THE SHADOW TERMS: CONTRACT PROCEDURE AND UNILATERAL AMENDMENTS

David Horton*

For decades, courts and commentators have debated the normative implications of contract procedure. Conservatives argue that mandatory arbitration clauses reduce the burden on the judicial system and that class arbitration waivers, choice-of-law clauses, and jury trial waivers allow businesses to pass litigation savings to their consumers in the form of lower prices. In response, liberals object that contract procedure dilutes substantive rights and runs roughshod over important jurisdictional and constitutional values.

This Article argues that neither view has accounted for a defining trait of contract procedure: the regularity with which drafters unilaterally amend procedural terms. Indeed, many standard form consumer agreements and a growing number of state statutes authorize drafters to revise procedural terms unilaterally. The frequency with which drafters exercise this power undermines the foundational conservative theory that sophisticated adherents can exert market pressure on drafters to offer efficient procedural terms. However, the liberal model of contract procedure—which urges courts to nullify procedural terms that erode substantive, jurisdictional, or constitutional interests—creates perverse incentives. Drafters respond to judicial decisions voiding procedural terms by amending their terms again. The target audience for these revisions is not the adherents who will be subject to them, but the courts who will adjudicate their validity. This "private conversation" between corporations and courts not only widens the informational gulf between drafters and adherents, but increases the burden on the judicial system. To end this pernicious feedback loop, the Article encourages policymakers to eliminate drafters' ability to amend procedural terms unilaterally.

* Associate Professor, Loyola Law School (Los Angeles). Thanks to Aaron Caplan, Dean Victor Gold, David Leonard, Doug NeJaime, Jennifer Rothman, Ted Seto, Gary Williams, Lauren Willis, and all other participants at the Loyola summer workshop series.

INTRODUCTION

McKee v. AT&T Corp.[1] began as an unremarkable consumer class action. The plaintiff, Michael McKee, claimed that AT&T had overcharged its telephone customers in his zip code.[2] AT&T responded by moving to compel arbitration. And here the trouble began. At first, AT&T's lawyers filed sworn statements that McKee's service agreement included a mandatory arbitration clause that required confidentiality, shortened the statute of limitations, barred class actions, and forbade the recovery of attorney's fees.[3] But then AT&T's lawyers retracted their declarations. They asserted that shortly after McKee had signed up for telephone service, AT&T had exercised its power to unilaterally amend its contracts and changed many of these clauses.[4] As the case progressed, it became clear that AT&T had unilaterally modified its dispute resolution provisions several more times. By the time the case reached the Washington Supreme Court, there were five iterations of McKee's service contract in the record.[5] AT&T had unilaterally revised the contract so often—twice alone in the month McKee had opened his account—that even its own lawyers did not know which terms applied.[6]

1. 191 P.3d 845 (Wash. 2008).
2. *Id.* at 848–49.
3. *Id.* at 849.
4. *Id.* at 850.
5. *Id.* at 850 n.2.
6. *Id.* at 860 n.13.

The shifting dispute resolution provisions in *McKee* are an example of "contract procedure": predispute agreements modifying the rules of litigation.[7] The importance of private procedural rulemaking would be hard to exaggerate. Studies find mandatory arbitration clauses and class arbitration waivers in over three-quarters of consumer agreements.[8] The first salvo of motion practice in many cases challenges the validity of these terms. Seven decades ago, Congress and the U.S. Supreme Court promulgated the Federal Rules of Civil Procedure[9] in an attempt to unify procedural rules[10] and reduce their impact on substantive claims.[11] Contract procedure inverts this paradigm. Rather than the government, private actors create procedural rules; rather than yielding to the merits, these rules generate litigation; and rather than marching in lockstep, cases follow their own "mini-codes of civil procedure."[12]

The normative consequences of this trend have been debated intensely. Conservative courts and commentators, business groups, and the defense bar see contract procedure as an economic necessity. For this constituency, which included majorities of the Burger and Rehnquist Courts and includes a majority

7. *See* David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 974 (2008) ("'Contract procedure' plays an increasingly central role in American civil justice."); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 598 (2005) (coining the term "contract procedure"). As I have explored elsewhere, dispute resolution terms are also becoming more common in wills and trusts. *See* David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1682 (2009).

8. A study of contracts imposed by financial services and telecommunications firms on their customers recently found that 75 percent contained mandatory arbitration clauses and 80 percent contained class action waivers. *See* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–83 (2008). A whopping 93 percent of these companies' employment agreements mandated arbitration. *Id.* at 883. Other studies have concluded that the prevalence of arbitration clauses varies significantly among consumer products. *See* Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 55, 62 (finding mandatory arbitration clauses in two-thirds of consumer contracts in the banking industry). *But see* Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado About Nothing?*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 45, 48 (Omri Ben-Shahar ed., 2007) (determining that a mere 6 percent of software licenses contain mandatory arbitration clauses).

9. *See* Rules of Civil Procedure for the Dist. Courts of the U.S., 308 U.S. 645 (1937).

10. Not only did the Federal Rules unify procedure at the national level, but they gradually became the blueprint for many state procedural codes. *See* WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE WITH FORMS 44–45 (Rules Ed. 1960) (observing that there is "but one procedure for state and federal courts").

11. By eliminating rigid pleading standards, vesting judges with discretion, and importing flexible tools from equity, the Federal Rules sought "'to get rid of technicalities and simplify procedure and get to the merits.'" Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2179 (1989) (quoting *Rules of Civil Procedure for the District Courts: Hearings on H.R. 8892 Before the H. Comm. on the Judiciary*, 75th Cong. 24 (1938) (statement of William D. Mitchell, Chairman, Advisory Comm. on Rules for Civil Procedure)).

12. Resnik, *supra* note 7, at 597.

on the Roberts Court,[13] claimants have overrun the judiciary. This excessive rights seeking imposes two different costs. First, it burdens the publicly funded court system. For example, Chief Justice Burger, the architect of the Court's controversial expansion of the Federal Arbitration Act (FAA),[14] made no secret that he viewed many plaintiffs as a mere "load on the courts."[15] Second, businesses must shift costs from consumer litigation to their consumers. Because modified procedural terms reduce these expenses, they arguably allow firms to lower prices, making both contractual partners better off.

On the other hand, liberal-minded observers, public interest organizations, and trial lawyers assert that consumers cannot negotiate, do not read, and cannot understand procedural terms.[16] Thus, the argument proceeds, these provisions are not voluntary or consensual, but rather a clandestine method of eliminating procedural rights.[17] Members of this bloc also claim that contract procedure imperils substantive rights and other important values. For example, even the mere choice of an extrajudicial tribunal may favor repeat-player corporations over one-shot individuals.[18] Similarly, the relinquishment of a "procedural" vehicle such as the class action can distort the substantive law by reducing incentives for plaintiffs to seek redress for wrongdoings that deprive many individuals of small amounts of money.

In this Article, I argue that both sides of this debate have overlooked a vital aspect of procedural provisions: their mutability. Many consumer contracts expressly permit unilateral modifications by the drafter. In addition, statutes in several states allow banks and credit card companies to change their terms even if the contract does not confer this power.[19] As cases like *McKee v. AT&T* elucidate, drafters have now begun to revise their dispute resolution terms

13. *See infra* notes 90–111 and accompanying text.

14. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2006)).

15. *Chief Justice Urges Greater Use of Arbitration*, N.Y. TIMES, Aug. 22, 1985, at A21.

16. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648 (2005) ("Empirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read.").

17. *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 ("[A]rbitration and forum selection clauses in contracts of adhesion are sometimes a method for stripping people of their rights." (emphasis omitted)).

18. Since arbitration is a competitive industry, arbitrators "have a financial incentive to make sure that the company is pleased with the results in arbitration." Sternlight, *supra* note 16, at 1650. A recent lawsuit by the San Francisco City Attorney against the National Arbitration Forum (NAF), for example, alleged that "creditors win 99.998% of the time in NAF cases that are decided by arbitrators on the merits." Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUS. WK., June 16, 2008, at 72.

19. *See infra* notes 131–132.

with dizzying frequency.[20] Yet courts and scholars have not yet appreciated what these ever-changing "shadow terms" mean for both the conservative and liberal models of contract procedure.[21]

The fact that drafters enjoy the power to alter procedural terms unilaterally undermines the bedrock economic assumption that adherents can impose market discipline on procedural terms. If procedural terms were fixed and static, it is theoretically possible that an informed minority of consumers could keep drafters honest by actively searching for efficient terms. Yet no rational adherent would spend the time and energy necessary to shop for terms that the drafter can freely change. Moreover, companies face little pressure to modify procedural clauses in accordance with adherents' preferences. Although businesses typically allow adherents to opt out of the amendment and end the contractual relationship, several factors prevent adherents from doing so. First, companies use "bill stuffers"—change-of-terms notices secreted in monthly statements—and other furtive means to notify adherents of the modifications. Second, adherents often must incur search and switching costs in order to reject the amended terms. Third, no consumer would defect to a rival company over a procedural term when the rival company can also add, remove, or change that very term. Finally, because unilateral revisions do not affect the price specified in the original contract, drafters cannot pass a portion of their savings on to adherents to compensate them for accepting a one-sided amended procedural clause. As a result, these procedural terms may not, in fact, be efficient.

However, the current doctrinal framework—largely a creature of the liberal vision of contract procedure—makes this problem worse. In response to academic and journalistic criticism, judges have begun to nullify procedural

20. I focus on unilateral changes to dispute resolution terms—as opposed to "substantive" terms that dictate the parties' rights and duties—for several reasons. For one, businesses do not change substantive terms nearly as frequently as they do procedural terms. *Cf. infra* Part II.B. In addition, although courts often enforce unilaterally modified procedural terms, *see infra* Part I.C.2, unilateral changes to substantive terms often must satisfy heightened regulatory and judicial scrutiny. *See* Rossman v. Fleet Bank (R.I.) Nat'l Ass'n, 280 F.3d 384, 400 (3d Cir. 2002) (holding that the plaintiff stated a cause of action under the Truth in Lending Act by alleging that her credit card company reneged on its promise of "no annual fee"); 16 C.F.R. § 238.0 (2006) (FTC regulation forbidding "bait and switch" tactics).

21. Unilateral amendments to procedural terms have yet to receive sustained scholarly attention. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 424–25 (2005) (briefly noting that courts have disagreed over whether the ex post addition of an arbitration clause to a consumer contract is valid); Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI.-KENT L. REV. 879, 887–88 (2008) (also briefly noting the split in authority); *see also* Eric Andrew Horwitz, Comment, *An Analysis of Change-of-Terms Provisions as Used in Consumer Service Contracts of Adhesion*, 15 U. MIAMI BUS. L. REV. 75 (2006) (surveying the doctrinal and regulatory framework that governs change-of-terms provisions generally).

terms for impairing substantive rights, or jurisdictional or constitutional values. But when courts do so, drafters respond with more unilateral revisions. The target audience for these changes is not the adherents who will be subject to the new clauses. Rather, drafters aim the revisions squarely at the one group that matters: the courts. Firms design the amendments to convince judges (who read in the context-rich environment of briefing and precedent) that their procedural clauses no longer diminish substantive, jurisdictional, or constitutional values, and thus are valid. The result, a "private conversation"[22] between corporations and the judiciary, is troubling. For one, the absence of consumer input, preference, or consent requires publicly subsidized, error-prone courts to act as proxies for these individuals—a result that is impossible to square with economic rationales for contract procedure. This also forces more cases onto court dockets, belying the judicial savings rationale for procedural terms such as arbitration clauses.

This Article proceeds in three parts. Part I traces the emergence of contract procedure. It describes how unilateral revisions have played an important (but neglected) role in the ascent of private procedural rulemaking. In addition, it shows that courts have adopted incompatible views about whether unilateral revisions are valid, compounding the doctrinal uncertainty that already plagues contract procedure.

Part II claims that unilateral amendments belie the conservative model of contract procedure. Because drafters can freely alter procedural terms, they face little pressure to bow to adherents' preferences. Yet the liberal view, which urges courts to strike down terms that affect substantive rights or other important values, creates an exclusive dialogue between drafters and courts. This feedback loop not only leads to consumer "contracting" without consumers, but increases the judiciary's workload.

Part III weighs policy solutions to the unilateral modification dilemma. It evaluates three proposals: imposing heightened disclosure requirements for unilateral amendments, expanding a burgeoning trend in consumer protection that subsidizes litigation of unconscionability issues, and prohibiting unilateral changes to procedural terms. It concludes that banning unilateral revisions is the most effective option.

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22. I owe this phrase and an intellectual debt to Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105, 1105 (2006) (arguing that insurance companies do not change ambiguous policy provisions because of the certainty that comes with language that has been widely interpreted).

I. THE EVOLUTION OF CONTRACT PROCEDURE

For centuries, parties have used predispute contracts to opt out of the judicial system or alter the rules of litigation.[23] However, events in the last thirty years—the spread of standard form contracts, the rise of law and economics, and the Supreme Court's support for arbitration—have made procedural terms a fixture in consumer, franchise, and employment agreements. In this Part, I describe these developments and explain how they have encouraged drafters to take the next step and revise their procedural terms unilaterally. I then detail how courts have disagreed over how to determine whether unilateral revisions are valid, further destabilizing contract procedure's rickety doctrinal edifice.

A. Early Judicial Ambivalence

Arbitration is almost as old as law itself. It has roots in ancient Greece and Rome,[24] and became popular among guilds and courts of the fair in the Middle Ages.[25] During this time, merchants relied on informal norms—not courts—to enforce awards.[26] But as commercial life changed in the sixteenth and seventeenth centuries, tradesmen began to memorialize in writing their agreements to settle disputes outside of the court system.[27] For the first time, courts were regularly called on to enforce these agreements. Either because they were wary of the quality of justice available in extrajudicial forums,[28] or because their livelihoods depended on fees from litigants,[29] courts employed

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23. *See infra* notes 24–34 and accompanying text.

24. For surveys of arbitration during its infancy, see DEREK ROEBUCK, ANCIENT GREEK ARBITRATION (2001); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597 (1927) ("There was a partially developed system of arbitration in Roman law, both during the classical period and under Justinian.").

25. *See* MICHAEL HICKS, ENGLISH POLITICAL CULTURE IN THE FIFTEENTH CENTURY 113 (2002) ("Arbitration was adapted to the full range of possible quarrels."); Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 136–37 (1934) (noting that traveling merchants sought "a simple and speedy determination of a cause, without reference to a formal procedure but in accord with customs of a trade").

26. *See* Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 599 (1997) (noting that medieval arbitration was self-regulating).

27. *See* RICHARD GRASSBY, THE BUSINESS COMMUNITY OF SEVENTEENTH-CENTURY ENGLAND 217–18 (1995) (tracing increased use of arbitration to growth in the insurance and lending industries and dissatisfaction among merchants with the speed of formal court process); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 446 (1984) (describing the use of deeds to secure performance of agreements to arbitrate).

28. *See* Reuben, *supra* note 26, at 599–600 ("[T]he process included no procedural safeguards to prevent bias in the determination of rights and duties.").

29. *See id.* at 600 (describing this as "a more cynical" view).

an array of creative rules to invalidate arbitration contracts.[30] Most notably, in 1746, *Kill v. Hollister*[31]—an eleven-sentence King's Bench opinion that cites no authority—articulated the ouster doctrine, holding that parties cannot agree to override the court's jurisdiction.[32]

Somewhat paradoxically, courts in this epoch also first endorsed the autonomy doctrine, a concept in conflict with the ouster doctrine. Introduced by Charles Dumoulin in the 1500s, the autonomy doctrine recognizes that the parties' shared intentions are paramount in contract law.[33] A corollary of this principle is that parties enjoy the freedom to employ choice-of-law clauses and select a particular territory's rules to govern their relationship.[34]

Courts in the young American Republic inherited these rules. In 1825, Chief Justice Marshall opened the door for the use of choice-of-law provisions by endorsing the autonomy doctrine.[35] Academics, though, were less sanguine about private law conferring "to the parties in truth the power of legislation."[36] Moreover, the Supreme Court invoked the ouster doctrine, calling arbitration clauses "valueless"[37] and opining that agreements "to oust the courts of the jurisdiction conferred by law are illegal and void."[38] This generalized hostility

30. For example, under the doctrine of revocability, parties could disavow their consent to arbitrate at any time. *See, e.g.*, Vynior's Case, (1609) 77 Eng. Rep. 597 (K.B.).

31. (1746) 95 Eng. Rep. 532 (K.B.).

32. *Id.*

33. *See* Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565, 572–73 (1921).

34. *See* Robinson v. Bland, (1760) 97 Eng. Rep. 717, 718 (holding that parties can trump local law by entering into transactions "with an express view to the law of another country"); PAVEL KALENSKÝ, TRENDS OF PRIVATE INTERNATIONAL LAW 64–65 (1971) (crediting Dumoulin for recognizing an express choice-of-law provision as a unique issue and not merely part of the general conflict-of-laws analysis).

35. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48 (1825) (declaring that an agreement "is governed by the law with a view to which it was made"); *see also* Pritchard v. Norton, 106 U.S. 124, 129 (1882) ("[I]n case of contract, the foreign law may, by the act and will of the parties, have become part of their agreement.").

36. Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 261 (1909).

37. Potomac Steamboat Co. v. Baker Salvage Co., 123 U.S. 40, 51 (1887).

38. Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874). State courts, however, were less suspicious. *See, e.g.*, Neely v. Buford, 65 Mo. 448, 451 (1877) (noting that arbitration "prevent[s] litigation in courts and [is] less expensive and dilatory").

toward contract procedure also led courts to strike down forum-selection clauses[39] and express qualms about contractually shortened statutes of limitations.[40]

These views began to change in the early twentieth century, as business groups and the American Bar Association launched a sustained assault on the ouster doctrine. This blitz included local, state, and federal lobbying,[41] as well as the publication of books and articles that trumpeted the virtues of arbitration.[42] Finally, in 1925, Congress passed the American Arbitration Act.[43] This statute, later renamed the Federal Arbitration Act (FAA),[44] cautions courts that only traditional contract law defenses—and not an abstract distrust of arbitration—can be grounds for refusing to enforce an arbitration clause:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[45]

Yet despite the effort that went into its passage and the centuries of law it overruled, the FAA lurked in relative obscurity for many decades. For one, the statute did not seem to apply to the full panoply of private dealing. Instead, it only regulated arbitration clauses in contracts "involving commerce"—a phrase that limited its scope to the extent of Congress's authority under the Commerce Clause.[46] At the time, Congress could not govern wholly

39. *See, e.g.*, Nute v. Hamilton Mut. Ins. Co., 72 Mass. (6 Gray) 174, 184–85 (1856) (voiding a clause requiring the insured to sue in a particular county); Benson v. E. Bldg. & Loan Ass'n, 66 N.E. 627, 628 (N.Y. 1903) ("[T]he jurisdiction of the court is beyond the agreement of the parties."); Eaton v. Int'l Travelers' Ass'n, 136 S.W. 817, 818 (Tex. Civ. App. 1911) (voiding a term that required insured to sue in Dallas). *But see* Marcus, *supra* note 7, at 999–1000 (noting that federal courts sitting in admiralty were more receptive).

40. For example, in *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386 (1868), the Supreme Court upheld a term in an insurance contract that required the insured to bring a claim within twelve months. Although the issue had little resemblance to arbitration, the Court went to great lengths to explain why the ouster doctrine did not apply. *See id.* at 390–91 ("[T]he condition in the policy in this case does not interfere with the authority of the courts.").

41. *See, e.g.*, IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 41–47 (1992) (describing statutes in New York, New Jersey, Massachusetts, and Oregon that paved the way for the FAA).

42. *See, e.g.*, JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 281 (1918) (criticizing the ouster doctrine); Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 149 (1921) (same).

43. 43 Stat. 883 (1925).

44. 9 U.S.C. §§ 1–16 (2006).

45. *Id.* § 2.

46. *Compare id.* § 1 ("'[C]ommerce', as herein defined, means commerce among the several States . . . ."), *with* U.S. Const. Art. VIII, § 8, cl. 3 ("The Congress shall have power . . . [t]o regulate commerce . . . among the several states . . . .").

intrastate transactions,[47] which excluded a vast swath of contracts from the FAA's ambit. Moreover, even after the Supreme Court enlarged Congress's Commerce Clause powers in the 1940s,[48] it refused to equivalently broaden the FAA.[49] As late as the 1960s, judges voided arbitration clauses for the bare reason that both contracting parties hailed from the same state.[50]

Well into the 1980s, courts continued to limit the FAA's reach. For example, they held that the statute did not require the arbitration of federal statutory claims. Beginning with the Supreme Court's 1953 decision in *Wilko v. Swan*,[51] judges found that asserted violations of federal securities, labor, antitrust, patent, pension, and civil rights laws were not arbitrable.[52] Many judges and commentators also assumed that the FAA neither applied in state court nor preempted contrary state law.[53] Perhaps because the FAA's legislative history contained multiple references to "the federal courts" and the "courts of the United States,"[54] litigants in state court ignored it for years,[55]

47. *See* Hammer v. Dagenhart, 247 U.S. 251, 272–73 (1918).

48. *See* Wickard v. Filburn, 317 U.S. 111, 129 (1942).

49. *See* Bernhardt v. Polygraphic Co., 350 U.S. 198, 199–201 (1956) (holding that the FAA did not govern a contract between a Vermont citizen and a New York corporation).

50. *See, e.g.*, John W. Johnson, Inc. v. 2500 Wis. Ave., Inc., 231 F.2d 761, 764 (D.C. Cir. 1956) ("[W]e cannot say that a contract to paint a building in the District [of Columbia] is a 'transaction involving commerce' within the meaning of § 2 of the [FAA], and neither party so contends."); Livingston v. Shreveport-Tex. League Baseball Corp., 128 F. Supp. 191, 202 (W.D. La. 1955) (holding that minor league baseball manager's contract "does not involve interstate [c]ommerce" even though it was clear that his job required him to travel from state to state); Coles v. Redskin Realty Co., 184 A.2d 923, 927 (D.C. Ct. App. 1962) (holding that settlement agreement stemming from sophisticated real estate deal bore only a "remote" connection to interstate commerce).

51. 346 U.S. 427, 438 (1953).

52. *See, e.g.*, McDonald v. City of West Branch, 466 U.S. 284, 292 (1984) (holding that the FAA did not apply to claim under Section 1983); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 736–37 (1981) (holding that the FAA did not apply to claim under Fair Labor Standards Act); Alexander v. Gardner-Denver Co., 415 U.S. 36, 56–58 (1974) (same for Title VII); Criswell v. W. Airlines, Inc., 709 F.2d 544, 547 (9th Cir. 1983) (same for the ADEA); Applied Digital Tech., Inc. v. Cont'l Cas. Co., 576 F.2d 116, 117 (7th Cir. 1978) (same for antitrust); Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (same for patent issues); Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 277 (E.D. Pa. 1977) (same for ERISA).

53. *See, e.g.*, Ross v. Twentieth Century-Fox Film Corp., 236 F.2d 632, 634 (9th Cir. 1956) (looking to California law to determine whether arbitration clause was "formal" enough to be valid); Pullman, Inc. v. Phoenix Steel Corp., 304 A.2d 334, 338 (Del. Super. Ct. 1973) (refusing to apply the FAA); Wilson & Co. v. Fremont Cake & Meal Co., 43 N.W.2d 657, 665 (Neb. 1950) ("[A] provision in a contract requiring arbitration . . . will not be enforced.").

54. *See, e.g.*, Recent Cases, 73 HARV. L. REV. 1382, 1383 (1960) ("[T]he House committee report indicated that the act was to apply only in the federal system.").

55. There are just five known instances of parties asking state courts to apply the FAA in the first thirty-four years of its existence. MACNEIL, *supra* note 41, at 127–28.

and state judges and legislators considered themselves free to curtail the practice of arbitration through restrictive common law and statutory rules.[56]

Thus, by the early 1980s, nearly sixty years after its passage, the FAA had abolished the ouster doctrine, but hardly resembled the juggernaut it is today. However, while arbitration law had remained relatively static during the latter half of the twentieth century, contract law had changed dramatically.

B. Standard Form Contracts

The FAA was enacted in an era dominated by the "classical" model of contract law. Classical theory, pioneered by Samuel Williston and Christopher Columbus Langdell, dealt largely with negotiated transactions between equals.[57] To be sure, not all contracts fit that mold: For example, standardized warranties and bills of lading had emerged in the nineteenth century,[58] and in 1919 Edwin Patterson had described life insurance policies as "contracts of adhesion."[59] But these non-negotiated, take-it-or-leave-it form contracts were seen as peripheral, and not symptoms of a larger pathology.

However, as the century progressed, industrialization and demand for consumer durables made standard form contracts the rule, not the exception. In a prescient 1943 paper, Friedrich Kessler noted the spread of "standardized mass contract[s] . . . in the transportation, insurance, and banking business."[60] By 1960, the ubiquity of form contracts prompted Karl Llewellyn to assert that "few 'private' law problems . . . remotely rival the[ir] importance."[61] And in 1971, W. David Slawson estimated that "[s]tandard form contracts probably account for more than ninety-nine percent of all contracts now made."[62]

These scholars and their contemporaries struggled to square standard forms and classical contract law. They identified three related but discrete areas of

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56. *See, e.g.*, CAL. CORP. CODE § 31512 (West 2006) (exempting franchise agreements from arbitration clauses); UTAH CODE ANN. § 78-31-1 (West 1953) (providing that only contracts to submit existing disputes to arbitration are enforceable) (repealed 1986); *see also supra* note 53.

57. *See, e.g.*, CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 21 (6th ed. 2007) (discussing the classical model).

58. *See, e.g.*, Liverpool & G.W. Steam Co. v Phenix Ins. Co., 129 U.S. 397, 441 (1889) (involving a standardized bill of lading and noting that customers often have "no alternative but to [sign] this, or to abandon his business"); Briggs v. Rumely Co., 64 N.W. 784, 784–85 (Iowa 1895) (dealing with boilerplate warranty accompanying sale of thresher).

59. Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (internal quotation marks omitted).

60. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

61. KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 362 (1960).

62. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–30 (1971).

concern. First, unlike the archetypal free market exchange, standard forms were not negotiated, implying that adherents lacked any opportunity to protect their own interests.[63] Second, the status disparity between the parties suggested that adherents (often individuals) were wholly at the mercy of drafters (usually sophisticated corporate entities). It thus seemed clear that drafters would pepper standard forms with one-sided clauses.[64] Finally, the perception that adherents did not read and could not understand fine-print terms made it difficult to identify the requisite "meeting of the minds" or "mutual assent" of contract formation.[65]

But in the late 1970s, academics writing in the nascent discipline of law and economics pushed back hard against these concerns. As is well known, the core of economic analysis of contract law is the intuitive notion that because individuals and entities rationally seek to further their self-interest,[66] they will only agree to an exchange if it will make them better off.[67] Unlike previous approaches, which were largely deontological and focused on the lack of either assent or fairness in standard forms as evils themselves, law and economics is less concerned with the niceties of any particular transaction. Because competition prompts firms to draft terms that reflect most adherents' preferences, any absence of assent or fairness to those clauses matters only to the extent that it suggests that the market is not functioning.[68]

Operating within this framework, Alan Schwartz, Louis L. Wilde, and George Priest challenged several common arguments against standard forms.[69]

63. *See, e.g.*, Karl Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700, 700–01 (1939) (voicing concern about the non-negotiability of standard form terms) (book review).

64. *See* Kessler, *supra* note 60, at 632 ("Standard contracts are typically used by enterprises with strong bargaining power.").

65. *See* LLEWELLYN, *supra* note 61, at 370 (noting the lack of true "assent" to boilerplate).

66. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 10 (2d ed. 1996) ("[C]onsumers maximize utility (*i.e.* happiness or satisfaction), firms maximize profits, politicians maximize votes, bureaucracies maximize revenues, [and] charities maximize social welfare."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (6th ed. 2003) ("The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions . . . .").

67. *See* STEPHEN A. SMITH, CONTRACT THEORY 100 (2004) ("Arguably the most fundamental idea underlying efficiency theories of contract law is that if two persons make a voluntary exchange the exchange will make each better off.").

68. *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 7 (1993) (noting that "monopoly, externalities, [and] information failures" can undermine the assumption that transactions are Pareto superior).

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

First, Schwartz argued that even a monopolist or oligopolist will draft terms that embody most adherents' preferences. If a firm exploited its market power to lace its standard forms with one-sided clauses, it would lose the business of marginal consumers who would have made the purchase but for these terms.[70] To be sure, a firm with substantial market share will charge supracompetitive prices,[71] but in Schwartz's view, because a company would profit most from the sheer act of charging high prices, rather than by providing undesirable terms, it has no reason to ignore customer preferences when designing its contracts.[72]

Second, in separate articles, Schwartz and Priest argued that even harsh terms may accord with most consumers' wishes. For example, a car with a broad warranty costs more than a car with a disclaimer of warranties; likewise, a loan with a security interest likely has a lower interest rate than an unsecured loan.[73] Because some consumers may prefer to pay less and assume more risk under the contract, voiding pro-drafter provisions can have pernicious effects. For example, suppose a company offers a product either for $100 with a comprehensive warranty or $90 with a disclaimer of warranties.[74] If a court or legislature bars warranty disclaimers, consumers who prefer the $90 product must forgo the purchase or spend $10 they would have rather devoted to other expenses. Either way, outlawing disclaimers makes these consumers worse off.[75]

Finally, in allied papers in 1979 and 1983, Schwartz and Wilde claimed that form contract terms may be optimal even in markets plagued by imperfect information.[76] Schwartz and Wilde began by noting the well-accepted premise that adherents' lack of awareness or knowledge can prevent them from

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Unconscionability, 63 VA. L. REV. 1053 (1977); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

70. *See* Schwartz, *supra* note 69, at 1072.

71. *See id.* at 1072 n.38.

72. *See id.* This argument is widely cited today. *See, e.g.*, R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 638 (1996) ("[A] rational monopolist would simply extract monopoly profits directly through the price."); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1212 (2003) ("By first providing efficient terms and *then* raising price above its competitive-market level, sellers can maximize total profits."); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 843 (2003) ("Even if the seller or creditor has market power, it has the right incentive to supply the terms that parties desire.").

73. *See, e.g.*, Schwartz, *supra* note 69, at 1057–58.

74. *Id.*

75. *Id.* Five years later, Priest provided some empirical support for Schwartz's theoretical intuitions. Analyzing sixty-two consumer product warranties, Priest found little evidence that firms use fine print to "limit their legal obligations to consumers as much as possible." *See* Priest, *supra* note 69, at 1301, 1319–25.

76. *See* Schwartz & Wilde, *Imperfect Information I*, *supra* note 69; Schwartz & Wilde, *Imperfect Information II*, *supra* note 69.

making utility-maximizing choices, therefore justifying state intervention in markets.[77] However, they argued that companies may still face pressure to offer efficient clauses—those that reflect consumers' ideal balance of risk and price—even if most consumers do not understand the risks that their contract terms allocate or the range of prices and terms available in a specific market.[78] The key to their theory is the existence of "comparison shoppers": consumers who actively search among competing businesses for ideal contractual terms.[79] In a competitive market, a company's survival depends on attracting marginal customers, including comparison shoppers. But drafters cannot distinguish between marginal shoppers and marginal uninformed consumers.[80] To avoid losing marginal shoppers to their rivals, they must offer to all their customers terms that correspond with most customers' preferences.[81]

Notably, Schwartz, Wilde, and Priest focused on the problematic terms of their era: warranties and security interests. During this period, however, private procedural rulemaking did not register on the legal or intellectual radar. For example, in the 1950s, there had been only minor scholarly and judicial interest in choice-of-law clauses in nonnegotiable steamship tickets and employment agreements.[82] Similarly, in the 1960s and 1970s, only a few courts closely

77. *See* Schwartz & Wilde, *Imperfect Information I*, *supra* note 69, at 632–33; Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1390–91.

78. *See* Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1389–90.

79. *See* Schwartz & Wilde, *Imperfect Information I*, *supra* note 69, at 638. Schwartz and Wilde construct a model where the only variation between products is the price. *Id.* at 642 (assuming that "consumers are interested primarily in prices [and] that the goods are homogeneous"). Although they then extrapolate it to a situation where contracts terms also vary, they note that the analogy is not perfect. *See id.* at 660–61 ("Evaluating terms is more costly than evaluating prices or search characteristics such as color, size or fit; some comparison shoppers in consequence may devote little time to examining terms.").

80. *See id.* at 638.

81. *See id.* at 639; Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1414. Schwartz and Wilde conclude that the best method of intervention when consumers are unaware of the full range of market offerings is for the government to take steps to increase the amount of comparison shopping. *See* Schwartz & Wilde, *Imperfect Information I*, *supra* note 69, at 651; Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1461–62.

82. *See* Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 204–05 (2d Cir. 1955) (Frank, J., dissenting) (reasoning that a choice-of-law clause in form steamship ticket should be unenforceable because "the idea of 'freedom of contract[ ]' cannot be applied rationally" to a standard form contract); Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1073 (1953) (noting that courts go to great lengths to ignore choice-of-law clauses in form employment agreements); Note, *Determining the Scope of Choice of Law Provisions in Steamship Tickets: Adhesion Contracts and the Conflict of Laws*, 65 YALE L.J. 553, 561–63 (1956) (noting that many passengers do not read a choice-of-law clause in a steamship ticket and "[a]t other times [their] inexpertness may prevent [them] from comprehending the significance of [their] agreement").

scrutinized arbitration clauses in form contracts.[83] Even as late as 1983, when Schwartz and Wilde published the final article in their series, contract procedure was not pervasive. Indeed, because the FAA did not govern statutory claims and arguably neither applied in state court nor preempted state anti-arbitration rules, there was no doctrinal infrastructure to support the widespread use of arbitration clauses.[84] As a result, standard form contracts did not have the byzantine procedural schemes that they do today.

Nevertheless, the laissez faire teachings of law and economics would dovetail neatly with the Supreme Court's broader civil justice agenda. As I explain next, starting in the mid-1980s, the Court would begin a campaign that continues to this day: a spectacular expansion of the FAA.

C. Contract Procedure

1. The Expansion of the FAA

Between 1940 and 1980, the number of cases filed each year in federal district court nearly tripled, from 68,135 to 198,710.[85] This dramatic increase gave rise to the meme that the country was enduring a "litigation explosion."[86] Magazines and newspapers ran articles titled *The Chilling Impact of Litigation* and *Too Much Law*, bemoaning the deluge of law, lawyers, and lawsuits.[87] In the same vein, a 1975 *Stanford Law Review* article warned that circuit judges would soon adjudicate a million cases a year, causing the Federal Reporter to swell to over a thousand annual volumes.[88]

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83. *See* Player v. George M. Brewster & Son, Inc., 96 Cal. Rptr. 149, 156 (Ct. App. 1971) ("We think the courts would and should scan closely contracts which bear facial resemblance to contracts of adhesion and which contain cross-country arbitration clauses before giving them approval."); Barnhart v. Civil Serv. Emp. Ins. Co., 398 P.2d 873, 877 (Utah 1965) (invalidating an arbitration clause in an insurance policy because "[w]ith respect to [the] arbitration [clause], even if it were discovered, its meaning and effect are somewhat uncertain even to lawyers and judges, and presumably would be more so to laymen").

84. *See supra* notes 46–56 and accompanying text.

85. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 37 (1983).

86. *See, e.g.*, Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 292 (2002) (tracing the development of this phrase).

87. *See* Galanter, *supra* note 85, at 6 n.4, 8 n.20 (citing *The Chilling Impact of Litigation*, BUS. WK., June 6, 1977, at 58, and *Too Much Law?*, NEWSWEEK, Jan. 10, 1977). A frequently voiced argument was that the expansion of regulation in the 1960s had prompted individuals to "defin[e] as legal problems more and more forms of the distresses, anxieties, and wounds they once regarded as . . . the responsibility of institutions other than the courts." Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1350 (1972).

88. John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975).

As concern grew about the judiciary's capacity to handle this crushing burden, some commentators called for greater use of alternative dispute resolution.[89] This movement found an outspoken champion in Chief Justice Warren Burger.[90] With Burger at the helm, the Supreme Court discovered in the FAA a long-dormant national commitment to arbitration. In 1983, the Court abruptly declared that the statute embodied "a liberal federal policy favoring arbitration agreements" and explained that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[91] The following year, the Court held in *Southland Corp. v. Keating*[92] that the FAA not only applied in state courts, but preempted a state statute that banned arbitration clauses in franchise contracts.[93] Three years later, to highlight that states could no longer regulate arbitration on their own terms, the Court granted certiorari in *Perry v. Thomas*[94] and reversed an unpublished California court of appeal opinion—which the state high court had declined to review—that exempted wage disputes from arbitration.[95]

Similarly, in 1985, the Court held that federal statutory claims were, in fact, arbitrable. The case, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[96] involved two large companies, and Justice Blackmun's majority opinion relied on the consensual nature of their agreement to arbitrate.[97] As Justice Blackmun saw it, this informed choice did not diminish the plaintiff's ability to vindicate its statutory rights, but rather "traded the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."[98] However, because the FAA expressly permits courts to void arbitration clauses "upon such grounds as exist . . . for the revocation of any

89. *See, e.g.*, Gerald Aksen, *Private Dispute Settlement*, 70 COLUM. L. REV. 178, 185 (1970) ("'Arbitration is an expanding area of the law reaching constantly into new fields. It deserves serious study and discriminating use.'" (quoting and reviewing MERTON C. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT vii (1968))); Irving R. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 13 (1976) (calling for compulsory arbitration of certain insurance claims).

90. In 1976, Chief Justice Burger gave the keynote address at conference honoring Roscoe Pound and asked the assembled members of the legal intelligentsia to "reapprais[e] . . . the values of the arbitration process." Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, *in Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction With the Administration of Justice*, 70 F.R.D. 83, 94 (1976). In his 1982 State of the Judiciary speech, he touted arbitration as "a better way to do it." Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (1982).

91. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

92. 465 U.S. 1 (1984).

93. *Id.* at 11.

94. 482 U.S. 483 (1987).

95. *Id.* at 492.

96. 473 U.S. 614 (1985).

97. *Id.* at 628 ("Having made the bargain to arbitrate, the party should be held to it . . . .").

98. *Id.*

contract"[99]—and thus does not supersede generic contract defenses such as unconscionability—the Court instructed future courts to be on the lookout for "well-supported claims of overwhelming economic power."[100]

Despite this admonition, the Court soon held that powerful brokerages could force their investors to arbitrate claimed violations of securities laws. In 1987, in *Shearson/American Express Inc. v. McMahon*,[101] the Court noted that "broker overreaching" could be a valid ground for "revoking the contract under ordinary principles of contract law," but did not pursue the issue further.[102] Likewise, in 1989, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[103] the Court dismissed in one sentence the plaintiffs' contention that their brokerage contract was adhesive, reasoning that "the record contains no factual showing sufficient to support that suggestion."[104] As a result, the securities industry continued its rampant use of arbitration clauses.[105]

Two years later, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*[106] further enlarged the FAA's radius by determining that a claim for wrongful firing under the Age Discrimination in Employment Act was arbitrable.[107] Even though the Court did not squarely hold that arbitration clauses in employment agreements were enforceable,[108] it signaled that neither the plaintiff's status as an employee nor the species of claim would alter its analysis. The Court concluded that the specter of biased arbitrators and the limited discovery available in arbitration did not prove that the extrajudicial forum would thwart the plaintiff's exercise of his statutory rights.[109] Although the Court admitted that there is "often unequal bargaining power between employers and employees," it found

99. 9 U.S.C. § 2 (2006).
100. *Mitsubishi*, 473 U.S. at 627.
101. 482 U.S. 220 (1987).
102. *Id.* at 227.
103. 490 U.S. 477 (1989).
104. *Id.* at 484.
105. *See, e.g.*, Hal Davis, *Banks Follow Brokerages: Arbitrate Yes, Litigate No*, NAT'L L.J., Sept. 12, 1994, at B1 ("[T]he retail brokerage industry . . . has made arbitration the exclusive forum for customer complaints."); David Satterfield, *Brokers and Brokerages Feeling Some Pain: Lawsuits and Arbitration Cases Begin to Roll in*, MIAMI HERALD, Dec. 21, 1987, at 7BM (noting that most cases from the October market crash that year "[would] end up in arbitration").
106. 500 U.S. 20 (1991).
107. *Id.* at 35.
108. The FAA expressly does not cover "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2006). The plaintiff in *Gilmer* did not argue below that this language categorically excludes all employment contracts, and thus the Court refrained from deciding the issue. *See Gilmer*, 500 U.S. at 25 n.2. A decade later, the Court definitively rejected that theory, construing Section 1 narrowly to "exempt[ ] from the FAA only contracts of employment of transportation workers." Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).
109. *See Gilmer*, 500 U.S. at 30–32.

this insufficient "to hold that arbitration agreements are never enforceable in the employment context."[110]

By 1991, then, the Court had left open just two avenues to contest arbitration clauses. First, a plaintiff could, theoretically, show that the lack of judicial forum would thwart her ability to vindicate statutory rights—though the Court had made clear that this would require forceful, specific proof.[111] Second, arbitration clauses remained susceptible to the same defenses that applied to any contract, such as unconscionability. But the Court had ignored the fact that *McMahon*, *Rodriguez de Quijas*, and *Gilmer* involved non-negotiated, standard form terms.

The Court's hospitality to contract procedure extended beyond the arbitration context. A month before the Court decided *Gilmer*, it issued its opinion in *Carnival Cruise Lines v. Shute*,[112] which embraced Schwartz, Wilde, and Priest's view of form contracts. In *Shute*, the Court upheld a forum-selection clause in a ship ticket, reasoning that it benefited not only the cruise line (by "limiting the fora in which it may be sued"), but also passengers (who enjoyed "reduced fares reflecting the[se] savings").[113] This proposition—that firms must pass lower litigation costs from procedural terms back to customers—would become a sturdy pillar for the conservative view of contract procedure.[114] Under this logic, a procedural provision in a form contract could rarely be "unfair," and thus could rarely be substantively unconscionable.

Banks, credit card issuers, and telecommunications companies watched this jurisprudence closely. As the next subpart describes, when the Court glossed

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110. *Id.* at 32–33.

111. The Court would later underscore this point in *Green Tree Financial Corp.-Alabama. v. Randolph*, 531 U.S. 79, 90 (2000), holding that the mere fact that an arbitration clause did not say who would pay for the proceeding did not prove that the plaintiff could not vindicate her rights.

112. 499 U.S. 585 (1991).

113. *Id.* at 594.

114. *See, e.g.*, Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 771 ("[R]efusing to enforce arbitration clauses containing 'unfair' provisions will give a windfall to individuals with disputes and impose costs on everyone else."); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 698–99 ("Each of the limitations on the options available to purchasers in the event of a transactional breakdown reduces costs to sellers. In competitive markets, that reduction should redound to the benefit of buyers by reducing the cost of goods."); Keith N. Hylton, *Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 263 (2000) ("Waiver and arbitration agreements, like all contracts, will be attractive to potential plaintiffs and defendants when they can enhance the joint wealth of the contracting parties."); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) [hereinafter Ware, *Adhesive Arbitration Agreements*] ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 [hereinafter Ware, *Price of Process*] ("[A]rbitration lowers the prices (and interest rates) consumers pay because competition forces businesses to pass their cost-savings on to consumers.").

over concerns that consumers did not knowingly assent to arbitration clauses, these groups saw an opportunity.

2. The Rise of the Unilateral Modification

In July 1992, Bank of America added a short paragraph to the monthly statements of 18.5 million checking and credit card customers:

> Change of Terms Notice . . . . Dispute Resolution—[i]f you or we request, any controversy with us will be decided either by arbitration or reference . . . . The arbitration or reference will take the place of a trial before a judge and jury . . . . If you continue to use your account, this new provision will apply to all past and future transactions.[115]

Of course, by this time, the mere existence of a compulsory arbitration clause was hardly notable.[116] But what made Bank of America's gambit controversial was its attempt to grandfather an arbitration clause into existing contracts—some decades old—that said nothing about alternative dispute resolution.[117] A month later, Wells Fargo, Bank of America's fiercest competitor, followed suit, and sent arbitration clauses in bill stuffers to seven million customers.[118]

In *Badie v. Bank of America*,[119] a coalition of consumer advocates and trial lawyers asked the California Superior Court to enjoin the bank's new arbitration policy.[120] In response, the bank argued that all of its contracts with consumers included the following clause, which empowered it to modify the agreements unilaterally:

> [W]e may change or terminate any terms, conditions, services or features of your account (including increasing your finance charges) at any time. We may impose any change in terms on your outstanding balance, as well

115. Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 277 (Ct. App. 1998); *see also* Jennifer Thelen, *Millions at Stake as BofA's ADR Clause Goes on Trial*, RECORDER (S.F.), July 12, 1993, at 1. The clause also instituted "judicial reference" for class actions, a procedure in which a judge appoints an arbitrator who oversees the aggregated claims. *Bank of America Rewrites Policy So It Avoids Court on Customer Disputes*, CHARLOTTE OBS., June 3, 1992, at 2D. As the defendant bank explained, the move was necessary in light of the fact that it had recently "faced dozens of multimillion-dollar[ ] class-action lawsuits." *Arbitration to Be the Rule at BofA*, S.F. CHRON., June 3, 1992, at C1.

116. Indeed, Bank of America had placed compulsory arbitration clauses in its credit instruments since 1986. *See* David K. Rubenstein, *How the Bank of America Manages Litigation*, CORP. LEGAL TIMES, Feb. 1992, at 6.

117. James Bates, *BofA to Impose Arbitration in Customer Disputes*, L.A. TIMES, June 3, 1992, at 1 (referring to the fact that some customer agreements may be twenty years old).

118. *See Wells Joins Trend Against Jury Trials*, S.F. CHRON., July 7, 1992, at C1.

119. 79 Cal. Rptr. 2d 273.

120. *See Bank of America Is Sued Over Arbitration Policy*, WALL ST. J., Aug. 5, 1992, at A6; *Consumer Group Sues BofA Over Arbitration*, S.F. CHRON., Aug. 5, 1992, at B1; Stephen G. Hirsch, *Trial Lawyers Sue BofA Over Arbitration Policy*, RECORDER (S.F.), Aug. 5, 1992, at 4.

> as on subsequent transactions and balances. We may also add new terms, conditions, services or features to your Account.[121]

The trial court focused on the word "change," which it construed as a synonym for "add," and held that the bank had given itself discretion to supplement its contracts in good faith.[122] However, the California Court of Appeals reversed, noting that the relevant inquiry was not the meaning of "change," but of "terms."[123] Because the original customer contracts said nothing about alternative dispute resolution, the court of appeal held that the arbitration clause was "an entirely new term" that went beyond "any subject, issue, right, or obligation addressed in the original contract."[124] Accordingly, the court of appeal held that the bank had exceeded its power to unilaterally amend the agreement.

Although *Badie* did not permit the bank to add the arbitration clause, it provided a blueprint for what might lead a court to approve such a maneuver. The court's preoccupation with the clause being an "entirely new term"—and not related to any subject mentioned in the original contract—implied that drafters could lawfully add, remove, or modify dispute resolution terms in any contract that already included dispute resolution terms.

Moreover, Bank of America had committed a tactical blunder by not giving customers the chance to decline the new term. Doing so would have made the addition seem less like a raw abuse of power. In fact, a year before *Badie*, the Seventh Circuit had stressed the importance of an opt-out period in the similar milieu of "rolling contracts."[125] In *Hill v. Gateway 2000, Inc.*,[126] the plaintiffs had ordered a computer over the phone, and the computer had arrived in a box along with an arbitration clause that stated that it would only become effective if the plaintiffs did not return the computer within thirty days.[127] The court upheld the clause, conceptualizing it as an "offer" that the plaintiffs accepted by keeping the computer.[128] By the same logic, a

121. *Badie*, 79 Cal. Rptr. 2d at 277–78. Ironically, however, as the litigation progressed, it became clear that Bank of America had revised this very clause. *Id.* at 278. Thus, it was unclear which version of the unilateral amendment provision governed the bank's unilateral amendment of the plaintiffs' contracts. The common thread in the multiple versions of the contract was that they permitted the bank to "change" its "terms." *Id.* at 277–78.

122. Badie v. Bank of Am., No. 944916, 1994 WL 660730, at *2, *6 (Cal. Super. Ct. Aug. 18, 1994).

123. *Badie*, 79 Cal. Rptr. 2d at 285.

124. *Id.* at 284.

125. A "rolling contract"—also sometimes called a "layered" or "shrinkwrap" contract—is embedded in a product's packaging and sets forth additional terms that become effective unless the consumer returns the product within a set period of time. *See, e.g.*, KNAPP ET AL., *supra* note 57, at 193–94.

126. 105 F.3d 1147 (7th Cir. 1997).

127. *Id.* at 1148.

128. *See id.* at 1150.

firm could repackage a unilateral change to a procedural term as an "offer" that a patron "accepted" simply by failing to opt out.

In other jurisdictions, banks and credit card issuers began to exploit a different loophole in consumer law. Section 3.205 of the Uniform Consumer Credit Code gives lenders free rein to amend the terms of their revolving credit accounts.[129] This provision, enacted in the 1970s, was designed to allow creditors to adapt to shifts in the financial climate while also making it easier for debtors to understand increases in their fees or interest rates.[130] However, nothing in section 3.205 limits its applicability to conspicuous terms. Indeed, several jurisdictions have passed versions of section 3.205 that allow lenders to modify any contractual term—even those that govern dispute resolution—if they first provide written notice of the change.[131] Some of these statutes eviscerate *Badie*'s holding by authorizing drafters to modify terms even when the underlying contracts do not expressly allow unilateral changes.[132]

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129. UNIF. CONSUMER CREDIT CODE § 3.205 (1974) (allowing creditors to "change the terms of an open-end credit account," but requiring creditors to give notice before revising finance charges and interest rates). Similarly, the Truth in Lending Act and its implementing provision, Regulation Z, require creditors to disclose changes to fees and interest rates, but do not mention changes to procedural terms. *See* 15 U.S.C. § 1601(a) (2006); 12 C.F.R. § 226.1 (2006).

130. *See* UNIF. CONSUMER CREDIT CODE § 3.205, comm. 1 ("This provision is designed to allow creditors to change the terms of their open-end accounts in a manner which is feasible from their standpoint but which safeguards the interests of their customers.").

131. Delaware, Rhode Island, Utah, and Virginia expressly permit lenders to include or change "arbitration or other alternative dispute resolution mechanisms." DEL. CODE ANN. tit. 5, § 952(a) (2001); R.I. GEN. LAWS § 6-26.1-11(a) (Supp. 2008) (same as Delaware); UTAH CODE ANN. § 70C-4-102(2)(b) (Supp. 2008) (requiring the original contract to grant the drafter the power to enact ex post revisions); VA. CODE ANN. § 6.1-330.63(D) (Supp. 2009) (allowing the addition of "arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever"). Other jurisdictions' versions give lenders the power to "modify any term" but differ in subtle ways from each other. *See, e.g.*, ALA. CODE § 5-20-5 (1996) (requiring thirty days notice of changes); FLA. STAT. ANN. § 658.995(4) (West 2004) (requiring only "prior written notice"); GA. CODE ANN. § 7-5-4(c) (2004) (same as Florida); IOWA CODE ANN. § 537.3205(1) (West 1997) (requiring sixty days notice); KAN. STAT. ANN. § 16a-3-204(2)-(3)(b) (2007) (requiring thirty days notice but not for changes that "involve[ ] no significant cost" to the debtor); ME. REV. STAT. ANN. tit. 9-A, § 3-204(2) (1999) (same as Kansas); NEV. REV. STAT. ANN. § 97A.140(4) (LexisNexis 2007) (same); N.D. CENT. CODE § 51-14-02 (2007) (requiring twenty-five days notice); OHIO REV. CODE ANN. § 1109.20(D) (West Supp. 2009) (providing merely that "a bank and a borrower may specify in their agreement any terms and conditions for modifying or amending the agreement"); S.D. CODIFIED LAWS § 54-11-10 (2006) (requiring twenty-five days notice); TENN. CODE ANN. § 45-2-1907(a) (2007) (requiring notice if mandated by federal law).

132. *See, e.g.*, UNIF. CONSUMER CREDIT CODE § 3.205 (allowing unilateral changes "[w]hether or not a change is authorized by prior agreement"); ALA. CODE § 5-20-5 (remaining silent on the issue of whether the underlying contract must authorize the changes); DEL. CODE ANN. tit. 5, § 952(a) (allowing unilateral changes "whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties"); IOWA CODE ANN. § 537.3205(1) (West 1997) ("[W]hether or not a change is authorized by prior agreement, a creditor may make a change in the terms . . . ."); KAN. STAT. ANN. § 16a-3-204(2) (2007) ("A creditor may change the terms, including

Accordingly, in *Stiles v. Home Cable Concepts, Inc.*,[133] an Alabama district court permitted a credit card issuer to grandfather an arbitration clause into an existing contract.[134] Unlike the contracts in *Badie*, the plaintiff's original agreement already included a procedural term (a Utah choice-of-law clause).[135] In addition, the card issuer gave the plaintiff two months to decline the arbitration clause and even enclosed a stamped, addressed rejection letter for the plaintiff's convenience.[136] In consideration for accepting the arbitration clause, the plaintiff would have received a 2 percent reduction in his annual interest rate.[137] Finally, as the card issuer noted, no matter whether Alabama or Utah law applied, statutes in both states expressly permitted creditors to revise contractual terms unilaterally.[138] In light of this legislative authorization, the court saw the issue not as whether the card issuer had the power to insert the clause (as in *Badie*), but whether the clause was unconscionable.[139] Given the abundant evidence that the clause was reasonable, including the fact that the plaintiff could have declined the new clause and continued to use his card without adverse consequences, the court had little difficulty concluding that it was valid.[140]

However, subsequent courts split sharply over how to analyze the issue. Some held that the insertion of an arbitration clause was not unconscionable if the drafter had complied with a unilateral-amendment statute. For instance, in *Bank One, N.A. v. Coates*,[141] a credit card issuer invoked its power to "change or amend the terms" in its contracts and sent a notice to cardholders that if they did not object within thirty days, they would be compelled to arbitrate any further disputes.[142] Like the *Badie* plaintiffs, the adherent in *Coates* asserted that the new arbitration clause exceeded his reasonable expectations because

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the finance charge, of an open end credit account whether or not the change is authorized by prior agreement."); ME. REV. STAT. ANN. tit. 9-A § 3-204(2) (1999) (same as Kansas); R.I. GEN. LAWS § 6-26.1-11(a) (Supp. 2008) (same as Delaware); VA. CODE ANN. § 6.1-330.63(C) (Supp. 2008) (authorizing lenders "to modify or delete terms, or to add new terms, which new or modified terms and amendment need not be of a kind previously included in or contemplated by [the] contract").

133. 994 F. Supp. 1410 (M.D. Ala. 1998).

134. *See id.* at 1416–17.

135. *Id.* at 1412–13. As in *Badie*, the original contract expressly permitted the drafter to "change" its terms. *Id.* at 1412.

136. *Id.* at 1413–14.

137. *Id.* at 1413.

138. *Id.* at 1418.

139. *See id.* at 1417–18.

140. *See id.* at 1413, 1417–18.

141. 125 F. Supp. 2d 819 (S.D. Miss. 2001).

142. *Id.* at 826.

his cardholder agreement did not mention arbitration.[143] The district court disagreed, reasoning that the words "change or amend" were "without limitation."[144] The court also noted that the agreement included an Ohio choice-of-law clause, and that an Ohio statute authorized unilateral revisions.[145]

Other courts went even further, upholding new arbitration clauses even if no unilateral-revision statute applied. In *Beneficial National Bank v. Payton*,[146] a bank reserved the power to "change the terms" in its credit card agreement.[147] A year later, it sent an arbitration clause to its customers in the form of a bill-stuffer; a year-and-a-half after that, it sent another bill-stuffer with a revamped arbitration clause.[148] Each notification gave customers thirty days to reject the changes in writing. Tracking *Badie*, the adherent claimed that the underlying change-of-terms clause only allowed the bank to alter "existing terms" and "did not give [the bank] the right to add altogether new terms."[149] The court was not persuaded, reasoning that "there is no practical distinction" between these concepts.[150]

Some judges went further still, upholding ex post arbitration terms that were neither legitimized by statute nor gave adherents the chance to opt out.

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143. *Id.* at 831. Notably, like *Stiles*, and unlike *Badie*, the original contract included a choice-of-law clause. *See id.* at 830. Thus, even if the underlying agreement did not specifically mention arbitration, contract procedure was not completely foreign terrain. *Cf.* Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 284 (Ct. App. 1998) (voiding arbitration clause that did not comport with "any subject, issue, right, or obligation addressed in the original contract"). Then again, because choice-of-law clauses have non-litigation-related purposes (i.e., providing background rules for the contractual relationship), the mere existence of a choice-of-law-clause may not place an adherent on notice that the drafter may later introduce an arbitration clause into the contract. *Coates* did not distinguish *Badie* on those grounds, but rather because the *Badie* "plaintiffs were not given the option of rejecting the arbitration clause." *Coates*, 125 F. Supp. 2d at 833.

144. *Coates*, 125 F. Supp. 2d at 831.

145. *Id.* For similar cases, see *SouthTrust Bank v. Williams*, 775 So. 2d 184, 190–91 (Ala. 2000) (noting that the Alabama statute allows lenders to amend contracts "based upon the apparent acquiescence of the cardholder, with or without a change-in-terms clause such as the ones involved in this case"); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 915 (N.D. Tex. 2000) (holding that under the Delaware statute, "each Plaintiff was statutorily and contractually bound by a valid amendment by virtue of the use of the credit card"); *Joseph v. M.B.N.A. Am. Bank, N.A.*, 775 N.E.2d 550, 553 (Ohio Ct. App. 2002) (also relying on the Delaware statute); *Fields v. Howe*, No. IP-01-1036-C-B/S, 2002 U.S. Dist. LEXIS 4515, at *12 (S.D. Ind. Mar. 14, 2002) (same); *Bank One, N.A. v. Harris*, No. 3:00CV-665LN, 2001 U.S. Dist. LEXIS 9615, at *34–36 (S.D. Miss. Jan. 2, 2001) (relying on the Ohio statute).

146. 214 F. Supp. 2d 679, 683 (S.D. Miss. 2001).

147. *Id.*

148. *See id.* at 683–84. Although the underlying contract included a Delaware choice-of-law clause, it is unclear whether the new arbitration clauses superseded this term. *See id.* at 684. Choice-of-law plays no part in the court's analysis.

149. *Id.* at 686.

150. *Id.* at 687.

For example, in *Herrington v. Union Planters Bank, N.A.*,[151] the signature card for plaintiffs' deposit accounts permitted their bank to modify clauses unilaterally.[152] After the bank merged with two other institutions, it informed its patrons that they would need to submit future claims to arbitration. The notice did not bestow a period for opting out, but rather informed customers that "[they] will be obligated according to such changes if [they] continue to maintain or use [their] account."[153] Seizing on this fact, plaintiffs cast the bank's conduct as an attempt "to 'slip in' an arbitration provision" to their deposit agreements without their consent.[154] The court disagreed, reasoning that the new arbitration clause had arrived with a letter labeled "important information,"[155] which put the plaintiffs on notice that they could reject the arbitration clause by closing their accounts.[156]

However, other courts voided retroactively added arbitration clauses. For example, in *DirecTV, Inc. v. Mattingly*,[157] a satellite television provider's subscription agreement reserved the right to make unilateral amendments but promised "a written notice describing [any] change."[158] Later, the adherent received a second contract in the mail that was nearly identical to his original contract, with the sole exception that it also contained an arbitration clause.[159] The Maryland Court of Appeals determined that the revised contract did not satisfactorily "describe the changes" because it did not arrive with a cover letter or any explanatory correspondence.[160]

In *Stone v. Golden Wexler & Sarnese*,[161] a New York district court likewise followed *Badie*.[162] The plaintiff's credit card contract selected Virginia law and let the bank "amend or change any part of [the a]greement, including the periodic rates and other charges, or add or remove requirements at any

151. 113 F. Supp. 2d 1026 (S.D. Miss. 2000).
152. *See id.* at 1028.
153. *Id.* at 1029.
154. *Id.* at 1031.
155. *Id.*
156. *See id.* at 1031–32; *cf.* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 668 (6th Cir. 2003) (enforcing an arbitration clause inserted by the employer under its power to amend the terms of employment on a specified day each year); Pierce v. Kellogg, Brown & Root, Inc., 245 F. Supp. 2d 1212, 1215 (E.D. Okla. 2003) (reaching the same result where the company gave employees ten days notice that all claims were subject to arbitration).
157. 829 A.2d 626 (Md. 2003).
158. *Id.* at 628.
159. *Id.* at 629.
160. *Id.* at 634–35.
161. 341 F. Supp. 2d 189 (E.D.N.Y. 2004).
162. *Id.* at 197–98.

time."[163] The bank tried to add an arbitration clause, giving customers a full year to reject this alteration.[164] Nevertheless, the court conceptualized the issue not as whether the clause was unconscionable, but whether the bank "had the authority to undertake such an amendment in the first place."[165] Noting that the change-of-terms clause in the original contract said nothing about dispute resolution—and in fact was nestled between financial topics such as rates and charges[166]—the court invalidated the purported amendment.[167]

In sum, in the first decade after companies began to flex their power to compel arbitration through change-of-terms provisions, courts reached wildly different conclusions about this practice. For some judges, the linchpin was the scope of the change-of-terms provision in the underlying contract.[168] If this clause conferred the bare power to modify existing terms—but not to add wholly new terms—these courts invalidated efforts to add an arbitration clause. Others courts simply ignored this issue.[169] But even when judges upheld new arbitration clauses, they did not speak with a single voice. Some relied on the existence of a statute that permitted unilateral amendments; others weighed the fact that the company had given adherents a chance to opt out; and others did not insist on either criterion.

This lack of analytical consensus would become a problem as drafters began to test the limits of their ability to revise contracts unilaterally. Firms soon tried to harness the power of change-of-terms clauses as a weapon against the class action. The rules that governed class arbitration waivers were already

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163. *Id.* at 191. The court did not address the fact that, unlike *Badie*, the change-of-terms provision specifically allowed the bank to "add" terms.

164. *Id.* at 191–92.

165. *Id.* at 196.

166. The court did not consider whether the choice-of-law clause in the original contract put adherents on notice that the bank might add other procedural terms in the future.

167. *See Stone*, 341 F. Supp. 2d at 197–98 ("[T]he Customer Agreement as a whole defines the key financial aspects of the relationship between the cardholder and the Bank. The Court agrees with the *Badie* court that the terms discussed in the change-in-terms clause must supply the universe of terms which could be altered or affected pursuant to the clause."). For similar cases, see *Long v. Fid. Water Sys., Inc.*, No. C-97-20118, 2000 U.S. Dist. LEXIS 7827, at *7–8 (N.D. Cal. May 24, 2000) ("Defendants never obtained any affirmative consent from [plaintiff] regarding incorporation of the arbitration clause as part of the existing contract."); *Perry v. FleetBoston Fin. Corp.*, No. 04-507, 2004 U.S. Dist. LEXIS 12616, at *12 (E.D. Pa. July 6, 2004) ("[T]his Court finds that the unilateral Change in Terms authority applies only to those terms already contained or contemplated in the original agreement . . . ."); *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 432 (N.C. Ct. App. 2004) (following *Badie* and applying Arizona law); *Martin v. Comcast*, 146 P.3d 380, 389 (Or. Ct. App. 2006) (refusing to enforce an arbitration clause imposed in "bill stuffer" because "a subscriber could easily have continued using Comcast's service without ever being aware of the arbitration clause").

168. *See supra* notes 157–167 and accompanying text.

169. *See supra* notes 146–156 and accompanying text.

unsettled, but the widespread use of bill stuffers to add these terms compounded this uncertainty.

a. The Class Arbitration Waiver

In a 1994 interview, a lawyer for the *Badie* plaintiffs speculated that Bank of America did not unilaterally insert arbitration clauses into its customer contracts merely to avoid the expense and languor of court-bound litigation.[170] Instead, she opined, the bank's "real intent was to eviscerate class action[s]."[171] Her comment referred to the fact that businesses and chambers of commerce have long complained that the class action device encourages baseless claims[172] and creates "blackmail" settlement pressure.[173] In the 1990s, however, most courts determined that the FAA did not allow arbitrators to hear aggregated claims.[174] Thus, an arbitration clause—even without an express class action waiver—was a potent weapon against the class action.

In the late 1990s, the major credit-card-issuing banks, normally bare-knuckled competitors, allegedly formed an "arbitration coalition," which met repeatedly to discuss plans for using arbitration clauses as a buffer against class actions.[175] In 1999 and 2000, American Express and MBNA Corporation used bill stuffers to graft arbitration clauses into the contracts of 68 million

170. *See* Davis, *supra* note 105 (citing an interview with Patricia Sturdevant).

171. *Id.*

172. A common critique of class certification standards is that because they forbid the judge from evaluating a case's merits, they "invit[e] frivolous class action suits." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254 (2002). Similar concerns prompted Congress to pass two wide-ranging class action reform statutes in the last fifteen years. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006).

173. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

174. *See* Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) (holding that the Federal Arbitration Act "forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter"); Med Ctr. Cars, Inc. v. Smith 727 So. 2d 9, 20 (Ala. 1998) ("[T]o require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration."); *see also* Herrington v. Union Planters Bank, N.A., 113 F. Supp. 2d 1026, 1034 (S.D. Miss. 2000); Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993). *But see* Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998) (allowing classwide arbitration); Dickler v. Shearson Lehman Hutton, Inc. 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (also allowing classwide arbitration).

175. *See* Class Action Complaint, Ross v. Bank of Am., N.A., at ¶¶ 97–118, No. 05-Civ.-7116 (S.D.N.Y. Aug. 11, 2005) (seeking antitrust liability based on roughly twenty meetings in which the firms discussed, among other things, "adopting set criteria for their arbitration clauses"); *In re* Currency Conversion Fee Antitrust Litig. No. 05-Civ.-7116, 2009 WL 151168, at *2 (S.D.N.Y. Jan. 21, 2009) (rejecting a motion to dismiss these claims); Gilles, *supra* note 24, at 398 (providing more detail about the case).

customers.[176] By 2001, nine of the ten highest-grossing credit card issuers,[177] and a wide range of other firms, had also unilaterally imposed arbitration on their consumers.[178]

Many of these new arbitration clauses expressly barred class actions.[179] This practice increased dramatically after the Supreme Court's 2003 opinion in *Green Tree Financial Corp. v. Bazzle*.[180] In *Bazzle*, the Court grappled with the question of whether an arbitration clause that did not mention class actions permitted the arbitrator to conduct a class-wide proceeding.[181] Rather than resolving this issue, a plurality of the Court held that arbitrators (and not courts) must decide whether "ambiguous" arbitration clauses prohibit class actions.[182] However, by allowing arbitrators to hear class actions in some circumstances, the plurality implicitly determined that the FAA does not preclude class-wide relief.[183] As a result, businesses realized that they could no longer depend on generic arbitration clauses to ward off class actions; instead,

176. *See* Edmund Sanders, *American Express Plans Arbitration Rule*, L.A. TIMES, May 12, 1999, *available at* http://articles.latimes.com/1999/may/12/business/fi-36424; Joan Lowy & Scripps Howard, *Consumers Losing Right to Sue Without Knowing It*, CLEVELAND PLAIN DEALER, May 14, 2000, at 5L (noting that MBNA gave its customers three weeks to opt out).

177. *See* Jess Bravin, *Banks Seek to Halt Suits by Cardholders*, WALL ST. J., May 2, 2001, at B1 ("[A]s many as 9 million holders of MasterCard and Visa cards issued by FleetBoston Financial Corp. who discarded a recent 'Important Legal Notice' may have unwittingly thrown away their right to participate in class-action lawsuits . . . ."); Christine Dugas, *More Credit Card Issuers Requiring Arbitration*, USA TODAY, May 25, 1999, at 2B (noting that First USA "added an arbitration clause to card agreements, barring class-action lawsuits"); Aossatou Sidimii, *Capital One Takes Away Most of Cardholders' Rights to Sue*, SAN ANTONIO EXPRESS-NEWS, Dec. 18, 2001, *available at* 2001 WLNR 7625283.

178. Mark Curriden, *A Weapon Against Liability: Fine Print Often Removes Jury Resolution as Option for Complaints*, DALLAS MORNING NEWS, May 7, 2000, at 25A (noting that over a thousand companies had made arbitration clauses "part of routine sales deals," including MCI WorldCom, Dell Computer Corp., Gateway, Inc., health insurers, Circuit City, Red Lobster, J.C. Penny, and Cigna); Charles Haddad & Aixa M. Pascual, *When You Want to Sue—But Can't*, BUS. WK., June 10, 2002, at 46 (adding Sears, Roebuck & Co., Alltel Corp., and Country Wide Home Loans to the list); Lowy & Howard, *supra* note 176 ("Businesses as varied as the Hooters restaurant chain, retailer Best Buy and the tax preparation firm H&R Block are part of the trend.").

179. *See, e.g.*, *No Suits for You*, U.S. NEWS & WORLD REP., June 7, 1999, at 58 ("Many arbitration clauses state that consumers cannot file class-action lawsuits—a key reason the clauses are spreading so quickly.").

180. 539 U.S. 444 (2003) (plurality opinion).

181. *See id.* at 447–48.

182. *See id.* at 451–52.

183. *See id.* at 454–55 (Stevens, J., concurring) (reading the plurality's holding to mean that "nothing in the Federal Arbitration Act . . . precludes [class-wide arbitration]").

they would need explicit class arbitration waivers.[184] Thus, after *Bazzle*, "[e]very big company rewrote their arbitration clauses to ban class actions."[185]

The widespread use of bill stuffers to add class arbitration waivers to existing contracts further fragmented judicial attitudes toward ex post revisions. Many judges no longer considered whether the underlying change-of-terms clause allowed the drafter to insert the class arbitration waiver.[186] Perhaps this shift stemmed from the fact that many of the firms that inserted waivers were banks and therefore claimed statutory authorization for the unilateral revision. Alternatively, it could have been because judges focused so intensely on whether forbidding class actions was normatively problematic.[187] In any event, even when courts voiced grave misgivings about the ex post addition of a class arbitration waiver, they did not evaluate whether the purported revision failed as an exercise of the underlying change-of-terms provision. Rather, they focused entirely on whether the new term was procedurally unconscionable.[188] Because a clause must also be substantively unconscionable to be void, this delicate analytical move immunized newly added class arbitration waivers from a *Badie*-type challenge.

Powertel, Inc. v. Bexley[189] exemplifies this point. In this case, a Florida appellate court roundly condemned a cell phone service provider's unilateral introduction of a class arbitration waiver.[190] The original contract did not let the service provider revise, amend, or add provisions; instead, it stated only that customers would receive "notice" of "modifications," which they would accept by continuing to use their phones.[191] The trial court struck down the

184. In fact, at oral argument, Justice Stevens asked: "Does this case have any future significance, because isn't it fairly clear that all the arbitration agreements in the future will prohibit class actions?" Transcript of Oral Argument, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1989562, at *55.

185. Nora Lockwood Tooher, *Plaintiffs Wrestle With Class Action Arbitration Bans*, ALL BUS., Nov. 19, 2007, *available at* http://www.allbusiness.com/legal/legal-services-litigation/8921629-1.html.

186. *See infra* notes 189–194 and accompanying text.

187. *See infra* notes 195–200 and accompanying text.

188. For example, compare *Discover Bank v. Shea*, 827 A.2d 358, 362 (N.J. Super. Ct. Law Div. 2001) ("Applying the persuasive reasoning of the *Badie* case, Discover's unilateral attempt to amend its original cardholder agreement to include an arbitration clause is ineffective."), with *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005) (analyzing the exact same clause but concluding only that "when[ ] a consumer is given an amendment to its cardholder agreement in the form of a 'bill stuffer' that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present"), and *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002) (also framing the issue in terms of unconscionability).

189. 743 So. 2d 570 (Fla. Dist. Ct. App. 1999).

190. *See id.* at 575.

191. *See id.* at 572.

new clause because it did not adequately inform customers that their contracts had changed:

> I am real concerned. I don't think there's been the type of notice contemplated here . . . . These things are so routine of throwing pamphlets in the mail with billings and things of that nature that, Lord, I'll bet 90 percent just throw them out and don't even read them. Because it becomes so routine in today's mailing habits.
>
> . . . .
>
> I don't think [defendant] has really complied with its own contract . . . .[192]

Nevertheless, although the appellate court quoted this language with approval, it inexplicably held only that the new term was procedurally unconscionable.[193] Yet this move did not change the outcome. Rather, the court concluded that because each class member sought only $4.50 in damages, individual claims were unfeasible, making the class action waiver substantively unconscionable.[194] By viewing the issue through the prism of unconscionability, though, the court neglected the threshold question of whether the new term exceeded the scope of the underlying change-of-terms provision.

Several years later, *Strand v. U.S. Bank Nat'l Ass'n*[195] illustrated how ignoring the issue of whether the original contract authorized unilateral amendments could be outcome determinative. In this case, a credit card issuer asserted that a North Dakota statute allowed it to "change [its] terms" and thus sanctioned its insertion of a class arbitration waiver.[196] The North Dakota Supreme Court disagreed, noting that "[t]he statute does not specifically authorize wholesale amendment of a credit card agreement by a sixteen-page bill stuffer."[197] The state high court thus found the waiver to be procedurally unconscionable.[198] But the court reached a different conclusion about the waiver's substantive effect. Branding the ability to aggregate claims "purely a procedural right," it rejected the plaintiff's argument that "no attorney will be willing to litigate these small claims on an individual basis."[199] Thus, even

192. *Id.* at 575.
193. *See id.* at 574–76.
194. *See id.* at 576.
195. 693 N.W.2d 918 (N.D. 2005).
196. *Id.* at 925 (quoting N.D. CENT. CODE § 51-14-02 (2003)).
197. *Id.*
198. *See id.* at 925–26.
199. *Id.* at 926–27.

though the term was flawed, and might have been invalid under *Badie*, the court enforced it.[200]

Until 2005, *Strand* set forth the majority view: class arbitration waivers did not impact substantive rights (and thus were not unconscionable) because the class action was merely a "procedural device."[201] However, in the last five years, state supreme courts in California, Illinois, New Jersey, and Washington, and the First, Second, Third, Ninth, and Eleventh Circuits, have broken ranks.[202] Like in *Powertel*, courts in these jurisdictions have recognized that the inability to pursue class-wide relief can deter the prosecution of numerous low-value claims. Therefore, they have held class arbitration waivers to be substantively unconscionable when the cost of bringing suit dwarfs any individual's potential recovery.[203]

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200. *See id.* at 927.

201. *See* Blaz v. Belfer, 368 F.3d 501, 504–05 (5th Cir. 2004) (opining that there is no "substantive right to pursue a class action"); Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting plaintiffs' argument that an arbitration clause was unconscionable because it foreclosed her ability to pursue class relief); Randolph v. Green Tree Fin. Corp.-Al., 244 F.3d 814, 818 (11th Cir. 2001) (same); Johnson v. W. Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000) (enforcing a class arbitration waiver); Arnold v. Goldstar Fin. Sys., Inc., No. 01-C-7694, 2002 WL 1941546, at *9 (N.D. Ill. Aug. 22, 2002) ("As a general matter, the right to bring a class action in federal court is a procedural right[.]"); Sagal v. First U.S.A. Bank, N.A., 69 F. Supp. 2d 627, 631–32 (D. Del. 1999) (same).

202. *See, e.g.*, Homa v. Am. Express Co., 558 F.3d 225, 230 (3d Cir. 2009) (striking down a class arbitration waiver); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218–19 (9th Cir. 2008) (same); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (same); Discover Bank v. Superior Court, 113 P.3d 1100, 1109–10 (Cal. 2005) (same); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 274–75 (Ill. 2006) (same); Muhammad v. County Bank, 912 A.2d 88, 99–100 (N.J. 2006) (same); Scott v. Cingular Wireless, 161 P.3d 1000, 1007 (Wash. 2007) (same).

203. *See* cases cited *supra* note 202. These cases often reason that discouraging plaintiffs from pursuing "negative-value" claims—those that will not be tried at all unless they can be tried en-masse—insulates corporations from wrongdoing. *See, e.g.*, *Discover Bank*, 113 P.3d at 108–09 ("[B]ecause . . . [a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation." (quoting Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 446 (2000))); *see also* Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-Dispute Limits on Process*, 75 TENN. L. REV. 365, 405 (2008) ("[P]re-dispute limitations have the potential to weaken the deterrent and remedial aims of the underlying substantive law . . . ."); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 103 (arguing that class arbitration waivers "are preventing the law from being adequately enforced"); Daniel R. Higginbotham, Note, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L.J. 103, 105 (2008) (arguing that class arbitration waivers let "businesses engage in unfair and potentially illegal activities").

Moreover, because the litigation of certain kinds of statutory claims (for example, antitrust) is notoriously costly and protracted, some courts have voided class arbitration waivers on the grounds that they prevent plaintiffs from effectively vindicating their rights. *See, e.g.*, *In re* Am. Express Merchants' Litig., 554 F.3d 300, 317–18 (2d Cir. 2009) (voiding class arbitration waiver because it prevented plaintiffs from pursuing statutory antitrust claims); Kristian v. Comcast Corp., 446 F.3d 25, With such a broad split in authority, courts have disagreed about the validity of the same clause. For example, in 1999, Sears, Roebuck and Co. invoked its "right to change any term or part" of its credit card agreements and added a class arbitration waiver. In 2001, the Southern District of Mississippi held that Sears's waiver was valid because the plaintiff had the ability to opt out.[204] In 2002, the Eastern District of Louisiana held that Sears's provision was not procedurally unconscionable since "the plaintiff was given adequate notice of the term."[205] And in 2003, the Illinois court of appeals also agreed, but went even further in its reasoning:

> We do not agree with *Badie*. The original credit card agreement contained a 'change of terms' provision notifying card holders [Sears] could change the terms of the agreement at any time. Although we agree with *Badie* that the parties did not intend for [Sears] to make additions or deletions to the credit card agreement that would essentially convert the credit card agreement to something else entirely, we do not read the change of terms provision so narrowly as to preclude an amendment containing an arbitration provision.[206]

However, in stark contrast, a North Carolina appellate court struck down Sears's class arbitration waiver in 2004, relying heavily on *Badie*:

> We find persuasive the approach adopted by *Badie* that permits credit card companies to rely upon 'Change of Terms' provisions in their adhesion contracts insofar as the new or modified terms relate to subjects already addressed in some fashion in the original agreements . . . . Thus, while a credit card company may reserve to itself the right to amend its credit card agreements with its cardholders, it can change only those terms encompassed within the scope of the original agreement between the parties.[207]

So twisted is the law that a single term can divide courts in the same state. For instance, Citibank gave its credit card holders twenty-five days to

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59 (1st Cir. 2006) (same). Although this inquiry is similar to the test for substantive unconscionability, it differs in that it does not require any element of procedural unconscionability to be present. *See In re* Am. Express Merchants' Litig., 554 F.3d at 320.

204. Rule v. Sears Roebuck & Co., No. 3:00-cv-390WS, 2001 U.S. Dist. LEXIS 25749, at *9 (S.D. Miss. Mar. 30, 2001).

205. Vigil v. Sears Nat'l Bank, 205 F. Supp. 2d 566, 572–73 (E.D. La. 2002).

206. Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886, 900 (Ill. App. Ct. 2003).

207. Sears Roebuck & Co. v. Avery, 593 S.E.2d 424, 433 (N.C. Ct. App. 2004). For other situations in which courts have split over the enforceability of a single term, compare *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174–75 (5th Cir. 2004) (upholding Cingular's class arbitration waiver), with *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274–75 (Ill. 2006) (noting that "the arbitration clause at issue in *Iberia Credit Bureau* is the same clause that is at issue in the present case" and yet voiding it).

decide whether to accept a unilaterally added class arbitration waiver or reject the waiver and continue using the card until it expired.[208] In 2006, a California court of appeals determined that the provision was not procedurally unconscionable because, "although the change was made in a 'bill stuffer,' plaintiffs were given an opportunity to opt out."[209] In 2007, another California appellate court held that the clause was procedurally unconscionable because "the so-called opt-out opportunity is largely illusory.'"[210] As this panel noted, because cardholders who object to the new term must secure a new card when their Citibank card expires, they "still must take-it-or-leave it," though "ha[ve] a somewhat more extended period in which to make that decision."[211] Yet in 2008, another California court of appeals found *no* procedural unconscionability, citing the opt-out period.[212] Later that year, *Hoffman v. Citibank*[213] saddled the Ninth Circuit with the unenviable job of predicting how the California Supreme Court would rule on the issue.[214] In an artful dodge, the court remanded the case to the district court for what it called "additional fact finding," though Judge Trott concurred for the sole purpose of lamenting the "mixed signals from California courts" and expressing his hope that "the legal dust will soon settle."[215]

Thus, courts throughout the country remain split over the validity of class arbitration waivers added through unilateral amendments. In addition, the malleability of procedural terms implicates two other areas of vast conceptual disarray: choice of law and the intersection of contract procedure and the Seventh Amendment.

b. The Choice-of-Law Revolution

The rise of the unilateral amendment coincided with another important trend in contract procedure: a renewed emphasis on contractual choice-of-law. As Charles Tiebout famously theorized, firms have begun to gravitate toward locales that provide their preferred bundle of public goods, including laws.[216] In this "law market," companies shop for legal rules, and jurisdictions

208. Firchow v. Citibank, No. B187081, 2007 WL 64763, at *2 (Cal. Ct. App. Jan. 10, 2007).
209. Jones v. Citigroup, Inc., 38 Cal. Rptr. 3d 461, 465 (Ct. App. 2006), *vacated by* 135 P.3d 2 (2006).
210. *Firchow*, 2007 WL 64763, at *9.
211. *Id.*
212. Citibank v. Walker, No. A1 17770, 2008 WL 4175125, at *6 (Cal. Ct. App. Sept. 11, 2008).
213. 546 F.3d 1078 (9th Cir. 2008) (per curiam).
214. *See id.* at 1083–84.
215. *Id.* at 1086 (Trott, J., concurring).
216. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

endeavor to attract "people, firms, and their assets by creating desired laws."[217] For example, after the Supreme Court held that the National Bank Act[218] allows national banks to charge the maximum interest rate and fees permitted by their home state,[219] Arizona, Delaware, Nevada, New Hampshire, Rhode Island, and South Dakota began to abolish or weaken their usury laws.[220] In response, lenders flocked to these jurisdictions and began to charge all their customers—including those outside these jurisdictions—the same high rates and fees.[221]

Similarly, through choice-of-law clauses, businesses can project other favorable legal rules through all their nationwide transactions. Just as lawmakers gain when they lure a large company to their state, they gain when a large company designates their state in a choice-of-law clause: the validity of such a clause hinges, in part, on whether the parties have a "substantial relationship" to the chosen state.[222] Thus, a firm often cannot select a particular state's law unless a significant part of its infrastructure—including people, money, and jobs—resides in that state.

The downside to jurisdictional competition, however, is a race to the bottom, in which states compete with one another to eliminate sensible regulations and ease restrictions on business. There is mounting evidence of this phenomenon in the specific niche of contract procedure. For example, the statutes that allow lenders to change the terms of their contracts attest to the value legislatures place on catering to banks and credit card companies. In fact, a year after *Stone v. Golden Wexler & Sarnese*,[223] in which a federal court struck down a unilaterally added arbitration clause under Virginia law, the

217. ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 65 (2009).

218. 12 U.S.C. § 85 (2006).

219. *See* Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 313 (1978) ("Since Omaha Bank and its BankAmericard program are 'located' in Nebraska, the plain language of [the National Bank Act, 12 U.S.C.] § 85 provides that the bank may charge 'on any loan' the rate 'allowed' by the State of Nebraska."); Smiley v Citibank, 517 U.S. 735, 744–45 (1996) (extending *Marquette* to late fees and other penalties).

220. *See, e.g.*, Elizabeth R. Schiltz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending Regulation*, 88 MINN. L. REV. 518, 552 (2004) ("After *Marquette*, . . . states such as South Dakota, Delaware, and Utah amended their laws to deregulate interest rates on credit cards for the express purpose of attracting nonpolluting, labor-intensive credit card operations to their states."); David Lazarus, *Loophole Lets Rates Rise on Credit Cards*, L.A. TIMES, Feb. 18, 2009, at C1 (listing "[o]ther states with nonexistent or weak usury laws").

221. *See, e.g.*, Mark Furletti, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 TEMP. L. REV. 425, 443 (2004) (noting that as of 2003, banks located in "Delaware, South Dakota, Nevada, Arizona, Rhode Island, and New Hampshire—six states that are home to four percent of the country's population . . . were owed over $350 billion of the $490 billion in U.S. consumer credit card loans").

222. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

223. 341 F. Supp. 2d 189 (E.D.N.Y. 2004); *see also supra* notes 161–167.

Virginia General Assembly enacted a statute permitting creditors to "add new terms" to their agreements, including "arbitration or other alternative dispute resolution mechanisms."[224] Some states have gone further. In 2006, Utah passed a law allowing creditors to use class arbitration waivers;[225] American Express and its many subsidiaries thus place Utah choice-of-law clauses in their cardholder contracts.[226] The common denominator among other oft-selected jurisdictions in choice-of-law clauses is that they either have a track record of enforcing class arbitration waivers,[227] or else do not recognize the class action device.[228]

To decide whether to uphold a choice-of-law clause, most states turn to the Restatement (Second) of Conflict of Laws, which instructs judges to honor the clause unless doing so would violate "a fundamental policy of a state which has a materially greater interest than the chosen state" in the matter.[229] By allowing courts to void choice-of-law clauses to protect an overriding state policy, the Restatement respects the sovereign prerogative of states to regulate important issues that affect their citizens.[230]

Nevertheless, for two reasons, the Restatement test does not deal effectively with unilateral revisions. First, the Restatement test is woefully inadequate when the unilaterally added term is a choice-of-law clause.[231] Unlike the unconscionability doctrine or the *Badie* rule, which both account for defects in contract formation, the Restatement test does not weigh the manner in which the drafter inserted the choice-of-law clause in the agreement. Instead, it focuses entirely on the choice-of-law provision's substantive effect—whether the provision would violate a core policy of an interested state. As a result, it does not

224. VA. CODE ANN. § 6.1-330.63(C), (D) (Supp. 2009).

225. *See* UTAH CODE ANN. §§ 70C-3-104, 70C-4-105 (Supp. 2008).

226. *See, e.g.*, Aviation Data, Inc. v. Am. Express Travel Related Servs. Co., 62 Cal. Rptr. 3d 396, 404 (Ct. App. 2007).

227. Drafters commonly choose Delaware and New York, which generally uphold class arbitration waivers. *See, e.g.*, Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627, 631–32 (D. Del. 1999); Edelist v. MBNA Am. Bank, 790 A.2d 1249, 1260–61 (Del. Super. Ct. 2001); Hayes v. County Bank, 811 N.Y.S.2d 741, 743 (App. Div. 2006).

228. Virginia, another oft-designated jurisdiction, has no class action device. *See, e.g.*, Am. Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699, 711 (Ct. App. 2001).

229. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971). The rule also requires that the state with the "fundamental policy" be the state whose law would apply in the absence of a choice-of-law clause. *Id.*

230. *See id.* at cmt. (g) ("Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interest and for state regulation.").

231. To be fair, my research did not uncover many instances of unilaterally added choice-of-law clauses. *Cf.* Douglas v. District Court, 495 F.3d 1062 (9th Cir. 2007). In that case, the Ninth Circuit struck down a unilaterally added choice-of-law clause because the drafter, a long distance telephone provider, merely posted it on its website, rather than providing written notice. *Id.* at 1065–67. However, there was no indication that the parties' original contract even included a unilateral change-of-terms clause.

deter drafters from unilaterally adding a choice-of-law clause. In fact, although there is a paucity of authority, some courts hold that general contract defenses do not apply to choice-of-law clauses, and that the Restatement test is the only possible grounds to void such clauses.[232] The Restatement test thus does not appear to impose any meaningful constraints on the ability of companies to add choice-of-law clauses unilaterally.

Second, the highly abstract and indeterminate Restatement test creates a shield of sorts for all procedural provisions, including unilateral amendments. As noted, drafters have strong incentives to include a choice-of-law provision that selects the law of a jurisdiction that is hospitable to contract procedure. When such a clause exists, and companies unilaterally add an arbitration clause or class arbitration waiver, courts do not have the luxury of merely evaluating whether the terms are valid under the law of the jurisdiction in which they sit. Instead, since the unilaterally added terms are likely enforceable under the law of the state cherry-picked by the drafter, the key inquiry becomes whether the choice-of-law provision itself is enforceable. This then triggers the Restatement test, forcing courts to assess whether the terms infringe a "fundamental policy" of a state with a "materially greater interest than the chosen state."[233] This standard is both stricter and more nebulous than the simple question of whether the terms are valid. Indeed, not every invalid term is invalid for the lofty reason that it violates a vital policy,[234] and not every vital state policy automatically trumps other states' policies.

To see why the Restatement test makes it more difficult to challenge a unilateral amendment, consider a series of cases involving Discover Bank in California. First, in *Szetela v. Discover Bank*,[235] in which Discover did not even

232. *See* Wash. Mut. Bank, FA v. Superior Court, 15 P.3d 1071, 1079 (Cal. 2001) (rejecting the argument that the Restatement test does not apply to standard form consumer contracts); *In re* Detwiler, 305 Fed. Appx. 353, 356, No. 08-72823, 2008 WL 5213704, at *2 (9th Cir. Dec. 12, 2008) ("[T]o render the choice-of-law provision unenforceable on th[e] basis [of unconscionability] would subvert the Restatement section 187 analysis . . . ."); William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum, and Arbitration*, 2 HASTINGS BUS. L.J. 1, 33 (2006) ("[P]arties and courts . . . almost invariably[ ] assume that the choice-of-law clause is binding as a matter of contract law.").

233. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

234. *Compare* Kaltwasser v. Cingular Wireless, LLC, 543 F. Supp. 2d 1124, 1128–29 (N.D. Cal. 2008) (holding that judicial opinions that class arbitration waivers are unconscionable can reveal a "fundamental" policy), *with* Halprin v. Verizon Wireless Servs., LLC, No. 07-4015, 2008 WL 961239, at *5 (D. N.J., Apr. 8, 2008) ("[T]he unconscionability of [a] particular class action waiver discussed in [a] particular case . . . is not evidence of a fundamental public policy . . . ."). *See also* James J. Healy, Note, *Consumer Protection Choice of Law: European Lessons for the United States*, 19 DUKE J. COMP. & INT'L L. 535, 545 (2009) (collecting examples of "the unpredictable nature of the fundamental public policy exception").

235. 118 Cal. Rptr. 2d 862 (Ct. App. 2002).

discuss the Delaware choice-of-law provision in its cardholder agreements,[236] the court held that Discover's unilaterally inserted class arbitration waiver was unconscionable.[237] Conversely, in 2005, when the enforceability of Discover's unilateral revision reached the California Supreme Court in a different dispute, Discover argued that the choice-of-law provision required the California high court to apply Delaware's permissive policy toward class arbitration waivers.[238] The California Supreme Court determined that the class arbitration waiver was unconscionable under California law, but remanded the case for the court of appeals to evaluate whether the choice-of-law provision altered the analysis.[239] On remand, the appellate court held that because the plaintiff sought to certify a nation-wide class and only asserted claims under Delaware law, California did not have a "materially greater interest" than Delaware in deciding the matter.[240] The choice-of-law clause thus entitled Discover to demand compliance with its unilaterally added class arbitration waiver in California court—despite the fact that the California Supreme Court had found it to be unconscionable.

Choice-of-law clauses have thus increased the use of unilateral modifications, as drafters export the law of favorable jurisdictions to bolster the legality of unilaterally added arbitration clauses and class arbitration waivers. Of course, more than any other procedural term, the actual effect of a choice-of-law clause will be lost on most consumers. Yet the test for whether choice-of-law provisions are enforceable seeks to protect state sovereignty but does not deter drafter overreaching.

c. The Role of the Seventh Amendment

Unilateral revisions implicate another problematic area: the intersection of contract procedure and the right to a jury trial. Under the Seventh Amendment, a plaintiff is entitled to a jury trial for claims that would have been tried before a jury in 1791.[241] Because this guarantee is a fundamental

236. *Id.* at 866 n.3 ("To the extent Delaware law is more favorable, Discover has waived this argument by failing to brief the choice of law issue.").

237. *See id.* at 867–68.

238. Discover Bank v. Superior Court, 113 P.3d 1100, 1003 (Cal. 2005).

239. *See id.* at 1117–18.

240. Discover Bank v. Superior Court, 36 Cal. Rptr. 3d 456, 461 (Ct. App. 2005).

241. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."); Curtis v. Loether, 415 U.S. 189, 193 (1974) ("[T]he thrust of the Amendment was to preserve the right to jury trial as it existed in 1791 . . . ."). This guarantee also extends to statutory claims "that are analogous to common-law causes of action." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989). All fifty states have similar constitutional or statutory provisions. *See, e.g.*, Jean R. Sternlight, *Mandatory Binding Arbitration and*

right, for years courts have required contractual jury trial waivers to be "voluntary and informed."[242] Judges decide whether a waiver meets this standard by examining factors such as the conspicuousness of the clause,[243] the plaintiff's background and business acumen,[244] and whether the plaintiff was represented by counsel.[245]

However, it is unclear whether the "voluntary and informed" rule will remain good law. This fact-specific inquiry seems to conflict with the fact that courts routinely enforce arbitration clauses—which implicitly waive the right to a jury trial—even when there is copious evidence that the adherent did not know about the clause. To understand the extent of this discrepancy, compare two federal district court decisions. In *First Union Nat'l Bank v. United States*,[246] the court invalidated a jury trial waiver (even though it was conspicuous) because the adherent (a former corporate officer) testified that he had not noticed it.[247] In *Marsh v. First USA Bank*,[248] the plaintiffs also swore under oath that they did not see an arbitration clause that the defendant had

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the Demise of the Seventh Amendment Right to a Jury Trial, 16 OHIO ST. J. ON DISP. RESOL. 669, 671 n.8 (2001).

242. Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986); *see also* K.M.C. Co., Inc. v. Irving Trust Co., 757 F.2d 752, 755–56 (6th Cir. 1985) (holding that jury trial waivers must be "done knowingly, voluntarily, and intentionally"); Nat'l Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255, 257–58 (2d Cir. 1977) (voiding a jury trial waiver that was not "knowing and intentional").

243. *See, e.g.*, Mowbray v. Zumot, 536 F. Supp. 2d 617, 621 (D. Md. 2008) (enforcing a jury trial waiver that was "set off in its own paragraph"); FGDI, Inc. v. Bombardier Capital Rail, Inc., 383 F. Supp. 2d 1350, 1352 n.2 (M.D. Fla. 2005) (voiding a waiver where "the title . . . Governing Law and Venue, would [not] put the typical reader on notice that jury waiver language may be stated therein"); Allyn v. W. United Life Assur. Co., 347 F. Supp. 2d 1246, 1252 (M.D. Fla. 2004) (enforcing a jury trial waiver that "is set forth in its own paragraph in boldface, uppercase font"); Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1106 (N.D. Ill. 1994) (voiding a waiver because "although the provision was printed in capital letters, it was not so conspicuous as to insure a knowing and voluntary waiver").

244. *See, e.g.*, Coop. Fin. Ass'n v. Garst, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995) ("Garst has freely admitted that he is a sophisticated and experienced businessman, and nothing in the record suggests that Garst could not have negotiated any provision of the contract."); *In re* Reggie Packing Co., 671 F. Supp. 571, 573 (N.D. Ill. 1987) (enforcing a waiver where plaintiff "requested revision of two clauses that were at least as inconspicuous as the waiver").

245. *See, e.g.*, Solutia Inc. v. FMC Corp., 456 F. Supp. 2d 429, 454 (S.D.N.Y. 2006) (enforcing a waiver that "was fully negotiated by both sides with the assistance of counsel").

246. 164 F. Supp. 2d 660 (E.D. Pa. 2001).

247. In a remarkable passage, the court reasoned:

> Despite the fact that Mr. Casagrande's deposition testimony often appeared to be vague and evasive, and thus suggestive of some level of sophistication in the business world, he nevertheless testified that he executed the signature pages to the [contract] alone, without seeing or reading the actual documents themselves. These actions are indeed contrary to what would normally be expected from a sophisticated businessman and thus we cannot find Mr. Casagrande to have the level of sophistication necessary to satisfy the test for a knowing and intelligent waiver.

Id. at 665.

248. 103 F. Supp. 2d 909 (N.D. Tex. 2000).

inserted via a bill stuffer.[249] Yet the court compelled arbitration because it found the plaintiffs' affidavits to be "implausible."[250] Courts thus scrutinize jury trial waivers for proof of consent, but blithely enforce arbitration clauses that are jury trial waivers in all but name only.[251]

The Seventh Circuit's 2008 opinion in *IFC Credit Corp. v. United Business & Industrial Federal Credit Union*[252] further muddied the waters. *IFC Credit Corp.*, the first word from a federal appellate court on this topic since 1986, enforced a jury trial waiver in a form sales contract without regard to whether the buyer was aware of the waiver.[253] Though the district court had invalidated the waiver because it had not been negotiated, was in the same font as the other provisions, and had not been reviewed by counsel,[254] Chief Judge Easterbrook saw the issue through a different lens. Rather than conceptualizing the waiver as a matter of constitutional law, he viewed it as a quotidian matter of contract law. Relying on the law and economics scholarship of the early 1980s, he claimed that the waiver benefited both the buyer and the seller:

> As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices. If buyers prefer juries, then an agreement waiving a jury comes with a lower price to compensate buyers for the loss . . . . As long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention.[255]

Chief Judge Easterbrook thus upheld the waiver and disapproved of the "voluntary and informed" principle.[256]

IFC Credit Corp. is particularly important because it comes at a time when firms are signaling that they may expand their use of contractual jury

249. *See id.* at 918.
250. *See id.* at 918–19.
251. *See* Sternlight, *supra* note 241, at 726 (contending that this divergence "makes no sense"). *But see* Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 167, 198 ("Rather than arbitration law conforming to jury-waiver cases, perhaps jury-waiver cases should conform to arbitration law . . . .").
252. 512 F.3d 989 (7th Cir. 2008).
253. *See id.* at 993.
254. *See* IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 474 F. Supp. 2d 945, 954 (N.D. Ill. 2006).
255. *Id.* at 993. Pointing to the fact that under Federal Rule of Civil Procedure 38, a party can waive the jury trial right by failing to request it in a complaint, Chief Judge Easterbrook reasoned that "[i]f accidental forfeitures can blot out any right to a jury trial . . . then there is no federal rule that bench-trial agreements must be attended by extra negotiation . . . ." *Id.* This logic equates two extremely different forms of conduct: a lawyer's waiver of a client's right to a jury trial in the heat of litigation and a consumer's waiver of their own right to a jury trial in a nonadversarial, transactional setting.
256. *See id.* at 993–94.

trial waivers. For one, they are bracing for the possibility that Congress will amend the FAA. On February 19, 2009, the House introduced the Arbitration Fairness Act, which would bar arbitration clauses in "employment, consumer, or franchise" contracts.[257] Even though an identical bill failed two years before,[258] some scholars believe that the Democrats' widened majority in Congress and regained control of the presidency might produce a different result.[259] If the legislation passes, firms would need to obtain bench-trial agreements to guard against the perceived risks of jury trials.[260]

In addition, there have even been notes of dissatisfaction with arbitration from within the business community. Because of the limited appellate oversight and possibility of drawing a "rogue" arbitrator, many companies prefer to opt back into the court system rather than participate in class-wide arbitration.[261] As a result, some class arbitration waivers contain non-severability provisions, which state that if a court strikes down the class arbitration waiver, it must also strike down the entire arbitration clause.[262] Given the possibility that the class arbitration waiver and the arbitration clause will stand or fall together, jury trial waivers furnish a second line of defense, letting drafters try high-stakes cases before a judge.

Moreover, as businesses are beginning to recoil against the fact that arbitration is "becoming increasingly expensive,"[263] some are mulling replacing

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257. H.R. 1020, 111th Cong. § 4 (2009).

258. *See* S. 1782, 110th Cong. § 4 (2007); H.R. 3010, 110th Cong. § 4 (2007). Republicans countered by introducing the Stop Trial Lawyer Pork Act in September 2008. *See* H.R. 7080, 110th Cong. (2008). The bill provides, among other things, that the Arbitration Fairness Act will "have no force or effect." *Id.* at § 102.

259. *See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1250 n.6 (2009) (claiming that the bill's passage "appears promising").

260. *See, e.g.*, Eisenberg et al., *supra* note 8, at 885–86 (noting that most firms currently rely on mandatory arbitration clauses—rather than jury trial waivers—to avoid trying cases to a jury).

261. *See, e.g.*, *id.* at 884–85 (finding that 60 percent of the consumer contracts studied provided that the arbitration clause would be invalid in the event that a court struck down the class arbitration waiver).

262. *See, e.g.*, Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 179 (2006) (arguing that these non-severability provisions prove that "[c]redit card companies [are] . . . even less enthusiastic about classwide arbitration than about class action litigation"). Many cell phone service providers also include a non-severable class arbitration provision. *See* AT&T Wireless Service Agreement, http://www.wireless.att.com/cell-phone-service/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service+Agreement (last visited Jan. 7, 2010); Verizon Wireless Customer Agreement, http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp (last visited Jan. 7, 2010); T-Mobile Terms and Conditions, http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true (last visited Jan. 8, 2010). *But see* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight From Arbitration?*, 37 HOFSTRA L. REV. 71, 115 (2008) (finding non-severability clauses in only 10.7 percent of franchise contracts).

263. Jarod S. Gonzalez, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, 87 NEB. L. REV. 675, 676 (2009).

arbitration clauses with jury trial waivers.[264] With arbitrators routinely charging over $500 per hour,[265] a bench trial offers a cheaper way to minimize the dangers of an excessive jury verdict.

If many drafters do in fact insert jury trial waivers into their contracts, the use of bill stuffers will push the Seventh Amendment issue to the fore. A notice slipped into a routine mailing will probably not satisfy the "voluntary and informed" rule. For instance, in *Kortum-Managhan v. Herbergers*,[266] the Montana Supreme Court found that an arbitration clause (not a jury trial waiver) in a bill stuffer violated the state constitutional right to a jury trial.[267] The court held that "a consumer must be informed of the consequences" and "personally" consent to relinquish her constitutional rights.[268] Relying on *Badie*, the court opined that the bill stuffer not only fell short of this objective, but was "sneaky and unfair."[269]

Accordingly, the standards that govern the enforceability of contractual jury trial waivers are very much unsettled. Cases such as *IFC Credit Corp.* and *Kortum-Managhan* talk past each other, exalting utilitarianism over deontology, or vice versa. This lack of guidance about what, if anything, the Constitution mandates provides real uncertainty at a time when many businesses are considering unilaterally inserting jury trial waivers into their contracts.

264. This is especially true in the employment context. *See, e.g.*, Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employees Are Compelled to Waive Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 769 (2005) ("Remarkably, some employers are discarding arbitration to return to court, but with a condition: employees must waive access to a jury and agree to a bench trial."); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 587 n.23 (2007) (collecting sources).

265. Noyes, *supra* note 264, at 587 n.24 (collecting data on JAMS arbitrators' fees in San Francisco and Washington, D.C.).

266. 204 P.3d 693 (Mont. 2009).

267. *See id.* at 700–01; *see also* MONT. CONST. art. 2, § 26 ("The right of trial by jury is secured to all and shall remain inviolate."); *id.* § 16 ("Courts of justice shall be open to every person . . . ."). The Seventh Amendment has not been incorporated into the Due Process clause of the Fourteenth Amendment. *See, e.g.*, Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916). Thus, the Amendment does not apply in state court, requiring states to apply their own constitutional jury trial guarantees.

268. *Kortum-Managhan*, 204 P.3d at 699.

269. *Id.* at 700. *Kortum-Managhan* is striking because it employs the blunt instrument of the state constitution rather than a fact-specific defense such as unconscionability to void the unilaterally added arbitration clause. *Cf.* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1449–51 (2008) (arguing that state courts strategically use unconscionability because it is harder for pro-FAA federal judges to overrule such a contextualized determination).

D. Summary

Buoyed by the law and economics literature of the late 1970s and early 1980s and the Supreme Court's fixation with shunting disputes away from the courts, contract procedure has spread exponentially. As firms have discovered the cost-saving and liability-limiting potential of extrajudicial forums, they have invoked their power to modify terms unilaterally and insert arbitration clauses into their agreements. Unilateral amendments became more common as firms started to employ increasingly complex terms, such as class arbitration waivers.

Courts void procedural clauses to protect extrinsic policies: substantive rights, state sovereignty, and constitutional values. However, they have not yet fashioned consistent criteria to govern the validity of unilateral amendments to these terms. Many see no normative significance in the fact that a business has unilaterally revised a clause, while others analyze the amendment under the rubric of procedural unconscionability and reach irreconcilable conclusions. Even cases such as *Badie* and *Kortum-Managhan*, which view unilateral revisions with skepticism, suggest that their evils can be remedied through greater transparency, such as clarifying in the original contract that firms may "add" or seek "personal consent" to new terms.

In the next Part, I argue that these approaches to the unilateral revision phenomenon are shortsighted. The staggering frequency with which drafters change terms ex post belies commonly given rationales for contract procedure. Instead of trying to assimilate unilateral modifications to procedural terms into existing doctrine, courts should recognize that such modifications create systemic problems that warrant special attention.

II. THE SHADOW TERMS

Unilateral amendments give drafters a kind of contractual dexterity. If a court in a particular state invalidates a term, a firm need not delete the term. Instead, the firm can simply replace it with a slightly more acceptable term. As a result, judicial rulings invalidating procedural terms often simply trigger another round of unilateral amendments.

This dialogue between corporations and courts creates a feedback loop. Firms have little reason to tailor their revisions to adherents' preferences because adherents probably cannot track the often subtle changes to procedural terms. Instead, firms write to persuade courts that their new clauses—though barely different—no longer offend important policies. This "private conversation" ensures that adherents cannot discipline the market for amended procedural clauses; indeed, their desires play no role in the formulation of these terms. Moreover, because businesses constantly tinker with their terms, courts must constantly determine whether new iterations are enforceable. Rather than decreasing the strain on the judicial system, this aspect of contract procedure keeps courts actively involved.

A. Efficiency

One of the most powerful arguments in favor of enforcing procedural terms is that they are efficient. In this subpart, however, I argue that there are reasons to be skeptical of this assertion. I contend that the efficiency claim does not apply to procedural terms that drafters repeatedly amend.

The centerpiece of the efficiency argument is Schwartz and Wilde's theory that a handful of erudite consumers can discipline markets plagued by imperfect information.[270] Under their hypothesis, "shoppers"—a small, informed subset of all consumers—keep drafters honest. Since firms cannot tell shoppers from non-shoppers, and their livelihood depends on attracting marginal consumers (some of whom will be shoppers), they must cater to majoritarian preferences.[271]

For instance, suppose that there are three corporations in an industry. Firm A introduces a class arbitration waiver that saves it $4 per contract but reduces each consumer's welfare by $2. Firms B and C do not. The only way for Firm A to survive is to give consumers back something that they value more than they dislike the waiver.[272] If Firm A does not, shoppers will flock to Firms B and C to avoid the $2 welfare deficit. Over time, this loss of marginal shoppers will drive Firm A out of business.[273] Yet if Firm A lowers its prices by $3, not only will the waiver continue to make Firm A better off (by $1), but it will also make customers better off (by $1). The true advantage in passing on these savings, though, lies in the fact that shoppers will now patronize Firm A. Even with the class arbitration waiver, the price reduction makes shoppers $1 better off than if they did business with the other firms. To keep up, Firms B and C would then likely also insert a class

270. Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1414.

271. *See supra* notes 77–81 and accompanying text.

272. *See* Korobkin, *supra* note 72, at 1209–10 ("If one seller ('Firm') were to provide a low-quality [term] but not reduce its price, no buyers would choose to purchase from Firm."); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 592 (1990) (noting that a firm can lure customers by charging the same amount for a product accompanied by a contract that omits a pro-seller clause).

273. *See* POSNER, *supra* note 66, at 116 ("If one seller offers unattractive terms, a competing seller, wanting sales for himself, will offer more attractive terms.").

arbitration waver and lower their prices. As a result, widespread use of "harsh" procedural terms within an industry can actually be "evidence that customers prefer the combination of term (bad) and price (low) relative to other economically possible combinations of term and price."[274]

Although conservative courts and scholars tend to assume that this tidy story translates into the milieu of contract procedure, this may not be so. First, Schwartz and Wilde presume that all consumers read the term at issue.[275] This may be plausible in the context of warranties and security interests—the terms that they analyzed.[276] These terms are fairly conspicuous aspects of the contracts in which they are embedded. Yet the assumption that all consumers read the relevant clauses seems dubious when applied to abstract, jargon-laden dispute resolution terms,[277] especially considering that these clauses discuss risks and rights with which consumers likely have little experience.

A second suspect premise that underlies Schwartz and Wilde's model is that adherents will be unbiased or systematically pessimistic about the odds of suffering adverse consequences.[278] However, an intervening generation of behavioral science has proven that individuals are, in general, irrationally optimistic.[279] In any event, no matter their psychological disposition at the time of contracting, adherents probably do not consider the possibility of being embroiled in future litigation. As a result, they behave as though they are optimistic. They may not demand a price reduction for a harsh procedural clause because they will underestimate the likelihood of the clause being invoked against them.[280]

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274. Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of* Williams v. Walker-Thomas Furniture Company, 26 U. HAW. L. REV. 441, 449 (2004); *see also* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 439 (2002) ("Uniformity of terms within an industry, in fact, might indicate that the industry is highly competitive."). One weakness with this hypothesis is that it does not seem to be falsifiable: whether a market contains pro-drafter or pro-adherent terms, the economic model concludes that it reflects adherents' preferences.

275. Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1450.

276. *See id.* at 1451–52 (postulating both that "most consumers probably do know what the warranty terms in their contracts are" and that "all consumers seem aware of security interest terms").

277. *Id.* at 1450 (noting that the fact "that nonshoppers fail to read makes it more likely that firms will degrade contract content").

278. *See id.* at 1446 ("[T]here is no reason to think that these mistakes lead to a systematically optimistic bias.").

279. *See, e.g.*, Christine Jolls et al., *A Behavorial Approach to Law and Economics*, *in* BEHAVIORAL LAW AND ECONOMICS 13, 47 (Cass R. Sunstein ed., 2000) ("[O]veroptimism leads most people to believe that their own risk of a negative outcome is far lower than the average person's."); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 809–12 (1980) (same).

280. *See* Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1429 ("Markets may correct poorly for consumer optimism.").

Finally, there is growing acceptance that bounded rationality prevents even informed adherents from making welfare-maximizing choices. Rather than comparing the many options available to them, consumers frequently use selective and noncompensatory decisionmaking strategies.[281] These heuristics mean that only a few "salient" product characteristics actually influence consumer behavior.[282] Because contract terms are product attributes, drafters may only face pressure to offer efficient "salient" terms. Indeed, they stand to lose nothing by offering a welfare-reducing clause that adherents do not factor into their purchasing decisions. Procedural terms are relatively obscure and thus prime candidates for nonsalience. Moreover, although firms have incentives to advertise high-quality "substantive" terms, firms are unlikely to do the same for procedural terms. The gist of a high-quality procedural term—that adherents retain their rights once litigation ensues—would probably not play well in a marketing campaign.[283] Thus, even if an industry contains many shoppers, by effectively ignoring harsh procedural clauses, they will likely fail to pressure companies into passing back any savings.

There are, of course, counterarguments to this gloomy view. Even if most adherents are poorly informed about the existence or effect of procedural terms, they will almost certainly be sensitive to price.[284] Vigorous competition may lead firms to disgorge their savings from any source—including procedural clauses—in an effort to lure marginal adherents. This would spur drafters to offer "harsh" procedural terms in return for lower prices. Arguably, this reflects majoritarian preferences. In light of the vagaries of litigation and the fact that contingency fees reduce successful plaintiffs' recoveries, most adherents

281. *See* JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 140–41 (1958) ("[M]ost human decision-making, . . . is concerned with the discovery and selection of satisfactory alternatives; only in exceptional cases is it concerned with the discovery and selection of optimal alternatives."); Korobkin, *supra* note 72, at 1223. A selective decisionmaker focuses exclusively on a few product attributes (for example, shopping for a cellular service provider based solely on the price, look, and size of the devices each offers). *See id.* at 1220. A noncompensatory decisionmaker does not contrast each similar product aspect (for instance, selecting a provider that offers an iPhone because of the "look," although it scores lower on the "size," and "price" categories). *See id.* at 1223.

282. *See* Korobkin, *supra* note 72, at 1225.

283. *See* Gillette, *supra* note 114, at 698 ("We would be surprised to hear that a firm advertised that its customers can sue it in the event of defective performance, rather than proceed to arbitration, because firms will be reluctant to suggest that they may breach their contracts.").

284. *See* Korobkin, *supra* note 72, at 1243 (noting that price is nearly always a salient factor in consumer decisionmaking); Ware, *Price of Process*, *supra* note 114, at 92 (noting that under the rate-of-return equalization principle, "whatever increases an industry's profits ultimately attracts additional capital to that industry, causing an increase in that industry's output and therefore a reduction in its price").

might rather have immediate savings rather than preserve their full range of procedural rights in the unlikely event that a dispute occurs.[285]

Accordingly, the oft-cited efficiency justification for private procedural rulemaking is shaky but defensible. However, as I explain next, it is far less persuasive in the context of unilateral revisions.

1. Unfettered Change of Terms

Most courts hold that companies can unilaterally amend any procedural term if the underlying contract includes a change-of-terms clause. From an efficiency standpoint, this rule creates three problems.

First, it makes ex ante shopping for procedural clauses—the heart of Schwartz and Wilde's theory—an exercise in futility. Because drafters can alter procedural clauses ex post, consumers frequently agree to one set of clauses and end up with very different ones. For example, in *Goetsch v. Shell Oil Co.*,[286] the plaintiff became a Shell credit card holder in 1979. His contract did not include an arbitration clause or even a unilateral change-of-terms clause.[287] Twenty-one years after he opened his account, he received a class arbitration waiver in a bill stuffer.[288] Of course, in 1979, arbitration was significantly more limited, and there was no such thing as a class action waiver. Nevertheless, the court upheld the new term, reasoning that the plaintiff had acquiesced to it by continuing to use his card.[289] *Goetsch* vividly illustrates why unilateral revisions destroy incentives for adherents to shop ex ante. Why take the time and effort to decide which procedural terms match your preferences when the drafter has broad discretion to modify them? Even if the plaintiff in *Goetsch* had engaged in a searching comparison of his options before he signed up for his account, a single unilateral revision would have mooted his work.

Second, in terms of an ex post, after-the-amendment market, unilateral revisions transform even sophisticated adherents into passive non-shoppers. For one, drafters reduce readership rates by using bill stuffers and the like to inform adherents of the new clauses. Sometimes the change-of-terms notice is indistinguishable from the cacophony of daily junk mail; sometimes it arrives along with "other items likely to be of greater interest to consumers, such as a

285. Of course, adherents as a class likely do not have homogeneous preferences: some likely prefer to pay more and be rid of harsh procedural terms. If the market does drive companies toward harsh terms and lower prices, these adherents will not be able to find procedural terms that accord with their preferences.

286. 197 F.R.D. 574 (W.D.N.C. 2000).

287. *Id.* at 576.

288. *See id.*

289. *See id.* at 577.

statement of how much is owed [or] forthcoming features on pay-per-view."[290] Either way, many adherents will not read the new terms.[291]

In addition, even adherents who notice the amendment often have no meaningful alternative other than to accept it. To be sure, some firms bestow opt-out periods ranging from several weeks to the contract's expiration date, and several courts have relied on these windows to hold that unilateral changes are not procedurally unconscionable.[292] Yet these "options" saddle adherents with prohibitive transaction costs. At bare minimum, they impose search costs: Adherents must studiously compare the proposed revision to their procedural terms with other companies' terms. And unlike an initial purchasing decision, adherents cannot bide their time or painstakingly research their options; rather, they must act by the company's deadline.[293]

Moreover, switching is expensive. Some wireless service providers, for instance, charge an early termination fee of up to $350[294] and yet do not offer any "means of rejecting the modified terms, other than canceling service."[295] Likewise, the effective cost of moving from one credit card to another is about $150[296] and can adversely impact a consumer's credit rating.[297] Of course, for

290. Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1661 (2006).

291. In a similar context, Clayton Gillette argues that terms in "rolling contracts"—which arrive after the sale—are no less problematic than standard form terms generally because the fact that many buyers ignore the fine print anyway means that "presentation through [a rolling contract] imposes no harm." Gillette, *supra* note 114, at 696. As Gillette acknowledges, however, any tactic that reduces readership rates also reduces the market pressure that firms experience to cater to majoritarian tastes. *See id.* at 696–97.

292. *See supra* notes 208–215 and accompanying text.

293. Two well-documented cognitive biases also reduce the probability that adherents will defect to a new company over a modified procedural clause. Under the "status quo bias" and the "endowment effect," "the initial allocation of legal entitlements can affect preferences for those entitlements." Russell Korobkin, *Behavorial Economics, Contract Formation, and Contract Law*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 279, at 116. Thus, a desire to preserve things as they are makes adherents more likely to shop for a credit card or a service provider before, as opposed to after, they have signed a deal.

294. *See, e.g.*, David Coursey, *Verizon: $350 Early Termination Fee Covers More Than Phone*, PCWORLD.COM, Dec. 18, 2009, http://www.pcworld.com/businesscenter/article/185125/verizon_350_early_termination_fee_covers_more_than_phones.html.

295. Kaltwasser v. Cingular Wireless LLC, 543 F. Supp. 2d 1124, 1130 n.5 (N.D. Cal. 2008).

296. *See* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 779 (2008).

297. For example, even Richard Epstein—an outspoken proponent of classical law and economics and limited state intervention in markets—has recognized the barriers to switching between credit cards:

> Switching a credit card company involves more than filing a new application. There may be lag in getting the response, and furthermore, canceling an existing card can be risky if there are disputed or outstanding charges, or if the credit card is used to pay off certain monthly bills on a regular basis. Any shift in card companies goes on the general credit record, which could lead other companies to turn down an applicant who is known regularly to switch.

Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 823 (2008).

most adherents, these costs and risks far exceed the value of any specific procedural term. But the absurdity of the "opt out" period comes into sharp relief when one considers that the adherent would be leaving a company over the existence or non-existence of a procedural term for another company that enjoys the unfettered power to add, delete, or modify its own procedural terms. With no way to be sure that the new firm will continue to use the same procedural provisions in the future, a rational adherent would stay put.

Finally, it is unclear how an adherent could ever benefit from accepting a unilateral revision. In the most markets, competition could prompt firms to pass back their savings from harsh terms. But unilateral amendments, which do not affect the price in the underlying contract, give drafters no such opportunity. As a result, there is no mechanism through which drafters can reward adherents for accepting pro-drafter clauses.[298] Indeed, consumers receive nothing for a unilateral modification other than the privilege of continuing the contractual relationship. The fact that unilateral revisions stand apart from the rest of the transaction belies the notion that adherents pay less (or receive more) for contracts with harsh terms. Accordingly, even in a competitive market, giving drafters the unchecked power to modify their procedural terms undermines the claim that procedural terms will be efficient.[299]

2. Shopping for Change-of-Terms Clauses

I have argued that unilateral revisions destroy incentives for consumers to shop for procedural terms both before and after contracting. It is possible, however, that adherents' power to shop among various change-of-terms clauses in the underlying contracts remedies this flaw.

For example, *Badie* and its progeny hold that a clause that only permits drafters to "change" terms does not allow drafters to add "completely new terms" that do not relate to any subject or issue mentioned in the original contract.[300] Thus, in states that follow this approach, an adherent could search for change-of-terms clauses that are similar to the one in *Badie* and deny

298. For an isolated exception, see *Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410, 1413 (M.D. Ala. 1998) (discussing a credit card issuer that would have reduced plaintiff's interest rate by two points if he accepted a unilaterally added arbitration clause).

299. Admittedly, if unilateral revisions reduce the cost of doing business, they may (over time in a competitive market) drive prices down. Thus, although a current credit card customer may experience a welfare loss due to a unilateral revision, a future customer may enjoy a lower interest rate. However, there is anecdotal evidence that firms do not respond in this manner. For example, when Wells Fargo followed Bank of America's lead and first added an arbitration clause to its contracts in 1992, it candidly admitted that it had "no current plans to lower rates or fees as a result of the program." Kathleen Sullivan, *Wells' Plan on Disputes Draws Fire*, S.F. EXAMINER, July 7, 1992, at D1.

300. *See* Badie v. Bank of America, 79 Cal. Rptr. 2d 779, 803 (Ct. App. 1998).

drafters the unchecked power to amend their terms. The adherent would probably have to pay more for this restrictive clause, but at least she would have options. Similarly, an individual who distrusts bill stuffers could seek out a change-of-terms clause like the one in *DirecTV, Inc. v. Mattingly*,[301] which pledged "a written notice describing the change."[302] Others might accept an unlimited change-of-terms provision in exchange for a substantial price reduction. Under this model, even if adherents cannot exert market discipline on unilateral amendments ex post, they can effectively accomplish the same result by shopping for change-of-terms clauses ex ante.

Nevertheless, this model rests on several heroic assumptions. For one, change-of-terms clauses would need to be "salient" to most adherents—important enough to impact their choices.[303] Yet this seems improbable. Unlike arbitration, which has received at least some journalistic attention, change-of-terms clauses are not part of popular discourse. Thus, it is unlikely that any adherent would factor a change-of-terms clause into her decisions, as opposed to the numerous other attributes inherent in every contract and product.

Moreover, even if adherents were attuned to the presence and scope of change-of-terms clauses, they would likely not be able to value the clauses properly. The idea that consumers can correctly gauge what they stand to gain or lose from any specific procedural term is unlikely enough; yet it strains credibility to suggest that adherents can perform this arithmetic for the infinite range of phantom clauses that the drafter could possibly insert.[304] Because adherents are unduly optimistic, a more likely scenario is that they underestimate either the cost of a future change-of-terms or the odds that the drafter will even revise its procedural terms at all.[305]

Another reason why there is probably no market for change-of-terms clauses is that the true scope of the drafter's power to alter terms unilaterally

301. 829 A.2d 626 (Md. 2003).

302. *Id.* at 628.

303. *See supra* notes 281–282.

304. Indeed, some scholars have expressed doubts about whether many adherents can even understand fixed, static procedural terms. *See, e.g.*, Sternlight, *supra* note 16, at 1648–49. Having to imagine what procedural terms a drafter might insert only raises the risk of misunderstanding and misperception. *Cf.* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 38 (2008) (noting that complexity in the market for home loans "undoubtedly increase[s] the opportunities for [consumer] errors").

305. Consider a rough analogy from the credit card industry. Banks typically offer "teaser" interest rates, which begin quite low and then spike at a predetermined date. *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1392 (2004) (noting that teaser rates typically last for six months and can be as low as 0 percent interest). Although consumers know every important variable in this scheme—what the new high rate will be and when it will kick in—many "still underestimate the cost of lock-in." *Id.* at 1407.

is rarely apparent from the contract itself. For one, several jurisdictions' change-of-terms statutes allow unilateral revisions no matter what the contract says.[306] In those states, an adherent could search for (and perhaps pay a premium for) a contract that does not feature a change-of-terms clause, only to find that one exists by legislative fiat. And even outside of those states, a strategic choice-of-law clause can effectively splice a change-of-terms statute into a contract that does not seem to allow unilateral amendments.[307] In either instance, a consumer could only discover the fact that an agreement empowers the drafter to modify terms unilaterally through painstaking legal research and analysis.

In a similar vein, the doctrinal inconsistency over the permissibility of unilateral revisions makes it difficult for any adherent to know exactly what she is getting. Some courts have held that a firm cannot add an arbitration clause to a contract that permits it to "change" its "terms" or "amend or change any part of [the] agreement . . . or add or remove requirements at any time."[308] However, other courts have enforced unilaterally inserted arbitration clauses when the underlying agreement merely confers the right to "change terms."[309] Thus, a consumer could purchase a favorable-seeming change-of-terms clause only to find that a court viewed it quite differently.[310]

For these reasons, unilateral amendments belie the theory that private procedural rules are efficient. Because unilateral revisions nullify the fruits of ex ante shopping and discourage ex post shopping through switching costs, drafters can insert harsh procedural terms with near impunity. Unlike the initial contracting stage, where corporations have an incentive to pass savings back and compete on the basis of price, unilateral amendments do not affect the price of the original contract. Thus, not only do firms have incentives to use one-sided terms, but they have incentives to hoard the savings from these terms.

306. *See supra* note 132.

307. It is unclear whether a court would ever hold that a state has a "fundamental" policy against unilateral amendments and thus strike down a choice-of-law clause. A California appellate court held that there was no policy against unilateral revisions in *Mandel v. Household Bank*, 129 Cal. Rptr. 2d 380, 384–85 (Ct. App. 2003), but the state supreme court granted review and the case settled before the court issued an opinion.

308. *See supra* notes 157–167.

309. *See supra* notes 141–156.

310. In addition, under *Badie v. Bank of America*, a unilateral amendment is not a valid "change" of "terms" if it is "an entirely new term" that does not comport with "any subject, issue, right, or obligation addressed in the original contract." 79 Cal. Rptr. 2d 273, 284 (Ct. App. 1998). Because most consumer, franchise, and employment contracts now include arbitration clauses, the *Badie* rule may no longer be an effective limiting principle. Indeed, a harsh, remedy-stripping arbitration clause inserted into a contract that already contains an arbitration clause would not be "an entirely new term"—and would thus be valid under *Badie*.

B. The Private Conversation

I have assumed thus far that each unilateral amendment further erodes adherents' procedural rights. For example, a drafter may insert an arbitration clause one year and a class arbitration waiver the next. However, in the middle of this decade, courts started to annul procedural terms with greater regularity, and corporations began to use unilateral modifications for a different purpose. As some judges refused to enforce provisions in arbitration clauses that waived the right to attorney's fees,[311] shortened limitations statutes,[312] and required the proceedings to be confidential,[313] drafters exercised their unilateral amendment powers to "soften" these terms.

These ostensibly pro-adherent amendments became more prevalent after 2005, as more and more courts began to invalidate class arbitration waivers.[314] As noted, class arbitration waivers are void in some jurisdictions if they individuate numerous low-value claims. Since no one will pursue such a claim unless they can do so on an aggregate basis, class arbitration waivers can absolve firms from wrongdoing.[315] In response, drafters created subsidies for individual plaintiffs to prosecute these claims. By fronting arbitration costs or providing an award of attorney's fees to prevailing plaintiffs, firms sought to make their class arbitration waivers more palatable to judges.[316] Thus, when courts nullified class arbitration waivers, drafters did not delete them; rather, they inserted into their arbitration clauses elaborate schemes designed to encourage individual plaintiffs to assert low-value claims.

Consider the etiology of AT&T's class arbitration waiver. In 2001, AT&T unilaterally inserted an arbitration clause that prohibited class actions and included several other remedy-stripping provisions, including one that

311. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 52–53 (1st Cir. 2006) (invalidating a portion of an arbitration clause that "unmistakably places the burden of a plaintiff's costs and attorney's fees squarely on him or her").

312. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (voiding a clause that "imposes a strict one year statute of limitations on arbitrating claims").

313. *See, e.g.*, Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003) (striking down a confidentiality clause because it allowed the drafter to "ensur[e] that none of its potential opponents have access to precedent while, at the same time, . . . accumulat[ing] a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract").

314. *See supra* note 203.

315. *See supra* note 203.

316. *See* T-Mobile Terms and Conditions, *supra* note 262 (offering to pay reasonable attorneys' fees and costs to prevailing parties and waiving T-Mobile's right to seek attorneys' fees and costs for non-frivolous claims); Verizon Wireless Customer Agreement, *supra* note 262 (offering a bounty of $5000 and attorneys' fees for plaintiffs who recover less than $5000 but more than Verizon's settlement offer); AT&T Wireless Service Agreement (discussed in detail *infra* notes 317–321).

eliminated any right the plaintiff might have to recover attorney's fees.[317] In 2005, after several more unilateral amendments to its procedural terms, AT&T unilaterally removed the remedy-stripping terms,[318] but did not delete the class arbitration waiver.[319] In December 2006 and again in January 2007, AT&T unilaterally overhauled its class arbitration waiver, disclaiming its own right to recover attorney's fees, allowing plaintiffs to attend the arbitration in person, by phone, or to waive a hearing, and providing a bounty of $5000 and double attorney's fees for any plaintiff who recovers more than AT&T's last written settlement offer.[320] AT&T also attached to its motions to compel arbitration the expert opinion of esteemed civil procedure professor Richard Nagareda, who stated that he has "never seen an arbitration provision that has gone as far as this one to provide incentives for consumers and their prospective attorneys to bring claims."[321]

At first blush, this trend seems to undermine my claim that unilateral amendments are inefficient. After all, if companies replace invalid clauses with less harsh language, perhaps judicial rulings do compel them to respect consumers' preferences in the long run.

But upon closer inspection, the use of unilateral revisions to soften procedural terms not only expands the informational gulf between drafters and adherents, but cuts adherents out of the loop completely. AT&T's new class arbitration waiver may make it easier for consumers to bring low-value claims individually, but AT&T did not write it in an attempt to convince shoppers to switch to or stay with AT&T. Even standing alone—not presented in a bill stuffer with a thirty-day deadline—the elaborate, 1,600-word, three-page, single-spaced provision[322] is likely unintelligible to most consumers. But AT&T's target audience is not consumers. Rather, AT&T aims squarely at the one constituency that really matters: courts. Courts, unlike consumers, will

317. *See, e.g.*, McKee v. AT&T Corp., 191 P.3d 845, 849 (Wash. 2008).

318. *See id.* at 850.

319. *See* Plaintiff's Brief in Support of Motion to Declare Class Action Waiver Unlawful at 1, Francis v. AT&T Mobility, L.L.C., No. 2:07cv14921 (E.D. Mich. Jan. 16, 2008), 2008 WL 393981.

320. *See* AT&T Mobility's Brief in Support of Motion to Compel Arbitration and to Dismiss Action at 3, Francis v. AT&T Mobility, L.L.C., No. 2:07cv14921 (E.D. Mich. Jan. 25, 2008), 2008 WL 393982 (claiming that "[t]he revised arbitration provision is, to ATTM's knowledge, the most pro-consumer arbitration provision in the country").

321. Coneff v. AT & T Corp., 620 F. Supp. 2d 1248, 1257 (W.D. Wash. 2009) (quoting the same paragraph of Nagareda's declaration); Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS, 2008 WL 5216255, at *13 (S.D. Cal. Aug. 11, 2008) (same); Brief of Defendant-Appellee AT&T Mobility LLC f/k/a Cingular Wireless L.L.C. at 9, Cruz v. Cingular Wireless, L.L.C., No. 08-16080-CC (11th Cir. Feb. 5, 2009), 2009 WL 1674426 (same); Opening Brief of Cingular Wireless, Kaltwasser v. Cingular Wireless, L.L.C., No. 08-15962 (9th Cir. Aug. 14, 2008), 2008 WL 4298012 (same).

322. AT&T Wireless Service Agreement, *supra* note 262.

evaluate the waiver in the context-rich environment of briefing, precedent, and expert declarations[323] (which, ironically, are only admissible if they "address an issue beyond the common knowledge of the average layman"[324]). If one court upholds the waiver, AT&T has earned the precious currency of positive case law, and can consider nominating that jurisdiction in its choice-of-law clause.[325] If no court enforces the waiver, AT&T can simply soften the language and try again. On the other hand, if many courts honor the waiver, AT&T can always "harden" it by shaving away at the inducements for consumers to assert claims individually.

The sheer volatility of these terms creates a disorienting complexity all its own. For instance, in two cases decided in 2008, AT&T had modified its contracts so frequently that its own attorneys accidentally perjured themselves by swearing under oath that obsolete procedural terms governed the plaintiffs' claims.[326] In *McKee v. AT&T Corp.*, AT&T's lawyers filed and then retracted declarations purporting to describe the relevant version of its arbitration clause.[327] Likewise, in *Trujillo v. Apple Computer, Inc.*,[328] contrary to the sworn statement of AT&T's counsel, the plaintiff had become a wireless customer at a time when AT&T was simultaneously posting one version of its arbitration clause online and printing an amended version of the provision in its terms of service.[329] If, as the *McKee* court noted, "even AT&T has had difficulty determining which contract terms applied,"[330] then its consumers must have been similarly confused.

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323. *Cf.* Boardman, *supra* note 22, at 1105–06 (noting that insurance companies "cling for decades" to ambiguous policy language because "courts know what it means" (emphasis omitted)).

324. United States v. Vallejo, 237 F.3d 1008, 1019 (9th Cir. 2001).

325. For example, in *Spann v. American Express Travel Related Services Co.*, 224 S.W.3d 698 (Tenn. Ct. App. 2006), a credit card company revised its class arbitration waiver "to make it more equitable to cardholders in response to court decisions striking down other arbitration provisions as unconscionable . . . ." *Id.* at 704. A Tennessee appellate court noted that the font of the bill stuffers "is incredibly small and seems ill designed to provide cardholders with notice of information that they are expected to actually read." *Id.* at 703 n.3. Yet it upheld the clause, citing the fact that the lender had opted into Utah law, which "take[s] a restrictive view of the doctrine of unconscionability." *Id.* at 712.

326. *See* McKee v. AT&T Corp., 191 P.3d 845, 849–50 (Wash. 2008) ("We detail the specifics of the declarations because AT&T later repudiated the declarations it filed and the agreement it sought to enforce."); Trujillo v. Apple Computer, Inc., 578 F. Supp. 2d 979, 983 (N.D. Ill. 2008).

327. *See* 191 P.3d at 850 n.2.

328. 578 F. Supp. 2d 979.

329. *See id.* at 983. The court was incredulous:

> AT[&T] also included in its supplemental submission a footnote (!!) in which it stated, contrary to the clear import of [its lawyer's] initial affidavit, that a person who searched online for its terms of service as of July 2007 would not have found the version of those terms of service upon which AT[&T] premised its motion to compel arbitration.

Id.

330. *McKee*, 191 P.3d at 860 n.13.

Unilateral revisions have thus created a "private conversation" between drafters and the courts. This state of affairs turns the normative prescriptions of law and economics on their head. Even if court orders can force companies to soften procedural terms, and thus push the terms closer to reflecting adherents' informed ex ante preferences, markets, not courts, should perform this task. Judicial intrusion into this quintessentially private arena creates the risk of error (as judges may find a term unconscionable when, in fact, it mirrors most adherents' preferences), and makes the institution of contract unreliable (as neither drafters nor adherents will know whether a term is valid until after a court has spoken).[331]

Likewise, the fact that courts must consider the validity of wave after wave of amended procedural clauses negates a purported benefit of arbitration: the conservation of judicial resources. To some extent, the judicial economy rationale for arbitration has already worn thin. Because the enforceability of an arbitration clause hinges on many fact-specific variables—the nature of the plaintiff's claim, restrictions on remedies or discovery, the allocation of costs, and where the arbitration takes place, among others[332]—adherents often can find a way to challenge the clause in court. The first sentence of a recent Eleventh Circuit opinion captures this propensity: "This is another arbitration dispute in which the parties are litigating whether or not they should be litigating."[333]

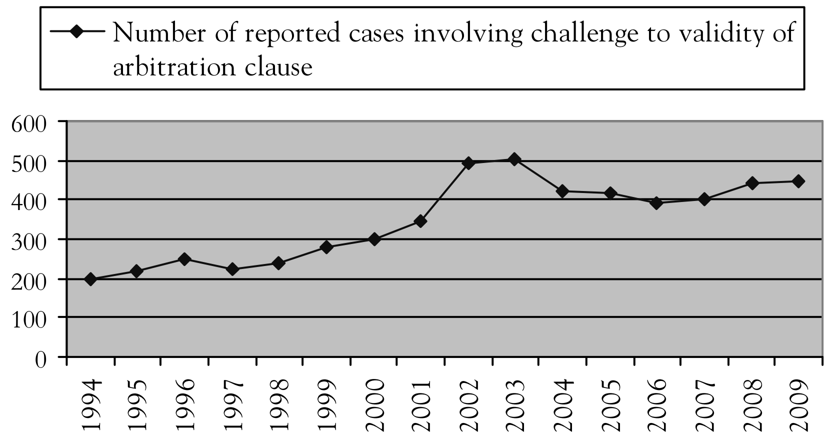
To get a rough sense of how the widespread use of arbitration clauses can actually create work for courts, consider how many times each year judges must adjudicate whether an arbitration clause is valid[334]:

331. *See, e.g.*, Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989) (noting that judicial intervention may be costly); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005) (discussing the costs of judicial error).

332. For surveys of these issues, see Bruhl, *supra* note 269, at 1438–39; Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 804–07 (2004).

333. Anders v. Hometown Mortgage Servs., Inc., 346 F.3d 1024, 1026 (11th Cir. 2003).

334. I generated these results by running the search di(arbitrat! /s unconscionab! invalid! unenforc! enforc! vindicat! % award) & da([year]) in the all-cases database on Westlaw for each of the last fifteen years. *Cf.* Bruhl, *supra* note 269, at 1440 n.85 (using a similar search string to determine the number of unconscionability challenges to arbitration clauses). I added the limitation "% award" (but not award) to root out cases that involved a challenge to an arbitrator's decision, not the validity of the arbitration clause.



As the chart shows, this number has ranged between four hundred and five hundred recently, has doubled in the last fifteen years, and continues to trend upward.[335] To put this figure in context, outside of the arbitration setting, only about one thousand cases each year feature a claim that a contract is invalid for any reason (duress, statute of frauds, impossibility, lack of consideration, unconscionability, and so forth).[336] Thus, battles over arbitration clauses likely constitute a plurality of all contract cases. I do not purport to answer the empirical question of whether the cost of this litigation outweighs the savings from funneling lawsuits outside of the judiciary. My point is simply that despite the judicial-economy rhetoric that underlies the Supreme Court's fervor for alternative dispute resolution, arbitration clauses often generate expensive and time-consuming litigation.

If procedural terms were fixed and static, this litigation would gradually taper off. For instance, Aaron-Andrew P. Bruhl notes that the total number of unconscionability challenges to arbitration clauses declined between 2003 and 2005. Bruhl suggests that courts may have sharpened the contours of what is permissible:

> One possibility is that many of the issues regarding unconscionability have now been resolved one way or the other, so that there is less need for litigation. That is, the doctrine has simply become more mature. Another possibility is that unconscionability challenges have leveled

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335. Of course, there are many other potential causes for this apparent increase, including fluctuations in the amount of litigation or the coverage of the Westlaw database.

336. I reached this result by using the search string di(contract /10 invalid! unenforc! enforc! void! % arbitrat!) & da([year]) in the all-cases database on Westlaw for each year since 2001. The same disclaimers as in the footnote above apply.

> off because the most aggressive arbitration clauses have been eliminated. The cases have told companies how far they can go, and the companies have redrafted their clauses to push right up to the edge.[337]

Indeed, if procedural clauses were immutable, firms would need to respect the boundaries defined by courts. Overreaching could have serious consequences. A class arbitration waiver that no court will enforce is tantamount to no class arbitration waiver at all. If the drafter placed such a provision in three years' worth of contracts, then it would be vulnerable to class actions brought by any customer who signed on during that period. As companies would be locked in to their clauses, they would need to err on the side of caution and use clauses that reduce litigation costs but stop just short of being invalid.

However, unilateral amendments prevent this kind of equilibrium from emerging. Armed with the ability to rewrite all of its agreements with all of its consumers in one fell swoop, a company has little to lose from actively testing the boundaries of precedent. Unilateral revisions provide an escape hatch for overreaching: they liberate firms from being stuck with any one set of terms. As a result, even if companies experiment with novel, harsh terms, they can always jettison them or incrementally soften them if necessary. To borrow a phrase from Bruhl, firms will not "push right up to the edge"; instead, they will try to redefine "the edge," and they will keep pushing and pushing.[338]

To return to the example of AT&T,[339] at first most judges invalidated its supposedly "pro-consumer" class arbitration waiver. These courts found that AT&T's efforts to encourage plaintiffs to bring claims individually—including its pledge to make an "alternative payment" of $5000 to plaintiffs who receive sizeable arbitral awards[340]—were inadequate substitutes for the class action.[341] AT&T responded not by reimagining the waiver or adding novel inducements for individuals to bring claims, but simply by hiking the "alternative payment" amount up to $7,500.[342] When courts continued to nullify the waiver, AT&T

337. Bruhl, *supra* note 269, at 1489.

338. Indeed, both my chart and Bruhl's data show that challenges to arbitration clauses (under the unconscionability rubric or otherwise) have begun to climb again since 2005. *Cf. id.* at 1440. Again, both data sets are imprecise, and I hesitate to draw sweeping conclusions from them.

339. *See supra* note 320 and accompanying text.

340. *See supra* note 320 and accompanying text.

341. *See* Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1257 (W.D. Wash. 2009) (voiding AT&T's class arbitration waiver despite noting that it provides "a guaranteed minimum recovery of at least $5,000 under certain conditions"); Stiener v. Apple Computer, Inc., 556 F. Supp. 2d 1016, 1019, 1030 (N.D. Cal. 2008) (same). *But see* Francis v. AT&T Mobility, LLC, No. 07-CV-14921, 2009 WL 416063, at *9 (E.D. Mich. Feb. 18, 2009) (enforcing the clause).

342. *See, e.g.*, Hall v. AT&T Mobility, LLC, 608 F. Supp. 2d 592, 595, 603–04 (D.N.J. 2009) (noting that the "alternative payment" is $7,500 but still invalidating the clause); Laster v. T-Mobile USA, Inc., No. 05cv-1167 DMS, 2008 WL 5216255, at *2, *14 (S.D. Cal. Aug. 11, 2008) (same).

raised the "alternative payment" to $10,000.[343] Because AT&T can modify the waiver unilaterally in all its existing agreements, it can continue to make minor changes and probe whether courts will honor it; it need not worry about being locked in to an invalid term in millions of contracts.[344] To be sure, AT&T will eventually either offer an "alternative payment" that will satisfy most judges or reach the point where the cost of defending the waiver outweighs any benefit that would flow from a court enforcing it. Until then, it will continue to make subtle changes to the provision and thus drag courts into the "private conversation." Because unilateral revisions place courts in this feedback loop, they increase the burden on the judicial system.

In sum, the traditional conservative rationales for contract procedure do not apply if drafters possess the power to modify procedural clauses at their leisure. It is pointless to shop—both ex ante and ex post—for terms that business can change. This lack of market pressure permits firms not only to offer one-sided terms without regard to adherents' desires, but to hoard the savings from these terms. Yet the liberal view—that courts should invalidate procedural terms when they infringe substantive rights or jurisdictional or constitutional values—does not go far enough. Drafters simply respond to unfavorable rulings with more unilateral changes. Even if these revisions are more favorable to adherents than previous versions, courts, not adherents, end up determining which clauses survive in the market. Excluded from the conversation between corporations and judges, consumers have no influence on the content of their procedural rights.

III. POLICY IMPLICATIONS

In this final Part, I consider three possible solutions to the unilateral revision dilemma: (1) federal legislation mandating heightened disclosure for unilateral changes to procedural terms, (2) expanding a little-noticed but important trend in state consumer protection laws that subsidize unconscionability challenges, and (3) embracing a judicial or legislative norm against modified procedural clauses. I then conclude that an outright ban on unilateral changes to procedural terms would be effective and justifiable, despite the powerful threshold objection that it interferes with freedom of contract. On close inspection, unilateral amendments to procedural clauses cannot be squared with contract theory or doctrine, and thus are not really part of contract law at all.

343. *See* AT&T Wireless Service Agreement, *supra* note 262.
344. AT&T has roughly seventy million customers. *See Coneff*, 620 F. Supp. 2d at 1258.

A. Disclosure

Economists regard mandatory disclosure as the least controversial and most effective form of governmental intervention in markets.[345] Indeed, by bringing terms to adherents' attention, disclosure facilitates informed, welfare-enhancing choices. As a result, it can ameliorate market failures without the litigation costs, judicial error risk, and ex post uncertainty inherent in doctrines such as unconscionability.

There are already some disclosure requirements for unilateral revisions to procedural terms. As mentioned, most of the statutes that permit unilateral amendments require drafters to notify consumers of changes.[346] In addition, in May 2009, President Obama signed the Credit Card Accountability Responsibility and Disclosure Act, which obliges lenders to provide "a written notice of any significant change" forty-five days before it becomes effective.[347] Although it is unclear whether a modification to a procedural term would be a "significant change,"[348] lenders presumably will be cautious and assume that it is.

One solution to the ills of unilateral revisions would thus be to amplify these rules and mandate that businesses highlight in vivid detail any alteration of their procedural clauses. For example, bill stuffers could arrive with an eye-catching, plain-English warning printed on the outside of the envelope. At the same time, to reduce search costs, all businesses in an industry could post a current version of their procedural terms online, or entrust a state agency or an independent firm to provide independent rating and analysis of their procedural clauses.[349] In the interests of uniformity and to avoid a thorny FAA preemption issue,[350] a federal statute would be preferable to patchwork state-by-state regulation.

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345. *See, e.g.*, Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1460; Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 200–01 (2008) ("Largely unfettered consumer choice paired with seller disclosure has been the dominant model of credit, insurance, and investment-product regulation for decades in the United States.").

346. *See supra* note 131.

347. Pub. L. No. 111-24, § 101(a)(2), 123 Stat. 1734, 1735 (2009).

348. The statute requires the Board of Governors of the Federal Reserve System to determine what constitutes a "significant change." *Id.*

349. *See* Korobkin, *supra* note 72, at 1244 (suggesting a similar alternative).

350. In 1995, Montana passed a statute requiring "[n]otice that a contract is subject to arbitration . . . [t]o be typed in underlined capital letters on the first page of the contract." MONT. CODE ANN. § 27-5-114(4) (1995). In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996), the Court found that the FAA preempted the statute, noting that the strong federal policy in favor of arbitration is "antithetical to threshold limitations placed specifically and solely on arbitration provisions." It is unclear whether a state disclosure statute that applied to procedural terms generally would survive an FAA preemption analysis. Although such a statute, unlike the one in *Casarotto*,

However, heightened disclosure does not address what makes ex post revisions to procedural clauses unique. To be sure, consumers often do not realize that procedural terms have changed, and disclosure would help rectify this lack of information. The root of the problem, though, is not just that adherents do not know about unilateral modifications, but that they have no incentive to do anything in response. As I have argued, search costs, switching costs, and the futility of defecting to another company over a clause that the new company can freely change all discourage consumers from taking action after receiving a bill stuffer. This stasis will persist even if businesses make adherents acutely aware of each modification.

Even if these obstacles did not exist, greater transparency would not necessarily empower adherents to demand efficient modified procedural terms. Recall that shoppers can only exert market discipline for "salient" clauses. Yet "'notice' is not the same as 'salience.'"[351] A consumer can read every term in a contract and still focus exclusively on a select few. In fact, studies reveal that a maximum of about five product characteristics will be "salient" to any given consumer.[352] As a result, even if drafters took elaborate measures to educate adherents about unilateral modifications, they might have little impact on whether adherents shop for better terms after receiving a bill stuffer.

Finally, and perhaps most importantly, sweeping disclosure would not stop corporations from amending their procedural provisions again and again. Although having to print a notice in colorful ink or update a website after each amendment would entail some expense and administrative hassle, it would not be too different from the current bill-stuffer regime. In fact, these measures might have the unintended consequence of normalizing unilateral amendments. If a provision jumps off the page, courts are much less likely to conclude that it is procedurally unconscionable.[353] Emboldened by the increased likelihood that courts will enforce unilateral amendments, drafters might revise their terms even more frequently. For these reasons, disclosure, standing alone, is a poor fit for the unilateral modification problem.

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would not apply "specifically and solely" to arbitration clauses, companies unilaterally amend arbitration clauses far more often than any other procedural term. *See supra* Part I.C.2.

351. Korobkin, *supra* note 72, at 1247.

352. *See id.* at 1227.

353. *See, e.g.*, Price v. Taylor, 575 F. Supp. 2d 845, 852 (N.D. Ohio 2008) (holding that an arbitration clause was not procedurally unconscionable when it was "typed in twelve-point font, and placed directly above Price's signature on a separate page"); Carideo v. Dell, Inc., 520 F. Supp. 2d 1241, 1249 (W.D. Wash. 2007) (refusing to find an arbitration clause procedurally unconscionable because it "was not hidden in a maze of fine print, but was presented in all capital letters in the four-page agreement").

B. The Unconscionability Sword

Another potential remedy springs from a little-noticed development in consumer protection law. It is well-settled that the unconscionability doctrine allows courts to invalidate a clause, but not to award damages.[354] However, a few state legislatures have erased this dichotomy and encouraged plaintiffs not only to invoke unconscionability as a shield against unfair provisions, but as a sword that gives rise to a cause of action. For instance, the California Consumer Legal Remedies Act (CLRA)[355]—which allows successful plaintiffs to recover damages and attorney's fees[356]—forbids "[i]nserting an unconscionable provision in [a] contract."[357] Similarly, the Florida Deceptive and Unfair Trade Practices Act licenses the state Attorney General, and arguably consumers as well, to demand compensation for "unconscionable acts or practices."[358] A handful of other jurisdictions penalize the drafter of an unconscionable term in a credit transaction through statutory damages or fee shifting.[359]

This strapping, muscular form of the unconscionability doctrine could apply with heightened force to unilateral revisions. At least in California, a plaintiff need not show that the allegedly unconscionable term caused a pecuniary loss; instead, the statute permits recovery of "certain types of transaction costs and

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354. *See, e.g.*, Cowin Equip. Co., Inc. v. Gen. Motors Corp., 734 F.2d 1581, 1582 (11th Cir. 1984) ("[T]he cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision . . . ."); Whitman v. Conn. Bank & Trust Co., 400 F. Supp. 1341, 1346 (D. Conn. 1975) ("The 'unconscionability' provision of the Uniform Commercial Code . . . carries no provision for damages."); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 7 (1993) (noting that in contract law, property rules safeguard parties from being held to duties to which they did not properly consent); Korobkin, *supra* note 72, at 1289 ("[C]ourts should recognize a right of buyers to be free of unconscionable contracting behavior, and this right should be protected with a 'property rule' rather than a 'liability rule.'").

355. CAL. CIV. CODE § 1750 (West 2009).

356. *Id.* § 1780(a). The contract must be for "the sale or lease of goods or services to any consumer." *Id.* § 1770(a).

357. *Id.* § 1780(a)(19).

358. FLA. STAT. ANN. §§ 501.204(a)(1), 501.207(3) (West 2006 & Supp. 2009) (allowing state officials "to reimburse consumers . . . found to have been damaged . . . [and] to strike or limit the application of clauses of contracts to avoid an unconscionable result"). It is unclear whether the Florida Deceptive and Unfair Trade Practices Act permits consumers suing on their own behalf to seek damages simply for being subject to an unconscionable term. David J. Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, 74 FLA. B.J. 49, 53 (2000) (arguing that consumers can probably seek the full range of non-monetary remedies).

359. *See, e.g.*, UTAH CODE ANN. § 70C-7-106(4) (2001) (permitting courts to award "not less than $100 nor more than $5000; and the cost of the action together with a reasonable attorney's fee" if the court "finds a consumer credit agreement or any part of the agreement to have been unconscionable"); COL. REV. STAT. ANN. § 5-5-109(5) (West 2008) (allowing a court to award attorney's fees to a consumer who has proven that a creditor's contract is unconscionable).

opportunity costs."[360] For example, one Ninth Circuit case held that a plaintiff stated a claim under the CLRA when she purportedly spent four hours on the phone with the company instead of working.[361] Therefore, a plaintiff who receives a bill stuffer with an unconscionable procedural term might be able to seek redress for time spent searching for a better term. Although the amount of damages would be negligible, the possibility of recovering attorney's fees and the relatively simple, self-contained universe of issues could make these cases attractive to hungry plaintiffs' lawyers.

In turn, the specter of liability might deter repetitive unilateral revisions. As I have argued, the conventional unconscionability defense does not prevent overreaching: Vested with the power to soften all of its contracts, the most a drafter stands to lose from a judicial decree voiding a procedural term is that a single lawsuit will not be subject to that term. However, the prospect of also having to pay damages and hefty attorney's fees for every unenforceable clause could change matters. With stronger incentives to avoid adverse rulings, firms might abandon their current practice of making numerous minor amendments to invalid terms. Instead, they might move more quickly toward iterations of terms that courts will likely enforce, thus reducing the frequency of unilateral modifications.

Nevertheless, encouraging unconscionability claims is, at best, a flawed and incomplete response to unilateral amendments. For one, as compared to markets and legislatures, judges are not well equipped to reform contract law. Because courts can only resolve individualized cases, they lack the broad stroke necessary to rectify market failures.[362] In fact, because the unconscionability doctrine is not designed to root out inefficient provisions,[363] it would not be an adequate way to police unilateral modifications from an economic standpoint. Finally, creating incentives for more litigation would only exacerbate the

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360. Meyer v. Sprint Spectrum L.P., 200 P.3d 295, 299 (Cal. 2009). In *Meyer*, the California Supreme Court also held that a plaintiff lacks standing to bring a "preemptive" challenge to an allegedly unconscionable term that the drafter has never tried to use against her. *See id.* at 301. Lower courts had generally reached the same conclusion, casting these challenges to the bare existence of a dispute resolution term as lawyer-generated litigation. *See* Lee v. Capital One Bank, No. C 07-4599 MHP, 2008 WL 648177, at *4 (N.D. Cal. Mar. 5, 2008) ("The obvious architect of this ill-conceived suit is plaintiff's attorney, who, not incidentally, also represented plaintiff in his materially identical claims against American Express and Chase Manhattan Bank.").

361. *See* Sisley v. Sprint Commc'ns Co., 284 Fed. Appx. 463, 466 (9th Cir. 2008).

362. *See* Schwartz & Wilde, *Imperfect Information I*, *supra* note 69, at 679 (noting that piecemeal litigation cannot "encourage markets to move toward competitive equilibria").

363. *See* Horton, *supra* note 7, at 1697 (noting how the unconscionability defense is an "exercise in accommodation" between economic and liberal-individualistic values); Korobkin, *supra* note 72, at 1207 ("[T]he factual circumstances that trigger findings of unconscionability under the doctrine are, at best, weakly correlated with the main cause of inefficiency in form terms.").

strain on the court system. Thus, legislative inducements to bring unconscionability challenges will not solve the unilateral amendment problem.

C. Banning Unilateral Amendments to Procedural Terms

Because other potential remedies appear inadequate, I thus propose that policymakers simply ban unilateral revisions to procedural terms. By holding firms to their promises, this prohibition would encourage adherents to shop ex ante and discipline the market for dispute resolution terms.[364] It would also put an end to welfare-depleting and litigation-breeding amended procedural terms.[365]

To be sure, forbidding a specific contractual term is a heavy-handed remedy.[366] Blanket prohibitions on terms may reduce social welfare: Because every aspect of a deal expands the value that the deal creates, banning a term forces the parties to share a smaller contractual "pie."[367] However, barring unilateral modifications to procedural terms would not be equivalent to barring a particular term. Instead, it would merely outlaw a mechanism for adding, subtracting, or modifying terms.

A powerful argument against contractual bans is that the mere existence of a term in a competitive market "is strong evidence that buyers prefer it to some other combination of attributes."[368] Not only do unilateral revisions lack this imprimatur, but they cut in the opposite direction. If existing terms do reflect the approval of the market, then unilateral revisions thwart this vetting process by deleting market-approved terms and substituting in new terms.

364. Federal legislation would be the best way to implement this norm. For one, it would avoid the FAA preemption issue that would likely arise if a state attempted to curtail unilateral revisions to procedural terms. *See supra* note 350. Moreover, because many state laws permit unilateral changes in credit transactions, federal legislation would be an effective way of leaving those laws intact but limiting them to nonprocedural terms.

365. To be clear, I do not purport to bar firms from changing the terms of their revolving or periodic accounts when the accounts come up for renewal. For example, suppose a customer's credit card expires in 2012. Under my proposal, the lender may inform the customer that she must agree to arbitrate disputes starting in 2012 in order to renew the card. In 2012, the customer is going to incur search and perhaps switching costs anyway; thus, the lender would not be imposing these expenses upon her in a strategic effort to get her to acquiesce to the new term. What the lender cannot do is give the customer thirty days in 2010 to decide whether to either accept the term in 2012 or cancel her account in 2012. Search and switching costs (plus the fact that the customer cannot know whether other companies will soon impose the same clause) make this a Hobson's choice.

366. *See, e.g.*, Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 131 (2006) (accusing "aggressive regulations that ban interest above certain levels or impose fixed public maximums on who can borrow or how much" of being "meat-cleaver measures").

367. *See, e.g.*, Korobkin, *supra* note 274, at 450–51 (noting that outlawing terms leads to some marginal consumers being priced out of the market); Schwartz & Wilde, *Imperfect Information II*, *supra* note 69, at 1457–58 ("[G]eneral bans of terms on information grounds seem without justification.").

368. Horton, *supra* note 7, at 1689; *see also supra* notes 277–279.

Moreover, giving drafters the power to revise terms unilaterally is more of a subsidy to drafters than an appendage of contract doctrine. Unilateral amendments to procedural terms would be invalid under traditional contract principles. For example, the preexisting duty rule requires additional consideration for contractual modifications.[369] Because newly added procedural terms confer no benefit upon adherents and no detriment on companies, they do not meet this standard. In addition, through bill stuffers, drafters require adherents to actively reject new terms, and deem no response as assent to the terms. Yet courts have generally refused to hold that silence in response to an offer is a valid manner of acceptance.[370]

Similarly, by bestowing upon firms the unfettered power to rewrite the contract, unilateral change-of-terms clauses violate the prohibition on illusory promises.[371] Of course, courts can always try to cure this problem by requiring drafters to exercise change-of-terms clauses in good faith. In fact, *Badie*'s holding—that a newly added arbitration clause exceeded consumers' reasonable expectations—stemmed from precisely such judicially implied limits on Bank of America's discretion.[372] Nevertheless, in the years since, courts have proven incapable of defining this boundary,[373] perhaps because any attempt to pinpoint adherents' expectations for nonsalient procedural terms ultimately will be arbitrary. Accordingly, because unilateral revisions to procedural terms would be invalid under several different contract doctrines, they are entirely creatures of the statutes and cases that authorize them.[374] Restricting unilateral

369. *See, e.g.*, McCallum Highlands, Ltd. v. Wash. Capital Dus, Inc., 66 F.3d 89, 93 (5th Cir. 1995).

370. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a ("Acceptance by silence is exceptional."). *But see* Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 1109 (9th Cir. 2002) (reasoning that the fact that employer asked employee to review a newly added arbitration clause and acknowledge receipt in writing meant that employee accepted the clause by failing to opt out). In addition, in an oft-cited and thoughtful essay, James J. White notes that allowing credit card companies to assume that debtors "accept" changes in terms by silence saves "disproportionate transaction costs (individual verbal affirmations by millions of cardholders) that would otherwise be imposed on the system." James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693, 1701 (2000). This prudential exception to the presumption that acceptance by silence is invalid may make sense for unilateral changes to substantive terms, which are often necessary for a lender to stay abreast of market conditions. However, it is unclear why any exception is necessary for unilateral changes to procedural terms, which have no similar social value.

371. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1981) ("Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise.").

372. *See* Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 284–85 (Ct. App. 1998) ("Moreover, permitting the Bank to exercise its unilateral rights under the change of terms provision, without any limitation on the substantive nature of the change permitted, would open the door to a claim that the agreements are illusory.").

373. *See supra* Part I.C.2.

374. For a striking (and humorous) illustration of why unilateral amendments allow drafters to deviate from traditional contract law (and thus confer a subsidy upon them) consider *Thompson v.*

modifications to procedural terms would thus not interfere with freedom of contract; instead, it would restore this facet of contract law to its proper axis.

CONCLUSION

The debate over contract procedure has not accounted for the fact that corporations unilaterally amend their dispute resolution clauses again and again. These modifications debunk the leading conservative rationales for privatizing procedure. The fact that drafters repeatedly amend procedural clauses means that contract procedure will neither lead to lower prices nor alleviate the burden on the judicial system. However, striking down procedural clauses for eroding procedural rights or jurisdictional and constitutional values—the doctrinal infrastructure championed by liberals—creates a nasty feedback loop. Drafters respond to adverse judicial rulings by amending their terms to try to convince courts that the new terms no longer diminish important interests and therefore are valid. This "private conversation" between companies and courts—consumer contracting without consumers—is impossible to square with the normative foundation of contract law. The time has come for legislatures and courts to see unilateral amendments to procedural terms for what they really are: not binding commitments, but mere words on a page.

Chase Bank USA, N.A., No. H-07-1642, 2009 WL 290186 (S.D. Tex. Feb. 5, 2009). In *Thompson*, the plaintiff wrote a letter to his credit card company purporting to change the terms of its contract and giving it ten days to reject the changes in writing. *Id.* at *1. The court held that the purported amendment was invalid because it lacked consideration. *See id.* at *2. Although the court noted that it was "seemingly unfair . . . to give credit card companies like Chase the right to unilaterally amend credit card agreements while simultaneously denying cardholders the same right," it instructed the plaintiff to "direct his efforts to the legislative branch instead of the courts." *Id.*