THE ARBITRATION DEBATE: A TALE OF TWO CONTRACT CITIES[1]

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[1] The title refers to *A Tale of Two Cities* by Charles Dickens (1859).

* Sapir College School of Law. I thank for their helpful comments: Shelly Kreiczer-Levy, Shahar Lifshitz, Florencia Marotta-Wurgler, Tamar Meshel and James Ernest Penner. I also thank the participants of the 13th Annual Conference of the Israeli Private Law Association, Bar-Ilan University; the 16th Annual International Conference on Contracts, Texas A&M University School of Law, Fort Worth, Texas; and the Private Law Research Group, National University of Singapore.

I. INTRODUCTION

Arbitration is a hotly debated issue. Some scholars, who support arbitration, point to its advantages and conclude that it offers a speedy, efficient, and cheap dispute resolution forum, preferable to court proceedings. Other scholars, critical of arbitration, point to its disadvantages in the employment or consumer context and to the misuse of arbitration by big corporations, concluding that in such cases employees and consumers are better protected by litigation. Thus, the "arbitration debate" centers on the difference between the two dispute resolution institutions and on the scope of the Federal Arbitration Act (FAA).[2] This "arbitration debate" is present not only in the literature, but also in Supreme Court decisions which are the subject of this Article. The Article suggests that the "arbitration debate" also represents a controversy between different visions of contract. Analyzing Supreme Court decisions, it reveals not only different interpretations and applications of the FAA, but many profoundly different perspectives on contract and contract law. That is, the "arbitration debate" is to a large extent a contract debate.

This Article makes three contributions. First, it adds a contract perspective to the arbitration literature, shifting the focus of the arbitration literature from the FAA to contract law. As such, it is a reminder that arbitration agreements are first and foremost contracts governed by contract law. Rather than a statutory interpretation of the FAA,[3] this Article examines it through a contract law prism. Also, it challenges the conventional wisdom that the Supreme Court is pro-arbitration by examining the dissenting opinions that express not only a critical view of arbitration but also a different perspective on contract law. Second, it adds a different locus to the pluralist theory of contract law. Thus far, pluralist theory literature mainly focused on theoretical perspectives and on their application to contract law doctrines. This Article views Supreme Court decisions as an additional site for a pluralist vision of contract law. Third, it adds to the literature on majority and dissenting opinions in Supreme Court cases. It shows that the difference of opinions between the two is profound and rooted in disparate worldviews about society,

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[2] Tamar Meshel, *The Judicial Grassroots of the "Arbitration Revolution"*, 15 WM. & MARY BUS. L. REV. 245 (2024).

[3] *See generally* Kristen M. Blankley, *Standing on Its Own Shoulders: The Supreme Court's Statutory Interpretation of the Federal Arbitration Act*, 55 AKRON L. REV. 101 (2021); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789 (2002).

human relations, and the market. In other words, the majority and the dissent hold different views on what constitutes a contract, its functions, and limits.

This Article proceeds as follows: Part I gives a short review of the "arbitration debate," both in the literature and in Supreme Court decisions, presenting the views of those who support as well as those critical of arbitration. Part II analyzes several recent Supreme Court decisions on arbitration and concludes that the debate reflected in these decisions is not only about the FAA but more profoundly about different visions of contract and contract law. Part III draws conclusions from this analysis regarding three subjects: arbitration, pluralist theory of contract law, and dissenting opinions.

II. THE ARBITRATION DEBATE: THE CONTROVERSY

Arbitration is a hotly debated topic, hence the "arbitration debate".[4] This Part gives a brief overview of the different opinions in the literature and in the Supreme Court's decisions on arbitration, both pro and more cautious views on this legal institution. This review provides a general notion of the arbitration debate and does not claim to be a comprehensive and full review of all the literature. In the same manner, it reviews the Supreme Court's arbitration jurisprudence in the last decade and does not include all arbitration cases.[5]

A. *Supporting Arbitration*

Many scholars support arbitration,[6] pointing to the advantages of arbitration over litigation.[7] The following are several examples of such pro-arbitration literature based on its benefits.

Prado suggested that, in commercial disputes, arbitration should be the default rule and courts the exception.[8] Bulgarella argued that the benefits of arbitration clauses in nursing home admission contracts outweigh their

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[4] *See* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1249 (2009).

[5] For the arbitration revolution in Supreme Court jurisprudence, see generally Meshel, *supra* note 2.

[6] *See, e.g.*, Robert W. Emerson & Zachary R. Hunt, *Franchisees, Consumers, and Employees: Choice and Arbitration*, 13 WM. & MARY BUS. L. REV. 487, 488 (2022).

[7] For the relations between arbitration and litigation, see Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1119 (2019) (arbitration and litigation are substitutes, complements, and competitors of each other).

[8] Fabio Nunez del Prado, *The Fallacy of Consent: Should Arbitration Be a Creature of Contract?*, 35 EMORY INT'L L. REV. 219, 221 (2021).

negatives, and that both parties to the contract are better off.[9] Wilson suggested that mass arbitration is a private enforcement mechanism protecting employees' rights.[10] Cole suggested that, for unionized employees, labor arbitration is better than litigation.[11]

Helfand argued that arbitration not only resolves disputes but may also do so in a way that promotes the parties' shared values.[12] For example, religious arbitration in accordance with religious law promotes the parties' religious values. He also argued that religious arbitration is supported from the multiculturalism perspective.[13] Similarly, Varner suggested that arbitration is a good forum for resolving cultural property disputes,[14] and Spitko claimed that arbitration is a good forum for cultural minorities.[15]

On the backdrop of the criticism against arbitration as unfair, Drahozal and Zyontz argued that both public and private regulation ensure due process and the fairness of arbitration proceedings.[16] Stipanowich suggested the Arbitration Fairness Index, a public rating system assessing the fairness of arbitration in the employment and consumer settings.[17] In the same vein, Satagopan suggested the Novel Appellate Arbitration Model.[18] Plass offered a simple and narrow legislative amendment to the FAA that would preserve

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[9] Wesley R. Bulgarella, *A Better Forum for All: Addressing the Value of Arbitration Clauses in Nursing Home Contracts*, 86 MISS. L.J. 365, 367 (2017).

[10] Cheryl Wilson, *Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence Has Created a Brand New Private Enforcement Regime in the Gig Economy Era*, 69 UCLA L. REV. 372, 378 (2022).

[11] Sarah R. Cole, *The Supreme Court and Arbitration: Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861, 862–63 (2010).

[12] Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2997 (2015).

[13] Michael A. Helfand, *Religious Arbitration and the New Multiculturalism: Negotiating Conflicting Legal Orders*, 86 N.Y.U. L. REV. 1231, 1237 (2011).

[14] Elizabeth Varner, *Arbitrating Cultural Property Disputes*, 13 CARDOZO J. CONFLICT RESOL. 477, 480 (2012).

[15] E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 276–77 (1999); *see also* Sarah R. Cole, *The Lost Promise of Arbitration*, 70 SMU L. REV. 849, 851 (2017).

[16] Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 289–90 (2012).

[17] Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985, 991 (2012).

[18] Axay Satagopan, *Conceptualizing A Framework of Institutionalized Appellate Arbitration in International Cal Arbitration*, 18 PEPP. DISP. RESOL. L.J. 325, 325– 26 (2018).

arbitration's attributes of speed, low costs, fairness, and informality.[19] Burch suggested a regulation of mandatory arbitration that would ensure its fairness,[20] a compromise balancing company needs with the protection of individual rights.

Ben-Shahar challenged the argument that consumers benefit from litigation and that mandatory arbitration serves the interests of businesses.[21] He claimed that only sophisticated consumers rather than poor consumers benefit from access to courts, but all consumers pay for access to courts.[22] Thus, weak consumers—who will not likely sue but pay for enhanced liability—subsidize elite consumers.[23] Therefore, access to justice is regressive, not benefitting all consumers equally.[24] He concluded that "mandatory arbitration clauses that deny access to courts eliminate a privilege that weaker consumers rarely enjoy anyway and save them the cost of cross-subsidizing their more affluent fellow consumers."[25]

Frankel suggested that courts should treat arbitration contracts like any other contract, and that rather than over-enforce arbitration contracts, courts should enforce them in accordance with state contract law.[26] Alternatively, Aragaki suggested a procedural model of the FAA, according to which the FAA was considered a procedural reform in the federal courts, rather than the current contract model of the FAA in which the FAA required courts to enforce arbitration agreements.[27] Chandrasekher and Horton suggested states should create incentives for plaintiffs' lawyers to arbitrate rather than limiting arbitration.[28] Supporting arbitration, Gross criticized the Supreme Court for failing to recognize the many varieties of arbitration that

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[19] Stephen A. Plass, *Reforming the Federal Arbitration Act to Equalize the Adjudication Rights of Powerful and Weak Parties*, 65 CATH. U. L. REV. 79, 83 (2015).

[20] *See* Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309 (2011).

[21] Omri Ben-Shahar, *The Paradox of Access Justice, and Its Application to Mandatory Arbitration,* 83 U. Chi. L. Rev. 1755, 1755 (2016).

[22] *Id.* at 1760.

[23] *See id.*

[24] *Id.* at 1779.

[25] *Id.* at 1805.

[26] Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 534, 537 (2014).

[27] Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1962–63. (2014). *See also* Imre S. Szalai, *Reconciling Fault Lines in Arbitration and Redefining Arbitration Through the Broader Lens of Procedure*, 18 NEV. L.J. 511, 519 (2018).

[28] Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 10 (2019).

exist today.[29] Whereas Ware, rather than either a conservative pro-arbitration or a progressive anti-arbitration approach, offered an intermediate centric approach to arbitration.[30] According to him, adhesive arbitration agreements should be enforced while also protecting consumers.[31]

B. *A Critical View of Arbitration*

Many other scholars are critical of arbitration.[32] Some point to its limitations, and others to the advantages of litigation in specific contexts such as employment or consumer agreements. The following are several examples of those who take a cautious view of this legal forum.

Leslie argued that when competing corporations illegally agree to use mandatory arbitration in their contracts with their consumers, they violate antitrust law and thus should be unenforceable.[33] Furthermore, Leslie warned against arbitration bootstrapping, which is the inclusion of unconscionable

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[29] Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 111, 115–16 (2015).

[30] Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv. Negot. L. Rev. 29, 36 (2017).

[31] *Id.* at 38–39. *See also* Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Conception *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 327 (2011) (suggesting regulation of arbitration balancing the costs and benefits of arbitration); Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1239–40 (2011) (favoring arbitration when balanced against state regulations); Amy J. Schmitz, *Arbitration Ambush in a Policy Polemic*, 3 PA. ST. Y.B. ON ARB. & MEDIATION 52, 55 (2011) (calling for consumer protection while preserving the benefits of arbitration); Andrew McWhorter, Note, *A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration*, 52 COLUM. J.L. & SOC. PROBS. 521, 524 (2019) (urging a holistic and contextual approach to mandatory arbitration curbing its abuses while preserving its benefits); Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666 (2013); George Padis, Note, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 TEX. L. REV. 665, 668 (2013) (proposing a reform that balances between competing social interests); Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 760 (2001) (distinguishing between traditional and modern arbitration).

[32] *See generally, e.g.*, Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795 (2012). For a general argument against alternative dispute resolution, see Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

[33] Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 385 (2018).

terms in mandatory arbitration contracts.[34] Resnik criticized the Supreme Court's arbitration jurisprudence for producing an unconstitutional system where legal rights are effectively determined by corporations drafting the arbitration clauses and by organizations conducting the arbitration rather than by the courts.[35] McManus suggested that forced arbitration agreements should be deemed unconscionable and unenforceable.[36] Horton suggested that Supreme Court arbitration jurisprudence has transformed the FAA into a private delegation of legislative power in violation of the nondelegation doctrine.[37] He further claimed that "adhesive arbitration clauses push the boundaries of ex ante consent, eliminate ex post judicial oversight, and ultimately displace democratically-created rights."[38] Finally, he warned against pirate arbitration, which is a misuse of arbitration to break the law.[39]

Chukwumerije criticized the Supreme Court's broad interpretation of the FAA and its limited interpretation of the effective-vindication doctrine. The result was curtailed opportunity of consumers to vindicate their rights embodied in state laws, especially in small value claims.[40] Criticizing the Supreme Court's pro-arbitration approach, Aronovsky suggested that adhesion employment and consumer arbitration agreements should not be

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[34] Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 266 (2015). *See also* Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 687–88 (2018) (explaining that only severing harsh terms in an arbitration agreement will lead to more litigation).

[35] *See generally* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

[36] Jeremy McManus, *A Motion to Compel Changes to Federal Arbitration Law: How to Remedy the Abuses Consumers Face When Arbitrating Disputes*, 37 B.C. J.L. & SOC. JUST. 177, 208 (2017). *See also* Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights?—Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015*, 25 B.U. PUB. INT. L.J. 143 (2016); Ramona L. Lampley, *Underdog Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727 (2015); Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751 (2014); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Tamar Meshel, *Two Comes Before Four and Five: The FAA in* Campbell v. Keagle, 117 NW. U. L. REV. ONLINE 74 (2022).

[37] *See generally* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011).

[38] David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 502 (2014).

[39] *See generally* David Horton, *Pirate Arbitration*, 106 MINN. L. REV. 2111 (2022).

[40] Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 375–76 (2014).

enforced.[41] Estlund warned that arbitration has a cooling effect; that is, only a few employees file claims.[42] Colvin argued that mandatory arbitration decreases equality of access to justice in employment relations.[43] Moses claimed that consumers do not meaningfully consent to arbitration.[44]

Roberts argued for a clear and universal definition of arbitration to draw the boundaries of federal law and to resolve some of the deficiencies of arbitration.[45] Similarly, Hensler and Khatam suggested reinventing arbitration to include public policy aspects.[46] Stipanowich suggested a nuanced rather than a monolithic approach to arbitration.[47] Stephan argued that the claimed benefits of arbitration—speed, cost, finality, informality, simplicity, customizability and privacy—are neither unparalleled nor mutual.[48] That is, arbitration's benefits are available in both litigation and arbitration, and they benefit only one party rather than both parties.[49] Gilles warned that since disputes are resolved in arbitration rather than in court, this means that not

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[41] *See generally* Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131 (2012). *See also* Amanda R. James, *Because Arbitration Can Be Beneficial, It Should Never Have to be Mandatory: Making a Case Against Compelled Arbitration Based Upon Pre-Dispute Agreements to Arbitrate in Consumer and Employee Adhesion Contracts*, 62 LOY. L. REV. 531 (2016); Ronald G. Aronovsky, *Starting Over: Letting States Regulate Adhesion Arbitration Agreements*, 71 SYRACUSE L. REV. 1019 (2021).

[42] Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 682 (2018). *See also* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 239–40 (2012); Margaret L. Moses, *How the Supreme Court's Misconstruction of the FAA has Affected Consumers*, 30 LOY. CONSUMER L. REV. 1, 1 (2017).

[43] Alexander J. S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 73–74 (2014). *See also* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310–12 (2015); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 156–57 (2019).

[44] Margaret L. Moses, *Privatized "Justice"*, 36 LOY. U. CHI. L.J. 535, 535 (2005).

[45] Niall Mackay Roberts, Note, *Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act*, 49 U.C. DAVIS L. REV. 1547, 1551 (2016).

[46] *See generally* Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381 (2018).

[47] *See generally* Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1 (2010).

[48] Paul Stephan, *Nothing to Say for the FAA: Why Arbitration Does Not Offer Unparalleled and Mutual Benefits*, 51 U. MEM. L. REV. 71, 73 (2020).

[49] *See id.*

only the number of lawsuits is reduced, but also the development of common law in these areas.[50] Raz argued that litigation is important for enforcement of corporate law, and that enforcing mandatory arbitration clauses in corporate charters and bylaws may mean a de facto immunity from fiduciary and equitable duties, such that misconduct by corporate law actors cannot be challenged by shareholders.[51] Keren argued that the Supreme Court's arbitration jurisprudence is based on legal hostility to collective actions (in courts and in arbitration), and is influenced by neoliberalism.[52] She warned that this leaves people feeling isolated and powerless.[53] This affects not only market citizenship and vindicates people's legal rights from corporations, but also affects their democratic citizenship, and their sense of acting together collectively in solidarity.[54]

C. *The Supreme Court's Arbitration Jurisprudence*

The Supreme Court has generally taken a pro-arbitration approach. In supporting arbitration, many of the Court's decisions have alluded to arbitration's benefits and advantages. The following are a few examples demonstrating the Supreme Court's embrace of arbitration.

Justice Alito stated that "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[55]

Similarly, Justice Breyer stated that:

> Congress was fully aware that arbitration could provide procedural and cost advantages. The House Report emphasized the "appropriate[ness]" of making arbitration agreements enforceable "at this time when there is so much agitation against the costliness

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[50] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 424 (2016). *See also* Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 635 (2020).

[51] Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 GEO. MASON L. REV. 223, 260 (2021). *See also* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 GEO. L. J. 583, 639 (2016).

[52] Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 Fla. L. Rev. 575, 613 (2020).

[53] *Id.* at 617.

[54] *Id.* at 637–38. *See also* Kathryn Abrams, *Dividing, Conquering – And Resisting*, 72 FLA L. REV. F. 57, 58 (2021).

[55] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010).

> and delays of litigation." . . . And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes.[56]

Justice Scalia also alluded to arbitration's advantages over litigation: it is informal, less costly, more speedy, and efficient.[57] It can also be tailored to the dispute by, for example, choosing a specialized arbitrator.[58]

Justice Gorsuch also explained that "arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved."[59]

Justice Roberts distinguished class arbitration from traditional individual arbitration, concluding that the former undermines the latter's benefits.[60]

However, not all justices support the Supreme Court's pro-arbitration approach, voicing a more cautious view in their dissenting opinions. Some justices have been reluctant to enforce arbitration agreements in the employment and consumer contexts. Acknowledging the power imbalance between the parties, and thus the problematic notion of consent to the agreements, they criticized the validity of these agreements. Furthermore, they claimed that public policy, for example regarding the protection of employee and consumer rights, weighs against enforcement of arbitration agreements. The following are several examples of the Supreme Court's critical view of arbitration in the consumer and employment settings.

Justice Ginsburg stated,

> Does the FAA permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the . . . [NLRA], 'to engage in . . . concerted activities' for their 'mutual aid or protection?' . . . The answer should be a resounding 'No.' . . . The Court today subordinates employee-protective labor legislation to the [FAA]. In so doing, the Court forgets the labor market imbalance that gave rise to the . . . NLRA, and ignores the destructive consequences of diminishing the right of employees 'to band together in confronting an employer.'[61]

She repeated her position, stating that "the Court misread the FAA to deprive

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[56] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 360 (2011).
[57] *Id.* at 344–45.
[58] *Id.* at 348.
[59] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).
[60] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019).
[61] *Epic Sys. Corp.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts."[62] And again, "Employees and consumers forced to arbitrate solo face severe impediments to the 'vindication of their rights.'"[63]

Similarly, Justice Kagan warned that:

> The FAA conceived of arbitration as a 'method of resolving disputes'—a way of using tailored and streamlined procedures to facilitate redress of injuries . . . In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action.[64]

III. THE ARBITRATION DEBATE: A CONTRACTUAL VIEW

The Supreme Court has issued numerous decisions on arbitration in the past decade. This Part analyzes some of these decisions, especially the different opinions expressed in them. These decisions no doubt represent differences of opinions regarding the FAA, its interpretation and application, as well as of arbitration as a legal institution.[65] They also address issues such as the scope of the FAA and conflicts between the FAA and other state or federal legislation.[66] Furthermore, they focus on issues of the division of power between the arbitrator and the court, the difference between bilateral arbitration and class-arbitration, and the contrast between litigation and arbitration. However, this Part demonstrates that these decisions also represent different perceptions of contract. In other words, the gap between the majority and the dissent in these opinions is not narrow and limited, but rather reveals

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[62] DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 67 (2015) (Ginsburg, J., dissenting).

[63] *Lamps Plus, Inc.*, 139 S. Ct. at 1421 (Ginsburg, J., dissenting).

[64] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 253 (2013) (Kagan, J., dissenting).

[65] *See, e.g.*, Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. 91 (2012); Neal R. Troum, *Policy Preferences and Enumerated Powers Under the Federal Arbitration Act*, 35 AM. J. TRIAL ADVOC. 263 (2011); Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 Y.B. ARB. & MEDIATION 1 (2013); Thomas J. Stipanowich, *Revelation and Reaction: The Struggle to Shape American Arbitration*, 3 Y.B. ARB. & MEDIATION 125 (2011); Imre S. Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115 (2016).

[66] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (the FAA and NLRA); *Italian Colors Rest.*, 570 U.S. at 228 (Kagan, J., dissenting) (the FAA and the Sherman Act).

a profound gap between the different views of contract and contract law. Though the idea that arbitration agreements are a matter of contract law is not new,[67] this Article offers a new contractual perspective on Supreme Court arbitration jurisprudence. In other words, though it is held that "arbitration is a matter of contract,"[68] this Article maintains that the different views in Supreme Court arbitration jurisprudence are not only a matter of FAA interpretation and implementation, but basically a matter of controversy regarding different visions of contract. Arbitration jurisprudence is not only about an alternative to litigation, but also about views on contracts. The following is a review of several court decisions, demonstrating the argument that the arbitration debate is, to a large extent, a contract debate regarding the vision and notion of contract.

As the following analysis shows, the difference between majority and dissenting opinion reflects fundamental disagreement on the basic questions of contract law: what is consent to contract?[69] How does the court infer consent? Is there one contract law applicable to all contracts, or is contract law sensitive to the context and should adapt according to the contract at hand? Should courts adopt a monistic and acontextual view of contract, or rather a pluralist and nuanced vision? What values should contract law promote? How to strike a balance between freedom of contract and other values? These are fundamental issues at the heart of contract law that go beyond arbitration agreements.

A. *Consent*

Justice Roberts, delivering the majority opinion of the Court in *Lamps Plus, Inc. v. Varela*,[70] decided that, according to the FAA, an ambiguous agreement cannot provide the necessary "contractual basis" for compelling class arbitration. This is because the FAA requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a class-wide basis. According to Roberts, consent is the basis of arbitration, and the "parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will

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[67] Paul Bennett IV, *"Waiving" Goodbye to Arbitration: A Contractual Approach*, 69 WASH & LEE L. REV. 1609, 1611 (2012); Todd D. Rakoff & Jed S. Rakoff, *Arbitration, Pseudo-Contract, and Objective Theory*, 133 HARV. L. REV. F. 13, 19 (2019).

[68] *Italian Colors Rest.*, 570 U.S. at 233; Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

[69] *See, e.g.*, Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615 (2017).

[70] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1411 (2019).

arbitrate, and the arbitrators who will resolve their disputes."[71]

Roberts rejected application of the rule according to which ambiguity in a contract should be construed against the drafter. According to Roberts, this rule is based on public policy and not on the intent of the parties.

This is a formal, limited and rigid notion of consent to contract. Roberts draws only from the words of the agreement, and as the agreement is ambiguous the Court cannot infer consent. Hence, consent must be worded clearly, as the Court cannot learn about agreement from vague language. As Roberts sees it, the words of the contract tell the story of consent. He sticks to the words of the agreement and refuses to consider any other considerations and circumstances. Other interpretation rules, such as *contra proferentem*, are a matter of public policy and not of consent. The words of the agreement are the only thing to be considered by the court. Intent is inferred from the language of the contract and not by any other means. The intent of the parties is derived solely from the explicit words of the agreement, and if the agreement is unclear or ambiguous the court is unable to conclude the intent of the parties. According to Roberts, "arbitration is strictly a matter of consent,"[72] and vague language is not enough. Only clear language entails consent. "Consent is essential under the FAA,"[73] and thus the court is very careful not to infer consent from ambiguous agreement. According to Roberts, the court is passive in giving effect to the contract relying on clear language only. The court may not actively and creatively read ambiguous language. "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed"[74] to arbitrate.

The dissenting opinion presented an utterly different view of consent to contract. Justice Kagan noted that the anti-drafter rule enabled the courts to conclude the parties' agreement and was not only a policy rule. She explained that "from an ex ante perspective, the rule encourages the drafter to set out its intent in clear contractual language, for the other party then to see and agree to…And from an ex post perspective, the rule enables an interpreter to resolve any remaining uncertainty in line with the parties' likely expectations."[75] She warned that the majority's result "is to disregard the actual contract the parties signed."[76] For Kagan, the anti-drafter rule helped the Court understand the parties' meaning. It is not only a policy-oriented rule but also asserts the parties' intent. Kagan learned the parties' consent not only from the language

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[71] *Id.* at 1416.
[72] *Id.* at 1415.
[73] *Id.* at 1416.
[74] *Id.*
[75] *Id.* at 1434.
[76] *Id.* at 1435.

of the agreement, but also from the contract law canonic rule. This is a broader reading of the agreement, not limited to the contract text, and is sensitive to the context of power imbalance between the parties and their expectations. For Justice Kagan the reading of the agreement is contextual. She took notice of the fact that the agreement was a standard form employment contract drafted by the employer. What the parties agreed to is understood not only from reading the agreement but from a larger picture of the drafting of the agreement. She criticized the majority, stating that its interpretation does not reflect the parties' consent.

Where Roberts looked solely at the language of the agreement, Kagan looked beyond it to the circumstances; where Roberts saw interpretation against the drafter as a policy rule irrelevant to the parties' intent, Kagan used the interpretation rule to conclude the consent of the parties; where Roberts' opinion is acontextual and limited, Kagan's opinion is contextual and policy oriented.

According to Justice Kagan, the plain meaning of the arbitration agreement yields a different result from Roberts' reading. The agreement states that "[T]he parties agree that any and all disputes, claims or controversies arising out of or relating to[ ] the employment relationship between the parties[ ] shall be resolved by final and binding arbitration."[77] This broad language includes class arbitration. That is, the same text read by Kagan to include class arbitration is read by Roberts to exclude class arbitration.

Like Justice Kagan, Justice Ginsburg gives a policy-oriented notion of consent. As Justice Ginsburg sees it, consent to contracts of adhesion is problematic, as a take-it-or-leave-it employment or consumer agreement is not really consensual. She warns that, due to their lack of bargaining power, consumers and employees do not truly consent to the agreement, and that under these conditions there is no genuine consent to arbitrate. In her view, employees and consumers are forced to arbitrate. She criticizes the majority:

> Today's decision underscores the irony of invoking "the first principle" that "arbitration is strictly a matter of consent," to justify imposing individual arbitration on employees who surely would not choose to proceed solo… Shut from the Court's sight is the "Hobson's choice" employees face: "accept arbitration on their employer's terms or give up their jobs.[78]

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[77] *Id.* at 1428. Kagan continues to give other examples from the employment contract supporting her broad interpretation to include class arbitration.

[78] *Id.* at 1421. "The Court, paradoxically reciting the mantra that "[c]onsent is essential," has facilitated companies' efforts to deny employees and consumers the "important right" to sue in court, and to do so collectively, by inserting solo-arbitration-only clauses that parties lacking bargaining clout cannot remove." *See also id.* at 1422.

Where Roberts saw consent, Ginsburg saw coercion; where Roberts saw agreement, Ginsburg saw no choice. When putting the agreement in the context of employers conditioning the employment on signing the arbitration contract, it colors the agreement in non-consensual colors. She objects to Justice Robert's simplistic view according to which signing an agreement means consent and points out realistically that employees did not have a choice but to sign the contract or they would not have a job. This complicated and more realistic view tells a more complex story about consent. Consent is contextual and should be derived from the circumstances, and signature alone is not always a sign of consent.

Furthermore, while Justice Roberts refused to look at public policy, Ginsburg engages in a policy-oriented analysis. She emphasizes the consequences of enforcing arbitration agreements in the employment context, which means impeding employee vindication of their rights against their employers. Thus, employees whose legal rights were violated are barred effective access to justice by their employment agreements. Ginsburg warns that the inevitable result of the majority's opinion is "curtailed enforcement of laws "designed to advance the well-being of [the] vulnerable."[79]

Where Roberts looked only to the text of the agreement, Ginsburg looks to the context and to the relations between the parties. Where Roberts saw consent, Ginsburg saw a matter of vindication of employee rights. Ginsburg warns against the consequences of the decision, to which Roberts disagreed. Roberts sees the role of the court to enforce the agreement as written, while Ginsburg sees the role of the court to protect employees' rights.

Two visions of consent—one limited to the words of the agreement and the other contextual and policy oriented—are similarly present in other Supreme Court arbitration decisions.

In *American Express Co. v. Italian Colors Restaurant*, Justice Scalia, delivering the opinion of the Court, enforced an arbitration agreement that included a waiver of class arbitration.[80] Like Roberts, he adhered to the text of the agreement, disregarding public policy. The argument that individual arbitration, rather than class arbitration, would contravene the policies of the antitrust laws was rejected. In the same manner, the argument that enforcing the class arbitration waiver would bar effective vindication was also rejected. That is, policy was set aside, and the contract was enforced as written. Justice Scalia presumably enforced the parties' contract and did not intervene in it, stating that, "the parties here agreed to arbitrate pursuant to that 'usual rule,'

[79] *Id.* at 1422.

[80] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

and it would be remarkable for a court to erase that expectation."[81] He formalistically adhered to the plain words of the agreement, maintaining that the written document reflected the parties' agreement. Like Roberts, this is a minimalist reading of the text and disregards context, policy, and consequences.

As Justice Kagan pointed out, the majority adhered to the intent of the drafter of the agreement, the empowered party. It is not the joint intention of the parties, but rather it is the intent of the privileged party; it is not neutral enforcement of the contract, but giving advantage to the stronger drafting party.

Contrary to the majority, Justice Kagan based her dissenting opinion on policy. She explained that enforcing the waiver of class arbitration means that "the monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[82] She argued that the effective vindication rule "would ensure that Amex's arbitration clause does not foreclose Italian Colors from vindicating its right to redress antitrust harm[83] . . . Without the rule, a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability."[84] Justice Kagan goes beyond the words of the arbitration agreement and sees the power relations between the parties. She does not stop at the language of the contract but looks at the inequality between the parties. Justice Kagan also considers the effect of the arbitration contract.

> The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless.[85]

The effect of enforcing the class arbitration waiver provides de facto immunity from legal liability. She is aware of the incentives to contract drafters, of the effect of antitrust laws and the effects of arbitration. As in the previous example, while the majority gave a plain reading of the text, the dissent gave a policy oriented contextual reading. Limiting the analysis to the language of the agreement might look like consent, but when also considering

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[81] *Id.* at 233.
[82] *Id.* at 240.
[83] *Id.*
[84] *Id.* at 241.
[85] *Id.* at 244.

the dynamics between the parties a much more complicated notion of consent arises. Kagan's dissenting opinion critiques the disregard of the inequality between the parties by the majority. Where the majority saw consent of both parties reflected in the words of the arbitration agreement, Kagan realistically pointed out that it only reflected the intent of the privileged drafting party.

Justice Scalia expressed the same narrow view of consent in another decision. In *Rent-A-Center, W., Inc. v. Jackson*, Justice Scalia enforced an arbitration contract in an employment contract.[86] The contract broadly provided arbitration to all disputes between the parties, and included a delegation provision according to which "the arbitrator rather than the court shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."[87] Justice Scalia read the arbitration contract to conclude that the arbitrator shall decide the unconscionability claim the employee made against the contract. Justice Stevens' dissent asserts that,

> If respondent's unconscionability claim is correct—*i.e.*, if the terms of the agreement are so one-sided and the process of its making so unfair—it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate. Accordingly, it is necessary for the court to resolve the merits of respondent's unconscionability claim in order to decide whether the parties have a valid arbitration agreement under §2. Otherwise, that section's preservation of revocation issues for the Court would be meaningless.[88]

Where Scalia saw consent of the employee to give the arbitrator authority to decide the validity of the agreement, Stevens questions this consent. He challenges the circularity of the majority reasoning: the consent is derived from the contract the employee challenges as unconscionable. If the contract is unconscionable, then the delegation provision is unenforceable. Where the majority saw consent, the dissent would have the court decide on the issue of unconscionability before it concludes consent. The dissent acknowledged that the question of consent required a much deeper and complex inquiry than relying on the agreement's wording. Justice Steven's dissent is contextual, reading the contract under the circumstances of employment agreements and inequality of bargaining power between the parties.

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[86] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 63 (2010).
[87] *Id.* at 66.
[88] *Id.* at 82.

A third example of this narrow as opposed to more complex notion of consent is found in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corporation*. Justice Alito, delivering the majority opinion, concluded that since the arbitration agreement is silent on the issue of class arbitration, the parties did not agree on class arbitration, because "arbitration is a matter of consent."[89] Justice Alito is formalistic, he read the words of the agreement, and since class arbitration was not mentioned anywhere in the agreement, he inferred against class arbitration. "The differences between bilateral and class action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."[90] Furthermore, he notes that, "Where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration."[91] Justice Alito emphasized that the intentions of the parties and their agreement controls. Like Justices Roberts and Scalia, he gave a minimal, simplistic and formalistic notion of consent, and since the agreement is silent there is no consent. Thus, class action arbitration should not be inferred from the mere arbitration agreement, silence is not dispositive, and only specific concrete explicit language shows consent. Silence means no agreement to arbitrate. Alito, like Roberts and Scalia, limited his analysis of consent to the four corners of the agreement.

Justice Ginsburg took a different view of the parties' consent. According to Ginsburg, "the parties jointly asked the arbitrators to decide, initially, whether the arbitration clause in their shipping contracts permitted class proceedings."[92] That is, while the majority inferred lack of consent from the agreement's silence, the dissent inferred consent from the parties' actions. Justice Ginsburg went beyond the language of the contract to learn what the parties agreed on. She concluded that "The parties' supplemental agreement, referring the class-arbitration issue to an arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision."[93] Thus, since the panel decided in favor of class arbitration, the parties must respect its ruling. Justice Ginsburg is more contextual in her opinion and looks to the circumstances, rather than taking a formalistic approach that sticks to the words of contract. She does not stop at the text but looks more broadly beyond the language of the agreement to determine the parties' intentions.

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[89] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).
[90] *Id.* at 687. *See also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).
[91] *Stolt-Nielsen S.A.*, 559 U.S. at 687.
[92] *Id.* at 693.
[93] *Id.* at 694.

The last example of different visions of consent is *Epic Systems Corporation v. Lewis*. Justice Gorsuch read the text of the arbitration agreement plainly. Accordingly, he stated that "The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures."[94] Since the arbitration contract specifically addressed individual arbitration and did not mention class arbitration there was no consent to the latter. Justice Gorsuch stated that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class-wide arbitration procedures without the parties' consent."[95] He held that the court only enforced the arbitration agreement according to its terms. As in the former examples, his notion of consent is limited to the text of the agreement.

Justice Ginsburg, in her dissenting opinion, read the arbitration agreement in its context, taking into account the power imbalance between employee and employer. Where the majority saw consent, the dissent criticized the notion of freedom of contract due to the inequality of bargaining power between the parties to an employment agreement. Justice Ginsburg's reading of the agreement is contextual and policy-oriented, while the majority's reading is ahistorical, acontextual and formalistic. She gave a detailed history and background of the law and emphasized that the employment agreement is a take-it-or-leave-it contract. In her rebuttal to the majority Justice Ginsburg stated:

> The freedom to depart asserted by the Court, as already underscored, is entirely one sided…Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers.[96]

Justice Ginsburg's reading takes into account the impact of the arbitration agreement, and she warns that the majority's reading brings back yellow dog contracts, which will have a devastating effect on employees' rights and on work relations and conditions. Her reading is policy-oriented and result-oriented. As Justice Ginsburg sees it, there was no consent, only a one-sided, take-it-or-leave-it employment agreement leaving the employees no choice. It is not a consensual agreement, but a non-negotiated agreement reflecting the intentions of the employer, the drafting powerful party. Rather

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[94] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1616, 1621 (2018).
[95] *Id.* at 1623.
[96] *Id.* at 1640.

than formalistically enforcing contracts, Ginsburg protects employees' rights.

The examples here show two different notions of consent. One is narrow and restricted, and only draws from the text of the agreement. It is acontextual and limited to the four corners of the agreement. The other does not stop at the words of the contract but also looks at context, such as the relations between the parties, and at public policy, such as vindication of employees or consumers' rights. It is contextual, complex and nuanced, taking a broad and comprehensive look at the agreement and its surrounding circumstances. While the majority saw two autonomous, equal parties enjoying freedom of contract, the dissent saw relational parties, negotiating under social context of inequality. While the majority saw two independent parties negotiating at arm's length, the dissent saw parties embedded in relations and situated in a market, society and economic system. This is a profound debate between two notions of consent to contract. This debate goes beyond the debate on the differences between litigation and arbitration, or between individual arbitration and class arbitration, or between the role of the court and the role of the arbitrator. This debate between two ideas of consent and the role of the court in detecting consent is general and goes beyond arbitration agreements.

B. *Context*

Justice Roberts—in his *Lamps Plus* majority opinion—treated all contracts alike.[97] His analysis was impervious to differences between different contracts. Without expressly saying so, this indifference to context was also apparent in Justice Gorsuch's majority opinion in *Epic Systems*.[98] This is a monistic view of contract, such that all contracts are treated equally, and no distinctions are made between different types of contracts.

Justice Ginsburg acknowledged different kinds of contracts. These included contracts between businesses, contracts between employees and an employer, and contracts between consumers and companies.[99] The first were between equal parties, and the others were characterized by an imbalance of power between the parties. Context mattered to Justice Ginsburg, for whom not all contracts are alike. There are critical differences between contracts, and the relations between the parties—especially power relations—are relevant.

Justice Ginsburg distinguished between contracts made between two commercial parties and contracts of adhesion.

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[97] *See generally* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

[98] *See Epic Sys. Corp.*, 138 S. Ct. at 1612.

[99] *See generally* DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 70 (2015) (Ginsburg, J., dissenting).

> Congress passed the FAA in 1925 as a response to the reluctance of some judges to enforce commercial arbitration agreements between merchants with relatively equal bargaining power…Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place.[100]

Justice Ginsburg distinguished between employment agreements and agreements between merchants; negotiated agreements and take-it-or-leave-it agreements; agreements between equals and agreements entered into under conditions of inequality between the parties.[101] In her historical and contextual analysis she paid attention to relevant circumstances that distinguish between different contracts.

Similar to Justice Ginsburg, Justice Breyer's dissenting opinion in *AT&T Mobility*[102] acknowledged the context of power imbalance between parties to a contract of adhesion. This case dealt with a standard consumer contract between AT&T and its customers. The company used its superior bargaining power in drafting the contract to prohibit class arbitration. In this case,

> when a class-action waiver 'is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'[103]

Contrary to this, "[i]nsofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power."[104] That is, this not a contract between two equal sophisticated parties.

This is more than a debate regarding the breadth of the FAA—whether

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[100] *Id.*

[101] *Epic Sys. Corp.*, 138 S. Ct. at 1643 (Ginsburg, J., dissenting).

[102] AT&T Mobility LLC v. Concepcion, 563 U.S. 362 (2011) (Breyer, J., dissenting).

[103] *Id.* at 358 (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (2005)).

[104] *Id.* at 362.

it is applied narrowly only to business agreements or more widely to include standard form contracts—employment contracts and consumer contracts. It is a contractual debate between a monistic view of contracts, according to which all contracts are alike, and a pluralistic view of contracts distinguishing between different kinds of contracts. It is an acontextual, one-contract-rule-fits-all-contracts approach, versus a contextual approach with nuanced contract rule that is case sensitive. It is an "all-contracts-are-equal" approach versus an approach acknowledging the variety of different types of contracts. It is a unifying approach, versus tailoring the rule based on the circumstances approach. Rather than disregarding the richness of the contract world, Justice Ginsburg celebrated the diverse and pluralistic world of contracts. Like the previous debate regarding consent to contract, this debate between a monistic and a pluralistic view of contract is not limited to arbitration contracts and is also relevant broadly to other contracts.

C. *Freedom of Contract and Public Policy*

Justice Scalia adhered to freedom of contract.[105] He stated that,

> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.[106]

What followed was deference of the court to the parties' agreed upon contract. As Scalia stated, "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."[107] He formalistically stuck to enforcing the contract.

In an additional reference to public policy, Scalia spoke to the issue of the enforceability of arbitration agreements, stating that "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[108]

Justice Alito, like Justice Scalia, also presented a freedom of contract analysis of arbitration contracts.

> Underscoring the consensual nature of private dispute

[105] *See AT&T Mobility LLC*, 563 U.S. at 333.
[106] *Id.* at 344–45.
[107] *Id.* at 351.
[108] *Id.* at 344.

> resolution, we have held that parties are 'generally free to structure their arbitration agreements as they see fit'… the contractual nature of arbitration that parties may specify with whom they choose to arbitrate their disputes… It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.[109]

In the other previously explored arbitration cases, the majority also enforced arbitration contracts by relying on freedom of contract, though not explicitly mentioning it.

Justice Gorsuch stated that "the Federal Arbitration Act requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.'"[110] Similarly, he stated that "arbitration agreements like those before us must be enforced as written."[111] This is a clear freedom of contract point of view. Accordingly, the court has a limited and passive role in enforcing the parties' agreement.

A different and more limited notion of freedom of contract was expressed in the dissenting opinions. Justice Ginsburg read arbitration agreements in a policy-oriented manner. She looked not only at the language of the agreement, but also at its consequences. For example, she warned that enforcing an arbitration agreement meant severe impediment to the vindication of consumer and employees' rights.[112] She also warned against the harmful consequence of the Court's decision, stating that "[w]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be 'the thing,' *i.e.*, without them, potential claimants will have little, if any, incentive to seek vindication of their rights."[113] Justice Ginsburg read the arbitration agreement with public policy in mind. It is not only the words of the agreement, but also policy that colors the words and infuses their interpretation and meaning.

Justice Ginsburg offered not only a different reading of the FAA, but also of the arbitration agreement. Rather than formalistically sticking to freedom of contract, she offered a balanced and limited notion of freedom of contract. Rather than a classic view of freedom of contract, she offered a

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[109] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,559 U.S. 662, 683–84 (2010).

[110] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018); *See also* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).

[111] *Epic Sys. Corp.*, 138 S. Ct. at 1632.

[112] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1421 (2019).

[113] *Stolt-Nielsen S. A.*, 559 U.S. at 699.

policy-oriented approach that limited freedom of contract. Rather than a *Lochner* vision of freedom of contract that disregards other values, according to Justice Ginsburg, protection of rights trumps freedom of contract. To Justice Ginsburg, the court's role is not limited to enforcing contracts, but also to advancing other values using contract law. In her view, the court is allowed to intervene in order to protect values and rights, thus allowing a more active and interventionist role to the court. In other words, contracts cannot be used by employers to shield themselves from employment legislation.

Justice Ginsburg's dissenting opinion was a policy-oriented decision. It criticized the majority, noting that "the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees 'to band together in confronting an employer.'"[114] Furthermore, "[t]he inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[115] Moreover, "today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments."[116] Justice Ginsburg read the FAA with a policy orientation, noting that

> Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to 'liberty of contract' . . . While stating that legislatures could curtail contractual 'liberty' in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced.[117]

While the majority enforced the arbitration agreement, Justice Ginsburg concluded that "the [class-arbitration O.G.] 'waivers' rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court."[118]

Freedom of contract is not the only value promoted by the majority. As the previous examples showed, the majority was guided by a pro-arbitration approach. In addition to freedom of contract, the policy promoted by the majority was advance arbitration. According to the majority, arbitration

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[114] *Epic Sys. Corp.*, 138 S. Ct. at 1633.

[115] *Id.* at 1646.

[116] *Id.* at 1630.

[117] *Id.* at 1634. *See also* Moses, *supra* note 3. For general critique of returning to *Lochner* era see generally Cheryl B. Preston, *How Did We End Up in a World Where Browsewraps Are Enforced Even when They Waive All Consumer Rights?*, 45 FLA. STATE U. L. REV. 1012 (2018).

[118] *Epic Sys. Corp.*, 138 S. Ct. at 1641.

is preferable to litigation, since it is informal and saves time and money.[119] While the majority endorsed a policy of enforcing arbitration agreements, the dissent endorsed protecting consumer and employees' rights. Another value at the heart of the majority opinion, as Justice Kagan noted, was hostility to class arbitration or class litigation.[120] The majority's opinion relied not only on the arbitration agreement, but also on a policy disfavoring class actions.[121] According to the majority, class arbitration is different from bilateral arbitration and the former lacks the advantages (such as informality, speed and low cost) of the latter.[122] It is a reading of the arbitration agreement that is not true to the parties' consent, but with anti-class arbitration in mind. According to Justice Kagan, the majority's reading of the agreement to arbitrate relied not on its text, but on a policy view according to which class arbitration undermines the central benefits of arbitration.[123]

While Justice Scalia enforced a waiver of class arbitration, Justice Kagan refused to enforce such a waiver to allow an antitrust law claim.[124] While Scalia stuck formalistically to freedom of contract, Kagan placed limits on contract enforceability in the name of public policy. While Scalia promoted blind enforceability of contracts, Kagan scrutinized the contract under policy considerations. Justice Kagan balanced competing values: freedom of contract, arbitration, antitrust law and vindication of rights. For Justice Scalia, only the first two values should be considered, and they do not conflict. According to Justice Kagan, "courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or any other contract."[125] Furthermore, "[a]n arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights."[126]

The majority and the dissenting opinions reflect different views on the interpretation and application of the FAA, on the enforceability of arbitration contracts and on the difference between litigation, class-arbitration, and individual arbitration. However, the majority-dissent difference of opinion also reflects a controversy between two competing policies. Both the majority

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[119] *See* cases cited *supra* notes 55, 59 –60 and accompanying text.

[120] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1435 (2019). *See also* Keren, *supra* note 54, at 575.

[121] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 334 (2011) ("[C]lass arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.").

[122] *AT&T Mobility LLC*, 563 U.S. at 348.

[123] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 240 (2013).

[124] *Id.* at 246 .

[125] *Id.* at 241.

[126] *Id.* at 242.

and the dissent based their analysis on policy—however—they differed regarding which policy to pursue. It is a conflict between different values and a matter of balancing between them: while the majority preferred one value, the dissent another. It is an ideological dispute as to which value to promote and how to strike a balance between conflicting values. It is a general disagreement regarding the limits of freedom of contract and on how to balance competing values. It is also a general disagreement on the role of the court: is it limited to enforcing contracts, or does it also include policing contracts? Is it to strictly enforce contracts, or to promote other values? This is a general debate, not limited to arbitration contracts.

D. *The Contract Debate*

The above analysis of the Supreme Court's arbitration jurisprudence revealed a contractual debate: a controversy between two conflicting perspectives on contract that goes to the heart of the basis of contract law. This subpart adds some concluding comments on the contract debate.

First, the above explored three examples of the contract debate, on the issues of consent, context, and freedom of contract. However, more examples could be added. The Supreme Court's arbitration jurisprudence also revealed more contract controversies: between a binary approach (based on dichotomies and hierarchies) and a more nuanced and contextualized approach (based on a spectrum); between a view of contract as an economic tool (to enhance welfare) and a view of contract as a social tool (to advance social ends); between a bargain approach to contract and a relational approach to contract; between a view of contract as a private agreement and a view of contract as a public institution; between a view of the parties as autonomous individuals and a more relational view of the parties; between a view sensitive to power imbalance between the parties and a view of the parties as two equals, disregarding power dynamics.

Second, the above three examples intersect. The view on consent is related to the view of freedom of contract; and is also related to the monistic/pluralistic view of contract. There is no clear-cut distinction between the issues of consent, context, and freedom of contract, and they are entangled.

Third, the contractual debate could be framed as a debate between classical contract law and modern contract law.[127] The majority opinions examined represent classic contract law (enforcement of contracts based on freedom of contract, limited intervention in the contract, a narrow notion of consent), while the dissenting opinions examined represent modern contract

[127] *See, e.g.*, Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983) (discussing classic and modern contract law).

law (more court intervention in contract, limited contract enforcement and a more complex notion of consent). In that regard, rather than a move from classic contract law to modern contract law and back to neo-formalism,[128] the above analysis showed that the Supreme Court's decisions reveal both the classic and the modern approach side by side. In other words, rather than a description of a general trend it seems more accurate that some judges hold a more classic contract view while others a more modern one.

Fourth, the above analysis painted with wide brush strokes shows the difference of opinions between the majority and the dissent. However, some nuances exist. While I included Justices Roberts, Scalia, Alito and Gorsuch in one camp and Justices Kagan and Ginsburg in the other camp, there are intra-group differences between the different justices.

Fifth, the contract debate described above is a general debate that goes to the basis of contract law. It is not limited to arbitration agreements but is generally applicable to other contracts and other contexts, since this debate is about fundamental perceptions of contract that are at the heart of contract law. As arbitration is a hot topic, it served only to demonstrate this debate. However, this is a debate between conflicting visions of contract that goes beyond arbitration agreements.

This Article aims to provide an initial examination of the contract debate. Therefore, the above issues are beyond the scope of this Article. I will hopefully further explore these issues in my future articles, elaborating on the contract debate in other contexts and regarding other contract debatable issues.

IV. THE ARBITRATION DEBATE: ON ARBITRATION, PLURALISM AND DISSENTING

The Supreme Court's arbitration jurisprudence, as analyzed in the previous part, has three implications. This part discusses the contribution of this analysis to arbitration literature, pluralist theory of contract and to dissenting opinion scholarship. First, it shifts the arbitration literature discussion from the FAA to contract, and from alternative dispute resolution to contract law. Second, it argues that pluralism in contract law theory is apparent in the relationship between majority and dissenting opinions. Lastly, it demonstrates the concept of profound dissent.

A. *Arbitration*

[128] John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 870 (2002); *See generally* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004).

As discussed in Part I, arbitration jurisprudence analyzed the FAA.[129] It focused on the application and interpretation of the FAA, and on the interaction between the FAA and other federal or state laws. It revealed an "arbitration debate" that is, a difference of opinion between two camps. On the one hand, the pro-arbitration camp that supports broad interpretation of the FAA and advances a pro-arbitration policy when the FAA conflicts with other laws. On the other hand, the critical camp that narrows the FAA reach and is cautious in expanding it to employment and consumer contexts or to standard form contracts. This camp considers arbitration's disadvantages, their effects in the vindication of rights and impact in contexts of power inequality between the parties. However, the analysis in Part II demonstrated that there is a more basic disagreement in Supreme Court jurisprudence. The controversy is not only about the FAA, its interpretation, application, and implementation—it is a more profound dispute about different visions of contract.

This reframing of the arbitration debate as a contract debate provides a deeper understanding of arbitration jurisprudence. It gives a fuller picture of the differences between the views of different justices and examines the contract at the heart of the arbitration dispute. The Supreme Court often cites the well-known notion that arbitration is a matter of contract, and this Article explores in depth its meaning and impact. Furthermore, it calls for a contract theory analysis of the arbitration decisions. The cases demonstrated how contract law works and reflected visions of contracts. At the same time, the cases also shaped contract law and demonstrated trends in contract law jurisprudence. That is, these cases have general relevance to contract law beyond arbitration agreements. For example, how do courts view the parties' consent or intent? Do they look only at the language of the contract, or do they also look at the context? Do they view all contracts the same, or do they see a rich and diverse world of contracts? Do they adopt a monistic view of contract law (one size fits all contracts) or a pluralistic view? What values does contract law advance? How should freedom of contract be balanced with other values? These are basic questions in contract law generally not limited to arbitration contracts. Furthermore, this analysis advances the view that arbitration is an alternative dispute resolution institution based on contract, and supports the view that arbitration is not only an alternative to litigation, but basically a matter of contract. Beyond analysis of the FAA, it also required contract analysis. Indeed, the Supreme Court arbitration jurisprudence is pro-arbitration. However, this is only part of the picture. First, it overlooks dissenting opinions with a more cautious approach to arbitration. The court is not unanimous in its approach to arbitration and some justices have refused to

[129] *See, e.g.*, David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665 (2018).

enforce arbitration agreements, especially in employment and consumer contexts. Second, it also disregards the conservative, neoliberal concept of freedom of contract in arbitration jurisprudence. Pro-arbitration basically means enforcing arbitration agreements and minimal intervention of the courts in the contract. It means strict enforcement of contracts in a Lochner manner, as Justice Ginsburg commented.

Though some recent Supreme Court opinions were given per curiam,[130] based on the analysis in Part III, this does not indicate that Supreme Court jurisprudence is not split between different views of contract. Furthermore, enactment of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021[131] will also not end the controversy, and neither will the pending Forced Arbitration Injustice Repeal Act of 2022. As the discussion in the previous part demonstrated, the questions posed in arbitration jurisprudence brought to the fore visions of contracts. It raised questions at the heart of contract law that require different perceptions of contracts. These are basic theoretical issues that were not resolved. They open the door to controversy between utterly different perceptions of contract. The arbitration debate is not limited to and not unrelated to contract issues.

B. *Pluralist Theory of Contract*

According to Baaij, the Supreme Court's arbitration jurisprudence could be justified by a pluralist contract theory which combines autonomy and efficiency theories of contract to support arbitration.[132] Rejecting this contractual approach, Baaij offers an alternative theory of arbitration, which

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[130] Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012); Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2079 (2022); Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1786 (2022); Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1710 (2022); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 525 (2019). See also other decisions with no dissenting opinion only concurrences: Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013); GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020); New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019).

[131] *See generally* Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J. L. & SOC. POL'Y 1 (2023); David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J. F. 1 (2022); Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 WASH. & LEE L. REV. 893 (2023).

[132] Cornelis J.W. Baaij, *A Case of Mistaken Identity: Questioning the U.S. Supreme Court's Contract Theory of Arbitration*, 14 VA. L. & BUS. REV. 121, 134 (2020).

is a laissez-faire theory of government.[133] This Article offers a different pluralist theory of arbitration agreements. Rather than the Supreme Court relying on both autonomy and efficiency theories, this Article views the Court's decisions as relying on different visions of contract. Moreover, reading the majority and the dissenting opinions together forms a pluralist notion of contract.

Pluralism in contract law is founded on the understanding that there is not only one theory or principle at the basis of contract law.[134] Rather, each theory provides important insights and perspectives on contract law, and no one theory gives a full explanation of contract law.[135] Some pluralist theories engage in balancing these values either horizontally or vertically, while others engage in the convergence of these values.[136] In addition, there is also structurally pluralist contract law that includes diverse types of contracts.[137] Moreover, there is also judicial pluralism in which judges apply plural values in rendering their decisions.[138] Lastly, there is democratic pluralism, which deals with justifying contract law in a society that is characterized by value

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[133] *Id.* at 123.

[134] *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543 (2003); Aditi Bagchi, *Pluralism*, *in* RESEARCH HANDBOOK IN THE PHILOSOPHY OF CONTRACT LAW (Chen-Wishart & Saprai eds., 2024); Daniel Markovits & Alan Schwartz, *Plural Values in Contract Law: Theory and Implementation*, 20 THEORETICAL INQUIRIES L. 571, 573 (2019). *See also*, ROBERT HILLMAN, THE RICHNESS OF CONTRACT LAW (1997).

[135] *See* Roy Kreinter, *On the New Pluralism in Contract Theory*, 45 SUFFOLK U. L. REV. 915 (2012). *See also* Bertram Lomfeld, *Contract as Deliberation*, 76 LAW & CONTEMP. PROBS. 1, 1–2 (2013); Bertram Lomfeld & Dan Wielsch, *The Public Dimension of Contract: Contractual Pluralism Beyond Privity*, 76 LAW & CONTEMP. PROBS. i (2013); Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract*, 29 TOURO L. REV. 659, 662 (2013); Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008); Steven J. Burton, *Normative Legal Theories: The Case for Pluralism and Balancing*, 98 IOWA L. REV. 535 (2013).

[136] *See* Zhong Xing Tan, *The Prospects for Pluralism in Contract Theory*, 41 LEGAL STUD. 547 (2021). *See also* Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483 (2005) (suggesting principled pluralism); Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1 (2005).

[137] Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROBS. 19, 33 (2013). *See also* Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1425 (2012).

[138] *See generally* Leon Trakman, *Pluralism in Contract Law*, 58 BUFF. L. REV. 1031 (2010).

pluralism and disagreement about the moral values underlying contract law.[139]

As these sporadic examples of the literature show, there are different pluralist theories to which this Article contributes. This Article shows how court decisions can also reflect pluralist notions of contract. The majority and the dissenting opinion, examined together, demonstrate different approaches to contract law. They complement each other and, read together, reflect tension between two different approaches. Thus, pluralist theory of contract not only helps us better understand contract doctrines, but also Supreme Court cases. Read together, the majority and dissenting opinions reflect that there is no single guiding principle, but rather plural notions of contract. Accordingly, the opinions should be read in their entirety, including the conflicting ideas of contract expressed by the different justices. The opinions discussed in the previous part show how judges reflect different ideas on contract and contract law, and how these ideas conflict with one another though they coexist in the full opinion. There is profound disagreement between the justices in their views of parties (as autonomous or relational) of contract and of the economic and social background of the contract. This tension is irreconcilable and shows how a monistic view of contract cannot aptly and accurately describe Supreme Court arbitration jurisprudence.

As this Article has demonstrated, Supreme Court opinions are also a locus for a pluralistic notion of contract. Rather than analyzing contract law doctrines and theories to show conflicting ideas of contract, this Article analyzed Supreme Court cases to show different visions of contract law. As such, pluralist theories also enrich our understanding of contract law cases.

Indeed, one notion of contract appears in the Court's majority opinion, and the other in the dissenting opinion. However, this division can change over time, and dissenting opinion can become the law. As discussed earlier, this pluralism in court decisions is relevant not only for arbitration agreements but for contract cases generally.

C. *Majority-Dissenting Opinions*

As discussed in the previous part, the opinions analyzed demonstrate that the majority holds an entirely different vision of contract than the dissenting opinion. These two conflicting approaches are in tension with one another. They not only yield different results but are also based on disparate visions of contract. The dissent is profound and reflects:

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[139] *See* Aditi Bagchi, *Private Law and Public Discourse*, 65 ARIZ. L. REV. 541 (2023); PRINCE SAPRAI, CONTRACT LAW WITHOUT FOUNDATIONS: TOWARD A REPUBLICAN THEORY OF CONTRACT LAW (2019).

> deep and broad divergence from the majority. Not only does the dissenter disagree with the opinion of the court, but indeed she sees it as flawed, erroneous, mistaken, and misguided. She challenges not only the conclusion, but also the court's reasoning, rationale, analysis, framing, basic assumptions, and core values. In so doing, she suggests an ideological alternative to the majority. The different result stems, in such cases, not from a procedural dispute, but rather from an alternative view of law and society. There is a deep gap, in such cases, between the majority and dissent, and the latter stands in direct opposition to the former.[140]

Thus, the previous part demonstrates two disparate contract worlds.

Nonetheless, not every dissenting opinion is in conflict with the majority, and some dissenting opinions are soft dissents, reflecting narrow disagreement with the majority.[141] For example, in *Badgerow v. Walters*,[142] the court addressed the question of jurisdiction of federal courts under the FAA. Under Section 4 of the FAA, the federal court must use a "look through" approach.[143] The majority held that this approach does not apply to Sections 9 and 10 of the FAA, while the dissenting opinion held that it does. As the dissent acknowledged, this is a technical question. The disagreement between the majority and dissenting opinions was regarding the reading of the FAA, its interpretation and implementation, and the application of precedent. Thus, it does not reflect a deep and wide gap between two conflicting opinions, nor between two opposing worldviews, but rather a narrow and limited conflict. Unlike Breyer's soft dissent in *Badgerow*, the dissenting opinions in the cases reviewed in the previous part are profound dissents. They present a conflict between different visions of contract and offer an alternative contract worldview to that of the majority. Not all dissenting opinions are equal. Some are in deep conflict with, and pose an alternative to, the majority, such as the dissenting opinions discussed here. Others represent a minor limited difference of opinion. There is rich and diverse literature on dissenting opinions.[144] This Article demonstrated how the concept of profound dissent is helpful in analyzing arbitration court opinions but is not limited to arbitration jurisprudence. It is relevant generally to court decisions, beyond arbitration or

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[140] Orit Gan, *I Dissent: Justice Ginsburg's Profound Dissents*, 74 RUTGERS U. L. REV. 1037, 1047–48 (2022).

[141] *Id.* at 1047.

[142] Badgerow v. Walters, 142 S. Ct. 1310 (2022). *See also* Kristen M. Blankley, *A Muddy Mess: The Supreme Court's Jurisprudence on Jurisdiction for Arbitration Matters*, 77 U. MIA. L. REV. 676 (2023) (discussing *Badgerow* and the questions left unanswered about the applicability of the FAA in federal courts).

[143] *Id.* at 1311.

[144] Gan, *supra* note 140, at 1040.

contract law.

V. CONCLUSION

Supreme Court arbitration decisions interpret and apply the Federal Arbitration Act, and shape arbitration as an alternative to litigation. Supreme Court arbitration jurisprudence reveals an "arbitration debate". Some justices, mainly writing the opinions of the court, support arbitration by enforcing arbitration agreements; while other justices, usually the dissenting ones, are more cautious and critical of arbitration, for example refusing to enforce class arbitration waivers in the employment context. This Article looks at arbitration jurisprudence from a contract perspective. Analyzing these decisions of the Supreme Court reveals that the above two approaches to arbitration are to a large extent a contract debate. The majority and the dissent hold utterly different visions of contract, and they seem to represent a tale of two different contract cities. This contract debate goes to the core of contract law: a debate between a formal and narrow vision of consent to contract and a contextual policy-oriented vision of consent to contract; a debate between a monistic and a pluralistic view of contract; and a debate between a classic freedom of contract approach and a more limited policy-oriented approach. This contract debate is not limited to arbitration jurisprudence. In future articles I will hopefully further develop this contractual debate between two different contract law cities in other contexts. Framing the arbitration debate as a contract debate has three implications. First, it emphasizes that arbitration is a matter of agreement; second, it suggests that, when read together, the dissenting and majority opinions reveal a pluralist notion of contract, where in the same decision two diverse perspectives of contract law coexist side by side; and third, it demonstrates the concept of profound dissent, which refers to a dissenting opinion representing a fierce conflict with and a deep critique of the majority opinion.