Ending *Lochner* Lite

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Introduction

One of the standard tropes of American law is a story of the evolution of constitutional doctrine from the era of *Lochner v. New York*[1] — characterized by widespread judicial invalidation of state and federal legislative efforts to set minimum terms of fairness in employment contracts[2] — to post-New Deal decisions upholding a vast array of state and federal legislation

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[1] 198 U.S. 45 (1905).

[2] The seven principal Supreme Court cases that constitute the *Lochner* era are discussed *infra* at note 40 and surrounding text.

regulating the marketplace.[3] But the legal story does not end with the overthrow of *Lochner*. In recent years, a new generation of contracts has surfaced imposing terms that require weaker contracting parties to forego the ability to enforce their post-*Lochner* rights in an effective manner.[4] This new generation of unfairly bargained contracts contains terms ranging from defendant-friendly forum-selection clauses buried in the fine print of a passenger ticket,[5] to non-negotiable choice-of-law provisions embedded in franchise contracts,[6] to class action waivers in both merchant and consumer credit card agreements.[7] But by far the most widely imposed term is a compulsory arbitration clause requiring the economically weak contracting party (such as an employee or consumer) to waive access to the courts in connection with the resolution of disputes arising out of the contract.[8] The weaker party is, instead, remitted to an arbitral forum that frequently operates according to procedures hand-tailored by the economically stronger party (such as an employer, manufacturer, or service provider).[9] Increasingly,

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[3] The cases documenting the fall of *Lochner* are discussed *infra* note 53 and surrounding text.

[4] The impact of nonconsensual form contracts imposed on weak contracting parties is thoughtfully and exhaustively discussed in MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013). For an early recognition of the problem, see W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 533 (1971).

[5] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (enforcing forum-selection clause in fine print of a cruise ship ticket). While the imposed contractual term at issue in *Carnival Cruise* was contrasted with the fairly bargained, commercial forum-selection clause enforced in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), Justice Blackmun ruled that the imposed clause was enforceable as a matter of federal admiralty law because the parties had notice of its terms, no evidence in the record supported a finding of undue hardship, and no evidence existed that the clause was designed to burden prospective plaintiffs unfairly. *Carnival Cruise Lines*, 499 U.S. at 593–95. *See also* Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 584 (2013) (enforcing fairly bargained, commercial forum-selection clause under 28 U.S.C. 1404(a)).

[6] *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (upholding choice-of-law provision in form franchise agreement for fast food restaurant).

[7] *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (enforcing clause in merchant credit card agreement barring aggregate arbitration or class actions, even when cost of pursuing individual claim would exceed possible individual recovery); AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (enforcing class-action waiver in form contract for mobile telephone service).

[8] *See, e.g.*, Perry v. Thomas, 482 U.S. 483, 490–92 (1987) (holding that state contractual wage claims are subject to mandatory arbitration under the Federal Arbitration Act ("FAA"), despite state statute to the contrary); Southland Corp. v. Keating, 465 U.S. 1, 16–17 (1984) (holding that compulsory arbitration clauses imposed by the strong contracting party are judicially enforceable under the FAA, despite state law holding them unconscionable).

[9] Imposed contractual limitations on an arbitrator's remedial powers often include a requirement of secrecy, prohibition of punitive damages, denial of power to issue prospective injunctive relief, limits on discovery, and lack of preclusive or precedential effect. *See, e.g.*, Pacificare Health Care Sys., Inc. v. Book, 538 U.S. 401, 406–07 (2003) (arbitration clause may prohibit award of punitive damages); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91–92 (2000) (arbitration agreement that does not discuss costs and fees is not per se unenforceable as potentially too expensive for weaker party); Volt Info. Scis. v. Stanford Univ., 489 U.S. 468, 479 (1989) (agreement to arbitrate "under different rules than those set forth in the [FAA] itself" was nevertheless enforceable under the FAA).

compulsory arbitration clauses include a waiver of aggregate dispute resolution,[10] forcing the aggrieved, weaker party to pursue an often toothless arbitral remedy in isolation, even when the cost of pursuing such a remedy exceeds the potential recovery.[11] My concern is that the Supreme Court's insistence on enforcing this new generation of imposed contracts — which enables economically powerful contracting parties to shunt the enforcement of both state and federal post-*Lochner* statutory rights — to structurally flawed arbitral fora that lack the remedial powers routinely exercised by courts, has the effect of diluting the real-world value of post-*Lochner* reforms, leaving us, today, with a watery legal brew that I call "*Lochner* Lite."[12]

Until now, observers have analyzed contracts of adhesion[13] imposing compulsory arbitration clauses through the lens of the unconscionability doctrine,[14] or as a structural-constitutional question of federalism and separation of powers.[15] I hope to take the constitutional strand of the analysis one step further by identifying the "state action" present when a federal statutory

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[10] The Supreme Court has considered the issue of aggregate arbitration six times. *See Italian Colors*, 133 S. Ct. at 2312 (FAA requires enforcement of arbitration clause barring aggregate arbitration or class action even when cost of pursuing individual antitrust claim exceeds possible individual recovery); Oxford Health Plans, LLC v. Sutter, 133 S. Ct. 2064, 2070–71 (2013) (broad but ambiguous language in agreement allows arbitrator to decide whether she is contractually empowered to hear aggregate arbitration, and arbitrator's decision concerning the existence of such a power is subject to deferential review); *Concepcion*, 131 S. Ct. at 1753 (FAA preempts state unconscionability ban on enforcing imposed waivers of aggregate arbitration); Stolt-Nielsen S.A. v. AnimalFeeds, Int'l Corp., 559 U.S. 662, 687 (2010) (stronger party cannot be forced to engage in aggregate arbitration under agreement that fails to provide for it); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453–54 (2003) (ambiguity on whether aggregate arbitration authorized by contract must be resolved by arbitrator); *Southland Corp.*, 465 U.S. at 16 (invalidating state's requirement of aggregate arbitration as preempted by FAA).

[11] *See Italian Colors*, 133 S. Ct. at 2312.

[12] I am not the first to point out the resemblance of the current state of the law to the *Lochner* era. *See, e.g.*, Catherine L. Fisk, Lochner *Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L. J. 153, 186 (1995) (noting that in federal judicial opinions interpreting the Employee Retirement Income Security Act of 1974 ("ERISA"), "[t]he essence of the discourse . . . is as radically formalist a notion of contract as that which prevailed in the *Lochner* era").

[13] By "contract of adhesion," I mean a form contract imposed on a take-it-or-leave-it basis by a party with dominant bargaining power, leaving the weak partner with an illusory "choice" analogous to those in many unconstitutional conditions cases, or cases involving the coerced "waiver" of a constitutional right, which the courts often (correctly) brand as no choice at all. *See* notes 144–145 and accompanying text. The term "contract of adhesion" was coined by Edwin Patterson in *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

[14] *See generally* Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L. J. 1383 (2014); 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 (2004).

[15] *See generally* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577 (1997); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference*

command like the United States Arbitration Act of 1925[16] (better known as the "Federal Arbitration Act" or "FAA") compels an unwilling state or federal judge to enforce a mandatory arbitration clause, even when such a nonconsensual contractual provision is otherwise unenforceable under the local law governing the contract.[17] I argue that to the extent the FAA compels state and federal judges to enforce such nonconsensual compulsory arbitration clauses requiring a weak bargainer to waive an otherwise existing ability to associate with others in seeking justice,[18] the combined governmental impact of the FAA and the subsequent involuntary judicial enforcement of such an unconscionable clause constitutes "state action" in violation of the aggrieved party's First Amendment right to freedom of association.[19]

In Part I, I attribute the cyclical reappearance of contracts imposing unfair terms on economically weaker parties to our failure to confront a radical disconnect in our contracts jurisprudence. On the one hand, the notion of "consent" remains the principal moral justification for deploying state power to enforce privately minted contractual norms.[20] On the other hand, genuine consent is lacking in most contracts of adhesion, either because the provision in question was buried in the fine print,[21] or because the weaker party lacked the ability to bargain over it,[22] or both. I explore the anomaly of

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for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 TUL. L. REV. 1 (1997).

[16] 9 U.S.C. §§ 1–16 (2012).

[17] As the material cited *supra* note 15 demonstrates, I am far from the first to note the "state action" implications of federal legislation forcing unwilling state and federal judges to enforce nonconsensual mandatory arbitration clauses. This article is, I believe, the first to link the state action inherent in compelled judicial enforcement of nonconsensual, mandatory arbitration clauses to an unconstitutional abridgment of First Amendment associational rights.

[18] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (FAA requires enforcement of arbitration clause barring aggregate arbitration or class action, even when cost of pursuing individual claim exceeds possible individual recovery); AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (FAA preempts state unconscionability ban on enforcing imposed waivers of aggregate arbitration).

[19] *See infra* section II.C.3.

[20] *See* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211–12 (1995) [hereinafter *The Limits of Cognition*]; Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 743–47 (1982) [hereinafter *The Bargain Principle*].

[21] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (enforcing forum-selection clause in fine print of a cruise ship ticket). *But see In re* The Kensington, 183 U.S. 263, 277 (1902) (declining to enforce forum-selection clause buried in ticket's fine print).

[22] *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454, 481–82 (1909) (chronicling the use of freedom of contract to invalidate efforts to regulate the terms of unbargained contracts). Dean Pound was writing in response to Justice Harlan's majority opinion in *Adair v. United States*, 208 U.S. 161, 179 (1908), which invalidated federal legislation prohibiting companies engaged in interstate commerce from entering into "yellow dog" contracts (i.e., contracts forbidding their employees from joining a labor union). Quoting contemporary sociologists, Dean Pound wrote:

> "Much of the discussion about 'equal rights' is utterly hollow. All the ado made over the system of contract is surcharged with fallacy." To everyone acquainted at first hand with actual industrial conditions the [quoted] statement goes without saying. Why, then do courts persist in the fallacy? Why do so many of them force upon

invoking a fictive consent to justify the enforcement of nonconsensual contracts in three doctrinal settings: (1) the rise and decline of *Lochner*; (2) the brief reign of *Shelley v. Kraemer*;[23] and (3) the contested status of modern unconscionability doctrine. I conclude that, despite powerful dictum during the *Lochner* years, courts have failed to confront the anomaly head on, relying on legal doctrines that enable the legislature (and an occasional common law judge) to mitigate the immediate consequences of allowing the strong to dictate the terms of judicially enforceable contracts in particular contexts, but do little to prevent the strong from imposing unfair contracts elsewhere.

In Part II, I briefly review the emergence of the FAA as a potent device allowing economically dominant contracting parties to shunt the enforcement of post-*Lochner* rights into structurally flawed arbitration fora. I argue that to the extent the FAA compels state and federal judges to enforce unfairly imposed contractual waivers of the capacity to invoke generally available techniques of aggregate dispute resolution, the FAA constitutes state action abridging the weaker party's First Amendment right to associate with others in the search for justice.[24]

I. The Recurring Anomaly of Judicial Enforcement of Non-Volitional Contracts

A. Consent, Violence, and Contract

One of the many important things that Robert Cover taught us during his tragically short career is that behind law's velvet façade is an iron fist — a coercive command backed by the threat, and often the reality, of state-imposed pain, violence, and even death.[25] Whether, and under what circum-

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legislation an academic theory of equality in the face of practical conditions of inequality?

Pound, 18 Yale L. J. at 454 (quoting Lester Frank Ward, Applied Sociology 281 (1906)).

[23] 334 U.S. 1 (1948).

[24] *See infra* section II.C.

[25] Robert Cover, *Violence and the Word*, 95 Yale L. J. 1601, 1601 (1986). Professor Cover, who suffered a fatal heart attack in 1986 at the age of forty-two, wrote at least two other groundbreaking works. See *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4 (1983); and Justice Accused: Anti-Slavery and the Judicial Process (1984), especially the brilliant introductory chapter on *Antigone*. I confess to an initial belief that Professor Cover had engaged in rhetorical overkill in characterizing law as a form of state-imposed "violence" associated with "terror." Thankfully, we do not live in a world where government thugs routinely appear on your doorstep armed with truncheons in an effort to force you to live up to your legal obligations. But, on reflection, Cover was right to remind us that behind the civilized ritual of service of process, due process hearings, entry of judgment, and sheriff's execution is the barrel of a gun. Ask the most recent homeowner or small farmer who lost his or her property to a bank foreclosure. Those of us who write for, edit, and consume the pages of the *Harvard Civil Rights–Civil Liberties Law Review* rarely experience the law as violence. We are generally on the dishing-out side. But Cover was seeking to remind us that the weak and poor repeatedly experience law as a set of rules, the violation of which risks state-imposed violence. It is not a bad idea for those of us on the other side of the hammer to remember what the nail feels like. We should remember that when we

stances, such a threat may be unleashed by the state, is the essential question of constitutional law. From the beginning, the Supreme Court has imposed significant constitutional limits on the political branches' power to issue orders backed by the threat of state-imposed violence.[26] We now recognize, as well, that constitutional limits exist on the power of judges to promulgate commands unilaterally,[27] either by enforcing common law torts[28] or protecting private property.[29] Today, it makes no difference whether the legal threat is criminal or civil, or is issued by the legislature, the executive, or a judge. From a constitutional perspective, the important thing is the threat's power to command obedience on pain of state-imposed violence.[30]

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decide to enforce a legal duty — like the duty to live up to the terms of an imposed contract — we are not engaging in moral philosophy, applied political science, or free market economics; we are issuing a threat backed by the fear of state-imposed violence.

[26] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 452 (1857) (invalidating aspects of the Missouri Compromise of 1850 banning slavery from the territories); Prigg v. Pennsylvania, 41 U.S. 539, 625–26 (1842) (invalidating Pennsylvania anti-kidnapping law designed to protect free blacks against seizure by bounty hunting slave catchers); Marbury v. Madison, 5 U.S. 137, 180 (1803) (invalidating provisions of Judiciary Act of 1789 granting original mandamus jurisdiction to Supreme Court).

[27] As a matter of separation of powers, federal courts may not act unilaterally to issue common law criminal threats. United States v. Coolidge, 14 U.S. 415 (1816); United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812). Moreover, since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts have lacked power to issue unilateral threats in common law civil cases. Instead, under *Erie*, federal courts must enforce the common law threats issued by the courts of the state in which they sit. The power of state judges to issue unilateral criminal threats in the First Amendment area was significantly limited in *Garrison v. Louisiana*, 379 U.S. 64, 77–78 (1964). Finally, while state common law courts may issue unilateral threats in civil cases, judicially promulgated state common law rules may be modified or rejected at will by the political branches.

[28] *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (constitutionalizing the tort of intentional infliction of emotional distress); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (constitutionalizing the common law tort of libel).

[29] *See* Peterson v. Greenville, 373 U.S. 244, 248 (1963) (reversing sit-in conviction on narrow grounds); Lombard v. Louisiana, 373 U.S. 267, 273–74 (1963) (same); *see generally* Bell v. Maryland, 378 U.S. 226 (1964) (same, with the six Justices who reached the constitutional issue dividing 3-3); *see also* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (holding that California state constitutional provision mandating access to private shopping center for First Amendment activities is not an unconstitutional taking). Constitutional limits on judicial enforcement of wills rest on the divide between property and contract. *See* Evans v. Abney, 396 U.S. 435, 447–48 (1970) (enforcing reversionary clause, in the same will at issue in *Newton*, *infra*, which was triggered by inability to operate whites-only park); Evans v. Newton, 382 U.S. 296, 302 (1966) (declining to enforce terms of testamentary trust establishing whites-only park); Pennsylvania v. Bd. of Dirs. of Trusts, 353 U.S. 230, 231 (1957) (declining to enforce testamentary trust administered by public officials establishing whites-only school); Pennsylvania v. Brown, 392 F.2d 120, 125 (3d Cir. 1968) (declining to permit substitution of private trustees to carry out discriminatory provisions of testamentary trust), *cert. denied*, 391 U.S. 921 (1968).

[30] The "state action" cases grapple with the question of whether the state can be deemed to have issued a threat of its own or to have significantly reinforced the threat of a private person. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 941–42 (1982) (finding that discriminatory civil jury peremptory challenges reinforced by state enforcement constitutes state action); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972) (holding that issuance of liquor license does not convert discriminatory private club into state actor); Terry v. Adams, 345 U.S. 461, 469–70 (1953) (finding that private pre-primary poll open only to whites constitutes state action); *see also* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S.

We are agreed, moreover, that it is morally acceptable to use the threat and reality of state-imposed violence to command obedience to regulations lawfully promulgated by democratic institutions (including rules made by common law judges) because the targets of the threat can be said to have impliedly consented to the enforcement of the government's lawful commands by being eligible to participate in the democratic process that ultimately generated those commands.[31] Justifying the use of state-imposed violence becomes more difficult, however, when we move from judicial enforcement of commands issued by democratically responsible public authorities, including democratically accountable common law judges and administrative agencies,[32] to judicial enforcement of privately minted commands issued by private entities.[33] Occasionally, the privately minted commands are aimed at other participants in the dispute resolution process — such as racial or gender-based peremptory challenges, discovery demands, service of process, or pre- and post-judgment collection procedures. Unless such a private command implements a preexisting consensual agreement, the Supreme Court has properly treated the command and its judicial enforcement as "state action" triggering substantive constitutional review.[34] More often, privately minted commands are couched as contracts, judicially enforceable by injunctions commanding specific performance on pain of contempt of court, or the imposition and collection of damages, backed by the state's power to seize the debtor's property by force if necessary.[35]

Where, as in most commercial settings, a privately minted contractual threat emerges from a tolerably fair bargaining process that justifies an imputation of mutual consent to the terms — analogous to the imputed consent that justifies the use of force to enforce the commands of democratic institu-

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288, 302 (2001) (recognizing statewide scholastic athletic association with public and private members as "state actor").

[31] Imputed participatory consent is the standard moral justification for the duty to comply with statutes enacted pursuant to democratic procedures. *See generally* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). I argue elsewhere that the current appallingly unequal state of our campaign finance system threatens the moral legitimacy of insisting on compliance with rules emerging from such an unequal system. *See* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (forthcoming 2015).

[32] That is why it is so important to maintain a link between administrative agencies and their democratic overseers, and between common law judges and a supervising legislature. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (invalidating administrative agency structure that unduly impeded democratic supervision).

[33] *But see* Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 861–63 (2010).

[34] *Compare* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) (declining to enforce racially motivated peremptory challenge in civil case) *and* Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982) (declining to enforce ex parte pre-judgment attachment) *and* Sniadach v. Family Fin. Corp., 395 U.S. 337, 341–42 (1969) (declining to enforce pre-judgment wage garnishment) *with* D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972) (enforcing *cognovit* note in the context of a freely bargained-for commercial contract).

[35] *See* Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (prohibiting issuance of injunction enforcing racially restrictive covenant); Barrows v. Jackson, 346 U.S. 249, 260 (1953) (prohibiting award of damages for violating racially restrictive covenant).

tions — judicial enforcement of private contracts is seen as an unquestioned good. The successful operation of a free market economy rests on the government's willingness to deploy enough "terror" to assure that commercial promises are kept,[36] even when, in cases like *Snepp v. United States*[37] and *Cohen v. Cowles Media Co.*,[38] enforcement of a freely bargained contract impinges on First Amendment values. But why, asked Dean Roscoe Pound more than a century ago, should a powerful entity have the ability to exploit a much weaker contractual partner by invoking the power of the state to enforce an illusory "bargain" to which the weaker party never meaningfully consented, and never would have entered into had she enjoyed even a glimmer of genuine bargaining power?[39] We have confronted Dean Pound's troubling question in at least three contexts — the rise and decline of *Lochner*, the brief reign of *Shelley v. Kraemer*, and the contested history of the unconscionability doctrine — without generating a satisfactory answer.

B. The Rise and Decline of Lochner

The judicial debate over *Lochner* was all about the disconnect between the traditional consent-based justification for protecting and enforcing contracts, and the reality of radical bargaining inequality between employers and would-be employees, making it impossible to characterize the terms of many employment contracts as genuinely consensual.[40] But the issue of

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[36] As Dean Pound noted in *Liberty of Contract*, Montesquieu's tale of the Troglodytes, who perished because they willfully refused to carry out their promises, sums up a long tradition respecting the importance of enforcing consensual contractual promises. *See Liberty of Contract*, *supra* note 22, at 456.

[37] 444 U.S. 507, 516 (1980) (enforcing CIA employee secrecy agreement).

[38] 501 U.S. 663, 672 (1991) (enforcing confidentiality agreement against newspaper that published the identity of a source).

[39] Pound, *supra* note 22, at 454.

[40] The debate over *Lochner* plays out in seven major cases. Four invalidated legislation that interfered with freedom of contract. *See* Adkins v. Children's Hospital, 261 U.S. 525, 562 (1923) (invalidating minimum-wage law for women in the District of Columbia); Coppage v. Kansas, 236 U.S. 1, 26 (1915) (invalidating state legislation prohibiting companies from entering into "yellow dog" contracts, which forbade employees from joining labor unions); Adair v. United States, 208 U.S. 161, 180 (1908) (invalidating similar federal law prohibiting companies engaged in interstate commerce from entering into "yellow dog" contracts with employees); Lochner v. New York, 198 U.S. 45, 64–65 (1905) (invalidating New York law setting ten-hour maximum work day for bakers). The other three upheld regulations of the free market. *See* Bunting v. Oregon, 243 U.S. 426, 438 (1917) (upholding legislation setting maximum hours for both male and female workers in mills, factories, and manufacturing establishments); Muller v. Oregon, 208 U.S. 412, 423 (1908) (upholding legislation setting maximum ten-hour work day for women employed in laundries); Holden v. Hardy, 169 U.S. 366, 398 (1898) (upholding legislation mandating eight-hour maximum work day for miners). Although the areas are analytically distinct, the *Lochner*-era Court paired the freedom of contract cases with an extremely narrow reading of Congress's power under the Commerce Clause to interfere with the making or enforcement of commercial contracts. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (holding that Commerce Clause does not authorize maximum-hour and minimum-wage provisions of Bituminous Coal Conservation Act); Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding that Commerce Clause does not authorize detailed wage- and price-fixing provisions of National Industrial Recovery Act);

whether one-sided agreements entered into by persons of radically unequal bargaining power should be thought of as judicially enforceable contracts at all rarely takes center stage. Instead, the question of unequal bargaining power is recycled as a justification for the legislature's exercise of its traditional nineteenth-century police power to prevent vulnerable individuals from placing their lives or health at risk, with little or no independent consideration of the general legitimacy of unequally bargained contracts.[41] In *Lochner*, *Adair*, *Coppage*, and *Adkins*, legislatures had responded to the bargaining imbalance between employers and employees by seeking to impose minimum-wage and maximum-hour regulations (*Lochner*; *Adkins*), and by providing employees with protection for union organizing activities (*Adair*; *Coppage*). Apart from Justice Day's dissent in *Coppage*,[42] however, the jurisprudential anomaly of treating imposed contracts born of radically unequal bargaining power as judicially enforceable consensual agreements is absent from the Supreme Court's analysis in all four cases. Its absence is not surprising. For laissez-faire stalwarts like Justices Peckham (who wrote *Lochner*) and Pitney (who wrote *Coppage*), openly confronting the moral and legal concerns raised by using state power to enforce one-sided employment contracts would be like releasing the serpent into free-market Eden. The dissenting Justices in *Lochner* and *Coppage* were, however, clearly aware of the unequal bargaining power issue[43] — Justice Brown had powerfully articulated it in *Holden v. Hardy*,[44] Dean Pound had highlighted it in his 1909 article,[45] and Justice Day discussed it in his *Coppage* dissent.[46] I suspect, though, that for both tactical and personal reasons, the more progressive Justices decided to fight the *Lochner*-era cases on conventional nineteenth-century police power grounds, rather than stir up the jurisprudential hornet's nest lurking behind the disconnect between the consent theory

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Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (holding that Commerce Clause does not authorize legislation banning interstate movement of products produced by child labor); United States v. E.C. Knight Co., 156 U.S. 1, 17–18 (1895) (holding that antitrust act premised on Commerce Clause does not ban contracts establishing monopolies in manufacturing, since manufacturing activities necessarily occur intrastate and thus are not covered by Congress's power to regulate the flow of interstate commerce).

[41] The most extensive discussion of the unequal bargaining issue occurs in Justice Brown's opinion for the Court in *Holden*, upholding a Utah law making it a misdemeanor to employ a miner for more than eight hours a day. Justice Brown argued that since certain employees may not be in a position to avoid agreeing to employment conditions that may place their health at risk, it is legitimate for the legislature to place limits on the terms of an employment contract that does place the employee's health at risk. 169 U.S. at 397. Useful as such an argument is in upholding paternalistic legislation, it does not call the very idea of unequally bargained contracts into question.

[42] *Coppage*, 236 U.S. at 29–30 (Day, J., dissenting); *see also id.* at 26–27 (Holmes, J., dissenting).

[43] *See id.* at 29–30 (Day, J., dissenting); *id.* at 26–27 (Holmes, J., dissenting); *Lochner*, 198 U.S. at 67–72 (Harlan, J., dissenting); *id.* at 75 (Holmes, J., dissenting).

[44] *See supra* note 41.

[45] *See supra* note 22.

[46] *Coppage*, 236 U.S. at 29–30 (Day, J., dissenting).

of contract and the widespread judicial enforcement of harsh contracts of adhesion reflecting dramatically unequal bargaining power.[47]

Thus, in *Lochner*, *Adair, Coppage,* and *Adkins*, the Supreme Court insulated harsh terms in employment contracts from legislative regulation because, according to the majority, the terms had been: (1) agreed to by formally competent persons, free from common law duress or fraudulent inducement;[48] and (2) could be enforced without undue harm to the health of the contracting parties or anyone else.[49] In each case, the dissenting Justices gamely sought to identify a formal lack of bargaining competence (usually by women),[50] or a health-related harm that would justify legislation forbidding the contract.[51] While they failed in *Lochner*, *Adair*, *Coppage*, and *Adkins*, they succeeded three times — in *Holden v. Hardy* (maximum hours for miners), *Muller v. Oregon* (maximum hours for women employed in laundries), and *Bunting v. Oregon* (minimum wage and maximum hours for factory workers) — and wrote powerful dissents in the four losing cases.[52] But whichever side won, none of the seven major cases from *Lochner* through *Adkins* asked why the harsh terms of unfairly bargained agreements should be dignified with the term "contract," and backed by the coercive machinery of the state.

Not even the Great Depression and the fall of *Lochner*[53] would force the jurisprudential issue of why agreements entered into by persons of radically

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[47] I am not suggesting that the more progressive Justices were being intellectually dishonest. In my experience, good lawyers and good judges often steer clear of intellectually disruptive arguments with potentially broad, but uncertain consequences.

[48] Adkins v. Children's Hospital, 261 U.S. 525, 554–55 (1923); *Coppage*, 236 U.S. at 8–9; Adair v. United States, 208 U.S. 161, 174 (1908); *Lochner*, 198 U.S. at 57.

[49] *Adkins*, 261 U.S. at 555; *Coppage*, 236 U.S. at 16; *Lochner*, 198 U.S. at 57.

[50] *Adkins*, 261 U.S. at 562 (Taft, J., dissenting); *Coppage*, 236 U.S. at 29–30 (Day, J., dissenting); *id.* at 26–27 (Holmes, J., dissenting); *Adair*, 208 U.S. at 191 (Holmes, J., dissenting); *Lochner,* 198 U.S. at 67–72 (Harlan, J., dissenting).

[51] *Adkins*, 261 U.S. at 566 (Taft, J., dissenting); *Coppage*, 236 U.S. at 41–42 (Day, J., dissenting); *Lochner*, 198 U.S. at 69–72 (Harlan, J., dissenting).

[52] *See supra* note 40 (describing the seven major *Lochner*-era cases).

[53] The fall of *Lochner* can be traced through *West Coast Hotel Co. v. Parrish*. *See* 300 U.S. 379, 400 (1937) (impliedly overruling *Lochner*, explicitly overruling *Adkins*, and upholding state law establishing minimum wage for female workers); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (rejecting narrow Commerce Clause reading in *E.C. Knight* in favor of "effects" test, and upholding Commerce Clause-based Congressional prohibition on dismissing employees for engaging in union organizational activity); United States v. Darby, 312 U.S. 100, 125–26 (1941) (overruling *Hammer v. Dagenhart*, and upholding ban on interstate transportation of goods manufactured in violation of federal minimum-wage and child labor standards). Once the Court adopted the effects test of *Jones & Laughlin*, where the effect of labor unrest in the steel industry on interstate commerce was enormous, and *Darby*, where the effect was substantial, it proceeded to minimize (some would say trivialize) the required impact on interstate commerce. *See* Wickard v. Filburn*,* 317 U.S. 111, 133 (1942) (holding that wheat grown and exclusively consumed on a farm sufficiently "affects interstate commerce" to permit Congressional regulation). More recent decisions, however, have been more demanding. *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995) (requiring Congress to spell out the causal link between interstate commerce and its regulation of guns near local, state-run schools); United States v. Morrison, 529 U.S. 598, 619 (2000) (invalidating the federal Violence Against Women Act because of an allegedly inadequate link between vio-

unequal bargaining power should be enforceable by the state to the forefront of the Court's contract analysis.[54] In *West Coast Hotel Co. v. Parrish*,[55] the Court upheld a state minimum-wage law for women, explicitly overruling *Adkins* (and overruling *Lochner sub silentio*, as I believe that *Bunting* had done two decades earlier).[56] Chief Justice Hughes's opinion was the usual mix of police-power concern over the adverse societal effects of extremely low wages and sexist condescension regarding the inability of women to bargain effectively for themselves. While the rhetoric of the *West Coast Hotel* is shot through with concern over unfairly bargained employment contracts, the Court steered clear of formally confronting the issue of why imposed agreements should be treated as contracts at all, electing to deploy the nineteenth-century police power argument raised initially in *Holden v. Hardy* to justify legislative regulation of unfairly bargained agreements threatening health.[57]

The bargaining equality issue also surfaces in Chief Justice Hughes's opinion in *NLRB v. Jones & Laughlin Steel Corp.*,[58] which rejected a Commerce Clause challenge to a provision of the National Labor Relations Act[59] forbidding the discharge of employees at a steel plant for union organizing activity.[60] While the *Jones & Laughlin* Court deferred to Congress's judgment that the best way to establish a fair contractual bargaining relationship between large employers and their employees is through collective bargaining,[61] Chief Justice Hughes said nothing about the enforceability of unfairly bargained contracts — including the very contracts prohibited by the NLRA — in the absence of legislative action.[62]

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lence against women generally and the flow of interstate commerce); Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2591 (2013) (opinion of Roberts, C.J.) (holding that the Commerce Clause does not authorize Congress to impose an affirmative duty to purchase health insurance, as opposed to imposing negative prohibitions), *accord*, *id.* at 2643 (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.). In *NFIB*, Chief Justice Roberts, after voting to invalidate the duty to buy health insurance, gave the Affordable Care Act life by upholding the financial penalty for failure to buy health insurance as a valid tax, as opposed to a penalty. *See* 132 S. Ct. at 2601 (opinion of Roberts, C.J.).

[54] *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 539 (1934) (upholding state statute fixing milk prices in order to preserve milk supply needed for children's health); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 447–48 (1934) (upholding temporary moratorium on bank foreclosures designed to prevent a wholesale collapse of the real estate market). Both cases are classic examples of nineteenth-century police power reasoning.

[55] 300 U.S. 379 (1937).

[56] *Id.* at 400. As discussed *supra* note 40, the Court in *Bunting* upheld a state law establishing a ten-hour maximum work day for both male and female employees in "any mill, factory or manufacturing establishment," thereby overruling *Lochner sub silentio*. *See* Bunting v. Oregon, 243 U.S. 426, 435 (1917).

[57] *See W. Coast Hotel*, 300 U.S. at 399.

[58] 301 U.S. 1 (1937).

[59] Pub. L. No. 74–198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2006)).

[60] *Jones & Laughlin Steel*, 301 U.S. at 49.

[61] *Id.* at 33, 45–46.

[62] *Jones & Laughlin Steel* is best known for its rejection of the restrictive categorical reading of the Commerce Clause adopted in *E.C. Knight* (which had distinguished between

The Supreme Court's failure to deal directly with the judicial enforceability of unfairly bargained contracts has made *Lochner* hard to bury once and for all.[63] If all that was wrong with *Lochner* was Justice Holmes' claim in his celebrated dissent that courts should defer to the legislature's determination of the need for economic regulation, *Lochner* is still on life support. A lively academic debate continues to rage over the proper level of judicial deference to such a legislative judgment.[64] But the appropriate level of deference is the wrong question to ask. David Strauss asks the right one.[65] He points out that *Lochner* is irretrievably wrong because employment contracts between a strong employer and a weak would-be employee are hardly ever freely bargained, and do not deserve to be dignified as an exercise in consensual private ordering entitled to state-backed enforcement.[66]

When the post-*Lochner* smoke clears, therefore, the legislature is left with broad power to shore up the unequal bargaining position of weak market participants by mandating minimally fair contractual terms. As a matter of doctrine, however, the legislature's power to regulate unfairly bargained contracts continues to rest on the nineteenth-century police power rationale of preventing injury to health or harm to nonconsenting third parties. Questions about the substantive legitimacy of threatening state-imposed violence to enforce unfairly bargained contract terms remain unanswered.

C. The Brief Reign of Shelley v. Kraemer

Nor were those questions answered during the brief reign of *Shelley v. Kraemer*,[67] the only time in our nation's history that the Supreme Court has forbidden judicial enforcement of a private contract on constitutional grounds. In *Buchanan v. Warley*,[68] the Supreme Court invalidated a city ordinance that made it unlawful for any "colored person" to occupy a house on a block where a majority of the residents were white.[69] Fierce racist opposition to *Buchanan* ushered in the heyday of the racially restrictive covenant, a specialized form of real estate contract that "runs with the land" and forbids the current owner from selling or renting the premises to non-whites,

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"commerce" and "manufacture," *see* United States v. E.C. Knight Co., 156 U.S. 1, 14–15 (1895)) in favor of a functional reading that stresses the impact of the regulated activity — whatever it is called — on the flow of interstate commerce. *See* 301 U.S. at 29–43.

[63] *See* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937). *Lochner* was not formally put to rest until *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and then only in dictum by three Justices. *See* 505 U.S. 833, 861–62 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[64] For a monumental effort to disinter *Lochner*, see generally David Bernstein, *Rehabilitating* Lochner*: Defending Individual Rights Against Progressive Reform*, 125 HARV. L. REV. 1120 (2012); and RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014).

[65] *See* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373 (2003).

[66] *Id.* at 383–86.

[67] 334 U.S. 1 (1948).

[68] 245 U.S. 60 (1917).

[69] *Id.* at 82.

and, occasionally, to Catholics or Jews.[70] Judicial enforcement of racially restrictive covenants reinforced residential segregation for more than thirty years,[71] until the Supreme Court ruled in *Shelley v. Kraemer* that issuance of an injunction barring a willing white owner from selling to a black purchaser was "state action" denying equal protection of the laws in violation of the Fourteenth Amendment.[72] Since racially restrictive covenants were all too often consensual, *Shelley* did not consider the general question of whether the state may (or must) throw its weight behind the terms of an unfairly bargained contract of adhesion. Instead, Chief Justice Vinson protected putative black purchasers (viewed in contractual terms as nonconsenting third parties) by constitutionalizing the nonconsensual contract's judicial enforcement[73] — just as Justice Brennan would protect the First Amendment sixteen years later, in *New York Times Co. v. Sullivan*,[74] by constitutionalizing the judicial enforcement of libel law.[75]

In *Barrows v. Jackson*,[76] the Court extended *Shelley* (over Vinson's dissent)[77] to bar damage actions against sellers who sold to blacks in violation of a racially restrictive covenant, reasoning that the prospect of damages would deter an otherwise willing seller from selling to a black purchaser, thereby harming nonconsenting third parties.[78] When, however, a party who had voluntarily signed a racially restrictive covenant (this time for a burial plot in an all-white cemetery), sought damages against the proprietor for its refusal to allow the burial of her husband (an American Indian killed in the Korean War), the Supreme Court of Iowa denied relief, despite *Shelley* (and, implicitly, *Barrows*).[79] On appeal, the Supreme Court affirmed by an equally divided court,[80] with four Justices apparently troubled by the consen-

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[70] Restrictive real estate covenants have had a long history unconnected to racism as a form of private zoning and played a crucial role in the years before zoning laws were enacted. *See* Charles E. Clark, *The Doctrine of Privity of Estate in Connection with Real Covenants*, 32 YALE L. J. 123, 144 (1922).

[71] *See* Hansberry v. Lee, 311 U.S. 32 (1940) (describing the mechanics for imposing a judicially enforceable racially restrictive covenant running with the land).

[72] *See Shelley*, 334 U.S. at 20.

[73] *Id.* at 20 ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.").

[74] 376 U.S. 254 (1964).

[75] See id. at 265 ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press.").

[76] 346 U.S. 249 (1953).

[77] *See id.* at 262 (Vinson, C.J., dissenting) (arguing that volitional contracts should be enforced against their makers).

[78] *Id.* at 254 (majority opinion).

[79] *See* Rice v. Sioux City Mem'l Park Cemetery, Inc., 60 N.W.2d 110, 116 (Iowa 1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), *and on rehearing, cert. dismissed*, 349 U.S. 70, 80 (1955).

[80] Rice v. Sioux City Mem'l Park Cemetery Ass'n, 348 U.S. 880 (1954), *on rehearing, cert. dismissed*, 349 U.S. 70, 80 (1955).

sual nature of the racist bargain, and the lack of a living, nonconsenting, third-party victim.[81]

As the inability to reach a decision in *Rice* demonstrates, the *Shelley* Court, caught in a maelstrom of criticism over the decision to constitutionalize the enforcement of a racist contract,[82] never developed a coherent theory of why judicial enforcement of certain contracts triggers constitutional review, while judicial enforcement of most others, like the contracts in *Snepp* and *Cowles Media*, does not.[83] Mired in controversy and badly split, the Court was only too happy to end its troubled experiment with subjecting the enforcement of certain contracts to substantive constitutional review. In *Jones v. Alfred H. Mayer Co.*,[84] Justice Stewart found a way out, ruling that the Civil Rights Act of 1866,[85] enacted pursuant to the Thirteenth Amendment (which applies to private conduct), had outlawed racial discrimination in the making and enforcement of contracts, including contracts for the sale or rental of real property.[86] Since Congress had already enacted broad legislation banning race and gender discrimination in private employment and in access to places of public accommodations like hotels and restaurants,[87] *Alfred H. Mayer* allowed the Court to yield the entire discriminatory contractual arena to Congress.[88]

That is where the law stands today. After the fall of *Lochner* and the short reign of *Shelley*, Congress and state legislatures may single out private contractual relationships likely to reflect radical disparities in bargaining power, and impose "fairer" contractual terms as a matter of ad hoc legislation — a kind of legislatively conducted collective bargaining on behalf of weak bargainers and nonconsenting third parties. But even after *Shelley*, we

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[81] I confess to hypothesizing about the concerns of the four Justices in *Rice* who refused to apply *Shelley*.

[82] *See* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, (2007) (surveying substantial academic commentary and lower court cases on *Shelley*).

[83] *See supra* notes 37–38 and accompanying text.

[84] 392 U.S. 409 (1968).

[85] Pub. L. No. 39-26, 14 Stat. 27 (codified as amended in scattered sections of 42 U.S.C. (2012)).

[86] *Alfred H. Mayer*, 392 U.S. at 443–44.

[87] *See, e.g.*, Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a–2000a-6 (2012) (prohibiting discrimination based on, *inter alia*, race in places of public accommodation); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012) (prohibiting discrimination based on, *inter alia*, race and sex in most places of employment).

[88] *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 173 (1976) (holding that the right to contract with private school for admission without regard to race is protected by the Civil Rights Act of 1866); Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) (holding that defendants' expulsion of white shareholder of corporation chartered to operate community recreational park due to assignment of his membership share to a black lessee interfered with the right to "lease" under the Civil Rights Act of 1866); Heart of Atlanta Motel v. United States, 379 U.S. 241, 261–62 (1964) (upholding Title II of the Civil Rights Act of 1964 as a valid exercise of congressional power under the Commerce Clause); Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (same).

still have not grappled with the persistent question of why harsh contracts imposed on the weak by the strong should be enforced by the state at all.

D. The Enigma of "Unconscionable" Contracts

Given widespread disparities in bargaining power in many settings, automatically enforcing unfairly bargained contracts would enable the economically powerful to use contracts of adhesion as a vehicle to impose harsh terms against the economically weak.[89] Eighteenth-century British contract law, often enforced in the Court of Chancery, sought to mitigate the problem by occasionally declining to enforce unconscionably harsh contractual terms.[90] The rise of classical laissez-faire contract theory during the nineteenth century displaced judicial willingness to sit in judgment of the substantive fairness of contractual bargains, however, and reduced the contours of unconscionability to a refusal to enforce contracts made by incompetents, contracts induced by fraud, duress, or misrepresentation, or contracts that would impose unreasonable harm on the weak bargainer's health or morals or on nonconsenting third parties.[91] Reflecting the egalitarian spirit of the mid-twentieth century, the *Restatement (Second) of Contracts*, under the supervision of Karl Llewellyn, and the *Uniform Commercial Code* ("UCC"), prepared under the leadership of Robert Braucher, codified the unconscionability doctrine without providing clear guidance for its use.[92] Mid-twentieth-century courts sporadically expanded the idea of unconscionability, occasionally withholding judicial enforcement of harsh contractual terms, especially when the terms reflected grossly disproportionate bargaining power. The movement reached its apogee with Judge J. Skelley Wright's groundbreaking opinion in *Williams v. Walker-Thomas Furniture*,[93] which refused to enforce debt-acceleration clauses and predatory creditor remedies in contracts of adhesion for the purchase of household furniture by low-income consumers absent a searching review for substantive fairness.[94] While *Walker-Thomas* directly confronted the anomaly of permitting the strong to impose harsh contractual terms, and then using state power to enforce those terms in the guise of a consensual contract, critics of such an amorphous

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[89] This principle was recognized in the "Peonage Cases" for example, which declined, under the Thirteenth Amendment, to enforce criminal penalties against black laborers for breach of employment contracts. *See* United States v. Reynolds, 235 U.S. 133, 150 (1914); Bailey v. Alabama, 219 U.S. 219, 243–44 (1911). *See generally* Aziz Huq, Note, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351 (2001).

[90] For a useful survey of the historical development of the unconscionability doctrine, see Amy Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 76–82 (2006).

[91] *Id.*

[92] *See* Restatement (Second) of Contracts § 208 (1979); UCC § 2-302 (1989).

[93] 350 F.2d 445 (D.C. Cir. 1965).

[94] *Id.* at 450. The D.C. Circuit did not declare the contract unconscionable. But because the district court had failed to consider the unconscionability of the contract, the D.C. Circuit reversed and remanded for a determination of the contract's unconscionability. *Id.*

judicial warrant launched a ferocious counterattack, arguing that the uncertainty inherent in a post hoc unconscionability doctrine would erode the ability of contracts to set predictable expectations on which the free market depends.[95] While the criticism has rendered many judges unwilling to intervene to rewrite contracts of adhesion,[96] state courts continue to invoke the unconscionability doctrine sporadically to deny enforcement of unduly harsh contract terms, especially in settings where genuine bargaining and actual consent are absent.[97] Indeed, that is precisely how a few state courts have sought to deal with mandatory arbitration clauses.[98]

Unconscionability as a general solution to non-bargained contracts of adhesion is, however, besieged on two sides — on one by laissez-faire judges and legislators who oppose moving the doctrine away from its narrow, nineteenth-century roots; and on the other by conceptions of federalism that have rendered state courts' judgments of unconscionability vulnerable to federal preemption under the FAA.[99]

II. The Rise and (Prospective) Fall of *Lochner* Lite

A. The Rise of Lochner *Lite*

Under *West Coast Hotel*, the post-*Lochner* regulatory front door is wide open, allowing a paternalistic legislature to specify in advance the terms of many otherwise unfairly bargained contracts. *Shelley* and *Barrow* open a constitutional side door, allowing courts to constitutionalize judicial enforcement of particularly sensitive private contracts, especially when they unfairly affect nonconsenting third parties. And, after *Walker-Thomas Furniture*, the common law back door remains at least partially open, permitting the occasional paternalistic judge to refuse to enforce as "unconscionable" any harsh, one-sided term that never would have emerged from

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[95] An early and influential attack on the aggressive use of unconscionability to police the fairness of contracts after-the-fact came from Professor Arthur Allen Leff in *Unconscionability and the Code — The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967). *See also* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203, 1210–11 (2003); Alan Schwarz, *A Reexamination of Nonsubstantive Unconscionability*, 63 Va. L. Rev. 1053, 1082–83 (1977).

[96] *See* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Calif. L. Rev. 433, 504–05 (1993) (noting how the modern Supreme Court has implicitly relied on "arguments drawn with increasing frequency directly from a utilitarian, law and economics perspective" when refusing to police the substantive fairness of contracts).

[97] *See* Schmitz, *supra* note 90, at 91–94; M. Neil Browne & Lauren Biksacky, *Unconscionability and the Contingent Assumptions of Contract Theory*, 2013 Mich. St. L. Rev. 211, 249–52 (2013).

[98] 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, 803–07 (2004).

[99] For an excellent summary of the current status of the unconsionability doctrine, see generally Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 Geo. L. J. 1383 (2014).

real bargaining. Nevertheless, a giant loophole in the regulatory framework remains as a result of our reluctance to confront the disconnect between invoking consent to justify state enforcement of private contracts and judicial enforcement of contractual terms lacking even a shred of genuine consent. Until that loophole is closed, the strong will constantly be tempted to use imposed contracts as a way to exploit the weak.

The proliferation of judicially enforceable compulsory arbitration clauses across a vast spectrum of contracts of adhesion is a predictable result of our failure to close this loophole. Having lost the Supreme Court battle over *Lochner*, powerful entities now seek to minimize the impact of many post-*Lochner* legislative reforms by unilaterally shunting their enforcement to weak and defendant-friendly arbitral fora. Do not mistake me. I am not arguing that compulsory arbitration clauses have resurrected *Lochner*. At least so far, these clauses do not bar state enforcement of a weak bargainer's post-*Lochner* rights.[100] Moreover, where a neutral, low-cost arbitrator is vested with power to: (1) engage in reasonable discovery; (2) entertain aggregate claims by similarly situated complainants; and (3) issue meaningful compensatory relief, then arbitration — even compulsory arbitration — may strengthen post-*Lochner* rights by providing an effective and less costly enforcement option. I come to praise that version of arbitration, not to bury it.

Today, however, contractually selected arbitrators too often operate under imposed procedural constraints designed to insulate the economically powerful contracting party from the risk of significant liability at the hands of a genuinely neutral arbiter.[101] Contractually mandated arbitration takes place in a "repeat player" setting, where the arbitrators are likely to encounter the same economically powerful participants in numerous proceedings over time (and unlikely to see the economically weaker participant more than once). In such a setting, even the most dedicated arbitrator cannot help but be influenced — perhaps subconsciously — by the prospect of future employment by the repeat player.[102] Additionally, discovery in most arbitration proceedings is either nonexistent, or at least much weaker than judicial discovery.[103] Privately selected arbitrators rarely enjoy the power to grant

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[100] *See, e.g.*, EEOC v. Waffle House, Inc., 534 U.S. 279, 295–96 (2002) (finding EEOC enforcement proceeding not barred by individual arbitration agreement).

[101] For a description of the hand-tailored procedural constraints that render many arbitral fora too weak to pose a threat to the strong contracting party, see David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 460–65 (2011). *See also* David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 388 (2012); Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 8 (2010).

[102] *Cf.* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009) (holding that under the Due Process Clause, a probability of actual bias required a West Virginia Supreme Court Justice to recuse himself from a case involving a litigant who had previously contributed over $3 million to the Justice's election campaign).

[103] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

injunctive relief,[104] and may be stripped of the power to issue punitive damages.[105] Most importantly, many imposed arbitrators lack power to entertain aggregate claims, either because the imposed contract explicitly bars aggregate proceedings, or because silence is construed as failing to authorize it.[106] Finally, imposed arbitration often takes place in secret without even the sanction of public disclosure.[107] Instead of the *frisson* of terror generated by the prospect of vigorous judicial enforcement that gives law its deterrent bite, many defendant-designed, compulsory arbitral fora are hand-tailored to frighten no one — least of all an economically powerful contracting party — thereby diluting the deterrent force of many post-*Lochner* reforms. Welcome to the world of *Lochner* Lite.

B. The Emergence of the FAA as the Engine of Lochner *Lite*

It all started innocently enough in 1925 with Congress's understandable desire to make contractually mandated arbitration available to parties of relatively equal bargaining power.[108] Reacting to reports of judicial skepticism about enforcing arbitration clauses in fairly bargained commercial contracts,[109] Congress enacted the United States Arbitration Act of 1925,[110] better known as the Federal Arbitration Act or FAA.[111] For more than twenty-five years, the Supreme Court read the FAA cautiously. In *Bernhardt v. Polygraph Co.*,[112] for example, the Court held that the FAA had no effect on a state's power to regulate the arbitrability of state-created causes of ac-

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[104] *See* Kilgore v. Keybank, Nat'l Ass'n, 673 F.3d 947, 958 (9th Cir. 2012) (discussing the absence of prospective injunctive relief in arbitral settings), *rev'd in part*, 718 F.3d 1052 (9th Cir. 2013) (en banc).

[105] *See* cases cited *supra* note 9.

[106] *See* cases cited *supra* note 10.

[107] *See* Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX. INT'L L.J., 121, 122 (1995). In 2013, a divided Third Circuit panel invalidated Delaware's effort to license its judges to conduct secret arbitrations as a violation of the First Amendment's guarantee of public access to the courts. *See* Del. Coal. for Open Gov't v. Strine, 733 F.3d 510, 519 (3d Cir. 2013).

[108] *See* Thomas E. Carbonneau, *The Reception of Arbitration in United States*, 40 ME. L. REV. 263, 269 (1988) (noting that "the FAA was designed to make the procedure of arbitration available to *commercial parties and those who engaged in maritime transactions*" (emphasis added)).

[109] *See id.* at 266–69 (locating the origin of this judicial skepticism in English jurisprudence disfavoring arbitration, and noting Congress's "concern[ ] that the legal appraisal of arbitration was not in tune with commercial realities").

[110] Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

[111] Section 2 of the FAA provides in relevant part:

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

Id. § 2.

[112] 350 U.S. 198 (1956).

tion.[113] And in *Wilko v. Swan*,[114] the Court recognized that the effectiveness of certain federal statutory rights may depend on the availability of a judicial forum.[115] In a much-told story,[116] the Supreme Court changed course in 1983, when it announced a strong national policy favoring arbitration rather than litigation.[117] A year later, in *Southland Corp. v. Keating*,[118] the Court overruled *Bernhardt* sub silentio, holding that the FAA may preempt state laws limiting the arbitrability of even state-created causes of action.[119] Current law remains mired in confusion over whether state enforcement of an arbitration agreement should be understood as "procedural" or "substantive." The Supreme Court's recent insistence that compulsory arbitration is outcome-neutral — with no material effect on the underlying substantive rights involved[120] — suggests the former. Indeed, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,[121] the Court explicitly characterized the availability of aggregate litigation as procedural for the purposes of the Rules Enabling Act.[122] I could understand holding that rules governing the availability of both arbitration and aggregate litigation are substantive be-

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[113] *Id.* at 202–03 (holding that because diverting a claim to arbitration affects its legal strength, state law governs the arbitrability of a state-created cause of action in a diversity proceeding); *see also id.* at 205 (Frankfurter, J., concurring) (construing FAA narrowly to avoid questions of Congress's power to interfere with state causes of action).

[114] 346 U.S. 427 (1953).

[115] *Id.* at 437–38 (1953) (holding that the FAA could not be applied to an agreement to arbitrate claims arising under the Securities Act of 1933 because "the protective provisions of the . . . Act require the exercise of judicial direction to fairly assure their effectiveness").

[116] The story is told particularly well in Paul D. Carrington & Paul H. Hagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996). *See also* Radin, *supra* note 4, at 131.

[117] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 (1983) (interpreting, for the first time, Section 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state . . . policies to the contrary."). It is unclear where the Burger Court got the power to "declare" national policy on anything, much less a national policy in favor of shifting the enforcement of the rights of weak contracting parties to less favorable arbitral fora. Article III courts decide cases and controversies. They do not "declare national policy."

[118] 465 U.S. 1, 16 (1984).

[119] *Id.* at 16. *Southland* arose out of a dispute between the 7-Eleven Corporation and a group of its California franchisees who claimed that the franchisor had violated the disclosure provisions of the California Franchise Investment Act. *Id.* at 5. The standard franchise agreement contained a compulsory arbitration clause. *Id.* The California Supreme Court ruled that, as a matter of California law, claims arising under the California Franchise Investment Act were not subject to compulsory arbitration and ordered the case remanded to the trial court for possible class certification. *Id.* The Supreme Court reversed, construing the FAA to preempt California's decision to exempt claims under the California Franchise Investment Act from compulsory arbitration. *Id.* at 16. The Burger majority opinion neither cites *Bernhardt* nor seeks to distinguish it. Justice Thomas has consistently disputed the correctness of *Southland*. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting).

[120] Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (holding that the FAA requires enforcement of an arbitration clause barring aggregate arbitration even when the cost of pursuing an individual claim would be greater than the available recovery); AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (enforcing class action waiver).

[121] 130 S. Ct. 1431 (2010).

[122] *See id.* at 1437 (holding that in diversity cases, FED. R. CIV. P. 23 preempts the application of state law restricting the availability of aggregate litigation for certain state law claims).

cause each plays a major role in defining the degree of coercive power of the underlying substantive norm. I could also understand a holding (although I would disagree with it) that both types of rules are procedural because *neither* plays such a role. What I cannot understand is why rules governing compulsory arbitration — despite the Court's insistence that arbitration is outcome-neutral — are treated as substantive in *Southland* for the purposes of preemption, while the availability of aggregate litigation is treated as procedural in *Shady Grove* for the purposes of the Rules Enabling Act.

After eviscerating state efforts to regulate compulsory arbitration in *Southland*, the Court effectively reversed *Wilko* by ruling that the FAA presumptively governs the arbitrability of a federal statutory right unless (1) Congress explicitly says otherwise;[123] or (2) the terms of the particular arbitration agreement make it impossible to "effectively vindicate" the right.[124] The Court has construed the "effective vindication" standard so narrowly, however, that it has never found an arbitration clause that did not satisfy it, even in *Italian Colors* where the cost of mandatory individual arbitration of an antitrust claim was higher than any potential recovery.[125]

The Court then virtually eliminated two significant statutory exemptions in the FAA: (1) judicial retention of the power in Section 4 to decline to enforce the arbitration contract in question upon "such grounds as exist at law or in equity for the revocation of any contract"; and (2) the proviso in Section 3 that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Section 3 exemption of employment contracts of "workers engaged in foreign or interstate commerce" was read microscopically to cover only employees actually engaged in the trans-

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[123] *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668–73 (2012) (holding that where a federal statute is silent as to whether a nonwaivable claim may proceed in an arbitrable forum, the FAA requires enforcement of an agreement to arbitrate the claim).

[124] *See* Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628–40 (1985).

[125] *See, e.g.*, *CompuCredit*, 132 S. Ct. at 668–73 (holding that the FAA renders federal statutory rights arbitrable unless Congress provides otherwise); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273–74 (2009) (holding that claims arising under the Age Discrimination in Employment Act are arbitrable under the FAA); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (same); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–86 (1989) (formally overruling *Wilko* and holding that claims arising under the Securities Act of 1933 are arbitrable under the FAA); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 237–38 (1987) (holding that claims arising under the Securities Act of 1934 are arbitrable under the FAA). Prior to the deluge, several cases had held that claims arising under particular federal statutes were exempt from the FAA's mandates. *See, e.g.*, McDonald v. City of W. Branch, 466 U.S. 284, 292 (1984) (holding that claims arising under 42 U.S.C. § 1983 are not subject to the FAA); Barrentine v. Ark. Best Freight Sys., 450 U.S. 728, 745–46 (1981) (holding that claims arising under the Fair Labor Standards Act and National Labor Relations Act are not subject to the FAA); Alexander v. Gardner-Denver Co., 415 U.S. 36, 56–57 (1974) (holding that claims arising under Title VII are not subject to the FAA). Whether these remain good law after *CompuCredit* is anybody's guess.

portation of goods across state lines.[126] The judicial power to decline to enforce the contract in question "upon such grounds as exist in law or equity" was construed equally narrowly, conferring a power to void arbitration agreements only on those state law grounds applicable to contracts generally.[127]

Finally, in *AT&T Mobility v. Concepcion*,[128] and *American Express Co. v. Italian Colors Restaurant*,[129] the Court delivered a one-two punch to aggregate arbitration. In *Concepcion*, the Court ruled that the FAA preempts a state's refusal to enforce arbitration clauses that preclude economically weaker parties from joining claims for aggregate arbitration.[130] And in *Italian Colors*, the Court held that a contractual waiver of class actions or aggregate arbitration was enforceable under the FAA, notwithstanding the plaintiffs' showing that the pursuit of individual actions would be prohibitively expensive and effectively prevent them from enforcing their federal antitrust claims.[131]

C. Pathways to Ending Lochner *Lite*

1. Altering the Supreme Court's Expansive Reading of the Federal Arbitration Act.

Congress gave us the FAA; Congress could take it away, or at least supersede the Supreme Court's runaway reading of the statute. Unfortunately, efforts to enact a general reform of the FAA are, I fear, doomed to failure in a Congress where corporations and wealthy campaign supporters, who benefit enormously from *Lochner* Lite, can pour unlimited funds into influencing the outcome of elections. But that is another story.

The next most democratically preferable way to end *Lochner* Lite would be to persuade the Supreme Court to reconsider its post-1983 precedents misconstruing the FAA, especially *Southland*. For the foreseeable future, though, it is unlikely that the Court will change course. The same five Justices that gave us *Lochner* Lite have also decimated a host of judicial procedural rules, leaving a federal judicial system that many now fear tilts in

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[126] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001). The *Circuit City* Court justified its very narrow construction of Section 3 by linking it to the narrow vision of Congress's Commerce Clause power prevailing when the FAA was passed in 1925. *Id.* at 116–19. That did not stop the Court, however, from defining the scope of the FAA's coverage according to the modern, far more expansive understanding of the Commerce Clause power. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273–76 (1995).

[127] Doctors' Assoc. v. Cassorotto, 517 U.S. 681, 686–87 (1996) (holding that the FAA permits state courts to void arbitration clauses only on state law grounds that apply to contracts generally, and not to arbitration agreements specifically).

[128] 131 S. Ct. 1740 (2011).

[129] 133 S. Ct. 2304 (2013).

[130] *Concepcion*, 131 S. Ct. at 1753.

[131] *Italian Colors*, 133 S. Ct. at 2315.

favor of powerful defendants.[132] It is unlikely that those Justices will begin to dismantle *Lochner* Lite on their own.

2. Administrative Correction.

The Consumer Financial Protection Bureau ("CFPB" or "Bureau"), established in 2010 under the Dodd-Frank Act, is empowered by Congress to issue regulations governing arbitration in the consumer finance area.[133] Given the poisonous political climate in Washington, the Bureau is proceeding very cautiously, having conducted a general investigation and issued a useful preliminary report highly critical of a number of arbitration abuses.[134] Before the CFPB can issue formal regulations, it must issue a formal report to Congress on the subject, which will, when eventually released, set off yet another round of furious legislative debate and lobbying efforts designed to preserve as much of *Lochner* Lite as possible. Moreover, whatever the CFPB manages to thread through the eye of the political needle will deal solely with consumer finance transactions, cannot have retrospective effect, and must delay its effective date for 180 days, during which the strong will remain free to impose an avalanche of fully enforceable mandatory arbitration clauses on their weaker partners.[135] So, while working on legislative, interpretive, or administrative antidotes is certainly worth the effort, none is likely to eliminate *Lochner* Lite in the foreseeable future. That leaves the Constitution.[136]

3. Associating Our Way Out of Lochner *Lite.*

I believe that the First Amendment's protection of freedom of association provides a path to ending the worst of *Lochner* Lite. In crafting a First Amendment argument, I draw initially on two well-established bodies of constitutional law dealing not with statutorily compelled judicial enforce-

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[132] The defendant-friendly cases, dealing with federal rules governing pleading, class actions, in personam jurisdiction, and qualified immunity are summarized and powerfully critiqued in Arthur R. Miller, *Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286 (2013); and Arthur R. Miller, *From* Conley*, to* Twombly*, to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2010).

[133] The Supreme Court recognized in *Italian Colors* that CFPB regulations, as the latest federal word, can override its preemption rulings concerning mandatory arbitration in contracts governed by CFPB. *See* 133 S. Ct. at 2309.

[134] *See generally* Consumer Fin. Prot. Bureau, Arbitration Study: Preliminary Results (2013), *available at* http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf, *archived at* http://perma.cc/D2QS-873X.

[135] The statutory framework governing the CFPB is set forth at Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955–2113 (2010).

[136] While I focus on First Amendment freedom of association, it is possible to argue that a federal statute requiring unwilling judges to enforce mandatory arbitration clauses deemed unconscionable under local law violates the Seventh Amendment right to a jury trial, as well as a general due process right of access to the courts. *See supra* note 15.

ment of nonconsensual contractual waivers, but with nonconsensual waivers extracted by the government itself: (1) the unconstitutional conditions doctrine;[137] and (2) the constitutional waiver cases.[138] I read the modern unconstitutional conditions cases beginning with *Speiser v. Randall* as turning on the fictive nature of the so-called "consensual bargain" that is struck when a desperately needed government benefit is conditioned on the waiver of a constitutional right. When the Court deems the "bargain" between the individual and the state to be nonconsensual, it correctly treats the coerced waiver as though it were a prohibition on the exercise of the right. I would treat statutorily compelled judicial enforcement of contractual terms that purport to waive a constitutional right — the First Amendment right to freedom of association — in the same way.

Similarly, the Supreme Court has repeatedly recognized that while volitional waivers of constitutional rights are permissible, extracted or nonconsensual waivers are not. I would require similar volitional consent before placing the weight of the state behind an imposed contractual waiver of a constitutional right. In short, where a dominant contracting party conditions a transaction of significant importance to the weaker party on a nonconsensual promise to forgo otherwise available methods of associating with others during dispute resolution,[139] and where such an unfairly extracted promise is deemed unenforceable under state contract law, I believe that a federal statute (like the FAA) compelling an otherwise unwilling judge to enforce that promise constitutes "state action" abridging the First Amendment right to associate freely with others in the pursuit of justice.

Such an effort to constitutionalize an aspect of contractual enforcement must clear three hurdles. First, I must demonstrate that the coercive power of a federal statute like the FAA, combined with the coercive power of judicial enforcement of imposed contractual clauses deemed unconscionable under local law, constitutes "state action" triggering constitutional review. Second, I must show that the First Amendment protects the speech of litigants and lawyers during state-mandated dispute resolution processes. Finally, I must persuade you that the ability of otherwise eligible parties to invoke generally available associational techniques to join with others dur-

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[137] *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 540–49 (2001) (holding that the government may not condition subsidies for legal aid attorneys on refraining from challenging existing welfare laws); FCC v. League of Women Voters of Cal., 468 U.S. 364, 374–81 (1984) (holding that the government may not condition public broadcasting grants on refraining from editorializing); Speiser v. Randall, 357 U.S. 513, 518–20 (1958) (holding that the government may not condition a property tax exemption for veterans on swearing an oath of loyalty).

[138] *See* Garrity v. New Jersey, 385 U.S. 493 (1967) (declining to treat public employment in law enforcement as an imputed waiver of Fifth Amendment rights); Miranda v. Arizona, 384 U.S. 436, 444–91 (1966) (requiring explicit warning before imputing waiver of Fifth Amendment rights); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (declining to recognize waiver of the right to counsel).

[139] Note how close such an extracted promise is to the imposed promises to forego labor union activity in *Adair* and *Coppage*.

ing dispute resolution falls within the First Amendment's guarantee of freedom of association. My argument is a narrow one. I am not arguing that it is impossible to waive associational rights in a fairly bargained commercial contract. Nor am I arguing that contracts of adhesion can never be enforced. Finally, I am not arguing that an affirmative duty exists to make it easy to associate in the context of dispute resolution. Rather, my argument is confined to settings like *Concepcion* where: (1) the contractual waiver of the right to associate has already been found to be unconscionable under state law governing the contract; and (2) but for the unfairly extracted waiver, the aggrieved party would be eligible to invoke generally available methods of association.

In short, when the federal government deploys the threat of violence to require unwilling judges to enforce an imposed promise deemed nonconsensual under state law, it ceases to protect legitimate private ordering and begins instead to the reinforce a unilateral power imbalance. That is the point at which the First Amendment should step in.

(a) State action is unquestionably present when the FAA trumps a state finding of unconscionability premised on unequal bargaining power.

The traditional objection to a constitutional challenge to judicial enforcement of a contract is rooted in a narrow conception of the "state action" doctrine. Where, as in *United States v. Snepp*, a judge enforces a contractual promise against a consenting party, state action is generally deemed absent (or waived) because the government is merely enabling consensual private ordering. But, as the dictum in Justice Brown's opinion for the Court in *Holden v. Hardy*[140] has made clear for more than a century, the "private ordering" argument rings hollow when it is applied to contractual terms where no meaningful consent is present, either because of cognitive failure,[141] or a radical disparity in bargaining power.[142] In those settings, the decision to throw the weight of the state behind a nonconsensual contract term cannot be seen as anything but classic state action — and no different from enacting a statute.

Some defenders of *Lochner* Lite argue that imposed mandatory arbitration clauses waiving aggregate arbitration should be treated as consensual (and thus within the private ordering sphere) by insisting that weak bargainers would willingly trade the freedom to associate in resolving future possible contractual disputes for the lower prices or higher wages that the harsh

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[140] Holden v. Hardy, 169 U.S. 366, 397–98 (1898).

[141] *See* Eisenberg, *The Limits of Cognition*, *supra* note 20.

[142] *See* Eisenberg, *The Bargain Principle*, *supra* note 20. *See also* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393–94 (1937).

contractual terms allegedly make possible.[143] Such an argument for imputed consent is, of course, simply a rerun of the Lochnerian insistence that in the long run everyone, including the weak, benefit by being forced to accept economically efficient harsh contract terms. Under such a tough love conception of imputed consent, every form of legal protection from minimum wage to freedom of speech may be erased pursuant to a fictive ex ante waiver premised on alleged utilitarian gains. Imputing consent to an efficiency-based waiver of First Amendment associational rights works no better than imputing consent to a waiver of Fourth Amendment protections in high-crime neighborhoods because the residents allegedly would be safer without them.

Moreover, weak bargainers operating ex ante cannot accurately measure the value of the associational rights they would be imputably consenting to waive. Confronted with terms waiving associational rights in case of a future problem that may never arise, everything we know about behavioral economics tells us that a weak bargainer will fail to "price" the cost of waiving those rights accurately. That is why too many young people don't contribute to 401(k) plans, or buy health insurance.[144] In the end, therefore, trying to label imposed contractual waivers of associational rights as consensual is no more successful than seeking to treat a government-imposed "unconstitutional condition," or other non-volitional waivers of constitutional rights, as a genuinely consensual.

One could argue, therefore, that every judicial enforcement of a nonconsensual contractual term is a form of state action triggering substantive constitutional review of the term at issue. Given *Shelley*, such a broad state action argument, effectively constitutionalizing the law of unconscionability, is not implausible. But I need not go so far. For the purposes of this Article, I will assume that the legal system's century-long failure to confront the disconnect between a consent-based justification for enforcing contracts and the striking absence of consent in many contracts of adhesion renders it quixotic to argue that all nonconsensual contracts are subject to constitutional review. It would take a truly great judge like J. Skelley Wright to develop such an argument, and these days, such judges are in very short supply. My state action argument is much narrower. I argue that when, as in *Concepcion*, a state judge or a state legislature has found that certain contractual provisions (for example, consenting to work long hours for very low wages; or, agreeing to be employed on racially discriminatory terms; or, promising to waive your right to associate with others in pursuing justice) are unconscionable because they are virtually never the result of consensual

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[143] Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract,* 58 EMORY L. J. 1401, 1405–09 (2012).

[144] For a summary of the groundbreaking work of Amos Tversky and Daniel Kahneman interrogating the assumptions of rational choice that underlie much of law and economics, see Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003).

bargaining, the fig leaf of legitimate private ordering falls away, exposing federally compelled enforcement as a naked exercise of state action.[145]

Suppose, for example, that in *Shelley* and *Barrows* the courts of Illinois and California had refused under state unconscionability law to enforce racially restrictive covenants against nonconsenting third parties, only to be confronted with a federal statute requiring judicial enforcement of all real covenants running with the land.[146] Would there be a moment's hesitation in characterizing both the federal statute and the ensuing judicial orders as classic exercises of state action for the purposes of constitutional review? That is precisely what happened in *Concepcion*. California courts had found, as a matter of California contract law, that nonconsensual waivers of aggregate dispute resolution were unconscionable because they almost never arise from consensual bargaining.[147] The Supreme Court, following *Southland*, then read the FAA as mandating the enforcement of arbitration clauses deemed nonconsensual under state law.[148] From the standpoint of state action, a federal statute that forces an unwilling state judge to compel an extremely weak bargainer to carry out a nonconsensual waiver of her associational rights is no different than a federal statute directly prohibiting the weak bargainer from exercising her associational rights in the first place. Since state action so clearly exists, the important and thus far unspoken constitutional question raised by cases like *Concepcion* and *Italian Colors* is whether a federal statutory ban on engaging in aggregate litigation or arbitration would pass First Amendment muster.

(b) Does the First Amendment play any role in the dispute resolution process?

The first question is whether the First Amendment applies to speech occurring during a dispute resolution proceeding. There is, after all, no more intensely regulated activity than the speech that takes place during a state-

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[145] It seems impossible to me to characterize the FAA as a federal legislative finding that compelled arbitration clauses are, in fact, consensual. The statute mandates their enforcement, whether or not they are consensual. If anything, the Supreme Court's approach to consent as a concept in the FAA cases borders on incoherence. On the one hand, the Court denies the power of an arbitrator to engage in aggregate litigation in the absence of consent from the stronger party; on the other hand, it steadfastly refuses to recognize that the weaker party never consented to arbitration in the first place. *Compare* Stolt-Nielsen S.A. v. AnimalFeeds, Int'l Corp., 559 U.S. 662, 681–85 (2010) (refusing to allow nonconsensual aggregate arbitration), *with* AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) (refusing to defer to state court finding that mandatory arbitration clause was not consented to by the weaker party).

[146] For the purposes of the hypothetical, I am assuming Congress's power to enact such legislation.

[147] California's judicial finding of unconscionability is set forth in *Discover Bank v. Sup. Ct.*, 113 P.3d 1100, 1108 (Cal. 2005) (holding that compulsory class action waivers may be both procedurally unconscionable, due to the "'oppression' or 'surprise'" inherent in the parties' "unequal bargaining power" (quoting A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486 (Cal. Ct. App. 1982)), and substantively unconscionable, "inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy").

[148] *Concepcion*, 131 S. Ct. at 1750–52.

sanctioned dispute resolution proceeding. Whether the formal proceeding takes place in court or in an arbitral forum, parties and attorneys speak only when permitted to do so by the presiding officer, and then in ritualistic ways governed by procedural rules. The lawyers follow a comprehensive script dictating what they may say, when they may say it, and for how long they may speak or write. To call their speech government-regulated is an understatement. And yet, the Supreme Court has ruled conclusively that the First Amendment applies in the courtroom and, presumably, in a state-imposed arbitral tribunal.[149]

In *Legal Services Corporation v. Velazquez*,[150] the Court struck down a federal regulation purporting to forbid federally funded legal aid attorneys from challenging the constitutionality of certain statutes on behalf of their indigent clients.[151] Citing *Rust v. Sullivan*,[152] which had upheld the constitutionality of prohibiting doctors delivering federally funded prenatal care to indigent women from discussing abortion,[153] the Legal Services Corporation ("LSC") argued that since the government was paying for the Legal Services lawyer, it could exercise a degree of control over her speech in the courtroom.[154] Distinguishing *Rust*, where the government was merely employing a subsidized doctor to convey the government's own message,[155] Justice Kennedy insisted that a lawyer always speaks for her client, and not on behalf of the government, no matter who is paying the bills.[156] He then characterized the courtroom as a specialized free market of ideas in which the adjudicator depends on a constitutionally protected flow of information, ideas, and argument in order to reach the best possible result.[157] He concluded that a government restriction on the content of an attorney's courtroom speech — even when that attorney is funded by the government — "threatens severe impairment of the judicial function."[158] After *Velazquez*, therefore, it is impossible to argue that the First Amendment is inapplicable to speech occurring during state-mandated dispute resolution proceedings.

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[149] Given the underlying purpose of freedom of association as an aid to collective action in support of common goals, and its repeated application to courts, the First Amendment right to associate must exist, as well, in a state-imposed arbitral forum.

[150] 531 U.S. 533 (2001).

[151] *Id.* at 549. As a matter of full disclosure, I argued *Velazquez* in the Supreme Court, and was principal counsel for the plaintiffs in the *Velazquez/Dobbins* litigation described herein.

[152] 500 U.S. 173 (1991).

[153] *Id.* at 203.

[154] *Velazquez*, 531 U.S. at 540.

[155] *Rust*, 500 U.S. at 193–99.

[156] *See Velazquez*, 531 U.S. at 541–43; *id.* at 542 ("The LSC lawyer . . . speaks on behalf of her private, indigent client.").

[157] *See generally id*. at 544–49.

[158] *Id.* at 546.

(c) Freedom of Association During the Dispute Resolution Process.

The final hurdle is whether the First Amendment protects the ability of aggrieved persons to associate with others in pursuing justice. Although that important legal issue remains unanswered, courts in the Second Circuit noted during the course of the *Velazquez* litigation that federal statutes and regulations flatly banning Legal Services lawyers from participating in class actions posed serious First Amendment issues.[159] The *Velazquez* litigation arose out of a series of congressional restrictions on the activities of federally funded Legal Services lawyers.[160] In addition to barring Legal Services lawyers from raising certain constitutional arguments in court, the Legal Services Corporation, in deference to the apparently absolute ban imposed by the statute, issued an initial set of regulations flatly banning Legal Services lawyers from participating in class actions or seeking to notify prospective clients of their right to seek redress in the courts, even when the forbidden representational activities were privately funded.

The first wave of challenges to the Legal Services regulations argued that under *FCC v. League of Women Voters*,[161] a flat ban on a Legal Services lawyer's ability to raise constitutional issues in court, or to participate in class action litigation, even when the forbidden activities were funded by state or private resources, violated the indigent clients' First Amendment associational rights. After the U.S. District Court for the District of Hawaii had invalidated portions of the flat ban regulation under *League of Women Voters*,[162] and the U.S. District Court for the Eastern District of New York had expressed serious concern over the flat ban,[163] the Legal Services Corpo-

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[159] *See infra* notes 167–168. For an early and courageous effort by a New York state judge to invalidate the class action restrictions on Legal Services lawyers on First Amendment grounds, see *Varshavsky v. Geller*, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996), reprinted in N.Y.L.J., Dec. 31, 1996, slip op. at 22.

[160] The congressional restrictions on the activities of federally funded Legal Services lawyers that precipitated the *Velazquez* litigation were enacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, and reenacted annually in all ensuing LSC appropriations, rendering them almost impervious to anything but a line-item presidential veto. The provisions are infelicitously cited as OCRAA. The OCRAA restrictions are implemented by regulations issued by the presidentially appointed Legal Services Corporation. The restriction on raising constitutional challenges (OCRAA § 504(a)(16)) was the provision struck down by the Supreme Court in *Velazquez.* The ban on participating in class actions is codified at OCRAA § 504(a)(7).

[161] 468 U.S. 364, 402 (1984).

[162] *See* Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402, 1419 (D. Haw. 1997). The Hawaii district court upheld the ban on invoking Rule 23, while expressing concern over constitutionalizing Rule 23 without appellate guidance. *Id.* at 1410–11. Unfortunately, the district judge apparently misunderstood the nature of plaintiffs' associational claim, which, as here, argued merely that otherwise eligible individuals were entitled to invoke existing associational techniques for which they qualified. The challengers did not argue that the state is affirmatively obliged to create the mechanisms in the first place. I carefully explained the limited nature of the association claim to the various judges in *Velazquez.*

[163] Mot. Prelim. Inj. at 68, Velazquez v. Legal Servs. Corp., 985 F. Supp. 323 (E.D.N.Y. Mar. 27, 1997) (No. 97 CV 182 (FB)); *see also* Velazquez v. Legal Servs. Corp. (*Velazquez I*), 985 F. Supp. 323, 343–44 (E.D.N.Y. 1997).

ration issued modified regulations permitting Legal Services lawyers to participate in class actions as long as they were administered and funded through a separate, nonfederal affiliate.[164] The U.S. District Court for the Eastern District of New York then upheld the modified regulations in *Velazquez I* as providing the lawyers with adequate room to exercise their clients' First Amendment rights.[165] The Second Circuit affirmed in part in *Velazquez II*, holding that the requirement of a separate affiliate to administer class action litigation was valid, unless it could be shown to impose an "undue burden" on the clients' First Amendment right to associate.[166] But the Second Circuit reversed the District Court's ruling concerning the First Amendment right to raise constitutional arguments, deeming it unconstitutionally content-based.[167]

After the Supreme Court's decision in *Velazquez III* invalidating the ban on raising certain constitutional arguments in court, the parties returned to district court to pursue an "as-applied" challenge to the requirement of separate affiliates administering non-federally funded class actions, arguing that the requirement that First Amendment activities be administered through a separate, non-federally funded affiliate posed an "undue burden" on the First Amendment right to associate. The district court agreed in *Velazquez IV*, and invalidated the application of LSC's separate affiliate regulation.[168] The Second Circuit reversed once again, rejecting the district court's "undue burden" balancing test, in favor of a more stringent "adequate alternative" test requiring a showing that the requirement of a non-federally funded separate affiliate operated as a virtual ban on pursuing First Amendment activity.[169] At that point, the parties collapsed into an exhausted truce under which many Legal Services programs now operate dual affiliates in order to use state and private funds to engage in First Amendment activities, such as participation in class actions, that cannot be funded federally.

Thus, while there was substantial disagreement during the *Velazquez* litigation over the feasibility of using unduly expensive separate affiliates to

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[164] *See* 45 C.F.R. § 1610.8 (1997) (the "program integrity" regulations).

[165] *Velazquez I*, 985 F. Supp. at 344; *see also* Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 981 F. Supp. 1288, 1301 (D. Haw. 1997) (vacating injunction in light of the Legal Services Corporation's withdrawal of the flat ban).

[166] Velazquez v. Legal Servs. Corp. (*Velazquez II*), 164 F.3d 757, 766–67 (2d Cir. 1999); *see also* Legal Aid Soc'y of Haw. v. Haw. Legal Servs. Corp., 145 F.3d 1017, 1024–29 (9th Cir. 1989) (upholding amended regulation as providing adequate space to engage in First Amendment activity).

[167] *Velazquez II*, 164 F.3d at 773. The Supreme Court affirmed that aspect of the Second Circuit's ruling in *Velazquez III*. Legal Servs. Corp. v. Velazquez (*Velazquez III*), 531 U.S. 533, 549 (2001).

[168] Dobbins v. Legal Servs. Corp., 349 F. Supp. 2d 566, 610 (E.D.N.Y. 2004) (invalidating the Legal Services Corporation's requirement of separate affiliates under the "undue burden" standard, and noting the importance of participation in class actions).

[169] Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 230–31 (2d Cir. 2006), *cert. denied*, 552 U.S. 810 (2006) (finding that the Corporation's regulation authorizing First Amendment activity only by a separate legal entity was sufficiently protective of constitutional rights).

administer non-federally funded First Amendment activities, the extensive *Velazquez/Dobbins* litigation supports the proposition that a congressional ban on invoking otherwise available aggregate litigation techniques would pose a serious First Amendment issue. The issue was not formally decided only because the LSC withdrew the flat ban. I believe, therefore, that when generally available procedural vehicles exist to foster association during the search for justice, such as Rule 18 (permissive joinder),[170] Rule 23 (class actions),[171] and widely utilized, aggregate arbitral practices codified in the bylaws of the two major arbitration providers,[172] the government may not forbid an otherwise eligible party from invoking the preexisting associational mechanisms, either directly through statutory prohibition, or indirectly through compelled judicial enforcement of an unconscionable contract.

The recognition in the *Velazquez/Dobbins* cases that litigants have a First Amendment interest in invoking generally available forms of association during the search for justice harmonizes well with the Supreme Court's protection of First Amendment freedom of association generally. First Amendment freedom of association made its formal debut in 1958 in Justice Harlan's opinion for a unanimous Court in *NAACP v. Alabama*[173] shielding the membership lists of the NAACP from hostile state scrutiny.[174] In the half century since *NAACP v. Alabama*, freedom of association has exploded into First Amendment prominence, profoundly influencing contemporary democracy by regulating the operation and structure of political parties and the administration of the nominating process;[175] shaping the contours of collec-

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[170] FED. R. CIV. P. 18.

[171] FED. R. CIV. P. 23.

[172] *See, e.g.*, *AAA court- and time-tested rules and procedures*, AM. ARBITRATION ASS'N, *available at* https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mdew/~edisp/adrstg_010623.pdf, *archived at* http://perma.cc/KL5M-XZGW; *JAMS Class Action Procedures*, JAMS, *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf, *archived at* http://perma.cc/43UN-JTYK. The suggestion that aggregate arbitration would destroy the essence of an arbitral forum flies in the face of the long history of successful aggregate arbitrations, especially in the labor area. *See* William Gould IV, *Kissing Cousins? The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 620 (2006); *see also* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 439–78 (2008). The assertion that aggregate arbitration would destroy the essence of arbitration would come as a shock to the American Arbitration Association and JAMS, the nation's leading providers of arbitrators, both of which have promulgated rules for aggregate arbitration.

[173] 357 U.S. 449, 451–67 (1958).

[174] *Id.* at 466. The Court's refusal to permit hostile state officials to gain access to the NAACP's membership lists is chronicled in a number of other cases. *See, e.g.*, Bates v. Little Rock, 361 U.S. 516, 527 (1960); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 297 (1961); Gibson v. Fla. Legislative Investigating Comm., 372 U.S. 539, 558 (1963). *See also* Doe v. Reed, 561 U.S. 186, 202 (2010) (upholding disclosure of petition signatures in absence of showing of likely retaliation); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101–02 (1982) (granting exemption from disclosure of campaign contribution to Socialist Workers Party on showing of likely retaliation); Shelton v. Tucker, 364 U.S. 479, 490 (1960) (striking down requirement that public school teachers reveal all organizational associations).

[175] The Supreme Court has decided many cases dealing with the intersection of freedom of association and the democratic process. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S.

tive action in support of an idea;[176] and defining the borders of social interaction.[177]

Most importantly for the purposes of this Article, the Supreme Court has recognized that collective resort to courts (and, presumably, to arbitral fora) in an effort to seek justice is a form of associational activity fully protected by the First Amendment. In *NAACP v. Button*,[178] the Court struck down limits on seeking lawyers and clients to engage in constitutional litigation supported by the NAACP, noting that "association for litigation may be the most effective form of political organization."[179] Similarly, in In re *Primus*,[180] the Court struck down a ban on ACLU solicitation of clients to challenge sterilization practices, noting that *Button* stands for the proposition

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567, 575–82 (2000) (recognizing political parties' First Amendment associational right to limit nonmember participation in their nomination processes); Eu v. S.F. Cnty. Democratic Central Comm., 489 U.S. 214, 222–25 (1989) (holding that a political party has First Amendment associational right to endorse candidates in a primary); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214–17 (1986) (holding that a political party has a First Amendment associational right to invite independents to vote in its primary); Anderson v. Celebrezze, 460 U.S. 780, 793–806 (1982) (finding early filing deadline violates First Amendment associational rights of independent candidate and voters); Elrod v. Burns, 427 U.S. 347, 355–60 (1976) (holding that dismissal of public employees on political grounds violates First Amendment associational and speech rights); Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (invalidating twenty-three month waiting period to vote in primary as violation of freedom of association); Williams v. Rhodes, 393 U.S. 23, 30–34 (1968) (holding that third parties have a First Amendment associational right to appear on a ballot). *But see* Clingman v. Beaver, 544 U.S. 581, 584 (2005) (holding that a state may bar political party members from participating in other parties' primaries); Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (holding state may prohibit candidates from appearing on the ballot for more than one party).

[176] *See, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2995 (2010) (upholding a university rule requiring student access to all recognized student organizations); Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010) (upholding criminal prohibition on the provision of "material assistance" to groups designated as foreign terrorist organizations, but reaffirming the right to associate with domestic organizations); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 574–75 (1995) (upholding restriction excluding LGB-related organization from marching in a privately sponsored St. Patrick's Day Parade because their coerced presence would violate the sponsor's First Amendment right of freedom of association); Healy v. James, 408 U.S. 169, 181 (1972) (recognizing right of students to form political clubs); Keyishian v. Board of Regents, 385 U.S. 589, 603–04 (1967) (invalidating loyalty oaths for teachers as a violation of associational freedom); Elfbrand v. Russell, 384 U.S. 11, 18 (1966) (invalidating broad loyalty oaths as a violation of associational freedom).

[177] Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000) (upholding associational right of Boy Scouts to exclude gay scoutmasters from their membership); Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (denying the associational right of an adult to dance with a teenager in a licensed public facility selling alcohol); N.Y. State Club Ass'n v. City of N.Y., 487 U.S. 1, 628–29 (1988) (upholding state nondiscrimination law applied to private clubs with more than 400 members that serve meals and charge nonmembers for services); Bd. of Dirs. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 549 (1987) (upholding state law prohibiting sex discrimination in places of public accommodation); Roberts v. U.S. Jaycees, 468 U.S. 609, 628–29 (1984) (same); Moore v. City of E. Cleveland, 431 U.S. 494, 502–06 (1977) (invoking substantive due process to protect the associational right of related persons to live together as an extended family).

[178] 371 U.S. 415 (1963).

[179] *Id.* at 431.

[180] 436 U.S. 412 (1978).

that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[181] In *Brotherhood of Railroad Trainmen v. Virginia*,[182] *United Mine Workers v. Illinois State Bar Association*,[183] and *United Transportation Union v. State Bar of Michigan*,[184] the Court explicitly recognized a fundamental First Amendment associational right to engage in aggregate activities in connection with non-constitutional litigation. Indeed, the Court's quote in *Primus* was lifted from *United Transportation Union*, upholding the right of aggrieved employees to engage in aggregate litigation activities designed to advance their common interests in enforcing the law vigorously.[185]

When you put the cases recognizing that the First Amendment applies to the dispute resolution process together with the presence of state action in connection with the compelled enforcement of promises found to have been extracted without consent, the result should be the constitutionally mandated refusal to enforce imposed contracts involuntarily waiving First Amendment-protected associational activity during the dispute resolution process.

Conclusion

As a practical matter, I believe that the future of *Lochner* Lite depends on a continued ability to ban aggregate arbitration. As Justice Scalia candidly noted in *Concepcion*, the last thing dominant bargainers want is a powerful arbitrator with the discretionary ability to award substantial sums on an aggregate basis.[186] Once the stakes become high enough, I predict that the powerful will opt for the security and predictability of the rule of law, putting an end to the regime of *Lochner* Lite. Even if they do not, aggregate arbitration will provide a meaningful enforcement forum. If we go down that route, however, we simply must find a better way to finance aggregate arbitration. But that is the next piece of the puzzle.

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[181] *Id.* at 426 (quoting United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971)).

[182] 377 U.S. 1, 8 (1964) (invalidating injunction forbidding union from recommending its preferred attorneys to injured workers or their families).

[183] 389 U.S. 217, 222–25 (1967) (upholding use of salaried, union-selected lawyer to provide legal representation to union members).

[184] 401 U.S. 576, 584–86 (1971) (upholding union-sponsored group legal plan).

[185] *Id.* at 585.

[186] AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1752–53 (2011) (noting that powerful entities will not risk the use of arbitration if the stakes are especially high).