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The Arbitration-Litigation Paradox

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ARTICLES

The Arbitration-Litigation Paradox

*Pamela K. Bookman**

The Supreme Court's interpretation of the Federal Arbitration Act is universally touted as favoring arbitration. Its arbitration cases and decisions in other areas are also viewed as supporting the Court's more general hostility to litigation. These pro-arbitration and anti-litigation policies can be mutually reinforcing. Moreover, they appear to be mutually consistent, in part because the Court describes the essential features of arbitration as being "informal," "speedy," "efficient"—in short, the categorical opposite of litigation.

This Article contends that the Court's approach is not as "pro-arbitration" as it appears. On the contrary, the Court's pro-arbitration and anti-litigation values sometimes conflict. When they do, hostility to litigation wins. For example, consider an arbitration clause that explicitly authorizes de novo judicial review. Pro-arbitration policies favoring party autonomy would enforce the clause and allow judicial review, but anti-litigation norms would require the opposite. In that factual context and others, the Supreme Court's hostility to litigation has overridden its support for arbitration. Such results are particularly problematic for international commercial arbitration.

This is the arbitration-litigation paradox: because courts play an important role in supporting arbitration, some litigation is needed to support arbitration. Efforts to limit litigation in U.S. courts and enforce distinctions between litigation and arbitration may in turn limit courts' ability to offer this support. Moreover, the Court's hostility to litigation—in arbitration cases and in other, seemingly unrelated contexts—weakens U.S. courts' ability to prioritize

* Assistant Professor of Law, Temple University Beasley School of Law. This Article benefited greatly from feedback during presentations at Fordham Law School, the Fourth Annual Civil Procedure Workshop at Stanford Law School, the Brooklyn Colloquium on International Economic Law, the Mid-Atlantic Junior Scholars Conference at the University of Richmond, the Junior International Law Scholars Association Meeting at American University Washington College of Law, and the Temple Law School 10/10 Workshop. For helpful discussions, I thank Jeff Dunoff, Elizabeth Edmondson, Craig Green, Dave Hoffman, Rebecca Inger, Alyssa King, Tom Lee, Henry Monaghan, David Noll, Alan Rau, Anthea Roberts, Aaron Simowitz, Paul Stephan, Edna Sussman, Chris Whytock, and Nathan Yaffe. I am grateful to Chelsey Dawson, Aaron Lapniewski, Linda Levinson, and the Temple Law Library librarians for excellent research assistance, and to the editors of the *Vanderbilt Law Review* for their dedication to this Article. This project was generously supported by a summer grant from the Beasley School of Law.

arbitration values such as party autonomy and procedural flexibility. This Article advocates prioritizing such values over hostility to litigation. It considers several avenues for pursuing this approach and sets the stage for further research into the competitive relationship between arbitration and litigation.

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INTRODUCTION

It seems universally acknowledged that Supreme Court decisions demonstrate a “pro-arbitration” policy.¹ In 1983, the Court described the 1925 Federal Arbitration Act (“FAA”) as having embraced a “liberal federal policy favoring arbitration agreements.”² Since that

1. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1424 (2008); Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661, 1719–20, 1720 n.166 (2010); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1638 (2005).

2. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); see also, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (noting that the Federal

time, the Court has enforced arbitration clauses in an ever-growing variety of contexts.³ It has also read the FAA to require interpretations of arbitration clauses in a way that “favors arbitration.”⁴

Supporters justify the Court’s enthusiasm for arbitration as crucial to, *inter alia*, the success of domestic and international business; the provision of a fair, final forum “that actually works”; and the protection of contractual freedom.⁵ Critics condemn the Court’s affinity for arbitration for—again, *inter alia*—cutting off access to justice,⁶ eroding substantive law,⁷ and leading to enforcement of clauses that might otherwise be deemed unenforceable.⁸

Also since the 1980s, the Court has showcased a hostility to litigation in a number of procedural areas. Like the Court’s pro-arbitration stance, its anti-litigation decisions have been widely acknowledged.⁹ Such cases have addressed heightened pleading

Arbitration Act “embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts”).

3. See *infra* Section II.B.

4. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1423 (2019); see also *id.* at 1418 (noting that “the FAA provides the default rule for resolving certain ambiguities in arbitration agreements . . . in favor of arbitration”).

5. Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT’L L. 1189, 1195 (2003).

6. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2809 (2015); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/JT2U-VR4N>] (“[F]irst . . . in a three-part series examining how [arbitration] clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court.”).

7. See, e.g., J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052 (2015) (arguing that “the Court’s recent arbitration jurisprudence undermines the substantive law itself”); Chloe Smith, *Arbitration Hindering Development of Common Law – LCJ*, LAW SOC’Y GAZETTE (Mar. 21, 2016), <https://www.lawgazette.co.uk/law/arbitration-hindering-development-of-common-law—lcj/5054358.article> [<https://perma.cc/AD2V-9J57>] (warning that the widespread nature of arbitration clauses has been “a serious impediment to the development of common law”).

8. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 282 (2015); see also, e.g., Resnik, *supra* note 6, at 2809 (“The recent Supreme Court FAA case law has garnered a good deal of criticism for cutting off the production of law, for undermining the role of Article III courts, for limiting associational rights, and for constricting access to law by enforcing bans on the collective pursuit of claims.” (footnotes omitted)); Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT’L L. REV. 81 (2012) (observing that other countries do not apply pro-arbitration policies in consumer and employment contracts). *But cf.*, e.g., Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL’Y 549, 589 (2008) (defending such arbitration).

9. As a shorthand, I will refer to the Court’s attitudes as “pro-arbitration” and “anti-litigation,” although these are simplistic characterizations. Indeed, much of this Article is devoted to unpacking the “pro-arbitration” label and revealing its inaccuracy. The meaning of “anti-litigation” is widely discussed in the literature. See, e.g., Andrew M. Siegel, *The Court*

standards, efforts to spare defendants from the burdens of discovery, limits on class certification, and other methods of disparaging and diminishing “the power of courts to adjudicate run-of-the-mill civil disputes.”¹⁰

Despite their differences, both supporters and critics of the Court’s recent arbitration jurisprudence typically agree on three points. First, the paradigm case for enforcing arbitration clauses is when they appear in business-to-business contracts between sophisticated parties, especially in international commercial contracts.¹¹ The implied premise of critics’ argument is that while pro-arbitration policies may be appropriate for international commercial contracts, they are not appropriate in other contexts.¹² Second, it is commonly assumed that the Court’s pro-arbitration decisions are in fact favorable to arbitration, especially in the paradigm case.¹³ Finally, both camps tend to view the Court’s pro-arbitration and anti-litigation policies as mutually reinforcing.¹⁴ Supporters consider one of arbitration’s key virtues to be

Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence, 84 TEX. L. REV. 1097, 1097 (2006) (examining “the contours of the Rehnquist Court’s hostility toward litigation”); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1850–56 (2014) (arguing that amendments to the Federal Rules of Civil Procedure and the enforcement of arbitration clauses have contributed to a trend of “constricting access to courts, limiting discovery, and denying trials”).

10. Siegel, *supra* note 9, at 1107.

11. Thomas O. Main, *Arbitration, What Is It Good For?*, 18 NEV. L.J. 457, 474 (2018) (suggesting that arbitration may be beneficial only in circumstances where parties knowingly and willingly opt to forego their right to go to court to resolve an international dispute).

12. See, e.g., Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 327 (2011):

[W]hile the Court’s largely unmitigated pro-arbitration stance resonates with general principles supporting arbitration as an alternative to court litigation in international commerce, it is fundamentally out of line with the broad run of national laws limiting or regulating the use of arbitration in the contracts for consumer goods and services, or in individual employment contracts.

Of course, some scholars consider private dispute resolution questionable in almost all contexts. See Gilles Cuniberti, *Beyond Contract – The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L L.J. 417 (2009) (collecting arbitration critiques and arguing for arbitration as the default approach to resolution in international commercial disputes).

13. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996) (describing the Supreme Court’s approach to arbitration as “leading the revolutionary transition” from litigation to arbitration).

14. See, e.g., Siegel, *supra* note 9, at 1109; see also *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1428 (2019) (Kagan, J., dissenting) (describing the “majority’s belief that class arbitration ‘undermine[s] the central benefits of arbitration itself’ ” as “of a piece with the majority’s ideas about class litigation”).

allowing parties to avoid litigation;¹⁵ other developments that avoid litigation are likewise welcome.¹⁶ Critics, meanwhile, argue that the negative consequences of the Court's pro-arbitration decisions are also negative consequences for litigation and are further exacerbated when combined with the Court's anti-litigation decisions.

The consistency between the pro-arbitration and anti-litigation trends seems to make sense because arbitration and litigation are commonly understood to be not just alternatives but opposites.¹⁷ On one hand, arbitration could be understood simply as a private, contract-based dispute resolution system in which decisionmakers render binding adjudication of parties' claims.¹⁸ Litigation, on the other hand, refers to the process of resolving disputes in a public court system

15. See, e.g., Brief for United States Council for International Business as Amicus Curiae in Support of Respondent at 2, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (No. 06-989), 2007 WL 2707883; George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 1–2 (2012) (highlighting that “[p]articipants in international commercial arbitration have long recognized the need to maintain arbitration as an effective and therefore attractive alternative to litigation”); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 436 (2010) (noting that proponents argue “arbitration is a more efficient dispute resolution procedure than litigation”); WHITE & CASE, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 2 (2018), [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-\(2\).pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-(2).pdf) [<https://perma.cc/7FEL-V86A>] (noting that proponents perceive “avoiding specific legal systems/national courts” as one of “arbitration’s most valuable characteristic[s]”).

16. The website for the U.S. Chamber of Commerce Litigation Center, which describes itself as “the voice of business and free enterprise in the federal and state courts,” lists “protecting the enforceability of pre-dispute arbitration agreements, including those that waive the availability of class actions” as “[a] critical piece of the Litigation Center’s work.” *Arbitration*, U.S. CHAMBER LITIG. CTR., <https://www.chamberlitigation.com/arbitration> (last visited Feb. 18, 2019) [<https://perma.cc/2PZ2-D58Q>]; *What We Do*, U.S. CHAMBER LITIG. CTR., <https://www.chamberlitigation.com/what-we-do> (last visited Feb. 18, 2019) [<https://perma.cc/TNY2-FTVT>]. The Chamber also actively files amicus briefs urging courts to cabin forum shopping and prevent what it considers to be “abuse of the class action mechanism.” *Class Actions*, U.S. CHAMBER LITIG. CTR., <https://www.chamberlitigation.com/class-actions> (last visited Feb. 18, 2019) [<https://perma.cc/MJ9X-2E33>]; *Forum Shopping*, U.S. CHAMBER LITIG. CTR., <https://www.chamberlitigation.com/forum-shopping> (last visited Feb. 18, 2019) [<https://perma.cc/CVW2-GSL4>]. These are efforts to support what scholars have called the “anti-litigation” developments in the courts. See sources cited *supra* note 9. Of course, the Chamber is not opposed to litigation in all forms; the Litigation Center does initiate litigation in some circumstances. See, e.g., *Government Litigation*, U.S. CHAMBER LITIG. CTR., <https://www.chamberlitigation.com/government-overreach> (last visited Feb. 18, 2019) [<https://perma.cc/L63N-KPRS>] (describing the Litigation Center as a routine challenger as “both a party and an amicus” to “regulatory overreach by federal, state, and local government agencies”).

17. See, e.g., Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2994 (2015); Leslie, *supra* note 8, at 266; Imre S. Szalai, *Reconciling Fault Lines in Arbitration and Redefining Arbitration Through the Broader Lens of Procedure*, 18 NEV. L.J. 511 (2018).

18. David L. Noll, Response, *Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 477–78 (2018).

according to procedures and institutions established by the state.¹⁹ In theory, these alternatives could share some characteristics. Indeed, they are both binding forms of dispute resolution and in some ways have a lot in common.²⁰

But the Supreme Court has stated that the “essence” of arbitration includes “its speed and simplicity and inexpensiveness,”²¹ and the Court describes these traits as features that distinguish arbitration from litigation.²² The FAA must safeguard these “virtues,” the Court recently proclaimed, because arbitration would otherwise “wind up looking *like the litigation it was meant to displace*.”²³ This essentialist vision sees arbitration as a substitute for litigation that is defined by its procedural differences from litigation.

That premise, however, is incorrect. Moreover, anti-litigation and pro-arbitration values are not always aligned. Indeed, pro-arbitration values are not monolithic. And the Court’s FAA jurisprudence, while pro-arbitration in many respects, does not treat all arbitration values equally. This Article focuses on the paradigm case—international commercial arbitration—to reveal that the Court is not as pro-arbitration as it appears.

This is the arbitration-litigation paradox: while it is commonly assumed that pro-arbitration and anti-litigation values go hand-in-hand, supporting arbitration—particularly international commercial arbitration—in some ways requires valuing and supporting litigation.

19. *Litigation*, WEX, <https://www.law.cornell.edu/wex/litigation> (last visited Mar. 23, 2019) [<https://perma.cc/K6YS-3HWP>].

20. See generally DONALD EARL CHILDRESS, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, *TRANSNATIONAL LAW AND PRACTICE* 545–48 (2015) (describing the similarities and differences between litigation, negotiation, mediation, and arbitration).

21. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018); see also *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (reemphasizing *Epic*’s view of arbitration).

22. Some scholars also adopt the essentialist view. Compare, e.g., Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 393, 399 (2018), and Drahozal & Ware, *supra* note 15 (asserting an essentialist view), with Hiro N. Aragaki, *The Metaphysics of Arbitration: A Reply to Hensler and Khatam*, 18 NEV. L.J. 541, 559 (2018) (criticizing it). For examples of scholarship looking at the central characteristics of arbitration, see Jean R. Sternlight, “*Arbitration Schmarbitration*”: *Examining the Benefits and Frustrations of Defining the Process*, 18 NEV. L.J. 371, 374 (2018), which notes that arbitration is difficult to define, and Thomas J. Stipanowich, *Arbitration: The “New Litigation”*, 2010 U. ILL. L. REV. 1, 51, which argues that arbitration’s central defining feature is its flexibility.

23. *Epic Sys.*, 138 S. Ct. at 1623 (emphasis added). The Court recognizes that party autonomy ultimately governs arbitration clauses and “parties remain free to alter arbitration procedures to suit their tastes,” including choosing “to arbitrate on a classwide basis.” *Id.* But it insists that the “essential insight remains: courts may not allow a contract defense to reshape *traditional individualized arbitration* by mandating classwide arbitration procedures without the parties’ consent.” *Id.* (emphasis added); see also *Lamps Plus*, 139 S. Ct. at 1416 (reiterating the “fundamental” differences between litigation and arbitration and quoting *Epic*).

It may also require respecting the ways in which arbitration looks increasingly similar to litigation.²⁴ The Court's hostility to litigation and embrace of essentialist values can weaken courts' ability to support international commercial arbitration.

To be "arbitration-friendly," modern sources recommend that courts "supervise with a light touch but assist with a strong hand."²⁵ This means courts should enforce arbitration agreements, and when reviewing arbitration awards, they should "decline to set aside awards for error of law or fact, however gross"; "read awards generously"; and avoid finding procedural defects unless serious due process violations have "caused real prejudice."²⁶ An "arbitration-friendly" approach also involves "interven[ing] quickly in support of arbitration by issuing court orders enforcing tribunal decisions where judicial assistance is needed."²⁷

Decisions on whether and how to follow this advice can reflect three broad sets of arbitration values: essentialist values, private law values, and international business values.²⁸ Essentialist values prize arbitration for the "essential virtues" that supposedly differentiate it from litigation—that arbitration is speedy, simple, and inexpensive, for example. The Court also sometimes refers to these traits as "fundamental attributes of arbitration."²⁹ These values embody a hostility to litigation and an appreciation of the ways arbitration reflects the opposite of litigation's shortcomings.³⁰ Arbitration's private law values include respect for party autonomy and adaptability. International commercial arbitration also serves a third set of values:

24. Arbitrators may also face a reverse arbitration-litigation paradox when parties seek to make arbitration more like litigation. *See, e.g.,* *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 480–92 (Aug. 4, 2011), <https://www.italaw.com/sites/default/files/case-documents/ita0236.pdf> [<https://perma.cc/MNW8-94CD>] (evaluating the issue of mass claims in arbitration). Thank you to Jeff Dunoff for pointing out this reverse paradox, which is a topic for future research.

25. Michael Hwang, *Commercial Courts and International Arbitration—Competitors or Partners?*, 31 *ARB. INT'L* 193, 194 (2015).

26. *Id.*; *see also, e.g.,* Carbonneau, *supra* note 5, at 1194 ("The Western, developed-state (and commercially predominant) view is that, no matter its degree, judicial intervention, in matters of transborder or domestic arbitration, is antagonistic to the autonomy and functionality of arbitration.").

27. Hwang, *supra* note 25, at 194.

28. *See infra* notes 179–182 and accompanying text (discussing the complexity of defining what it means to be "pro-arbitration").

29. *Lamps Plus*, 139 S. Ct. at 1418; *Epic Sys.*, 138 S. Ct. at 1622; *AT&T Mobility LLC v. Conception*, 563 U.S. 333, 344 (2011).

30. *See* Siegel, *supra* note 9. For the historical development of this attitude, *see infra* Section I.B.

promoting international trade and business, including U.S. companies' ability to operate on a global scale.³¹

These values reflect three overlapping visions of the relationship between arbitration and litigation. One vision, consistent with essentialist values, is that arbitration is a private substitute for litigation. A second vision sees courts as a support network for arbitration, recognizing and enforcing arbitration agreements and awards and otherwise complementing ongoing arbitration—for example, by helping direct the collection of evidence or appointing arbitrators where parties cannot agree. Under a third view, arbitration and litigation are competitors in the market for dispute resolution services, where the “customers” are international business entities. These three visions are not mutually exclusive. This Article will focus on the interaction between the first two—substitution and support—leaving consideration of the competitive relationship between arbitration and litigation for ongoing work.³²

In the last fifteen years, the Supreme Court has had a hot arbitration docket, with a heavy focus on expanding arbitrability.³³ In many of these cases, the three sets of arbitration values have aligned.

But where essentialist values have conflicted with private law and international business values, the Court has prioritized the former over the latter pair. For example, a focus on private law values like autonomy and adaptability would permit parties to agree about the amount of judicial review over arbitration. But the Court has said that parties do not have the freedom to craft arbitration clauses that authorize de novo judicial review of arbitrators' decisions.³⁴ Likewise, a private-law-values approach would safeguard arbitrators' traditional control over arbitral procedure.³⁵ Instead, to thwart the possibility of

31. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1, 9 (1972) (“The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.”).

32. See Pamela K. Bookman, *The Adjudication Business*, YALE J. INT'L L. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3338152 [<https://perma.cc/LQ4R-VVWD>] [hereinafter Bookman, *Adjudication Business*].

33. The Court considered three arbitration cases during the 2018 Term: *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

34. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583–84 (2008).

35. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (“[P]rocedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”); George Bermann & Alan Scott Rau, *Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 PEPP. L. REV. 469, 470 (2016) (“American jurisprudence differs from other systems as to the conclusiveness of the arbitrator’s jurisdictional determinations.”).

class arbitration, the Court has overturned arbitrators' decisions³⁶ and required courts to disregard state law rules of contract interpretation.³⁷ Appreciation for courts' role supporting arbitration would protect U.S. courts' ability to enforce arbitral awards, but instead, doctrinal developments limiting access to U.S. courts can block enforcement proceedings.³⁸ In short, neither the Supreme Court's recent arbitration cases nor its decisions in other areas that impact arbitration suggest that the Court prioritizes supporting private law values over hostility to litigation in circumstances where the two may conflict. This practice has negative effects for international commercial arbitration.

When the Supreme Court began enforcing forum selection clauses, including arbitration clauses, in the 1970s,³⁹ the Court relied heavily on the contracts' international commercial context as justification. That is the original and arguably most legitimate context for supporting arbitration. It is therefore a natural testing ground for the effectiveness of a purportedly pro-arbitration policy. Of course, any of the arguments articulated here may apply equally in the domestic commercial arbitration context, but the possibility of arbitration is especially important where the parties are from different countries. Such circumstances increase the need for a neutral and predictable forum for potential disputes as well as the need for national courts' support.⁴⁰

This Article will focus on international commercial arbitration for two additional reasons. The fate of international commercial arbitration involves incredibly high stakes.⁴¹ A recent survey of leading international arbitration law firms revealed information about over one hundred active international commercial arbitration cases in which at least \$500 million was "in controversy," including fifty-eight cases in which claims totaled more than \$1 billion and nine with claims over

36. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671–72 (2010).

37. *See Lamps Plus*, 139 S. Ct. at 1415 (finding state law contract principles preempted by the FAA "to the extent [they] 'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA").

38. *See infra* Part III.

39. *See infra* Section I.B.

40. *See generally* W. Michael Reisman & Brian Richardson, *Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration*, in INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *ARBITRATION – THE NEXT FIFTY YEARS* 17 (Albert Jan van den Berg ed., 2012).

41. *See, e.g.*, ALEC STONE SWEET & FLORIAN GRISEL, *THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY* 1–4 (2017); Walter Mattli & Thomas Dietz, *Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction*, in INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENTENDING THEORIES AND EVIDENCE 1 (2014).

\$9 billion.⁴² In the decade between 2004 and 2014, modest accounts estimated that “the total number of arbitrations . . . nearly doubled.”⁴³

Furthermore, international commercial arbitration presents a fairly well-defined set of agreements between international businesses who contract at arm’s length.⁴⁴ Arbitration is not one coherent institution.⁴⁵ As David Noll points out, “[T]he term actually refers to several distinct systems, each with its own basis of authority, procedures, and external constraints.”⁴⁶ It is therefore useful to focus on an identifiable type of arbitration. For the most part, the mainstream opposition to arbitration—that the parties have not meaningfully agreed to arbitration or that the parties have deeply uneven bargaining power—is not applicable in international commercial arbitration.⁴⁷ This Article seeks to interrogate the Court’s approach to arbitration while bracketing those critiques. It also brackets international investment arbitration and state-to-state arbitration, which present different sets of issues.⁴⁸

This Article continues my previous work considering U.S. courts’ treatment of transnational litigation.⁴⁹ It contributes to several different lines of scholarship. It engages in conversations about

42. SWEET & GRISEL, *supra* note 41, at 3–4 (citing Michael D. Goldhaber, *Arbitration Scorecard 2013: Contract Disputes*, AM. LAW. (July 1, 2013, 12:00 AM), <https://www.law.com/americanlawyer/almID/1202607030865> [<https://perma.cc/X9LQ-UM2V>]).

43. CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* 25 (2014).

44. See Mattli & Dietz, *supra* note 41, at 1–2 (defining international commercial arbitration).

45. Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 122, 132 (2015) (criticizing the Supreme Court’s approach to arbitration as a “one-size-fits-all process” because it “ensures that virtually no ground exists to challenge an unfair arbitration clause”).

46. David L. Noll, *Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 478 (2018); see also, e.g., Hensler & Khatam, *supra* note 22; Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108 AM. J. INT’L L. 750, 751–54 (2014) (criticizing the Supreme Court for using interpretive tools from contract and commercial arbitration contexts in evaluating a case about investor-state arbitration under the Argentina-U.K. investment treaty).

47. Cf. Catherine A. Rogers, *The Arrival of the “Have-Nots” in International Arbitration*, 8 NEV. L.J. 341, 343 (2007) (“Unlike judges, arbitrators only earn money if they are appointed by parties. Because one-shot players are unlikely to re-appoint an arbitrator in the future, the argument goes, arbitrators have an incentive to favor repeat players in the hopes that a favorable award will translate into future appointments.”).

48. See, e.g., Hensler & Khatam, *supra* note 22 (discussing the differences between domestic, international commercial, and international investment arbitration); see also, e.g., Roberts & Trahanas, *supra* note 46, at 760 (criticizing the Supreme Court’s essentialist view of arbitration in an investment arbitration case and contrasting commercial and investment arbitration).

49. See Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AJIL UNBOUND 57 (2016) [hereinafter Bookman, *Doubling Down*]; Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015) [hereinafter Bookman, *Litigation Isolationism*]; Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016) [hereinafter Bookman, *Unsung Virtues*].

international commercial arbitration in the Supreme Court,⁵⁰ the relationship between national courts and international commercial arbitration,⁵¹ and rising barriers to access to U.S. courts.⁵² Drawing these areas together, the Article adds to conversations about the unintended ramifications of these developments on U.S. courts' arbitration policies.⁵³ It also contributes to scholarly debates about what arbitration is⁵⁴ and how to promote it.⁵⁵ At least one author has documented ways in which the Court's supposedly pro-arbitration decisions in fact undermine international commercial arbitration—for example, by “incorrectly claim[ing] that arbitration is inappropriate and undesirable in high-stakes cases.”⁵⁶ Another well-taken criticism of the effectiveness of the Court's efforts to support arbitration is that the Court's overenthusiasm for arbitration in unwarranted contexts gives

50. See, e.g., Aragaki, *supra* note 22; Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21; Stipanowich, *supra* note 12.

51. See, e.g., Margaret Moses, *Arbitration/Litigation Interface: The European Debate*, 35 NW. J. INT'L L. & BUS. 1, 17 (2014); Luca G. Radicati di Brozolo, *The Impact of National Law and Courts on International Commercial Arbitration: Mythology, Physiology, Pathology, Remedies and Trends*, 2011 PARIS INT'L ARB. J. 663; W. Michael Reisman & Heide Iravani, *Arbitration and National Courts: Conflict and Cooperation: The Changing Relation of National Courts and International Arbitration*, 21 AM. REV. INT'L ARB. 5, 34 (2010); S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. DISP. RESOL. 1, 4.

52. See generally STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Bookman, *Litigation Isolationism*, *supra* note 49; Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015); David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41 (2014); Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501 (2016).

53. See Adam Raviv, *Too Darn Bad: How the Supreme Court's Class Arbitration Jurisprudence Has Undermined Arbitration*, 6 Y.B. ARB. & MEDIATION 220 (2014) (arguing that though recent cases *Concepcion* and *Italian Colors* ostensibly promoted arbitration, they may have undermined its adoption and utilization); Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344 (2016) (describing the impact of recent Supreme Court decisions on the enforcement of foreign judgments and arbitral awards).

54. Cf. Aragaki, *supra* note 22, at 542 (discussing the adaptation and evolution of arbitration); Hensler & Khatam, *supra* note 22, at 407 (stating that “arbitration looks a lot like litigation and adjudication in the United States”); Main, *supra* note 11, at 461 (“Arbitration is . . . not a competitor nor even an alternative to formal adjudication; rather it is a partner of formal adjudication.”); Sternlight, *supra* note 22; Szalai, *supra* note 17, at 524 (“[A]rbitration serves as a competitive, contrasting foil to the traditional court system.”).

55. See Raviv, *supra* note 53, at 221; *infra* notes 178–182 and accompanying text.

56. *Id.*; see also Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of Waiver*, 6 AM. REV. INT'L ARB. 223 (1995) (noting that the federal standard disfavoring “waiver” of the right to arbitrate is “pro-arbitration” insofar as it often sends litigants to arbitration, but not pro-arbitration insofar as the standard may discourage arbitration agreements in the first place).

arbitration in more legitimate contexts a bad name.⁵⁷ International commercial arbitration specialists often bemoan this stain on arbitration's reputation.⁵⁸ In that sense, as scholars have noted, the Supreme Court's approach to arbitration law writ large undermines what would otherwise be considered legitimate areas of arbitration, especially with respect to international commercial arbitration.⁵⁹

To date, however, scholarship has not identified or unpacked the contradiction inherent in the Supreme Court's arbitration policy: that it single-mindedly prioritizes certain arbitral values—namely the essentialist values that seek to maintain distinctions between arbitration and litigation—over other values like autonomy and adaptability.⁶⁰ The Court seems more dedicated to enforcing its view that litigation and arbitration are and must be opposites than it is to considering the (sometimes messy) realities of arbitration practice and balancing the different values that arbitration can embody. This, I argue, reflects the triumph of hostility to litigation over any particular enthusiasm for arbitration.

This Article makes four main points. First, the Court is not as uniformly favorable to arbitration—especially international commercial arbitration—as conventional wisdom makes it out to be,⁶¹ because its prioritization of essentialist values undermines private law and international business values that are vital to international commercial arbitration.

Second, the Court's essentialist thesis—that the essence of arbitration lies in characteristics that distinguish it from litigation—is faulty and disproven by the practical realities of international

57. For a critique of the legitimacy of enforcing arbitration clauses in contracts of adhesion, see, for example, David Horton, *Arbitration As Delegation*, 86 N.Y.U. L. REV. 437, 455 (2011) (arguing that “Congress never intended the FAA to apply to adhesion contracts”). See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

58. See S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533, 543–52 (discussing the legitimacy crisis within international arbitration).

59. Diego P. Fernandez Arroyo, *The Legitimacy and Public Accountability of Global Litigation: The Particular Case of Transnational Arbitration*, in *THE TRANSFORMATION OF ENFORCEMENT: EUROPEAN ECONOMIC LAW IN A GLOBAL PERSPECTIVE* 355, 365 (Hans W. Micklitz & Andrea Wechsler eds., 2016) (describing the broad array of stakeholders interested in the “manner and reasons that arbitral decisions are taken”); Cuniberti, *supra* note 12, at 419; Raviv, *supra* note 53, at 221.

60. Cf. Raviv, *supra* note 53, at 221 (arguing that the Court's supposedly “pro-arbitration” decisions undermine arbitration by depicting it negatively).

61. See, e.g., *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir. 2006) (“[I]t is difficult to overstate the strong federal policy in favor of arbitration . . .”).

arbitration.⁶² Arbitration can have many characteristics traditionally associated with litigation. The essence of arbitration is not any particular procedural characteristic. Because it is “a creature of contract,” arbitration’s procedural specifics are left open to the parties and the arbitrators to determine.⁶³

Third, this Article exposes the harm to international commercial arbitration from the Court’s fealty to hostility to litigation and the essentialist thesis. The essentialist view yields not only wrong answers but also perverse approaches to arbitration law questions. For example, the question may arise whether a court may assist an arbitration tribunal in collecting evidence through discovery. The essentialist response would be a categorical “no”: discovery is an infamous defining feature of *litigation* (and in particular, U.S. litigation), so it should not be available in arbitration.⁶⁴ But this analysis is too simplistic. It does not consider the relevant statutory authority⁶⁵ nor does it even try to consider the normative question of what role courts should play in assisting arbitral tribunals with discovery or the question of what the parties to the arbitration agreement intended.⁶⁶

Finally, the Article contends that courts should understand the relationship between litigation and arbitration as complicated and threefold: they are substitutes, complements, and competitors of each other.⁶⁷ Understanding the relationship between litigation and arbitration in this way should enable courts and litigation to better support arbitration, balance competing arbitral values, and facilitate fruitful competition for international commercial dispute resolution. This Article focuses on the substitution and support models, leaving the competitive aspect of the relationship for future work.⁶⁸

62. In discussing this Article with me, a mediator referred to the idea that arbitration and litigation are opposites as “the narcissism of small differences.”

63. See *infra* notes 286–305 and accompanying text.

64. See, e.g., IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 34.1 (1994) (“Avoidance of the delay and expense associated with discovery is . . . one of the reasons parties choose to arbitrate.”). *But cf. id.* § 34.3.1 (“[A]n agreement to arbitrate is not necessarily a wholesale renunciation of the right to discovery.”).

65. See 9 U.S.C. § 7 (2012) (FAA); 28 U.S.C. § 1782 (2012) (permitting judges to order discovery to assist foreign tribunals).

66. See Kevin E. Davis et al., *Private Preference, Public Process: U.S. Discovery in Aid of Foreign and International Arbitration*, in THE LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION 233, 236 (Franco Ferrari ed., 2016); see also Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293, 3299 (2015) (differentiating between pretrial and post-judgment discovery).

67. See Aaron D. Simowitz, *Convergence and Foreign Judgments*, 92 S. CAL. L. REV. (forthcoming 2019) (manuscript at 118) (on file with author).

68. See Bookman, *Adjudication Business*, *supra* note 32; *infra* Section IV.C.

Part I sets forth the history of the 1925 Federal Arbitration Act and the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). Part II describes the Supreme Court’s hostility to litigation and enthusiasm for arbitration. It then demonstrates that in situations where arbitration’s private law and international business values potentially conflict with essentialist values and the Court’s hostility to litigation, hostility wins out. This understanding of arbitration is both mistaken and dangerous. Part III explores the effect of anti-litigation decisions—outside the arbitration context and especially in the area of transnational litigation—on courts’ ability to support international commercial arbitration. Part IV recommends prioritizing private law and international business values over essentialist ones, especially in international commercial arbitration cases, and recognizing the supportive and competitive relationship between litigation and arbitration. This Part considers how several contested issues would be resolved under the essentialist view and advocates instead resolving them under this more nuanced understanding. It also considers which institutional actors should implement these changes, finding that state and lower federal courts should be at the forefront of these efforts. The Part concludes by setting the stage for further research into the competitive relationship between arbitration and litigation.

I. “PRO-ARBITRATION” ORIGINS

The history of modern U.S. arbitration law began over a century ago when New York business representatives organized to drive the adoption of state, federal, and international laws that supported commercial arbitration.⁶⁹ Today, these laws establish an international arbitration system that relies on the support of courts.

Indeed, the foundation of public arbitration laws rests on national courts.⁷⁰ Historically, courts treated arbitration clauses as

69. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMM. ARBITRATION Reporters’ Memorandum (AM. LAW INST., Tentative Draft No. 1, 2010) (discussing the international, federal, and state laws that make up the “legal landscape of international commercial arbitration in the U.S.”); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 159 (1992).

70. See, e.g., Christopher A. Whytock, *Litigation, Arbitration, and the Transnational Shadow of the Law*, 18 DUKE J. COMP. & INT’L L. 449, 471 (2008):

Private enforcement may be possible on the basis of reputational sanctions, but only under particular circumstances which are not likely to exist except within relatively small and enduring communities. Therefore, . . . transnational arbitration generally

invalid agreements to “oust” courts of jurisdiction. Modern arbitration laws⁷¹ require courts to recognize arbitration agreements on “equal footing” with other kinds of contractual provisions.⁷² In addition to supporting arbitration at “the front end” by enforcing arbitration agreements, modern laws also require judicial support in the “middle” and at the “back end”⁷³—for example, by helping parties select arbitrators or assisting arbitral tribunals with discovery and by requiring recognition and enforcement of arbitration awards.⁷⁴

This Part examines the history of the FAA, the New York Convention, and the laws governing international commercial arbitration in the United States through the lens of the relationship between arbitration and litigation. It explains that one purpose of the FAA was to facilitate a private adjudication system for business disputes that was faster and fairer than what U.S. courts in the 1920s could provide. It shows that the New York Convention’s regime of international commercial arbitration, like its domestic counterpart, the FAA, was built on the foundation of judicial support for an institution that was vital to international business interests. That support was needed to enforce parties’ agreements and expectations.

A. Domestic Commercial Arbitration

The origin story of the FAA has been told many times.⁷⁵ The 1925 Act responded to the then-prevalent refusal of courts to specifically enforce arbitration agreements.⁷⁶ It instructed courts to put

continues to rely on domestic court enforcement, and to that extent, it retains an important public dimension.

(citation omitted).

71. See MACNEIL, *supra* note 69, at 55 (defining “modern” as the genre of post-1920s arbitration laws setting up this structure).

72. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *cf.* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1945 (2014) (describing the contract model of arbitration).

73. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 242 (2013) (Kagan, J., dissenting) (discussing these three stages of arbitration).

74. See Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2157, 330 U.N.T.S. 38; MACNEIL, *supra* note 69, at 16 (discussing the features of modern arbitration laws).

75. See, e.g., MACNEIL, *supra* note 69, at 34; IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 11 (2013); Aragaki, *supra* note 72, at 1942; see also AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 6 (2017) (describing the origins of the adversarial nature of arbitration through the rise of conciliation in the nineteenth century); Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2957 (2015) [hereinafter Kessler, *Arbitration and Americanization*].

76. David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 994 (2017).

arbitration clauses on an “equal footing” with other kinds of contract terms⁷⁷ and “set forth the procedures to be followed in federal court for litigation about arbitration.”⁷⁸ The federal law followed in the footsteps of the 1920 New York arbitration statute and other similar statutes.⁷⁹

According to scholars, the Act “was originally designed to cover contractual disputes between merchants of relatively co-equal bargaining power.”⁸⁰ Its lead proponents, Julius Cohen and Charles Bernheimer, worked for the New York State Chamber of Commerce and appeared before Congress as representatives of dozens of “business men’s organizations.”⁸¹ They sang arbitration’s praises “as a way ‘to make the disposition of business in the commercial world less expensive,’ ” faster, and more just.⁸² Also appearing before Congress were Herbert Hoover, the Secretary of Commerce; W.H.H. Piatt, Chairman of the Committee on Commerce, Trade, and Commercial Law of the American Bar Association; and others advocating for “arbitration in commercial matters.”⁸³ Indeed, in the proceedings leading up to the FAA’s enactment, “every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants.”⁸⁴ The cited examples discussed contracts between merchants, often involving international transactions.⁸⁵

The business world had legitimate complaints about litigation. Civil procedure before the 1938 adoption of the Federal Rules of Civil Procedure was rigid and complex; it notoriously provided lawyers with

77. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002).

78. Aragaki, *supra* note 72, at 1987.

79. MACNEIL, *supra* note 69, at 84; MACNEIL ET AL., *supra* note 64, § 8.1.

80. Szalai, *supra* note 17, at 524–25; *see also* Leslie, *supra* note 8, at 305–06; 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, 106 (2006). *But compare* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) (“[T]he FAA compels judicial enforcement of a wide range of written arbitration agreements.”), *with id.* at 125 (Stevens, J., dissenting) (“The history of the Act, which is extensive and well documented, makes clear that the FAA was a response to the refusal of courts to enforce commercial arbitration agreements . . .”). In a fascinating new work, Professor Amalia Kessler sheds important light on Progressive lawyers’ influence on the FAA and their understanding of arbitration as part of “their program for urban civil justice.” Kessler, *Arbitration and Americanization*, *supra* note 75, at 2962. But she does not purport to rebut the foundational assumption that the Act originally targeted arbitration clauses in commercial contracts. *Id.* at 2943–44.

81. Leslie, *supra* note 8, at 302.

82. *Id.*; *see also* Moses, *supra* note 80, at 103.

83. Leslie, *supra* note 8, at 303–04 (quoting Gray Silver, then-representative of the American Farm Bureau Federation).

84. *Id.* at 305.

85. *Id.* at 306.

incentives to “insist on procedural formalities for strategic gain”⁸⁶ and involved long delays.⁸⁷ Hiro Aragaki argues that the FAA was developed in the context of “[an] increasingly intolerable situation in the courts and the seeming stagnation of judicial reform efforts in Congress,” by advocates who “saw privatization as the most effective vehicle for improving adjudicative dispute resolution.”⁸⁸

Arbitration provided significant advantages in these commercial contexts. An extensive literature has since explored how and why arbitration, the “creature of contract,”⁸⁹ can provide sophisticated parties with important opportunities to craft the fate of their disputes in the name of maintaining party autonomy, procedural flexibility, and other private law virtues.⁹⁰ The ability to choose arbitration can be an expression of contractual freedom.⁹¹ These private law values of arbitration have particular force in combination with essentialist values—that is, in circumstances when litigation is viewed as “intolerable” and arbitration seems to offer a cure for litigation’s ills.

The Supreme Court’s version of the FAA’s origin story is superficially consistent with the scholarly account just described. The Court cites two main reasons for the FAA’s enactment: first, to “revers[e] centuries of judicial hostility to arbitration agreements” and “to place arbitration agreements ‘upon the same footing as other contracts,’ ” and second, “to allow parties to avoid ‘the costliness and delays of litigation.’ ”⁹² The Court does not consider the business interests driving the arbitration reform movement to limit its interpretation of the statute.⁹³ Conversely, the Court has focused on the importance of arbitration *displacing* litigation.⁹⁴ As a result, while the Court recognizes the private law values of arbitration, it focuses its attention on safeguarding essentialist values. Scholars’ historical accounts that the FAA sought to promote arbitration as a flexible alternative to litigation lends credence to the idea that businesses

86. Aragaki, *supra* note 72, at 1966.

87. *Id.* at 1968.

88. *Id.* at 1976.

89. See Hiro N. Aragaki, *Arbitration: Creature of Contract, Pillar of Procedure*, 8 Y.B. ARB. & MEDIATION 2, 3 (2016) (discussing the popularity of and problems with this term).

90. See, e.g., Drahozal & Ware, *supra* note 15, at 451–52.

91. See, e.g., EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 2 (2010) (“[A]utonomy and freedom are at the heart of [international arbitration].”).

92. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974).

93. *Cf. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting) (“In recent decades, this Court has veered away from Congress’ intent simply to afford merchants a speedy and economical means of resolving commercial disputes.”).

94. See *Epic Sys.*, 138 S. Ct. at 1623.

avored arbitration for its perceived speed, low cost, and efficiency. But the FAA was also a procedural reform effort that could proceed in parallel with reform efforts in the courts.⁹⁵ In other words, one can view the FAA as valuing better procedures in dispute resolution rather than simply (or only) valuing the avoidance of litigation.

At its most basic level, however, the FAA mandated judicial support for arbitration when parties chose it as their dispute resolution mechanism of choice.⁹⁶ It placed exceedingly few limits on what counts as arbitration. The statute does not define arbitration, vis-à-vis litigation or otherwise.

B. International Commercial Arbitration

As originally enacted in 1925, the FAA applied to international commercial arbitration as well as domestic arbitration.⁹⁷ To thrive as an institution, however, international commercial arbitration required a more direct international commitment to support arbitration. In 1970, the United States finally heeded the American Bar Association's call to ratify the New York Convention in order to "join in an international regime of commercial arbitration for the benefit of its own nationals who trade and invest throughout the world."⁹⁸ The Convention harnessed the cooperation of national judicial systems as a "control mechanism" for arbitration.⁹⁹ It also limited judicial control so that national courts would not gain too much power over arbitration and threaten to favor their own nationals over foreign counterparties.¹⁰⁰

95. See Aragaki, *supra* note 22, at 560 (noting that the FAA was intended to allow businesses "to avoid the problem that commercial cases were often incorrectly decided in court by untutored juries or because of procedural technicalities having nothing to do with the substantive merits"); Szalai, *supra* note 17, at 519 (describing the FAA as a procedural reform).

96. MACNEIL ET AL., *supra* note 64, § 4.1.2 ("[Legislation] created a comprehensive framework within which the agreement to arbitrate and the hearing could proceed and the award could be enforced or modified by the courts. This legislative framework contains a blend of facilitation and regulation supporting arbitration as a method of dispute resolution.")

97. Section 2 of the FAA requires courts to enforce arbitration agreements involving interstate and foreign commerce unless there is a ground for revocation of the contract. 9 U.S.C. § 2 (2012).

98. MACNEIL, *supra* note 69, at 162 (quoting *Part IV. Committee Reports of Comparative Law Division*, 1960 AM. BAR ASSOC. SEC. INT'L & COMP. LAW PROC., 147, 232 (specifically referencing the Report of the Committee on International Unification of Private Law)).

99. SWEET & GRISEL, *supra* note 41, at 2; Bermann, *supra* note 15, at 2 ("National courts play a potentially important policing role in this regard. Most jurisdictions have committed their courts to do all that is reasonably necessary to support the arbitral process."); Reisman & Richardson, *supra* note 40, at 21; Linda Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of International Law*, 38 GA. J. INT'L & COMP. L. 25, 26 (2009).

100. Reisman & Richardson, *supra* note 40, at 23.

The Convention thus established a legal infrastructure wherein courts play a crucial role in supporting international commercial arbitration.¹⁰¹ Litigation about arbitration is “as common as [it is] inevitable, given the growing complexity, significance, and adversarial nature of [international commercial arbitration].”¹⁰² Courts perform an important “governance support function by making themselves available for enforcement of arbitration agreements and arbitral awards,” even if they are never called upon to do so.¹⁰³ Arbitration also relies on national courts to develop substantive law since arbitral decisions interpreting law hold no formal precedential value.¹⁰⁴

Some studies suggest that requests for judicial assistance for pending arbitration are rising¹⁰⁵ and that they are more prevalent in the United States than in other countries.¹⁰⁶ The argument that arbitration relies on national law and national courts, however, does not depend on the quantity of court interventions in arbitration¹⁰⁷ any

101. Vera Korzun & Thomas H. Lee, *An Empirical Survey of International Commercial Arbitration Cases in the US District Court for the Southern District of New York, 1970-2014*, 39 *FORDHAM INT'L L.J.* 307, 313 (2015); *see also, e.g.*, SWEET & GRISEL, *supra* note 41, at 4; Main, *supra* note 11, at 459–60; Whytock, *supra* note 70, at 471.

102. SWEET & GRISEL, *supra* note 41, at 4; Korzun & Lee, *supra* note 101, at 317 (cataloging eleven types of judicial interventions in international commercial arbitration that correspond primarily to roles outlined for courts in the UNCITRAL Model Law on International Commercial Arbitration); Strong, *supra* note 51, at 2.

103. *See* Whytock, *supra* note 70, at 468; Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, 12 *BUS. & POL.* 19–20 (2010) [hereinafter Whytock, *Private-Public*]:

[D]omestic courts mitigate enforcement problems by signaling to transnational commercial actors that they are likely to enforce arbitration agreements, arbitral awards, and the rules governing the transnational commercial arbitration system. Other things being equal, the higher the perceived probability of judicial enforcement, the higher the probability that transnational actors will comply before actual judicial enforcement is necessary. . . . Thus, perhaps even more important than judicial enforcement in particular cases is the *expectation* of judicial enforcement in potential future cases.

104. *See* Smith, *supra* note 7 (lamenting that arbitration’s popularity stifles common law development); Bookman, *Adjudication Business*, *supra* note 32 (manuscript at 48); *cf.* SWEET & GRISEL, *supra* note 41, at 119–70 (discussing the role and form of precedent in the International Court of Arbitration).

105. Strong, *supra* note 51, at 7 (suggesting such litigation is on the rise in the United States and the UK); Christopher A. Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Insights from the Federal Courts*, 2 *WORLD ARB. & MEDIATION REV.* 39, 42 (2008) (empirical analysis finding that “[a]lthough some observers argue that it is generally unnecessary to seek judicial enforcement, the results suggest that there is actually considerable judicial involvement at the post-award stage of the transnational arbitration process”); *cf.* Korzun & Lee, *supra* note 101, at 348 (finding that these requests level off).

106. Strong, *supra* note 51, at 3–4.

107. The studies are informative but ultimately may underreport; requests for judicial interference may not be accompanied by a written opinion catalogued by Westlaw or Lexis Nexis.

more than the quantity of jury trials dictates the influence of the possibility of a jury trial on rules of procedure and evidence or settlement practices.¹⁰⁸ Arbitration relies on courts because it operates in the shadow of litigation.¹⁰⁹

This dynamic plays out in U.S. law governing international commercial arbitration. After the United States ratified the New York Convention, Congress added a second chapter to the FAA that implemented the Convention. A third chapter was added in 1990 to codify the Inter-American, or “Panama,” Convention, which contains provisions similar to those in the New York Convention and includes a different set of signatory nations.¹¹⁰ International arbitration agreements and awards are thus governed both by treaty and by the relevant statutory provisions enacting the treaty. But they are also potentially governed by the FAA’s original first chapter—that is, the chapter that regulates domestic arbitration, “to the extent it is not ‘in conflict’ with the Convention.”¹¹¹ As a result, domestic U.S. arbitration law, which largely consists of judge-made interpretations of the FAA, functions as a “gap-filler” in U.S. law concerning international arbitration.¹¹²

In the United States, the work that the New York Convention requires of national courts is done primarily by state and lower federal court judges, as guided by the U.S. Supreme Court. The domestic provisions of the FAA instruct courts on how to support arbitration in a

See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681 (2007); Elizabeth Y. McCuskey, *Submerged Precedents*, 16 NEV. L.J. 515 (2016).

108. See, e.g., Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 (2019).

109. Korzun & Lee, *supra* note 101, at 309 (“The reality . . . is that international arbitration always operates in the shadow of national courts . . .”); Whytock, *supra* note 70, at 471; Whytock, *Private-Public*, *supra* note 103, at 20 (“[P]erhaps even more important than judicial enforcement in particular cases is the *expectation* of judicial enforcement in potential future cases.”).

110. I refer to the international regime as the New York Convention, although which convention applies will depend on the nations at issue. “There is no substantive difference” between the New York and Panama Inter-American Conventions: “both evince a ‘pro-enforcement bias.’” *Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 105 (2d Cir. 2016). Congress’s “international” provisions overlap significantly with the “domestic” parts of the FAA, but they are not identical. See GARY BORN, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS* 53 (2d ed. 2015); MACNEIL, *supra* note 69, at 162–63.

111. See, e.g., *GEA Grp. AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 415 (7th Cir. 2014) (“Chapter 2 expressly preserves the applicability of Chapter 1 to foreign arbitration unless there is a conflict either with Chapter 2 or with the Convention (Chapter 2 implements the Convention—it is not the Convention itself). There is no conflict in this case.”).

112. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMM. ARBITRATION § 5-3 Reporters’ Comments cmt. b (AM. LAW INST., Tentative Draft No. 1, 2010); *id.* cmt. d (adopting “the better view . . . that Article VII does not permit a foreign Convention award to be confirmed or vacated under FAA Chapter One”).

rather “skeletal” manner.¹¹³ It requires them to consider arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹⁴ (This “save upon . . .” language constitutes the so-called savings clause.) Courts are directed to stay and compel arbitration of proceedings that involve issues “referable to arbitration.”¹¹⁵ Other statutory sections require different kinds of judicial support in the middle of ongoing arbitration proceedings, like appointing arbitrators under certain circumstances¹¹⁶ or issuing subpoenas for evidence.¹¹⁷ At the back end, the FAA authorizes courts to confirm arbitral awards as U.S. judgments, with only a few exceptions.¹¹⁸

Arbitration agreements are governed by “background principles of state contract law,” and the Court has stated that the FAA does not “purport[] to alter” such principles.¹¹⁹ Nevertheless, the federal common law of arbitration also provides background default understandings of how arbitration works. Federal common law fleshes out the bones of the FAA’s skeletal structure, addressing subjects like arbitrators’ authority to adjudicate their own jurisdiction (the competence-competence doctrine), the interpretation and validity of international arbitration agreements, and the tribunal’s procedural powers.¹²⁰ The Supreme Court has never addressed most of these issues, even though they raise many thorny questions about which lower federal and state courts disagree.¹²¹

Although the FAA was enacted in the 1920s, it was not until the 1970s—after the ratification of the New York Convention—that the Supreme Court stepped in to curb courts’ aversion to forum selection clauses.¹²² International commercial contracts provided the context for these first steps. The contracts in these early cases showcased two key characteristics: first, they were freely negotiated commercial contracts between sophisticated business entities, and second, the international

113. *Cf.* BORN, *supra* note 110, at 53.

114. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

115. *Id.* §§ 3–4.

116. *Id.* § 5.

117. *Id.* § 7.

118. *Id.* §§ 9–11, 15.

119. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009).

120. *See* BORN, *supra* note 110, at 54.

121. *See, e.g., CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc.*, 14 F. Supp. 3d 463, 480 (S.D.N.Y. 2014), *vacated and remanded*, 850 F.3d 58 (2d Cir. 2017); Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 138 S. Ct. 1185 (2018) (No. 17-1272) (raising question of delegating arbitration jurisdiction to arbitrators by cross-references to arbitration center rules).

122. *See* Main, *supra* note 11, at 463.

nature of the transaction made the neutrality and certainty offered by forum selection particularly desirable.

The turning point came in *The Bremen v. Zapata Off-Shore Co.*¹²³ That case addressed the validity of a forum selection clause in an international towage contract that designated the London High Court of Admiralty as the chosen forum.¹²⁴ Bucking the traditional view that such clauses were unenforceable, the Court emphasized that “in international trade, commerce, and contracting,” parties’ ability to contractually bind themselves to an acceptable forum is vital to eliminating the uncertainty and inconvenience that would “arise if a suit could be maintained [anywhere] an accident might occur or . . . where [the parties] might happen to be found.”¹²⁵ The Court noted that enforcing the clause both “accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world.”¹²⁶ It was important to the Court that the forum selection clause appeared in a contract negotiated at arm’s length between sophisticated international business parties who sought to gain neutrality and to “bring vital certainty to this international transaction.”¹²⁷

The Court soon extended this reasoning to enforce an arbitration clause in another international commercial contract, even though the Court presumed the clause would not have been enforced if the contract had been domestic.¹²⁸ In *Scherk v. Alberto-Culver Co.*, the Court again explained why forum selection clauses, including arbitration clauses, are “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”¹²⁹ Such provisions protect parties from the dangers of hostile fora or judges “unfamiliar” with the parties’ interests.¹³⁰ The Court admonished that invalidating the arbitration clause “would . . . reflect a ‘parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.’ ”¹³¹

123. 407 U.S. 1 (1972).

124. *Id.* at 2.

125. *Id.* at 13–14.

126. *Id.* at 11.

127. *Id.* at 14, 17. Presumably, the Court’s comfort level was also enhanced by the regard it held for the London court that the parties had designated. *Id.*

128. See MACNEIL, *supra* note 69, at 163.

129. 417 U.S. 506, 516 (1974).

130. *Id.*

131. *Id.* at 519.

In later years, the Court erased its distinction between domestic and international contracts and enforced arbitration clauses in domestic contracts that governed, for example, federal statutory rights.¹³² These decisions have met with substantial criticism. But even arbitration skeptics typically acknowledge the validity of enforcing arbitration clauses in the context of valid international commercial contracts.¹³³

II. LITIGATION VERSUS ARBITRATION

While courts provide important support for arbitration, many focus on the relationship between litigation and arbitration as characterized by substitution rather than support. Both the Supreme Court and commentators routinely depict litigation and arbitration not just as two different options for dispute resolution, but as opposites.¹³⁴ Scholars praise arbitration for offering “speed, economy, informality, technical expertise, and avoidance of national fora.”¹³⁵ Implicit, and sometimes explicit, in this positive view of arbitration is a negative view of litigation—as slow, inefficient, overly formal, inexpert, and, particularly in the international context, potentially biased.¹³⁶ In a preeminent study of international arbitration stakeholders, the two most valuable characteristics of arbitration were found to be the easy international enforceability of awards (an attribute that court decisions

132. See Carbonneau, *supra* note 5, at 1203.

133. See *supra* note 11 and accompanying text.

134. See, e.g., Helfand, *supra* note 17, at 3023.

135. Bermann, *supra* note 15, at 2; see, e.g., Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL’Y ANALYSIS 1 (2002), <https://object.cato.org/pubs/pas/pa433.pdf> [<https://perma.cc/CHG4-88DQ>]:

Arbitration is a private-sector alternative to the government court system. Compared with litigation, arbitration is typically quick, inexpensive, and confidential. It generally operates in a commonsense way, without all of the legal jargon and procedural maneuvering that go on in court. Unlike judges, arbitrators are chosen by the parties to the dispute. Cases are resolved by respected professionals with technical, as well as legal, expertise.

136. The concept is not new. When the London commercial arbitration tribunal was first inaugurated in 1892, one commenter wrote: “This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.” Hensler & Khatam, *supra* note 22, at 401 (quoting Edward Manson, *The City of London Chamber of Arbitration*, 9 LAW Q. REV. 86, 86 (1893)). Anecdotes about notorious cases of U.S. courts’ biases against foreign parties drive these fears. See, e.g., William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 563 (2002). But modern studies do not substantiate them. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122–23 (1996) (survey showing that U.S. courts are not biased against foreign parties).

lack¹³⁷) and the ability to avoid certain legal systems and national courts.¹³⁸

The conclusion of many arbitration enthusiasts is that arbitration can and should displace litigation as a dispute resolution mechanism (at least in certain circumstances).¹³⁹ Seen in this light, the combination of a hostility to litigation and enthusiasm for arbitration seem perfectly consistent. Indeed, U.S. courts, especially the Supreme Court, have embraced both of these values.

This Part outlines the contours of the Supreme Court's hostility to litigation and enthusiasm for arbitration over the past few decades. It contends that pro-arbitration policies are not monolithic and can encompass different, sometimes competing, values. It demonstrates that in cases where the private law values of arbitration potentially conflict with the Court's hostility to litigation, the latter value wins out, in large part because of the Court's commitment to the characterization of arbitration as the opposite of litigation. It concludes by arguing that this approach is flawed because it mischaracterizes both the essence of arbitration and the relationship between arbitration and litigation.

A. *Hostility to Litigation*

Scholars have identified hostility to litigation as a signature feature in both the Rehnquist and the Roberts Courts. For example, Andrew Siegel has argued that the Rehnquist Court was driven by its "hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for

137. The distinction between arbitration and litigation is a result of international agreement. Over 150 countries have signed onto the New York Convention, promising to enforce foreign arbitration awards, while only a handful have signed on to the Choice of Court Convention, promising to enforce foreign court awards where jurisdiction was based on an exclusive forum-selection clause. *Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries> (last visited Mar. 24, 2019) [<https://perma.cc/XGP2-RKCW>].

138. WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION 6 (2015), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf [<https://perma.cc/CL9E-MCRC>].

139. See GILLES CUNIBERTI, *RETHINKING INTERNATIONAL COMMERCIAL ARBITRATION: TOWARDS DEFAULT ARBITRATION* (2017); Cuniberti, *supra* note 12; Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 433 (2010) (articulating, and criticizing, the "displacement thesis"). Several scholars, of course, have challenged the conception that arbitration and litigation are opposite sides of the same dispute resolution coin. See, e.g., Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30–31 (1979) (contesting that litigation's only or even primary purpose is dispute resolution); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 445 (1982) (same); see also ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* (2017). And some scholars contest that dispute resolution is arbitration's only purpose, at least in some contexts. See, e.g., Helfand, *supra* note 17, at 3029.

organizing social relations and collectively administering justice.”¹⁴⁰ Siegel focused on several areas, including the Court’s reluctance to afford remedies and the constitutionalizing of tort reform through regulation of punitive damages.¹⁴¹ Other scholars noted the primacy of hostility to litigation in other substantive areas, such as employment law.¹⁴²

The Roberts Court has stayed true to that mission.¹⁴³ In cases involving issues ranging from personal jurisdiction¹⁴⁴ and pleading standards¹⁴⁵ to class certification,¹⁴⁶ discovery,¹⁴⁷ and trials,¹⁴⁸ the Court has turned litigation into an obstacle course for civil plaintiffs. Litigation isolationism¹⁴⁹ is also in some ways a manifestation of this hostility. Litigation isolationism refers to the particularly strong judicial antagonism toward *transnational* litigation—i.e., cases involving foreign parties, foreign conduct, or events on foreign soil.¹⁵⁰ U.S. courts have raised barriers to transnational litigation, for example, by narrowing the bases for personal jurisdiction, especially over foreign

140. Siegel, *supra* note 9, at 1108; *see, e.g.*, Victor Marrero, *Mission to Dismiss: A Dismissal of Rule 12(b)(6) and the Retirement of Twombly/Iqbal*, 40 CARDOZO L. REV. 1, 52 (2018); Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 982 (2007) (noting “the Court’s broader hostility to litigation as a tool of dispute resolution”); Dahlia Lithwick, *Humble Pie: Why Does John Roberts Hate Courts So Much?*, SLATE (Sept. 2, 2005, 1:25 PM), <https://slate.com/news-and-politics/2005/09/humble-pie.html> [<https://perma.cc/BW9X-GVNU>] (discussing John Roberts’s writings and career and concluding that he “sees almost no role for courts as remedial institutions” and “has made it his work to try to hobble the courts”).

141. Siegel, *supra* note 9, at 1118, 1146.

142. Moss, *supra* note 140, at 1002–03.

143. *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 325 (2013); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691 (2016); Subrin & Main, *supra* note 9, at 1856.

144. *See generally* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401 (2018).

145. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 588 (2007) (Stevens, J., dissenting); *see also* Miller, *supra* note 143, at 325.

146. *See generally* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013). *But cf.* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971 (2017).

147. *See generally* Robert H. Klonoff, *Application of the New “Proportionality” Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. 1949 (2018).

148. *See generally* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

149. *See generally* Bookman, *Litigation Isolationism*, *supra* note 49.

150. *Id.* at 1085.

defendants,¹⁵¹ and expanding forum non conveniens far beyond a “limited exception.”¹⁵² These developments can make the barriers for plaintiffs in transnational cases even higher than the obstacles that other plaintiffs generally face.¹⁵³

This negative view of U.S. litigation is consistent with what Thomas Subrin and Stephen Main have called the “Fourth Era in U.S. Civil Procedure”—an era in which “litigation is often perceived as a nuisance.”¹⁵⁴ Steve Burbank and Sean Farhang have extensively documented the “counterrevolution against federal litigation,” accomplished largely by Supreme Court procedural decisions clamping down on private enforcement of federal rights through federal litigation over the past several decades.¹⁵⁵

As Burbank and Farhang have shown, this antagonism has developed largely in the area of private enforcement of federal rights, and it has occurred primarily through trans-substantive procedural reform.¹⁵⁶ Because procedural rules apply in all kinds of cases, they also impact other perhaps unintended areas of litigation. That is, while increased barriers to litigation may have initially been intended to thwart, for example, class actions or plaintiff forum shopping,¹⁵⁷ they can also raise barriers to other kinds of litigation, like government regulatory litigation,¹⁵⁸ or, as relevant here, arbitration enforcement proceedings.¹⁵⁹

151. See generally *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

152. See, e.g., Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157 (2012). This development has largely taken place in the lower federal courts, although it has been facilitated by the Supreme Court's decision that forum non conveniens motions may be adjudicated before motions challenging a court's jurisdiction. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

153. See generally Bookman, *Litigation Isolationism*, *supra* note 49. This is not to say that hostility to litigation is the only driving force behind these developments but rather that it is likely a strong force, perhaps among others. Cf. Noll, *supra* note 52, at 82–83 (discussing the role of hostility to litigation as a driving force behind trends in interpretation of “jurisdictional statutes, procedural statutes, the Due Process Clause, and unwritten canons of statutory interpretation”).

154. Subrin & Main, *supra* note 52, at 502.

155. See generally BURBANK & FARHANG, *supra* note 52; see also SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT* 7 (2015) (documenting forces within and beyond the Supreme Court driving these developments).

156. See generally BURBANK & FARHANG, *supra* note 52.

157. See *supra* note 16.

158. See *Government Litigation*, *supra* note 16.

159. There is some evidence that procedural limitations on court access have a substance-specific effect—cutting down on certain kinds of tort litigation or discrimination claims, for example, but preserving a path for contract disputes. See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2146 tbl.3 (2015); Elizabeth M. Schneider,

For purposes of this Article, it is important to draw attention to one particular area in which the Court's hostility to litigation has played a starring role: arbitration cases. As Siegel argued, the Rehnquist Court "consistently enforced form arbitration agreements that shift cases from courts to alternative forums without regard for the practical consequences to potential plaintiffs."¹⁶⁰ Under the Roberts Court, this trend has continued on steroids. Maria Glover documents a "three-decade-long expansion of the use of private arbitration as an alternative to court adjudication in the resolution of disputes of virtually every type of justiciable claim,"¹⁶¹ culminating in *American Express Co. v. Italian Colors Restaurant*.¹⁶² In that case, the Court eschewed some of its previous statements made in dicta that expressed concern for parties' ability to actually bring claims.¹⁶³ The Court upheld an arbitration clause in restaurants' contracts with a credit card company even though it knew that doing so would render the restaurants' antitrust claims virtually impossible to bring.¹⁶⁴ This was an expression of enthusiasm for arbitration that exalts in its hostility to litigation. The next Section traces the role of hostility to litigation in the Court's approach to arbitration over time.

B. Enthusiasm for Arbitration

Litigation-avoidance values have driven the Court's love affair with arbitration since the 1970s. Scholars have noted that a likely motivator "was the Court's view that litigation had become excessive and needed to be curtailed."¹⁶⁵ Chief Justice Burger, who often expressed concern with judicial workload pressures, consistently criticized "litigiousness" and linked it to a "mass neurosis . . . [that]

The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. PA. L. REV. 517, 520 (2010). The empirical data, however, is difficult to assess. See William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35, 37 (2013); cf. J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625 (2017).

160. Siegel, *supra* note 9, at 1117–18.

161. Glover, *supra* note 7, at 3054.

162. 570 U.S. 228 (2013).

163. *Id.* at 235 & n.2 (declining to apply the "effective vindication" exception" and noting that it "originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies'" (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U. S. 614, 637, n.19 (1985)) (alterations in original)).

164. *Id.* at 234 ("The antitrust laws do not 'evin[c] an intention to preclude a waiver' of class-action procedure." (quoting *Mitsubishi Motors*, 473 U.S. at 628) (alteration in original)).

165. Bruhl, *supra* note 1, at 1429.

leads people to think courts were created to solve all the problems of society.”¹⁶⁶ At the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in 1976, Burger’s “chief message . . . was that the ‘litigation explosion would have to be controlled.’”¹⁶⁷ This message was consonant with “the business community’s growing dissatisfaction with the legal system.”¹⁶⁸

At the same time, the Court exalted arbitration. The Court has described the FAA as embodying “a national policy favoring arbitration”¹⁶⁹ that does not just put arbitration contracts on equal footing with other kinds of contracts but seems to affirmatively favor arbitration over litigation.¹⁷⁰ As an early draft of the Restatement of the U.S. Law of International Commercial Arbitration reports, “U.S. law has a now long-established history of providing strong support to both party autonomy in arbitration and to the enforceability of arbitral agreements and awards.”¹⁷¹

The Court identifies the purpose of the FAA’s pro-arbitration policies as twofold: first, to enforce arbitration agreements and preserve freedom of contract,¹⁷² and second, to avoid or replace litigation.¹⁷³ An extensive literature examines arbitration as a manifestation of contractual freedom¹⁷⁴ and a hallmark of private law.¹⁷⁵ According to these private law values, the signature features of arbitration are the choice, autonomy, and flexibility that it affords parties. As Alan Rau argues, “[I]f there is any ‘public policy’ at all implicated in arbitration, it . . . lies in making a relatively inexpensive and efficient process of dispute resolution available to the parties if and to the extent they wish

166. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1588 n.157 (2014) (quoting *Chief Justice Urges Greater Use of Arbitration*, N.Y. TIMES, Aug. 22, 1985, at A21).

167. Bruhl, *supra* note 1, at 1429.

168. *Id.*

169. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

170. David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 698–703 (2018) (describing the FAA as a “super-statute”); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 104–07 (2012) (discussing Supreme Court cases).

171. RESTATEMENT (THIRD) U.S. LAW OF INT’L COMM. ARBITRATION Reporters’ Memorandum at xvi (AM. LAW INST., Tentative Draft No. 1, 2010).

172. *See, e.g., Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (calling arbitration a “creature of contract”).

173. *See, e.g., Epic Sys.* (describing arbitration as “meant to replace” litigation). *Cf. supra* note 92 (discussing reasons for the FAA’s enactment).

174. *See generally* Aragaki, *supra* note 89, at 2 (citing scholarship on the contract-based theory of arbitration).

175. *See* Steven J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 707 (1999).

to take advantage of it.”¹⁷⁶ In the 1980s, the Court cited arbitration’s “adaptability” as one of its key virtues.¹⁷⁷

The Court, however, rarely engages in the difficult work of considering what it means to be “pro-arbitration.”¹⁷⁸ William Park has identified the goals of a pro-arbitration policy as ensuring accuracy, fairness, efficiency, and enforceability.¹⁷⁹ As George Bermann explains, however, the seemingly simple term “pro-arbitration” can have “a wide range of meanings.”¹⁸⁰ It can include, for example, policies that render arbitration time- or cost-effective, that effectuate the parties’ likely intentions, or that enable the arbitrator to exercise discretion and flexibility in matters of arbitral procedure.¹⁸¹ “[T]rade-offs between among [sic] pro-arbitration considerations” are inevitable.¹⁸²

In recent decades, the Court has focused intensely on one kind of pro-arbitration policy: the importance of arbitration’s function as a substitute for litigation. Relying on the FAA’s legislative history,¹⁸³ the Court often states that the FAA was intended “to allow parties to avoid ‘the costliness and delays of litigation’ ”¹⁸⁴ because arbitration was supposed to “largely eliminate[]” that cost and delay.¹⁸⁵ The Court has now held in multiple contexts that this litigation-avoidance purpose prevails over Congress’s intent in other statutes to provide claimants with their day in court¹⁸⁶ or to allow collective action¹⁸⁷ and over many

176. Alan Scott Rau, *Hall Street Associates v. Mattel, Inc.: Fear of Freedom*, 17 AM. REV. INT’L ARB. 469, 479 (2006) (emphasis omitted).

177. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

178. *See* George A. Bermann, *What Does It Mean To Be Pro-Arbitration?*, 34 ARB. INT’L 341 (2018).

179. William W. Park, *Arbitration and Fine Dining: Two Faces of Efficiency*, in *THE POWERS AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER* 251 (Patricia Shaughnessy & Sherlin Tung eds., 2017) (discussing trade-offs among these goals).

180. Bermann, *supra* note 178, at 342.

181. Park, *supra* note 179, at 343.

182. Bermann, *supra* note 178, at 342.

183. Commentators have noted that in the course of developing this robust FAA, “the Court’s reading of legislative history [of the FAA] appears selective.” Miller, *supra* note 143, at 327–28, 327 n.156; *see also* Aragaki, *supra* note 89, at 7 (“[T]he expression, ‘arbitration is a creature of contract,’ does not occur in the legislative history of the FAA . . .”).

184. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (quoting H.R. REP. No. 68-96, at 2 (1924)).

185. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985).

186. This policy “applies with special force in the field of international commerce.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

187. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

areas of state law.¹⁸⁸ The vision of arbitration as a substitute for litigation goes hand in hand with an understanding of arbitration's "essential" virtues as those that differentiate it from the litigation "it was meant to displace"—e.g., its speed, low cost, and efficiency.¹⁸⁹ The Court has accordingly seen the FAA's purpose as protecting those virtues.¹⁹⁰ As noted, these policies often align with developments that mark the Court's hostility to litigation.¹⁹¹

In international commercial cases, a third set of values is also at play: promoting trade, orderliness, and predictability in international commerce. Indeed, the argument in favor of arbitration is especially strong in the international commercial context.¹⁹² Enforcement of arbitration agreements not only supports freedom of contract and avoiding litigation in potentially biased national courts (which international business operators seem justified in wanting to avoid).¹⁹³ At its best, it also enables parties from different nations to choose a neutral and expert arbiter for potential disputes and, if the arbitration clause will be enforced, to create some much-desired predictability.¹⁹⁴ In the international commercial context, the Supreme Court has sensibly acknowledged that the success of international trade and

188. See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984); MACNEIL ET AL., *supra* note 64, § 8.6. *But see Southland*, 465 U.S. 1 at 25 (O'Connor, J., dissenting) (arguing that the legislative history plainly does not suggest that Congress intended the FAA to preempt state law).

189. *Epic Sys.*, 138 S. Ct. at 1623; *see also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (endorsing these "virtues").

190. *See infra* Section II.C.

191. See MACNEIL ET AL., *supra* note 64, § 8.6 ("Underlying this pro-arbitration stance appears to be the desire to help clear court dockets, not as a simple consequence of party choice to use arbitration, but as a policy in its own right."); *supra* notes 143–153 and accompanying text. Writing in 1994, MacNeil noted that *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), provided a potential exception to this trend because it permitted parties to direct that state law would govern their arbitration agreements. MACNEIL ET AL., *supra* note 64, § 8.6. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), which held that parties cannot avoid FAA preemption by choosing state law to govern their arbitration agreements, has undermined that possibility.

192. In the investment arbitration context, there is also a strong argument in favor of arbitration, but the calculus about judicial review is somewhat different. *See Roberts & Trahanas, supra* note 46.

193. *See supra* Section I.B (discussing *The Bremen* and *Scherk*).

194. *See, e.g.,* Bermann, *supra* note 15; Cuniberti, *supra* note 12; Edna Sussman, *The Arbitration Fairness Act: Unintended Consequences Threaten U.S. Business*, 18 AM. REV. INT'L ARB. 455, 460 (2007). There are also arguments in favor of arbitration that go beyond its role as a dispute resolution mechanism. *See Helfand, supra* note 17, at 3011 (questioning that dispute resolution is arbitration's only purpose); Markovits, *supra* note 139, at 433 (same). *But see* Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 34–35 (2008) (arguing that arbitration affords less predictable results because arbitrators want to provide a resolution that pleases both sides rather than following more predictable legal reasoning).

commerce requires the United States to recognize the validity of laws and dispute resolution outside of U.S. courts.¹⁹⁵

It is no wonder that the Supreme Court's major shifts to enforcing arbitration and forum selection clauses occurred in cases involving international commercial contracts. In those cases, the Court explained that the international context weighed heavily in favor of enforcing the parties' choices in those contracts.¹⁹⁶ As discussed in Part I, *The Bremen* and *Scherk* explicitly relied on the particular circumstances in international business transactions to justify enforcement of such clauses.

In the 1980s, the Court acknowledged the important role that national courts play in supporting the institution of international commercial arbitration. The Court itself played that role by prioritizing private law and international business values over essentialist ones. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, the Court noted:

If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.¹⁹⁷

There, the Court asserted that arbitration's "hallmarks" were its "adaptability and access to expertise" rather than its contrasts to litigation.¹⁹⁸ Had the Court prioritized the differences between arbitration and litigation and sought to safeguard arbitration's "essential" characteristics, it might have reached a different result. The claimants had argued that the Court should not enforce the agreement to arbitrate antitrust claims because arbitration was less equipped than litigation to handle such complex disputes and important federal statutory rights.¹⁹⁹ The Court rejected this argument. Instead, it found

195. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (explaining that invalidating the arbitration clause "would . . . reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts' " because "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts" (quoting *The Bremen*, 407 U.S. 1, 9 (1972))).

196. *See id.* at 515 (finding it "significant" and "crucial" that the contract involved was a "truly international agreement"); *The Bremen*, 407 U.S. at 11–12 (enforcing forum selection clauses "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world"); Main, *supra* note 11, at 463 (describing *The Bremen* as the "taproot of [the] kudzu vine" that is arbitration).

197. 473 U.S. 614, 638–39 (1985) (citation omitted) (quoting *Kulukindis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

198. *Id.* at 633.

199. *See id.* (responding to the notion that "potential complexity [of antitrust issues] should . . . suffice to ward off arbitration"). Notably, the Court in *Mitsubishi* was not as

that arbitration was up to the challenge and recognized the importance of courts' support for arbitration in the context of international trade.²⁰⁰

Key to the Court's decision in *Mitsubishi* was recognizing this conflict of values and then subordinating essentialist concerns to the more important considerations of private law values and supporting international business. As discussed in the remainder of this Part, the essentialist view has serious flaws—for example, not valuing arbitration's adaptability and capacity for complexity, in contrast to what the Court did in *Mitsubishi*.²⁰¹ In that case, the Court not only prioritized other arbitration values over essentialist ones but also acknowledged that the multiple values underlying arbitration can conflict, considered courts' important role in supporting the international commercial arbitration system, and balanced the different competing values.²⁰²

In the past few decades, however, the Court has shifted to prioritize arbitration's essentialist values over its private law or international business ones, either without recognizing the possibility of a conflict or by discounting its importance.²⁰³ The next Section discusses the Court's recent embrace of arbitration's essentialist values and hostility to litigation to the exclusion of other values that are critically important to international commercial arbitration.

C. *The Essentialist Values of Arbitration*

This Section discusses more recent Supreme Court cases in order to illustrate how hostility to litigation has infiltrated the Court's enthusiasm for arbitration since *Mitsubishi*. The first pair of cases,

enthusiastic about arbitration as it seemed. In dicta, *Mitsubishi* assumed that courts could invalidate an arbitral *award* as against public policy if they interpreted a foreign choice-of-law clause to preclude the effective vindication of federal statutory rights. *Id.* at 637 n.19 (“We . . . note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.”). But subsequent Supreme Court decisions have all but eliminated the public policy defense in public cases, and this dictum has “proven to be largely an empty threat.” Rogers, *supra* note 47, at 367 n.154. U.S. courts do not decline to enforce arbitral awards based on the public policy considerations from *Mitsubishi*. See SWEET & GRISEL, *supra* note 41, at 178 n.38 (“We are not aware of any . . . [U.S. court refusing] to enforce awards based on public policy considerations after *Mitsubishi*.”).

200. *Mitsubishi*, 473 U.S. at 629.

201. *See id.* at 633

202. *See* Bermann, *supra* note 178, at 349–53 (discussing the policy considerations of arbitration and when such policies might conflict).

203. *Cf.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011) (“Contrary to the dissent’s view, our cases place it beyond dispute that the FAA was designed to promote [the expeditious resolution of claims].”).

AT&T Mobility v. Concepcion and *Epic Systems v. Lewis*, concern the enforceability of an individualized arbitration clause that prohibits aggregation of claims in a class action litigation or class arbitration. In these cases, the Court makes clear its embrace of the essentialist thesis and the substitution relationship between arbitration and litigation. A second pair, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and *Lamps Plus v. Varela*, also concern class arbitration, but from a different angle: they consider arbitrators' and courts' authority to order class arbitration when an arbitration clause is silent or ambiguous as to whether such proceedings are permitted. In all four of these cases, essentialist values conflict with other arbitration values and the Court prioritizes the former. But the essentialist rhetoric is not limited to combatting the specter of class arbitration. A fifth case, *Hall Street Associates v. Mattel*, follows similar logic in a different context. In all these cases, the Court justifies this prioritization by the strength of the essentialist thesis—the importance of preserving the “essence” of arbitration. Of these five cases, four involved entirely domestic disputes, but they all raise concerns for both domestic and international arbitration.²⁰⁴

Concepcion and *Epic* confronted the validity of class action waivers in individualized arbitration clauses and whether such waivers could also preclude class arbitration. In both cases, the Court bristled at the possibility that arbitration could take on what it saw as a hallmark of litigation: collective treatment of mass claims. In both, it also concluded that the FAA protected arbitration's essential virtues and therefore prevented state law from rendering unenforceable arbitration clauses that required individualized treatment of claims.

Concepcion involved cell phone customers who contested the validity of the arbitration clause in their contracts with AT&T, which required parties to bring cases only in their individual capacity.²⁰⁵ Following California law, the United States Court of Appeals for the Ninth Circuit struck down the clause as unconscionable because it failed to provide an “adequate[] substitute[] for the deterrent effects of class actions.”²⁰⁶

The Supreme Court reversed. It ruled that the FAA preempted the Ninth Circuit's holding, which would have allowed the *Concepcions* to demand class treatment in arbitration, because it “disfavor[ed]” and

204. See *supra* Part I (discussing the trans-substantivity of most U.S. arbitration law).

205. *Concepcion*, 563 U.S. at 336–37.

206. *Id.* at 338 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2008 WL 5216255, at *11–12 (S.D. Cal. Aug. 11, 2008), *rev'd sub nom. Concepcion*, 563 U.S. 333).

“interfer[ed] with” arbitration.²⁰⁷ “[T]he informality of arbitral proceedings,” the Supreme Court explained, “is itself desirable, reducing the cost and increasing the speed of dispute resolution.”²⁰⁸ The Court identified “[t]he overarching purpose of the FAA” as “ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings.”²⁰⁹ Requiring classwide arbitration was impermissible because that would “interfere[] with fundamental attributes of arbitration.”²¹⁰

Building on this analysis,²¹¹ the Court in *Epic Systems Corp. v. Lewis* hammered home that it considered individualized proceedings as well as the “informal nature of arbitration”²¹² to be some of “arbitration’s fundamental attributes.”²¹³ *Epic* concerned the possibility that a federal law protecting collective action—specifically, the Fair Labor Standards Act—could invalidate an arbitration clause calling for individualized arbitration.²¹⁴ The Court held that the FAA would not countenance such a result.²¹⁵ Congress enacted the FAA, the Court explained, to counter courts’ “hostility” to arbitration.²¹⁶ The FAA therefore safeguards “the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness.”²¹⁷ The FAA must do this; otherwise, “arbitration would wind up looking *like the litigation it was meant to displace*.”²¹⁸

These two cases showcase the essentialist thesis. In both *Concepcion* and *Epic*, the majorities did not appear to consider

207. *Id.* at 341 (describing the case as involving the application of unconscionability “in a fashion that *disfavors* arbitration.” (emphasis added)); *id.* at 344 (“Requiring the availability of classwide arbitration *interferes with* the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” (emphasis added)).

208. *Id.* at 345; see also 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009) (“[A]rbitration procedures are more streamlined than federal litigation . . . ; the relative informality of arbitration is one of the chief reasons that parties select arbitration.”).

209. *Concepcion*, 563 U.S. at 344 (emphasis added); see also *id.* at 346 (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results’” (quoting *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008))).

210. *Id.* at 344.

211. Other Supreme Court cases also advance the essentialist thesis. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013) (relying on *Concepcion*, which “invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law ‘interfere[d] with fundamental attributes of arbitration’ ” (alteration in original) (quoting *Concepcion*, 563 U.S. at 344)).

212. 138 S. Ct. 1612, 1623 (2018).

213. *Id.* at 1622.

214. *Id.* at 1620.

215. *Id.* at 1619.

216. *Id.* at 1621.

217. *Id.* at 1623.

218. *Id.* (emphasis added).

themselves to be compromising private law values when prioritizing essentialist ones, as they purported to enforce the plain terms of the arbitration clause before them. The Court in *Concepcion* considered the FAA's two goals—"enforcement of private agreements and encouragement of efficient and speedy dispute resolution"—and determined that its decision furthered both.²¹⁹ The dissent, however, thought its preferred outcome—upholding the lower court's ruling that the class action waiver in the arbitration clause was unenforceable—would protect the pro-arbitration value of respecting the law of the seat of arbitration, including the FAA's recognition that arbitration clauses would be enforced by state contract law rules of the arbitral seat, which here would include California's law of unconscionability.²²⁰

While the Court portrayed itself as “merely” enforcing the terms of the individual agreements, these cases presented a conflict of arbitration values. If efficiency is the goal, class arbitration can be more efficient than individualized arbitration in contexts that are likely to generate large numbers of claims.²²¹ An interesting illustration appeared in a recent report that twelve thousand Uber drivers alleged that the company was refusing to arbitrate their claims in part because of the excessive costs of arbitrating so many claims.²²² Class arbitration would offer a more efficient solution to this deluge of individual claims in arbitration, and efficiency is another pro-arbitration value.²²³ Prioritizing those efficiency values over essentialist ones would advise in favor of class arbitration.

Other Supreme Court cases present the conflict between essentialist values and other arbitration values even more plainly. *Mitsubishi* is a case in point. There, the Court recognized the conflict and prioritized private law and international business values over essentialist ones. Rejecting protests that antitrust claims proceeding in

219. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). The dissent “cautioned against thinking that Congress’ primary objective was to guarantee . . . particular procedural advantages” rather than “secur[ing] the ‘enforcement’ of agreements to arbitrate.” *Id.* at 361 (Breyer, J., dissenting) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985)).

220. *Id.* at 359–62; see also Bermann, *supra* note 178, at 348.

221. See Raviv, *supra* note 53, at 229 (“If a goal of arbitrations is to promote efficiency, and class actions promote efficiency, then shouldn’t class arbitration be extra-efficient?”).

222. Graham Rapier, *12,000 Uber Drivers Say the Company Is Refusing To Honor the Arbitration Clause in Its Terms and Conditions*, BUS. INSIDER (Dec. 8, 2018, 9:27 AM), <https://www.businessinsider.com/uber-drivers-say-company-avoiding-arbitration-lawsuit-2018-12> [<https://perma.cc/5Z5A-Z85Y>]. Recent reports indicate that Uber has settled many of these claims. Andrew Wallender, *Uber Settles ‘Majority’ of Arbitrations for at Least \$146M*, BLOOMBERG NEWS (May 9, 2019, 12:56 PM), <https://news.bloomberglaw.com/daily-labor-report/uber-sees-wage-suits-dropped-including-12-501-arbitration-claims> [<https://perma.cc/N5RV-QXXY>].

223. See Bermann, *supra* note 178, at 348.

arbitration would make arbitration look too much like litigation, the Court instead focused on arbitration's "adaptability" as its hallmark feature.²²⁴

In the next pair of more recent cases, *Stolt-Nielsen* and *Lamps Plus*, however, the Court reached the opposite conclusion when faced with the same conflict. Once again, the Court confronted the possibility of class arbitration, but now in the face of arbitration clauses that did not specifically select individualized dispute resolution.

Stolt-Nielsen is the Court's only international commercial arbitration case of the last decade. There, the Court took the highly unusual step of overturning the decision of an arbitral panel on its merits.²²⁵ Private law and international business values support limited bases for overturning arbitrators' merits decisions. Accordingly, the FAA limits judicial review of decisions that parties have entrusted to arbitration to events such as arbitrator "corruption," "fraud," "evident partiality," "misconduct," or "misbehavior"²²⁶ or conduct by arbitrators that "exceeded their powers."²²⁷ The Court had previously stated when applying the "exceeding power" standard that if an arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."²²⁸

The contract at issue in *Stolt-Nielsen* had an arbitration clause that the parties stipulated did not say anything about class arbitration.²²⁹ After a Department of Justice investigation revealed *Stolt-Nielsen* had engaged in unlawful anticompetitive activities, many parties that had done business with the company filed a putative class action in federal court.²³⁰ The Second Circuit found that the contracts required arbitration of any antitrust claims, and the plaintiffs then demanded class arbitration.²³¹ *Stolt-Nielsen* agreed to submit "that threshold dispute to a panel of arbitrators."²³² A distinguished panel decided unanimously that the arbitration clause permitted class arbitration, relying on public policy rationales and other published

224. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

225. *Stolt-Nielsen*, 559 U.S. at 676–77 ("In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers.").

226. 9 U.S.C. § 10(a)(1)–(3) (2012).

227. *Id.* § 10(a)(4).

228. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

229. 559 U.S. at 668.

230. *Id.* at 667.

231. *Id.* at 688 (Ginsburg, J., dissenting).

232. *Id.* at 689.

clause construction awards issued under the American Arbitration Association's Supplementary Rules for Class Arbitrations ("AAA Rules") and discrediting Stolt-Nielsen's account of the history and context of the clause.²³³

Stolt-Nielsen petitioned the United States District Court for the Southern District of New York to vacate the clause construction award.²³⁴ The District Court vacated it on the basis that "the arbitrators manifestly disregarded a well defined rule of governing maritime law that precluded class arbitration under the clauses here in issue."²³⁵ The Second Circuit reversed, holding that "the demanding 'manifest disregard' standard ha[d] not been met."²³⁶ In short, the lower courts examined the panel's legal analysis and disagreed about the quality of that analysis and its conclusions. The Second Circuit also rejected Stolt-Nielsen's argument that the arbitrators had "exceeded their powers" under FAA section 10(a)(4).²³⁷ The parties had expressly agreed that the arbitration panel would follow the AAA Rules.²³⁸ Those Rules authorize arbitrators to decide whether an arbitration clause "permits the arbitration to proceed on behalf of or against a class."²³⁹

The Supreme Court reversed. It did not address the manifest disregard standard or whether it was met in this case.²⁴⁰ Rather, the Court held that the arbitrators had indeed "exceeded their powers" by considering public policy by interpreting the arbitration clause to permit class treatment when the parties had agreed that the clause was "silent" on the topic. Justice Alito explained that arbitrators cannot possibly infer an agreement to *class* arbitration from parties' consent to "submit their disputes to an arbitrator," because class arbitration

233. *Id.*; *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 89–90 (2d Cir. 2008), *rev'd*, 559 U.S. 662 (2010). Note that the Supreme Court's and the Second Circuit's accounts of the panel's award are inconsistent. The Second Circuit upheld the ruling because, inter alia, "Stolt-Nielsen's arguments regarding the negotiating history and context of the agreements did not establish that the parties intended to preclude class arbitration." *Stolt-Nielsen*, 548 F.3d at 90. The Supreme Court parsed the ruling to conclude that the arbitrators simply imposed their own policy preferences in interpreting the award. *Stolt-Nielsen*, 559 U.S. at 672.

234. *Stolt-Nielsen*, 559 U.S. at 689 (Ginsburg, J., dissenting) (citing 9 U.S.C. § 10(a)(4) (2012) as the grounds for the petition).

235. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 386 (S.D.N.Y. 2006), *rev'd*, 548 F.3d 35 (2d Cir. 2008), *rev'd*, 559 U.S. 662 (2010).

236. *Stolt-Nielsen*, 548 F.3d at 87.

237. *Id.* at 101.

238. *Id.*

239. *Id.* (quoting *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N 4 (Oct. 8, 2003), [https://www.adr.org/sites/default/files/Supplementary Rules for Class Arbitrations.pdf](https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf) [<https://perma.cc/9DGL-2DAY>]).

240. *Stolt-Nielsen*, 559 U.S. at 672 n.3.

makes arbitration too much like litigation.²⁴¹ Since arbitration clauses represent parties' choice that arbitration is superior to litigation, that choice cannot possibly include the agreement to be bound by an arbitration proceeding that looks so much like litigation—and arbitrators may not infer such an agreement from silence.²⁴² The Court again expounded the essentialist view that parties choose arbitration for “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes,” which would be “less assured” in class arbitration, “giving reason to doubt” that the parties consented to such arbitral procedures.²⁴³ The whole point of arbitration, the Court stated, is to *opt out* of litigation. Expeditiousness be damned—the multitude of parties suing *Stolt-Nielsen* were left to proceed through arbitration on an individual basis.²⁴⁴

The Court's reasoning was driven in part by essentialist values: the Court assumed parties choosing arbitration are choosing a dispute mechanism that differs from litigation. But it is one thing to interpret an arbitration clause in that manner and quite another thing to hold that the arbitrators—to whom the parties have delegated decisionmaking authority over the interpretation question—have exceeded their authority in reaching the opposite conclusion. Private law and international business values typically favor stronger deference to arbitrators' merits decisions than that.²⁴⁵

The majority in *Stolt-Nielsen* thus prioritized essentialist values over private law values, including respecting the parties' assignment of the class-treatment decision to arbitrators, enforcing arbitrators' decisions, and upholding the flexibility and possible efficiencies of

241. *Id.* at 685:

An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. . . . [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.

242. *Id.* at 685–86.

243. *Id.*

244. See Raviv, *supra* note 53, at 229 (“If a goal of arbitrations is to promote efficiency, and class actions promote efficiency, then shouldn't class arbitration be extra-efficient?”).

245. Whether to annul an award on excess of authority grounds can present a classic situation where different pro-arbitration values can conflict. As Bermann explains, “A reviewing court might well consider that annulling the award on excess of authority grounds would give effect to the probable intentions of the parties, but . . . it may worry about appearing to inject itself into the merits of the dispute, which in principle is off-limits to a reviewing court.” Bermann, *supra* note 178, at 347 (footnotes omitted). But “[i]f a policy or practice that is pro-arbitration when viewed in isolation is prejudicial enough to one or more other pro-arbitration values, then it may ultimately not be pro-arbitration at all, or at least a great deal less pro-arbitration than initially thought.” *Id.* at 348.

allowing class arbitration in this case. A court concerned with private law values like autonomy and adaptability would ordinarily not second-guess arbitrators' determinations of arbitration clauses that they were tasked with interpreting. Nor would it take a closed view of the potential for arbitration to innovate with new mechanisms for efficiency. The Second Circuit's decision weighed these competing values and read the arbitrators' award with deference; the Supreme Court seemed to review it under something akin to a *de novo* standard.

Another overarching value behind a support-based theory of the relationship between litigation and arbitration (as opposed to a substitution theory) is the need for courts not only to support arbitrators' decisions but also to provide guidance for future courts addressing similar issues. Parties prize arbitration for the certainty and predictability it purportedly provides. But *Stolt-Nielsen* raised more questions than it answered. Questions left open include what it means for an arbitral panel to "exceed its authority" and whether and under what circumstances arbitral decisions can be set aside as being in "manifest disregard of the law." These gaps in the law perpetuate uncertainty and generate the inevitable litigation that accompanies such uncertainty.²⁴⁶ Indeed, *Stolt-Nielsen* received considerable criticism from the international commercial arbitration community.²⁴⁷

This is not to say that the Court's opinion was naïve or unsophisticated. Rather, it reflects the Court's now fairly consistent opposition to the use of litigation and litigation-like procedures, such as class actions, to vindicate federal statutory rights.²⁴⁸ The dissents in these decisions sometimes mention the essentialist fallacy, but the majorities continue to prioritize their commitment to essentialist values and hostility to litigation over consideration of other ways that courts can best support arbitration.

Nevertheless, perhaps recognizing the potential mayhem that *Stolt-Nielsen* could unleash, the Court walked its decision back in 2013.

246. Rau, *supra* note 176, at 496 (noting that manifest disregard is "the argument of choice" for losing parties" in arbitration); Stipanowich, *supra* note 11, at 342–43; *Discussion of Restatement of the Law Third, The U.S. Law of International Commercial Arbitration*, 89 A.L.I. PROC. 143, 173 (2012) (statement of Mr. Elsen) ("[M]anifest disregard is a way that the deep pocket goes into court and wears out the other party and tries to knock out a settlement, even though they lost the point in arbitration . . .").

247. The international commercial arbitration community includes several arbitrators and arbitration practitioners who are also academics or write academic literature. See, e.g., Born & Salas, *supra* note 50; Thomas E. Carbonneau, *The Assault on Judicial Deference*, 23 AM. REV. INT'L ARB. 417 (2012); Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435 (2011); Stipanowich, *supra* note 11.

248. See *supra* Section II.A (discussing hostility to litigation and the work of Burbank and Farhang).

In *Oxford Health Plans LLC v. Sutter*, the Court approved an arbitrator's decision to permit class arbitration when interpreting an arbitration clause that did not speak to the question of class treatment.²⁴⁹ The Court distinguished *Stolt-Nielsen* by explaining that in that case, the panel had interpreted the parties' stipulation that the contract was "silent" with respect to the availability of class arbitration, whereas in *Oxford Health*, the arbitrator interpreted the arbitration clause itself (which did not mention class treatment).²⁵⁰ *Oxford Health* neutralized the effect of *Stolt-Nielsen* to some extent and may explain why there is little evidence of parties or courts pushing to extend its broader reading of FAA section 10(a)(4).²⁵¹

In *Lamps Plus*, however, the Court resurrected *Stolt-Nielsen*. The Ninth Circuit interpreted an arbitration clause to permit class arbitration.²⁵² The arbitration clause did not address the availability of class treatment; the court found it was "ambiguous" on that issue.²⁵³ To reach its conclusion, the Ninth Circuit applied *contra proferentem*,²⁵⁴ following California's default rule of contract interpretation that interprets contract ambiguities against the drafter, who, in this case, opposed class treatment.²⁵⁵

The Supreme Court reversed. Extending *Stolt-Nielsen*, the Court announced that "the FAA . . . bars an order requiring class arbitration when the agreement is not silent [as it had been in *Stolt-Nielsen*], but rather 'ambiguous' about the availability of such arbitration."²⁵⁶ Repeating a now familiar refrain, the Court rejected the

249. 569 U.S. 564 (2013); see Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 16 (2014) ("After *Sutter*, *Stolt-Nielsen* has largely been limited to its facts.").

250. Justice Alito concurred, though he would have reversed had he reviewed the arbitrator's decision de novo, and he doubted whether the class arbitration would bind absent class members, which, he thought, should advise future arbitrators to find that similar clauses would not permit class arbitration. *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring).

251. See, e.g., Tucker v. Ernst & Young, LLP, 159 So. 3d 1263, 1275–76 (Ala. 2014) (relying on *Oxford Health* to limit the reading of *Stolt-Nielsen*); Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031 (2017) (discussing class arbitration after *Stolt-Nielsen*).

252. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 673 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1407 (2019).

253. *Id.* at 671–72.

254. See *id.*

255. *Lamps Plus*, 139 S. Ct. at 1417.

256. *Id.* at 1412. Curiously, the Court misstated the holding of *Stolt-Nielsen*, which held that arbitrators may not compel class arbitration when an arbitration agreement is silent on that issue. See *id.* (describing *Stolt-Nielsen* as holding "that a court may not compel arbitration when an agreement is 'silent'" (emphasis added)). *Oxford Health*, by contrast, held that an arbitrator may interpret an arbitration clause to permit class proceedings. 569 U.S. at 573. Thank you to Alyssa King for pointing out this inconsistency.

possibility that an ambiguous clause could authorize compelling class arbitration because “[c]lass arbitration is not only markedly different from the ‘traditional individualized arbitration’ contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration.”²⁵⁷ As Justice Kagan wrote in dissent, “The heart of the majority’s opinion lies in its cataloging of class arbitration’s many sins.”²⁵⁸

Focusing on the principle that “arbitration is strictly a matter of consent,”²⁵⁹ the Court identified courts’ and arbitrators’ tasks as “giv[ing] effect to the intent of the parties.”²⁶⁰ Repeating *Stolt-Nielsen*’s logic, the Court reasoned that the “crucial differences” between class and individualized arbitration create “reason to doubt” that parties agreed to class arbitration when they agreed to arbitrate their disputes.²⁶¹ In reaching this conclusion, the Court had to hold that this reasoning, apparently inherent in the FAA, preempts the state law contract interpretation rule of *contra proferentem*, even though that law did not discriminate against arbitration in the sense of invalidating an arbitration clause or requiring suits to proceed in court. Disparaging this well-established contract law principle as merely “based on public policy factors,”²⁶² the Court argued that the canon therefore does not reveal the parties’ intent.²⁶³

The majority in *Lamps Plus* asserts that the decision “is consistent with a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration

257. *Lamps Plus*, 139 S. Ct. at 1415 (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018); and *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010)); *see also id.* at 1416 (emphasizing the importance of “the fundamental difference between class arbitration and the individualized form of arbitration envisioned by the FAA”); *id.* (quoting passages from *Concepcion*, *Stolt-Nielsen*, and *Epic* discussed in this section).

258. *Id.* at 1435 (Kagan, J., dissenting).

259. *Id.* at 1415 (majority opinion) (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010)).

260. *Id.* at 1416 (quoting *Stolt-Nielsen*, 559 U.S. at 684).

261. *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 687, 685–86).

262. *Id.* at 1417.

263. *Id.* (“Like the contract rule preferring interpretations that favor the public interest, *contra proferentem* seeks ends other than the intent of the parties.” (citation omitted)). The Court defended this move by likening it to its “refusal to infer consent when it comes to other fundamental arbitration questions,” specifically, the gateway question of whether the parties have agreed to arbitrate at all. *Id.* at 1416–17. But as Ted Folkman aptly explains, those gateway questions concern “whether the party has assented to arbitrate in the first place,” which is “quite different from questions about the procedure that will govern the arbitration the parties have agreed [to].” Ted Folkman, *Case of the Day: Lamps Plus v. Varela*, LETTERS BLOGATORY (Apr. 30, 2019), <https://lettersblogatory.com/2019/04/30/case-of-the-day-lamps-plus-v-varela/> [<https://perma.cc/KBF9-RJ3U>].

agreements.”²⁶⁴ The decision was, of course, predictable. But the revolution came, as Justice Kagan noted in dissent, in “insisting that the FAA trumps . . . neutral state [contract interpretation] rule[s] whenever [their] application would result in” a particular disfavored procedure within arbitration, namely, class arbitration.²⁶⁵

This is *Lamps Plus*'s conflict between essentialist values and private law values: essentialist values reject arbitral procedures that start to resemble “the litigation [that arbitration] was meant to displace.”²⁶⁶ Enforcing this supposed distinction between litigation and arbitration, however, conflicts with private law values, including the fundamental value the Court lionizes in *Lamps Plus*: that arbitration is a creature of contract. *Lamps Plus* undermines parties' expectations that general contract principles apply to arbitration contracts and replaces those principles with a federal common law of arbitration contracts. It also takes away arbitrators' traditional power—the power delegated by the arbitration agreement—to control and innovate with arbitral procedure. If courts cannot order class arbitration based on state contract law rules of interpretation, it is hard to know what is left of the discretion *Oxford Health* purported to preserve for arbitrators.

Some may assume that the cases discussed so far simply reflect a strong version of the essentialist view as it applies to class proceedings: that arbitration should not involve class treatment without explicit authorization in the arbitration agreement. But *Stolt-Nielsen* also stands for broader positions about arbitrators' capacity to determine their own jurisdiction and the extent to which courts will police that jurisdiction. *Lamps Plus*, likewise, may stand for broader positions about courts' constraints on arbitral procedure. This is another area where private law arbitration values can butt heads with essentialist views of arbitration in ways that affect important issues in international commercial arbitration.

Finally, this discussion may give the impression that the Supreme Court's essentialist values come out only in response to the threat of class arbitration. *Hall Street v. Mattel*, however, brought the conflict between essentialist and private law values to bear in a different context.²⁶⁷ *Hall Street* raised the question of whether parties could contractually expand the grounds for judicial review of an

264. *Lamps Plus*, 139 S. Ct. at 1418.

265. *Id.* at 1428 (Kagan, J., dissenting).

266. *Id.* at 1416 (majority opinion) (quoting *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018)).

267. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

arbitration award beyond those set forth in the FAA.²⁶⁸ One might think that if arbitration were truly a “creature of contract,” parties would be able to articulate the scope of the powers they were granting the arbitrators and specify which they were reserving for the courts.²⁶⁹ Unlike *Stolt-Nielsen* or *Lamps Plus*, there was no contention that the arbitration agreement was “silent” or “ambiguous” as to what the parties intended.

In rejecting parties’ ability to opt into more judicial review for arbitration, the Court justified its decision in terms of its pro-arbitration policy. Closer inspection, however, reveals that the decision is rooted in the Court’s essentialist values over and possibly instead of other arbitration values.

The Court explained that for the FAA to further “a national policy favoring arbitration,” it made more sense to limit review to what is “needed to maintain arbitration’s *essential virtue of resolving disputes straightaway*.”²⁷⁰ Any other reading opens the door to the full-bore legal and evidentiary appeals that can “rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.”²⁷¹ In other words, allowing parties to choose more judicial review—even though it would validate party autonomy—would make arbitration too much like litigation. The Court reached this conclusion without further support for its contention that either lack of review or “resolving disputes straightaway” is actually arbitration’s “essential virtue.”²⁷² On the contrary, several major arbitration associations allow parties to opt into review,²⁷³ and many arbitration proceedings, especially in international commercial arbitration, can be remarkably long.²⁷⁴

268. For a scathing takedown of *Hall Street*, see Rau, *supra* note 176, at 485 (“The *Hall Street* opinion must, then, represent a new low in context-free, policy-free, abstract, non-functional decision-making.”).

269. *See id.* at 472 (arguing that this would be a better framing of the question presented in *Hall Street*).

270. *Hall St. Assocs.*, 552 U.S. at 588 (emphasis added).

271. *Id.* (alteration in original) (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

272. *Id.*

273. *See, e.g., Optional Appellate Arbitration Rules*, AM. ARB. ASS’N 3 (Nov. 1, 2013), https://www.adr.org/sites/default/files/AAA_ICDR_Optional_Appellate_Arbitration_Rules.pdf [<https://perma.cc/WEC3-AREW>] (providing for the option of appellate review consistent with the objectives of arbitration, defined as “a fair, fast and expert result that is achieved economically”).

274. As Justice Stevens noted in dissent, the outcome in *Hall Street* “conflict[ed] with the primary purpose of the FAA”: eliminating judicial hostility and requiring enforcement of arbitration agreements by their terms. 552 U.S. at 593 (Stevens, J., dissenting); *see also* Rau, *supra* note 176, at 478–79 (asserting that the analysis of the essentialist description of arbitration was “beside the point”); Wilson, *supra* note 170, at 106 (“Faced with this conflict between the

Hall Street resolved certain questions, but it raised others. Most significantly, perhaps, it did not address circuit splits about courts' ability to overturn arbitral awards when arbitrators manifestly disregard the law.²⁷⁵ "Manifest disregard" is a controversial judge-made basis for vacatur adopted in some circuits. The controversy arises both because of the doctrine's origin—it does not appear in the text of the FAA—and because it permits "judicial review of the legal merits of arbitral awards, which modern arbitration law has long viewed as inimical to core process values such as efficiency and finality."²⁷⁶ Some argue that the essentialist reading deployed in *Hall Street* also eliminates the possibility of manifest disregard as a basis for vacatur, but not all courts read it that way.²⁷⁷

There are different ways of reading *Hall Street*; other factors, such as the Court's reading of the statutory language, may have also driven the decision.²⁷⁸ Nevertheless, through the lens of the arbitration-litigation paradox, *Hall Street* provides an example of a situation where the traditionally "pro-arbitration" stance of interpreting arbitration clauses by their terms and giving effect to party autonomy conflicts with the "essentialist" stance of differentiating arbitration from litigation based on the supposedly essential characteristic that arbitration resolves suits "straightaway." The Court's dedication to keeping arbitration and litigation distinct prevailed.

The significance of the battle between essentialist values and private law and international business values is not limited to the cases discussed in this Section. Even if these cases are outliers on their particular facts, many of the major arbitration issues looming on the horizon, which have been percolating in the lower courts, involve similar value conflicts. For example, there is the question of whether arbitrators may impose punitive damages awards. A recent, high-

congressional purpose of enforcing the contract as written, subject to contractual defenses, and the judicially created purpose of favoring arbitration, the Court opted for favoring arbitration." (footnote omitted).

275. See Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009).

276. *Id.*

277. See, e.g., *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 662 (2010) (acknowledging the Second Circuit's "conclusion that the 'manifest disregard' doctrine survives *Hall Street*"); *supra* note 240 and accompanying text (noting that *Stolt-Nielsen* again left open questions about validity of "manifest disregard" doctrine); see also *infra* text accompanying notes 337–338 (discussing the perception that manifest disregard presents a significant risk of vacating arbitral awards notwithstanding most experts' view that the doctrine is all but obsolete).

278. See e.g., Aragaki, *supra* note 275 (explaining why *Hall Street* does not eliminate the availability of manifest disregard as a basis for vacatur); Rau, *supra* note 176, at 480–95 (speculating about the underlying rationales for the decision).

profile (domestic) arbitration provides a colorful example. There, an arbitrator held that Twentieth Century Fox and its related companies had “pocketed tens of millions of dollars that should have gone to” the actors, executive producer, and writer of the TV series *Bones*.²⁷⁹ The arbitrator awarded \$50 million in compensatory damages and an additional \$128 million in punitive damages to the *Bones* team.²⁸⁰ The arbitrator had determined that the arbitration clause did not forbid the award of punitive damages arising from fraud claims, which were covered by the arbitration agreement and which Fox had insisted on arbitrating.²⁸¹ Even if it had, California law prevented parties from contracting out of punitive damages liability for fraud.²⁸²

Fox sued to vacate the \$128 million punitive damages award, arguing that the arbitrator exceeded his authority by awarding punitive damages.²⁸³ The question potentially pits essentialist values against private law ones. One could argue that punitive damages are a characteristic (and potentially negative) feature of litigation, precisely the kind of litigation feature that parties seek to avoid by choosing arbitration. Private law values, on the other hand, would support enforcing the arbitrator’s authority to decide the scope of his jurisdiction and the scope of damages within the confines of the powers delegated to him by the arbitration clause.²⁸⁴ Part IV addresses additional controversial issues where this conflict comes into play.

279. John Koblin & Edmund Lee, *Arbitrator Scolds Fox and Orders It To Pay \$178 Million to ‘Bones’ Team*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/business/media/bones-fox-arbitration-award.html> [<https://perma.cc/8QC2-WTPZ>].

280. *Id.*

281. Twentieth Century Fox Film Corp. v. Wark Entm’t, Amended Final Award, No. 220052735 (Feb. 20, 2019), <https://pmcdeadline2.files.wordpress.com/2019/02/final-amended-award-redactions.pdf> [<https://perma.cc/YB9X-RK3T>].

282. *Id.* at 10.

283. Defendants’ Notice of Motion And Motion For Order Vacating Or Correcting Arbitration Award; Memorandum Of Points And Authorities In Support Of Motion, Wark Entm’t Inc. v. Temperance Brennan, L.P., No. BC602287 (Cal. Sup. Ct. Feb. 27, 2019) (contesting arbitrator’s authority to award punitive damages as defying the express terms of the arbitration clause); see also Gene Maddaus, *Judge Overturns \$128 Million ‘Bones’ Judgment in Huge Win for Fox*, VARIETY (May 3, 2019), <https://www.msn.com/en-us/entertainment/tv/judge-overturns-dollar128-million-bones-judgment-in-huge-win-for-fox/ar-AAAODBv> [<https://perma.cc/GPH7-BG9L>].

284. The arbitrator’s award in the *Bones* case made strong arguments about why the arbitration clause’s punitive damages limitations should not apply to the fraud claims, including an emphasis on Fox’s insistence that the entire dispute be heard in arbitration. See Amended Final Award, *supra* note 281. The California Superior Court, however, vacated the punitive damages award, holding that the arbitrator exceeded his powers by interpreting the contract to permit such damages. Minute Order, Ruling on Submitted Matter, Wark Entm’t, Inc. v. Twentieth Century Fox Film Corp., No. BC602287 (Cal. Super. Ct. May 2, 2019), <https://pmcdeadline2.files.wordpress.com/2019/05/minute-order-bones-wm.pdf> [<https://perma.cc/JK53-XUNT>]. The plaintiffs intend to appeal, emphasizing the limited standard of review over an arbitrators’ interpretation of the parties’ contract. See Dominic Patten, *‘Bones’ Stars & EPs Vow To Appeal Cleaving Of \$179M*

D. The Flaws in the Essentialist View

Thus far, this Part has depicted the Supreme Court's anti-litigation and pro-arbitration jurisprudence and has demonstrated how the Court has relied on an essentialist definition of arbitration—as being the opposite of litigation in important, mostly procedural respects—when confronting situations where anti-litigation and essentialist values conflict with other arbitration values. In those circumstances, the Court has focused on sustaining distinctions between litigation and arbitration rather than balancing conflicting pro-arbitration values, such as the autonomy and flexibility that parties often seek when they choose arbitration or the international business values the Court originally identified as motivating its support for international commercial arbitration.²⁸⁵ This Section unpacks flaws in the Court's essentialist vision of arbitration and argues that essentialist values should at least be weighed against other arbitration values and should usually be subordinated to them when the values conflict. This is especially true when the case involves international commercial arbitration, where the essentialist thesis is particularly weak.

There are three flaws with the essentialist thesis. First, the Court improperly characterizes the “essence” of arbitration. Second, the essentialist view undervalues courts' role in supporting arbitration. And third, at the intersection of the first two points, by positing that arbitration and litigation are opposites, the essentialist view logically results in the erroneous conclusion that the two are incapable of being viable alternative paths to similar goals.

First, there is the question of what arbitration is and what arbitral procedure can be. To be sure, the Court at times recognizes the value of flexibility in arbitration and of parties' ability to craft precisely the kind of dispute resolution system that suits their needs.²⁸⁶ But it more often asserts that there are certain fundamental attributes of arbitration that, if abridged, make parties' choices and default

Profit Award By Judge – Update, DEADLINE (May 2, 2019, 4:27 PM), <https://deadline.com/2019/05/bones-award-overturned-judge-fox-win-1202606584> [<https://perma.cc/C7PT-MM3S>].

285. In a rich account of the Court's arbitration cases, Maria Glover identifies *Italian Colors* as the turning point where the Court went from emphasizing the importance of arbitration as an efficient private dispute resolution mechanism to valuing arbitration instead, and exclusively, as a vindication of freedom of contract. Glover, *supra* note 7, at 3057. Glover's depiction parallels this Article's account to some extent, but it focuses on that case's effect of eliminating dispute resolution altogether and “erod[ing] substantive law,” particularly with regard to potential disputes arising out of contracts of adhesion. *Id.* at 3054.

286. See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (recognizing limits of *Concepcion*); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (calling “adaptability” one of the “hallmarks of arbitration”).

understandings lose the protection of the FAA and its pro-arbitration policy. For the most part, those forbidden characteristics are procedures that make arbitration look more like litigation.²⁸⁷

The practice of international commercial arbitration demonstrates that this narrow and inflexible understanding of arbitration is fundamentally mistaken. Dissenters in Supreme Court arbitration cases have made this point even apart from the international commercial context.²⁸⁸

Modern international commercial arbitration has grown exponentially since the enactment of the FAA, expanding in frequency and complexity.²⁸⁹ It has acquired many attributes that make it similar to litigation. International arbitration today includes multiparty arbitration,²⁹⁰ jurisdictional disputes, and controversies over evidence, discovery, and challenges to arbitrators.²⁹¹ It is high stakes.²⁹² It is expensive.²⁹³ It can be far from speedy.²⁹⁴ It can have appellate processes.²⁹⁵ Parties in arbitration can opt for the application of the Federal Rules of Civil Procedure. Some arbitral tribunals publish

287. *See supra* Part II.

288. *See, e.g.,* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting):

Where does the majority get its . . . idea—that individual, rather than class, arbitration is a “fundamental attribut[e]” of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

(citation omitted) (quoting *id.* at 342 (majority opinion)) (alteration in original); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1420 (2019) (Ginsburg, J., dissenting).

289. NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 27 (6th ed. 2015). While recognizing that the defining features of arbitration have not changed, Redfern and Hunter note that “[t]he modern arbitral process has lost its early simplicity. It has become more complex, more legalistic, more institutionaliz[ed], and more expensive.” *Id.*; *see also, e.g.,* Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the “Judicialization” of International Arbitration*, 25 AM. REV. INT’L ARB. 223, 227 (2014); Stipanowich, *supra* note 22, at 11 (“In order to grapple more effectively with a wide range of business disputes, including many large, complex cases, arbitration procedures have tended to become longer and more detailed.”).

290. *Cf. Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 551 (Aug. 4, 2011) (permitting class treatment within an International Centre for Settlement of Investment Disputes (“ICSID”) case).

291. Gerbay, *supra* note 289, at 228.

292. *Compare Concepcion*, 563 U.S. at 350 (“Arbitration is poorly suited to the higher stakes of class litigation.”), *with Raviv*, *supra* note 53, at 222–27 (discussing the attraction of high-stakes arbitration).

293. In contrast to government-subsidized courts, arbitrators and arbitral tribunals charge considerable fees that are often a percentage of the award. Gerbay, *supra* note 289, at 243 n.107.

294. *Id.* at 229.

295. Hiro N. Aragaki, *Constructions of Arbitration’s Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 163.

lengthy articles of their own procedural rules.²⁹⁶ Parties choosing arbitration have—and should have—tremendous flexibility about how to structure it.²⁹⁷ When they do not, their arbitration clause delegates to the arbitrators (not courts) choices about dispute resolution procedure. That is not to say that there are no limits on what arbitrators can do—there are.²⁹⁸ Rather, those limits do not come from inherent procedural distinctions between arbitration and litigation.

An extensive literature considers why international arbitration has developed to resemble litigation in certain ways, with many scholars identifying the influence of American lawyers and legal complexity on the judicialization of international arbitration.²⁹⁹ Whatever the cause, the cost and length of at least some international commercial arbitration has increased greatly. In these and other respects, international commercial disputes—whether they proceed in arbitration or in courts—share many characteristics.³⁰⁰ Indeed, many scholars attribute the success of international commercial arbitration to its judicialization and the ways in which it has grown to more closely resemble litigation.³⁰¹ On the other hand, judicialization is also a source of concern among some practitioners.³⁰²

Importantly, the practice of international commercial arbitration is not just any counterexample. Business-to-business arbitration generally and international commercial arbitration in particular are the paradigm, original context for the pro-arbitration policy.

International commercial arbitration thus reveals the fundamental error in the essentialist thesis. Arbitration turns out to be difficult to define. The “orthodox view” of arbitration as “a monolithic, one-dimensional concept with settled features,” such as speed, privacy,

296. Gerbay, *supra* note 289, at 236.

297. *Id.*

298. There are multiple sources of such constraints—for example, the parties’ agreement and limitations on arbitrators’ powers to issue injunctions.

299. See, e.g., JOSHUA KARTON, *THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW* 23 (2013) (explaining that arbitrators tend to have “significant bonds of common experience” developed in “Anglo-American firms or major universities”); SWEET & GRISEL, *supra* note 41.

300. Gerbay, *supra* note 289, at 227–28 (“[A]rbitration increasingly resembles litigation before domestic courts.”).

301. SWEET & GRISEL, *supra* note 41, at 5.

302. A survey of international arbitration practitioners that did not even ask about the topic received several responses reporting “concerns over the ‘judiciali[z]ation’ of arbitration, [citing] the increased formality of proceedings and their similarity with litigation, along with the associated costs and delays in proceedings.” *Corporate Choices in International Arbitration: Industry Perspectives* 5, PWC (2013), <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf> [<https://perma.cc/QV77-XSQL>].

and informal procedures,³⁰³ grasps onto certain characteristics that are sometimes true of arbitration. But these are far from the immutable, or even the most common, characteristics of all arbitration—and, as noted, it depends on what kind of arbitration is at issue. Not all arbitration satisfies this description, and often it does not try to.³⁰⁴ An accurate definition of “arbitration” is thus often fairly bare-bones, “such as ‘a process in which a third party who is not acting as a judge renders a decision in a dispute.’”³⁰⁵ These practical realities powerfully argue against prioritizing essentialist values over other arbitral values in cases where they conflict.

Second, the Court’s prioritization of essentialist values is consistent with a view of arbitration as a substitute for litigation, but this understanding underappreciates the interdependent relationship between national courts and private arbitration. A focus on protecting arbitration from the encroachment of litigation-like (or, more specifically, U.S.-litigation-like) characteristics can obscure courts’ important role of supporting arbitration, which includes respecting arbitration awards and providing clarity and guidance for future courts and arbitrators.³⁰⁶

In these cases, the Court rejected either arbitrators’ or lower courts’ interpretations of arbitration agreements, defined arbitration rigidly instead of safeguarding its “adaptability,”³⁰⁷ and interfered with arbitration in ways that disrupt the stability, independence, and certainty for which the international commercial arbitration system strives. In doing so, the Court compromised the United States’ role in supporting the institution of international commercial arbitration.

In *Stolt-Nielsen*, for example, the Court overturned an arbitral award on its merits because the arbitrators had insufficiently justified their legal conclusions.³⁰⁸ The Court chided the arbitrators for relying

303. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 40 (1999).

304. Sternlight, *supra* note 22, at 372 (arguing that arbitration sometimes “does not even aspire” to the attributes of speed and informality).

305. *Id.* (quoting CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 383 (2d ed. 2011)).

306. Born & Salas, *supra* note 50, at 38:

Appellate courts in other legal systems are able to produce consistent and predictable bodies of judicial authority on issues of arbitration—despite substantial diversities of opinion on the same sorts of issues that the U.S. Supreme Court faces. The U.S. legal regime for arbitration would benefit enormously if the Supreme Court were able to provide comparable consistency and clarity in this country.

(footnote omitted).

307. *Id.* (identifying “adaptability” as one of the “hallmarks of arbitration”).

308. *See id.* at 34.

on public policy,³⁰⁹ but it did not consider the ramifications for arbitrators working in areas where there are lacunae in the law.³¹⁰ Nor has it seen fit to grant certiorari in cases that might bring enhanced clarity to various areas of law relating to international commercial arbitration, such as when an arbitral decision may be overturned for “manifest disregard of the law,”³¹¹ though the Court routinely and aggressively grants cert in cases relating to other aspects of arbitration.³¹²

The Court takes seriously its role in policing the enforcement of arbitration *agreements*. It receives criticism for arbitration’s extension into unwarranted spheres. These extensions are consistent with hostility to litigation in other areas and the effect of these decisions in curbing class actions³¹³ (to take one example) is no accident. But this overzealous enforcement of arbitration agreements can, in some cases, simply lead to less arbitration and less dispute settlement.³¹⁴ Moreover, the Court has come to equate “favoring arbitration” with favoring “traditional, individualized arbitration”—which is not the same thing.³¹⁵ The emphasis on essentialist distinctions insufficiently acknowledges, let alone balances, other arbitral values.

The third point appears at the intersection of the first two. Reflecting the essentialist view, the Court paints parties’ choice of arbitration itself as a trade-off, a reflection of the parties’ preference for speed and efficiency, for example, over heightened procedural

309. Justice Kagan rightfully criticized the majority for similarly relying on its policy preferences in *Lamps Plus*. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1435 (2019) (Kagan, J., dissenting).

310. See Alan Scott Rau, *Arbitrators and The Interpretation of Contracts*, 30 AM. REV. INT’L ARB. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3275810 [<https://perma.cc/RSU6-MS38>]. Ironically, the expansion of arbitrability is often faulted with curbing the growth of the common law. See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409–10; Smith, *supra* note 7. This effect may lead to more holes in the law that arbitrators must fill, not fewer.

311. See, e.g., Aragaki, *supra* note 22, at 163–64 (describing circuit split on manifest disregard splits after *Hall Street*); Reisman & Richardson, *supra* note 40, at 48.

312. See Beth Graham, *U.S. Supreme Court to Decide Three Arbitration Cases in Fall 2018 Term*, AM. BAR ASS’N (Nov. 16, 2018), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2018/supreme-court-decides-3-arbitration-cases-fall-2018> [<https://perma.cc/TU4E-JLGS>].

313. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 639 (2012).

314. See *Lamps Plus*, 139 S. Ct. at 1420–22 (Ginsburg, J., dissenting) (explaining how “[t]he Court has relied on the FAA . . . to deny to employees and consumers ‘effective relief against powerful economic entities’”).

315. See *supra* notes 178–182 and accompanying text.

safeguards.³¹⁶ This conception shortchanges arbitration as a true alternative for providing a just and fair dispute resolution system. To support arbitration's legitimacy and promote it as an option for dispute resolution, courts should recognize that arbitration, just like litigation, seeks to balance fairness with speed and efficiency.³¹⁷ Instead, this conventional narrative of litigation and arbitration as opposites assumes, as Hiro Aragaki points out, a zero-sum game with respect to efficiency and procedural safeguards of justice.³¹⁸ The more efficient a dispute resolution system, like arbitration, the less fair or just the outcome might be; the more procedural safeguards, the more parties pay for justice in the slog and inefficiencies inherent in litigation. Aragaki convincingly demonstrates that this is a false dichotomy and a dangerous way of approaching arbitration for both courts and scholars because it devalues the importance of fairness in arbitration.³¹⁹

These problems are not merely rhetorically prickly. As the Court has decided these cases, scholars, international arbitrators, and practitioners have noted these cases' muddying consequences for international commercial arbitration.³²⁰ The Court's approach has undermined the perceived legitimacy of arbitration of all kinds. Moreover, as prominent international arbitration practitioners Gary Born and Claudio Salas put it, "[T]he Court's contradictory positions [in arbitration cases] seriously compromise the legal framework for arbitration in the U.S., leaving businesses, courts and others with little

316. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–86 (2010) ("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."); see also *Lamps Plus*, 139 S. Ct. at 1416 (quoting this passage).

317. See, e.g., AM. ARB. ASS'N, *supra* note 273, at 3 ("The objective of arbitration is a fair, fast and expert result that is achieved economically.").

318. Aragaki, *supra* note 295, at 144.

319. Aragaki, *supra* note 72, at 1941–42.

320. See, e.g., Born & Salas, *supra* note 50, at 21 ("Over the past decade, the U.S. Supreme Court has issued a series of confusing and, at times, confused opinions on class arbitration."); Rau, *supra* note 176, at 502–05 (considering whether, after *Hall Street*, contracting parties can still expressly exclude the application of the FAA to their arbitration clauses and instead opt for the application of state arbitration law); Stipanowich, *supra* note 12, at 423 ("[T]he nature and performance of arbitration procedures in different settings presents a very complex picture, making it impossible to 'draw confident conclusions about the effect of invalidating wide swaths of arbitration agreements.'") (quoting Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 CARDOZO J. CONFLICT RESOL. 579, 584 (2009)); Charles H. Brower, II, *Hall Street Assocs. v. Mattel, Inc.: Supreme Court Denies Enforcement of Agreement to Expand the Grounds for Vacatur Under the Federal Arbitration Act*, AM. SOC'Y INT'L L. (May 27, 2008), <https://www.asil.org/insights/volume/12/issue/11/hall-street-assocs-v-mattel-inc-supreme-court-denies-enforcement> [<https://perma.cc/F87Z-HRG7>] ("However, in rendering its judgment, the Supreme Court left open a number of questions . . .").

security about how arbitration agreements will be interpreted and enforced in the future.”³²¹ The lingering uncertainty about the availability of vacatur on the basis of manifest disregard, for example, haunts international commercial arbitration in the United States—even though manifest disregard claims are rarely successful in practice.³²² Scholars and practitioners can only speculate about how far the reasoning in *Hall Street* may be extended in the international commercial arbitration realm to limit parties’ ability to specify the procedures for arbitration.³²³ Similarly, *Lamps Plus* raises questions about what aspects of contract law will in the future be dubbed as mere manifestations of “public policy” and cast aside to make room for FAA-required default rules.

To be sure, there are consistencies between hostility to litigation as expressed through essentialist enthusiasm for arbitration and support for international commercial arbitration. For example, both positions seem to favor corporate business interests, as businesses supposedly loathe litigation but adore arbitration.³²⁴ Arbitration agreements are widely enforced. Few businesses are clamoring loudly for more class arbitration,³²⁵ and so restrictions on that practice are supported by institutions like the U.S. Chamber of Commerce.³²⁶ The Court’s preference for arbitration itself can cut off court access.³²⁷ Many

321. Born & Salas, *supra* note 50, at 38.

322. See Brower, *supra* note 320 (“Despite the clear holding that parties may not contract to enlarge the FAA’s grounds for vacatur, *Hall Street* leaves at least four open questions.”); *supra* note 246 and accompanying text; *infra* note 337 and accompanying text.

323. See, e.g., Stanley A. Leasure, *Arbitration Law in Tension After Hall Street: Accuracy or Finality?*, 39 U. ARK. LITTLE ROCK L. REV. 75, 103 (2016); Brower, *supra* note 320.

324. See, e.g., Brief for United States Council for International Business As Amicus Curiae in Support of Respondent at 3, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (No. 06-989), 2007 WL 2707883 (“Arbitration is attractive to the international business community because it provides finality and certainty while also achieving other goals such as speed and efficiency.”); Ware, *supra* note 135, at 1 (“Compared with litigation, arbitration is typically quick, inexpensive, and confidential. It generally operates in a commonsense way Unlike judges, arbitrators are chosen by the parties to the dispute. Cases are resolved by respected professionals with technical, as well as legal, expertise.”). *But see*, e.g., Julian Nyarko, *We’ll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT’L REV. L. & ECON. (forthcoming 2019) (manuscript at 7) (“[P]arties treat international arbitration as a second-best alternative to a well-functioning domestic court system that is used not in order to avoid foreign courts, but in an attempt to avoid supposedly dysfunctional court systems.”).

325. Uber and Lyft may become prominent exceptions. See *supra* note 222–223 and accompanying text; see also Folkman, *supra* note 263.

326. Cf. King, *supra* note 251, at 1035 (“[C]ontract drafters did not affirmatively choose a class arbitration in any example. Rather, they faced class arbitration because they wrote contracts without class waivers and did not change the terms before the plaintiffs’ claims accrued.”).

327. See, e.g., *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1420–22 (2019) (Ginsburg, J., dissenting); Gilles & Friedman, *supra* note 313, at 647; Glover, *supra* note 285, at 3054–55; Siegel, *supra* note 9, at 1142 (“The decisions boldly, repeatedly, and explicitly call for the courts to

scholars have noted the combined strength of pro-arbitration and anti-litigation forces in driving dispute resolution in a variety of contexts away from courts and toward arbitration (or just away from any resolution).³²⁸ But this Article seeks to highlight the circumstances when the forces are opposed. In those circumstances, the prioritization of essentialist values to the exclusion of private law or international business values can harm the institution of international commercial arbitration.

One may object that the Court's misimpression of arbitration and litigation as opposites does not matter. One may think there is some truth to the description. Or one may believe that if presented with an international commercial arbitration case, the Court would likely enforce explicit arbitration clauses that specify particular procedures, even if they included litigation-like characteristics, and therefore party preferences will nonetheless be enforced.³²⁹ These objections undervalue the role of courts in international commercial arbitration. The New York Convention establishes a system where courts exist in the background to enforce arbitration agreements, to recognize and enforce arbitration awards, and to support arbitral proceedings along the way. A large part of that support is deferring to the arbitrators' authority and assuming that arbitrators—not courts—determine arbitration's shape.³³⁰ *Stolt-Nielsen* and *Lamps Plus* suggest U.S. courts might not do that.

More to the point, perhaps, courts' work is not necessarily in adjudicating any particular case but in providing "the perceived probability of judicial enforcement."³³¹ One might have confidence that if and when the appropriate case presents itself, the Supreme Court will reverse course and go back to prioritizing private law and international business values over formalistic, essentialist ones. In the meantime, however, in the absence of such a case since *Mitsubishi* in 1985 and in the presence of cases like *Concepcion*, *Epic*, and *Lamps Plus* promoting a primarily trans-substantive, essentialist vision of arbitration, U.S.

shepherd more and more cases out their own courthouse doors and into the hands of arbitrators . . ."); Stephanie Bornstein, Super-Hybrid Regulatory Enforcement (Feb. 15, 2019) (unpublished manuscript) (on file with author).

328. See *supra* Introduction.

329. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018) (discussing the limits of *Concepcion*'s essentialist description of arbitration); cf. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 668–70 (2010) (deciding whether class arbitration was available, even though the parties had asked arbitrators to decide that issue).

330. See W. Laurence Craig, *Some Trends and Developments in the Law and Practice of International Commercial Arbitration*, 50 TEX. INT'L L.J. 699, 718 (2016).

331. Whytock, *Private-Public*, *supra* note 103, at 19–20.

law reflects a pro-arbitration-*clause* jurisprudence with a narrow view of what arbitration is and can be and with little regard for the effects on international commercial arbitration.

The essentialist view represents an assumption by national courts that arbitration is the opposite of litigation; this assumption creates default rules that fundamentally change the relationship between courts and arbitration. These default rules are incorporated into a special federal common law of contracts—traditionally the domain of state law—specifically for contracts that contain arbitration clauses.³³² Such developments cede considerable control over arbitral proceedings to courts. These unwarranted default rules could lead to courts' shirking their responsibilities to support arbitrators' authority, interfering in areas that parties agree or assume are subject to arbitrators' judgment, and accordingly undermining both parties' expectations and the institution of international commercial arbitration. In short, the effect of these decisions is not logically limited to cabinining class arbitration.³³³

The flexibility of international arbitration practice enables it to adapt to Supreme Court decisions, and practitioners and academics alike have urged parties to be more explicit in their arbitration clauses³³⁴ in response to the cases discussed here. That is not to say that practitioners do not care or that these decisions do not impose costs on parties and burdens on the system. Including greater specificity in international contracts imposes additional costs. The suggestions, moreover, are not guaranteed to be followed,³³⁵ and their existence implies that, previously, at least some international contracts contained different background assumptions. Lingering uncertainty on issues like

332. See Leslie, *supra* note 8, at 266–67; see also *supra* Section II.C (discussing *Lamps Plus*).

333. See *infra* Section IV.B.1 (discussing different outcomes for issues in international commercial arbitration depending on whether one focuses on essentialist values or private law values).

334. See, e.g., Howard S. Zelbo & Jennifer L. Gorskie, *U.S. Supreme Court Limits the Ability of Arbitrators To Order Class Arbitration*, CLEARY GOTTLIEB 9 (Nov. 2010), <https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/litigation-and-arbitration-report-november-2010.pdf> [<https://perma.cc/B4AH-AYFP>].

335. Forum selection clauses and arbitration clauses are notoriously inserted at the eleventh hour and without extensive consideration. See, e.g., Eric S. Sherby, *A Checklist for Drafting an International Arbitration Clause*, BUS. L. TODAY, Sept. 2010, at 1, <https://apps.americanbar.org/buslaw/blt/content/articles/2010/09/0001.pdf> [<https://perma.cc/2BUC-UF2J>].

[I]n many cases, the litigator or arbitration specialist receives an 11th-hour e-mail or phone call from a transactional lawyer, along the lines of “please send me your standard arbitration clause for an international transaction.” At that late stage, there is no time for any lawyer involved to hit the “how-to” books.

Arbitration clauses are also often boilerplate provisions. Cf. Stephen J. Choi, Mitu Gulati & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate*, 67 DUKE L.J. 1 (2017).

the judicial standard of review of arbitral awards is also a bogeyman for foreign clients considering international arbitration in the United States, which can make parties seek out other countries to host their arbitrations or enforce their awards.³³⁶ Experts agree, for example, that manifest disregard is almost completely obsolete, and the New York Appellate Division recently affirmed its extremely narrow scope by reversing a trial court decision that had vacated an arbitral award on that ground.³³⁷ But according to practitioners, clients still need to be reassured that “U.S. law, as applied by New York courts, is as favorable to the enforcement of international arbitration awards as the laws of other major international arbitration centers around the world.”³³⁸

III. LITIGATION ISOLATIONISM AND INTERNATIONAL COMMERCIAL ARBITRATION

The previous Part demonstrated how the Supreme Court’s arbitration decisions have in fact undermined U.S. courts’ ability to support international commercial arbitration.³³⁹ This Part investigates how other aspects of U.S. courts’ hostility to litigation, which seem unrelated to arbitration, likewise negatively affect international commercial arbitration.³⁴⁰

336. On the other hand, complications with enforcing foreign arbitral awards might encourage parties—if they are thinking about this issue far enough in advance—to seat their arbitrations in the United States to avoid enforcement problems. Thanks to Aaron Simowitz for this point.

337. *In re Daesang Corp. v. NutraSweet Co.*, 85 N.Y.S.3d 6, 8 (N.Y. App. Div. 2018). New York Supreme Court Judge Charles Ramos, who is designated to hear all international arbitration disputes before the Commercial Division, had vacated the award for manifest disregard. As practitioners noted at the time, the case had potential to “affect New York’s reputation as a seat for the reliable enforcement of international arbitral awards, and as a venue with courts that respect and support this alternative dispute resolution process.” Claudia Salomon, *New York Vacates Arbitral Award with Manifest Disregard Doctrine*, N.Y.L.J. (Aug. 7, 2017), <https://www.lw.com/thoughtLeadership/new-york-vacates-arbitral-award-with-manifest-disregard-doctrine> [<https://perma.cc/8S6S-XEUZ>].

338. John V.H. Pierce et al., *NY Appellate Division Confirms Narrow Scope of the Manifest Disregard Doctrine*, WILMERHALE (Oct. 23, 2018), <http://www.wilmerhale.com/en/insights/client-alerts/20181023-ny-appellate-division-confirms-narrow-scope-of-the-manifest-disregard-doctrine> [<https://perma.cc/QH56-9JCX>]; see also *supra* note 246 and accompanying text; cf. COMM. ON INT’L COMMERCIAL DISPUTES, N.Y.C. BAR, THE “MANIFEST DISREGARD OF LAW” DOCTRINE AND INTERNATIONAL ARBITRATION IN NEW YORK 2 (Aug. 2012), <https://www.nycbar.org/pdf/report/uploads/20072344-ManifestDisregardofLaw--DoctrineandInternationalArbitrationinNewYork.pdf> [<https://perma.cc/2SQR-FBBB>] (attempting to dispel the belief that manifest disregard makes arbitration awards unusually difficult to enforce in New York).

339. See also, e.g., Born & Salas, *supra* note 50, at 21 (contrasting the most recent arbitration trilogy, which made the United States distinctive for its poor arbitration stance, with the older trilogy, which put the United States at the forefront of international commercial arbitration).

340. As noted in the Introduction, similar effects may apply to domestic arbitration.

Most notably, rising barriers to transnational litigation can affect litigation over international arbitration.³⁴¹ The developments that make up “litigation isolationism” impose particularly heightened barriers on transnational litigation.³⁴² These developments also threaten to undermine U.S. courts’ ability to support international commercial arbitration.

Litigation isolationism is characterized by the growth of areas of the law that limit access to U.S. courts in transnational cases. Four key examples are the narrowing of personal jurisdiction,³⁴³ the expanded availability of forum non conveniens,³⁴⁴ the growth of international comity as an independent basis for abstention,³⁴⁵ and the strengthening of the presumption against the extraterritorial application of federal statutes.³⁴⁶ Like other litigation-avoidance trends, litigation isolationism is made up of trans-substantive developments. Developments in these areas have made their mark on arbitration cases in unexpected ways.

The first example is personal jurisdiction. In *Daimler AG v. Bauman*, the Court held that Daimler was not subject to general personal jurisdiction in California because it was not “at home” there.³⁴⁷ This holding cabined lower courts’ prevailing understanding that general personal jurisdiction was available based on extensive business contacts.³⁴⁸ The case limits plaintiffs’ ability to sue foreign defendants in U.S. courts based on the defendants’ conduct abroad. This is especially true because recent Supreme Court cases concerning specific personal jurisdiction also limit plaintiffs’ ability to sue foreign defendants in U.S. courts.³⁴⁹

341. See George A. Bermann, ‘Domesticating’ the New York Convention: The Impact of the Federal Arbitration Act, 2 J. INT’L DISP. SETTLEMENT 317, 322 (2011) (noting that some civil procedure rules may “sit uncomfortably with the requirements of the [New York] Convention”).

342. Bookman, *Litigation Isolationism*, *supra* note 49, at 1089.

343. *Id.* at 1091–93; Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT’L L. 325, 338–41 (2018).

344. Bookman, *Litigation Isolationism*, *supra* note 49, at 1093–96. See generally Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017).

345. Bookman, *Litigation Isolationism*, *supra* note 49, at 1096–97.

346. See Bookman, *Doubling Down*, *supra* note 49, at 57; Bookman, *Litigation Isolationism*, *supra* note 49, at 1097–99.

347. 571 U.S. 117, 122 (2014).

348. See Alan M. Trammell, *A Tale of Two Jurisdictions*, 68 VAND. L. REV. 501, 503–04 (2015).

349. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781–83 (2017) (limiting specific personal jurisdiction over defendants with respect to nonresident plaintiffs’ claims despite those claims’ similarities to resident plaintiffs’ claims for which defendants were subject to personal jurisdiction); *Walden v. Fiore*, 571 U.S. 277, 289 (2014) (holding that a defendant’s actions do not create sufficient contacts simply because they are directed at the plaintiff whom the defendant knew to have connections with the forum state); *J. McIntyre Machinery, Ltd. v.*

These personal jurisdiction developments have an even broader reach. Personal jurisdiction may not limit much litigation supporting arbitration *clauses*. Parties to contracts with forum selection or arbitration clauses are typically thought to have waived personal jurisdiction objections to being sued in courts located at the seat of arbitration.³⁵⁰ Litigation to enforce arbitration agreements brought outside the designated arbitral seat, however, may face personal jurisdiction problems.

Litigation over other aspects of arbitration is a different matter. The narrowing of personal jurisdiction threatens to undermine courts' jurisdiction over foreign entities in suits to recognize or enforce foreign arbitral awards³⁵¹ or to assist in the collection of evidence for international commercial arbitration.³⁵² The federal and state appellate courts in New York, for example, are divided on whether to entertain an arbitral award enforcement proceeding if the court lacks personal jurisdiction over the award debtor under *Daimler's* "at home" test.³⁵³ In *Sonera Holding B.V. v. Çukurova Holding A.S.*, the Second Circuit dismissed an action seeking recognition of a \$932 million arbitral award for lack of jurisdiction over the debtor under this standard.³⁵⁴ Linda Silberman and Aaron Simowitz warn that "[t]his export of jurisdictional rules from the realm of traditional adjudication to the very different landscape of recognition poses serious dangers to the routine

Nicastro, 564 U.S. 873, 884 (2011) (finding no specific jurisdiction over a foreign manufacturer defendant); Bookman, *Litigation Isolationism*, *supra* note 49, at 1132; Pamela Bookman, *Supreme Court Decision on Specific Personal Jurisdiction a "SomethingBurger,"* TEMP. 10-Q: TEMP.'S BUS. L. MAG. (Aug. 14, 2017), <https://www2.law.temple.edu/10q/supreme-court-decision-specific-personal-jurisdiction-somethingburger> [<https://perma.cc/A9A5-U7QH>] (explaining how *Bristol-Myers* can limit litigation against foreign defendants).

350. See, e.g., *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lescopulos*, 553 F.2d 842, 844 (2d Cir. 1977).

351. See *Sonera Holding B.V. v. Çukurova Holding A.S.*, 750 F.3d 221, 224–25 (2d Cir. 2014) (dismissing suit for enforcement of an arbitration award for lack of general personal jurisdiction under *Daimler*); Silberman & Simowitz, *supra* note 53, at 352 (explaining why this should not be the result of *Daimler*).

352. See, e.g., *Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 92 (S.D.N.Y. 2015) (finding personal jurisdiction to compel a nonparty to comply with subpoenas).

353. See *Sonera*, 750 F.3d at 223; Silberman & Simowitz, *supra* note 53, at 352–53 (noting that "[n]umerous federal courts of appeal have held that either property or personal jurisdiction is necessary to support an action to confirm a foreign arbitral award" and that "[t]wo lower court New York state decisions have dispensed with any jurisdictional requirement for an action to enforce a foreign judgment").

354. 750 F.3d at 223; see Silberman & Simowitz, *supra* note 53, at 359–62 (discussing *Sonera* and *Daimler*); cf. *First Inv. Corp. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 750 (5th Cir. 2012) (canvassing circuits' requiring personal jurisdiction requirements in arbitral award enforcement actions).

recognition of foreign judgments and awards.”³⁵⁵ Heeding their call for broader bases for jurisdiction, including property-based jurisdiction, over such lawsuits, a New York intermediate appellate court recently held that “*Daimler*’s restriction of general jurisdiction to states where a corporate defendant is ‘at home’” does not apply in proceedings to recognize or enforce foreign judgments.³⁵⁶ This split authority highlights that narrowing personal jurisdiction is another example of the anti-litigation canon that can throw sand on the tracks of the international commercial arbitration system.³⁵⁷

A second component of litigation isolationism is the widespread grant of forum non conveniens dismissals in U.S. courts.³⁵⁸ Forum non conveniens is a “federal common-law venue rule”³⁵⁹ that permits courts to dismiss a case if there is an available alternative forum and “despite the deference owed to the plaintiff’s choice of forum, the balance of private and public interests favors dismissal.”³⁶⁰ The inquiry focuses on a number of public and private interest factors. Forum non conveniens can offer a basis for courts to decline jurisdiction over cases supporting international arbitration—in suits to enforce either arbitral awards or arbitration agreements.³⁶¹

355. Silberman & Simowitz, *supra* note 53, at 347–48.

356. *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 76 N.Y.S.3d. 1, 7 (N.Y. App. Div. 2018).

357. Courts likewise need personal jurisdiction in order to adjudicate other arbitration-supporting claims, such as suits to challenge the impartiality of an arbitrator. *See, e.g., AmTrust Fin. Servs., Inc. v. Lacchini*, 260 F. Supp. 3d 316, 321 (S.D.N.Y. 2017) (dismissing such a suit for lack of personal jurisdiction). While the conclusion in *Lacchini* seems correct because the arbitrator in that case had *no* contacts with New York or the United States, the tightening of specific and general jurisdiction could create circumstances where U.S. courts lack personal jurisdiction over an arbitrator in an international commercial arbitration even if the arbitrator has extensive contacts with U.S. parties and may have greatly harmed those parties and their business interests.

358. *See* Bookman, *Litigation Isolationism*, *supra* note 49, at 1093–96 (“As a matter of practice, forum non conveniens often excludes transnational cases involving foreign plaintiffs and foreign conduct from U.S. courts.”); Childress, *supra* note 152, at 168–70.

359. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994).

360. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE U.S.: JURISDICTION § 424 (2018). In *Gulf Oil Corp. v. Gilbert*, the Court enumerated nonexclusive “public” and “private” interest factors to guide a forum non conveniens decision. 330 U.S. 501, 508 (1947). Public factors include court congestion, imposition of jury duty, “having localized controversies decided at home,” and having a forum court that is at home with the law governing the case. *Id.* at 508–09. Private factors include “ease of access” to evidence and witnesses, and “other practical problems that make trial . . . easy, expeditious and inexpensive.” *Id.* at 508.

361. Chris Whytock’s empirical work suggests that “judges apply the forum non conveniens doctrine fairly well” based on “factors widely thought to be relevant to the appropriateness of a U.S. court” and are “more predictable, and less influenced by caseload and ideology than critics of the doctrine indicate.” Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 528 (2011) (footnotes omitted). The rates of dismissal are twice as high when foreign plaintiffs are involved (which is doctrinally unsurprising). *Id.*

Defendants have invoked forum non conveniens when asking courts to stay or dismiss both motions to compel arbitration and actions seeking recognition or enforcement of an international arbitral award. The Second Circuit has twice dismissed arbitral recognition and enforcement requests on the basis of forum non conveniens.³⁶² Commenters condemn this development as “a dramatic step backward for the enforcement in the United States of international arbitration awards.”³⁶³

The application of forum non conveniens in arbitration award enforcement cases seems plainly incorrect for a number of reasons—for example, that forum non conveniens is not named in the New York Convention as a basis for refusing to enforce an arbitral award; the doctrine concerns the convenience of trying a case, not enforcing judgments;³⁶⁴ and the public policy concerns that the courts expressed through the forum non conveniens doctrines were not among the forum non conveniens “public interest” factors.³⁶⁵ The improper use of forum non conveniens as a bar to enforcing international arbitral awards is particularly problematic because, as Judge Lynch explained in his dissent in *Figueiredo Ferraz v. Republic of Peru*, “arbitrators have no power to enforce their judgments, [so] international arbitration is viable only if the awards issued by arbitrators can be easily reduced to judgment in one country or another and thereby enforced against the assets of the losing party.”³⁶⁶ In addition, while the most recent draft of the Restatement on U.S. Law of International Commercial Arbitration recognizes that courts may stay or dismiss a motion to compel arbitration based on forum non conveniens, some scholars argue that the doctrine is not appropriate in this context either.³⁶⁷

362. See *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011); *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002).

363. Matthew H. Adler, *Figueiredo v. Peru: A Step Backward for Arbitration Enforcement*, 32 NW. J. INT'L L. & BUS. 38A, 38A (2012).

364. *Id.*; Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 AM. REV. INT'L ARB. 1, 2 (2012).

365. *Figueiredo*, 665 F.3d at 401, 407–08 (Lynch, J., dissenting); Adler, *supra* note 363, at 42A; Louis Del Duca & Nancy A. Welsh, *Enforcement of Foreign Arbitration Agreements and Awards: Application of the New York Convention in the United States*, 62 AM. J. COMP. L. 69, 93 (2014).

366. *Figueiredo*, 665 F.3d at 395 (Lynch, J., dissenting).

367. Compare RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 2-25 (AM. LAW INST., Tentative Draft No. 4, 2015) (“An action to compel arbitration pursuant to an international arbitration agreement may be subject to stay or dismissal on forum non conveniens grounds . . .”), with Rau, *supra* note 364, at 35 (2012) (arguing that forum non conveniens should have only “the most marginal presence” when considering a motion to compel in light of the Convention’s goals to “increase the currency of awards by limiting challenges and expediting

International comity abstention and the presumption against extraterritoriality can also affect U.S. litigation supporting international commercial arbitration. Like *forum non conveniens*, international comity abstention can give courts the opportunity to abstain from exercising jurisdiction in cases that seem “too foreign.”³⁶⁸ It permits a court, in its discretion, “to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.”³⁶⁹ The doctrine itself is muddled and scholars have called for its clarification³⁷⁰—but that opens the possibility that courts may rely on it to decline to enforce a foreign arbitral award in uncomfortable situations. In a recent case, a party argued that international comity required U.S. courts to decline to enforce an arbitral award because a foreign court, located at the seat of the arbitration, had set the award aside.³⁷¹ The Second Circuit, however, rejected that argument on the basis that the foreign court judgment was not entitled to respect under international comity.³⁷²

The fourth leg of litigation isolationism is the presumption against extraterritoriality, a canon of statutory interpretation that directs courts to presume that statutes are intended to apply

enforcement”). See also Gardner, *supra* note 344 (arguing that *forum non conveniens* should be rejected entirely).

368. See Bookman, *Litigation Isolationism*, *supra* note 49, at 1086, 1096; Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019) (examining the doctrinal trend of “international comity abstention” among lower courts).

369. *In re Maxwell Comm’n Corp. v. Societe Generale*, 93 F.3d 1036, 1047 (2d Cir. 1996); see, e.g., *Reino de España v. ABSG Consulting, Inc.*, 334 F. App’x 383, 384 (2d Cir. 2009) (articulating standard for abstention based on international comity); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237–38 (11th Cir. 2004) (finding international comity abstention appropriate in light of U.S.-Germany agreement establishing mechanism for hearing claims similar to plaintiffs’); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 63 (S.D. Tex. 1994) (dismissing Ecuadorian plaintiffs’ claims alleging pollution on the basis of “comity of nations”); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–98 (1993) (concluding that “international comity would not counsel against exercising jurisdiction” in a case involving foreign conduct).

370. See Gardner, *supra* note 368.

371. *Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016). In *Pemex*, a Mexican subsidiary of KBR, COMMISA, sought confirmation of an arbitral award that it had won against a state-owned Mexican enterprise, PEP. *Id.* at 97, 99. While the confirmation proceedings were pending in New York federal court, a Mexican court set aside the award on the basis that PEP could not be forced to arbitrate according to a recently enacted Mexican law. *Id.* at 99. PEP argued that international comity required the U.S. court to defer to the Mexican court judgment. *Id.* at 100. The Second Circuit upheld the district court’s decision to confirm the award over the pull of recognizing the Mexican court’s judgment as a matter of international comity. *Id.* at 107.

372. *Pemex*, 832 F.3d at 106. For a thorough analysis of the Second Circuit’s reasoning, including an endorsement of its “enforcement of foreign judgments” approach and a criticism of its use of an abuse of discretion standard to review the district court’s decision to confirm the award, see Linda Silberman & Nathan Yaffe, *The U.S. Approach to Recognition and Enforcement of Awards After Set-Asides: The Impact of the Pemex Decision*, 40 FORDHAM INT’L L.J. 799, 812 (2017).

domestically.³⁷³ The Court has recently reinvigorated the doctrine, applying it to prevent U.S. securities laws from regulating fraud related to shares in foreign companies traded on foreign exchanges³⁷⁴ and to prevent the European Community from suing U.S. companies under the civil Racketeer Influenced and Corrupt Organizations Act (“RICO”).³⁷⁵ The presumption, the Court has said, applies to statutes “across the board”³⁷⁶ and “in all cases.”³⁷⁷

If applied too broadly, the presumption could conceivably limit the application of the FAA to international arbitration or limit parties’ and tribunals’ ability to request evidence located abroad. Admittedly, it seems unlikely that the presumption would be marshaled to interpret the FAA not to apply extraterritorially, since the intent to codify the New York Convention is so clear. But one could imagine a reading of certain FAA provisions that would prevent application of the statute to foreign international arbitrations or that could suggest that the domestic sections of the FAA should not be used to fill certain gaps in other statutory sections that govern international arbitration.³⁷⁸ The presumption against extraterritoriality could also hinder other aspects of judicial support for arbitration. For example, courts are divided on whether 28 U.S.C. § 1782, the statute that permits courts to order discovery to aid foreign tribunals (which can be understood to include arbitral tribunals³⁷⁹), applies to discovery located abroad.³⁸⁰

373. See Bookman, *Litigation Isolationism*, *supra* note 49, at 1097.

374. See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010); William J. Moon, *Regulating Offshore Finance*, 71 VAND L. REV. 1, 19–27 (2019) (detailing *Morrison’s* consequences for the regulation of international finance and insurance markets).

375. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016); Bookman, *Doubling Down*, *supra* note 49, at 58 (criticizing *RJR Nabisco*).

376. *RJR Nabisco*, 136 S. Ct. at 2100.

377. *Morrison*, 561 U.S. at 261.

378. See RESTATEMENT (THIRD) OF U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4-3 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2012) (arguing that a better reading of the FAA is to not allow such gap filling); George A. Bermann, *American Exceptionalism in International Arbitration*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2011, at 8–9 (Arthur W. Rovine ed., 2012) (explaining why Chapter 1 of the FAA would be needed as a gap filler for “foreign non-Convention awards”).

379. See *infra* notes 398–402 and accompanying text.

380. Courts are divided on whether 28 U.S.C. § 1782 authorizes discovery of documents outside the United States. Compare, e.g., *Purolite Corp. v. Hitachi Am., Ltd.*, No. 17 Misc. 67 (PAE), 2017 WL 1906905, at *2 (S.D.N.Y. May 9, 2017), *In re Godfrey*, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007), and *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (rejecting the extraterritorial application of the statute), with *Sergeeva v. Tripleton Int’l Ltd.*, 834 F.3d 1194, 1199–200 (11th Cir. 2016), *In re Accent Delight Int’l Ltd.*, No. 16-MC-125 (JMF), 2018 WL 2849724, at *4 (S.D.N.Y. June 11, 2018), and *In re Gemeinschaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) (holding that the statute can apply extraterritorially). See also Simowitz, *supra* note 66, at 3324–25 (differentiating between

One might argue that to the extent personal jurisdiction, forum non conveniens, international comity abstention, or the presumption against extraterritoriality make it more difficult to support *foreign* arbitration, that development will drive parties to seat their arbitrations in the United States, anticipating easier enforcement in U.S. courts with access to U.S.-based assets.³⁸¹ That may be true for those with sufficient foresight,³⁸² but it does little for those who did not foresee this unusual and unexpected resistance to arbitral award recognition and enforcement. It could encourage hiding assets in the United States, where they could be protected from award creditors. And in any event, these developments still undermine courts' ability to carry out U.S. obligations under the New York Convention.³⁸³

Other aspects of the Court's hostility to litigation may also impact courts' ability to support international commercial arbitration in the long term. One might not think that developments such as heightened pleading standards or limitations on discovery would have any effect on courts' support of international commercial arbitration. And in many arbitration-support cases, these issues do not obstruct courts' ability to enforce arbitration clauses or awards. But the limitations on litigation generally can hamper litigation that supports arbitration. Heightened pleading standards, for example, may compound the difficulties in filing certain kinds of objections to arbitral awards, like those based on unethical conduct by arbitrators or opposing counsel, which can be difficult to prove before discovery.³⁸⁴ By analogy, trends limiting discovery could likewise be used to limit discovery in support of arbitration, although that does not appear to be happening in practice.³⁸⁵

In sum, it should not be surprising that narrowing access to U.S. courts through trans-substantive procedural developments—especially those that have exacerbated effects in the transnational sphere—could limit courts' ability to play an active role in supporting international

the majority position of a strong presumption in favor of extraterritorial enforcement discovery and the minority position that “treats merits and enforcement discovery as essentially similar”).

381. See *supra* note 336; see also Silberman & Simowitz, *supra* note 53, at 345–47 (discussing the uncertainty regarding proper bases for jurisdiction for enforcement and recognition actions in light of *Daimler*).

382. Research suggests that arbitration clauses are typically inserted at the last minute. See *supra* note 335 and accompanying text.

383. See Whytock, *Private-Public*, *supra* note 103, at 20 (prioritizing importance of the expectation of judicial enforcement over actual enforcement in any given case).

384. Cf. Rogers, *supra* note 47, at 369–70 (discussing the difficulties of enforcement for U.S. courts in international litigation).

385. See Yanbai Andrea Wang, *Exporting American Discovery* (2019) (unpublished manuscript) (discussing the liberal grant of discovery under section 1782 petitions).

arbitration. This spillover has received extensive criticism,³⁸⁶ and some may wonder whether cases like *Sonera* and *Figueireido* are simply outliers. They have admittedly not gained traction, but they nevertheless have precedential effect. Importantly, from the perspective of supporting international commercial arbitration, they create uncertainty—and litigation—that itself undermines international arbitration.

IV. VALUING INTERNATIONAL COMMERCIAL ARBITRATION

The previous two Parts explained the Supreme Court's hostility to litigation and enthusiasm for arbitration and explored the ways in which the former shapes the latter. They showed how focusing on essentialist values can compromise international commercial arbitration by prioritizing hostility to litigation—and the view that the essence of arbitration lies in its distinctions from litigation—over other arbitral values. Meanwhile, litigation isolationism and other manifestations of hostility to litigation can further weaken that regime by limiting access to court support of arbitration.

This Part discusses the importance of judicial support for arbitration and considers ways in which courts could prioritize private law and international business values when resolving contemporary arbitration issues. It also lays the groundwork for future work exploring the complex, competitive relationship between litigation and arbitration.³⁸⁷

A. Replacing the Essentialist View

The focus on the essentialist view of arbitration and the accompanying perception that hostility to litigation is beneficial to arbitration weaken courts' ability to support international commercial arbitration. As a result of cases like *Hall Street*, *Stolt-Nielsen*, and *Lamps Plus*, U.S. courts will not enforce certain kinds of arbitration agreements and parties may be less certain that courts will enforce their arbitrators' decisions and that courts will apply neutral contract principles to interpret their arbitration agreements. The narrowing of personal jurisdiction and the expanded reach of forum non conveniens

386. RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-29(a) cmt. a (AM. LAW INST., Tentative Draft No. 3, 2013) ("Actions for post-award relief are ordinarily summary in nature and do not entail significant fact-finding. Thus, they are generally poor candidates for forum non conveniens treatment." (citation omitted)).

387. See Bookman, *Adjudication Business*, *supra* note 32.

and other litigation-hostile developments likewise create uncertainty over when U.S. courts will enforce arbitration awards and otherwise support arbitration.

The prioritization of hostility to litigation and essentialist values is not inadvertent. This Article argues, however, that it is inappropriate for courts that seek to support arbitration. One potential antidote to the negative and misinforming consequences of the essentialist thesis³⁸⁸ is reintroducing and reemphasizing other arbitral values. Courts, lawmakers, practitioners, and scholars should recognize the multifaceted and dynamic nature of arbitration. The practical realities of international commercial arbitration and its ability to become judicialized and resemble litigation refutes the essentialist thesis; such arbitration contrasts starkly with the Court's often simplified, idealized depiction of arbitration.

Any decision contemplating courts' interpretation of arbitration clauses, interaction with arbitrators, enforcement of arbitration awards, interference with pending arbitration, or the like should be informed not by a need to differentiate arbitration from litigation, but by an understanding of the role of courts in supporting arbitration and in valuing party autonomy, arbitral flexibility, and international business. This is not to say that the substitution theory is wrong; arbitration is in some ways a substitute for litigation. But it does not capture the entirety of that relationship. Likewise, there may be circumstances where all three kinds of arbitration values align in directing a single outcome. But where private law and international business values conflict with essentialist ones, the former should usually prevail, especially if one is concerned about effects for international commercial arbitration. Failure to view the relationship between courts and arbitration through this lens, as we have seen, can undermine U.S. courts' ability to play their important supporting roles in the international commercial arbitral order.

B. Providing Judicial Support

Having established that arbitration depends on courts—and that a robust pro-arbitration federal policy therefore should respect and protect the litigation that supports that arbitration—the question arises as to how to give effect to this theory.

This Section proceeds in four parts. It first addresses several currently contested issues in arbitration law where following the

388. *See supra* Part II.

essentialist view would undermine judicial support for arbitration. It argues against adopting that view. Second, it advocates reconsidering the Court's currently trans-substantive approach to arbitration law, in which the Court's FAA jurisprudence seems to apply equally to issues arising from employment, consumer, insurance, and international commercial arbitration contracts. Third, it discusses rolling back the litigation isolationism developments that have hampered the enforcement of arbitral awards and other kinds of judicial support. Finally, it considers which institutional actors should lead these efforts, reviewing the merits and demerits of relying on Congress, the Supreme Court, or state and lower federal courts.

1. Pro-Arbitration Policies

This Article thus far has identified *Hall Street*, *Stolt-Nielsen*, and *Lamps Plus* as prime examples of cases where a policy that prioritized arbitration's values differently would have yielded a different outcome. These cases and others that proclaim the essentialist view of arbitration reveal the Court's proclivity toward valuing essentialist distinctions and limits on litigation over other arbitral values like autonomy, adaptability, and promoting international trade.

There are many areas of arbitration law where adhering to the essentialist view would yield a result that would conflict with other values behind international commercial arbitration.³⁸⁹ The split authority in state and lower federal courts on these issues demonstrate that these courts do not necessarily embrace the essentialist view with the fervor of the Supreme Court. Ironically, these differences of opinion themselves generate litigation.

In each of these contexts, the supportive role that courts afford arbitration under the international arbitration system should guide courts' analysis. I do not pretend that it is always easy to determine which stance best supports arbitration.³⁹⁰ The focus of this Section is to advocate considering that question without concern for policing distinctions between arbitration and litigation,³⁹¹ instead prioritizing private law and international business values when they conflict with

389. This argument may also hold true for other kinds of arbitration. *See supra* note 40 and accompanying text.

390. *See* Bermann, *supra* note 178.

391. While the United States does not have a specialized arbitration court, one might aspire for an outlook similar to the one Alan Scott Rau attributed to the French Cour d'Appel de Paris: "[A] bench of arbitration mavens, fully at home with the interrelated pieces of the system, mindful of what is necessary to further the interests of users, and committed to doing so." Rau, *supra* note 176, at 478.

the essentialist vision. Courts should be sensitive to the possibility that policing essentialist distinctions between arbitration and litigation can interfere with arbitration's flexibility.

Let us consider three examples of issues where the essentialist view compromises courts' ability to support arbitration's other values.³⁹² My purpose here is not to resolve the questions raised in each of these areas—the questions are complex and have been the subject of entire articles in their own right. Rather, I aim to highlight areas where the essentialist view might seem to yield easy answers and to encourage more nuanced consideration.

First, the Court's recent decision in *Lamps Plus* leaves open questions about the extent to which courts can control arbitration procedures and what other "fundamental attributes" of arbitration will next be held to trump "plain vanilla" state contract law.³⁹³ Punitive damages and discovery seem like potential contenders for features which, if used in arbitration, might be challenged as undermining the "essential virtues" of arbitration.³⁹⁴

A second hot-button topic is the extent to which courts can review the merits of arbitrators' decisions. As discussed in Part II, *Hall Street* and *Stolt-Nielsen* left the scope of judicial review uncertain, both in terms of what it means for arbitrators to "exceed" their authority under the FAA and whether vacatur is available under the manifest disregard standard.

Traditionally, private law and international business interests behind arbitration favor keeping judicial review of arbitral awards to a minimum.³⁹⁵ International arbitration enthusiasts almost uniformly argue for narrowing and clarifying the standard for exceeding authority and against recognizing manifest disregard as a basis for vacatur. Parties to arbitration disputes are routinely afraid of reversals, particularly on the basis of manifest disregard, even though that argument is very rarely successful. Thus, one would imagine that a Supreme Court concerned with supporting international arbitration

392. This list is not meant to be exhaustive. See, e.g., *Standard Chartered Bank Int'l (Ams.) Ltd. v. Calvo*, 757 F. Supp. 2d 258, 259 (S.D.N.Y. 2010) (declining to enforce parties' confidentiality request and describing it as having "all the characteristics of an artificial construct in which major financial institutions seek to invoke the jurisdiction of this Court using their own set of rules"); Gary B. Born & Adam Raviv, *Arbitration and the Rule of Law: Lessons from Limitations Periods*, 27 AM. REV. INT'L ARB. 373, 375–76 (2016) (discussing state and federal court decisions holding that statutes of limitations do not apply in arbitration because "arbitration is . . . fundamentally different from litigation").

393. See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1428–35 (2019) (Kagan, J., dissenting).

394. See *supra* notes 279–283 and accompanying text.

395. See, e.g., Roberts & Trahanas, *supra* note 46, at 750.

would, at least, nip manifest disregard in the bud. That conclusion could even follow consistently from the essentialist thesis. *Hall Street's* reasoning that arbitration, unlike litigation, must be resolved “straightaway”³⁹⁶ is consistent with the conclusion that manifest disregard is not an available basis for vacatur. The Court’s failure, time and again, to take up manifest disregard seems to demonstrate that even its cert grant practice reflects a prioritization of using arbitration to thwart litigation more than promoting the private law and international business values underlying international commercial arbitration.

Another scenario that puts tension on the “straightaway” nature of arbitration is whether U.S. courts will enforce awards rendered by arbitral tribunals seated in countries where more judicial review is allowed.³⁹⁷ If the essence of arbitration is that disputes are resolved straightaway, that could suggest that an arbitration clause that calls for arbitration in a jurisdiction with more than cursory judicial review should not be enforced. But that would not be a permissible reason not to enforce under the New York Convention.

Finally, a third issue is whether 28 U.S.C. § 1782 permits courts to order discovery to support evidence collection by arbitral tribunals.³⁹⁸ The essentialist view would suggest that such discovery is presumptively impermissible.³⁹⁹ After all, discovery (like class treatment) seems like a characteristic that differentiates litigation from arbitration.⁴⁰⁰ A more contractarian view might permit judicial assistance to aid discovery only if the arbitration agreement permits

396. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (describing “arbitration’s essential virtue” as “resolving disputes straightaway”).

397. Reisman & Richardson, *supra* note 40, at 46.

398. *Compare In re Kleimar N.V.*, 220 F. Supp. 3d 519, 521–22 (S.D.N.Y. 2016) (holding a Maritime arbitration association to be a “foreign tribunal” within the meaning of 28 U.S.C. § 1782), with *In re Application of Hanwei Guo*, No. 1:18-mc-00561 JMF, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019) (finding a Chinese arbitration organization was not a “foreign or international tribunal”). See also Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT’L L. 127, 133–39 (2012) (describing split among lower courts on this issue after *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)); Davis et al., *supra* note 66, at 12–18 (same); Jonathan Blackman & Jessica Stiefler, *Discovery in Aid of Arbitration Under 28 USC 1782*, GLOBAL ARB. REV. (Aug. 29, 2017), <https://globalarbitrationreview.com/chapter/1146894/discovery-in-aid-of-arbitration-under-28-usc-1782> [<https://perma.cc/M7L5-RVSS>] (same). On the question of whether arbitral tribunals count as courts in the European Union, see Alyssa King, *The Agent, the Judge, and the Chancellor: Arbitral Authority and the EU Preliminary Reference Procedure* (2018) (unpublished manuscript) (on file with author).

399. See Davis et al., *supra* note 66, at 23 (illustrating how the Second Circuit has barred discovery under 28 U.S.C. § 1782 using essentialist reasoning).

400. *Cf. id.* at 24.

it.⁴⁰¹ Neither of these views, however, incorporates public policy implications, understandings of parties' actual default assumptions, or other factors that focus on supporting international commercial arbitration.⁴⁰² Such considerations may lead to a more nuanced view of when discovery is appropriate to support arbitration—regardless of whether discovery seems too “litigation-like.” The point is that there are other pro-arbitration values at stake, including private law and international business values, that should take precedence over maintaining essentialist distinctions between arbitration and litigation.

2. Beyond Trans-Substantivity

The Supreme Court's broad interpretation of the FAA has rendered U.S. arbitration law primarily trans-substantive. There are some distinctions in the ways that arbitration agreements and international and domestic awards are enforced.⁴⁰³ But for the most part, the Court's statements with respect to arbitration arising out of consumer contracts, employment contracts, or domestic business contracts usually apply in the next arbitration case, even though it may involve an international commercial contract or some other distinguishable context.⁴⁰⁴

Scholars have documented trans-substantivity's shortcomings.⁴⁰⁵ The FAA does not seem to have originally required

401. *Id.*

402. *See id.* at 25.

403. *See* Raviv, *supra* note 53, at 239–42 (exploring how the difference between the savings clauses for domestic and international arbitration could, but probably will not, yield different outcomes when considering unconscionable arbitration clauses); Elizabeth Edmondson & Gretchen Stertz, *'Nondomestic' Arbitrations: An Underrecognized Path to Federal Court Review*, N.Y.L.J. (Mar. 16, 2018, 3:10 PM), <https://www.law.com/newyorklawjournal/2018/03/16/nondomestic-arbitrations-an-underrecognized-path-to-federal-court-review> [<https://perma.cc/APB8-YPAL>] (differentiating between international, domestic, and “nondomestic” award enforcement under the FAA).

404. *See* RESTATEMENT (THIRD) OF U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-3 cmt. d (AM. LAW INST., Tentative Draft No. 2, 2012) (discussing how FAA Chapter 1 can serve as a gap filler for Chapters 2 and 3).

405. *See, e.g.*, Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1159 (2006) (“[D]ifferent substantive policies sometimes justify different procedural choices . . .”); Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (discussing the persistent and inevitable tension between procedure generalized across substantive lines and procedure applied to implement a particular substantive end); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) (describing the trans-substantive premise of the Rules as “unworkable”).

trans-substantive treatment of all arbitration.⁴⁰⁶ Nevertheless, the Court has read away the substantive distinctions in the FAA,⁴⁰⁷ narrowly interpreting the “savings clause” so that the statute requires enforcement of arbitration clauses in many contexts where state courts would have held the clauses violated state law.⁴⁰⁸ The Court’s FAA jurisprudence is widely criticized for its trans-substantivity and its extension of the statute into contexts in which the FAA was never meant to apply.⁴⁰⁹ This trans-substantivity also deserves criticism for making arbitration decisions in other contexts apply to international commercial arbitration, often to the detriment of private law and international business values that are particularly important in international commercial arbitration.

The confluence of these two lines of criticism—that the courts improperly enforce arbitration clauses in certain contexts, like consumer contracts, and that they are insufficiently supportive of arbitration in other contexts, specifically international commercial litigation—seems like a clarion call to regulate arbitration in a subject-matter-specific way. While such line-drawing can be difficult, in many other countries, arbitration regulation differs depending on the nature of the contract—be it a consumer, employment, or commercial contract, for example.⁴¹⁰ This Article’s modest aim in this regard is to flag “arbitration” as an overbroad category and to point out that differentiating among different kinds of arbitration is important not only because of negative effects in areas where critics argue arbitration should not be favored, like consumer contracts, but also because of

406. See Szalai, *supra* note 17, at 524 (arguing that while the FAA was originally substance specific, designed solely for commercial contract disputes, it is now—but should not be—trans-substantive).

407. For example, Section 1 of the FAA states that the rules for enforcing arbitration agreements “shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2012). The Court has read this limitation narrowly. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

408. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (finding state court’s rejection of arbitration clause on basis of unconscionability to violate the FAA, notwithstanding the savings clause).

409. See, e.g., Gilles, *supra* note 310, at 394; Tal Kastner & Ethan Leib, *Contract Creep*, 107 GEO. L.J. 1277 (2019).

410. See Tony Cole et al., *Legal Instruments and Practice of Arbitration in the EU*, DIRECTORATE-GENERAL FOR INTERNAL POLICIES 118 (2014), [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf) [<https://perma.cc/24D2-Z6WK>] (noting that “[u]nder the Irish Arbitration Act of 2010, all commercial disputes can be referred to arbitration,” but other “categories of disputes,” such as “those relating to the remuneration or the terms or conditions of employment,” cannot be arbitrated); Walter D. Kelley Jr., *Mandatory Arbitration in the United States and Europe*, HAUSFELD (Feb. 29, 2016), <https://www.hausfeld.com/news-press/mandatory-arbitration-in-the-united-state-and-europe> [<https://perma.cc/6R2C-HXU7>].

negative effects in areas where many believe arbitration should be favored, like international commercial arbitration.

3. Rolling Back Litigation Isolationism

Reform should also address litigation isolationist trends like narrowing personal jurisdiction and expanding use of forum non conveniens. When applied to arbitral award enforcement suits, these developments can have unintended consequences.⁴¹¹

I have argued elsewhere that litigation isolationism is dangerous and self-defeating and that it should be rolled back.⁴¹² With respect to the damage that litigation isolationism has done in the realm of international commercial arbitration, potential fixes resemble a scalpel more than a sledgehammer. While one could dramatically alter personal jurisdiction, forum non conveniens, or international comity abstention, for these purposes, one could instead simply specify that in cases seeking the enforcement of foreign arbitral awards, none of these bases should be a barrier to enforcement. Silberman and Simowitz have explored other approaches to satisfying the constitutional standard of due process in enforcement cases.⁴¹³ Likewise, one could clarify that forum non conveniens and international comity abstention are not valid “procedural” defenses to an arbitral award enforcement proceeding under the FAA or the New York Convention.⁴¹⁴ A court could similarly conclude that the presumption against extraterritoriality is rebutted by the language and context of the FAA and 28 U.S.C. § 1782⁴¹⁵ without necessarily having to revamp the analysis under the presumption.

4. Institutional Actors

The previous Sections have identified a number of areas where legal change could smooth the road for litigation to support arbitration and arbitration’s private law and international business values. Once the importance of courts’ role in supporting arbitration eclipses essentialist values, certain paths forward become clear, or at least less

411. See Simowitz, *supra* note 343, at 328 (discussing effect of tightening scope of personal jurisdiction on the effectiveness of certain federal statutes).

412. See Bookman, *Litigation Isolationism*, *supra* note 49, at 1090; Bookman, *Unsung Virtues*, *supra* note 49, at 632.

413. See Silberman & Simowitz, *supra* note 53, at 344–47 (advocating for, among other things, the requirement of a jurisdictional nexus, but through the context of enforcement rather than a simple plenary action).

414. See *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 407–08 (2d Cir. 2011) (Lynch, J., dissenting).

415. See, e.g., *In re Hully Enters., Ltd.*, 358 F. Supp. 3d 331, 344–45 (S.D.N.Y. 2019).

muddled by the distraction of differentiating between arbitration and litigation.

The question then arises: Which institutional actor or actors should take on the task of implementing these changes? This Section considers the role of Congress, the Supreme Court, and state and lower federal courts.

Congress. One approach is to amend the FAA. Amendment could negate the essentialist view by offering a more flexible definition of arbitration. Chapter 2 of the FAA, which codifies the New York Convention, could be amended to address some of the legal reforms discussed above or distinguish between rules for domestic and international arbitration, providing more specific rules or cross-references to the underlying norms of the international commercial arbitration community.⁴¹⁶ It could direct an agency to take on the complicated task of dividing arbitration law into subcategories for substance-specific regulation.⁴¹⁷

It is difficult to assess the likelihood of such reforms. On one hand, the quest for an Arbitration Fairness Act that would invalidate forced arbitration in consumer and employment contracts, long pushed by former Senator Al Franken, has floundered for over a decade.⁴¹⁸ On the other hand, there is bipartisan support for some kind of arbitration reform, particularly to end forced arbitration in cases of workplace sexual harassment.⁴¹⁹ But that legislation, too, seems to be stalled.⁴²⁰

416. See Sussman, *supra* note 194, at 456 (criticizing the trans-substantive draft Arbitration Fairness Act for failing to differentiate between domestic and international arbitration); see also Bermann, *supra* note 378, at 8–9 (identifying gaps in the FAA, e.g., for handling the enforcement of arbitral awards rendered in countries that are not party to the New York or Panama Conventions); Carbonneau, *supra* note 5, at 1194–96 (discussing history of distinctions between international and domestic arbitration under U.S. law).

417. Such an approach was modeled when Congress, in creating the Consumer Financial Protection Board (“CFPB”), tasked that agency with investigating binding pre-dispute arbitration in consumer contracts, and the CFPB produced regulations that would have barred such arbitration. See *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROTECTION BOARD (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court> [<https://perma.cc/B69H-LL74>]. Of course, those regulations lost their legs under the Trump administration. *Id.*

418. The bill was originally introduced in 2007. H.R. 3010, 110th Cong. (2007); S. 1782, 110th Cong. (2007); see also Press Release, Rep. Hank Johnson, Sen. Al Franken and Rep. Hank Johnson Lead Fight to End Unfair Forced Arbitration Agreements (Mar. 7, 2017), <https://hankjohnson.house.gov/media-center/press-releases/sen-al-franken-and-rep-hank-johnson-lead-fight-end-unfair-forced> [<https://perma.cc/6U6M-V2H2>].

419. Lauren Davidson, *An Important, Bipartisan Bill Is Taking On Sexual Harassment*, WOMEN’S MEDIA CTR. (Feb. 2, 2018), <http://www.womensmediacenter.com/fbomb/an-important-bipartisan-bill-is-taking-on-sexual-harassment> [<https://perma.cc/PC6C-5L7G>].

420. Marina Fang, *Business Groups Might Be Quietly Killing A Bill That Would Bring Sexual Abuse Claims to Light*, HUFFINGTON POST (May 18, 2018), <https://www.huffingtonpost.com/entry/>

If arbitration reform succeeds, Congress should make sure that any such reform considers the potential impact on international commercial arbitration. Arbitration reform should present an opportunity to make the changes mentioned above that would benefit international commercial arbitration. Moreover, any statutory revisions should be mindful to preserve doctrines critical to U.S. courts' support of arbitration, including the recognition of arbitrators' competence to adjudicate their own jurisdiction ("competence-competence") and the doctrine of separability.⁴²¹

The Supreme Court. The Supreme Court made much of this mess, and one could argue that it should be the one to clean it up. The Court's confusing and probably incorrect analysis that the FAA sets forth substantive law that preempts state arbitration law has a number of downsides,⁴²² but from the international commercial arbitration perspective, it at least gives the Court the potential to create national uniformity in an area of private international law.⁴²³

One possibility is for the Court to focus on clarifying arbitration issues specifically in the international commercial arbitration context and insulating international commercial arbitration from the essentialist rhetoric that the Court has used in the past. The Court could grant cert to resolve some of the many circuit splits on important issues in international commercial arbitration. The issues discussed above⁴²⁴ are only the tip of the iceberg in terms of issues in international commercial arbitration that would benefit from clear Supreme Court guidance.⁴²⁵ Many of these cases, moreover, would provide excellent vehicles for the Court to recant its essentialist view of arbitration. The context of international commercial arbitration itself provides much of the evidence as to why the Court should revise this position, because it

forced-arbitration-sexual-harassment_us_5afda846e4b0a59b4e019e0a [https://perma.cc/7ZS3-BB AB].

421. Sussman, *supra* note 194, at 462.

422. See Szalai, *supra* note 17, at 515–19 (arguing that the way the Supreme Court interprets the FAA causes more confusion than necessary).

423. By contrast, other aspects of private international law, like enforcement of foreign judgments and choice of law, are controlled by state law. *Cf.* AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 29–149 (2006) (arguing for national uniformity in enforcement law); BORN, *supra* note 110 (manuscript pt. 1 at 1) (noting that state law rules govern many important aspects of international law in U.S. courts).

424. See *supra* Section IV.B.1.

425. See, e.g., Petition for Writ of Certiorari, *AMCI Holdings, Inc. v. CBF Indústria de Gusa S/A* (2017) (No. 17-481), 2017 WL 4404968 (raising issue of whether “a foreign arbitration award [may] be enforced directly against a non-party under the New York Convention”); *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

blurs the conventionally understood distinctions between arbitration and litigation.

How likely is the Court to reverse course? The cert grant practice is complicated and intentionally cryptic.⁴²⁶ The Court grants cert on very few of the petitions filed.⁴²⁷ But circuit splits are typically the surest drivers of cert grants, and there are several in this area.⁴²⁸ The Court seems to have an interest in arbitration. It grants cert in an inordinate number of cases raising issues of domestic arbitration agreement enforcement,⁴²⁹ particularly in the area of class arbitration.⁴³⁰ So it is not outside the realm of possibility.

On the other hand, the Court has granted cert in far fewer cases in the areas of international arbitral award recognition and enforcement (the “back end” of arbitration) or international commercial arbitration practice (the “middle”).⁴³¹ Indeed, this Article has revealed that the Court’s interest in arbitration may be driven by hostility to litigation more than concerns about fostering international trade or supporting international commercial arbitration.⁴³² It therefore seems unlikely to expect a course correction from the Court,⁴³³ although I

426. See Tejas N. Narechania, *Certiorari, Universality, and a Patent Puzzle*, 116 MICH. L. REV. 1345, 1399–402 (2018).

427. For example, the Court granted 75 out of 6,289 petitions considered in 2016. *The Supreme Court 2016 Term: The Statistics*, 131 HARV. L. REV. 403, 410 tbl.2(B) (2017).

428. See Brief for the Respondent in Opposition to the Petition for Writ of Certiorari, *Dow AgroSciences, LLC v. Bayer CropScience A.G.* (2017) (No. 17-372), 2017 U.S. S. Ct. Briefs LEXIS 4191 (raising questions about when courts may decline to enforce arbitral awards in light of public policy); Petition for Writ of Certiorari, *Neusoft Med. Sys. Co. v. Neulsys*, (2016) (No. 15-1121), 2016 U.S. S. Ct. Briefs LEXIS 1091 (asking whether state courts can “stay state court proceedings pending international arbitration in China of claims arising from a contract containing a valid arbitration clause”); see also *supra* note 274 and accompanying text.

429. See Drahozal, *supra* note 249 (reviewing the Court’s grants of arbitration cases).

430. Experts question whether these are the most pressing arbitration issues facing courts today. See, e.g., Liz Kramer, *SCOTUS Adds Another Class Arbitration Case to Its Docket*, ARB. NATION (Apr. 30, 2018), <https://www.arbitrationnation.com/scotus-adds-another-class-arbitration-case-docket> [<https://perma.cc/KU4C-4MWW>]:

If any Supreme Court clerk or justice had called me and asked “what are some of the really hot arbitration questions that this Court should resolve in order to ensure consistent decision-making around the country?,” class arbitration would not have been on my list. I read every arbitration opinion that issues from the federal circuit courts and state high courts, and the issues I see courts struggling with most often include delegation clauses and issues relating to non-signatories.

431. Cf. *BG Grp. PLC v. Republic of Arg.*, 572 U.S. 25, 34–46 (2014) (reviewing a suit filed as a petition to vacate or modify an arbitral award); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 699 (2010) (reviewing a suit filed to challenge arbitration award imposing class arbitration).

432. See Brooke D. Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 336–39 (2014) (noting the Court’s tendency to prioritize its hostility to litigation over federalism values).

433. Justices Gorsuch and Kavanaugh seem likely to continue the trend signed onto by their predecessors. Each of them wrote early opinions in arbitration cases. Justice Kavanaugh, in his

would urge it to refocus on international commercial arbitration issues, where clarity itself—sometimes regardless of outcome—can have positive effects.

State and lower federal courts. The battlefield for these issues therefore lies in the state and lower federal courts. The Supreme Court of course wields much influence over U.S. arbitration law, but the bulk of the work is done by state and lower federal courts. Not surprisingly, these courts diverge on important issues relating to international commercial arbitration, as demonstrated by the numerous areas where authorities are split. They are in a much better position, however, to reject the essentialist view.

This is not as rebellious an approach as it might appear at first blush. The essentialist thesis informs a default worldview that the Supreme Court seems to embrace, but it arguably operates primarily in dicta. Since international commercial arbitration, on its face, so blatantly disproves the thesis, it would be unremarkable for a lower court to make fact-specific exceptions to those default background principles, particularly when facing an international commercial arbitration case.

As a guide to drive more consensus on these issues, the soon-to-be-finalized Restatement on U.S. Law of International Commercial Arbitration is well poised to provide a resource for parties, lawyers, and courts to consider current and thoughtful approaches to the multitude of arbitration-supporting issues that courts face today.

C. Competition Between Litigation and Arbitration

Courts are not merely a substitute or support for arbitration; those roles do not encompass the entirety of the relationship between litigation and arbitration. The two also compete for the business of international commercial adjudication.⁴³⁴ This aspect of the relationship is more complicated than it first appears and deserves full treatment on its own. As a coda, this Section sets up the relevance of the competitive nature of the relationship and lays ground for further research.

first ever opinion, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), showcased strong devotion to the Court's recent arbitration cases, which he seems to view as plainly correct as a matter of textual interpretation. In *Epic Systems Corp. v. Lewis*, Justice Gorsuch stated the essentialist thesis with startlingly clarity, warning against arbitration becoming too similar to "the litigation it was meant to replace." 138 S. Ct. 1612, 1632 (2018); see also *supra* notes 211–218 and accompanying text.

434. See ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 85–86 (2009).

Among those who view courts and arbitral tribunals as competing to be designated as the chosen forum in international commercial contracts, many contend that arbitration is hands-down winning any such competition. It is widely stated that parties to international commercial contracts prefer resolving their contractual disputes through arbitration.⁴³⁵ This view resonates with the essentialist idea that arbitration's merits are evident in the ways it is different from—and better than—litigation. The empirical research on party preferences, however, is far from conclusive; several studies suggest that arbitration is not “the predominant dispute settlement mechanism in either domestic or international commercial contracts.”⁴³⁶

An emerging phenomenon—the proliferation of specialized, English-language-friendly, international commercial courts around the world—further belies the conventional understanding of the competition between arbitration and litigation. New York and London have offered internationally attractive commercial courts for over a century.⁴³⁷ More recently, these specialized courts have been considered or established in the Netherlands, Germany, France, Belgium, China, Singapore, Qatar, Dubai, and beyond.⁴³⁸

In some respects, these courts seem to suggest that the competition between arbitration and litigation may be more fierce than commonly assumed. Although these courts are so new that their popularity is difficult to assess, the resources put into them suggest a demand for both litigation and arbitration to resolve international commercial disputes. These courts' designs take into consideration the traditional strengths and weaknesses of litigation and arbitration in an apparent attempt to make themselves more competitive with arbitration. They are state-backed tribunals but have adopted some arbitration-like characteristics. For example, their jurisdiction is often

435. See, e.g., SWEET & GRISEL, *supra* note 41, at 1 (noting that international commercial parties “nearly universal[ly]” seek to “keep transnational commercial disputes out of the courts, and thereby beyond the reach of local laws”); Gary Born, *Integration and Dispute Resolution in Small States*, in INTEGRATION AND INTERNATIONAL DISPUTE RESOLUTION IN SMALL STATES 221, 221 (2018) (“Over the last century, international arbitration has become the preferred means for resolving international commercial disputes.”).

436. Nyarko, *supra* note 324, at 13.

437. Bookman, *Adjudication Business*, *supra* note 32.

438. *Id.*; see also, e.g., Xandra Kramer, *International Commercial Courts: Should the EU Be Next? – EP Study Building Competence in Commercial Law*, CONFLICTOFLAWS.NET (Sept. 23, 2018), <http://conflictoflaws.net/2018/international-commercial-courts-should-the-eu-be-next-ep-study-building-competence-in-commercial-law> [https://perma.cc/RGY7-JQXV].

created by consent rather than territorial contacts with the forum,⁴³⁹ their procedural rules may be highly responsive to the parties' preferences,⁴⁴⁰ and confidential proceedings are sometimes available.⁴⁴¹ At the same time, they can do things arbitration traditionally cannot, like allow joinder of third parties. These courts challenge the essentialist view because they do not fit neatly into the label of either courts or arbitral tribunals.⁴⁴² As hybrids, they pick and choose from the traditional characteristics of courts and arbitration.

In such an environment, productive competition between litigation and arbitration⁴⁴³—as both vie to be the designated forum in international commercial contracts—may have the potential to improve both institutions and increase the value of both systems to potential users.⁴⁴⁴ Studies of law markets suggest that such competition can drive governments, courts, and arbitral centers to strive for positive reform of the law and legal services that they provide.⁴⁴⁵ But as I discuss in a related work, *The Adjudication Business*, it is far from clear that these courts are primarily aimed at producing the best possible dispute resolution mechanism as opposed to, for example, a favorable option for

439. See Bookman, *Adjudication Business*, *supra* note 32 (noting that much, but not all, of the jurisdiction of these courts is likely to be based on consent).

440. See, e.g., Andrew Godwin, Ian Ramsay & Miranda Webster, *International Commercial Courts: The Singapore Experience*, 18 MELB. J. INT'L L. 219, 239 (2017).

441. See, e.g., *id.* at 220.

442. Firew Tiba, *The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia*, 14 LOY. U. CHI. INT'L L. REV. 31, 42–46 (2016) (discussing the hybrid approach both in the Gulf Region and Singapore); Wei Sun, *International Commercial Court in China: Innovations, Misunderstandings and Clarifications*, KLUWER ARB. BLOG (July 4, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/07/04/international-commercial-court-china-innovations-misunderstandings-clarifications> [https://perma.cc/QC2H-4MSR] (describing the hybrid First and Second International Commercial Courts launched in China in June 2018).

443. O'HARA & RIBSTEIN, *supra* note 434, at 86 (remarking that courts being required to enforce arbitration provisions, including choice-of-law provisions, has led to competition among different forums for the most efficient commercial laws); Delphine Nougayrede, *Outsourcing Law in Post-Soviet Russia*, 6 J. EURASIAN L. 383, 436 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433771 [https://perma.cc/CA2R-RXA9]; see also Bookman, *Adjudication Business*, *supra* note 32.

444. Paul B. Stephan, *International Investment Law and Municipal Laws: Substitutes or Complements?*, 9 CAP. MKT. L. REV. 354, 368 (2014).

445. Studies that argue that courts competing for the business of adjudication drives courts into a “race to the bottom” competition tend to focus on torts and other cases where plaintiffs unilaterally choose the forum for dispute after the dispute has arisen. Positive competitive forces are thought to work in contexts where parties together choose a forum pre-dispute, for example through a forum selection or arbitration clause. See Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 244 (2016) (“The potentially beneficial effect of competition when forum selection is consensual helps to explain the strong federal policies in favor of enforcement of forum selection clauses and arbitration.” (footnote omitted)).

locals or a mechanism for attracting the business of adjudication itself.⁴⁴⁶

U.S. courts' allegiance to the essentialist thesis may thwart U.S. efforts to compete for the business of international commercial adjudication and to benefit from that competition. Interestingly, those efforts to compete are likely to proceed at the state and local levels, although federal courts play a role. Litigation isolationism may handicap states that seek to make their courts open to international litigation, and the arbitration-litigation paradox hinders states' ability to entice parties to select it as a seat of arbitration. The assumption that the FAA strictly differentiates between litigation and arbitration also stands in the way of state innovation with hybrid tribunals of the type that have been emerging internationally.

This tension between federal law's restriction of international dispute resolution and the desire of states, especially New York, to compete to be the go-to destination for international commercial dispute resolution is ripe for further exploration. This Article has set the stage for understanding the complex relationship between arbitration and litigation on the world stage of international commercial dispute resolution. Further work remains to understand the competition between arbitration and litigation as well as the competition among nations for the business of adjudication.

CONCLUSION

This Article has argued that while the Supreme Court's hostility to litigation and enthusiasm for arbitration seem to be in a symbiotic relationship, the former can cripple the latter. The Court's pro-arbitration policy prioritizes enforcing artificial distinctions between arbitration and litigation over other arbitral values, such as party autonomy, flexibility, and promoting international business. This focus on arbitration's "essential" characteristics reflects the Court's hostility to litigation, embodied in an enthusiasm for enforcing arbitration agreements and distinctions between arbitration and litigation. This approach is particularly problematic for international commercial arbitration, which relies on courts for its existence and success. The result is a U.S. law of arbitration that declines to enforce arbitration

446. Bookman, *Adjudication Business*, *supra* note 32; see also Matthew S. Erie, *The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution*, 59 VA. J. INT'L L. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333765 [<https://perma.cc/5S2K-QMYA>] (discussing the complicated history of different international commercial courts and dispute resolution centers).

agreements or awards when doing so conflicts with this essentialist vision of arbitration. This Article has offered several ways to correct these missteps. Most realistically, I urge state and lower federal courts to take up this call, following the direction of the forthcoming Restatement of the U.S. Law of International Commercial Arbitration.

The arbitration-litigation paradox is that some litigation, supposedly arbitration's antagonistic opposite, is needed to support arbitration and allow it to thrive, particularly in the international commercial arbitration context. The Court's prioritization of essentialist values also thwarts competition between litigation and arbitration and the ability of the United States to compete in the international market for international commercial dispute resolution. The state of this market and the United States' role in it is particularly ripe for reevaluation now that so many other countries are experimenting with international commercial courts, hospitality to arbitration, and hybrid tribunals.