵⁹ *Id.* at 30-31; Jackson W. Armstrong, *Violence and Peacemaking in the English Marches Towards Scotland, c. 1425–1440*, in *IDENTITY AND INSURGENCY IN THE LATE MIDDLE AGES* 53, 68-70 (Linda Clark ed., 2006).

⁶⁰ ROEBUCK, *MIDDLE AGES*, *supra* note 56, at 28-30; Edward Powell, *Arbitration and the Law in England in the Late Middle Ages*, 33 *TRANSACTIONS ROYAL HIST. SOC'Y* 49, 52 (1983).

judgment on the dispute, and once embodied in an accord, was enforceable at common law to the same extent as any comparable agreement.⁶¹ However, neither the process nor the settlement could be imposed without the parties' active agreement. Indeed, common-law courts often required parties to pay fees to access mediation after initiating a legal proceeding.⁶²

The primacy of consent was also mediation's greatest benefit. A binding resolution based purely on a neutral arbiter's judgment risked providing the prevailing party a more favorable result at the cost of the losing party's refusal to comply.⁶³ For this reason, it was not uncommon for parties to select mediation not only before litigation or arbitration began, but even during the proceedings or after a judgment or award.⁶⁴

Early private arbitration was similarly consensual, but as today, the arbitrators' award was binding even without a separate settlement agreement.⁶⁵ Rather than resolution based on the consent of the parties, arbitration offered resolution based on the judgment of their appointees, who evaluated the merits but had discretion to reach equitable results in the interests of subjective justice, *ex aequo et bono*.⁶⁶ The process and the award were made binding first by the use of penalty clauses to secure performance, and later by the widespread use penal bonds.⁶⁷ The award might also be enforceable in debt and a bar to litigation in another forum.⁶⁸

⁶¹ ROEBUCK, MIDDLE AGES, *supra* note 56, at 30, 379-80.

⁶² *Id.* at 45 ("Parties who had instituted [court] proceedings were expected to see them through and not to waste the court's time.").

⁶³ See Powell, *supra* note 60, at 50 ("The administration of justice depended instead on the cooperation of local society at all levels, with the scope for graft and inefficiency this entailed. In such circumstances, where the coercive apparatus serving the courts was weak and the influence of the local community powerful, it was inevitable that the mediatory, restitutive functions of justice would prevail over the punitive.").

⁶⁴ ROEBUCK, MIDDLE AGES, *supra* note 56, at 29, 45.

⁶⁵ Powell, *supra* note 60, at 55-56; see also ROEBUCK, MIDDLE AGES, *supra* note 56, at 403.

⁶⁶ ROEBUCK, MIDDLE AGES, *supra* note 56, at 401; see also JOHN MARCH, ACTIONS FOR SLANDER AND ARBITREMENTS 160 (Gray's Inn rev. ed. 1674) ("[Arbitrators'] power is far greater [than judges'], for as they may judge as they please, keeping themselves to the Submission . . .").

⁶⁷ Joseph Biancalana, *The Development of the Penal Bond with Conditional Defeasance*, 26 J. LEGAL HIST. 103, 103-04 (2005); see also ROEBUCK, MIDDLE AGES, *supra* note 56, at 57-60, 363-68. It was common in ecclesiastical courts to secure performance of an arbitration agreement by a *compromissum*. The *compromissum* was, in effect, the Roman precursor to the bonds enforced in common-law courts.

Arbitral neutrality was implicit in the process in that arbitrators were nominated either as appointees of each side or as fully neutral “friends of both sides”⁶⁹ — typically in equal number, with ties broken by an additional arbitrator or substituted for the judgment of an “umpire.”⁷⁰ Court-appointed arbitrators were similarly expected to be “respectable and law abiding” individuals.⁷¹ No legal remedy existed

ROEBUCK, MIDDLE AGES, *supra* note 56, at 58. Neither the *compromissum* nor the bond made arbitration agreements subject to specific performance, but they raised the cost of breach beyond actual damages in order to achieve the same effect. The *compromissum* also allowed the parties to define the form of the proceeding and the selection of arbitrators. *See also* Powell, *supra* note 60, at 54-55, 63.

⁶⁸ Y.B. 45 Edw. 3, fol. 16a-16b, Mich., pl. 18 (1371); ROEBUCK, MIDDLE AGES, *supra* note 56, at 371-79, 384-87; Powell, *supra* note 60, at 63; *see also* MARCH, *supra* note 66, at 160 (“[Arbitrators’] sentences are absolutely definitive and conclusive, from which there lies no Appeal . . .”); *id.* at 262 (“[I]t doth evidently appear, that the scope and end of Arbitrements and other Judgments is all one; and chiefly, the finall determination of Strifes, Suits, and Controversies . . .”).

⁶⁹ ROEBUCK, MIDDLE AGES, *supra* note 56, at 53 (internal quotation marks omitted); *id.* at 56 (“Party-appointed arbitrators might be assumed to be *parti-pris* but were expected to decide according to reason, fairness and right.”); *see also* ROBERT L. HENRY, CONTRACTS IN THE LOCAL COURTS OF MEDIEVAL ENGLAND 95-96 (1926) (describing inquest in local courts as a special form of arbitration, and noting that “[t]he elements of arbitrament were present”); *id.* (“First, there was consent. . . . Second, the inquest involved submission to a group, not the friends of either party; and third, there was a decision by such body.”). Note that the expectation of early arbitration was not complete impartiality or independence in the modern sense. Arbitrators were frequently well-known in the community, closely acquainted with the parties, and personally familiar with the dispute. In this sense, early arbitral tribunals were no different from early juries. MAILLAND & MONTAGUE, *supra* note 55, at 57 (“In the fifteenth century the change [to selecting jurors for impartiality and independence] had taken place, though in yet later days a man who had been summoned as a juror, and who sought to escape on the ground that he already knew something of the facts in question, would be told that he had given a very good reason for his being placed in the jury-box.”); *see also* HENRY, *supra*, at 99 (“Where the inquest, late in our period, had begun to change its character, and was not necessarily constituted of first-hand witnesses to a transaction, a development towards rules of exclusion might be expected.”).

⁷⁰ ROEBUCK, ELIZABETH I, *supra* note 56, at 107-08, 114. The tacit link between neutrality and unevenness in number is preserved in our language. The word “umpire,” with its connotations of objectivity, derives from the Old French *nonper*, meaning “unequal in number.”

⁷¹ ROEBUCK, MIDDLE AGES, *supra* note 56, at 62; *see also* ARBITRIUM REDIVIVUM I (1694) (“Arbitrement . . . is an Award, Determination or Judgment made, or given between persons in Controversie, by the Arbitrators or Umpire, being such person or persons as are thereunto elected, by the Parties controverting, for the ending and pacifying of the said Controversie according to the Submission or Compromise of the said Parties, and agreeable to Reason and good Conscience.”); MARCH, *supra* note 66, at 160 (“An Arbitrator is, as our Books say, a Judge, *indifferently chosen by the parties*, to end the matter in controversie between them” (emphasis added)); *id.* at 262

for biased arbitration, but Chancery entertained such claims from at least the mid-fifteenth century.⁷²

At the same time, although neutrality was no more than implicit in the arbitrators' selection, it was made readily enforceable through revocability of the consent to arbitrate.⁷³ In 1609, Lord Coke famously articulated the common-law doctrine of revocability in *Vynior's Case*, reasoning that consent to arbitrate could be revoked at the price of forfeiting the penal bond paid to secure performance.⁷⁴ However, consent to arbitrate was effectively revocable long before Lord Coke's time, as his citations to the Year Books suggest.⁷⁵ The longstanding use

("[T]his caveat . . . must be observed, lest this course prove as bad, if not worse then a Law Suit; that there be honest, indifferent, and judicious Arbitrators chosen, not only such as are just men, but such as are skillful and knowing in the matters in controversie, that their ignorance may not make them erre . . ."). Although March refers to the arbitrators as "men," the accurate modern term is indeed "individuals." Women were "rarely appointed," but they were never categorically excluded. ROEBUCK, MIDDLE AGES, *supra* note 56, at 63, 276-77.

⁷² Powell, *supra* note 60, at 65 & n.103 (citing several early Chancery proceedings, the first at P.R.O. C 1/9/160, dating to 1432-1443).

⁷³ See Paul D. Carrington & Paul Y. Castle, *The Revocability of Contract Provisions Controlling Resolution of Future Disputes Between the Parties*, 67 LAW & CONTEMP. PROBS. 207, 210 (2004) ("We perceive that the purpose underlying Lord Coke's revocability doctrine was that the rule served to insure the disinterest of arbitrators."); Sayre, *supra* note 54, at 609 ("[W]hen arbitration of legal liability . . . is made irrevocable . . . , then in effect the common law right of revocation of submission is destroyed, while nothing is done to insure a fair hearing in the arbitration. The common law allowed revocation to prevent this very difficulty."). Revocable arbitration must be distinguished from the modern technique of "nonbinding arbitration." Apart from the judicial, social, and economic pressures encouraging performance, revocable arbitration was made binding by execution of the agreement. See *infra* note 76. By contrast, nonbinding arbitration becomes binding only by means of a further act of consent. In this sense, it is arguably not arbitration at all, but a kind of neutral evaluation. See *infra* Parts III.A.1, III.B.

⁷⁴ *Vynior's Case*, (1609) 77 Eng. Rep. 597 (K.B.) 598-99 ("[A] man cannot by his act make such authority, power, or warrant not countermandable, which is by the law and of its own nature countermandable . . .").

⁷⁵ See Sayre, *supra* note 54, at 595, 602 & nn.25-26 (citing the earlier Year Books referring to revocability, with the earliest citation from 1375); see also Y.B. 5 Edw. 4, fol. 3b, Trin., pl. 2 (1465) ("If I am bound to stand to the award . . . , I am not able to be released from that award . . . ; but it is otherwise if it is without a bond, *s'il soit sans obligation, auter est.*" (as quoted in ROEBUCK, MIDDLE AGES, *supra* note 56, at 363)). Julius Henry Cohen argues that Lord Coke's reliance on the Year Books was misplaced. In particular, he identifies the 1375 case, Y.B. 49 Edw. 3, fol. 8b-9b, Hil., pl. 14, as an early example of "clear and unmistakable authority contrary to the [revocability] doctrine stated by [Lord] Coke." JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 109-10 (1918). In that case, Brode sued de Ripple in debt for failure to proceed with an arbitration secured by a penal bond. The parties had attempted arbitration, which failed when the arbitrators and umpire failed to reach the

of penalty clauses and penal bonds indicates as much. For centuries, the only legal means of ensuring an arbitration agreement's execution⁷⁶ was by incentivizing it through threat of an action of debt on an obligation.⁷⁷

necessary agreement. The Court of Common Pleas concluded that de Ripple's continued willingness to proceed with arbitration served as a bar to Brode's action. Y.B. 49 Edw. 3, fol. 8b-9b, Hil., pl. 14; COHEN, *supra*, at 110-12. Cohen understands this as "a recognition of the validity of the arbitration agreement, provided the parties reduce the obligation to the solemn form [the contract under seal] then recognized in the law as the necessary basis for all obligations." COHEN, *supra*, at 112-13. And so it was. But contrary to Cohen's assertion, this has no bearing on the doctrine of revocability as stated by Lord Coke — a doctrine that does not question the validity of the agreement, but simply renders the promise embodied in the agreement revocable. Nor would this make the agreement into what modern observers might call an "illusory promise": While revocation is valid, so too is the agreement. Revocation is therefore a failure to comply with the conditions for defeating the bond — a "breach" — with "damages" due in the amount of the bond. *See* *Park Constr. Co. v. Indep. Sch. Dist. No. 32, Carver Cnty. (Park Constr. Co.)*, 296 N.W. 475, 479 (Minn. 1941) (Peterson, J., dissenting). Had de Ripple refused to proceed with a second attempt at arbitration, the court would presumably have considered whether his refusal constituted revocation, which would then have rendered the penal bond mature. This early case did not state the revocability doctrine in the same terms as *Vynior's Case*, but the two authorities are fully consistent. Note also that the mechanics of revocability are not entirely anachronistic. Revocability finds a close contemporary parallel in the rejection of executory contracts in bankruptcy. *See* 11 U.S.C. § 365 (2012); *In re The Ground Round, Inc.*, 335 B.R. 253, 261 (B.A.P. 1st Cir. 2005), *aff'd*, 482 F.3d 15 (1st Cir. 2007).

⁷⁶ As no distinction existed between the arbitral procedure and the resulting award, arbitration was not executed until an award was made. *See* ROEBUCK, *MIDDLE AGES*, *supra* note 56, at 355-89; Sayre, *supra* note 54, at 597-98. Disputed agreements to arbitrate were therefore inherently executory, and until the rise of *assumpsit*, damages were unavailable unless the agreement was under seal. 14 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 189 n.4 (1964).

⁷⁷ J. Berryman, *The Specific Performance Damages Continuum: An Historical Perspective*, 17 *OTTAWA L. REV.* 295, 296 (1985) (noting that in the absence of a developed body of contract law, the penal bond, "the basic contract institution for three centuries, gave the greatest impetus for specific performance" by allowing the parties to set their bond "at any amount"). Until the early fourteenth century, the writ of covenant might have offered an opportunity for specific performance, as covenant at that time could be used for breach of any executory promise, whether parol or under seal. BAKER, *supra* note 10, at 318-20; *see also id.* at 324 n.39. But there seems to be no record in the Year Books that covenant was seen as an option for enforcing submissions to arbitration. *See id.* at 320 n.20; ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381: A TRANSFORMATION OF GOVERNANCE AND LAW* 65 (2000) ("[A]ctions [of covenant] were not litigious but only a mechanism for formalizing a conveyance on which the parties were already agreed. Some few people did use covenant to enforce agreements but that use was rare."). Rather, the actions, at least in the central courts, were in debt on an obligation. *See* BAKER, *supra* note 10, at 318, 322 (noting that central courts did not hear disputes over parol contracts or where evidence of a transaction was lacking).

Such actions may have arisen on penalty clauses as early as the mid-thirteenth century.⁷⁸ By the mid-fifteenth century, the penal bond — an efficient, sealed instrument fixing liquidated damages — had become the primary means of incentivizing compliance.⁷⁹

Although Lord Coke did not cite arbitral neutrality to justify the doctrine of revocability, his stated rationale in *Vynior's Case* betrays hints of the natural connection. According to Lord Coke, an individual's submission to arbitration is "by the law and of its own nature countermandable."⁸⁰ Examples illustrated the concept. "[I]f I make a letter of attorney to make livery[] or to sue an action . . . in my name," the authority may still be revoked "although made by express words irrevocable."⁸¹ So, too, "if I assign auditors to take an account," "make one my factor," or "make my testament and last will irrevocable."⁸² The common thread is clear enough. In each case, the agreement is similarly executory — delegating rights and responsibilities to another without an interest — and premised on some personal trust.⁸³ And in each case, as with the submission to arbitration, revocability is the surest means of

⁷⁸ 13 CLOSE ROLLS OF THE REIGN OF HENRY III 529-30 (1264–1268) (Public Record Office 1937); Biancalana, *supra* note 67, at 104 n.7; *see also* ROEBUCK, MIDDLE AGES, *supra* note 56, at 365-66.

⁷⁹ BAKER, *supra* note 10, at 320-21, 324; Biancalana, *supra* note 67, at 115-16.

⁸⁰ *Vynior's Case*, (1609) 77 Eng. Rep. 597 (K.B.) 599.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 14 HOLDSWORTH, *supra* note 76, at 189 ("[T]hough the submission was regarded as a contract, it was also regarded as a mandate. Therefore it could be revoked at any time before the award was given."); *see also* *Park Constr. Co.*, 296 N.W. 475, 480 (Minn. 1941) (Peterson, J., dissenting) (noting that the arbitrator has been called a "mandatory," an "appointee," and an "agent," and citing *Chitty on Contracts* for the description of arbitration a kind of "delegated power"); *id.* ("An arbitrator's authority may be revoked before award for the simple reason that any authority without an interest is subject to revocation by the party granting it."); Sayre, *supra* note 54, at 599-600. The term "delegation" must not be taken to imply an agency relationship in the modern sense. The law of agency did not then exist as it does today. Sayre, *supra* note 54, at 599-600. Modern observers occasionally misuse the term. *See, e.g.*, COHEN, *supra* note 75, at 95-96. As an agency relationship, in its contemporary sense, would be inappropriate in the arbitration context, this may lead observers to discount the rationale in *Vynior's Case* as poorly founded and easily discredited. Sayre, *supra* note 54, at 600 ("[I]t is knocking down a man of straw to point out that an arbitrator is not an agent in the modern sense."). To explain the persistence of revocability as a centuries-long misapplication of modern agency principles is to take an unjustifiably dim view of both the logic in *Vynior's Case* and the later courts' reasons for adhering to the precedent. *See id.* at 601 ("Few principles of the modern law have continued without change for three hundred years; yet we are told that *Vynior's Case* has such extraordinary vitality that its doctrine alone has limited the development of arbitration in commercial disputes in all common law countries.").

accounting for the parties' relationship and controlling the delegee's performance⁸⁴ — be it the attorney, the factor, the executor, or the arbitrator — before execution.⁸⁵

The concept of delegation might seem peculiar in the context of dispute resolution. But it must be remembered that arbitration predates the time when a single, central judicial body wished, presumed, or was expected to hold sole responsibility for resolving private conflicts. Both before and after *Vynior's Case*, arbitration was simply one forum of many with overlapping jurisdiction. As Professor Sayre has noted, “[t]his conception of basing rights upon powers voluntarily granted by individuals was far more significant in the early law than it is today.”⁸⁶ Even within the common-law courts, parties

⁸⁴ Carrington & Castle, *supra* note 73, at 210. Consider the concluding words of Stewart Kyd's treatise on arbitration and awards, first published in 1791. STEWART KYD, A TREATISE ON THE LAW OF AWARDS 392-93 (2d ed. 1799) (“Such is the general System of the Law of Awards; a system which . . . has been, in modern times, established on the principles of sober reason and sound sense; a system, which, were the parties submitting always certain of appealing to a judge of perfect wisdom and incorruptible integrity, would be highly beneficial to society: but which, from the weakness and depravity of men, frequently becomes the instrument of the most flagrant injustice, and the most serious oppression.”); *see also* *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (Story, J.) (“[A]rbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but rusticum judicium.”). This is further manifestation of the binding nature of the underlying agreement. *See* 3 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 41 (2d ed. 1791) (“Neither *natural* or *legal disabilities* do hinder any one from being an arbitrator. If they are incompetent judges, the fault is those that chuse them.”).

⁸⁵ *Cf.* *Toppin v. Healey*, (1863) 11 Wkly. Rep. 466 (C.P.) 467 (affirming the revocability of a contract authorizing the plaintiff to negotiate a mortgage for the defendant, and holding that “the law . . . is clear that where there is an agreement that one shall do a thing for another, and the thing to be done is to be done under that authority, although the person giving the authority cannot revoke the agreement, he may revoke the authority at any time before performance”); 2 C.J. *Agency* § 151 (1915) (“[The] power to revoke an agent's authority at any time is not at all affected by the fact that there is an express or implied contract between the agent and the principal that such agency is irrevocable The only effect of such stipulations is to give the agent a cause of action against the principal for a wrongful revocation in breach of such contract.”). Again, although the doctrine of revocability applied similarly to arbitrators and to agents, an arbitrator must not be equated with an agent in the modern sense. *Supra* note 83.

⁸⁶ Sayre, *supra* note 54, at 600; *see also* R. C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 76 (2d ed. 1988) (“[W]e find in England, well before the

often had the opportunity to select from alternate methods of trial, including one option — wager of law — in which proof rested entirely on the oaths of nominees.⁸⁷ There was no difficulty, then, in understanding arbitration as different in form from trial and yet “a partial substitute” for it.⁸⁸ Furthermore, while revocability ensured a neutral process at the cost of a fully binding one, this cost was minimal given the state of contract law at the time. Parol promises were unenforceable at common law,⁸⁹ and specific performance was difficult to obtain.⁹⁰

The historical incentives for arbitration are familiar to contemporary observers. The legal process at the time was widely criticized as slow, opaque, and ineffectual.⁹¹ The mercantile community in particular preferred arbitration of their commercial disputes, for which the common law was considered both procedurally burdensome and substantively unsuited.⁹² Notably, though, no evidence exists of an early judicial “hostility” to arbitration outside the mere existence of revocability.⁹³ First, agreements to arbitrate were never categorically illegal bargains. Early courts of law would surely not have treated

assizes of Henry [II] allegedly put the recognition at the disposal of litigants, the use of juries in local courts . . . purely on the basis of a party agreement to resort to that particular mode of proof.”).

⁸⁷ Sayre, *supra* note 54, at 600.

⁸⁸ *Id.* at 600-01.

⁸⁹ See *supra* notes 76–77 and accompanying text.

⁹⁰ See DENNIS R. KLINCK, CONSCIENCE, EQUITY, AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 66 (2010) (“[T]he naked promise . . . , however binding as a matter of private conscience, is not enforceable in Chancery.”).

⁹¹ See, e.g., MARCH, *supra* note 66, at 262 (“[T]he Law seems more favourable to Arbitrements, then other Judgments, insomuch as by Arbitrators the strict course and tedious ceremonies of Law Suits which are wont most commonly to weary Suiters (and to dive somewhat too deep into their Purses) are cut off, and shorter decisions by them made, with little or no cost at all.”). March appears to be quoting directly from William West’s *Symboleography* of 1594. See ROEBUCK, ELIZABETH I, *supra* note 56, at 307-08.

⁹² Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 132, 144-45 (1934); see also ROEBUCK, ELIZABETH I, *supra* note 56, at 309; Henry Horwitz & James Oldham, *John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century*, 36 HIST. J. 137, 145 (1993).

⁹³ Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 395 (describing claims of hostility to arbitration as ahistorical, at least until the eighteenth century, and warning that “[t]here is a danger that such a myth will become so pervasive that it affects the work of scholars and practitioners”); see also *Preface* to ARBITRIUM REDIVIDIVUM, *supra* note 71 (noting that “[a]rbitrement is much esteemed and greatly favoured in our Common Law; the end thereof being privately to compose Differences between Parties by the Judgment of honest Men”); *supra* note 91.

revocation of an illegal agreement as forfeiture of a penal bond securing compliance,⁹⁴ nor later courts of equity as evidence of unclean hands.⁹⁵ Second, while agreements to arbitrate prospective disputes may have been unusual before the nineteenth century, they clearly did arise,⁹⁶ and no common-law rule against them yet existed.⁹⁷ And third, while the common-law courts did not share the same obligation to encourage arbitration as their ecclesiastical counterparts, it was their willingness to accept extrajudicial awards as binding that ensured the effectiveness of the process.⁹⁸ It comes as no surprise, then, that Blackstone's description of early arbitration offers no clue that it had ever met with disfavor.⁹⁹

In 1696, Parliament enacted the Administration of Justice Act,¹⁰⁰ effectively overruling the holding in *Vynior's Case* that breach of an agreement to arbitrate was punishable by complete forfeiture of the security. Under the statute, courts were limited to awarding actual damages.¹⁰¹ Penal bonds were thus stripped of much of their coercive

⁹⁴ Sayre, *supra* note 54, at 603; *see also* *Park Constr. Co.*, 296 N.W. 475, 486 (Minn. 1941) (Peterson, J., dissenting) (citing Sayre). *But see* *Kulukundis*, 126 F.2d 978, 983 n.11 (2d Cir. 1942) (arguing that “[t]he real truth . . . seems to be that [early courts] were unfriendly [to arbitration] but did not carry out their hostility to its logical conclusion”).

⁹⁵ *See, e.g.*, *Cheslyn v. Dalby*, (1840) 160 Eng. Rep. 357 (Ex.) 364-65.

⁹⁶ ROEBUCK, ELIZABETH I, *supra* note 56, at 303-05.

⁹⁷ ROEBUCK, MIDDLE AGES, *supra* note 56, at 355. It was not until 1746 that the foundation arose for a common-law rule invalidating agreements to arbitrate prospective disputes. *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.) (“[T]he agreement of the parties cannot oust this Court”); Sayre, *supra* note 54, at 604 & nn.27-28. However, the “ouster of jurisdiction” rationale was not a dominant perspective in English law. *See infra* Part II.B.

⁹⁸ Powell, *supra* note 60, at 62-63.

⁹⁹ 2 WILLIAM BLACKSTONE, COMMENTARIES *16-17 (“[T]hough originally the submission to arbitration used to be by word, or by deed, yet both of these being revocable in their nature, it is now become the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named. And experience having shewn the great use of these peaceable and domestic tribunals, especially in settling matters of account, and other mercantile transactions, which are difficult and almost impossible to be adjusted on a trial at law; the legislature has now established the use of them” (footnote omitted)); *see also* Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 403 (describing Blackstone as “show[ing] no hint of judicial jealousy”). Note that Blackstone's *Commentaries* date to the late 1760s, some two decades after the *Hollister* decision, but make no mention of that case or its “ouster” rationale. *See supra* note 97. Nor, it seems, does another fairly contemporaneous source. *See VINER*, *supra* note 84.

¹⁰⁰ 8 & 9 Will. 3, c. 11.

¹⁰¹ *Id.* § 8. Chancery was already granting this relief in some cases. BAKER, *supra* note 10, at 325 & n.45. American sources commonly refer to this provision as the

power, and the arbitral process was made substantially less binding on the parties, even if the legal enforceability of the arbitration agreement itself remained unchanged.¹⁰²

In 1697, Parliament partially remedied this problem in its first act governing arbitration.¹⁰³ The statute restricted the doctrine of revocability by enabling an arbitration agreement to be made a rule of court, with revocation then punishable as contempt.¹⁰⁴ But the statute also left open the possibility — and indeed the likelihood, if either party soured on the agreement — of revocation before the rule of court was entered.¹⁰⁵ The effect of the statutory change was therefore limited.¹⁰⁶ Even so, the statute mitigated its minimal curtailment of revocability by pairing it with basic procedural safeguards, declaring invalid “any arbitrage or umpirage procured by corruption or undue means.”¹⁰⁷ The procedural balance achieved at common law was thus translated, in partial form, into the nascent scheme of statutory arbitration.

As the courts’ supervisory role grew, it gradually became clear that with appropriate judicial safeguards, revocability served less to protect the neutrality of the process than to undermine its intended binding

Statute of Fines and Penalties.

¹⁰² *Kulukundis*, 126 F.2d 978, 982-83 (2d Cir. 1942) (describing the statute as the origin, for practical purposes, of the unenforceability of arbitration agreements). *But see* Sarah E. Rudolph, *Blackstone’s Vision of Alternative Dispute Resolution*, 22 MEMPHIS ST. U. L. REV. 279, 289-90 (1992) (noting the continued use of penal bonds, and suggesting that the statute did not facilitate revocability to the extent commonly believed, as Chancery refused to follow the statute where damages were “difficult to determine”). Note that *Kulukundis* incorrectly dates the statute to 1687, roughly a decade too early. *Kulukundis*, 126 F.2d at 982. The year 1687 is inconsistent with the regnal years of King William III, who ascended the throne with Queen Mary II in 1689. Still, the error appears frequently in American academic literature, and *Kulukundis* seems the likely source.

¹⁰³ Arbitration Act 1697, 9 Will. 3, c. 15. The statute received royal assent in May 1698, and many sources convert the regnal year to 1698. For a description of the drafting and passage of the statute, see Horwitz & Oldham, *supra* note 92, at 137-45. Although this was the first Act of Parliament dealing with arbitration, it would be misleading to call it the first such legislative act. In 1484, the Exchequer Chamber in effect legislated its approval of arbitrators’ authority to decide disputes. ROEBUCK, MIDDLE AGES, *supra* note 56, at 352-53.

¹⁰⁴ Sayre, *supra* note 54, at 605.

¹⁰⁵ *Id.* at 605-06.

¹⁰⁶ Ernest G. Lorenzen, *Commercial Arbitration — International and Interstate Aspects*, 43 YALE L.J. 716, 717 (1934); Sayre, *supra* note 54, at 605. *But see* Horwitz & Oldham, *supra* note 92, at 154-55 (arguing that the 1697 arbitration law laid the groundwork for an increase in references to arbitration starting in the latter half of the seventeenth century).

¹⁰⁷ Arbitration Act 1697, 9 Will. 3, c. 15.

effect. By design or not, revocation had long served as a rough tool for separating binding but legitimate dispute resolution from acts of pure coercion. By the nineteenth century, both law and equity had assumed a wide-ranging power to invalidate awards produced by biased arbitrators or insufficient process,¹⁰⁸ as well as a more limited power to set aside unjust submissions.¹⁰⁹ Statutory arbitration was increasingly achieving much the same ends as revocability, but without negating the otherwise binding nature of the submission.¹¹⁰

As Parliament made further alterations to English arbitration through the nineteenth century, it expanded the space for statutory arbitration while preserving an equilibrium between the binding and neutral characteristics of the process.¹¹¹ Parliament formalized arbitration to enhance its adjudicative qualities — ensuring access to witnesses and the production of evidence¹¹² — while continuing to pare back revocability at the margins.¹¹³ At the same time, courts

¹⁰⁸ FRANCIS RUSSELL, *A TREATISE ON THE POWER AND DUTY OF AN ARBITRATOR, AND THE LAW OF SUBMISSIONS AND AWARDS* 627-39, 672-75 (1st ed. 1849); *see also* 14 HOLDSWORTH, *supra* note 76, at 198-203 (discussing the longstanding but newly applied principles of “natural justice” animating the courts’ extension of authority over “subordinate jurisdictions” such as arbitral tribunals).

¹⁰⁹ RUSSELL, *supra* note 108, at 77-79.

¹¹⁰ *See* W. OUTRAM CREWE, *THE LAW OF ARBITRATION*, at vii-ix (2d ed. 1898); Sayre, *supra* note 54, at 616 (“The common law objection to irrevocability of submission is removed by the statutory provisions for a fair hearing in the arbitration proceedings.”). Justice Story recognized this dynamic in an early American case. *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (“[W]henever arbitrations are made compulsive, it is by legislative authority, which at the same time, arms the arbitrators with the fullest powers to ascertain the facts, to compel the attendance of witnesses, to require discovery of papers, books and accounts, and generally, also, to compel the parties to submit themselves to examination under oath.”).

¹¹¹ *See* Douglas Hurt Yarn, *Commercial Arbitration in Olde England (602–1698)*, 50 *DISP. RESOL. J.* 68, 72 (1995) (“The attempt to ‘balance’ court enforcement with court oversight as expressed in the 1698 Act dominates the theme of subsequent arbitration legislation and judicial opinion.”).

¹¹² *Civil Procedure Act 1833*, 3 & 4 Will. 4, c. 42, §§ 40–41; *Carrington & Castle*, *supra* note 73, at 213; Sayre, *supra* note 54, at 606.

¹¹³ *See* *Civil Procedure Act 1833*, 3 & 4 Will. 4, c. 42, § 39 (“[T]he Power and Authority of any Arbitrator or Umpire appointed by or in pursuance of any Rule of Court . . . , or by or in pursuance of any Submission to Reference containing an Agreement that such Submission shall be made a Rule of any of His Majesty’s Courts of Record, shall not be revocable by any Party to such Reference without the Leave of the Court”); *Common Law Procedure Act 1854*, 17 & 18 Vict., c. 125, § 17 (“Every Agreement or Submission to Arbitration by Consent, whether by Deed or Instrument in Writing not under Seal, may be made a Rule of any One of the Superior Courts of Law or Equity at Westminster, on the Application of any Party thereto,

asserted the power to refuse referrals to arbitration on policy grounds, or where they perceived the dispute as incapable of appropriate resolution on the terms provided.¹¹⁴ Finally, with the Arbitration Act 1889, “[t]he regular case of a private agreement to arbitrate without . . . application to a court” was subsumed into the statutory scheme.¹¹⁵ Common-law arbitration was largely extinguished,¹¹⁶ and the “delicate balance” achieved at common law was codified for the age of statutory arbitration.¹¹⁷

B. American Arbitration

In the United States, common-law arbitration was initially understood in much the same terms as in England. The characteristics of the process were familiar — a consensual agreement to arbitrate,¹¹⁸

unless such Agreement . . . intend that it should not . . .”); Carrington & Castle, *supra* note 73, at 213-14; Robert B. Ferguson, *The Adjudication of Commercial Disputes and the Legal System in Modern England*, 7 BRIT. J. L. & SOC’Y 141, 156 (1980); Lorenzen, *supra* note 106, at 717; Sayre, *supra* note 54, at 607. The statute of 1854 also set forth procedures enabling judges to facilitate arbitration, and “may be said to have formed the framework” of the fuller statute enacted in 1889. See Arbitration Act 1889, 52 & 53 Vict., c. 49; G. Ellenbogen, *English Arbitration Practice*, 17 LAW & CONTEMP. PROBS. 656, 658 (1952).

¹¹⁴ Courts retained this power in the statute of 1889. Arbitration Act 1889, 52 & 53 Vict., c. 49 § 4 (“[The] [c]ourt or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.”); Ellenbogen, *supra* note 113, at 661-66. English courts retain this power today, in modified form, under the current arbitration statute. See Arbitration Act 1996 § 81(1); *id.* § 1 (“The provisions of this Part are founded on the following principles, and shall be construed accordingly — (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part.”).

¹¹⁵ Sayre, *supra* note 54, at 607; see also Arbitration Act 1889, 52 & 53 Vict., c. 49.

¹¹⁶ Common-law arbitration was not completely extinguished in England and Wales. Even now, it applies to oral arbitration agreements. See Arbitration Act 1996 § 81(1)(b).

¹¹⁷ Carrington & Castle, *supra* note 73, at 214 (“As the enforcement of revocability retreated, the statutory requirements of procedure progressed to take revocability’s place in safeguarding against improper conduct in arbitration proceedings. Consequently, the delicate balance between guarantees of disinterest and the enforceability of arbitration agreements was maintained through a change of doctrinal guards.”).

¹¹⁸ JOHN T. MORSE, JR., *THE LAW OF ARBITRATION AND AWARD* 3 (1872) (“A

a binding award on the merits,¹¹⁹ and neutrality secured by the power to revoke consent at the cost of nominal damages.¹²⁰ American arbitration also suffered from familiar tensions. As courts' supervisory powers grew,¹²¹ the rationales for revocability began to erode. With alternate means of safeguarding the integrity of arbitration, and with only nominal damages available for breach, revocability became a means of avoiding the otherwise binding consequences of an ordinary agreement. This was all the more peculiar given the routine enforcement of executory contracts from the seventeenth century onwards; revocability made arbitration not just less binding, but anachronistically so.

As the rationales underpinning revocability dissolved, courts had either to render arbitration more binding or to identify a new basis for their treatment of it. Here, the American and English approaches diverged. The doctrine of ouster, first announced in *Kill v. Hollister* in 1746, purported to legitimize revocability on the basis of parties' inability to oust courts of their jurisdiction to decide private disputes.¹²² This undercut the case for eliminating revocability to restore the binding nature of arbitration. If there was tension in

submission is a contract . . . [The parties] must act freely and not under threats or duress."); *id.* at 342 ("The question [of the award's adherence to the submission] is properly the intention of the parties.").

¹¹⁹ *Id.* at 487 ("A valid award operates as a final and conclusive judgment . . . respecting all matters determined and disposed of by it."); *id.* at 294 ("[The arbitrators'] decision cannot be appealed from, revised, or annulled by reason of any mistake which they may have fallen into."); *id.* at 101 ("Persons who already have formed an opinion, or received a bias, on the subject-matter of the submission, are incompetent to act as arbitrators.").

¹²⁰ *See id.* at 96, 230; *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845).

¹²¹ *See, e.g.,* MORSE, *supra* note 118, at 117-18 (notice of hearing); *id.* at 123-24 (access to evidence); *id.* at 126-30 (ex parte hearings and disclosure of evidence); *id.* at 145-47 (admission of evidence); *id.* at 320-22 (mistakes in an award); *id.* at 533-40 (fraud and misconduct).

¹²² *Kill v. Hollister*, (1746) 95 Eng. Rep. 532 (K.B.); Lorenzen, *supra* note 106, at 717 (suggesting that ouster "was created perhaps to justify the maintenance of the revocability rule which could no longer be mitigated by the use of bonds" after the Administration of Justice Act 1696); *see also* 14 HOLDSWORTH, *supra* note 76, at 190 ("This rule of the common law which allowed a party to an arbitration to put an end to it at any time before an award was given, even though his action involved a breach of covenant, was probably one of the rules which helped, in the middle of the eighteenth century, to give rise to the doctrine that any contract to oust the jurisdiction of the courts was void because it was against public policy."); Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 405.

treating arbitration as both binding and unenforceable, this was simply what higher principles of justice required.

In England, ouster seems never to have taken root. *Hollister* was subject to criticism in English courts, and the decision was only rarely cited in the century after it appeared.¹²³ There are several possible reasons for this. First, the decision was not well-founded in precedent. *Hollister* presented the doctrine of ouster as settled law without citing any authority for its reasoning.¹²⁴ This is unsurprising, as no such authority existed.¹²⁵ Indeed, just three years before *Hollister*, Chancery had expressly accepted the idea that an arbitration agreement might “oust” the courts of their jurisdiction.¹²⁶ Second, *Hollister* was inconsistent with longstanding English practice. The judgment suggested that arbitration was revocable on public-policy grounds, particularly where the arbitration agreement arose prior to the parties’ dispute, as it had in *Hollister*.¹²⁷ But for at least five centuries, English courts had routinely enforced arbitral awards and ordered monetary damages for breach — remedies premised on a valid underlying agreement.¹²⁸ Nor had English law ever made a categorical distinction

¹²³ Rudolph, *supra* note 102, at 291 (identifying only six cases in which *Hollister* was cited before 1850); see also COHEN, *supra* note 75, at 180-204; Horwitz & Oldham, *supra* note 92, at 145-47, 154-55 (noting the increase in references to arbitration from the mid-eighteenth to early nineteenth centuries).

¹²⁴ Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 405; see also James Oldham, *Detecting Non-Fiction: Sleuthing Among Manuscript Case Reports for What Was Really Said*, in LAW REPORTING IN BRITAIN: PROCEEDINGS OF THE ELEVENTH BRITISH LEGAL HISTORY CONFERENCE 133, 138 (Chantal Stebbings ed., 1995) (“The question of ousting the court of jurisdiction was a by-product of a contract interpretation question. . . . [T]his point was not fully debated or well argued, and no one mentioned *Wellington v. Macintosh*.”). For another view of *Hollister*, see *Park Constr. Co.*, 296 N.W. 475, 485-86 (Minn. 1941) (Peterson, J., dissenting) (describing “ouster” as merely a rhetorical device for describing revocability — later misinterpreted, perhaps willfully, by advocates of statutory arbitration).

¹²⁵ Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 405 (“[Ouster] was not heard of till the middle of the 18th century. It was firmly denied by Lord Hardwicke in *Wellington v. Macintosh*; held to be settled law three years later, with no authority to support it, in *Kill v. Hollister* and still disputed into the 19th century.” (citations omitted)); Wolaver, *supra* note 92, at 139, 142.

¹²⁶ *Wellington v. Mackintosh*, (1743) 26 Eng. Rep. 741 (Ch.) (“Persons might certainly have made such an agreement as would have ousted this court of jurisdiction”); see also Oldham, *supra* note 124, at 137 (“Lord Hardwicke’s opinion [in *Wellington*] was straightforward, and was strongly supportive of the arbitration process.”); Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 405.

¹²⁷ See Oldham, *supra* note 124, at 137; Sayre, *supra* note 54, at 604 n.27.

¹²⁸ See *supra* notes 93-99 and accompanying text; see also 14 HOLDSWORTH, *supra* note 76, at 190-91 (“[T]he doctrine [of ouster] is a product of that desire to rationalize the law which we see in Blackstone and other eighteenth-century lawyers.

between predispute and postdispute arbitration agreements.¹²⁹ This was consistent with the traditional rationale for revocability, which rested not on the courts' inviolable authority, but on the principles of delegated powers — a rationale well-suited to an earlier, more decentralized adjudicative environment.¹³⁰ Third, Parliament itself intervened to curtail revocability starting in the early nineteenth century. It was no great leap, then, when after years of limited use, the ouster rationale was largely discarded in 1856 in *Scott v. Avery*, which accepted even blanket predispute arbitration agreements as conditions precedent to suit.¹³¹

It was not a very successful attempt to rationalize the law, not only because it rested on no direct authority, but also because logically it was inconsistent with the practice of arbitration, which was as old as the common law and had been recognized and encouraged by the Legislature in 1698.”)

¹²⁹ Lorenzen, *supra* note 106, at 718 (“It should be noted that the English acts have always covered both present and future disputes.”); *see also* JOSEPH HAWORTH REDMAN, A CONCISE TREATISE ON THE LAW OF ARBITRATIONS AND AWARDS 1 (3d ed. 1897) (“At common law any agreement by which parties refer an existing or possible future matter in dispute between them to the judicial and final determination of a third person . . . is called a submission . . .” (emphasis added)); *id.* at 22 (citing 52 & 53 Vict. c. 49 § 27 for the same approach in statutory arbitration); RUSSELL, *supra* note 108, at 64-65 (“There is often a covenant or agreement in deeds of partnership, policies of insurance, and other instruments, providing that if any disputes shall arise they shall be referred to arbitration. . . . [W]hen an arbitrator is named in the original clause, it seems to differ little, if at all, from an ordinary submission.”).

¹³⁰ *See supra* notes 80–90 and accompanying text.

¹³¹ *Scott v. Avery*, (1856) 10 Eng. Rep. 1121 (H.L.) 1138-39 (appeal taken from Eng.); *see also* Lorenzen, *supra* note 106, at 718 (“The revocability rule, as has been seen, dissolved early into the public policy doctrine against ousting the courts of jurisdiction, and, in 1855, in the case of *Scott v. Avery*, the application of this doctrine to arbitration agreements was recognized as irrational and inequitable where the agreement was open to the interpretation that the arbitration was only a condition precedent to resort to the courts.”); Wolaver, *supra* note 92, at 139-43. *Scott v. Avery* did not repudiate the doctrine of ouster as stated in *Hollister*. In fact, it approved of it. *Scott v. Avery*, (1856) 10 Eng. Rep. 1121 (H.L.) 1136-39; *see also* Wolaver, *supra* note 92, at 143. But *Scott v. Avery* also approved of treating arbitration agreements as conditions precedent to suit, which allowed arbitration agreements to be pleaded as a bar to an action in court. The practical result was that ouster was eliminated as a justification for revocability, although it remained — and remains today — as a justification for refusing to honor covenants that would strip courts of their supervisory powers. RUSSELL ON ARBITRATION §§ 2–050 to 2–053 (David St. John Sutton et al. eds., 21st ed. 1997). *Scott v. Avery* thus effected a kind of modernization of English arbitration law, validating the theory of ouster, which was better suited than delegation to courts' modern view of their role in private dispute resolution, while also restricting ouster to courts' powers to supervise the neutrality of arbitration. This preserved the function of revocability while largely eliminating it, thereby allowing arbitration agreements to be placed on a level closer to that of other contracts.

In the United States, a more “reactionary” approach prevailed.¹³² The doctrine of ouster, transplanted from its native environment, flourished and became dominant across the states.¹³³ *Hollister* itself was cited with approval by the U.S. Supreme Court.¹³⁴ The reasons for this departure from English practice are uncertain, but it bears noting that American courts — perhaps further removed from the ancient, decentralized model of dispute resolution¹³⁵ — conceived of arbitration as originating in a judicial act rather than an act of delegation.¹³⁶ Courts were the default option. Ouster, as a means of ensuring this, was a particularly fitting doctrine. The result was a kind of arbitration that was, by definition, of lesser binding value than other agreements.

A less binding form of arbitration risked a break in arbitration’s traditional meaning. This definitional tension was evident in responses to the harshness of ouster within the judicial and professional communities. American courts recognized that the doctrine all but required that agreements encompassing the “whole question of liability” be treated as unenforceable.¹³⁷ This prevented them from following the English view of *Scott v. Avery*, which allowed such agreements as conditions precedent to suit. However, this still left room for a narrower reading,¹³⁸ under which arbitration might be made a condition precedent if restricted to discrete facts and related questions of law, and if the agreement was properly phrased.¹³⁹ To

¹³² Lorenzen, *supra* note 106, at 718.

¹³³ See 6A CORBIN, *supra* note 11, § 1433 n.80; Sayre, *supra* note 54, at 604 & n.27.

¹³⁴ See, e.g., *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. 386, 388 (1868).

¹³⁵ See *Carrington & Castle*, *supra* note 73, at 214 (“The royal courts were in business to resolve disputes; they were not regarded as enforcers of public law and policy, as U.S. courts, even in the nineteenth century, were.”).

¹³⁶ See, e.g., 6 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1919 n.3 (1938) (“The British cases constantly emphasize that arbitrators are agents to make contracts for the parties; the American that the process is judicial in nature. Many differences in substantive arbitration law result therefrom in the two systems.”); Lorenzen, *supra* note 106, at 718 (noting the popularity of *Vynior’s Case*, *Hollister*, and related cases in American courts, and arguing that “[c]ommon-law arbitration in the United States followed the more reactionary steps of the English development”).

¹³⁷ 6A CORBIN, *supra* note 11, § 1433 (“The prevailing rule, in practically all common law jurisdictions, was that a general agreement to arbitrate all future disputes that may thereafter arise, to the exclusion of the regularly organized courts, is contrary to public policy and void.”); RESTATEMENT OF THE LAW OF CONTRACTS § 551(1) (1928) (“A provision in a bargain that arbitration of the whole question of whether there has been a breach of contract shall be a condition of any right of action is illegal . . .”).

¹³⁸ Lorenzen, *supra* note 106, at 718-19.

¹³⁹ 3 WILLISTON, *supra* note 12, § 1721 (“In many States . . . the distinction is taken

similar ends, courts drew distinctions between arbitration and appraisal, with the latter treated as a valuation, perhaps characterized by lesser procedure, and perhaps motivated by avoiding rather than resolving a dispute.¹⁴⁰

Of course, in mitigating the harshness of ouster, American courts were admitting exceptions to a doctrine ostensibly founded on the inviolability of judicial authority.¹⁴¹ And in attempting to separate

between an agreement to arbitrate the whole question of liability . . . , and an agreement which merely provides for the determination of a particular fact as for the valuation of a loss or injury.”); RESTATEMENT OF THE LAW OF CONTRACTS § 551(2) (1928) (“A provision in a bargain imposing as a condition arbitration regarding one or more facts on which a duty depends or regarding the loss suffered by a party injured by a breach of the bargain is not illegal.”). This common-law rule continued to apply in most states even after the FAA, at least until displaced by state arbitration statutes. Lorenzen, *supra* note 106, at 719 (“Agreements to arbitrate future disputes were, until 1920, almost completely left in the realm of the ‘revocability rule.’ . . . Even at the present time [1934] the great majority of states have done nothing to change the revocability rule in regard to such agreements.”); *see also* Sigal v. Three K’s, Ltd., 456 F.2d 1242, 1243 (3d Cir. 1972) (applying the common law in the absence of a territorial arbitration statute in the Virgin Islands, and invalidating as “illegal” an agreement making arbitration a condition precedent to suit for breach of contract).

¹⁴⁰ *See* Wesley A. Sturges, *Arbitration Under the New North Carolina Arbitration Statute, the Uniform Arbitration Act*, 6 N.C. L. REV. 363, 378-79 (1928) (associating submissions of discrete questions of fact, which “can be pleaded to defeat an action brought upon a cause embraced in the agreement,” with appraisal and valuation); 6A CORBIN, *supra* note 11, § 1442 (“There may be no agreement at all; one party can make his own appraisal of anything. Or, two parties may agree to meet and make a joint appraisal, hoping that they will be able to agree thereon. Or, without any dispute, existing or contemplated as possible, two parties may ask a third to make an appraisal for them, sometimes intending to be bound by it and sometimes not. Or, for the purpose of avoiding a possible future dispute, they may ask an appraisal by a third person, without requiring any hearing or opportunity to submit evidence.”). That these are all considered distinct from arbitration likely indicates more about arbitration than it does about appraisal. The Supreme Court of Canada has remarked upon the unusually developed distinctions between arbitration and appraisal in U.S. law. *See* Sport Maska Inc. v. Zittler [1988] 1 S.C.R. 564, para. 68 (“The U.S. courts have developed a criterion which does not appear to have attracted the attention of the English and Canadian courts. It suggests that arbitration implies the submission of the entire dispute to an arbitrator, whereas an expert opinion [an appraisal] is limited to a more specific aspect such as the valuation of damage or of some piece of property.”).

¹⁴¹ *See* 3 WILLISTON, *supra* note 12, § 1722 (“The lines of distinction drawn by the decisions are not very clear and turn often upon matters of form rather than of substance, which is objectionable where the question is one of policy.”). For an example of the logical problem courts had created, *see* Meacham v. Jamestown, F. & C.R. Co., 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring). There, Justice Cardozo disapproved of treating arbitration of the entire matter as a condition precedent to suit because “[a] rule [of ouster] would not long survive if it were subject to be avoided by so facile a device.” *Id.* But this reasoning was equally applicable to other arbitration agreements that courts routinely accepted as valid conditions

appraisers' valuations from arbitrators' determinations of fact, courts were revealing the flexibility of the terms on which ouster's application depended.¹⁴² This underscored the doctrine's logical flaws and encouraged critics in the professional community to seize on ouster as legally unprincipled. The doctrine's most vocal critics had no difficulty identifying a more compelling explanation for ouster's origins. Lord Campbell's opinion in *Scott v. Avery* had laid out the

precedent — for example, agreements to resolve the discrete factual questions on which the whole question of legal liability turned. *See supra* note 137 (quoting Restatement § 551(1), according to which arbitration of the whole dispute *cannot* be made a condition precedent); *supra* note 139 (quoting Restatement § 551(2), according to which arbitration of factual disputes *can* be made a condition precedent); 6A CORBIN, *supra* note 11, § 1433 n.81 (“It requires some explaining to show that [§ 551(2)] does not contradict [§ 551(1)]. Is not ‘breach of contract’ a fact on which the duty to make compensation depends?”).

¹⁴² 6A CORBIN, *supra* note 11, § 1442 (“[T]he terms overlap, and . . . an arbitrator may also be an appraiser. It remains to be shown the extent to which they do not overlap, and just when usage does not justify calling an appraiser an arbitrator also.”). The extent of the difference between appraisal and arbitration remains unclear and varies between states. *See supra* note 53. In California, an appraisal is often an arbitration. *See Klubnikin v. Cal. Fair Plan Assn.*, 84 Cal. App. 3d 393, 395 (1978) (“[A]ppraisers’ empowered by the terms of a policy of fire insurance to determine the ‘cash value’ and ‘loss’ utilized to ascertain the amount payable on the policy are arbitrators within the meaning of [California] Code of Civil Procedure section 1280.”); *supra* note 53. Elsewhere, appraisal seems to be a dispute-resolution mechanism in which the controversy is limited to valuation and the formal procedures implicit in arbitration are unnecessary. *See, e.g., Allstate Ins. Co. v. Suarez*, 833 So. 2d 762, 766 (Fla. 2002) (describing an agreement’s loss-estimate provision as providing for appraisal rather than arbitration because “[i]t is difficult to imagine that a *formal arbitration hearing* was within the contemplation of the parties when entering into the agreement” (emphasis added)); *In re Fletcher*, 143 N.E. 248, 251 (N.Y. 1924) (“[T]he third parties are not expected to settle the matter in a quasijudicial manner and it seems to us that [the contract], therefore, does not come within the letter or the spirit of the [New York arbitration] statute.”). A common touchstone is whether the mechanism replaces the role of a court. Perhaps for that reason, the plainest example of appraisal is likely found in purchase agreements delegating to a third party the power to set a purchase price, as such a process sets the terms for executing an agreement rather than resolving the disputes resulting from it. *See City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910) (“[W]hen, as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference, and is not intended to settle any which has arisen. This seems to be the distinction between an arbitration and an appraisal, though the first term is often used when the other is more appropriate.”); *see also In re Fletcher*, 143 N.E. at 250-51 (distinguishing from arbitration any “matters which except for the provisions of the contract would be settled not by the courts after a judicial inquiry, but by the parties themselves without such inquiry”). For a variation on this situation, see *infra* Part III.B.4.

ideal line of challenge, ascribing ouster to the greed and jurisdictional jealousy of eighteenth-century English judges.¹⁴³ “A more unworthy genesis cannot be imagined.”¹⁴⁴

This state of affairs presaged a concerted shift towards statutory arbitration. Although revocability was no longer necessary to secure procedural neutrality, the doctrine of ouster had caused revocability to become calcified in American law. The effects of ouster could be mitigated to some extent, but this only undermined the doctrine’s legitimacy. Statutory change was the only way of restoring the sort of balance English arbitration had long enjoyed.¹⁴⁵ At the federal level, this yielded the FAA.¹⁴⁶

¹⁴³ *Scott v. Avery*, (1856) 10 Eng. Rep. 1121 (H.L.) 1138; Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 404-05 & n.47 (quoting Lord Campbell and describing his opinion as “indulging what had become a quirk of his character, the denigration of his brother judges”). The idea of rent-seeking judges and jurisdictional “jealousy” did not appear in England or the United States prior to Lord Campbell’s opinion in *Scott v. Avery*. See, e.g., *supra* note 99; *Burchell v. Marsh*, 58 U.S. 344, 345 (1854) (“Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact.”). Two aspects of *Burchell* are worthy of note. First, the Court’s view of arbitration is fully consistent with the term’s common-law definition as a consensual, binding, and neutral process of dispute resolution. Second, just two years before *Scott v. Avery*, the Court was unquestionably supportive of arbitration. The “jealousy” theory rose to prominence in tandem with criticism of ouster’s impact on predispute arbitration agreements. See also Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 582 n.2 (1952). For a cogent rebuttal of Lord Campbell’s opinion, see Roebuck, *The Myth of Judicial Jealousy*, *supra* note 17, at 405 (“The suggestion that the rule against ousting the jurisdiction of the court arose from the judges’ greed for fees does not survive scrutiny. . . . There seems, on the contrary, to have been plenty of work to be shared among the courts by 1750, and the records of all courts show that they referred cases to arbitrators after they began to refuse to allow an arbitration clause to be pleaded as a bar.”).

¹⁴⁴ *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915); see also Stone, *supra* note 15, at 976 (“[B]y the 1920s, the ouster-of-jurisdiction explanation for the revocability doctrine became the dominant, if not universal, understanding of arbitration law. . . . Thus narrowed in its interpretation, the revocability doctrine became a straw man that courts and commentators set out to attack.”).

¹⁴⁵ *Atl. Fruit Co. v. Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924) (“Thus without legislation, and because the trend of modern opinion is toward the literal enforcement of the contracts of men of mature years and presumably sound mind, this court is asked to provide some method of overriding, or explaining away not only its own previous decisions but those of the Supreme Court, which for a generation or so have been regarded as declaring the law to be that any agreement contained in an executory

C. *FAA Arbitration*

It is an irony of the FAA that a statute motivated by tensions in the definition of arbitration should provide no definition of its own. But this does not mean that arbitration has no meaning in federal law. The “age-old”¹⁴⁷ canon holds that “absent contrary indications, Congress intends to adopt the common law definition of statutory terms.”¹⁴⁸ “[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, [Congress] presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind”¹⁴⁹

The FAA’s history and purpose are consistent with this outcome. Although it is ironic that the FAA lacks an express definition of arbitration, it is hardly anomalous. In the centuries before the FAA, express definitions neither animated legal disputes nor arose in statute. As long as parties could turn to revocability or to the courts’ common-law supervisory powers, definitional disputes were unnecessary.¹⁵⁰ That is not to say that the meaning of arbitration was unimportant; it is instead to say that the meaning of arbitration was tied to the doctrines governing it — doctrines that shifted over time so

contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted.”); *id.* at 221 (“The situation . . . is beyond all question one that calls for remedial action. Yet those recognizing the evil, recognize also the difficulty of devising a remedy suitable to agreements like charter parties, made in all parts of the world, to be performed on any waters and where the natural, yet tyrannical inclination of the stronger party to the bargain will be to insert a clause requiring arbitration in his own ‘home town.’”).

¹⁴⁶ *Volt*, 489 U.S. 468, 474 (1989) (“The [FAA] was designed to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate, and place such agreements upon the same footing as other contracts.” (citations and internal quotation marks omitted)); *see also* Horton, *supra* note 31, at 1261, 1265-66.

¹⁴⁷ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 320 (2012) (citing several examples of “[t]he age-old principle . . . that words undefined in statute are to be interpreted and applied according to their common-law meanings”).

¹⁴⁸ *United States v. Shabani*, 513 U.S. 10, 13 (1994). It is a separate question whether the FAA also suggests that the existing common-law definition is federalized. *See supra* note 53.

¹⁴⁹ *Morissette v. United States*, 342 U.S. 246, 263 (1952).

¹⁵⁰ The boundary between arbitration and appraisal was an exception, and it seems that the relatively developed body of U.S. case law separating the two processes owes something to the fact that ouster applied to arbitration but not to appraisal. *See supra* note 140 and accompanying text.

as to maintain a relatively stable balance in arbitration's essential qualities.

With the FAA, Congress made its own contribution to this essential balance, reversing a peculiar evolution of common-law doctrine that had made American arbitration agreements less binding than other contracts.¹⁵¹ As the Supreme Court has described it, “the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”¹⁵² This left federal law with the existing definition of arbitration, untouched except so as to secure its binding nature. Congress altered one aspect of the common law, and in so doing, at least tacitly accepted the remainder.¹⁵³

The Supreme Court has occasionally phrased the FAA's objectives in slightly different terms. It has held that “the FAA is ‘at bottom a policy guaranteeing the enforcement of private contractual arrangements’”¹⁵⁴ — the “strict-enforcement” view.¹⁵⁵ And it has held that “the FAA was designed to promote arbitration”¹⁵⁶ — the “promote-arbitration” view.¹⁵⁷ To the extent these views differ from the idea that the FAA

¹⁵¹ See 9 U.S.C. § 2 (2012) (“[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”); Horton, *supra* note 31, at 1264; see also H.R. REP. NO. 96, at 1-2 (1924) (“The need for the [FAA] arises from an anachronism of our American law. . . . The courts have felt that the [ouster doctrine] was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature . . .”).

¹⁵² *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (“[The FAA’s] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”); *supra* notes 145–46 and accompanying text; see also H.R. REP. NO. 96, at 1 (“Arbitration agreements are purely matters of contract, and the effect of the [FAA] is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed upon the same footing as other contracts, where it belongs.”).

¹⁵³ See also *United States v. Texas*, 507 U.S. 529, 534 (1993) (“[S]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.” (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952))); SCALIA & GARNER, *supra* note 147, at 318 (citing examples of the canon under which “[a] statute will be construed to alter the common law only when that disposition is clear”).

¹⁵⁴ *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)).

¹⁵⁵ Horton, *supra* note 31, at 1261-62.

¹⁵⁶ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011).

¹⁵⁷ Horton, *supra* note 31, at 1261-62.

sought to place arbitration on the same footing as other contracts,¹⁵⁸ they are ahistorical.¹⁵⁹ Nonetheless, it bears noting that neither view would contradict the FAA's implicit incorporation of arbitration's common-law meaning. To say that arbitration agreements must be enforced according to their terms reveals nothing about arbitration but that contract creates it. To say that arbitration agreements must be promoted as a matter of policy reveals nothing about arbitration but that Congress commends it. Courts relying on these views of the FAA's purpose are begging the question that only the common-law definition can answer.¹⁶⁰

Recently, in *Concepcion*, the Supreme Court also suggested that FAA arbitration is, by definition, associated with speedy, informal dispute resolution.¹⁶¹ Notwithstanding the historicity of such a definition, this yields a rule that is neither workable nor complete. In *Concepcion*, the Court suggested at one moment that sufficient procedural complexity would disqualify a process as FAA arbitration.¹⁶² The Court suggested at the next moment that procedural complexity was disqualifying if externally imposed on the parties.¹⁶³

But if the former is true — if *Concepcion* stands for the proposition that lesser procedure is a requisite characteristic of FAA arbitration — this raises the peculiar prospect of treating procedurally rigorous arbitration agreements as unenforceable under the FAA.¹⁶⁴ Such an

¹⁵⁸ The strict-enforcement and promote-arbitration readings of the FAA's purpose seem at first glance like glosses on the "same-footing" reading. But when used to justify the FAA's obstacle preemption, such imprecise accounts of the statute's purpose take on outsized importance. See *id.* at 1268-72 (noting that some state-law defenses to contracts may be inconsistent with "promoting" or strictly enforcing arbitration while doing nothing to impair its treatment as a contract like any other).

¹⁵⁹ See *id.* at 1263-64 (concluding that only the "same-footing" rationale is consistent with the FAA's history and text); *supra* Part II.B.

¹⁶⁰ For examples of the logical problems that result from attempting to derive a definition from strict-enforcement or promote-arbitration views of the FAA, see *infra* Part III.

¹⁶¹ *Concepcion*, 563 U.S. at 345, 348.

¹⁶² See *id.* at 351 ("Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. . . . But what the parties in the aforementioned examples would have agreed to is *not arbitration as envisioned by the FAA . . .*" (latter emphasis added)).

¹⁶³ See *id.* ("But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, *and therefore may not be required by state law.*" (emphasis added)); see also *id.* at 348 ("[C]lass arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA." (emphasis added)).

¹⁶⁴ Contrast this with the Canadian Supreme Court in *Sport Maska*, which surveyed arbitration jurisprudence and found dispute-resolution processes likelier to qualify as

odd result may not be problematic in practice, as procedurally rigorous agreements might still be enforceable under ordinary contract law. But this underscores the illogic of converting a common private motivation for arbitration into an indispensable part of it.¹⁶⁵ This is also in tension with Supreme Court decisions rejecting the idea that the FAA must be interpreted so as to ensure speedy dispute resolution when contract language requires otherwise.¹⁶⁶ And it is tension with the other purpose the *Concepcion* majority itself identified in the FAA — respect for the parties' agreement.¹⁶⁷

On the other hand, if the latter is true — if the FAA's meaning matters only in an obstacle-preemption analysis, and not when applied to the words of a contract — this gives the parties the power to expand the definition of FAA arbitration by mutual consent. Remarkably, this power even allows the parties to redefine FAA arbitration to include procedures that would be *preempted* by the FAA if they arose by operation of state law. The result, in effect, is that arbitration exists wherever the parties invoke the FAA, regardless of

arbitration as they approached the procedural formality of trial. *See infra* note 197. Contrast this also with state and federal high court decisions distinguishing arbitration from appraisal based in part on arbitration's necessary procedural formality. *See supra* note 142; *infra* note 223 and accompanying text. In fact, it appears that the only instances in which U.S. Supreme Court has tied FAA arbitration to procedural *informality*, as a definitional matter, are cases in which it has used that reasoning to restrict access to class arbitration. *See* S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?: Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 255 (2012) ("[T]he existence of court-like procedures has never raised questions about the legitimacy of an arbitration proceeding outside the class arbitration context."). This was true of *Concepcion*. And it was true of a case decided one year earlier. *See* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (Alito, J.) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").

¹⁶⁵ *See* *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004) (Alito, J.) ("Although efficiency is certainly an objective of parties who favor arbitration over litigation, efficiency is not the principal goal of the FAA."). Consider one strange result, if *Concepcion* is taken literally: The separability doctrine, as a federal-law doctrine specific to arbitration, might apply to agreements for bilateral arbitration but not to agreements that permit class arbitration. *See* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (describing separability).

¹⁶⁶ *See, e.g., Moses Cone*, 460 U.S. 1, 20 (1983) (holding that "the [FAA] requires piecemeal resolution when necessary to give effect to an arbitration agreement"); *Hay Grp.*, 360 F.3d at 410 (citing additional Supreme Court precedent to this effect).

¹⁶⁷ *Concepcion*, 563 U.S. at 344.

what the language of either the contract or the statute actually means.¹⁶⁸ This is inconsistent with the way courts interpret contractual terms in general¹⁶⁹ and the FAA in particular.¹⁷⁰ This is also in tension with the Supreme Court's view that the FAA's meaning cannot be made a function of the parties' agreement.¹⁷¹

Furthermore, both readings of *Concepcion* yield definitions that are manifestly incomplete. Arbitration cannot be characterized *only* as dispute resolution by lesser procedure, or there would be nothing to distinguish it from a binding coin flip or a blanket waiver of liability.¹⁷² If *Concepcion* defines procedural ceilings for the FAA,¹⁷³ it

¹⁶⁸ There are other, more defensible means of reaching this result, but the sweeping language of *Concepcion* seems to have foreclosed them. See *infra* note 173.

¹⁶⁹ See *infra* notes 187–88 (noting that the meaning of a contract flows from the parties' mutual understanding and not from nomenclature).

¹⁷⁰ See *infra* Part III (surveying the definitions circuit courts give to FAA arbitration irrespective of the labels contracts attach to the dispute-resolution process).

¹⁷¹ See *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (“[T]o rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration. To that particular question we think the answer is yes . . .”). To paraphrase *Hall Street*, resting on the general policy that arbitration agreements are enforceable as such is to beg the question, which is whether the FAA understands “arbitration” as meaning anything in particular when it employs that term.

¹⁷² See *infra* note 217.

¹⁷³ This is not necessarily the only reading of *Concepcion* consistent with its outcome. A more defensible reading might turn not on procedural ceilings applicable to all forms of arbitration, but instead on a bright-line distinction between bilateral and class arbitration. Note that the Supreme Court has alluded to the importance of procedural informality only in the context of class arbitration — in *Concepcion* and *Stolt-Nielsen*, for example. See *supra* note 164. If one treats these class-arbitration cases as announcing generally applicable principles, one quickly runs into conflicts with the more robust body of precedent from the bilateral-arbitration context. See *supra* notes 164–71 and accompanying text. But if one treats these cases as distinguishing class arbitration from “ordinary,” bilateral arbitration, one might arrive at a workable rule. For example, the Court might have concluded that FAA arbitration is, by definition, bilateral. Then, recognizing class arbitration as a distinct but parallel form of dispute resolution — and one the drafters of the FAA did not anticipate — the Court might nonetheless have permitted class arbitration to proceed under the FAA, provided that the parties expressly consent to that distinct but parallel mechanism. This approach would allow the Court to justify its peculiar insistence on informality as a reference to bilateral arbitration. And it would allow the Court to justify its exception for cases of mutual consent as a reasonable accommodation for class proceedings that would otherwise, by definition, fall outside the FAA's scope. *Stolt-Nielsen* seems to leave room for this approach. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010) (“[W]e see the question as being whether the parties agreed to authorize class arbitration.”). But *Concepcion* does not, as it reaches beyond the

also invites the question of how to define procedural floors — a question the common law is again left to answer.

The FAA's text also lends support for incorporating the common-law definition. The statute leaves to state law the “front-end” defenses to an agreement, and reserves to federal law the “back-end” defenses to an award.¹⁷⁴ Here, in the defenses to an award, the FAA suggests what conditions would be inconsistent with its application. An award may not be enforced if “procured by corruption, fraud, or undue means.”¹⁷⁵ It may not be enforced if the arbitrators demonstrate “partiality,”¹⁷⁶ or if they refuse “to hear evidence pertinent and material to the controversy.”¹⁷⁷ It may not be enforced if the arbitrators conduct the process in such a way as to prevent a “mutual, final, and definite award upon the subject matter submitted.”¹⁷⁸ These are not innovations of the FAA; they are codifications of common-law standards consistent with arbitration's meaning.¹⁷⁹ And if awards are unenforceable under the FAA for failing to abide by these standards, then surely a process tending to produce such awards — that is, a form of “arbitration” inconsistent with a binding disposition¹⁸⁰ — is equally unenforceable under the FAA.¹⁸¹

formality of class proceedings. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (“Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. . . . But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.”). Alternatively, *Concepcion* might rest not on procedural informality at all, but simply on consent. If arbitration is necessarily consensual, the parties cannot be forced to comply with procedures — like the class arbitration in *Concepcion* — to which they have not agreed. But this is again insufficient to explain *Concepcion*'s sweeping language. Many ad hoc arbitration agreements lack thorough procedural rules. In such cases, state arbitration law routinely acts as gap-filler. If *Concepcion* turns on the parties' consent alone, the FAA could not selectively preempt “overformal” state arbitration procedures in this gap-filling context. Ultimately, if *Concepcion* is to remain valid, it must either be limited, or it must be read — contrary to a substantial body of inconsistent precedent — as setting procedural ceilings on the definition of arbitration.

¹⁷⁴ See *supra* notes 27–30 and accompanying text.

¹⁷⁵ 9 U.S.C. § 10(a)(1) (2012).

¹⁷⁶ *Id.* § 10(a)(2).

¹⁷⁷ *Id.* § 10(a)(3).

¹⁷⁸ *Id.* § 10(a)(4).

¹⁷⁹ See *supra* notes 118–19 and accompanying text.

¹⁸⁰ See *infra* Part III.B (discussing the flaws inherent in any definition that treats FAA arbitration as potentially nonbinding).

¹⁸¹ See Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 431 (2007)

One might object that a robust definition of arbitration shifts section 10's back-end defenses into the threshold question of whether submission to arbitration is appropriate in the first place. To the extent the FAA is understood as favoring arbitration by eliminating judicial barriers to enforcement,¹⁸² this arguably conflicts with the statute's purpose. But such a view is again begging the question, as it allows the mere mention of arbitration to supplant a true agreement to it.

The weakness of this argument becomes clear if one compares arbitration to other forms of dispute resolution. In the administrative sphere, for example, no court would call a constitutionally deficient process a "meaningful opportunity to be heard" simply because the parties had the opportunity to correct errors on appeal.¹⁸³ Back-end defenses resolve discrete failures of process, not the categorical lack of it. To qualify as a hearing, the process must, as a threshold matter, carry the procedural incidents inherent in that term as a matter of constitutional law.¹⁸⁴

The same is true in the statutory context. No court would allow a federal agency to ignore the procedural incidents of formal adjudication as laid out in the Administrative Procedure Act ("APA").¹⁸⁵ That an agency labels the process "formal adjudication" makes no difference. Nor would a court permit the same in the context of informal adjudication, where the APA is silent and the incidents of the process are creations of interstitial common law.¹⁸⁶ Why, then, should the FAA's

(describing sections 9 and 10 of the FAA as "incorporat[ing] notions of a 'fundamentally fair' adjudicative process, including the opportunity to present material evidence before a decision maker who has made a timely disclosure of circumstances that might call his or her impartiality into question"); *id.* at 435 ("[S]tandards for vacatur of arbitral decisions . . . envision some form of hearing before an impartial tribunal, as do provisions authorizing the issuance of summonses or subpoenas.").

¹⁸² See *supra* notes 154–59 and accompanying text.

¹⁸³ See *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (citations and internal quotation marks omitted)).

¹⁸⁴ *Id.*

¹⁸⁵ See 5 U.S.C. § 554 (2012) (identifying the procedures necessary "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing"); *id.* § 556 (2012) (identifying additional procedures applicable in formal adjudication).

¹⁸⁶ See *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (holding that the agency's informal adjudication complied with the Due Process Clause and the

silent definition be treated any differently, and the statute's satisfaction be presumed from labels alone?

To be sure, arbitration is distinct from other forms of adjudication in that it arises from contract. But arbitration's consensual nature only makes courts' current approach more difficult to justify. Arbitration owes both its existence and the nature of its execution to the parties' mutual assent. If the parties agree to a form of dispute resolution that falls outside a reasonable understanding of arbitration, it is irrelevant that they call the process by that name.¹⁸⁷ A court alters the agreement by elevating language over substance so as to thrust the FAA upon it.¹⁸⁸ This is particularly problematic if courts refuse to give meaning to that very language, except to understand it as invoking the FAA.

Courts' peculiar treatment of arbitration appears to be rooted in the harsh critiques leveled against early judges following the doctrine of ouster, which fueled the push for the FAA.¹⁸⁹ Although Congress was silent as to the meaning of arbitration, it was clear about what motivated its shift to statutory arbitration. Congress was critical of earlier courts' "emotional" averseness to arbitration — their "jealousy" and "hostility" towards out-of-court settlement¹⁹⁰ — and saw the FAA

"minimal requirements . . . set forth" in section 555 of the APA, and thereby suggesting that informal adjudication — a process undefined in the APA — must satisfy certain intuited standards, even if it does not impose a uniform body of discrete procedural rights).

¹⁸⁷ RESTATEMENT (SECOND) OF CONTRACTS: WHOSE MEANING PREVAILS § 201(1) (1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.")

¹⁸⁸ *Id.* § 201 cmt. c ("[T]he primary search is for a common meaning of the parties, not a meaning imposed on them by the law. . . . The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding. . . . Ordinarily, therefore, the mutual understanding of the parties prevails even where the contractual term has been defined differently by statute or administrative regulation."); *cf. infra* notes 242, 246, 456–58 and accompanying text (discussing recent courts' analysis of "reasonable commercial expectations" to evaluate whether a contract contemplates arbitration).

¹⁸⁹ *Cf. Roebuck, The Myth of Judicial Jealousy, supra* note 17, at 395 & n.2 (discussing earlier developments in American arbitration law, and finding that "[t]he development of the law in the United States seems to have suffered from the availability to judges of this spurious historical justification for their antipathy").

¹⁹⁰ *See* H.R. REP. NO. 96, at 1-2 (1924) ("[B]ecause of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate . . ."); *supra* notes 143–44 and accompanying text. As discussed, it is at best doubtful whether courts were in fact hostile to arbitration in the way Congress was led to believe. *See supra* notes 14–17, 93–99, 141–44 and accompanying text; *see also* MORSE, *supra* note 118, at 436–37 ("In old times a considerable degree of prejudice was often exhibited against the system of adjusting disputes by voluntary arbitration

as the only remedy.¹⁹¹ Now, nearly a century since ouster was eliminated from federal law, these critiques continue to haunt judicial opinions. Avoiding “hostility” has become a prism through which courts view any decision touching on the FAA. When courts review demands for arbitration, they routinely preface their opinions by distancing themselves from the hostility of their nineteenth-century predecessors, as if declaring loyalties lest they later come into question.¹⁹² “Hostility” — irrationality — has also become a slick line of attack. When decisions turn against arbitration, appellate judges may ascribe the results to the biases of their unreconstructed colleagues,¹⁹³ reducing legal reasoning to a kind of argument *ad hominem*.¹⁹⁴

As the consequences of invoking the FAA have grown over the past three decades, courts have struggled to reconcile their preference for liberally applying the FAA with the logical need for definitional limits. Courts routinely make reference to the presumption favoring arbitration even in situations where the question is not the scope of the arbitration agreement, but the existence of it.¹⁹⁵ But they also seem to acknowledge that arbitration must not become — unique amongst

in pais. . . . It is well known, however, that this old-time hostility has long since disappeared. Courts are rather glad than otherwise, in the present busy age [1872], to be relieved of any portion of those burdens of litigation which, without such assistance, they would be quite unable to bear. A sounder doctrine has prevailed for a century past.”)

¹⁹¹ See *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984) (citing discussion of the FAA in a 1923 Senate hearing).

¹⁹² See, e.g., *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 848 F. Supp. 2d 410, 420 (S.D.N.Y. 2012); *Meyer v. T-Mobile USA Inc.*, 836 F. Supp. 2d 994, 999 (N.D. Cal. 2011); *Davis v. Joseph J. Magnolia, Inc.*, 640 F. Supp. 2d 38, 41 (D.D.C. 2009); see also *Dean v. Draughons Junior Coll., Inc.*, 917 F. Supp. 2d 751, 765 (M.D. Tenn. 2013) (“This court harbors no hostility towards arbitration However, in cases such as the one presented here, requiring impoverished individuals to arbitrate could effectively prevent them from exercising their rights as state citizens.”).

¹⁹³ See, e.g., *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 440 (9th Cir. 2015) (Smith, J., dissenting). The “judicial hostility” argument may also appear when courts use the FAA to preempt state statute. See, e.g., *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1124 (1st Cir. 1989) (“The states are forbidden from critical scrutiny expressed in a fashion which might mask historic hostility toward arbitration.”). This is an odd application of the “judicial hostility” argument. That argument was originally deployed against judges and the common law by advocates of state and federal statutory arbitration. It is now deployed by judges — interpreting a version of the FAA constructed largely through judicial interpretation — against state arbitration statutes.

¹⁹⁴ See *Park Constr. Co.*, 296 N.W. 475, 486 (Minn. 1941) (Peterson, J., dissenting) (describing the “judicial jealousy” theory for the origin of the defunct revocability rule as “somewhat like argument *ad hominem*”).

¹⁹⁵ See *infra* notes 239, 349, and accompanying text.

dispute-resolution techniques, and unique amongst contractual terms — a magic word. Most federal circuits have resolved this conflict by avoiding definitions except where strictly necessary to resolve a case. This leaves the case law with traces of arbitration’s common-law definition, but deprives it of the clear and comprehensive reasoning that might enable courts to actively police the FAA’s boundaries.

III. DEFINITIONAL AVOIDANCE

Partial definitions of arbitration arise occasionally in state,¹⁹⁶ federal, and international¹⁹⁷ law. However, one line of cases appears to have grown in prominence specifically in the context of the FAA. This line of cases reflects the logical and practical faults of an incomplete

¹⁹⁶ See, e.g., *supra* notes 53, 142 (discussing partial definitions of arbitration under state law); *infra* notes 278, 452 (discussing California’s more complete common-law definition of arbitration).

¹⁹⁷ Arbitration is not defined in the New York Convention, which governs transnational arbitrations. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3; 9 U.S.C. §§ 201–208 (2012) (codifying the Convention). But definitions do arise in the domestic law of several common-law signatory states. In England and Wales, the consensual, binding, and neutral qualities of arbitration are revealed indirectly in statute and more directly in case law. See *supra* note 114; *infra* note 286; *Arenson v. Casson Beckman Rutley & Co.*, [1977] A.C. 405 (H.L.) 428 (appeal taken from Eng.) (“The indicia [of an arbitrator] are as follows: (a) there is a dispute or difference between the parties . . . ; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called on to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.”). The Supreme Court of Canada has laid out a definition of arbitration with similar characteristics. See *Sport Maska Inc. v. Zittler* [1988] 1 S.C.R. 564, para. 99 (“One of the principal aspects that emerges from an analysis of the [Quebec] Code of Civil Procedure, academic opinion and the case law [of Canada, England, the United States, and France] is the similarity that must exist between arbitration and the judicial process. The greater the similarity, the greater the likelihood that reference to a third party will be characterized as arbitration. The facts that the parties have the right to be heard, to argue, to present testimonial or documentary evidence, that lawyers are present at the hearing and that the third party delivers an arbitration award with reasons establish a closer likeness to the adversarial process The fact that the decision is final and binding is also indicative of an arbitration”). Although the case arose in Quebec, *Sport Maska* did not limit its reasoning to the civil-law context, and its arbitration criteria have since been applied in the common-law provinces. See, e.g., *Universal Workers Union (Labourers’ Int’l Union of N. Am., Local 183) v. Ferreira*, 2009 ONCA 155, paras. 20–27, 37–40; *Tamarack Capital Advisers Inc. v. SEM Holdings Ltd. et al.*, 2006 BCCA 349, paras. 9–13; *Precision Drilling Corp. v. Matthews Equip. Ltd.*, 2000 ABQB 499, para. 21 (“[I]t is obvious that [the] analysis [in *Sport Maska*] applies equally to the jurisprudence of the common law on arbitration.” (citation omitted)).

definition, the promise of a more comprehensive definition, and the courts' preference for avoiding the issue altogether.

A. *AMF Inc. v. Brunswick Corp.*

To the limited extent contemporary courts cite a federal definition of arbitration, that definition is typically traceable to the district court decision in *AMF Inc. v. Brunswick Corp.*¹⁹⁸ In 1983, two rival manufacturers of bowling surfaces and machinery — AMF Incorporated and Brunswick Corporation — entered a settlement agreement to resolve competing claims of deceptive advertising.¹⁹⁹ In their settlement agreement, the rivals stated that if similar disputes arose in the future, they would first submit their claims to the nonbinding judgment of an “advisory third party,”²⁰⁰ the National Advertising Division (“NAD”) of the Better Business Bureau (“BBB”).²⁰¹

Two years later, a new advertising dispute arose. Brunswick had placed ads in a bowling trade journal declaring its laminate lane surfaces more durable and economical than AMF's wooden lanes.²⁰² Invoking the existing settlement agreement, AMF demanded that Brunswick substantiate these statements before the NAD.²⁰³ Brunswick refused. AMF then sued in the Eastern District of New York to compel Brunswick's compliance, citing the FAA.

The parties presented the district court with an unusual FAA dispute. As the court recognized, section 2 of the FAA applies to agreements “to settle *by arbitration* a controversy.”²⁰⁴ But it was unclear whether the dispute-resolution mechanism described in the companies' settlement agreement in fact contemplated arbitration as understood by the FAA. AMF contended that it did, while Brunswick argued that the mechanism's nonbinding nature disqualified the process as FAA arbitration.²⁰⁵

¹⁹⁸ 621 F. Supp. 456 (E.D.N.Y. 1985).

¹⁹⁹ *Id.* at 457.

²⁰⁰ The agreement read, in relevant part, “Both parties agree to submit any controversy which they may have with respect to data[-]based comparative superiority of any of their products over that of the other to such advisory third party for the rendition of an advisory opinion. Such opinion shall not be binding upon the parties, but shall be advisory only” *Id.* at 458.

²⁰¹ *Id.* at 459.

²⁰² *Id.* at 458.

²⁰³ *Id.*

²⁰⁴ *Id.* at 459.

²⁰⁵ *Id.*

Lacking precedent squarely on point, the court declared that “the essence of arbitration” is “to have third parties decide disputes.”²⁰⁶ The court further determined that section 2 of the FAA required that the arbitration *settle* a controversy between the parties.²⁰⁷ According to the court, the nonbinding arbitration sought by AMF would at least settle the question of whether Brunswick possessed evidence to substantiate its advertising.²⁰⁸ Furthermore, as the NAD’s process had enjoyed universal compliance in the past,²⁰⁹ the nonbinding arbitration was “highly likely” to yield the same final resolution as a process with an expressly binding result.²¹⁰ The district court therefore compelled nonbinding arbitration under the FAA.²¹¹

²⁰⁶ *Id.* at 460; *see also id.* (“If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.”).

²⁰⁷ The court’s reasoning here was not entirely clear. It may have felt that arbitration must by definition result in the resolution of a dispute, and that this was reflected in the text of section 2. *Id.* (“If the parties have agreed to submit a dispute for a *decision* by a third party, they have agreed to arbitration.” (emphasis added)). Or it may have felt that arbitration required only the submission of a dispute, with the text of section 2 creating an independent requirement that a controversy actually be settled. *Id.* (“If the parties have agreed to *submit* a dispute for a decision by a third party, they have agreed to arbitration.” (emphasis added)). As the court drew no clear distinctions, and as the latter definition of arbitration is superseded by the text of the FAA in any case, the court’s precise reasoning is immaterial here. *See id.* at 459 (“Arbitration is a term that eludes easy definition. . . . Case law has done little to sharpen the definition.”).

²⁰⁸ *Id.* at 460-61 (“Obviously there is a controversy between the parties — is there data supporting Brunswick’s claim of superiority. Submission of this dispute will at least ‘settle’ that issue, even though the parties may want to continue related disputes in another forum.”).

²⁰⁹ *Id.* at 458 (“Reportedly no advertiser who has participated in the complete process . . . has declined to abide by the decision.”).

²¹⁰ *Id.* at 461 (“It is highly likely that if Brunswick’s claims are found by NAD to be supported that will be the end of AMF’s challenge to the advertisement. Should the claims not be found to be supported, it is probable that Brunswick will change its advertising copy.”).

²¹¹ *Id.* at 463. It should be noted that the FAA was not strictly necessary to the disposition of the case. The district court found the parties’ settlement agreement specifically enforceable on its own terms, like any other contract. *Id.* at 461. Generally, the definition of arbitration is only necessary to resolving demands for specific performance where the FAA prevents contract defenses from invalidating an agreement. A contract is often enforceable based purely on state contract law, regardless of whether it contemplates arbitration. *See, e.g.,* *Omni Tech Corp. v. MPC Solutions, LLC*, 432 F.3d 797, 800 (7th Cir. 2005) (“Because this agreement is valid under Wisconsin law, whether or not it carries the label ‘arbitration,’ it must be implemented in full.”).

1. The Essence of Arbitration as Final Settlement

AMF lends support to two possible definitions of arbitration under the FAA, each superficially reasonable but fatally flawed upon closer examination. The first definition flows from the district court's view that the "essence of arbitration" is third-party dispute resolution. In *AMF*, one incidental dispute — Brunswick's possession of evidence — was certain to be resolved by compliance with nonbinding arbitration. The larger dispute — the deceptive-advertising claim — was highly likely to be resolved. The district court did not indicate whether either was dispositive,²¹² but it evidently perceived that the operative question in *AMF* was whether the dispute-resolution process contemplated submission to a third party with some final settlement resulting.²¹³ This definition of arbitration might therefore be termed a "settlement" or "finality" definition.

The district court identified some support for a finality definition in the text of the FAA. As the court noted, section 2 covers agreements "to settle by arbitration a controversy."²¹⁴ If one emphasizes the statute's reference to settlement, its broadest reading requires nothing more than some matter of dispute, a third-party mechanism for final disposition, and some likelihood of success. Indeed, the district court phrased its understanding of the "issue posed" in *AMF* in precisely those terms — not as whether the parties' agreement contemplated arbitration, but as "whether 'a controversy' would be 'settled' by the process set forth in the agreement."²¹⁵

The flaw in this definition is that it does nothing to define arbitration qua arbitration. It instead elides the term altogether, and without explanation, in favor of an adjacent term in section 2. Such a reading is inconsistent with the text of the FAA: Section 2 covers all agreements to *settle* by *arbitration* a controversy. It covers, in other words, all agreements that contemplate (1) resolution of a dispute, and (2) the use of arbitration to do so. If arbitration is merely an agreement to submit to the decision of a third party, the definition of arbitration — indeed, the word "arbitration" itself — becomes almost superfluous to the statute. Under this view, one might rewrite section

²¹² See *supra* note 207 (noting that the court may have arrived at this result in one of two ways).

²¹³ See *AMF*, 621 F. Supp. at 461 ("That [the arbitration] may not end all controversy between the parties for all times is no reason not to enforce the agreement.").

²¹⁴ 9 U.S.C. § 2 (2012).

²¹⁵ *AMF*, 621 F. Supp. at 459.

2 as covering agreements “to settle by a third-party a controversy” without affecting the meaning of the FAA in any way.²¹⁶

Furthermore, applying a finality definition yields illogical and impractical results. When X and Y contract for all disputes to be resolved by Z’s roll of the dice, they have contracted for a form of third-party dispute resolution that purports to offer conclusive settlement of a controversy. But no court would call such a contract an agreement for arbitration and feel bound to refer the dispute to Z pursuant to the FAA.²¹⁷ Whatever arbitration may be, it undoubtedly requires something more.

The district court in *AMF* identified some support for a finality definition in two non-FAA precedents from the early twentieth century.²¹⁸ But here, too, the court’s analysis was incomplete. *AMF*’s strongest authority for a finality definition came from *City of Omaha v. Omaha Water Co.* There, in a case predating the FAA, the Supreme Court characterized “a plain case of the submission of a dispute or difference” as “an arbitration” even though the arbitrators were termed appraisers in the agreement in question.²¹⁹ Drawing only from this portion of the decision, the district court inferred that any submission

²¹⁶ See *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (“The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute.” (citations and internal quotation marks omitted)).

²¹⁷ See, e.g., *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1239 n.3 (11th Cir. 2008) (“The parties could not contract for a binding coin flip, with the winner to receive an award of his choice, and expect the agreement to be enforced under the FAA.”); cf. *REDMAN*, *supra* note 129, at 2-3 (“[A] mere agreement between two persons to be concluded by the decision of a third would not in itself constitute that third person an arbitrator. To give him that character there must be a ‘difference’ between the parties, or his duties must involve the performance of *judicial functions*.” (emphasis added)).

²¹⁸ *AMF*, 621 F. Supp. at 460 (citing *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910)); *id.* (citing *Pac. Indem. Co. v. Ins. Co. of N. Am.*, 25 F.2d 930, 931 (9th Cir. 1928)). The district court also stated that “[c]ase law following the passage of the [FAA] reflects unequivocal support of agreements to have third parties decide disputes.” *Id.* However, it does not appear that the district court understood this “case law” as echoing its use or interpretation of the “essence of arbitration” concept; and in any case, the district court offered no citations for its statement.

²¹⁹ *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910). As *AMF* acknowledged, the Supreme Court’s statement was also a dictum. See *AMF*, 621 F. Supp. at 460. In the quoted passage, the Supreme Court was not describing the dispute before it, but an earlier circuit case, *Cont’l Ins. Co. v. Garrett*, 125 F. 589 (6th Cir. 1903), on which one of the *Omaha Water* parties had erroneously relied.

to third-party dispute resolution might constitute FAA arbitration and thereby invoke “the benefits of the Act.”²²⁰

Once placed in its proper context, however, the quoted passage from *Omaha Water* is far narrower than *AMF* would suggest. Indeed, *Omaha Water* was not concerned with establishing a definition of common-law arbitration at all, but with distinguishing arbitration from appraisal as necessary to resolve a claim conflating the two. According to *Omaha Water*, appraisal is a process for assigning value consistent with an agreement to do so. Appraisal “precludes or prevents difference, and is not intended to settle any dispute which has arisen.”²²¹ By contrast, arbitration is a means of settling existing disputes.²²² But that does not mean, as the district court in *AMF* appeared to hold, that arbitration is *nothing more than* a means of settling existing disputes. In fact, the Supreme Court in *Omaha Water* indicated entirely the opposite, as its very reason for distinguishing between appraisal and arbitration was to determine what additional procedures would have been necessary — beyond simply a third party’s resolution of the dispute — for an arbitration to be valid.²²³

AMF also cited *Pacific Indemnity v. Insurance Company of North America* to support a finality definition. There, the Ninth Circuit considered whether California’s arbitration law, passed in 1927, could be applied to a dispute arising out of a contract predating the statute.²²⁴ In resolving this question, the Ninth Circuit adopted Justice Cardozo’s view from a similar case deciding the retroactivity of New York’s arbitration statute. In Justice Cardozo’s view, “[a]rbitration is a form of procedure whereby differences may be settled.”²²⁵

²²⁰ *AMF*, 621 F. Supp. at 460.

²²¹ *Omaha Water*, 218 U.S. at 194.

²²² *Id.* (“[*Continental Insurance Co.*] was a case where the full amount of the insurance was claimed as the extent of the loss. This was denied. It was therefore a plain case of the submission of a dispute or difference which had to be adjusted. The rule applicable to a judicial proceeding therefore applied. It was in fact an arbitration, though the arbitrators were called appraisers.” (emphasis added to reflect the text quoted in *AMF*)); see also *supra* note 142.

²²³ *Omaha Water*, 218 U.S. at 194 (“An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced, is implied when the matter to be decided is one of dispute and difference.”).

²²⁴ *Pac. Indem. Co. v. Ins. Co. of N. Am.*, 25 F.2d 930, 931 (9th Cir. 1928) (“The contract out of which the controversy in this case arose was entered into prior to the enactment of the amendment of 1927, and for that reason the plaintiff in error contends that the amendment is not retroactive, and the case is governed by the law in existence at the time the contract was made.”).

²²⁵ *Id.* (quoting *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 290 (N.Y. 1921));

Again, however, the passage quoted in *AMF* is far less sweeping once placed in its proper context. Neither the Ninth Circuit nor the New York Court of Appeals attempted to define arbitration. The courts' concern was simply identifying arbitration as a means of dispute resolution — whatever its characteristics — in order to explain why retroactivity was appropriate. As a means of settling differences, arbitration “is not a definition of the rights and wrongs out of which differences grow.”²²⁶ The California statute, like its New York counterpart, “did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing.”²²⁷ Since the statutes did not alter existing obligations, but only the means of resolving prospective disputes, there was no basis for refusing enforcement to contracts predating the statutes' enactment.²²⁸ But again, arbitration's characterization as a kind of dispute resolution does not mean that arbitration is *nothing more than* dispute resolution. *Pacific Indemnity*, like *Omaha Water*, simply answered the limited question posed — a question tangential to the larger definitional dispute in *AMF*.

2. The Essence of Arbitration as Discernible from History

AMF also suggests a second, potentially more complete approach to defining arbitration. This approach flows from the district court's use of the “essence of arbitration” to establish a definition, but leaves room for “essential” characteristics beyond finality alone. Under this view, a workable definition of arbitration is discernible from historical practice. Arbitration is what it always was, at its core — whatever courts might find that to be. This might be termed an “essence-of-classical-arbitration” definition.

Although it focused on finality, the district court in *AMF* did offer some support for this fuller approach to arbitration. Most notably, the district court recognized that factors beyond finality played a role in a valid arbitral process. Even as the court described “an adversary proceeding, submission of evidence, witnesses and cross-examination”

see also *AMF*, 621 F. Supp. at 460.

²²⁶ *Pac. Indem.*, 25 F.2d at 931 (quoting *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 290 (N.Y. 1921)).

²²⁷ *Id.* (quoting *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 290 (N.Y. 1921)).

²²⁸ *Id.* at 931-32 (“Changes in the form of remedies are applicable to proceedings thereafter instituted for the redress of wrongs already done. They are retrospective if viewed in relation to the wrongs. They are prospective if viewed in relation to the means of reparation.” (quoting *Berkovitz v. Arbib & Houlberg*, 130 N.E. 288, 290 (N.Y. 1921))).

as nonessential elements of arbitration,²²⁹ it noted that the Second Circuit imposed a standard of “fundamental fairness” on arbitration proceedings.²³⁰ Furthermore, while the district court did not explain what role the third party must play in third-party dispute resolution, it recognized that arbitration, at least in *AMF*, was to be conducted by an extrajudicial adjudicator capable of issuing a reasoned decision.²³¹

The district court’s focus on finality may also be consistent with applying an essence-of-classical-arbitration approach specific to the dispute between *AMF* and Brunswick. This was a case dealing with the enforceability of nonbinding arbitration. Brunswick had challenged the FAA’s application based on the agreement’s inability to offer “final settlement of the controversy between the parties.”²³² The district court therefore had no need to reach into legal history for a more comprehensive definition of the essence of arbitration. It effectively agreed with Brunswick that “final settlement” constituted an essential characteristic, and on the facts before the court, that characteristic alone sufficed to resolve the dispute in *AMF*’s favor.

This, however, also suggests the central weakness in an essence-of-classical-arbitration definition. Defining contemporary arbitration as historical arbitration, without more, simply reframes the question without answering it. Asked for a definition, the court responds only that the definition has not changed. This problem is compounded when, as in *AMF*, courts look to pre-FAA precedent for the meaning of a process whose past executory unenforceability ensures that squarely contested definitions will not be found.²³³ The result is a definition of

²²⁹ *AMF*, 621 F. Supp. at 460. Note that this conflicts with an uncited portion of *Omaha Water*, in which the Supreme Court treated essentially the same procedural characteristics as “right[s] . . . implied” in arbitration. See *City of Omaha v. Omaha Water Co.*, 218 U.S. 180, 194 (1910); *supra* note 223.

²³⁰ *AMF*, 621 F. Supp. at 460. This could of course be consistent with the finality approach as well, if one treats the Second Circuit’s fairness standard not as a reflection of arbitration’s essential qualities, but as supplemental protection overlaying a process that independently satisfies the definition of arbitration. On the other hand, if fundamental fairness is a special standard applied only to arbitration, rather than a manifestation of arbitration’s basic nature, this would seem plainly incompatible with the FAA. See *supra* notes 175–81 and accompanying text (describing the textual support for a “fundamental fairness” standard in the definition of FAA arbitration).

²³¹ *AMF*, 621 F. Supp. at 461.

²³² *Id.* at 459.

²³³ See *supra* Part I.C; *supra* note 150 and accompanying text; cf. *BAKER*, *supra* note 10, at 324 (“[Penal bonds] . . . hindered the development of a law of consensual contract. Since the action of debt was brought to enforce the penal obligation and not the underlying agreement, many of the later problems in the law of contract did not arise. . . . The relationship between the parties was ruled not by contractual principles

grand pretensions but little foundation; a definition claiming deep roots and universal application, yet often animated by the unique set of facts presently before the court.

3. A Unifying Theory: Definitional Avoidance

The ambiguity of the district court's reasoning in *AMF* points to a latent third approach to defining arbitration — namely the avoidance of definitions altogether, except as necessary to equitably dispose of a dispute. In *AMF*, the definition of arbitration is not primarily a question of legal doctrine, but one of practical results: Where it was necessary for the district court to identify the concrete procedural characteristics inherent in arbitration, the court did so in the narrowest possible way. Where it was necessary to describe those characteristics, the court did so in the broadest possible terms. This practice of “definitional avoidance” afforded the court space to achieve an equitable outcome while remaining true to its understanding of arbitration as an essentially empty term.

The district court's embrace of definitional avoidance is manifest throughout its decision. The court noted that cases had not traditionally turned on arbitration's meaning, declaring that “[a]t no time have the courts insisted on a rigid or formalistic approach to a definition of arbitration.”²³⁴ The court also stressed that arbitration need not be “binding” to be valid and enforceable under the FAA.²³⁵ Quoting post-FAA scholarship, it even suggested that arbitration might be “synonymous with mediation and conciliation,”²³⁶ two forms of dispute resolution with no power whatsoever to impose dispositions on the disputants.

Here, the district court appeared to take its cue not only from the absence of definitional disputes in the legal record, but also from an expansive view of the FAA's intent. Like many other modern courts, it cited — without example — the “centuries-old jealousy of the courts” with respect to arbitration.²³⁷ It also noted recent courts' liberal approach to arbitrability and the preemption of state-law contract

but by the law of deeds and conditions.”).

²³⁴ *AMF*, 621 F. Supp. at 460.

²³⁵ *Id.* (“The arbitrator's decision need not be binding in the same sense that a judicial decision needs to be to satisfy the constitutional requirement of a justiciable case or controversy.”).

²³⁶ *Id.* at 459 (quoting G. Taylor, *Preface* to EDWIN E. WITTE, *HISTORICAL SURVEY OF LABOR ARBITRATION*, at v-vi (1952)) (internal quotation marks omitted).

²³⁷ *Id.* at 460 (internal quotation marks omitted).

defenses²³⁸ — considerations irrelevant in *AMF* and in defining arbitration generally,²³⁹ but evidently informing a sort of “mood” of deference to the terms of a purported arbitration agreement.²⁴⁰

²³⁸ See *id.* (citing *Moses Cone*, 460 U.S. 1, 24-25 (1983)); see also *infra* note 349.

²³⁹ While one might describe the existence of an arbitration agreement as a threshold question of substantive arbitrability, *Moses Cone* did not. It associated arbitrability with an agreement’s scope, not its existence. *Moses Cone*, 460 U.S. 1, 24-25 (1983) (“[T]he courts of appeals have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning *the scope of arbitrable issues* should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” (emphasis added)); see also *Volt*, 489 U.S. 468, 475-76 (1989) (describing both *Moses Cone* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), as “establish[ing] that . . . ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration”). Although the Supreme Court has yet to address this precise question, nothing in *Moses Cone* indicates that the federal policy favoring arbitrability should be interpreted as a federal presumption in favor of *discovering* agreements to arbitrate. Nor could *Moses Cone* carry such a meaning, as that would conflict with the axiomatic understanding of arbitration as a creature of contract. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”); see also *Chevron U.S.A. Inc. v. Consol. Edison Co. of N.Y.*, 872 F.2d 534, 537 (2d Cir. 1989) (“Application of the presumption . . . is constrained by the fact that the source of any obligation to arbitrate is the contract between the parties . . .”). This is particularly true in the context of definitional disputes: If arbitration is a creature of contract, the doctrine favoring arbitrability might extend as far as contractual ambiguities — whether, for example, an ambiguously worded agreement manifested the parties’ intent to arbitrate a given dispute — but no further. Were it otherwise, the doctrine would manufacture consent to arbitrate in situations where ordinary contract law would find consent lacking. But contractual ambiguities are not the genesis of definitional disputes, where the question is not the meaning of the agreement but the meaning of the FAA. Indeed, *AMF* and its progeny seem to apply the federal rule favoring arbitrability backwards — not to decide whether an ambiguous contract calls for FAA arbitration, but to decide whether the supposedly ambiguous definition of FAA arbitration should encompass the clear terms of the contract. See *AMF*, 621 F. Supp. at 460. This at once manufactures a problem that needn’t exist — presuming that arbitration lacks an ascertainable definition — and converts the federal rule favoring arbitration into a kind of canon of construction to resolve it. This is an extraordinarily elastic reading of Supreme Court precedent like *Moses Cone*, which dealt only with factual disputes over an agreement’s scope.

²⁴⁰ See *supra* notes 190–94 and accompanying text. One detects in this reasoning hints of a “purposivist” definition of arbitration, informed by the strict-enforcement and promote-arbitration views of the FAA’s objectives: Arbitration must be defined so as to ensure enforcement of arbitration agreements or so as to promote arbitration. See *supra* notes 154–57 and accompanying text; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011) (citing *Moses Cone*’s “liberal federal policy

The consequence of definitional avoidance is to obscure the rationale the court most clearly used in arriving at an equitable outcome. This rationale is consistent with a robust understanding of arbitration as consensual, binding, and neutral. Specifically, the district court in *AMF* emphasized that the “mechanism agreed to” by the rival companies ought to be enforceable under the FAA as it would “provide an effective alternative to litigation.”²⁴¹ This requires a binding and neutral process — a kind of adjudication, rather than simply disposal of the dispute.

With respect to the binding nature of the process, the district court stated that a result need not be “binding,” provided that the agreement establish a process yielding final settlement. But the court then went on to accept the process as arbitration specifically because it did — in its effect if not its language — impose a binding result. In *AMF*, “[v]iewed in the light of reasonable commercial expectations,” neither party could realistically evade the NAD’s judgment, even if the contract technically permitted the parties to do so.²⁴² As a result, allowing Brunswick to refuse compliance with the settlement agreement would have been to disregard the FAA even though the contract’s most reasonable interpretation indicated the parties’ mutual assent to binding arbitration. This would effectively have rehabilitated the old doctrine of revocability simply because the agreement failed to label the NAD’s process as the binding disposition it was.²⁴³

As to the neutral nature of the process, the district court made no explicit mention of neutrality. But the court found that the settlement agreement provided a particularly effective alternative to litigation because the dispute-resolution mechanism offered a disposition equally — if not more fully — based on the merits. First, the district

favoring arbitration agreements” as a manifestation of the promote-arbitration view). Of course, these are not definitions at all, but circularities, with the logically untenable results manifest in *AMF* and its progeny. Whatever legitimacy these views of the FAA’s purpose might have in other respects — as guides to obstacle preemption, for example — they are incapable of supplying a definition of arbitration. *See supra* notes 158–60 and accompanying text.

²⁴¹ *AMF*, 621 F. Supp. at 461. This is not a novel description of arbitration. *See* Wesley A. Sturges, *Arbitration — What Is It?*, 35 N.Y.U. L. REV. 1031, 1032 (1960) (“In defining arbitration, it has been common in the law reports for judges to expand upon its general outline as set out above and to refer to it as a *substitute for litigation in the courts*.” (citing the decisions of state courts from 1887 to 1956 — that is, in the several decades immediately before and after the FAA’s enactment)); *supra* notes 110, 129, 136, 142, 164, 197, 212; *infra* notes 277, 300, 372.

²⁴² *AMF*, 621 F. Supp. at 461.

²⁴³ *See id.* at 460 (“No magic words such as ‘arbitrate’ or ‘binding arbitration’ or ‘final dispute resolution; are needed to obtain the benefits of the [FAA].”).

court recognized that the lack of an adversarial process did not unfairly prejudice either party.²⁴⁴ Second, the court found that the extrajudicial adjudicator selected to resolve the dispute was likely better-suited than a judge to “finding the faint line that separates data[-]supported claims from puffery in the sometimes mendacious atmosphere of advertising copy.”²⁴⁵ Indeed, for centuries, this sort of highly technical dispute between merchants was precisely the class of disagreement for which arbitration was considered the fairest means of resolution.

In short, interpreting the contract in the light of reasonable commercial expectations — that is, consistent with the standard rule that contracts are construed as by an objective observer familiar with their context²⁴⁶ — the dispute-resolution mechanism in *AMF* constituted arbitration under the common-law understanding of that term. It did so because it was a consensual agreement providing for binding and neutral adjudication of the dispute. The *AMF* court effectively stated as much in its decision, but only after disclaiming that very understanding of arbitration in favor of vaguely defined alternatives. These alternatives are nominally consistent with the lack of firm historical definitions and the deferential tenor of the FAA. However, they suffer from numerous faults. They undermine the plain meaning of section 2 to absurd results, they draw on incomplete or inapposite precedent, and they obscure the comprehensive, historically rooted definition of arbitration they claim to seek.

Although circuit courts have since split between the two approaches *AMF* expressly articulated, it is the tacit influence of definitional avoidance that best explains their decisions as a whole. As in *AMF*, a cursory reading of history and precedent has guided circuit courts to

²⁴⁴ See *id.* at 461 (“In a confidential-submission scheme, such as the one agreed to here, adversarial hearings cannot take place. But this fact does not militate against application of the [FAA]. Rather it supports arbitration since the special arbitrator may be more capable of deciding the issue than is a court which relies so heavily on the adversary process.”). The district court also recognized the importance of respecting the voluntary nature of the process. See *id.* (“That the arbitrator will examine documents in camera and ex parte does not prevent recognition of the procedure as arbitration since the parties have agreed to this special practice in this unique type of dispute.”); *id.* at 460 (“Arbitration is a creature of contract, a device of the parties rather than the judicial process.”).

²⁴⁵ *Id.* at 461.

²⁴⁶ See *Metric Constructors, Inc. v. Nat’l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999); 11 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 30:4 (4th ed. 2015). This underscores the tension between a federal definition of arbitration and the rule that agreements to arbitrate are interpreted, like all contracts, in accordance with applicable state law. See *supra* notes 30, 53.

the conclusion that arbitration is an essentially empty term. *AMF* then offers the means of rendering that conclusion legally palatable, with finality and essence-of-classical-arbitration approaches each lending to the courts' hollow definitions a facade of substance. Courts have hewed to these approaches even as new cases have exposed their flaws. The result is a series of decisions disclaiming the common-law definition of arbitration, yet often manipulating or misstating *AMF*'s express reasoning — like the court in *AMF* itself — so as to achieve the intuitively equitable results a more robust common-law definition would require.

B. Finality Definitions

Five circuits have adopted some version of a finality definition in the three decades since *AMF* was decided²⁴⁷: the Second,²⁴⁸ the Third,²⁴⁹ the Fourth,²⁵⁰ the Ninth,²⁵¹ and the Tenth Circuits.²⁵² These decisions, along with their definitions of arbitration, vary with the question put to each court. Together, however, the decisions confirm the difficulty of applying *AMF*'s finality definition literally. In the few circuits that attempt to do so, naked flaws in logic underscore the lengths to which courts will go to avoid a clear and comprehensive definition of arbitration. In the remaining circuits, even as courts disclaim clear definitions, they effectively adopt *AMF*'s implicit understanding of arbitration as a procedurally adequate alternative to trial. In the context of *AMF*'s finality approach, this means that arbitration must constitute a process culminating in a binding award.

1. The Third Circuit (1997)

In *Harrison v. Nissan Motor Corp.*, the plaintiff, suing in diversity under Pennsylvania's "lemon law," stated a claim against the

²⁴⁷ It bears repeating that "finality" and "essence of classical arbitration" are simply a useful typology for the courts' superficial reasoning when defining arbitration. They do not represent formal rules, and as *AMF* itself demonstrated, the two approaches may overlap.

²⁴⁸ *Bakoss*, 707 F.3d 140 (2d Cir. 2013); see also *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co. (McDonnell Douglas)*, 858 F.2d 825 (2d Cir. 1988) (not relying on *AMF*).

²⁴⁹ *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343 (3d Cir. 1997); see also *Dluhos v. Strasberg*, 321 F.3d 365 (3d Cir. 2003).

²⁵⁰ *United States v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001).

²⁵¹ *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998).

²⁵² *Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning Inc.*, 390 F.3d 684 (10th Cir. 2004).

manufacturer of her 1994 Nissan Sentra for the automobile's alleged defects.²⁵³ Harrison claimed that she had attempted to use Nissan's informal, nonbinding dispute-settlement procedure to resolve her claim, which the state lemon law required as a "first resort" before litigation.²⁵⁴ This informal process consisted of "arbitration services" provided by the BBB Auto Line, to which Harrison claimed to have sent a letter seeking assistance.²⁵⁵ Forty days elapsed from the date of Harrison's letter, at which point both federal and state law considered the "first resort" complete.²⁵⁶ Harrison then sued.

Nissan moved to dismiss Harrison's claims, arguing that Harrison's letter failed to satisfy the lemon law's "first resort" requirement.²⁵⁷ The district court denied Nissan's motion to dismiss, and Nissan filed an interlocutory appeal, citing section 16 of the FAA.²⁵⁸ That section permits interlocutory appeals of district court orders denying motions to compel arbitration.²⁵⁹ The Third Circuit then faced the question of whether the Auto Line dispute-resolution process, no longer a mandatory alternative to trial after lapse of the forty-day period, constituted arbitration for the purpose of establishing appellate jurisdiction.

The Third Circuit turned immediately to *AMF*. It embraced *AMF*'s finality definition, reiterating the decision's focus on the "settle"

²⁵³ *Harrison*, 111 F.3d at 345.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 346. BBB described only the latter portion of its dispute-resolution process as arbitration. *Id.* at 351; *see also id.* at 346 ("The warranty that accompanies Nissan's vehicles describes the BBB Auto Line as a remedy available to consumers who are dissatisfied with their vehicles' performance. . . . It also explains that the BBB Auto Line has both a mediation and an arbitration component. If the complaint cannot be mediated, the consumer can present the matter to an impartial person or a three-person arbitration panel. The arbitrators' decision is not binding unless the consumer accepts it as binding.").

²⁵⁶ *Id.* at 346.

²⁵⁷ *Id.* at 345.

²⁵⁸ *Id.*

²⁵⁹ 9 U.S.C. § 16 (2012). Note that the FAA does not expressly permit circuit courts to hear denials of a motion to dismiss. As a result, in order to make an argument under section 16, Nissan also contended that its motion to dismiss effectively constituted a motion to compel arbitration. The Third Circuit found it unnecessary to resolve this point, but one judge noted his disagreement with Nissan's argument nonetheless. *See Harrison*, 111 F.3d at 349 n.10. Nissan's argument has succeeded elsewhere. *See, e.g., Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) ("Since no one has been prejudicially misled by [defendant's] request for an over-favorable remedy of dismissal, its request for dismissal in favor of the [purported arbitration] can be treated as encompassing the lesser alternative remedy of a stay and reference.").

language of section 2.²⁶⁰ As the Third Circuit described it, *AMF* swept nonbinding processes within the FAA's ambit, but limited enforcement under section 2 to dispute-resolution mechanisms capable of settling a controversy given "reasonable commercial expectations."²⁶¹

At the same time, in applying a literal reading of *AMF* to the facts in *Harrison*, the Third Circuit faced a problem. "Final settlement" had proved a workable rule for *AMF*, where the nominally nonbinding arbitration was an effectively binding process. In *Harrison*, the logical insufficiency of "final settlement" was laid bare: Aggrieved automobile consumers might well pursue litigation even after a favorable Auto Line award, as remedies in court were likely far more generous than those in available through the BBB.²⁶² On the other hand, Auto Line must have settled at least some otherwise meritorious litigation, or else the auto manufacturers would have refused to participate.²⁶³ Auto Line, in other words, only sometimes resulted in final settlement — and therefore, under the literal word of *AMF*, only sometimes qualified as FAA arbitration.²⁶⁴ Worse, final settlement turned not on the objective nature of the agreement or the dispute-resolution process, but on the parties' whims.

Rather than confront the evident weakness in *AMF*'s logic, the Third Circuit opted to amend *AMF*'s definition of arbitration.²⁶⁵ Ironically,

²⁶⁰ See *Harrison*, 111 F.3d at 349 (describing *AMF* as "[p]erhaps the most useful approach to the question whether the FAA applies to nonbinding arbitration"); *supra* notes 214–17 and accompanying text.

²⁶¹ *Harrison*, 111 F.3d at 349 (quoting *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 461 (E.D.N.Y. 1985)).

²⁶² *Id.* at 350 ("[A] Lemon Law claimant will almost always file suit after the completion of the BBB Auto Line procedures because the BBB Auto Line is not authorized to award many types of damages that a plaintiff can receive under the Lemon Law.").

²⁶³ *Id.* ("Because of the safeguards guaranteeing fairness, Nissan contends that there is a reasonable expectation that Lemon Law disputes will be resolved by the BBB Auto Line. If there was no expectation that these procedures would settle the majority of such disputes . . . , automobile manufacturers would refuse to bear the cost of creating mechanisms such as the BBB Auto Line.").

²⁶⁴ See *id.* at 349 ("Considering the Auto Line mechanism in light of [*AMF*]'s approach, the question whether the nonbinding character of the procedures precludes the application of the FAA is close.").

²⁶⁵ *Id.* at 350 ("[W]e need not reach the question . . . whether the nonbinding character of the BBB Auto Line prevents the application of the FAA to this particular case, because we are satisfied that the informal dispute resolution procedure provided by Nissan pursuant to the Lemon Law . . . is not 'arbitration' as contemplated by the FAA.").

animated by the same tendency towards definitional avoidance,²⁶⁶ the Third Circuit targeted its amended definition at an equally narrow set of facts, in effect “correcting” *AMF*’s definitional deficit by reproducing it under new conditions. In *AMF*, the district court had disposed of the dispute before it by endowing arbitration with an “essential” attribute tailored to the NAD’s nominally nonbinding process. In *Harrison*, the Third Circuit disposed of the dispute before it by endowing arbitration with an “essential” attribute tailored to Auto Line’s forty-day deadline.²⁶⁷ Namely, the Third Circuit held that “the essence of arbitration . . . is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes *through to completion*, i.e. to an award made by a third-party arbitrator.”²⁶⁸ As litigation re-emerged as an option after the forty-day deadline, the “arbitration” Nissan sought to compel was not guaranteed to proceed to completion.²⁶⁹ Auto Line therefore did “not constitute arbitration within the meaning of the FAA,”²⁷⁰ and Nissan’s interlocutory appeal failed for lack of jurisdiction.²⁷¹ The Third Circuit’s opportunistic definition²⁷² thus served its purpose of arriving at an unambiguous result while breaking little legal ground.²⁷³

²⁶⁶ Like other courts, the Third Circuit seemed motivated at least in part by liberal Supreme Court interpretations of the FAA’s scope, despite their irrelevance to the threshold definitional question. *See, e.g., id.* (“We also acknowledge the force of Nissan’s arguments that Congress intended to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause, and that whether an agreement to arbitrate a dispute in interstate commerce is ‘binding,’ ‘partially binding’ or ‘not binding at all’ may have nothing to do with ‘the full reach of the Commerce Clause.’” (citation omitted)). Of course, whether an agreement touches interstate commerce has nothing to do with whether it satisfies the definition of arbitration.

²⁶⁷ In so doing, the Third Circuit also stepped back from *AMF*’s definition, painting *AMF*, notwithstanding its sweeping language, as a case-specific definition of arbitration. *Id.* (describing the judge in *AMF* as “defining arbitration for purposes of determining whether the nonbinding arbitration clause before him was subject to enforcement under the FAA”). As *Harrison* did essentially the same, this would suggest the Third Circuit saw its own decision in similarly limited terms.

²⁶⁸ *Id.* at 351 (emphasis added). Note that the definition is circular twice over. Arbitration is defined in relation to the essence of arbitration, which is defined as arbitrating to completion.

²⁶⁹ *Id.* (“While many cases in which claimants invoke the informal process will proceed to an arbitrator’s award, some will not.”).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 345.

²⁷² The court’s legal justification for its definition consisted of a single *confer* citation to an earlier Third Circuit decision, which stated that “[o]nce a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration.” *Id.*

As in *AMF*, however, the court's minimalist portrayal of arbitration gives way to a clearer and more comprehensive definition on closer look. Under its finality approach, *AMF* had indicated that arbitration required only the submission of a dispute and the settlement of a controversy.²⁷⁴ *Harrison* then added the requirement that the arbitral process conclude with an award.²⁷⁵ Although the Third Circuit expressly avoided holding that arbitration required a binding award,²⁷⁶ the court's emphasis on the award's existence, in conjunction with *AMF*'s insistence on settlement, is difficult to reconcile with any other conclusion. If arbitration requires both settlement and an award, it requires a binding award. The only alternative consistent with *Harrison* would be a process yielding nonbinding awards, yet reliably resulting in negotiated settlement on different terms — an implausible prospect. As a result, even as it disclaimed categorical definitions, the

at 350-51 (citing *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997)). This is a shallow foundation for a concept as lofty as “the essence of arbitration” — particularly once the quoted passage is read in context. *Great Western Mortgage* never addressed the requisite characteristics of arbitration; it simply reiterated Supreme Court precedent requiring the scope of arbitration agreements to be liberally construed. See *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 230-31 (3d Cir. 1997) (“Since the purpose of the FAA is to ensure that agreements to arbitrate are enforced, a court compelling arbitration should preserve the remaining disputed issues for the arbitrator to decide. Any argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state statute may be presented in the arbitral forum.”). But of course, the breadth of arbitrators' jurisdiction says no more about the meaning of arbitration than the breadth of a court's jurisdiction says about the meaning of trial.

²⁷³ That the definition was opportunistic does not mean that it was entirely incorrect. Had the Third Circuit wished, it could have found ample evidence in the historical record for the idea that arbitration must culminate in an award. But unlike *Harrison*, the record would not have stopped there, but would have noted that the award must be binding and definite. See, e.g., *MORSE*, supra note 118, at 384 (“It is one of the cardinal rules in the law concerning arbitration that the award must be final; that is to say, it must constitute a complete and final disposition and determination of the matter submitted.”); *id.* at 408 (“[An award] must have such a degree of fulness and precision that no reasonable doubt as to the meaning and intention of the arbitrator can be entertained by intelligent men acquainted with the subject-matter.”); supra note 119.

²⁷⁴ See supra notes 208–10 and accompanying text.

²⁷⁵ *Harrison*, 111 F.3d at 350 (“Arbitration does not occur until the process is completed and the arbitrator makes a decision.”); *id.* at 351 (“[A] claimant cannot be barred from pursuing litigation under the Lemon Law if the mechanism delays for more than forty days. The claimant would not, therefore, pursue the procedure to completion in all cases. Under all these circumstances, the informal dispute resolution mechanism . . . does not constitute arbitration within the meaning of the FAA.”).

²⁷⁶ *Id.* at 350 (“[W]e need not reach the question whether the FAA applies to nonbinding arbitration in general . . .”).

Third Circuit effectively provided just that with respect to the question of nonbinding arbitration qua arbitration.²⁷⁷ This definition was consistent with arbitration's common-law understanding, and yet, couched in contrary language, worthless by design as precedent to support it.

2. The Ninth Circuit (1998)

If *Harrison* represents a flexible application of *AMF*'s finality definition, the Ninth Circuit's decision in *Wolsey, Ltd. v. Foodmaker, Inc.* represents the literalist alternative.²⁷⁸ In *Wolsey*, rather than manipulate *AMF* to fit a new set of facts, the Ninth Circuit took *AMF* at its word, fashioning the most sensible rule it could from the limited

²⁷⁷ The Third Circuit restated this view more clearly six years later. *Dluhos v. Strasberg*, 321 F.3d 365, 370, 371 (3d Cir. 2003) (finding that the contested dispute-resolution mechanism did not constitute arbitration because "unlike methods of dispute resolution covered by the FAA, [these] proceedings were never intended to replace formal litigation" (emphasis added)). Note that this has no impact on the enforceability of the Auto Line mechanism generally; it affects only the mechanism's enforceability under the FAA. As is often the case, state law suffices to enforce the agreement — here, the warranty — without the assistance of the FAA. See *Harrison*, 111 F.3d at 346 ("While the warranty states that resort to the BBB Auto Line is completely voluntary, it also notes that some state laws require resort to the program before filing a lawsuit.").

²⁷⁸ This may not be good law. The Ninth Circuit seems to be internally split as to whether a federal definition of arbitration even exists. In 1987, the Ninth Circuit held that the definition of arbitration was a matter of state contract law. See *Wasył, Inc. v. First Bos. Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987); *supra* note 53. The court reaffirmed this view in 2000, albeit with strong reservations. *Portland Gen. Elec.*, 218 F.3d 1085, 1091-92 (9th Cir. 2000); *supra* note 53. In the interim, the court suggested a federal definition in *Wolsey*, making no mention of *Wasył*, even though one party raised the case in its brief. See Brief for Appellant at 12-13, *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998) (No. 96-56345), 1997 WL 33545421. *Wolsey* and *Wasył* are irreconcilable. One might wish to read *Wolsey* as tacitly limiting *Wasył* to contracts that expressly incorporate state arbitration law, then supplying a federal definition for all other contracts. But this would be inconsistent with *Wolsey* itself, which defined arbitration before it considered to what extent California law applied to the contract in question. Nor could *Wolsey* simply be applying California law. The court made no attempt to do so, and at that time, California understood arbitration as culminating in a binding award. *Cheng-Canindin v. Renaissance Hotel Assocs.*, 50 Cal. App. 4th 676, 687-88 (1996) ("[A]lthough arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless there is a third party decision maker, a final and binding decision, and a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision."); *id.* at 684-85 (citing BLACK'S LAW DICTIONARY 105 (6th ed. 1990)). This remains the rule in California. See *Operating Eng'rs Local Union No. 3 v. City of Porterville, No. F067635*, 2014 WL 4947174, at *6 (Cal. Ct. App. Oct. 2, 2014) ("[W]e decline to follow *Wolsey* and instead follow *Cheng-Canindin* . . .").

reasoning available. The result was a definition of arbitration even broader than *AMF*'s, and even less logically sound.

The plaintiff in *Wolsey* was a Hong Kong corporation, *Wolsey, Ltd.*, that had entered an agreement granting it the right to develop Jack in the Box locations in Hong Kong and Macau.²⁷⁹ After a dispute over its plans to expand, *Wolsey* raised allegations of fraudulent inducement and initiated the dispute-resolution process set forth in the parties' agreement.²⁸⁰ This called for a meeting between senior executives, followed if unsuccessful by "non-binding arbitration under the rules of the American Arbitration Association," followed by litigation in federal court.²⁸¹

A senior executive meeting failed to settle the dispute. Nonbinding arbitration produced an award in *Wolsey*'s favor, which *Foodmaker* declined to accept.²⁸² *Wolsey* then brought its claims in federal court. Once at court, however, *Wolsey* raised claims it had not previously brought in the nonbinding arbitration. *Foodmaker* moved to compel arbitration of those claims, citing the FAA.²⁸³ The district court denied, reading the contract's California choice-of-law clause as incorporating a provision in the California Arbitration Act that empowered it to join related claims into an existing court proceeding.²⁸⁴ *Foodmaker* then filed an interlocutory appeal, arguing that nonbinding arbitration of the new claims must be enforced under the FAA, notwithstanding California law.²⁸⁵

Faced with the familiar question of whether nonbinding arbitration qualifies as arbitration under the FAA, the Ninth Circuit adopted the finality definitions from *AMF* and *Harrison*.²⁸⁶ Perhaps unwittingly, the

²⁷⁹ *Wolsey*, 144 F.3d at 1206.

²⁸⁰ *Id.* at 1206-07.

²⁸¹ *Id.* at 1206.

²⁸² *Id.* at 1207.

²⁸³ *Id.*

²⁸⁴ *Wolsey, Ltd. v. Foodmaker, Inc.*, No. Civ. 96-0634-E(POR), 1996 WL 33333427, at *3 (S.D. Cal. Aug. 8, 1996); see also CAL. CIV. PRO. CODE § 1281.2(c).

²⁸⁵ *Wolsey*, 144 F.3d at 1207.

²⁸⁶ *Id.* at 1208-09, 1213. For a similar case in the English context, see *Kruppa v. Benedetti & Anor*, [2014] EWHC 1887 (Comm). There, the relevant portion of the parties' agreement stated as follows: "[T]he parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction." *Id.* at para. 2. Justice Cooke held that this did not constitute an agreement to arbitrate because it provided for the possibility of litigation subsequent to the purported arbitration, which was inconsistent with the binding nature of arbitration. *Id.* at para. 14 ("The requirement to submit finally to a binding arbitration is absent and would, on the face of the clause, be inconsistent with its terms because of the two stage process envisaged.").

court was then stuck: In defining “arbitration” down to “settlement,” *AMF* had caused the definition of arbitration to turn on the likelihood of the parties resolving their dispute. But unlike in *AMF*, *Wolsey*’s truly nonbinding process made for unpredictable outcomes.²⁸⁷ And without a procedural idiosyncrasy like *Harrison*’s forty-day arbitration deadline, *Wolsey* lacked a hook for skirting the issue by resolving the case on other grounds.²⁸⁸ As a result, the only way of salvaging a workable rule from *AMF*’s statement that arbitration needn’t be binding was to define “settlement” down as well — to the mere possibility of settlement. The Ninth Circuit thus held that parties to a valid arbitration need only “agree to submit the dispute to a third party” and “agree not to pursue litigation until the process is completed.”²⁸⁹ The district court was reversed.²⁹⁰

This led to a further problem. In adopting *AMF*, the Ninth Circuit had also adopted its weak foundations: The Ninth Circuit repeated *AMF*’s misleading passage from *Omaha Water*.²⁹¹ It repeated *AMF*’s misplaced deference to the federal rule requiring liberal interpretations of arbitrability — an issue distinct from the threshold existence of an agreement from which arbitrability might flow.²⁹² And the Ninth Circuit repeated *AMF*’s decision to effectively rewrite section 2 of the FAA by reducing “settle by arbitration” to “settle.”²⁹³ This latter flaw then took on new dimensions under *Wolsey*’s holding that arbitration needn’t conclude in settlement at all. For if certainty of settlement was unnecessary as an incident of arbitration, then even “settle” was an overly restrictive reading of section 2.

To square its reasoning with the text of the FAA, the Ninth Circuit sought to muddy the meaning of “settle” itself. The court cited *Black’s Law Dictionary*, which characterized “settle” as a “word of equivocal meaning; meaning different things in different connotations.”²⁹⁴ These meanings included “to agree, to approve, to arrange, to ascertain, to liquidate, to come to or reach an agreement, to determine, to establish,

²⁸⁷ See *supra* note 264 and accompanying text.

²⁸⁸ See *supra* notes 265–67 and accompanying text.

²⁸⁹ *Wolsey*, 144 F.3d at 1208 (internal quotation marks omitted). The former is *Wolsey*’s reading of *AMF*; the latter is *Wolsey*’s reading of *Harrison*.

²⁹⁰ *Id.* at 1213.

²⁹¹ *Id.* at 1208; see also *supra* notes 221–23 and accompanying text.

²⁹² See *Wolsey*, 144 F.3d at 1209; see also *supra* notes 237–39 and accompanying text.

²⁹³ *Wolsey*, 144 F.3d at 1208; see also *supra* notes 214–17 and accompanying text.

²⁹⁴ *Wolsey*, 144 F.3d at 1207-08 (citing BLACK’S LAW DICTIONARY 1230 (5th ed. 1979)).

to fix, to free from uncertainty, to place, or to regulate.”²⁹⁵ Having complicated the task of defining settlement, the Ninth Circuit then abandoned the effort altogether, leaving “settle by arbitration” a nullity.²⁹⁶

Here, the Ninth Circuit demonstrated the absurd endpoint of applying *AMF*’s finality definition literally. First, the Ninth Circuit’s open definition of “settle” conflicts with the unambiguous meaning of section 2. The FAA does not use “settle” in isolation, but refers to agreements to “settle . . . a controversy.”²⁹⁷ The Supreme Court itself has used variations on “settle a controversy” on multiple occasions, and in no case could a reasonable person read the Court’s phrasing as unclear.²⁹⁸ It is irrelevant that “settle” might mean “arrange” or “liquidate” in other usages if one simply reads the word in context. Indeed, the *Black*’s definition suggested just that, counseling that “the particular sense in which [‘settle’] is used may be explained by the context or surrounding circumstances.”²⁹⁹ That the Ninth Circuit made no effort to follow this counsel, even after quoting it, suggests that the court may have recognized the logical conflict that would result if it had.

Second, the Ninth Circuit’s use of the dictionary to define “settle” underscores its failure to do the same with the term actually at issue in *Wolsey*. *Wolsey* was not a dispute over the meaning of settlement; it was a dispute over the meaning of arbitration. The court had only to consult the dictionary at hand. Its own edition of *Black*’s defined arbitration as “[t]he reference of a dispute to an impartial (third) person chosen by the parties to the dispute *who agree in advance to abide by the arbitrator’s award* issued after a hearing at which both parties have an opportunity to be heard.”³⁰⁰ Even if “settle” was

²⁹⁵ *Id.* (citing BLACK’S LAW DICTIONARY 1230 (5th ed. 1979)).

²⁹⁶ *Id.* at 1207 (“*Wolsey* maintains that a provision in a contract to submit a controversy to non-binding arbitration is not a provision to ‘settle’ a controversy. However, *Wolsey*’s reliance on the use of the word ‘settle’ in Section 2 of the FAA does not get it far.”). The Ninth Circuit then quoted the definition of “settle” from *Black*’s *Law Dictionary* and, without further analysis, shifted to the more fertile definitions in *AMF* and *Harrison*.

²⁹⁷ 9 U.S.C. § 2 (2012).

²⁹⁸ *See, e.g.*, *New Jersey v. New York*, 523 U.S. 767, 772 (1998), *judgment entered*, 526 U.S. 589 (1999) (“[T]he two neighboring States tried to settle their controversy.”); *Dickman v. C.I.R.*, 465 U.S. 330, 347 (1984) (“Congress has not attempted to settle the controversy through legislation.”).

²⁹⁹ *Wolsey*, 144 F.3d at 1207-08 (citing BLACK’S LAW DICTIONARY 1230 (5th ed. 1979)).

³⁰⁰ BLACK’S LAW DICTIONARY 96 (5th ed. 1979) (emphasis added); *see also id.* (defining arbitration, alternatively, as “[a]n arrangement for taking *and abiding* by the

ambiguous, “arbitration” was not, and the FAA’s reference to “settling by arbitration” required a ruling in *Wolsey*’s favor.³⁰¹

Third, the Ninth Circuit’s reading of “settle” conflicts with *AMF* itself. Although *Wolsey* found the meaning of “settle” ambiguous, nothing in *AMF* suggests that the district court there felt similarly. In fact, *AMF* made explicit that some form of settlement was a necessary incident of arbitration.³⁰² The district court found ambiguity only in how expansive that settlement needed to be — whether it sufficed to settle an incidental controversy, or whether the entire matter required resolution.³⁰³ That *AMF*’s reasoning had to be altered for its finality definition to produce a workable rule should suggest that *AMF*’s finality definition was a flawed foundation to start from.

Finally, the logical consequences of *Wolsey* are even more extraordinary than those of *AMF*. Under *AMF*’s finality definition, agreements for all manner of ADR might be arbitration if they offer a reasonable likelihood of settlement.³⁰⁴ Under *Wolsey*’s adaption — itself the inevitable outcome of attempting to apply *AMF* literally — settlement is no longer necessary. Any agreement with the slightest potential for out-of-court settlement might be termed arbitration. This would sweep into the FAA any kind of ADR supervised by a third party, including many commonplace conditions precedent to arbitration.³⁰⁵ The FAA’s purpose would then no longer be enforcing otherwise valid agreements to arbitrate, but enforcing any agreement forestalling litigation — and even some forestalling arbitration itself.

3. The Fourth Circuit (2001)

In *U.S. v. Bankers Insurance Co.*, the Fourth Circuit became the only federal appellate court to accept the full implications of *Wolsey*. There,

judgment of selected persons in some disputed matter, *instead of carrying it to established tribunals of justice*, and [which] is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation.” (emphases added)).

³⁰¹ If the nonbinding process did not constitute arbitration, section 16 of the FAA could not be used to establish appellate jurisdiction for an interlocutory appeal.

³⁰² *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460-61 (E.D.N.Y. 1985).

³⁰³ See *supra* notes 212–13 and accompanying text.

³⁰⁴ See *supra* notes 216–17, 236 and accompanying text.

³⁰⁵ See *Kemiron Atl., Inc. v. Aguakem Int’l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (“The FAA’s policy in favor of arbitration does not operate without regard to the wishes of the contracting parties. Here, the parties agreed to conditions precedent before arbitration can take place and, by placing those conditions in the contract, the parties clearly intended to make arbitration a dispute resolution mechanism of last resort. . . . Because neither party requested mediation, the arbitration provision has not been activated and the FAA does not apply.”).

the plaintiff was a private company, Bankers Insurance, providing flood insurance policies through a program created and administered by the Federal Insurance Administration (“FIA”).³⁰⁶ The FIA formalized the company’s participation through an agreement, renewed annually, that incorporated boilerplate language from the Code of Federal Regulations.³⁰⁷ This language included an arbitration provision covering “any misunderstanding or dispute . . . with reference to any factual issue” related to the agreement.³⁰⁸ The resulting arbitral “determination” was then made “binding upon approval by the FIA.”³⁰⁹

In 1999, the federal government sued Bankers for allegedly failing to report and relinquish interest earned on certain federal funds.³¹⁰ Bankers moved to stay litigation pending arbitration, and the district court denied.³¹¹ Bankers then filed an interlocutory appeal with the Fourth Circuit under section 16, forcing the court to determine whether a nonbinding dispute-resolution procedure constituted arbitration under the FAA.³¹²

The Fourth Circuit adopted the expansive view of arbitration it found in *AMF* and *Wolsey*, holding that arbitration need only offer the possibility of settlement given “reasonable commercial expectations.”³¹³ From this vague precedent, the court extracted something of a bright-line rule: If the dispute-resolution process was not a “futile exercise” on the path to settlement, the process qualified as FAA arbitration.³¹⁴

On the facts in *Bankers*, there was reason to believe that settlement would fail. Acceptance of the award depended on its unilateral approval by a party both refusing to arbitrate and insulated from the costs of protracted litigation.³¹⁵ But as the Fourth Circuit suggested, it would also be “reasonabl[e] and rational[]” for the federal government

³⁰⁶ U.S. v. Bankers Ins. Co., 245 F.3d 315, 317 (4th Cir. 2001).

³⁰⁷ *Id.* at 317-18.

³⁰⁸ *Id.* at 318.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 317-18.

³¹¹ *Id.* at 317.

³¹² *Id.*

³¹³ *Id.* at 322 (citing *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460-61 (E.D.N.Y. 1985)).

³¹⁴ *Id.* at 322-23.

³¹⁵ *Id.* at 322 (“The Government’s position, viewed in a pragmatic manner, makes some sense. If the Government is opposed to arbitration and can reject an arbitration award or decision, the arbitration process is unlikely to provide a resolution to this case.”).

to “approve an arbitration award or decision that it found favorable.”³¹⁶ As a result, the nonbinding arbitration could not be called definitively “futile,” and it therefore qualified as arbitration under the FAA.³¹⁷

This application of *Wolsey* confirms the flaws inherent in a finality definition. By treating arbitration as settlement and settlement as unnecessary, *Bankers* rendered arbitration unnecessary.³¹⁸ The essential definition of arbitration — the question first animating the *AMF* line of cases — then vanishes entirely. Arbitration is no longer a substitute for judicial adjudication, but any means of avoiding it. Courts lose touch with the FAA’s original purpose, which was not to drive parties towards out-of-court settlement wherever the odds of success are better than “futile,” but simply to eliminate doctrines that prevented agreements to arbitrate from being enforced as any other contract.³¹⁹

³¹⁶ *Id.* at 323.

³¹⁷ *Id.*

³¹⁸ The Fourth Circuit found it important to distinguish between mandatory arbitration, in which the arbitral process is imposed up to the point of the award, and binding arbitration, which encompasses both the process and the resulting award. *See id.* at 322 (“Mandatory arbitration, as a prerequisite to initiation of litigation, and binding arbitration, where the parties must accept an award or decision of the arbitrator, are two different things.”). The agreement in *Bankers* envisioned mandatory but not binding arbitration, which the Fourth Circuit found sufficient to invoke the FAA. However, the Fourth Circuit appears to be relying on a category of “arbitration” with no substance. All agreements are “mandatory” in the same sense as the agreement here; the contrary is simply an illusory promise. Furthermore, contrary to the Fourth Circuit’s concerns, insisting on the binding nature of arbitration does nothing to prevent courts from enforcing agreements to undertake other forms of ADR, such as the “mandatory arbitration” here, but simply limits *the FAA* to true arbitration. *See, e.g.,* *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1241 (11th Cir. 2008) (“[A]greements to mediate . . . might be specifically enforceable in contract or under other law . . . [D]istrict courts have inherent, discretionary authority to issue stays in many circumstances, and granting a stay to permit mediation (or to require it) will often be appropriate.”); *see also supra* notes 211, 277; *infra* note 355.

³¹⁹ *See* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“We . . . are not persuaded by the argument that the conflict between two goals of the Arbitration Act — enforcement of private agreements and encouragement of efficient and speedy dispute resolution — must be resolved in favor of the latter in order to realize the intent of the drafters. The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate . . . , at least absent a countervailing policy manifested in another federal statute.”).

4. The Tenth Circuit (2004)

In *Salt Lake Tribune Publishing Company v. Management Planning, Inc.*, the plaintiff publishing company was engaged in a price dispute with the newspaper owners and the parties' jointly selected appraiser.³²⁰ In an option contract to purchase the newspaper, the parties had agreed to a multistep process for arriving at an acceptable price. First, the parties would "endeavor in good faith to agree."³²¹ If they failed to do so within ten days, they would then each appoint an appraiser to assign a fair market value.³²² If the resulting appraisals differed by less than ten percent, the purchase price would equal the average of the two appraisals.³²³ If the appraisals differed by more than ten percent, the parties would jointly appoint a third appraiser, and the purchase price would equal the average of the two appraisals closest to one another.³²⁴ However, if the third appraisal was itself the average of the two original appraisals, the third appraisal would become the purchase price.³²⁵

The purchasers and sellers failed to agree on a price.³²⁶ Predictably, their appointed appraisers then differed substantially on the company's fair market value.³²⁷ The parties agreed to appoint a third appraiser, who arrived at a result closer to that proposed by the seller-appointed appraiser.³²⁸ The publishing company then sued both the newspaper and the third appraiser, which jointly defended the price and the third appraisal as an arbitration meriting considerable deference under the FAA.³²⁹ Adopting the defendants' position, the district court dismissed the purchaser's claims.³³⁰

In reversing the district court, the Tenth Circuit claimed to follow *Harrison*.³³¹ According to the Tenth Circuit, *Harrison* held that the

³²⁰ *Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 686-87 (10th Cir. 2004).

³²¹ *Id.* at 687 n.2.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 687.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 686.

³³⁰ *Id.*

³³¹ *Id.* at 689-90 ("Under federal law, we must determine if the process at issue sufficiently resembles classic arbitration to fall within the purview of the FAA. Central to any conception of classic arbitration is that the disputants empowered a third party

defining characteristic of arbitration “is that the disputants empowered a third party to render a decision settling their dispute.”³³² As the Tenth Circuit understood it, this was consistent with the idea that the third party’s decision must not only give rise to settlement, but must constitute the settlement — in other words, that it must be binding.³³³ Here, the final appraisal did not constitute the settlement, but simply gave rise to settlement based on an average of two appraisals.³³⁴ Moreover, had the first two appraisers arrived at estimates closer in value, the third appraisal would not even have occurred.³³⁵ The third appraisal was therefore not binding and could not be called arbitration.³³⁶

The effect of *Salt Lake Tribune* was to acknowledge the logical conclusion that both *Harrison* and *AMF* had attempted to avoid. *Harrison* had in fact expressly refused to rule on whether nonbinding arbitration fell within the FAA.³³⁷ *AMF* had even suggested that mediation and conciliation might qualify as arbitration, as long as some ancillary controversy was “settled” as a result.³³⁸ Yet the Tenth Circuit had no trouble finding both precedents consistent with the idea that arbitration is necessarily binding.³³⁹ The Tenth Circuit may

to render a decision settling their dispute.” (citation omitted)). The Tenth Circuit cited *Fit Tech* for the former and *Harrison* for the latter, both progeny of *AMF*.

³³² *Id.* at 690-91.

³³³ The Tenth Circuit found *Harrison* consistent with two authorities to this effect. *Id.* at 690 (citing IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, REMEDIES, AND AWARDS UNDER THE FEDERAL ARBITRATION ACT § 2.3.1.1 (1992), for the view that “the decision of the dispute resolver shall be both final and binding”); *id.* (citing *McDonnell Douglas*, 858 F.2d 825, 830 (2d Cir. 1988), for the view that arbitration turns on whether “the parties clearly intended to submit some disputes to their ‘chosen instrument for the definitive settlement of grievances under the Agreement’”). *McDonnell Douglas* is one of the few post-*AMF* precedents that squarely addresses the definition of arbitration without citing *AMF* or its progeny. See *infra* Part III.B.5.

³³⁴ *Salt Lake Tribune*, 390 F.3d at 690 (“[The parties] fashioned an agreement where, in the event that they could not agree on a price and their chosen appraisers were too far apart, a third appraiser would contribute a value that may, or may not, be used to calculate the exercise price. . . . However, one feature that must necessarily appertain to a process to render it an arbitration is that the third party’s decision will settle the dispute.”).

³³⁵ *Id.* at 691 (“[T]o the extent there existed a dispute requiring arbitration, the party appraisers produced the dispute by affixing values more than ten percent apart.”).

³³⁶ The process also lacked the hallmarks of a neutral adjudication. In setting the price at an average of two or more appraisals, the parties were not attempting to reach a result that was objectively correct, but one that seemed acceptably fair to both sides.

³³⁷ See *supra* notes 265, 276.

³³⁸ See *supra* notes 212–15, 235–36 and accompanying text.

³³⁹ See *Salt Lake Tribune*, 390 F.3d at 690 n.3 (“Both cases [*McDonnell Douglas* and

have misread the earlier cases. Or it may have read past their avoidance of definitions to the more logically defensible reasoning beneath — a reasoning consistent with arbitration’s common-law understanding.

5. The Second Circuit (2013)

In *Bakoss v. Lloyds of London*, an insurance beneficiary (“Bakoss”) sought a payout from his insurer (“Lloyd’s”) for total and permanent disability.³⁴⁰ Pursuant to his insurance agreement, Bakoss provided medical evidence from his personal doctor.³⁴¹ Lloyd’s then obtained an evaluation from its physician, who disagreed with the disability diagnosis.³⁴² To settle the matter, Lloyd’s invoked the agreement’s “third-physician provision,” which called for the two “party-appointed” physicians to agree on a third physician, whose medical evaluation would be “final and binding.”³⁴³ Bakoss refused to participate, and instead sued in state court.³⁴⁴

Lloyd’s sought to remove the case to federal court under the FAA,³⁴⁵ which permits removal of arbitration agreements falling under the New York Convention.³⁴⁶ Bakoss opposed removal, arguing that the third-physician provision failed to satisfy the definition of arbitration.³⁴⁷ Citing *AMF*,³⁴⁸ the district court found for Lloyd’s.³⁴⁹

AMF] acknowledged that arbitration involves a third party rendering a decision that settles the dispute between the parties.”); *supra* note 333.

³⁴⁰ *Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135 (Bakoss (E.D.N.Y.))*, No. 10-CV-1455 (DLI)(LB), 2011 WL 4529668, at *2 (E.D.N.Y. Sept. 27, 2011).

³⁴¹ *Id.*

³⁴² *Id.* at *2-3.

³⁴³ *Id.* at *3-4.

³⁴⁴ *Id.* at *1.

³⁴⁵ *Id.*

³⁴⁶ See 9 U.S.C. § 205 (2012); *supra* note 197.

³⁴⁷ *Bakoss (E.D.N.Y.)*, 2011 WL 4529668, at *6.

³⁴⁸ The court also cited *McDonnell Douglas*, a Second Circuit case that had provided a far clearer definition of arbitration than *AMF*. *Bakoss (E.D.N.Y.)*, 2011 WL 4529668, at *6; see also *supra* note 333. Oddly, though, the court cited *McDonnell Douglas* only once, and even then only as additional support for its four citations to *AMF*. See *Bakoss (E.D.N.Y.)*, 2011 WL 4529668, at *6. Despite its clearer holding and comparable age, *McDonnell Douglas*’s rate of substantive citation suggests that it carries less weight in federal courts than *AMF*’s progeny, particularly outside the Second Circuit.

³⁴⁹ *Bakoss (E.D.N.Y.)*, 2011 WL 4529668, at *6 (“[I]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.” (indirectly quoting *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y.

On appeal, Bakoss challenged the district court's use of a federal rather than state definition of arbitration.³⁵⁰ In affirming the lower court on this question, the Second Circuit restated *AMF*'s federal definition, on which the lower court had relied.³⁵¹ Notably, the Second Circuit then described *AMF* as consistent with its own precedent in *McDonnell Douglas*, which defined arbitration as "submit[ting] certain disputes to a specified third party for *binding* resolution."³⁵² While the court may have been motivated by a desire to treat in-circuit precedents as a coherent whole, the result is significant departure. Under *Bakoss*, *AMF* is seen as requiring a binding award — contrary to its own language disavowing that view, and contrary to its reading in the Third, Ninth, and Fourth Circuits. A literal reading of *AMF*'s finality definition now appears impossible within the district from which it arose, even as that definition has been adopted elsewhere.

6. Finality Definitions Summarized

The district court in *AMF* stated outright that arbitration, as understood by the FAA, demands final settlement of a dispute. Implicitly, its understanding of arbitration as an adequate alternative to trial suggests that arbitration requires not just final settlement, but a binding disposition. These are distinct concepts. Final settlement implies the resolution of a controversy, or at least part of it, on some terms. Binding resolution settles a controversy on its own terms and no others; the adjudication is the settlement.

The impracticality of the former definition is evident in the Tenth and Second Circuits' interpretation of *AMF* as — contrary to its own express statements — requiring the latter. It is further evident in *Harrison*, where the Third Circuit attempted to avoid defining arbitration as necessarily binding, even when its reasoning led to no other logical conclusion. The flaws of a broad finality definition are

1985))). Like the *AMF* court, the district court here also cited *Moses Cone* for its "presumption in favor of arbitration." *Id.* at *7. However, the district court's paraphrasing here is potentially misleading. The court appears to have drawn on the following: "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses Cone*, 460 U.S. at 24. This passage concerns the scope of an arbitration agreement, not its existence. *See supra* note 239.

³⁵⁰ *Bakoss*, 707 F.3d 140, 142 (2d Cir. 2013).

³⁵¹ *Id.* at 143.

³⁵² *Id.* (emphasis added); *McDonnell Douglas*, 858 F.2d 825, 830 (2d Cir. 1988).

perhaps most striking in the Ninth and Fourth Circuits' attempts to apply that definition literally. If arbitration is nothing more than third-party settlement, and if settlement needn't be certain, "arbitration" becomes so hollow as to undermine the very purposes of the FAA.³⁵³ Despite their efforts to avoid it, the courts' decisions point collectively towards a definition of arbitration consistent with its common-law understanding.

At the same time, regardless of the courts' view of nonbinding arbitration, the logical and practical shortcomings of a finality approach remain.³⁵⁴ Settlement alone is insufficient. A binding award alone is equally insufficient. As other circuits have noted, arbitration, by definition, must also demand something of the process leading to the award.

C. *Essence-of-Classical-Arbitration Definitions*

Three circuits have adopted some version of an "essence-of-classical-arbitration" definition since *AMF*³⁵⁵: the First Circuit,³⁵⁶ the Sixth Circuit,³⁵⁷ and the Eleventh Circuit.³⁵⁸ These decisions adopt different strategies for applying the essence of classical arbitration, but they generally emphasize *AMF*'s implicit reasoning that arbitration functions as a procedurally adequate alternative to trial. Together, the decisions point towards requisite qualities — beyond simply a binding award — characteristic of true arbitration. These qualities in turn trace the outline of the common-law definition of arbitration that most courts continue to avoid.

³⁵³ See *supra* notes 304–05, 318–19 and accompanying text.

³⁵⁴ See *supra* Part III.A.1.

³⁵⁵ An additional circuit, the Seventh, has declined the opportunity to define arbitration, instead noting that a court could enforce the parties' agreement regardless of whether it fell under the FAA. See *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 799 (7th Cir. 2005) ("The district court assumed that it may ignore any form of alternative dispute resolution other than 'arbitration.' Why would that be so? Many contracts have venue or forum-selection clauses. These do not call for 'arbitration' but are routinely enforced . . ."); *supra* note 211. For a comprehensive discussion of the scope of arbitration law and the enforcement of alternative ADR arrangements, see generally Stipanowich, *supra* note 181.

³⁵⁶ *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1 (1st Cir. 2004).

³⁵⁷ *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684 (6th Cir. 2012).

³⁵⁸ *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235 (11th Cir. 2008).

1. The First Circuit (2004)

In *Fit Tech, Inc. v. Bally Total Fitness*, the buyers agreed to purchase the sellers' fitness centers.³⁵⁹ The purchase agreement calculated the purchase price in relation to the centers' estimated corporate earnings, subject to adjustment based on business performance after the transfer of ownership.³⁶⁰ If the sellers disputed the earnings estimates, they could file a notice of protest, and the parties would endeavor to reach an agreement.³⁶¹ If the parties could not reach agreement, they would turn the dispute over to an accounting firm, which would review the evidence, conduct an audit if necessary, and issue a "final and binding" figure.³⁶²

Several disputes arose in the course of the parties' dealings, eventually leading the sellers to file claims against the buyers. Specifically, the sellers alleged that the buyers had improperly calculated corporate earnings and improperly managed the new business in order to reduce the final purchase price.³⁶³ The district court split these claims into two categories, sending accounting-related disputes to the "accountant remedy," and reserving the business-management claims for itself.³⁶⁴ The buyers filed an interlocutory appeal under the FAA, claiming the parties' agreement provided for arbitration of the full range of claims.³⁶⁵

The First Circuit considered it necessary, as a threshold matter, to determine whether the accountant remedy constituted arbitration. According to the court, the question of defining arbitration was reducible to "how closely the specified procedure resembles classical arbitration and whether treating the procedure as arbitration serves the intuited purposes of Congress."³⁶⁶ The court first noted that arbitration likely must be binding.³⁶⁷ As the agreement here provided

³⁵⁹ *Fit Tech*, 374 F.3d at 2-3.

³⁶⁰ *Id.* at 3.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at 4.

³⁶⁴ *Id.* at 4-6.

³⁶⁵ *Id.* at 5.

³⁶⁶ *Id.* at 7.

³⁶⁷ *Id.* (finding that "other circuits (defensibly, in our view) have declined to treat an agreement for non-binding arbitration as 'arbitration' within the meaning of the [FAA]," and citing *Dluhos* and *Harrison*). Again, note that *Harrison* expressly stated that it was *not* reaching such a conclusion, but its reasoning naturally leads to no other result. See *supra* notes 275-77 and accompanying text.

for a “final and binding” disposition, that requirement was satisfied.³⁶⁸ Second, the court looked to the “other common incidents of arbitration.”³⁶⁹ It noted specifically that the parties’ agreement called for “an independent adjudicator, substantive standards . . . , and an opportunity for each side to present its case.”³⁷⁰ These it considered sufficient reasons to treat the accountant remedy as true arbitration.³⁷¹

Although the court offered a relatively comprehensive definition of arbitration, the courts avoidance of definitions was manifest even here. Although the court did not identify them as such, its “incidents of arbitration” were clearly procedural features ensuring a neutral disposition on the merits. They provided some means for ensuring the adequacy of the process, which the court understood in at least some respect as an alternative to trial.³⁷² But the court did not state this. Indeed, the court did not appear to select these particular attributes for any reason other than their appearance in the disputed agreement before the court. As a result, the decision offered guidance only in cases presenting comparable agreements and parallel facts. It was only an ad hoc hint at a more comprehensive definition of arbitration.

2. The Eleventh Circuit (2008)

The limitations of *Fit Tech* were echoed in *Advanced Bodycare Solutions, LLC v. Thione International, Inc.* There, the Eleventh Circuit considered a licensing agreement granting a distributor exclusive rights to market the manufacturer’s nutritional products.³⁷³ The

³⁶⁸ *Fit Tech*, 374 F.3d at 3, 7.

³⁶⁹ *Id.* at 7.

³⁷⁰ *Id.* The court cited *Harrison* and *AMF*, amongst others, for these “common incidents of arbitration.” However, *Harrison* did not list or insist on these procedural characteristics, and *AMF* specifically described these kinds of characteristics as “not essential elements of arbitration.” *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985) (emphasis added). To the extent *Fit Tech* is consistent with *Harrison* and *AMF*, it is by virtue of those cases’ implicit understanding that arbitration — notwithstanding the courts’ explicit statements to the contrary — is necessarily binding and neutral. See *supra* notes 241–45, 277, and accompanying text.

³⁷¹ *Fit Tech*, 374 F.3d at 7 (“To us, this is arbitration in everything but name.”).

³⁷² The court noted that the principal argument against treating the agreement as an arbitration agreement was that it called for arbitration of only a select subset of the parties’ potential disputes. As a result, “a reference [to arbitration] does not fully spare the court’s resources.” *Id.* As this is common — and simply a reflection of the parties’ will — the court accepted the accountant remedy as arbitration. *Id.* The court then considered the separate question of the business management claims’ arbitrability. On this basis, it affirmed the district court’s decision. *Id.* at 12.

³⁷³ *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1236 (11th Cir. 2008).

agreement contained a dispute-resolution process that expressly attempted to avoid “resort to litigation.”³⁷⁴ In the event of a dispute, the parties would first “attempt in good faith to negotiate.”³⁷⁵ If that failed to produce a resolution, the parties then had the option of “non-binding arbitration or mediation” before an independent third party, to be held in Atlanta, with each party bearing its own expenses.³⁷⁶ Finally, if that too failed, either party had the power to sue.³⁷⁷

After receiving a shipment of products in 2004, the distributor notified the manufacturer of apparent defects.³⁷⁸ The manufacturer sent replacements, but fewer than necessary to fully replace the allegedly defective batch.³⁷⁹ The distributor then sued for breach of contract.³⁸⁰ The manufacturer responded with a motion to stay under section 3 of the FAA, citing the distributor’s failure to first pursue nonbinding arbitration or mediation.³⁸¹ The district court denied the motion, and the manufacturer filed an interlocutory appeal under section 16.³⁸²

The Eleventh Circuit relied heavily on the *AMF* line of cases. It noted that certain decisions had emphasized the finality of arbitration, while others had emphasized the essence of classical arbitration.³⁸³ The court also noted that these approaches were reconcilable if one simply treated a final decision as an element of classical arbitration.³⁸⁴ The court then went on to define the “essence” of arbitration for itself. It stated that arbitration requires some balance of (1) an independent adjudicator, (2) substantive legal standards, (3) evidence and argument from each party, and (4) a decision purporting to resolve the rights and duties of each party.³⁸⁵

³⁷⁴ *Id.* at 1237.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 1236-37.

³⁷⁹ *Id.* at 1237.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 1237-38.

³⁸² *Id.* at 1236-38.

³⁸³ *Id.* at 1239.

³⁸⁴ *Id.* (“These differing formulations do not constitute a real disagreement, because submitting a dispute to a third party for a binding decision is quintessential “classic arbitration.”). Like *Fit Tech*, the court elected a reading of the *AMF*-descended cases that rendered them consistent in calling for binding resolution. As discussed, this is the logically necessary outcome, but one that other circuits have avoided stating outright. See *supra* notes 274–77 and accompanying text.

³⁸⁵ *Advanced Bodycare*, 524 F.3d at 1239.

Here, the Eleventh Circuit essentially restated the three essence-of-classical-arbitration requirements from *Fit Tech* and the broad finality requirement from *AMF*. It then found this sufficient to determine that the dispute-resolution mechanism did not constitute arbitration.³⁸⁶ The licensing agreement allowed for either mediation or nonbinding arbitration. According to the court, mediation failed to satisfy the definition of arbitration because it did not ensure a decision “declaring the rights and duties of the parties,” but simply offered settlement based on mutual consent.³⁸⁷ As a result, the broader licensing agreement similarly failed to ensure a final decision, as it made mediation an option.³⁸⁸

Like *Fit Tech*, however, this provided no universal definition or rule. It simply restated the features the *Fit Tech* court found relevant from the accountant remedy provided in the *Fit Tech* purchase agreement. The court here offered nothing about the sufficiency or relative importance of these characteristics or — importantly — the ends to which they are applied.³⁸⁹ Furthermore, the court returned to the broad finality-based approach from *AMF*, which did not require that arbitration be binding. In this respect, *Advanced Bodycare* was even broader than *Fit Tech*, as the Eleventh Circuit excised *Fit Tech*’s statement that arbitration includes a binding award even as it adopted the remainder of *Fit Tech*’s definition.³⁹⁰ The Eleventh Circuit was able to do so because after determining that mediation was not arbitration, it found it unnecessary to analyze nonbinding arbitration as well.³⁹¹ *Fit*

³⁸⁶ *Id.* (“Although we acknowledge that there are few clear rules in delineating the bounds of FAA arbitration, we believe there is one that controls this case. The FAA clearly presumes that arbitration will result in an ‘award’ declaring the rights and duties of the parties.”). Note that this aspect of the Eleventh Circuit’s definition, as in *AMF*, rests not on the nature of arbitration, but on the language of the FAA.

³⁸⁷ *Id.* at 1239-40.

³⁸⁸ *Id.*

³⁸⁹ *Advanced Bodycare*, 524 F.3d at 1239 (“The presence or absence of any one of these circumstances will not always be determinative, and parties have great flexibility under the FAA to select pre-packaged dispute resolution procedures, or to craft their own.”).

³⁹⁰ *See supra* notes 367–71.

³⁹¹ *Advanced Bodycare*, 524 F.3d at 1240-41 (“Because we decide the case on this basis, we reserve for another day whether *non-binding* arbitration is within the scope of the FAA.”). On the other hand, the court also offered a purposivist argument against enforcing mediation under the FAA, and this would seem similarly applicable to a later case dealing with nonbinding arbitration. *See id.* at 1239-40 (“Unlike submitting a dispute to a private adjudicator, which the FAA contemplates, compelling a party to submit to settlement talks it does not wish to enter and which cannot resolve the dispute of their own force may well *increase* the time and treasure

Tech's ad hoc definition of arbitration therefore survived only insofar as necessary to provide a new definition here.

3. The Sixth Circuit (2012)

In *Evanston Insurance Co. v. Cogswell Properties, LLC*, the Sixth Circuit considered an insurance agreement covering a large commercial property. The agreement provided a mechanism for settling disputes regarding property values and loss estimates.³⁹² Each party would select a “competent and impartial appraiser,” and the two appraisers would then jointly select an umpire.³⁹³ The appraisers would separately determine the value of the property and loss, and if they failed to agree, they would “submit their difference to the umpire.”³⁹⁴ Once at least two of the three reached agreement, that decision would be “binding.”³⁹⁵ At the same time, the insurer also “retain[ed the] right to deny the claim.”³⁹⁶

A fire broke out on the first day of the property’s insurance coverage, damaging a small portion of the building.³⁹⁷ The insurer and the property owner disagreed on the value of the damage, so they appointed appraisers and an umpire to resolve the dispute.³⁹⁸ When the appraisers failed to agree, the umpire conducted his own appraisal.³⁹⁹ The property owner’s appraiser then agreed with the umpire’s determination, concluding the process.⁴⁰⁰

The insurer sued in federal court to vacate the appraisal for bad faith and manifest mistake, and the district court granted the insurer’s motion for summary judgment.⁴⁰¹ The property owner moved for reconsideration on the grounds that the appraisal process constituted arbitration, and that the district court improperly applied state law rather than the FAA when considering vacatur.⁴⁰² The district court

spent in litigation.”); *cf. supra* notes 161–72 and accompanying text (discussing the weaknesses of defining arbitration as any process that hastens dispute resolution).

³⁹² *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 686 (6th Cir. 2012).

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 687.

³⁹⁸ *Id.* at 688.

³⁹⁹ *Id.* at 688–89.

⁴⁰⁰ *Id.* at 689.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 690.

denied this motion, and after a new appraisal, the property owner appealed.⁴⁰³

In addressing the definition of arbitration, the Sixth Circuit referred to several of the *AMF*-derived cases. It cited *Salt Lake Tribune* for the proposition that a mechanism's characterization as arbitration depends on its resemblance to "classic arbitration."⁴⁰⁴ It cited *Fit Tech* for its "common incidents of classic arbitration."⁴⁰⁵ And it cited *Harrison* for the requirement that arbitration conclude with an award.⁴⁰⁶ Uniquely, though, the Sixth Circuit then summarized these cases by citing *Black's Law Dictionary* for an ostensibly complete and universal definition of arbitration.⁴⁰⁷ This familiar definition provides that arbitration is a consensual, binding, and neutral process.⁴⁰⁸

Analyzing the facts before it in light of the *Black's* definition, the Sixth Circuit found the agreement incapable of enforcement under the FAA. The dispute-resolution mechanism was not "binding" because the insurer retained the unilateral right to deny a claim even after agreement to the umpire's appraisal.⁴⁰⁹ Nor was the mechanism "neutral," as the insurance policy "does not suggest that a hearing-type appraisal process is required."⁴¹⁰ As a result, the policy "does not provide for a final and binding remedy by a neutral third party."⁴¹¹

4. Essence-of-Classical-Arbitration Definitions Summarized

In the branch of *AMF*-derived cases that considers the essence of classical arbitration, a fuller outline of the common-law definition appears. Collectively, courts trace the boundaries of a process that is consensual, binding, and characterized by certain procedural features rendering it an adequately neutral alternative to trial. Yet if post-*AMF*

⁴⁰³ *Id.* at 690-91.

⁴⁰⁴ *Id.* at 693.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* ("Black's Law Dictionary defines arbitration as 'a method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding. — Also termed (redundantly) binding arbitration.'").

⁴⁰⁸ See *supra* notes 48–52 and accompanying text.

⁴⁰⁹ *Evanston*, 683 F.3d at 693.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* at 693-94. The court went on to note that the result would be the same under state law, as state law would recognize this dispute-resolution mechanism as an appraisal, which state law treats as distinct from arbitration. *Id.* at 694-96. This logic would seem equally applicable to federal law under *Omaha Water*. See *supra* notes 219–23 and accompanying text.

courts are inadvertently sketching a picture of common-law arbitration, they are deliberately sketching in sand. The definitions that arise are both variable and case-specific. Courts continue to avoid stating outright and in universal terms the definition they claim to seek. This is particularly conspicuous here, as the “essence-of-classical-arbitration” formulation implies that arbitration has long carried some constant kernel of meaning, independent of the facts in each case.

The binding nature of arbitration arises in *AMF* and in *Harrison*, but only implicitly, to the extent necessary to resolve the dispute. Arbitration becomes openly and necessarily binding in *Salt Lake Tribune*, where the case turned on that question. But this characteristic later falls away in *Advanced Bodycare*, where the court disposed of the case on other grounds.

The neutral nature of arbitration arises at least implicitly in *AMF*, and then more openly in *Fit Tech* and *Advanced Bodycare*. However, the *Fit Tech* features are limited to those that existed in the agreement before that court in that case. *Advanced Bodycare* reiterates them, but with no explanation for their inclusion, their sufficiency, or their relative importance. With no universal principles or goals underpinning the *Fit Tech* features, the court announces a balancing test with no fulcrum. Such a definition of arbitration offers later courts no guidance at all, but simply restates a kind of balance of equities in newly precise terms. Only *Evanston* takes the final step of adopting a definition founded on universal principles external to the case at bar — a definition at once logically complete and true to *AMF*'s initial holding that arbitration is defined by its essential qualities.

D. Towards Definitional Engagement

A peculiar result of the post-*AMF* courts' ad hoc approach to defining arbitration is that almost none of the cases — only *Wolsey* in the Ninth Circuit and *Bankers* in the Fourth⁴¹² — would have come out differently under a more robust definition of arbitration as consensual, binding, and neutral. The results are almost all “correct” under a thorough common-law definition, whatever branch of *AMF* each court followed, and whatever reasoning it applied to reach its conclusions. But this is not to say that the definition of arbitration is an irrelevant consideration. Rather, it is to say that the courts, acting on the idea of arbitration as a term without clear meaning, have made it so.

⁴¹² Both courts would have lacked jurisdiction to hear an interlocutory appeal. See 9 U.S.C. § 16 (2012).

The *AMF* cases offer a way out of the problem they create, if only courts engage seriously in their purported search for arbitration's essence. To say that arbitration demands finality alone is manifestly incomplete. To say that arbitration is defined as classical arbitration is simply to acknowledge that the term retains its original common-law meaning, which the FAA has done nothing to displace. This definition is hiding in plain sight. The *AMF* cases collectively trace the definition, yet they refuse to state it in clear, universal terms. As a result, they render it powerless — a definition so shapeless and shifting as to be inapplicable beyond a single set of facts.

The Sixth Circuit, uniquely, embraces an understanding of arbitration founded on procedural qualities fully external to the case before the court. The means of vindicating these qualities are open to interpretation. A robust definition does not purport to resolve every definitional dispute conclusively, but leaves room for differing doctrines and case-specific results. However, a robust definition has the advantage of offering all parties a common foundation on which to build their arguments. Perhaps more importantly, it identifies clearly the ends that arbitral procedure serves. For example, arbitration requires “an opportunity for each side to present its case” not because it has traditionally done so,⁴¹³ but because arbitration is a necessarily neutral process for resolving a case on its merits. This then allows courts to engage in a single, coherent conversation regarding the discrete procedural features necessary to ensure that arbitration remains worthy of its name, and not simply a contractual magic word.⁴¹⁴ Without such a definition, litigants challenging the FAA's application are limited to fighting on the shrinking field of state-law contract defenses. With federal-law defenses limited to the back-end challenges of arbitral awards, this risks rendering the FAA a conclusive front-end presumption imposing a purported arbitration simply on a contract's utterance of it.

IV. CONSEQUENCES OF A RENEWED COMMON-LAW DEFINITION

A renewed common-law definition of arbitration is only a starting point. It is a means of framing courts' future enquiries into the

⁴¹³ See *supra* Part III.C.1.

⁴¹⁴ See *supra* note 243. Given that *AMF* found “magic words” unnecessary to create arbitration, it would be strange if that decision came to stand for the idea that “magic words” were sufficient to create arbitration. *AMF* rested on the idea that the procedural incidents define the process, regardless of nomenclature. Surely this principle should hold true whether the procedural incidents qualify as arbitration or fall short of it.

procedural features required of true arbitration, which may vary based on the nature of the dispute, the disputants, and the purported agreement to arbitrate. Identifying and defending discrete procedural features exceeds the scope of this Note.⁴¹⁵ Nonetheless, given the minimal impact of a renewed common-law definition on the outcomes of the *AMF* cases, it bears mentioning what consequences such a definition might have elsewhere.

A. *Applying the Definition*

It becomes clear how a renewed definition would play out if one considers the contract defense most often used in lieu of a definitional analysis. This is the defense of unconscionability. Rather than evaluate the threshold question of FAA applicability, courts routinely presume applicability, then use the general contract defense of unconscionability to invalidate the agreement.

In *Hooters of America, Inc. v. Phillips*,⁴¹⁶ the Hooters restaurant chain sought to compel arbitration of a worker's Title VII claims stemming from an alleged instance of workplace sexual harassment.⁴¹⁷ In 1994, Hooters had drafted an arbitration agreement covering all "employment-related disputes," and declaring that Hooters would later promulgate specific arbitration rules "from time to time."⁴¹⁸ The company then obtained its workers' signatures by conditioning "raises, transfers, and promotions" on accession to the agreement.⁴¹⁹

In 1996, Hooters issued a set of arbitration rules governing employment-related disputes.⁴²⁰ These rules required workers — but not the company — to provide notice of the nature of their claims prior to arbitration.⁴²¹ They required workers — but not the company — to provide a list of fact witnesses and "the facts known to each."⁴²² The arbitration rules further provided that one arbitrator would be

⁴¹⁵ For a discussion of arbitration that goes into some detail regarding its necessary procedural features, see generally Sturges, *supra* note 241.

⁴¹⁶ 173 F.3d 933 (4th Cir. 1999).

⁴¹⁷ *Id.* at 935.

⁴¹⁸ *Id.* at 935-36.

⁴¹⁹ *Id.* The Fourth Circuit does not appear to have objected to the manner in which Hooters obtained "consent" to this agreement. This is unsurprising. Although the most intuitive argument against adhesive arbitration agreements might be their lack of consent, modern courts embrace the legal fiction that submission to unavoidable terms is an act of consent.

⁴²⁰ *Id.* at 938.

⁴²¹ *Id.*

⁴²² *Id.*

selected by each side, with the third jointly selected from a list provided exclusively by Hooters — a list that could include Hooters managers themselves.⁴²³ Once arbitration began, Hooters alone had the power to add new claims to the arbitration.⁴²⁴ Hooters alone had the power to move for summary judgment or dismissal.⁴²⁵ And Hooters alone had the power to record the proceedings.⁴²⁶ The arbitration rules also granted the company the exclusive power to seek vacatur or modification of the arbitral award in court, as well as the unilateral authority to alter its own arbitration rules at any moment before or during the process.⁴²⁷

The Fourth Circuit had no difficulty finding the Hooters arbitration rules unjust. Indeed, the court went so far as to twice describe the proposed rules as falling short of arbitration's fundamental nature as "a system whereby disputes are fairly resolved by an impartial third party."⁴²⁸ According to the court, the Hooters rules "creat[ed] a sham system unworthy even of the name of arbitration."⁴²⁹ The company "so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word."⁴³⁰ Because the 1994 arbitration agreement had vested Hooters with the power to issue specific arbitration rules, its failure to do so in good faith constituted a breach of its own agreement.⁴³¹

Oddly, though, the Fourth Circuit found that it was only able to rule in this case as a result of the initial arbitration agreement's implicit promise to promulgate arbitration rules in good faith. According to the court, the normal means of settling disputes such as this would be by reference to arbitration. The arbitrators — not a judge — would determine if their power was proper.⁴³² As the court

⁴²³ *Id.* at 938-39.

⁴²⁴ *Id.* at 939.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 940.

⁴²⁹ *Id.*

⁴³⁰ *Id.* at 941.

⁴³¹ *Id.* at 940 ("By agreeing to settle disputes in arbitration, Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck. Thus we conclude that the Hooters rules also violate the contractual obligation of good faith.").

⁴³² *Id.* at 941 ("Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance. Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for

reasoned, “[i]n the case before us, we only reach the content of the arbitration rules because their promulgation was the duty of one party under the contract. The material breach of this duty warranting rescission is an issue of substantive arbitrability and thus is reviewable before arbitration.”⁴³³

Given the courts’ statements that the Hooters rules effectively removed the proposed process from the category of arbitration, it is unclear why the court’s view of its power should be limited in this fashion — except as an example of the *Hooters* court’s own act of definitional avoidance. If the Hooters arbitration rules were contained in the initial 1994 arbitration agreement and disclosed to Phillips, they would be rendered no less one-sided by her nominal awareness of them. The process would be no less “skewed,” and Phillips no less “denied arbitration in any meaningful sense of the word.”⁴³⁴ Yet the Fourth Circuit would evidently feel compelled by the FAA to both to ignore the threshold definitional question and to submit this “sham” arbitration to an arbitrator for evaluation of its fairness.⁴³⁵

Here, a renewed common-law definition of arbitration yields contrary results. If, as the *Hooters* court itself acknowledged, arbitration is a process characterized by neutral dispute resolution, the existence of such a process is a necessary precursor to the questions of substantive arbitrability reserved to the court alone.⁴³⁶ If the process fails to satisfy the definition of arbitration, the FAA is inapplicable,⁴³⁷ but the law of contracts remains. As with any other agreement, the parties must then argue for or against specific performance based on the normal gamut of state-law contract defenses — and without the arbitration-specific doctrine of separability.⁴³⁸

vacating an arbitral award.”); *see also id.* (“This case . . . is the exception that proves the rule: fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA.”).

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *See id.* at 940.

⁴³⁶ One might describe the existence of an arbitration agreement as a question of substantive arbitrability, but this risks conflating two related questions to which two different legal standards apply. *See supra* note 349.

⁴³⁷ *See Drahozal, supra* note 31, at 172-73 (arguing that the definition of arbitration sets an “outer limit” on the power of the FAA, with the lack of a “neutral decision maker” removing the *Hooters* arrangement from the category of arbitration).

⁴³⁸ The doctrine of separability treats an arbitration clause as distinct from the larger contract containing it, with the result that defenses to arbitration must be specific to the arbitration clause rather than generally applicable to the container contract. *See supra* note 165.

Procedurally one-sided arbitration is common in adhesive consumer contracts as well. In *Ting v. AT&T*, for example, a federal district court refused as unconscionable an arbitration agreement imposed on subscribers of AT&T's residential long-distance service.⁴³⁹ The agreement eliminated class actions, imposed a secrecy provision on parties to arbitration, and required parties to share the substantial costs of arbitration services purchased from the American Arbitration Association ("AAA").⁴⁴⁰ As the district court found, the result was an agreement inconsistent with the goals of arbitration itself.⁴⁴¹ The true aim of the agreement was to frustrate dispute resolution by throwing up barriers to genuine claims. "Aware that the vast majority of service related disputes would be resolved informally, AT&T sought to shield itself from liability in the remaining disputes by imposing [its agreement]"⁴⁴²

On appeal, the Ninth Circuit largely affirmed the district court.⁴⁴³ The Ninth Circuit determined that the class-action ban,⁴⁴⁴ the fee-splitting provision,⁴⁴⁵ and the secrecy provision⁴⁴⁶ were all invalidated

⁴³⁹ *Ting v. AT&T*, 182 F. Supp. 2d 902, 906-07, 938-39 (N.D. Cal. 2002).

⁴⁴⁰ *Id.* at 939.

⁴⁴¹ *See id.* at 938 ("This lawsuit is not about arbitration. If all AT&T had done was to move customer disputes . . . from the courts to arbitration, its actions would likely have been sanctioned by the state and federal policies favoring arbitration." (emphasis added)).

⁴⁴² *Id.* at 938-39; *see also id.* ("It is not just that AT&T wants to litigate in the forum of its choice — arbitration; it is that AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable and must be enjoined.").

⁴⁴³ *Ting v. AT&T (Ting)*, 319 F.3d 1126, 1152 (9th Cir. 2003).

⁴⁴⁴ *Id.* at 1150 ("It is not only difficult to imagine AT&T bringing a class action against its own customers, but AT&T fails to allege that it has ever or would ever do so. Instead, it raises a number of alternative challenges to the district court's holding. However, because 'bilateral' is a requirement in all California arbitration agreements . . . , we affirm the district court's conclusion that the class-action ban violates California's unconscionability law.").

⁴⁴⁵ *Ting*, 319 F.3d at 1151 ("[P]arties that agree to arbitrate statutory claims still are entitled to basic procedural and remedial protections so that they can effectively realize their statutory rights. Among these protections is the assurance that an individual need not 'pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.'" (citing *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997))).

⁴⁴⁶ *Id.* at 1151-52 ("[I]f the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player. This is particularly harmful here, because the contract at issue affects seven million Californians. Thus, AT&T has placed itself in a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, AT&T accumulates a wealth of knowledge on how to negotiate the terms of its own

by California's law of unconscionability. In so ruling, the court noted that its reasoning was consistent with the FAA's prohibition on "singling out" arbitration agreements for disfavored treatment.⁴⁴⁷

Under a more robust definition of arbitration, this reconciliation of the FAA with contract defenses becomes unnecessary. Arbitration is a necessarily neutral process. As a result, an agreement that imposes secrecy in the interest of frustrating neutral dispute resolution is not an agreement to arbitrate.⁴⁴⁸ An agreement that imposes financial burdens on adjudication in the interest of discouraging potential claimants is not an agreement to arbitrate.⁴⁴⁹ There is no question that an agreement exists — the courts here raise no objection to consumers' fictive consent to an adhesive contract.⁴⁵⁰ However, the agreement is not one for arbitration, and the FAA cannot govern consumers' defenses to AT&T's demand for specific performance. Nor, again, can the doctrine of separability shield the dispute-resolution clause from defenses to the contract as a whole.

These considerations may also alter courts' judgment of whether to sever unconscionable terms to save an otherwise unenforceable dispute-resolution clause. If the parties have in fact agreed to arbitration, setting aside invalid language may well be the best means of honoring the parties' initial intent. But courts cannot take for granted that parties have agreed to arbitration simply because the contract invokes the word — least of all when the very factors rendering a provision unenforceable also demonstrate that the

unilaterally crafted contract. Further, the unavailability of arbitral decisions may prevent potential plaintiffs from obtaining the information needed to build a case of intentional misconduct or unlawful discrimination against AT&T.”).

⁴⁴⁷ *Id.* at 1151.

⁴⁴⁸ See, e.g., *Narayan v. Ritz-Carlton Dev. Co.*, 350 P.3d 995, 1006 (Haw. 2015) (“[W]here an arbitration clause contains severe limitations on discovery alongside a confidentiality provision, the plaintiff may be deprived of the ability to adequately discover material information about his or her claim.”). The Hawaii Supreme Court found the arbitration agreement in *Narayan* unconscionable, but it could just as well have found that the structural limits on neutral, merits-based adjudication disqualified the process as arbitration. The U.S. Supreme Court has since vacated judgment in *Narayan* and remanded with instructions to reconsider in light of *Imburgia*. See *Ritz-Carlton Dev. Co. v. Narayan*, No. 15-406, 2016 WL 100318 (U.S. Jan. 11, 2016); *supra* note 44. However, the Hawaii Supreme Court has other bases on which to reaffirm its judgment. See *Narayan*, 350 P.3d at 1002-03 (finding that the parties also failed to form an agreement). The common-law definition of arbitration may be one such basis.

⁴⁴⁹ See, e.g., *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 685-89 (Cal. 2000).

⁴⁵⁰ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011) (“[T]he times in which consumer contracts were anything other than adhesive are long past.”).

dispute-resolution mechanism was neither intended nor expected to produce a binding and neutral disposition.⁴⁵¹ The same may be true in cases where the party seeking to compel arbitration offers to modify the unenforceable term.⁴⁵² Nor could a delegation clause prevent courts from addressing these questions.⁴⁵³

⁴⁵¹ In California, this is a common dynamic in cases challenging agreements as unconscionable because of oppressive fee-shifting provisions. Such provisions are routinely severed, and arbitration enforced. *See, e.g.,* *Eakins v. Corinthian Colleges, Inc.*, No. E058330, 2015 WL 758286, at *10 (Cal. Ct. App. Feb. 23, 2015); *Sandoval v. Medway Plastics Corp.*, No. B252412, 2014 WL 7185045, at *7 (Cal. Ct. App. Dec. 17, 2014); *Serpa v. Cal. Sur. Investigations, Inc.*, 215 Cal. App. 4th 695, 710 (2013). But the fee-shifting provision might *itself* demonstrate that the reasonable understanding of the agreement is that it sought not to arrive at binding and neutral awards, but to frustrate or forestall them. A court then improperly alters the agreement if it severs the provision so as to provide for an arbitration that was never intended. *See supra* notes 187–88 and accompanying text; *cf. Armendariz*, 6 P.3d at 696 (“If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract . . . , then such severance and restriction are appropriate.”). An agreement structured to impair arbitration does not have arbitration as its central purpose. It must stand or fall on its own terms.

⁴⁵² For example, consider cases in which the party seeking to compel arbitration offers to modify its fee-shifting provision to avoid a claim of unconscionability. In adhesive contracts, this essentially means that the drafting party has delegated to itself the power to determine who has access to the dispute-resolution forum in the first instance: Plaintiffs who cannot afford unconscionable fees must either prevail upon the company to permit arbitration or prevail upon a court to invalidate all or part of the agreement. This is not characteristic of an agreement to resolve disputes in a consensual, binding, and neutral fashion. Nor is it consistent with adjudication generally. *Cf. Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 & n.18 (9th Cir. 2003) (invalidating as unconscionable an employer-controlled mechanism for waiving certain arbitration fees, and suggesting that such a mechanism might run afoul of California’s common-law definition of arbitration from *Cheng-Camindin*). This is an exculpatory mechanism more than an adjudicative one.

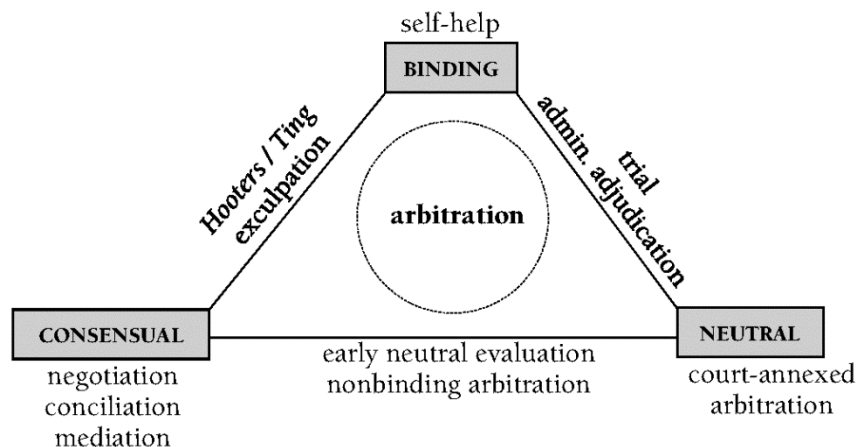
⁴⁵³ Delegation clauses are provisions expressly granting the arbitrators the power to resolve all questions related to the arbitration agreement itself, including the agreement’s validity and scope. The Supreme Court currently treats delegation clauses as independent arbitration agreements requiring independent defenses to enforcement. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68, 72-74 (2010). But this presents no difficulty in a definitional analysis, as the definition of arbitration applies equally — and independently — to both the arbitration agreement and its delegation clause. Indeed, whatever its special status under the FAA, a delegation clause does not ordinarily function as a separate agreement in practice. It is a provision within the larger arbitration agreement, governed by the procedures set forth in that agreement. If these procedures fall short of FAA arbitration, they remove the delegation clause from the FAA just as surely as they remove the larger agreement from the FAA. Furthermore, if the arbitration agreement is challenged as inconsistent with the definition of arbitration because it seeks to place obstacles in the way of binding and neutral dispute resolution, a delegation clause only compounds the

Of course, there must be limits to the procedural features inherent in arbitration. Breathing life into the threshold question of the FAA's applicability risks adding a new legal hurdle to enforcement of arbitration agreements. This could be inconsistent with the FAA's goal of preventing judicial interference with valid agreements to resolve disputes out of court. This could also be inconsistent with the Supreme Court's jurisprudence of deference to the power of the arbitrator.⁴⁵⁴

But the question then is whether simply invoking the word "arbitration" is, in all instances, sufficient for a contract to manifest the parties' objective intent to arbitrate. As *Hooters* and *Ting* demonstrate, it cannot be. Particularly in the context of adhesive consumer and employment contracts, the reference to arbitration is too often used for purposes inconsistent with the very meaning of arbitration. The management in *Hooters* did not intend to craft a consensual, binding, neutral dispute-resolution procedure, but a purely binding, nominally consensual one, disposing of all disputes to its favor. Similarly, the drafters of the *Ting* agreement did not seek a dispute-resolution procedure at all, but a means of frustrating dispute resolution before it could begin. In the words of section 2, they sought not to "settle by arbitration a controversy," but rather to settle by a purported arbitration agreement — to eliminate by the very existence of procedural hurdles — the controversies they might otherwise have faced.

problem by adding further obstacles. For example, a questionable fee-shifting provision is all the more inconsistent with arbitration when a delegation clause ensures that it cannot be challenged without first being satisfied. And the reasonable reading of the agreement — and of the delegation clause — is all the more consistent with exculpation rather than adjudication.

⁴⁵⁴ See, e.g., *Moses Cone*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").



Simply put, *Hooters* and *Ting* are cases not of arbitration, but of exculpation. They do not present situations in which the agreed-upon process is a means of settling disputes consistent with arbitration's common-law meaning. These are cases in which the process itself is used as a cudgel against neutral disposition, shielded by courts' refusal to ask the threshold question of the FAA's applicability.⁴⁵⁵ As long as such definitional avoidance persists, courts will continue to incentivize the drafters of self-styled arbitration agreements to abuse arbitration in this fashion. Ironically, this reading of the FAA risks creating the sort of apocryphal anti-arbitration prejudice the statute sought to destroy.

B. Common-Law Procedural Standards

Although identifying discrete procedural features exceeds the scope of this Note, the aforementioned cases reveal two directions in which a common-law definition of arbitration might develop. First, the *AMF* line of cases makes repeated mention of "reasonable commercial expectations" to evaluate whether an agreed-upon process is

⁴⁵⁵ See *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1145 (2013) ("Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself." (emphasis added) (quoting *Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 90 (2003), as modified on denial of reh'g (Jan. 8, 2004))). Also, unlike the effective-vindication doctrine recently abandoned by the Supreme Court, this logic is equally applicable whether claims arise under state or federal law, as it derives from the meaning of the FAA itself, rather than from the interplay of conflicting federal statutes. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2314-15 (2013) (Kagan, J., dissenting).

objectively recognizable as arbitration.⁴⁵⁶ Most notably, in *AMF* itself, the district court found that the reasonable expectation of the NAD's nominally voluntary process was its culmination in a binding award.⁴⁵⁷ This differs from a state-law doctrine of reasonable expectations impermissibly "singling out" arbitration, as it asks not what a party expects of arbitration in the abstract, but what a party expects of its agreement, and whether that qualifies it as an agreement to arbitrate. This is not a doctrine favoring equitable constructions or specific parties; it is simply a restatement of the general rule that the touchstone for contract interpretation is the reasonable third party familiar with the agreement's context. The outcome of this approach is manifest in *Ting*, where the reasonable expectation of the agreement is not dispute resolution by arbitration, but the avoidance of it.⁴⁵⁸

Second, as *Hooters* and *Ting* suggest, the common-law definition of arbitration can only be served by an analysis that accounts for the nature of the dispute, the disputants, and the agreement. Adhesive consumer and employment contracts differ from the "classical" arbitration agreement negotiated between merchants of relatively equal bargaining power.⁴⁵⁹ The consensual, binding, and above all neutral qualities of arbitration are undermined by an analysis that ignores such differences.⁴⁶⁰ For example, two merchants who bargain openly for a dispute-resolution agreement that imposes fee splitting are parties to a different agreement from the kind at issue in *Ting*. The expectation of such an agreement might indeed be the neutral and binding resolution of disputes, and so the same agreement might fairly be called an arbitration in the merchants' case.

⁴⁵⁶ See *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 461 (E.D.N.Y. 1985); *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 349 (3d Cir. 1997); *U.S. v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001).

⁴⁵⁷ *AMF*, 621 F. Supp. at 461.

⁴⁵⁸ The Supreme Court has already hinted at its willingness to apply this reasoning in another context. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) ("First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration — its informality — and makes the process slower, more costly, and *more likely to generate procedural morass than final judgment.*" (emphasis added)).

⁴⁵⁹ Put differently, if their goal is identifying the essence of classical arbitration, courts cannot apply that "essence" meaningfully without accounting for changes to the classical understanding of contracts from which it arose.

⁴⁶⁰ Cf. *supra* notes 183–84 and accompanying text (describing the context-specific enquiry necessary to determine whether a process satisfies the "hearing" required as a matter of procedural due process); *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) ("The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.").

As a result, a robust common-law definition of arbitration might obviate the need for certain legislative reforms aimed at modestly correcting or clarifying current interpretations of the FAA. Legislation in this vein — recently titled the Fair Arbitration Act⁴⁶¹ — has repeatedly failed in the U.S. Senate. This legislation would effectively append the AAA’s Consumer Due Process Protocols to the FAA.⁴⁶² These protocols would require that arbitrators be “competent” and “neutral,” the selection of arbitrators bilateral, and the proceedings open to recording.⁴⁶³ The legislation would ensure that parties can present evidence, cross-examine witnesses, and obtain information potentially impugning the neutrality of their adjudicator.⁴⁶⁴

None of this is necessary if courts simply treat arbitration as the same consensual, binding, neutral process of dispute resolution it traditionally has been. An agreement for dispute resolution by three biased, incompetent partisans with no evidence before them is not arbitration simply because a contract bestows that name upon it. It is unnecessary to amend the U.S. Code to make this so. Such an agreement is inconsistent with the common-law understanding of arbitration, and the agreement must be enforced or invalidated as any other agreement — outside the ambit of the FAA, and subject to state contract law.

The fact that the Fair Arbitration Act takes its cues from the protocols of professional arbitration associations exposes the illogic of the present situation. At least some agreements that contravene the AAA’s protocols fall outside the definitional boundaries of arbitration.

⁴⁶¹ Fair Arbitration Act, S. 1186, 112th Cong. (2011); Fair Arbitration Act, S. 1135, 110th Cong. (2007); Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000). This series of proposed bills was the product of Republican Senator Jeff Sessions of Alabama. The Sessions legislation should not be confused with the Arbitration Fairness Act, introduced by Democratic Senator Al Franken of Minnesota. See Arbitration Fairness Act, S. 878, 113th Cong. (2013). The Sessions legislation was far more limited, and consumer and labor organizations “staunchly opposed” the proposal as a front for “legitimiz[ing] mandatory arbitration.” Jean R. Sternlight, *Consumer Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 127, 181 n.158 (Edward Brunet et al. eds., 2006). The Franken legislation proposed far more sweeping changes and was generally supported by consumer and labor interests. It would have barred all predispute arbitration agreements concerning employment, consumer, antitrust, or civil rights matters, with the partial exception of predispute clauses in collective-bargaining agreements. S. 878 § 3(a).

⁴⁶² 153 Cong. Rec. 8,989 (2007) (statement of Sen. Jeff Sessions) (describing the Fair Arbitration Act of 2007 as “modeled after consumer and employee due process protocols of the American Arbitration Association, which have broad support”).

⁴⁶³ Fair Arbitration Act, S. 1186 § 2(a) (2011).

⁴⁶⁴ *Id.*

Yet it is private arbitration groups creating a kind of common law of their own to identify and police these boundaries, filling the void left by the federal courts' withdrawal from the scene.⁴⁶⁵ Whatever limits the FAA has imposed on courts' ability to answer threshold questions, surely nothing suggests it intended to delegate interpretation of the statute itself to arbitrators and the entities employing them.

CONCLUSION

The shifting doctrines governing arbitration reveal the extent to which the essential meaning of the process has remained constant over time — with two notable periods of tension. In the decades prior to the FAA's enactment, judicial inflexibility stunted the evolution of the common law. This was roundly criticized, and contributed to the perception that courts were reflexively hostile to arbitration. Now, overcorrecting for this perception, federal courts are re-entering a similar period of inflexibility. With state contract law increasingly excluded from the conversation over arbitration's necessary features, less and less stands in the way of arbitration's use as a magic word — and thus a far less defensible example of the sort of blanket jurisdictional ouster courts once feared.

The common-law definition of arbitration performs the FAA's newly necessary gatekeeping function. Federal courts appear at least tacitly to recognize this. They have made abortive efforts at applying a common-law definition, even as they seem cowed by the inevitable criticism that decisions refusing to enforce arbitration are motivated by emotional opposition. It is past time that this change. Whatever judicial jealousy or hostility to arbitration once existed has long since disappeared. Federal arbitration law must move away from definitions

⁴⁶⁵ See Press Release, Am. Arbitration Ass'n, The American Arbitration Association Calls for Reform of Debt Collection Arbitration (July 23, 2009), <https://www.nclc.org/images/pdf/arbitration/testimonysept09-exhibit3.pdf>, archived at <http://www.webcitation.org/6cx6j1jOf>, at 42 (“The [AAA] . . . today recommended in a House subcommittee hearing that the process surrounding consumer debt collection arbitration needs major reform and recommended a national policy committee to identify and research solutions. AAA said it will not administer any consumer debt collection programs until those solutions are determined.”); *id.* (“[I]t is evident to the AAA that ‘a series of important fairness and due process concerns must be addressed and resolved before we will proceed with the administration of any consumer debt collection programs.’ . . . [A]reas needing attention from the national policy committee include consumer notification, arbitrator neutrality, pleading and evidentiary standards, respondents’ defenses and counterclaims, and arbitrator training and recruitment.”). Of course, AAA policies only extend as far as AAA arbitrations.

animated by a historically, textually, and logically unjustifiable policy of deference, and on to arguments grounded in law. The proliferation of adhesive consumer and employment contracts makes it particularly urgent that courts re-establish definitional boundaries, lest arbitration devolve into an act of coercion unfounded in statute and unrecognizable in the history of the common law.