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Does Rigorously Enforcing Arbitration Agreements Promote “Autonomy”?

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Does Rigorously Enforcing Arbitration Agreements Promote “Autonomy”?

HIRO N. ARAGAKI*

In recent years, the U.S. Supreme Court has helped transform arbitration law into a radical private-ordering regime in which freedom of contract has come to eclipse public regulation. Arbitration jurisprudence justifies this transformation in part on a profound and longstanding commitment to the ideal of individual autonomy, understood as the freedom—lacking in litigation—to select a disputing process best suited to one’s needs.

In this Article, I question the cogency of this justification. I argue, first, that autonomy has had different and sometimes conflicting meanings even within arbitration jurisprudence. Second, depending on the meaning one ascribes to autonomy, it is at best uncertain whether a commitment to it requires enforcing arbitration agreements with minimal regulation by the state. Ironically, the libertarian interpretation of autonomy that lies at the heart of the Court’s recent arbitration decisions turns out to be the least adept at explaining why arbitration agreements should be “rigorously enforce[d]” . . . according to their terms.” To the extent we wish to continue viewing enforcement as important for the value of autonomy in arbitration, therefore, it appears we must rethink what autonomy means in this context and whether in certain circumstances autonomy may be best promoted by refusing to enforce arbitration agreements.

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INTRODUCTION

In the early twenty-first century, it is no exaggeration to declare that freedom of contract is now “at the very core of how the law regulates arbitration.”¹ By freedom

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1. Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of*

of contract, I mean the enforcement of arbitration agreements with minimal regulation by the state—what the U.S. Supreme Court has described as “‘rigorously enforc[ing]’ arbitration agreements according to their terms.”²

The triumph of freedom of contract in the arbitration area is evident in a number of different ways. Although arbitration was once largely limited to contractual claims,³ in the modern era agreements to arbitrate are enforceable even as to claims under Title VII and other federal statutes designed to further important public interests.⁴ It matters little whether the terms of the agreement make it too costly or burdensome as a practical matter to bring such causes of action in the arbitral forum. For as the Court recently explained, the law’s “command to enforce arbitration agreements trumps any interest in ensuring the prosecution of . . . claims.”⁵

Likewise, under the doctrine of Federal Arbitration Act (FAA) preemption, private agreements to arbitrate are now effectively immunized from any state legislation or public policy.⁶ Thus, arbitrators may award punitive damages even if state law reserves such quasi-public remedies exclusively to judicial processes.⁷ State legislatures are powerless to promote informed assent to so-called mandatory arbitration clauses—for example, by requiring such clauses to be printed in underlined capital letters on the face of an adhesion contract.⁸ The net effect is that arbitration agreements are not just enforced but *rigorously* enforced to a degree

Arbitration Agreements, 36 VAND. J. TRANSNAT’L L. 1189, 1193 (2003) [hereinafter Carbonneau, *Contract Freedom*] (criticizing this view); *see also* Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT’L ARB. 213, 258 (2005) [hereinafter Carbonneau, *Crossroads*] (describing freedom of contract as an “absolute value” in arbitration); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3068 (2015) (describing the Court’s recent arbitration jurisprudence as a “pure freedom of contract” paradigm (emphasis in original)); Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 486 (1997) (“[T]he arbitration process is in fact all about . . . private ordering and self-determination.”).

2. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

3. *See Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 25 (1924) (statement of Alexander Rose, Arbitration Society of America).

4. *See* Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1256–57 (2011).

5. *Italian Colors Rest.*, 133 S. Ct. at 2312 n.5.

6. In effect, such agreements are enforced “notwithstanding any state substantive or procedural policies to the contrary.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

7. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 61 n.7 (1995); *cf.* UNIF. ARBITRATION ACT § 21(a) & cmt. 1 (2000), available at http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf [<https://perma.cc/GN2W-VBV7>] (permitting punitive damages in arbitration); NAT’L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES princ. 14 & cmt. (1998), available at https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [<https://perma.cc/KK8B-PTH9>] (permitting punitive damages in consumer arbitration).

8. *See* *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

unknown in other contracting contexts. This has led many commentators to claim that arbitration agreements are a type of “super contract.”⁹

What explains the law’s embrace of a radical private-ordering regime in the arbitration area? To realists, it is a function of the Court’s conservative, pro-business leanings.¹⁰ Positivists, on the other hand, will explain it as flowing inexorably from the plain language of the FAA—language that seems practically to dictate freedom of contract by declaring that arbitration agreements “shall be valid, irrevocable, and enforceable” subject only to common-law contract defenses.¹¹ Theorists will give still a third answer: enforcing arbitration agreements strictly according to their terms is a natural implication of the strong commitment in both arbitration law and practice to the ideal of personal autonomy. It is this last explanation that I propose to interrogate in this Article.

Autonomy has for some time occupied a central place in arbitration jurisprudence and in the jurisprudence of alternative dispute resolution (ADR) more generally.¹² Unlike the one-size-fits-all approach of litigation, arbitration’s hallmark has been the wide scope of choice that it provides for parties to design a disputing procedure best suited to their needs and circumstances.¹³ From the Court of Arbitration for Sport¹⁴ to the Writers Guild arbitration procedure,¹⁵ arbitration has given parties the freedom to develop a stunning diversity of procedures designed to meet the unique challenges of a variety of different disputing contexts. This has led courts and commentators to claim that party autonomy is not just one among many distinctive values in arbitration; it is “the highest priority in the pantheon of arbitration values.”¹⁶ I refer to this as the “autonomy thesis.”

9. See *infra* notes 120–23 and accompanying text.

10. See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL’Y (SPECIAL ISSUE) 1, 74, 96 (2011); Andrew Cohen, *No Class: The Supreme Court’s Arbitration Ruling*, THE ATLANTIC (Apr. 27, 2011), <http://www.theatlantic.com/national/archive/2011/04/no-class-the-supreme-courts-arbitration-ruling/237967/> [<https://perma.cc/GX8K-APTS>].

11. 9 U.S.C. § 2 (2012) (emphasis added) (making arbitration clauses enforceable except on “such grounds as exist at law or in equity for the revocation of *any* contract” (emphasis added)); see Aragaki, *supra* note 4, at 1246–47 (noting that the savings clause has been construed as including only common-law contract defenses).

12. See, e.g., Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 65 (1999) (“Party autonomy is a significant feature of all ADR, and constitutes an especially critical underpinning to arbitration theory and practice.”).

13. Thomas J. Stipanowich, *Arbitration The “New Litigation,”* 2010 U. ILL. L. REV. 1, 50–51.

14. See generally Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World’s Sports Disputes*, 35 VAL. U. L. REV. 379 (2001).

15. See, e.g., *Ferguson v. Writers Guild of Am., W., Inc.*, 277 Cal. Rptr. 450 (Ct. App. 1991); WRITERS GUILD OF AM., W., THE LEGAL ARBITRATION PROCESS, available at http://www.wga.org/uploadedfiles/if_you_are_a_member/arbitration_pamphlet.pdf [<https://perma.cc/ZQU7-Q4NC>].

16. Edward Brunet, *The Core Values of Arbitration*, in EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 3, 5 (2006); see also *id.* at 4 (describing party autonomy as “the fundamental value of arbitration”).

At a superficial level the autonomy thesis seems to help explain why the Court views the rigorous enforcement of arbitration agreements as the “preeminent” or “primary” purpose of federal arbitration law.¹⁷ For by faithfully enforcing arbitration agreements, the state appears to do little more than create space for the parties freely to pursue their own ideas of the “good” of dispute resolution.¹⁸ By contrast, regulating such agreements appears to restrict autonomy because it risks imposing external values about adjudication on the parties—values that they did not necessarily freely choose.¹⁹

In this Article, I question whether the autonomy thesis points unproblematically in the direction of enforcing arbitration agreements with minimal regulation by the state. I argue that autonomy can mean many different things and that, depending on the conception of autonomy to which one subscribes, autonomy might require not freedom *of* contract but rather freedom *from* contract. Although philosophers have for a long time sought to understand the multiple and often conflicting ways of understanding autonomy, courts and commentators writing in the arbitration area have paid comparatively little attention to these nuances. As a result, they have been led to overestimate the persuasiveness of the autonomy thesis in justifying the rigorous enforcement of arbitration agreements.

This Article proceeds as follows. In Part I, I seek to better understand the nature of the autonomy thesis—in particular, whether it is a claim primarily about negative or positive liberty. Some commentators cleave to the staunchly libertarian view that autonomy is little more than the absence of external constraints on choice, while others betray a much more robust conception of autonomy as a type of self-governance. But the diversity of views among commentators has not (for the most part) been reflected in the Court’s modern arbitration jurisprudence. At the heart of that jurisprudence, I argue, is a conception of autonomy *qua* negative liberty.

In Part II, I evaluate the extent to which a commitment to the autonomy thesis (in either its negative or positive variants) requires rigorously enforcing arbitration agreements. The argument in favor of rigorous enforcement entails two things: (i) an affirmative argument for enforcement and (ii) an argument against the regulation of that enforcement by the state. I conclude that interpreting autonomy in negative liberty terms presents a weak justification for either (i) or (ii). Although interpreting autonomy in positive terms presents a somewhat stronger affirmative argument for why arbitration agreements should be enforced, it does not necessarily imply minimal regulation by the state. Positive liberty is moreover in tension with the strong negative liberty orientation of arbitration law. Forging a more persuasive and balanced link between autonomy and enforcement along positive liberty lines would

17. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *accord Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (“[T]he basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate.”).

18. As Thomas Stipanowich put it, “[a]rbitration law promotes the autonomy of parties by enforcing their agreements to arbitrate.” Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 430 (2007).

19. See George A. Bermann, *Ascertaining the Parties’ Intentions in Arbitral Design*, 113 PENN ST. L. REV. 1013, 1028 (2008).

therefore require relinquishing important features of the Court's modern arbitration jurisprudence.

I. MAKING SENSE OF THE AUTONOMY THESIS

Many important values animate the law and practice of arbitration. Autonomy—broadly construed as the freedom to design a process tailored to the parties' needs—is certainly one such value. So is procedural simplicity or efficiency,²⁰ which is believed to reduce the time and cost of adjudication and to produce other systemic benefits such as clearing congested court dockets.²¹ Still another is the preservation of business relationships and discouraging unnecessary adversarialism.²² And as I have elsewhere argued, access to justice and better procedure were also expressed reasons to prefer arbitration over litigation around the time the FAA was enacted.²³

What I shall call the “autonomy thesis” is the now well-entrenched claim that autonomy is (or should be) the *primary* value that animates arbitration law and policy.²⁴ Thus, Thomas Stipanowich argues that “the central and primary value of arbitration is not speed, or economy, or privacy, or neutral expertise, but rather the ability of users to make key process choices to suit their particular needs.”²⁵ Stephen Ware likewise claims that because “‘autonomy . . . [i]s the value that transcends these

20. See, e.g., *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (observing that “the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution”); *Stolt-Nielsen*, 559 U.S. at 684–86 (observing that, by increasing costs and decreasing efficiency and speed, class arbitration “changes the nature of arbitration”); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (describing “arbitration’s essential virtue of resolving disputes straightaway”).

21. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1363 (“Arbitration is a process disputants have used for years in an effort to circumvent the court system’s costly delays and congested dockets.” (footnote omitted)); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 642 (1996) (linking the Court’s aggressively pro-arbitration jurisprudence beginning in the 1980s with a “growing concern that dockets were overloaded”).

22. See, e.g., *Advantages Ascribed to Arbitration*, 9 J. AM. JUDICATURE SOC’Y 73, 74 (1925) (“Arbitration [c]onserves [f]riendly [r]elations”); Warren E. Burger, *Isn’t There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?* 25 OHIO ST. J. ON DISP. RESOL. 433, 451–52 (2010).

23. See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939 (2014).

24. See, e.g., UNIF. ARBITRATION ACT prefatory note (2000) (“[A]utonomy of the parties . . . should be given primary consideration”); Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 39 (“[A]rbitration is aimed first and foremost at ensuring the parties’ procedural autonomy.”); Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059, 1069 (1987) (theorizing that “the legitimacy of arbitral proceedings flows directly from a vision of private autonomy as the conceptual basis of contract law”).

25. Stipanowich, *supra* note 13, at 51.

other values,” it is “arbitration’s essential virtue.”²⁶ So, too, Edward Brunet declares that “party autonomy [is] the highest priority in the pantheon of arbitration values.”²⁷ Consistent with these claims, Alan Rau contends that “arbitration should be understood through the lenses of contract rather than of adjudication” and that with respect to arbitration law, “the only serious inquiry ought to be one into the understanding and underlying assumptions of the contracting parties.”²⁸

But despite what may be a near “universal[.]”²⁹ acceptance of the *significance* of autonomy to arbitration law and policy, it is an underappreciated fact that there is little agreement about what exactly autonomy in this context means. Many contemporary debates in arbitration can be understood as debates not over the relative importance of autonomy vis-à-vis other values but over the meaning of autonomy itself. Until we are clear about that meaning, therefore, it will be impossible to assess the claim that the autonomy thesis favors the rigorous enforcement of arbitration agreements. In this Part, I attempt to bring this clarity.

A. Negative and Positive Liberty

A distinction is often drawn in liberal political theory between “negative” and “positive” liberty.³⁰ Although the distinction has been subject to extensive criticism,³¹ for my purposes it provides a useful analytic framework through which to understand the autonomy thesis.

From a negative liberty standpoint, freedom is little more than the absence of *external* restraint or coercion by the state or by private actors.³² As Isaiah Berlin put it, “I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this [negative] sense is simply the area within which a man can act unobstructed by others.”³³ Negative liberty has often been described as an “opportunity concept” because it conceives of freedom merely in terms of how many doors are open rather than slammed shut.³⁴ The inherent appeal

26. Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 92 (2014) (quoting Stephen Ware, *Comments of Professor Stephen Ware*, in BRUNET ET AL., *supra* note 16, at 327, 339).

27. Brunet, *supra* note 16, at 5.

28. Rau, *supra* note 1, at 487.

29. S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?* Stolt-Nielsen, AT&T, and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 226 (2012) (observing that “party autonomy . . . is universally agreed to be a fundamental principle of arbitration”).

30. The most well-known statement of this distinction is Isaiah Berlin’s. See ISIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969).

31. See generally KATRIN FLIKSCHUH, *FREEDOM: CONTEMPORARY LIBERAL PERSPECTIVES* (2007).

32. See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 16–17 (1960) (defining liberty as the absence of both “restraint,” in the sense of being *prevented from* taking certain actions, and “constraint,” in the sense of being *forced to* take certain actions).

33. BERLIN, *supra* note 30, at 122.

34. 2 CHARLES TAYLOR, *What’s Wrong with Negative Liberty?*, in PHILOSOPHY & THE HUMAN SCIENCES 211, 213–14 (1985). Berlin, in particular, conceived of negative liberty using the metaphor of open doors. BERLIN, *supra* note 30, at xxxix (describing negative liberty

of this conception is that it is value neutral: it imports no substantive judgments about how easy or difficult it is to walk through any given door—indeed, about which open doors are worth walking through to begin with—and thus about what real freedom looks like.³⁵ To borrow Lea Brilmayer’s example, from a negative liberty standpoint the “life choices of the beer-swilling, pornography-reading jet-ski cowboy” are no less free—or deserving of freedom—than those of “the bookish intellectual.”³⁶ Freedom consists rather in the individual’s essential separateness from others and from the state.³⁷

Classical utilitarianism, by contrast, paid little respect to this separateness. It had few qualms about sacrificing the freedom of some to improve the welfare of the many through, for instance, redistributive measures.³⁸ But from a liberal perspective that places a premium on the sanctity of the individual, this type of intervention “fails to take seriously the distinction between persons.”³⁹ True freedom requires instead that individuals be treated as ends in themselves, not as mere means toward the achievement of other public or private objectives.⁴⁰ This, in turn, entails that they possess rights against intrusions on their freedom both by others and by the state.⁴¹ It explains why rights-based theories tend to find their origin in theories of negative liberty.

On the negative liberty view, therefore, freedom is *inversely* related to government regulation. States do not respect individual freedom through social assistance, measures designed to promote human flourishing, or other forms of what Sir William Vernon-Harcourt described as “grandmotherly government.”⁴² They do so instead by staying out of everyone’s business. It is for this reason that negative liberty theories typically betray a deep skepticism of centralized decision making, paternalism, and state intervention in free markets.⁴³ Restrictions on freedom can

as dependent, *inter alia*, on “how many doors are open” and “how open they are”).

35. HAYEK, *supra* note 32, at 18 (“[T]o be free may mean freedom to starve, to make costly mistakes, or to run mortal risks.”).

36. Lea Brilmayer, *Lonely Libertarian: One Man’s View of Antidiscrimination Law*, 31 SAN DIEGO L. REV. 105, 123 (1994).

37. See H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828, 829–34 (1979) (describing rights-based liberal and libertarian theories as emphasizing the moral “separateness” of individuals).

38. See, e.g., Jeremy Bentham, *The Philosophy of Economic Science*, in 1 W. STARK, JEREMY BENTHAM’S ECONOMIC WRITINGS 81, 115–16 (1952).

39. JOHN RAWLS, A THEORY OF JUSTICE 187 (1971).

40. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30, 48–50 (1974).

41. This is the move Robert Nozick makes in *Anarchy, State, and Utopia*. Nozick argues that rights as “[s]ide constraints upon action reflect the underlying Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent. Individuals are inviolable.” NOZICK, *supra* note 40, at 31.

42. See T.H. Green, *Liberal Legislation and Freedom of Contract*, in THE LIBERTY READER 21, 25 (David Miller ed., 2006).

43. For example, Mill famously took the view that the state may not compel individuals to

do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or

only be justified on narrow and supposedly value-neutral terms such as preventing harm to, or securing a like freedom for, others.⁴⁴

If negative liberty is more of an “opportunity concept,” positive liberty is better understood as an “exercise concept”: it asks not just how many doors are open, but whether their being open contributes in any meaningful sense to one’s freedom—especially if one lacks the resources, wherewithal, or maturity to walk through any of them.⁴⁵ A bird in the wild whose wings have been clipped has the *opportunity* to fly in the sense that nobody is preventing it from doing so, such as by confining it to a cage; from a negative liberty standpoint it is therefore perfectly free. But as Bishop Bramhall once put it, this is at best a “brutish liberty”⁴⁶ because the physical handicap renders the bird unable to *exercise* this freedom in any real or meaningful way. Freedom in the positive sense is therefore often described as a freedom “to”—what John Dewey referred to as an “effective power to do specific things.”⁴⁷ To positive liberty theorists, the bare freedom “from” constraint is an impoverished conception of freedom. Although freedom from external constraint may be a necessary ingredient of freedom insofar as a caged bird with its wings intact is also unable to fly, it does not fully capture what it means to be free.

Positive freedom can also be conceived in much thicker terms, as denoting a kind of “self-realization,”⁴⁸ “self-mastery,”⁴⁹ or “self-determination.”⁵⁰ This is the sense in which the term “autonomy” has traditionally been used.⁵¹ The difference between

persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.

JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 14 (John Gray ed., Oxford Univ. Press 1998).

44. See, e.g., IMMANUEL KANT, *PRACTICAL PHILOSOPHY* 387–88 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) (asserting that individual freedom may be legally restricted so that the free use of one’s choice can co-exist with everyone else’s freedom under a universal law); MILL, *supra* note 43, at 14 (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”).

45. See TAYLOR, *supra* note 34, at 213–14.

46. John Bramhall, *A Defence of True Liberty*, in HOBBS & BRAMHALL *ON LIBERTY & NECESSITY* 43, 44 (Vere Chappell ed., Cambridge Univ. Press 1999); see also Morris R. Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553, 560 (1933) (observing that the (negative) freedom to make a million dollars is not meaningful if one finds oneself out of work).

47. John Dewey, *Liberty and Social Control*, in 11 *THE COLLECTED WORKS OF JOHN DEWEY* 360, 360 (John J. McDermott and Jo Ann Boydston eds., Southern Illinois Univ. Press 2008); accord RAWLS, *supra* note 39, at 204 (distinguishing between “liberty” in the negative sense and the “worth of liberty” in the sense of having the means to achieve one’s aims).

48. TAYLOR, *supra* note 34, at 215–17.

49. John Christman, *Liberalism and Individual Positive Freedom*, 101 *ETHICS* 343, 344 (1991) (describing positive liberty not just in terms of the absence of constraint but also in terms of a “capacity for self-mastery and self-government”).

50. See JOHN GRAY, *On Negative and Positive Liberty*, in *LIBERALISMS: ESSAYS IN POLITICAL PHILOSOPHY* 45, 57 (1989).

51. “Autonomy” literally means self-legislation, a characteristic originally exemplified by Greek city-states that created their own laws rather than have them handed down by foreign powers or home-grown tyrants. It was not until the Enlightenment that autonomy came to be seen as a property of the individual—what Immanuel Kant and others described as a “property

a thin conception of positive liberty and a thicker conception *qua* autonomy is that the focus of the former is on the ability to *do* things, whereas the focus of the latter is on the capacity to *be* a certain type of rational, independent-thinking person—one who determines the course of her own life rather than have it be determined for her by tradition, peer pressure, or the force of habit.⁵² This capacity has sometimes been described as the ability to make choices about one's choices.⁵³ That is, a person is autonomous in the thick sense not just because she is free to exercise certain first-order choices such as whether to smoke a cigarette on any given day; rather, she is free because she is able to (and does) make second-order choices about her first-order choices, such as by choosing to quit smoking altogether. This is the sense in which Gerald Dworkin describes autonomy as a

second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values. By exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.⁵⁴

Thicker conceptions of positive liberty *qua* autonomy highlight the extent to which the mere absence of external constraints, whether on opportunity or exercise, cannot be the whole picture. *Internal* constraints such as fear, false consciousness, inadequate information or understanding, lack of motivation, dependency, or poor judgment become salient in a way they are not for negative liberty (or even thin positive liberty) theories.⁵⁵

which will has of being a law to itself." IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 114 (H. J. Paton trans., Harper Torchbooks 1964) (1785); *accord* JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 16 (G.D.H. Cole trans., 1950) (describing autonomy as "obedience to a law which we prescribe to ourselves").

52. STANLEY I. BENN, *A THEORY OF FREEDOM* 176–77 (1988) ("The heteronomous person, however, receives his *nomos* ready-made, as a well-trained, well-drilled soldier may live punctiliously according to the *Manual of Military Law* and battalion orders." (italics in original)); Christman, *supra* note 49, at 344–45.

53. *See* GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 12–20 (1988); Christman, *supra* note 49, at 346. *But see* Onora O'Neill, *Autonomy, Coherence and Independence*, in *LIBERALISM, CITIZENSHIP AND AUTONOMY* 203, 207–08 (David Milligan & William Watts Miller eds., 1992) (arguing that the idea of autonomy cannot be fully captured in terms of the ability to form preferences about one's preferences). *See generally* Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 *J. PHIL.* 5 (1971) (distinguishing between the ability to make choices and the ability to make choices about one's choices).

54. DWORKIN, *supra* note 53, at 20. John Christman likewise describes autonomy as something "more than having a certain attitude toward one's desires . . . [i]t means . . . that one's values were formed in a manner or by a process that one had (or could have had) something to say about." Christman, *supra* note 49, at 346.

55. *See* BENN, *supra* note 52, at 154; TAYLOR, *supra* note 34, at 215–16 ("You are not free if you are motivated, through fear, inauthentically internalized standards, or false consciousness, to thwart your self-realization."); Christman, *supra* note 49, at 344–45; Joel Feinberg, *Legal Paternalism*, 1 *CANADIAN J. PHIL.* 105, 110–12 (1971).

There are at least two consequences of a positive conception of freedom. First, whereas negative liberty theories seek to minimize the role of the state,⁵⁶ positive liberty theories are not only hospitable to but also sometimes require active state assistance in the form of education, subsidies, or other social services designed to enable the full or meaningful realization of freedom.⁵⁷ Second, unlike negative liberty theories, positive liberty theories cannot claim to be value neutral. To see how this is the case, consider two hypothetical settings⁵⁸: The first is a city in which religious freedom is tolerated but in which every intersection has a traffic light. The second is a city in which there are no traffic lights but a local ordinance prohibits religious prayer in public spaces. In which city is there less (positive) freedom? Most people would likely answer the second, but the real question is why. It cannot be because the second city restricts more bare *opportunities* for free choice, for traffic lights apply to everyone (even atheists) and they restrict us in more places and at more times of the day than the religious ordinance (after all, few people have the need or desire to pray in public multiple times a day). Instead, it is because religion has great meaning and worth in our lives, such that the slightest reduction in the opportunity to pray is taken as a serious assault on our freedom.⁵⁹ The freedom to drive unimpeded through busy city streets, by contrast, has comparatively little value especially when considered against the benefits of coordinating traffic flow—so little, in fact, that we likely do not even register the many periods that we are stuck at a red light as an unfreedom.⁶⁰ This leads Charles Taylor to conclude that “[positive] freedom requires a background conception of what is significant, according to which some restrictions are seen to be without relevance for freedom altogether, and others are judged as being of greater and lesser importance.”⁶¹

Making these distinctions, however, invariably requires importing normative judgments that can often betray a greater commitment to substantive values than to bare freedom of choice. And if so, state intervention designed to deter or punish bad choices and promote good ones may become unobjectionable the closer one hews to

56. See, e.g., NOZICK, *supra* note 40 (advocating a “night-watchman state”).

57. Cass Sunstein takes such a view when he argues that real freedom of choice might require educating parties before they enter into certain contracts. See Cass R. Sunstein, *Disrupting Voluntary Transactions*, in *MARKETS AND JUSTICE* 279, 282 (John W. Chapman & J. Roland Pennock eds., 1989).

58. I have adapted this hypothetical slightly from Charles Taylor. See TAYLOR, *supra* note 34, at 218–19.

59. Richard Arneson makes a similar point with the colorful example of a recently released prisoner who is unable to move his thumbs because they are cast in splints. The extent to which we believe the parolee to be positively free depends not on the sheer number of thumb movements that he is now precluded from pursuing, but rather in the worth or value of the movements that are now foreclosed. If he were a member of a religious cult that placed enormous significance on the ability to manipulate one’s thumbs in different positions for ritual purposes, for example, it would dramatically change our assessment of his positive liberty even though the same number of acts were foreclosed. Richard J. Arneson, “*Freedom and Desire*,” 15 *CANADIAN J. PHIL.* 425, 426–27 (1985).

60. As Taylor explains, “It is not just a matter of our having made a trade-off, and considered that a small loss of liberty was worth fewer traffic accidents . . . we are reluctant to speak here of a loss of liberty *at all* . . .” TAYLOR, *supra* note 34, at 218 (emphasis added).

61. *Id.* at 219.

a positive liberty view.⁶² A good example here is T.H. Green, who once argued that until society reaches a certain stage of enlightenment, intrusive government regulation in the form of health, education, and labor laws is justified in order to help individuals realize their “real freedom.”⁶³

The problem is that if restricting choice can be justified as compatible with positive liberty, the very distinction between freedom and coercion begins to collapse.⁶⁴ As Berlin well recognized, this is a slippery slope toward something far worse than paternalism:

Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their “real” selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfilment) must be identical with his freedom⁶⁵

The further we go down the road toward thick and thicker versions of positive liberty, therefore, the more we seem to import substantive values that stray from the ideal of private ordering. This is perhaps one reason why the dominant conception of autonomy in both liberal theory and contract theory alike is that of negative liberty.⁶⁶

B. Negative and Positive Interpretations of the Autonomy Thesis

1. Autonomy as Negative Liberty

More often than not, “autonomy” in the Court’s arbitration jurisprudence has come to signify the wide latitude—virtually unknown in litigation—that parties enjoy to make any number of process choices. For example, parties may choose what issues to arbitrate (if any), how the arbitration will be conducted (including

62. See, e.g., Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263, 288 (1999) (“Positive freedom thus might support a broad range of regulatory legislation.”).

63. Green, *supra* note 42, at 26.

64. Cf. Pettit, *supra* note 62, at 289 (noting that such a position allows “those arguing for labor legislation . . . or for the unconscionability of a contract [to] claim that they are arguing for freedom”).

65. BERLIN, *supra* note 30, at 133; see also ISIAH BERLIN, “*From Hope and Fear Set Free,*” in CONCEPTS AND CATEGORIES 173 (Henry Hardy ed., 1978).

66. See STEPHEN A. SMITH, CONTRACT THEORY 107 (2004); see also *id.* at 47 (“In practice . . . nearly all rights theories regard contractual rights as classically individualist or ‘negative-liberty’ rights.”). It should come as no surprise that the chief architects of classical contract law, such as Christopher Columbus Langdell and Oliver Wendell Holmes were arch formalists who generally advocated the notion that “no one should be liable to anyone for anything.” GRANT GILMORE, THE DEATH OF CONTRACT 15 (Ronald K. L. Collins ed., 1995). As Gilmore explained, “[s]ince [that] ideal was not attainable, the compromise solution [in contract law] was to restrict liability within the narrowest possible limits.” *Id.*; see also *id.* at 22–23, 47–49.

applicable procedural and evidentiary rules), and who will adjudicate their dispute.⁶⁷ As the Court has often remarked,

the FAA does not require parties to arbitrate when they have not agreed to do so nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. . . . Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.⁶⁸

In other words, autonomy consists in not being “prevent[ed]”—that is, in having the bare *opportunity* to make process choices without “coercion” by others or by the state.

This conception of autonomy as negative liberty is apparent in several key arbitration decisions from the Court. Consider *Doctor’s Associates, Inc. v. Casarotto*.⁶⁹ There, the Court held that a Montana statute requiring arbitration clauses to be printed in underlined capital letters on the front page of the container contract was preempted by the FAA’s contrary injunction to “‘ensur[e] that private agreements to arbitrate’ are enforced according to their terms.”⁷⁰ Critics of the decision argued that the statute should not have been preempted because it was actually consistent with the fundamental principle of “autonomy” in arbitration. For by bringing the clause to the immediate attention of the adherent, they claimed, the statute helped ensure that she would make a more informed and reasoned decision about arbitration (whatever that decision ultimately turned out to be).⁷¹ In rejecting this argument, the Court came down squarely on the side of negative liberty: states may not help weaker parties like the franchisees in *Casarotto* make better, more informed choices because paternalistic legislation of this sort does not improve anyone’s freedom. Instead, it compromises the drafting party’s freedom to enforce

67. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 683 (2010); Gary B. Born, *Keynote Address: Arbitration and the Freedom To Associate*, 38 GA. J. INT’L & COMP. L. 7, 16 (2009) (“If the parties desire a fast-track arbitration, one that is over and done within three months, they can agree to that. If the parties desire a documents-only arbitration, because they do not want to incur significant expense in having their dispute resolved, they can agree to that.” (footnote omitted)).

68. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478–79 (1989) (citations omitted). This rationale is cited in one form or another in many of the Court’s recent decisions. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1749, 1757 (2011); *Stolt-Nielsen*, 559 U.S. at 681–84; *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293–94 (2002); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring).

69. 517 U.S. 681 (1996).

70. *Id.* at 688 (alteration in original) (quoting *Volt*, 489 U.S. at 479).

71. *See* Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in BRUNET ET AL., *supra* note 16, at 63, 69; Margaret L. Moses, *Privatized “Justice,”* 36 LOY. U. CHI. L.J. 535, 542 (2005); Sternlight, *supra* note 21, at 668 (arguing that the purpose of the FAA was to “promote arbitration that is knowingly selected by the parties”).

agreements that both parties chose willingly. On this view, freedom is better safeguarded by staying out of the parties' business altogether.

Consider also *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*.⁷² There, the parties had agreed to arbitrate under the California Arbitration Act (CAA), which permits courts to stay arbitration pending related litigation if "there is a possibility of conflicting rulings on a common issue of law or fact."⁷³ By contrast, the FAA's pro-arbitration approach requires courts to compel arbitration at once even if there are related claims pending in court that involve third parties to the arbitration agreement,⁷⁴ which in turn helps promote recourse to the arbitral forum and further other values associated with arbitration, such as speed and efficiency.⁷⁵ The question presented was whether the CAA's stay provision stood as an obstacle to those purposes and objectives and thus should be preempted. The Court's answer was that not even the pro-arbitration policies behind the FAA could trump the parties' freedom of choice: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."⁷⁶

Volt reveals the extent of arbitration law's commitment to the liberal principle of value neutrality: respect for party autonomy demands respecting the parties' freedom to make even *bad* or irrational choices, such as by opting into state arbitration schemes that are less solicitous of arbitration than the FAA and thus arguably inconsistent with the "national policy favoring arbitration."⁷⁷ Many commentators share this assessment of arbitration law. Rau, for example, has argued that "[s]ince arbitration has *no virtues* other than what the parties themselves happen to find in it," arbitration law forbids courts and legislatures from "imposing a particular image of arbitration on [the parties] against their will."⁷⁸ On this view, true freedom consists of the absence of constraints on the parties' choices rather than the pursuit of good

72. 489 U.S. 468 (1989).

73. CAL. CIV. PROC. CODE § 1281.2(c) (West 2007); *see also Volt*, 489 U.S. at 471.

74. *See* 9 U.S.C. § 4 (2012).

75. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220–21 (1985).

76. *Volt*, 489 U.S. at 476; *accord Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) ("[P]arties may agree to limit the issues they choose to arbitrate and may agree on rules under which any arbitration will proceed. They may choose who will resolve specific disputes . . . [and they] may specify *with whom* they choose to arbitrate their disputes." (emphasis in original) (citations omitted)).

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

78. Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 479 (2006) (emphasis added); *see also* Bermann, *supra* note 19, at 1013 ("[T]he federal interest in arbitration does not consist of enforcing agreements to arbitrate according to some sort of abstract or ideal arbitral model, but rather according to the particular arbitral model upon which the parties had agreed.").

choices.⁷⁹ To the extent *Volt* and cases like it can be described as a “paean to party autonomy,”⁸⁰ therefore, it is to autonomy *qua* negative liberty.

Casarotto and *Volt* are not outliers; they are of a piece with the increasingly strong negative liberty and even libertarian orientation of the Court’s modern arbitration jurisprudence.⁸¹ In this jurisprudence, freedom of contract—in the sense of both maximal enforcement and minimal regulation—has become a paramount value.⁸²

2. Autonomy as Positive Liberty

Although arbitration law takes the autonomy thesis as a straightforward claim about negative liberty, in arbitration scholarship the thesis has sometimes been conceived along the lines that “autonomy” has traditionally been understood in philosophical discourse: as suggesting a capacity for self-government more so than mere freedom from constraint. This is evident in the frequent claim that arbitration is a vehicle of “self-regulation”⁸³ or “self-determination,”⁸⁴ suggesting not so much a simple freedom to choose as a capacity to make sensible, informed, and reflective dispute-resolution choices that (ideally) result in something qualitatively superior to the default of litigation. Gary Born offers the following vivid—if perhaps

79. See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract . . . ; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”); *Volt*, 489 U.S. at 478; *Byrd*, 470 U.S. at 219.

80. See Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225, 234 n.40 (1997).

81. See Stephen J. Ware, *Arbitration and Unconscionability after Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1006 (1996); accord Carbonneau, *Contract Freedom*, *supra* note 1, at 1195 (arguing that modern U.S. arbitration law has severely undercut “the role of the state and the prospect of state regulation”).

82. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 334 (criticizing the Court’s FAA jurisprudence as predicated on a “blind commitment to freedom of contract”); Richard E. Speidel, *Contract Theory and Securities Arbitration: Whither Consent?*, 62 BROOK. L. REV. 1335, 1336–37 (1996) (arguing that the Court’s FAA jurisprudence has emphasized “freedom to contract” at the expense of “freedom from contract”); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 535 (1994) (“[T]he FAA’s core is freedom of contract with respect to arbitration agreements . . .”).

83. FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS* 4 (1st ed. 1948) (describing arbitration as a form of “self-regulation . . . [that] embodies the principles of independence, self-reliance, equality, integrity, and responsibility”); IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 3.2.1 (Supp. 1999).

84. Rau, *supra* note 1, at 486. In addition to arbitration, other types of contract procedures, such as choice-of-forum clauses, have also been justified based on the ideal of self-government. E.g., Martin H. Redish, *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 545, 548 (1995) (arguing that enforcement of forum selection clauses comports with “values of individual self-determination”).

counterfactual—description of how this type of thick positive liberty might manifest itself in a commercial arbitration agreement:

[P]arties . . . *take care* to draft and tailor their dispute resolution mechanism specifically to suit their particular relationship. . . . [They] act to define and structure not just their dispute resolution mechanism, but also their underlying relationship itself; they act to safeguard their shared association with one another against the disputes which will inevitably arise and against the process of dispute resolution. Parties choose arbitration not just because of its characteristics as a dispute resolution mechanism, but because of their ability jointly to determine how the process of dispute resolution will affect their underlying relationship with one another.⁸⁵

Ironically, the best and strongest examples of a positive liberty interpretation of the autonomy thesis come from critics of so-called mandatory binding arbitration. For example, Paul Carrington and Paul Haagen argue that unsophisticated parties who enter pre-dispute arbitration agreements do not manifest “true” assent or “genuine” freedom of contract,⁸⁶ either because they are unlikely to have read or understood the agreement or because they did not have the leverage to negotiate around it.⁸⁷ The implication is that real freedom of contract in this context requires a certain capacity for autonomous decision making—a capacity that rarely exists in actual fact. Likewise, Margaret Jane Radin contends that by clicking “I agree” to boilerplate arbitration clauses, consumers are typically not acting independently or reflectively, and thus not autonomously.⁸⁸ For Radin, freedom is just as much a function of internal constraints such as lack of information and cognitive biases as it is of external constraints such as duress.⁸⁹ This is why she argues that the devolution of contractual assent from “true” consent to something like “fictional . . . opportunity to assent” or “constructive notice of terms”⁹⁰ poses a serious problem for traditional, autonomy-based justifications for enforcement.

A similar commitment to positive liberty drives longstanding efforts to amend the FAA, the latest expression of which is the Arbitration Fairness Act of 2015 currently pending in Congress. The Act seeks to void only pre-dispute arbitration agreements, on the theory that when a party agrees to arbitrate *before* an actual dispute has arisen she has “no meaningful choice.”⁹¹ Only after the contours of a dispute become

85. Born, *supra* note 67, at 17 (emphasis added).

86. Carrington & Haagen, *supra* note 82, at 340; *see also* Sternlight, *supra* note 21, at 675–77.

87. Carrington & Haagen, *supra* note 82, at 334–35, 340; *see also* Sternlight, *supra* note 21, at 676–77.

88. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 88–90 (2013).

89. *Id.* at 23–29. Radin has elsewhere argued for market inalienability in particular contexts on the ground that it would be consistent with promoting positive liberty. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903–05 (1987).

90. RADIN, *supra* note 88, at 83.

91. Arbitration Fairness Act of 2015, S. 1133, H.R. 2087, 114th Cong. § 2(3) (2015).

known, the argument goes, can a choice be “truly voluntary.”⁹² Note that in each of these cases, the claim is not necessarily that freedom of choice should be subordinated to other public values. Instead, the claim is that the *exercise* of that freedom will be qualitatively superior if certain (predispute) choices are removed.⁹³

In sharp contrast, libertarian or negative liberty defenders of arbitration law argue against drawing such distinctions about the quality of choice.⁹⁴ To them, freedom is just the absence of coercion or duress.⁹⁵ As long as nothing or nobody is *preventing* the consumer from “put[ting] the pen down without signing the form,” the consumer has acted freely and thus autonomously.⁹⁶ Not even substantively unconscionable contracts or contracts procured by undue influence are “unfree,” on this view, for the simple reason that neither involves the type of external compulsion that rises to the level of duress.⁹⁷

Here it bears noting that positive liberty claims are not confined to the mandatory binding arbitration context. A good example is the work of Thomas Stipanowich, who is broadly supportive of arbitration. To be sure, Stipanowich sometimes wears his negative liberty stripes when he claims that the “*opportunity* for choice . . . is the one overriding value of arbitration, enabling arbitration to take many different forms and respond to many different needs and circumstances.”⁹⁸ Otherwise put, “the single

92. *Id.* § 2(5).

93. *See, e.g.*, Carrington & Haagen, *supra* note 82, at 339–46 (interpreting the old English revocability doctrine, by which a party could “revoke” pre-dispute arbitration agreements, as a means “to assure true assent”).

94. *See, e.g.*, Ware, *supra* note 81, at 1033 (eschewing the question of what constitutes “meaningful choice”).

95. Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 201 n.23 (1998) [hereinafter Ware, *Consumer Arbitration*]. Ware’s precise claim here is that “[c]ontracting in the absence of duress is contracting voluntarily.” *Id.* Ware refers the reader at this juncture to another article, in which he essentially defines “voluntarily” to mean “freely” and its opposite to mean “coerced.” Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 109 (1996) [hereinafter Ware, *Employment Arbitration*]. He argues that “one’s consent must be either voluntary or coerced; it cannot be both.” *Id.* Thus, *any* choice—no matter how poor, uninformed, or otherwise encumbered—is free just to the extent it is uncoerced. *See id.* at 109–13, 120–26. This is classic libertarianism. *See, e.g.*, HAYEK, *supra* note 32, at 137 (arguing that “[e]ven if the threat of starvation to me and perhaps to my family impels me to accept a distasteful job at a very low wage, even if I am ‘at the mercy’ of the only man willing to employ me,” I am still free in the negative sense); NOZICK, *supra* note 40, at 262–64 (“A person’s choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted within their rights in a way that did not provide him with a more palatable alternative.”).

96. Ware, *Consumer Arbitration*, *supra* note 95, at 201.

97. Ware, *Employment Arbitration*, *supra* note 95, at 127 (arguing that unconscionability reflects a determination that certain contracts should not be enforced “even though they are the product of voluntary consent”—that is, that “voluntary consent . . . [should be] subordinate[d] . . . to other values”). By the same token, because undue influence requires “unfair persuasion,” Ware believes it, too, is predicated on a substantive judgment about the type of contracts the law should enforce rather than on a (value-neutral) judgment about what counts as free choice. *See id.* at 127 n.226.

98. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial*

most important advantage of binding arbitration” is “the *flexibility* to make arbitration what you want it to be”⁹⁹—irrespective, that is, of your ability to exercise that freedom.

But Stipanowich also recognizes that the mere “possibility of choice” does not necessarily translate into “real, practical choices.”¹⁰⁰ For example, he reports that even sophisticated users such as business executives face significant hurdles to the meaningful exercise of autonomy, such as “lack of relevant knowledge,”¹⁰¹ bad habits or attitudes,¹⁰² “inexperience,” or the difficulty of having frank conversations about possible future conflicts.¹⁰³ This leads him to conclude that “[f]or most business users,” real freedom of choice “is an illusion.”¹⁰⁴

Even when such users have the capability or resources to take full advantage of that freedom, Stipanowich laments that they typically choose not to do so.¹⁰⁵ For example, they often delegate important decisions to others, such as transactional counsel, who give scant thought to dispute-resolution provisions until the eleventh hour¹⁰⁶ or litigators who end up co-opting arbitration into little more than a privatized version of judicial procedure.¹⁰⁷ In other words, they stop exercising all the qualities that Berlin identified of the autonomous agent: “to be a subject, not an object . . . deciding, not being decided for, self-directed and not acted upon by external nature or by other men . . . conceiving goals and policies of my own and realizing them.”¹⁰⁸ As a result, the value proposition of “classic” arbitration is undermined. Unnecessarily contentious motion practice and discovery come to corrupt arbitration’s traditional emphasis on securing a speedy and effective hearing on the merits. Arbitration becomes the “new litigation.”¹⁰⁹

From a pure negative liberty standpoint that prizes value neutrality, it is difficult to understand Stipanowich’s complaint. *Qua* negative liberty, autonomy just means, “to each his own.” If the parties have chosen (without coercion) a process with all the trappings of full-bore litigation, or chosen to surrender that choice to their counsel, what is the problem? Brunet anticipated this precise rejoinder to Stipanowich more than a decade ago. Observing that parties were increasingly opting for a “judicialized” model of arbitration by agreeing to provisions for discovery,

Arbitration: Challenges, Opportunities, Proposals, 25 AM. REV. INT’L ARB. 297, 316–17 (2014) (emphasis added).

99. Stipanowich, *supra* note 13, at 51 (emphasis added).

100. Stipanowich, *supra* note 98, at 318; *see also* Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. L.J. 383, 386 (2009) (urging the need to “promote real choices in arbitration”).

101. Stipanowich, *supra* note 98, at 314.

102. *Id.* at 309.

103. Stipanowich, *supra* note 100, at 388–90; Stipanowich, *supra* note 98, at 315–16.

104. Stipanowich, *supra* note 100, at 386; *accord* Stipanowich, *supra* note 98, at 309 (stating that even sophisticated parties are only nominally “choosing,” not choosing well or making good choices).

105. Stipanowich, *supra* note 98, at 314 (observing that parties “fail[] to take advantage of the choices inherent in arbitration”).

106. *Id.* at 314–15.

107. Stipanowich, *supra* note 100, at 392.

108. BERLIN, *supra* note 30, at 131.

109. *See generally* Stipanowich, *supra* note 13.

motion practice, and even judicial review, Brunet argued that the autonomy thesis required honoring such choices no matter how much they ended up transforming arbitration into litigation.¹¹⁰

It is only by construing the autonomy thesis as a claim about positive liberty that Stipanowich can draw the lines that he wishes to draw—that is, to claim that some choices are “good,” “worse,” or “better” than others.¹¹¹ In other words, autonomy for Stipanowich is not just an opportunity concept; it is also an exercise concept. It is precisely because he has a conception of what exercising true or meaningful autonomy is and why it is valuable that Stipanowich can urge parties to “exert greater control over their destiny in arbitration,”¹¹² to “be more deliberate in taking advantage of the spectrum of available choices,”¹¹³ and to have access to greater “discernment[,] . . . knowledge, experience, and sound judgment” in arbitration matters.¹¹⁴

II. DOES THE AUTONOMY THESIS EXPLAIN THE RIGOROUS ENFORCEMENT OF ARBITRATION AGREEMENTS?

Why is it important whether the autonomy thesis is construed as a claim about negative or positive liberty? The answer has to do with the fact that “autonomy” has been the principal *policy* rationale to support the proposition that arbitration agreements must be enforced strictly “according to their terms.”¹¹⁵ For example, Ware argues that enforcing arbitration clauses “advances the parties’ freedom to define their legal rights and obligations as they wish.”¹¹⁶ Brunet reasons that “[i]n a state such as ours characterized by the respect for individual liberty, courts should enforce customized agreements to arbitrate and the legislature should regulate

110. Brunet, *supra* note 12, at 45, 84–86. Brunet’s negative liberty orientation in this context is in sharp tension with the positive liberty orientation he adopts in his defense of the Montana statute at issue in *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). See *supra* note 71 and accompanying text. This tends to confirm my observation that courts and commentators have used crucial terms like “autonomy” without attempting to understand what it really means and what it requires.

111. Stipanowich, *supra* note 100, at 394, 400; Stipanowich, *supra* note 98, at 309 (lamenting “the habits and attitudes of business ‘users’ and counsel” that often prevent “making good choices regarding arbitration” (emphasis added)).

112. Stipanowich, *supra* note 100, at 401.

113. Stipanowich, *supra* note 13, at 52.

114. Stipanowich, *supra* note 100, at 436.

115. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); accord *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (“[T]he basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate.”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

116. Ware, *supra* note 82, at 555; see also Brunet, *supra* note 12, at 84 (arguing for broad “party autonomy to fashion arbitration procedures deemed essential by the contracting partners”); Ware, *Employment Arbitration*, *supra* note 95, at 86 (“[C]ontemporary arbitration law . . . is well-suited to ensure that disputes are resolved by arbitration only when the disputants have voluntarily consented to that. The argument was that contract law enforces only duties assumed through voluntary consent . . .”).

minimally.”¹¹⁷ In Stipanowich’s view, modern arbitration statutes such as the FAA strengthened the enforcement of arbitration agreements in order to promote party autonomy.¹¹⁸

For these and other commentators, enforcement follows naturally—even axiomatically—from a commitment to the autonomy thesis. The animating idea appears to be that enforcement does little more than respect or give effect to the parties’ free choices. The corollary is that when the state regulates arbitration agreements, it imposes external values that invariably frustrate those choices. But as we shall see, depending on how one understands “autonomy,” the autonomy thesis may or may not support enforcing arbitration agreements; indeed, most of the time it appears to require just the opposite.

My analysis will have implications for contract theory more generally, which also appeals to autonomy as an affirmative argument for enforcement. But the precise conclusion I draw is less problematic for contract theory than it is for the Court’s arbitration jurisprudence for at least two reasons. First, contract theory’s more eclectic foundations mean that there is no widespread consensus on the notion that the value of autonomy trumps all other values—that is, there is no equivalent of an “autonomy thesis.” Instead, contract theory candidly acknowledges the limitations of a pure autonomy-based justification for enforcement and recognizes the importance of other normative commitments, such as efficiency, equity, and the morality of promising. Second, contract theory is not committed to minimizing state regulation—and thus to “rigorous” enforcement—in quite the same way as the Court’s modern arbitration jurisprudence. State legislation and public policy currently make contracts unenforceable in a wide variety of contexts (consumer, insurance, investment, and landlord-tenant, to name a few). Thus, contract theory appreciates that valuing autonomy does not require untrammelled enforcement.

But the tension between autonomy and enforcement becomes a much bigger problem in the arbitration area. First, until recently, alternative rationales for enforcement have played a comparatively minor role in arbitration jurisprudence. For example, the autonomy thesis has led the Court to hold that autonomy arguments always trump efficiency arguments.¹¹⁹ Second, arbitration agreements are enforced even *more* stringently than other contracts. For example, FAA preemption means that arbitration agreements are effectively immune from state legislation and public

117. Brunet, *supra* note 16, at 5.

118. Stipanowich, *supra* note 18, at 430 (“Arbitration law promotes the autonomy of parties by enforcing their agreements to arbitrate . . .”).

119. See, e.g., *Volt*, 489 U.S. at 476 (enforcing arbitration clause despite defendant’s argument that doing so would create inefficiencies in the form of conflicting rulings on a common issue of law or fact); *Dean Witter*, 470 U.S. at 220–21 (enforcing arbitration clause despite plaintiff’s argument that doing so would result in delay and other inefficiencies); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (enforcing arbitration clause despite plaintiff’s argument that compelling arbitration was inefficient because it would require related disputes to be resolved in separate arbitral and judicial forums rather than being consolidated before a court of law). In its more recent jurisprudence, however, the Court has shown an increasing solicitude for efficiency values. See *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (describing freedom of contract as a means to the end of efficiency).

policy, which ordinarily render contracts unenforceable in a wide variety of settings.¹²⁰ In addition, FAA section 4 effectively *requires* courts to grant specific performance upon proof of a valid arbitration agreement,¹²¹ whereas in most other contexts courts retain the discretion to withhold such equitable remedies.¹²² For these and other reasons, many commentators now contend that arbitration agreements have evolved into a kind of “super contract.”¹²³ But if autonomy does not point unproblematically in the direction of enforcement to begin with, it is difficult to appreciate why arbitration agreements should be enforced even more stringently than contracts generally.

A. Negative Liberty and the Enforcement of Arbitration Agreements

As explained in Part I.B, arbitration law conceives of the autonomy thesis largely in negative liberty terms. But negative liberty presents at best an awkward justification for the rigorous enforcement of arbitration agreements.¹²⁴

120. Aragaki, *supra* note 4, at 1271–72.

121. 9 U.S.C. § 4 (2012); *Dean Witter*, 470 U.S. at 218 (“By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” (emphasis in original)); *see also* Philip G. Phillips, *A Lawyer’s Approach to Commercial Arbitration*, 44 YALE L.J. 31, 33 (1934) (reasoning that the FAA’s mandatory language prevents courts from “refus[ing] specific performance of arbitration on grounds which heretofore have influenced chancellors and legal scholars to favor refusal of equitable relief”); Sidney P. Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. PA. L. REV. 160, 164, 172 (1934) (arguing that the FAA mandates specific performance for arbitration agreements, leaving no room for the court’s exercise of equitable discretion); Legislation, *Statutory Tinkering with Specific Performance*, 47 HARV. L. REV. 1036, 1041 (1934) (observing that “the discretion of the equity court has been strikingly narrowed by statutes which purport to make mandatory the granting of specific performance of arbitration”).

122. 3 RESTATEMENT (SECOND) OF CONTRACTS § 357(1) (1981) (“Subject to the rules stated in §§ 359–69, specific performance of a contract duty will be granted in the discretion of the court”); *id.* § 357 cmt. c (“The granting of equitable relief has traditionally been regarded as within judicial discretion.”).

123. Tom Carbonneau, *A Comment upon Professor Park’s Analysis of the Dicta in First Options v. Kaplan*, MEALEY’S INT’L ARB. REP., Nov. 1996, at 18, 19 (“*Kaplan* and its antecedents convert arbitration agreements into ‘super’ contracts of adjudication that can dislodge entirely the operation of law from private litigation.”); Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 6 (1997) (“[T]oday, the agreement to arbitrate is effectively a ‘superclause’ that is specifically enforceable even in the face of allegations that the contract of which it is a part was induced by fraud or is otherwise avoidable.”); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convulved Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1127–37 (2002) (describing pre-litigation agreements, in particular arbitration agreements, as super contracts because they are routinely enforced through specific performance and because traditional contract and public policy defenses have had limited effect). *See generally* Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531 (2014).

124. Others have made the same observation outside the arbitration context. *See, e.g.*, Brilmayer, *supra* note 36.

Negative liberty arguments are most persuasive as against regulation that *prohibits* or *prevents* people from doing as they please—for example, when the state subjects certain conduct to tortious or criminal liability. But as I argue in Part II.A.1 below, when the state regulates arbitration agreements (such as through consumer-protection statutes or other measures) it typically does not impose any legal constraints on action; instead, it merely refuses to help one party enforce an agreement that fails to comply with the regulation. Both parties remain negatively free to follow through with the agreement if they so desire. Enforcement, in other words, is a type of state assistance rather than interference. Regulation making arbitration agreements unenforceable is just the withdrawal of that assistance and, for that reason, does not in any meaningful sense restrict negative liberty.

In Part II.A.2, I argue that negative liberty arguments are even less persuasive when it comes to making the affirmative case for enforcing arbitration agreements. Negative liberty theorists make it seem as if enforcement simply leaves the parties free to do as they wish. But the reality is that in practically any action for enforcement, one party no longer wishes to be bound. It is difficult to explain how coercing that party to arbitrate is consistent with her negative liberty; to the contrary, negative liberty would appear more consistent with the freedom to change one's mind.

1. Regulating Enforcement Does Not Compromise Negative Liberty

In a seminal essay, Richard Epstein argued that when a court refuses to enforce a contract for reasons that go to the substance of the bargain, it “*impos[es]* upon the parties its own views about their rights and duties.”¹²⁵ Rather than simply leaving the parties where it finds them, it actually interferes with their freedom of action conceived in negative terms. Epstein explains:

One of the first functions of the law is to guarantee to individuals a sphere of influence in which they will be able to operate, without having to justify themselves to the state or to third parties: *if one individual is entitled to do within the confines of the tort law what he pleases with what he owns, then two individuals who operate with those same constraints should have the same right with respect to their mutual affairs against the rest of the world.*¹²⁶

From this, Epstein concludes that contracts should be enforced with minimal (substantive) regulation by the state.

The Epstein quotation exemplifies a common tendency to write as if the law should guarantee maximal enforcement to contracts between two individuals for much the same reason that it guarantees each individual maximal freedom from regulation other than tort law. The trouble is that enforcing a contract is hardly the

125. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975) (emphasis added).

126. *Id.* at 293–94 (emphasis added).

same thing as allowing individuals to associate with one another.¹²⁷ It is one thing to argue that if a tenant of a residential apartment building is free to play Bach partitas past 11:00 p.m., two tenants should also be free to combine and play Bartok duets past 11:00 p.m. For here, one person's freedom from restrictive rules about noise is simply being extended to permit a like freedom to two persons. But it is quite another to argue that when two tenants make a contract to play Bartok duets sometime in the future, neither of them is free unilaterally to change her mind at a later point in time. At most, promoting the first tenant's negative liberty would require that two tenants should not be *prohibited* from playing or planning to play together after 11:00 p.m., not that the landlord (or perhaps even the state) should marshal its resources to *enforce* their agreement to play in the future.

H. L. A. Hart's distinction between "duty-imposing" and "power-conferring" rules provides a helpful framework for unpacking this argument. As Hart describes them, duty-imposing rules are non-optional in the sense that they "set[] up and defin[e] certain kinds of conduct as something to be avoided or done by those to whom it applies, irrespective of their wishes."¹²⁸ This is what gives such rules the structure of "orders backed by threats."¹²⁹ Good examples are negligent torts and antidiscrimination law, both of which define certain acts or transactions as a wrong subject to compensation or penalties.¹³⁰

By contrast, power-conferring rules "provide individuals with facilities for realizing their wishes, by conferring legal powers upon them to create, *by certain specified procedures and subject to certain conditions*, structures of rights and duties within the coercive framework of the law."¹³¹ Good examples include the law of contracts and the rules of civil procedure.¹³² There are no *ex ante* duties to create

127. In the arbitration context, Gary Born makes an argument similar to Epstein's when he links the development of arbitration law in the West with the increasing emphasis not so much on individual but rather on "associational" liberty. *See* Born, *supra* note 67, at 15–21. On this view, the purpose of arbitration law would appear to be to leave the parties largely free to "associate" (i.e., structure their arbitration process) as they see fit, with limited interference by the state. To support this argument, Born traces the history of arbitration to trade associations, medieval guilds, religious communities, and other groups for whom arbitration guaranteed "maximum autonomy and control over the resolution of their disputes." *Id.* at 17.

But the crux of modern arbitration law is to *enforce* arbitration agreements and awards against reluctant parties—that is, to *sever* the parties' association and facilitate an accounting of who owes what to whom. It is plainly not to stay out of the parties' business altogether, as it once might have been in the case of self-regulating associations that enforced arbitration agreements and awards internally, without recourse to courts of law.

128. H. L. A. HART, *THE CONCEPT OF LAW* 27 (2d ed. 1994).

129. *Id.* at 28.

130. *See id.* at 26–38 (defining a duty-imposing rule as a rule the disobedience of which is a wrong subject to punishment or compensation). Duty-imposing rules can take the form of a mandatory or a default rule. Antidiscrimination statutes can be thought of as a species of the former because parties generally may not defeat the application of such laws through private agreement. Negligent torts are an example of the latter insofar as parties are generally free to contract around the duty of due care through exculpatory clauses.

131. *Id.* at 27–28 (emphasis added). The italicized portion highlights what makes this a power-conferring *rule* rather than just the conferral of power.

132. *Id.* at 28–34. Gregory Klass has significantly refined Hart's somewhat sweeping

enforceable exchange relationships or bring an action in court; it is only to the extent that parties wish to avail themselves of these forms of state assistance that they must adhere to power-conferring rules such as contract doctrine, the rules of judicial procedure, and other applicable legislation. A landlord who wishes to create an enforceable contract, for instance, must (inter alia) refrain from making certain misrepresentations and comply with applicable landlord-tenant statutes.¹³³ Failing to do so simply means that the state will not assist the landlord in enforcing the contract; it does not constitute a “wrong” to which a sanction attaches.¹³⁴

Sitting as it does at the crossroads of contract and procedure, arbitration law consists largely of power-conferring rules—that is, of rules that stipulate the conditions precedent for courts to enforce arbitration agreements and awards.¹³⁵ Duty-imposing rules are largely beside the point in this arena because no state currently makes it a crime or a tort to arbitrate disputes or to include or omit certain provisions in arbitration agreements.¹³⁶

assimilation of contract law to power-conferring rules. Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726 (2008) (arguing that contract law is in truth a set of compound rules that exhibit both power-conferring and duty-imposing features).

133. See 1 RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981) (misrepresentation); *id.* § 178 (public policy).

134. See HART, *supra* note 128, at 33–34. For a more detailed argument for why breach of contract does not constitute a “wrong” in the first place, see *infra* notes 171–77 and accompanying text.

135. The FAA itself, like other so-called modern U.S. arbitration statutes, is a set of power-conferring rules. Its chief innovation was to assist parties in enforcing arbitration agreements in a particular way—namely, through specific performance as a matter of right. See Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 PENN. ST. Y.B. ARB. & MEDIATION 39, 46 (2013); Aragaki, *supra* note 23, at 1947–49; see also *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 6 (1923) [hereinafter *1923 Hearing*] (question of Sen. Thomas Walsh (“[The purpose of the FAA was] to overcome the rule of equity, that equity will not specifically enforce any arbitration agreement[.]”). The newfound availability of specific performance for arbitration agreements simply opened up more meaningful avenues of state assistance, such as in compelling arbitration, in staying existing litigation, and in barring new litigation on the same subject.

The old common-law revocability doctrine—the doctrine that the FAA was designed to overturn—was also a power-conferring rule. It did not make arbitration or arbitration agreements illegal, since even prior to the New York Arbitration Law of 1920 parties were free to *enter* pre-dispute arbitration agreements, follow through with them on their own accord, obtain money damages in case of breach, and have any resulting award enforced as a judgment of the court. *Toledo S.S. Co. v. Zenith Transp. Co.*, 184 F. 391, 398–400 (6th Cir. 1911) (holding that arbitration agreement may not be revoked after entry of award); *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065) (Story, J.) (same); *Conn. Fire Ins. Co. v. O’Fallon*, 69 N.W. 118, 119 (Neb. 1896) (same). It simply made the power to enforce an executory arbitration agreement using the remedy of specific performance conditional on neither party revoking the agreement prior to an award.

136. There are, however, duty-imposing rules governing certain incidents of the arbitration process, such as bribing an arbitrator. See, e.g., MO. ANN. STAT. § 570.150 (West 1999 &

Duty-imposing rules are a palpable restriction on negative liberty. An employer subject to antidiscrimination laws is no longer free to hire or fire employees in any way it wishes. Likewise, the duty of due care restricts our freedom to be careless, irresponsible, and unreasonable in ways that injure or annoy others. But it is much harder to appreciate how power-conferring rules likewise constrain autonomy *qua* negative liberty. Rather than restrict freedom of choice, power-conferring rules allow individuals to do what they could not do without state assistance—that is, they make *more* choice possible. The rules themselves do not deprive persons of a bare freedom to act;¹³⁷ their effect is simply to withdraw certain benefits from parties who do not comply with them.¹³⁸ This leads contract scholar Stephen Smith to conclude that “[r]efusing to enforce a contract is not an interference with [negative] freedom” at all.¹³⁹

Consider again the Arbitration Fairness Act of 2015. If passed, the effect of the Act would be to place further conditions on the parties’ ability to avail themselves of FAA section 2—namely, arbitration agreements involving consumers and employees will qualify for enforcement only if they were formed post-dispute.¹⁴⁰ The Act is therefore a power-conferring rule rather than a duty-imposing rule: nothing in the Act *prevents* consumers and large service providers such as AT&T from entering arbitration agreements and following through with them if they so desire. The Act merely provides that the state will not help one party enforce an arbitration agreement or award in certain circumstances.¹⁴¹

Supp. 2016); W. VA. CODE ANN. § 61-5-7 (LexisNexis 2014).

137. See SMITH, *supra* note 66, at 257 (making the same argument with regard to rules that refuse enforcement of prostitution contracts); Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105, 111–12 (2002) (making the same argument in the context of discussing the basic compatibility between inalienability rules and liberal theory).

It bears noting that, historically, freedom of contract arguments were often directed against duty-imposing rules rather than power-conferring rules. Adam Smith, for example, argued against criminal usury laws on the ground that they violated the “natural liberty” of free exchange. ADAM SMITH, WEALTH OF NATIONS 263 (Charles J. Bullock ed., Cosimo Classics 2007). Likewise, in the celebrated case of *Lochner v. New York*, 198 U.S. 45 (1905), the Court held that a penal statute making it a misdemeanor, *inter alia*, for a baked-goods establishment to “require[] or permit[]” employees to work more than a certain number of hours per week, *id.* at 46, was unconstitutional because it “interfer[ed] with their independence of judgment and of action,” understood as the right to enter more so than enforce the contract, *id.* at 57.

138. See HART, *supra* note 128, at 34; SMITH, *supra* note 66, at 264–65 (discussing the view that contract enforcement is a state-provided service, “in much the same way that the state provides educational, recreational, or police services”).

139. SMITH, *supra* note 66, at 257. It is perhaps for this reason that the liberal tradition has generally not considered the enforcement of contracts to be on par with basic rights of the individual, such as freedom of conscience or freedom of association. See Freeman, *supra* note 137, at 108–09.

140. Arbitration Fairness Act of 2015, S. 1133, H.R. 2087, 114th Cong. § 3 (2015).

141. A similar point can be made about the common-law public policy defense, which makes criminal or illegal contracts unenforceable. For many centuries, courts have justified the defense on the ground that when the parties are *in pari delicto*, the plaintiff has “no right to be assisted,” for “[n]o [c]ourt will lend its aid to a man who founds his cause of action upon

Negative liberty theorists like Epstein sometimes elide the important distinction between duty-imposing and power-conferring rules, which in turn helps them co-opt straightforward autonomy arguments against the former into arguments against the latter. As a result, power-conferring rules are misleadingly portrayed as a form of active interference with private ordering, when in fact they merely place conditions on the receipt of state benefits.¹⁴² Arguing *against* power-conferring rules such as the Arbitration Fairness Act then comes to epitomize a “hands off,” *laissez-faire* position, when in fact it is just the opposite.¹⁴³

The doctrine of FAA preemption provides a good example of this confusion. Pursuant to this doctrine, any state law that “stands as an obstacle to the accomplishment and execution” of the FAA’s purposes will be displaced or preempted.¹⁴⁴ Because the Court construes the FAA’s overriding purpose to be the enforcement of arbitration agreements strictly according to their terms, the FAA preempts any state law that impedes the enforcement of arbitration agreements.¹⁴⁵ The only exceptions are “grounds as exist at law or in equity for the revocation of any contract,” typically understood to mean common-law contract defenses.¹⁴⁶

Courts and commentators often improperly characterize enforcement-impeding state laws as restrictive or coercive, which in turn enables them to appeal to negative liberty when justifying FAA preemption. Take *AT&T Mobility v. Concepcion*,¹⁴⁷ in which the issue was whether the FAA should preempt an unconscionability precedent set by the California high court in *Discover Bank v. Superior Court*.¹⁴⁸ *Discover Bank* held that collective-action waivers were unconscionable when contained in certain types of consumer adhesion contracts.¹⁴⁹ It was therefore in the nature of a power-conferring rule: compliance was necessary only to the extent the drafter of an arbitration clause sought state assistance through enforcement.

an immoral or an illegal act.” *Holman v. Johnson*, [1775] 98 Eng. Rep. 1120, 1121 (K.B.) (emphasis added); *see also* *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011) (“[A] court will not, on grounds of public policy, aid a promisee by enforcing the promise. . . . It will simply leave both parties as it finds them” (quoting 2 RESTATEMENT (SECOND) OF CONTRACTS § 197 cmt. a (1979))); *McMullen v. Hoffman*, 174 U.S. 639, 669–70 (1899) (stating that courts will “refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it” and “will leave the parties as it finds them”).

142. *See, e.g., infra* notes 150–54, 213–14 and accompanying text; *infra* note 216.

143. This is just another iteration of the same move in other domains such as classical legal thought and libertarianism, which have been skillfully exposed by many others. *See, e.g.,* G.A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* 56–61 (1995) (libertarianism); Freeman, *supra* note 137, at 132 (libertarianism); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 491 (1923) (classical legalism).

144. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). For a more extensive discussion of FAA preemption, *see* Aragaki, *supra* note 4, at 1241–48.

145. Aragaki, *supra* note 4, at 1242–45.

146. 9 U.S.C. § 2 (2012); *see* Aragaki, *supra* note 4, at 1245–47.

147. 131 S. Ct. 1740 (2011).

148. 113 P.3d 1100 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740.

149. *See id.* at 1110.

Nonetheless, the Court portrayed *Discover Bank* as a duty-imposing rule—as a “prohibition on collective-action waivers”¹⁵⁰ that “superimpose[d]” or “require[d]” class proceedings regardless of the parties’ explicit choice to the contrary.¹⁵¹ This enabled the Court to reason that *Discover Bank* constituted an unwarranted restriction or invasion of the parties’ freedom,¹⁵² and thus an affront to the autonomy thesis. But as the Court was ultimately forced to concede, *Discover Bank* does not actually “require” anything¹⁵³—it merely withdraws the power to enforce class waivers against a now reluctant party. Willing parties remain free to honor class waivers despite *Discover Bank*, such as by refraining from bringing representative actions.¹⁵⁴

2. Enforcement Compromises the Negative Liberty of the Party Who No Longer Wishes To Arbitrate

If the autonomy thesis is a claim about negative liberty, there is yet a further, more acute problem when the thesis is used affirmatively to justify enforcement. Courts and commentators assume that enforcement is non-coercive because it merely “give[s] effect to the intent of the parties,”¹⁵⁵ “advances the parties’ freedom to define their legal rights and obligations as they wish,”¹⁵⁶ or gives

150. *Concepcion*, 131 S. Ct. at 1746 (emphasis added).

151. *Id.* at 1752–53.

152. *Id.* at 1748–49 (explaining that parties enjoy wide “discretion in designing arbitration processes,” such as to select applicable procedural rules and to choose arbitrators with expertise in a given field). As the Court noted, the parties were free to choose even unwise procedures that dilute the speed and efficiency gains ordinarily to be expected from arbitration. For example, they “could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation.” *Id.* at 1752 (emphasis in original).

153. *Id.* at 1750 (emphasis in original). Others have also noted this sleight of hand. See, e.g., Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435, 526–27 & n.308 (2011); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 707 (2012).

154. The Court made the same move when announcing the doctrine of FAA preemption for the first time in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). *Southland* involved the California Franchise Investment Law (CFIL), which purported to void agreements to arbitrate CFIL claims. *Id.* at 3. Reasoning that the CFIL was preempted by the FAA, the Court nonetheless enforced the parties’ arbitration clause. It justified this decision in part by characterizing the CFIL as restricting autonomy *qua* negative liberty because it “require[d] a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Id.* at 10 (emphasis added). But the CFIL did not force parties to litigate against their will; willing parties remained free to settle their disputes through arbitration. The CFIL merely withdrew state assistance in compelling arbitration when one party refused to cooperate.

155. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (emphasis added); *accord* *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458 (2003); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989) (describing enforcement as honoring the parties’ “liberty to choose the terms under which they will arbitrate”).

156. *Ware*, *supra* note 82, at 555 (emphasis added); *accord* *Brunet*, *supra* note 16, at 6 (arguing that enforcement “contributes to party autonomy by upholding the intent of the

“expression [to] private *parties*’ desires to control, to the maximum extent possible, the nature and character of their underlying relationship.”¹⁵⁷ But it cannot be overemphasized that enforcing a contract typically does not honor the intention of *both* parties. To be sure, the parties may have been uncoerced at the time they entered the contract (let us call this T_1). But in the case of predispute arbitration agreements, enforcement typically does not happen until a much later point in time (let us call this T_2). At T_2 , it is almost certainly the case that the contract no longer expresses the wishes of one party—otherwise there would be no occasion for enforcement to begin with.

There are of course limited exceptions, such as where the court’s active cooperation or assistance is required in order to effectuate performance.¹⁵⁸ Consider a predispute agreement to alter the standard for granting summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Here it is possible to imagine a situation—however unlikely—in which (i) *both* parties continue to desire their chosen procedural alteration at T_2 but (ii) the court nonetheless refuses to honor it for reasons of public policy. Scholars who argue in favor of viewing the Federal Rules as default rules typically take this situation as their paradigm case, which in turn helps them argue for a broad right to customize litigation procedures.¹⁵⁹ After all, if both parties reaffirm their choice at T_2 , it becomes harder to justify disregarding that choice from either an autonomy or a Pareto-efficiency standpoint.

Another apt example relates to so-called back-end enforcement of agreements to alter the grounds for vacatur of arbitral awards. FAA section 10 provides for vacatur only upon proof of procedural irregularities such as arbitrator bias or a refusal to hear material evidence.¹⁶⁰ In *Hall Street Associates v. Mattel*,¹⁶¹ the parties sought to

parties in their choice of arbitration procedure” (emphasis added)).

157. Born, *supra* note 67, at 20 (emphasis added).

158. Bob Bone refers to procedures contemplated by such agreements as “Type III” procedures. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1339–40 (2012).

159. Thus, Henry Noyes argues that because the parties jointly “own” the dispute, “it is hard to accept that there is some fundamental unfairness in the parties’ agreement to adopt and apply mutually agreed-upon litigation procedures.” Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts To Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 620 (2007). Fair enough if both parties remain in agreement at T_2 . But if not, the argument in favor of enforcement against a reluctant party is far from straightforward on either efficiency or autonomy grounds. Likewise, Michael Moffitt’s well-known argument in favor of viewing the Federal Rules as default rather than mandatory nonenforcement rules is fueled almost entirely by examples in which both parties are assumed to be in agreement at T_2 . See, e.g., Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 472–73 (2007) (arguing that if each side agrees not to object on hearsay grounds to the other’s expert’s testimony, there is little reason to refuse enforcement). Indeed, Moffitt excludes from consideration contexts such as mandatory binding arbitration, which involve adhesive agreements and a significant “temporal distance between the agreement and its implementation”—contexts that are most likely to produce disagreement about enforcement at T_2 . *Id.* at 481 (“Broad, anticipatory customization is not what I envision.”).

160. See 9 U.S.C. § 10(a)(1)–(4) (2012).

161. 552 U.S. 576 (2008).

contract around section 10 by providing that awards could also be vacated for errors of law. Following issuance of the arbitrator's award, *both* parties filed cross-motions to vacate for legal error on the basis of their contract. In other words, both reaffirmed their agreement at T₂; they just disagreed about what specific error had been committed. A motion to enforce the agreement was still necessary, however, because the parties required the court's cooperation to conduct a heightened review, which some courts had refused.¹⁶² These examples highlight the fact that even willing parties are sometimes unable to execute their agreement without active assistance from the courts.¹⁶³ In such cases, the assumption of bilateral consent at T₂—however implausible as a factual matter—would appear warranted.

But the same is not true with respect to the front-end enforcement of arbitration clauses under FAA section 2 or 4, which has been the central issue in almost all of the Court's game-changing arbitration decisions over the past five decades.¹⁶⁴ Where both parties remain in agreement *after* a dispute arises, there is no need for court intervention because the parties will submit to their chosen arbitration process of their own accord. In any legal action brought under section 2 or 4, therefore, at least one party resists enforcement in part or in whole. This has two important implications for the claim that enforcement promotes the parties' autonomy *qua* negative liberty.

First, enforcement reduces the *breaching* party's negative liberty because it is plainly coercive.¹⁶⁵ The point is even more forceful in the arbitration context because the principal means of enforcing arbitration agreements is not through a liability rule (i.e., money damages) but rather through a much more coercive set of property rules¹⁶⁶: (i) specific performance, which requires the breaching party to submit to arbitration on pain of having a default judgment entered against her,¹⁶⁷ and (ii) an injunction barring access to the courts.¹⁶⁸ Negative liberty theorists typically fail to

162. It was only on appeal that Mattel "switched horses" and argued that the FAA vacatur standards were mandatory. *See id.* at 580.

163. This is especially true of procedural contracts, where the requested remedy is typically specific performance. Courts have the discretion to deny specific performance if it would "impose on the court burdens in . . . supervision that are disproportionate to the advantages to be gained from enforcement." 3 RESTATEMENT (SECOND) OF CONTRACTS § 366 (1981).

164. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (nonarbitrability and vindication of rights); *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011) (preemption); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010) (separability and delegation); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) (delegation); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (nonarbitrability); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (preemption); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (separability); *Wilko v. Swan*, 346 U.S. 427 (1953) (nonarbitrability). The only exceptions appear to be *Hall Street*, 552 U.S. 576, and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

165. *See SMITH, supra* note 66, at 258 ("By their very nature, contractual obligations *restrict* individual autonomy. Indeed, they represent one of the few ways by which a private individual may legally restrict the future freedom of another." (emphasis added)).

166. On the distinction between property and liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

167. *See* 9 U.S.C. § 4 (2012).

168. *See id.* § 3.

address the coerciveness of enforcement because they treat executory contracts as simultaneous transactions—that is, they elide the crucial distinction between T_1 and T_2 .¹⁶⁹ This leads them to assume that if there is no coercion at the time the adherent enters the contract (T_1), there is *ipso facto* no coercion at T_2 , because $T_1 = T_2$. By contrast, critics of mandatory binding arbitration are apt to highlight this distinction, as when they argue against the use of pre-dispute arbitration agreements where lack of understanding, optimistic overconfidence, or weak bargaining power at T_1 typically lead the adherent to take a different view of her agreement at T_2 . The thrust of their critique is not so much that consumers and employees are “coerced” or “forced” at T_1 when they are presented with an arbitration clause on a “take-it-or-leave-it” basis; instead, it is that even if there were something short of coercion at T_1 , there was certainly coercion at T_2 .¹⁷⁰

Second, it is difficult to see how enforcement safeguards the *nonbreaching* party’s negative liberty. Negative liberty might be improved when we protect someone from harm or misfeasance—for example, from tortious interference with her person or property. But as we saw, it is not improved when we protect her from nonfeasance or, in what is the same thing, when we assist her in ways that we believe are wise, good, or beneficial.¹⁷¹ Enforcing a wholly executory contract is more akin to the latter than it is to the former. The reason is that, absent unjust enrichment or detrimental reliance, breach is just the failure to fulfill the promise of a future *benefit*, which is to say that it is more in the nature of an omission than active misfeasance.¹⁷² And if

169. This elision is also what causes some commentators erroneously to rest the case for contract enforcement on Pareto efficiency. A simultaneous voluntary transaction is a reliable indication of a move to Pareto-superior states of welfare in a way that a deferred transaction that requires enforcement is not. The reason is that the Pareto standard cannot explain why the breaching party’s revealed preference at T_2 does not trump her revealed preference at T_1 , and thus why a contract should be enforced over the present objection of one party. *See infra* note 256. It matters little that the breaching party may have changed her mind at T_2 opportunistically or that she may never have intended to perform the contract to begin with. The Pareto standard is a measure of utility not morality. *See, e.g.*, VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* 13 (Ann S. Schwier & Alfred N. Page eds., Ann S. Schwier trans., Augustus M. Kelley Publishers 1971) (1906) (arguing that it is an “error” to critique the study of political economy for “not taking morality into account. It is like accusing a theory of the game of chess of not taking culinary art into account.”).

170. This is the argument behind longstanding efforts to amend the FAA to make pre-dispute arbitration agreements unenforceable, *inter alia*, in the consumer and employment contexts. *See* Arbitration Fairness Act of 2015, S. 1133, H.R. 2087, 114th Cong. (2015); Arbitration Fairness Act of 2013, S. 878, H.R. 1844, 113th Cong. (2013); Arbitration Fairness Act of 2011, S. 987, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2009, S. 931, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2007, S. 1782, H.R. 3010, 110th Cong. (2007).

171. On the distinction between nonfeasance and misfeasance, see Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 29, 32 (Dennis Patterson ed., 1996).

172. *See, e.g.*, P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 141–43 (1991); EMILE DURKHEIM, *ON THE DIVISION OF LABOR IN SOCIETY* 217 (George Simpson ed., trans., Macmillan Co. 1933) (1893) (arguing that by breaching a contract, “I do not enrich myself at the expense of another; I only refuse to be useful to him”); *cf.* SMITH, *supra* note 66, at 140

so, enforcement merely helps the nonbreaching party realize a benefit or satisfy her expectations; it does not deter or compensate for any actual interference with her freedom.¹⁷³

The same is not necessarily true, of course, where the nonbreaching party has partially performed and thereby either unjustly enriched the other party¹⁷⁴ or relied to her detriment.¹⁷⁵ Enforcement in these circumstances does not simply further an interest in keeping promises; it improves the nonbreaching party's freedom from unjust detention of her property¹⁷⁶ and tortious conduct,¹⁷⁷ respectively. But neither situation captures what is typically at stake in the enforcement of arbitration agreements.

One reason is that, according to the Court's own "separability" doctrine, arbitration clauses are conceived as stand-alone contracts whose validity or enforceability does not depend on the validity or enforceability of the larger contract in which they are contained.¹⁷⁸ At the moment of breach, the *arbitration clause* (as distinct from the container contract) is typically wholly executory; as to that clause, reliance and restitution do not provide persuasive grounds to justify enforcement.¹⁷⁹

("An act of nonfeasance, such as failing to give to charity, may reveal the actor as lacking in virtue . . . but it raises no question of rights, and hence is not a proper subject for legal regulation [on individual-autonomy grounds].").

173. This is the sense in which Lon Fuller and William Perdue argued that enforcing a contract in these circumstances using the remedy of expectation damages amounts to a "queer kind of 'compensation.'" L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 53 (1936).

174. An example would be a contract between A and B for the sale of goods, payment on credit. If A delivers the goods at the time the contract is formed (T₁) but B refuses to pay for them at T₂, A has a compelling claim of misfeasance: A has suffered a tangible loss (parting with the goods) and B has gained a corresponding benefit that does not rightfully belong to her.

175. An example would be a service contract between A and B. If B repudiates after A has performed some part of the promised services, here, too, A will have a strong claim of misfeasance because she has suffered actual, present harm.

176. Lon Fuller argued that in cases like this, it is not the expectation interest but rather the restitution interest that "presents the strongest case for relief." Fuller & Perdue, *supra* note 173, at 56. Consider that the gravamen of the medieval writ of debt, an important precursor of the cause of action for breach of contract, was not that the defendant "had failed to do something which he had said he was going to do, but rather that he was detaining or withholding something to which the creditor was entitled. He was guilty of misfeasance, not nonfeasance." A. W. B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 80 (1975); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 *COLUM. L. REV.* 94, 141 (2000) ("Debt, according to Holmes, had its origin not in . . . exchange of promises, but in an action to recover a sum certain that the medieval jurists thought of as property of the plaintiff wrongly withheld by the defendant.").

177. See GILMORE, *supra* note 66, at 95–97.

178. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967).

179. By contrast, if one party withdrew from arbitration after proceedings had been initiated but before the award, there would be a stronger tort-based argument to enforce the agreement because the nonbreaching party would have detrimentally relied.

Here it could be retorted that, separability doctrine notwithstanding, performance of the

Another reason is that the remedy enshrined in section 2 of the FAA for breaching arbitration agreements is not restitution, reliance, or even expectation damages; it is nothing less than mandatory specific performance. But specific performance is the remedy par excellence for vindicating the promissory interest—that is, the interest in *realizing future benefits*.¹⁸⁰ It therefore goes far beyond compensating for any interference with negative liberty, which has been the standard critique of awarding expectation damages or specific performance in lieu of reliance or restitution.¹⁸¹

Given this, it is difficult to see how autonomy *qua* negative liberty can possibly supply a reason in favor of enforcing arbitration agreements. As many theorists have already observed, it is just as consistent with letting the parties alone, both in the sense of (i) giving the breaching party the freedom to change her mind and (ii) withholding assistance to the nonbreaching party in realizing the benefit of her bargain or her expectation interests.¹⁸²

Here it could be objected that enforcement is not coercive to the breaching party because she had no right to breach in the first place. Any liberal society must

container contract is surely relevant insofar as it might suggest that the seller or service provider conferred a benefit or relied to its detriment when the product or service was originally provided and paid for. Because arbitration tends to lower costs, the argument goes, rational sellers or service providers will pass those cost savings on to purchasers in the form of lower prices. If the purchaser then breaks her promise to arbitrate, it would be unjust for her to retain the benefit of the lower priced product or service, which also represents the measure of the seller or service provider's detrimental reliance. This is in the nature of a negative liberty, rights-based retort.

But the argument that sellers and service providers pass on the cost savings from arbitration to their customers has rarely been used to support enforcement on rights-based grounds; instead, it has been used principally to support enforcement on efficiency grounds. The idea is that everyone is better off (i.e., saves money) with arbitration clauses—including the consumer who may choose otherwise. See Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255–56 (2006); cf. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (making similar argument with respect to forum-selection clauses). Likewise, the Court has rarely (if at all) invoked reliance or unjust enrichment to justify enforcement, preferring instead to focus on the bare fact of an agreement or promise. For example, it rationalized FAA preemption in part on the theory that the FAA “‘assure[s] those who desired arbitration . . . that their *expectations* would not be undermined.” *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (emphasis added) (quoting *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 387 (2d Cir. 1961) (Lumbard, C.J., concurring)). Likewise, in undoing the nonarbitrability line of cases beginning with *Wilko v. Swan*, 346 U.S. 427 (1953), it frequently warned that, “‘having made the bargain to arbitrate,’ [parties would] be held to their bargain.” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987); accord *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

180. As Seana Shiffrin argued in a related vein, if the purpose of contract law were to enforce promises, specific performance rather than expectation damages would be the standard remedy for breach. For morality requires that promisors keep their promises rather than pay them off. See Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 722–23 (2007).

181. See, e.g., *supra* note 173.

182. Pettit, *supra* note 62, at 286–90; Todd D. Rakoff, *Is “Freedom From Contract” Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 481–82.

recognize rule-of-law constraints on freedom. When a trespasser pitches a tent on property owned by another, we think of the *owner's* negative liberty as having been infringed. Forcing the trespasser to leave or pay rent merely deters or compensates for that infringement and is not in any meaningful sense an infringement of the *trespasser's* freedom. And if so, the objection goes, why shouldn't it be the same in the case of enforcing an arbitration agreement against a breaching party? I have two responses.

First, the objection loses some force in the arbitration context. The reason is that courts have invoked the autonomy thesis to support enforcement even where one party had the right to breach and was therefore arguably *without* blame for resisting arbitration. For instance, under the aegis of FAA preemption, countless parties have been compelled to arbitrate pursuant to agreements that were either void or unenforceable under state law.¹⁸³ An important policy rationale for these developments has nevertheless been the idea that enforcement furthers “consent, not coercion,”¹⁸⁴ the “wishes of the contracting parties,”¹⁸⁵ and their “discretion in designing arbitration processes . . . tailored to the type of dispute.”¹⁸⁶ But for the reasons explained above, it is difficult to see how this is the case where one party no longer consents to or desires arbitration *and* was fully within her rights under state law to go back on her agreement.

Second, even if the party resisting arbitration had no right to breach, it does not somehow neutralize the unfreedom she experiences when the agreement is enforced against her. This “neutralization” argument is a favorite of some libertarians, like Robert Nozick, who view the law as merely rendering us unable to do things (for example, commit trespass or breach of contract) rather than *unfree* to do them.¹⁸⁷ But as G. A. Cohen has argued, this is questionable as a factual matter since we consider even properly convicted murderers to be unfree when they are imprisoned.¹⁸⁸ The real point seems to be that enforcement renders the breaching party unfree but that her unfreedom is deemed *normatively* irrelevant because she has broken the law. But the trouble is that normative judgments are not value neutral; in this case, the judgment presupposes a baseline of legal entitlements that are themselves predicated

183. See, e.g., *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011) (enforcing arbitration agreement even though void because unconscionable or contrary to public policy); *Southland Corp.*, 465 U.S. 1 (enforcing arbitration agreement even though void by statute). Justice Thomas would extend this to arbitration agreements that are unenforceable due to post-formation defects such as frustration of purpose or the statute of frauds because he assumes (paradoxically) that enforcement *despite* the defects would further the “consent of the parties.” *Concepcion*, 131 S. Ct. at 1755 n.* (Thomas, J., concurring).

184. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

185. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (enforcing award of punitive damages prohibited by state decisional law).

186. *Concepcion*, 131 S. Ct. at 1749.

187. NOZICK, *supra* note 40, at 262 (“Other people’s actions place limits on one’s available opportunities. Whether this makes one’s resulting action non-voluntary [i.e., free] depends upon whether these others had the right to act as they did.”); see also HAYEK, *supra* note 32, at 153 (“[W]hen we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free.”).

188. COHEN, *supra* note 143, at 60.

on assumptions about the significance or worth of certain activities such as failing to keep promises or occupying land belonging to another.¹⁸⁹ Enforcement reflects and reinforces those normative judgments. It cannot therefore retreat into value neutrality by claiming to honor the freedom of *both* parties. For in reality, it sacrifices the freedom of one in order to vindicate the other's. As Morris Cohen observed almost a century ago,

in enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are *important questions of public policy*. . . . [T]he notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves.¹⁹⁰

The upshot is that the breaching party's freedom claims can be bracketed only by relinquishing negative liberty's aspiration to value neutrality. Otherwise put, a true value-neutral stance must recognize that the breaching party's freedom claim is no less relevant than that of the nonbreaching party. But if so, as I have been arguing, it is difficult to explain why enforcing a contract against the breaching party is nonetheless consistent with promoting her negative liberty.

B. Positive Liberty and the Enforcement of Arbitration Agreements

Does interpreting the autonomy thesis as a claim about positive liberty help explain why arbitration agreements should be both minimally regulated and enforced over the objection of the breaching party? Perhaps better than a negative liberty interpretation, but not by much.¹⁹¹

In Part II.B.1, I argue that state regulation making arbitration agreements unenforceable can cut both in favor of and against positive liberty. On the one hand, if enforcing an arbitration agreement enables parties to accomplish things they could

189. *Id.* at 56, 59–60; Hale, *supra* note 143, at 470–74.

190. Cohen, *supra* note 46, at 562 (emphasis added). Writing less than a decade after the FAA's passage, Philip Phillips similarly noted the irony of a system of "voluntary" arbitration that depended on judicial enforcement. See Philip G. Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258, 1265–67 (1933).

191. Many scholars have likewise viewed contract enforcement as more consistent with positive rather than negative liberty. See DURKHEIM, *supra* note 172, at 216 (referring to the "eminently positive nature" of contract enforcement); Pettit, *supra* note 62, at 285–86 (arguing that contract enforcement is more readily explainable on positive rather than negative liberty grounds); Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 937 (1982) (reviewing P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981)) (noting that "[i]t follows from the harm principle that enforcing voluntary obligations is not itself a proper goal for contract law," yet defending enforcement on positive liberty grounds); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 8–9 (1992) (explaining private property and contract rights in positive liberty terms).

not without the assistance or cooperation of the courts, enforcement would appear to promote the exercise of freedom and withholding enforcement would appear to compromise it. On the other hand, if what the parties seek to accomplish through their agreements is unlikely to result in any real or actual freedom, little will be lost by refusing to enforce those agreements. For example, to what extent does it improve positive freedom in arbitration to enforce agreements that call for the arbitrators to decide a case by consulting the “entrails of a dead fowl”? The answer to this question will likely depend on what we think freedom means in the arbitration context, which in turn will presuppose certain value judgments.

In Part II.B.2, I argue that positive liberty provides a more plausible argument for why enforcing an arbitration agreement against an unwilling party arguably promotes her autonomy. The problem is that the conditions under which enforcement can be understood as improving positive liberty often do not obtain in the case of arbitration agreements. Yet arbitration law insists on enforcement *regardless* of whether those conditions exist. The same point has been made about the law’s enforcement of boilerplate clauses more generally.¹⁹² The upshot is that, to the extent we embrace a positive liberty interpretation of the autonomy thesis, we may be forced to acknowledge a variety of contexts in which arbitration agreements should not be enforced at all.

1. Regulating Enforcement Does Not Necessarily Compromise Positive Liberty

The crux of the problem in Part II.A.1 was that, *even assuming that both parties remain in agreement at T_2* (as the parties in *Hall Street* did in the trial court), it is difficult to see how regulating arbitration agreements interferes with the parties’ negative liberty. For by refusing to enforce a particular arbitration agreement, the state is not preventing or prohibiting parties from arbitrating on their own accord, as they did within medieval guilds and still do within certain trade associations and religious communities.¹⁹³ Instead, it simply imposes conditions on the power to invoke the machinery of enforcement when one party no longer wishes to be bound.

Construing the autonomy thesis as a claim about positive liberty presents a way out of some of these problems. Assuming the unlikely scenario in which both parties remain in agreement at T_2 —an assumption I shall indulge throughout Part II.B.1—state assistance through enforcement can certainly promote the exercise of freedom. In *Hall Street*, for example, enforcement enabled the parties to commandeer the resources of a reviewing court through private agreement.¹⁹⁴ In other cases, it helps the parties

192. See, e.g., RADIN, *supra* note 88, at 82–98.

193. Arbitration without recourse to courts of law has historically been possible where there exists an effective means of enforcing agreements and awards extra-judicially—for example, on the strength of professional or community norms. See, e.g., CLARENCE F. BIRDSEYE, *ARBITRATION AND BUSINESS ETHICS: A STUDY OF THE HISTORY AND PHILOSOPHY OF THE VARIOUS TYPES OF ARBITRATION AND THEIR RELATIONS TO BUSINESS ETHICS*, at vii (1926) (referring to “self-governing bodies . . . such as guilds, exchanges, boards of trade or trade associations,” which created their own arbitration rules and enforced arbitration awards internally); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969–73 (1999).

194. See *supra* notes 160–63 and accompanying text.

realize the fruits of their agreement by providing for judicial assistance when they cannot agree on the selection of arbitrators¹⁹⁵ or when there is a need to stay related litigation.¹⁹⁶ Ironically, therefore, it is much easier to see how state regulation of enforcement compromises autonomy if autonomy is understood as a form of positive, rather than negative, liberty.

But once we shift gears and think of autonomy as the ability *to* do things rather than the mere absence of external constraints, the question of what things it makes sense to say that we are (or should be) free to do becomes salient. We typically think of being free to do only those things that have some plausible value. As Stanley Benn and William Weinstein have argued, it seems something of an oxymoron to say that one is free *to* do something completely valueless such as cutting off one's ears.¹⁹⁷ "[T]o see the point of saying that one is (or is not) free to do X," they explain, "we must be able to see that there might be some point in doing it. Our conception of freedom is bounded by our notions of what might be worthwhile doing; it is out of its element when we find its objects bizarre."¹⁹⁸ Joseph Raz reaches the same conclusion from the standpoint of his much thicker account of positive liberty. In his view, it does not make sense to speak of autonomy in relation to valueless activities such as murder.¹⁹⁹ And in a related vein John Gray argues that it is impossible to regard the proverbial "contented slave" as free no matter how unconstrained she might have been when choosing slavery or how fulfilled she now finds herself as a slave. For "judgments about freedom always invoke judgments about the preferences of the standard rational chooser, and . . . there is something at least problematic about counting as a freedom an opportunity to act which no reasonable man would ever take."²⁰⁰

If positive liberty cannot escape questions about purpose, value, or reasonableness, then the extent to which enforcement furthers autonomy *qua* positive liberty—and thus the extent to which restricting enforcement limits autonomy—will depend critically on how those questions are answered. Consider the extreme case of an arbitration agreement that provides for disputes to be adjudicated by a "panel of three monkeys"²⁰¹ or by "studying the entrails of a dead fowl."²⁰² Here it is difficult to appreciate any good reason why parties would make such choices, let alone care

195. 9 U.S.C. § 5 (2012).

196. *Id.* § 3.

197. S. I. Benn & W. L. Weinstein explain this as follows: "[C]utting off one's ears is not the sort of thing anyone, in a standard range of conditions, would reasonably do . . . (even though some people have, in fact, done it)." S. I. Benn & W. L. Weinstein, *Being Free to Act, and Being a Free Man*, 80 MIND 194, 195 (1971).

198. *Id.*

199. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 380–81 (1986). Thus, although we might consider one who writes a stern letter to the editor after careful reflection to be more autonomous than one who does so in an unthinking rage, the same would not be true if the act in question had been the commission of a brutal murder. Calculating and instrumentally rational to be sure, but not autonomous.

200. GRAY, *supra* note 50, at 58.

201. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.).

202. *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *overruled by* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

about their enforcement. The point is not just that in such cases the freedom to choose one's arbitration process is outweighed by a more compelling concern for arbitration's public or institutional integrity.²⁰³ Rather, the point is that from a positive liberty standpoint it is hard to appreciate how this is a freedom at all.²⁰⁴ Arbitrating before a panel of three monkeys, for instance, forecloses a host of moves that we care about in adjudicative processes, such as the ability to present evidence and reasoned arguments with confidence that a neutral decision maker will hear and consider them. Much like cutting off one's ears, it is difficult to see how such a process contributes to anyone's actual freedom and thus why the autonomy thesis, construed as a claim about positive liberty, would favor enforcement.

Here it may be retorted that, as between a jurisdiction that does not enforce bizarre arbitration procedures and one that does, there are more opportunities available (and thus more freedom) in the latter.²⁰⁵ The problem with this retort is that the sheer number of choices, while important, cannot be the exclusive measure of positive freedom. Consider two further jurisdictions: in the first, courts will enforce any choice of a decision maker so long as they are human; agreements calling for a panel of three monkeys or a jury of twelve orangutans²⁰⁶ are unenforceable. In the second, courts will enforce the choice of any primate to be a decision maker except those who self-identify as Mormon. In terms of quantity, there are vastly more choices available in the second jurisdiction—namely, the entire primate kingdom minus just 15 million humans.²⁰⁷ But that does not necessarily translate into more positive freedom. There is arguably less real freedom in the second jurisdiction if it means that parties will be deterred from appointing competent, desirable arbitrators of their

203. This is the typical rationale offered by commentators for why such agreements are, or should be, unenforceable. *See, e.g.*, Sarah Rudolph Cole, *Revising the FAA To Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 233 n.76 (2007) (arguing that “freedom of contract must yield in those cases where the integrity of the courts as an institution is threatened”); *cf.* Richard Lorren Jolly, *Between the Ceiling and the Floor: Making the Case for Required Disclosure of High-Low Agreements to Juries*, 48 U. MICH. J.L. REFORM 813, 817–21 (2015) (arguing that the parties’ autonomy to select unconventional litigation procedures should be limited by public policy considerations).

204. Taylor has defended this point in a related example. *See supra* note 60 and accompanying text.

205. This might be a plausible argument if the state *prohibited* parties from arbitrating in front of a panel of three monkeys, such as by imposing criminal penalties on such proceedings. But as explained in Part II.A.1, when the state merely withholds the power of enforcement, it does not in any meaningful sense place restrictions on negative liberty. The parties remain free to arbitrate their disputes in any way they wish, so long as they do not require the court’s assistance through enforcement.

206. *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) (“[I]f the parties stipulated to trial by 12 orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.”).

207. The Church of Jesus Christ of Latter-day Saints estimates its current worldwide membership at 15,372,337 individuals. *See Facts and Statistics*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS: NEWSROOM, <http://www.mormonnewsroom.org/facts-and-statistics> [<https://perma.cc/8SW2-CF36>] (last updated 2016).

own choosing who happen to subscribe to a particular faith.²⁰⁸ The upshot is that the nature of our choices is at least as important as their quantity in our assessments about freedom in the positive sense. Positive liberty claims register only against “a background understanding, too obvious to spell out, of some activities and goals as highly significant for human beings and others as less so.”²⁰⁹

A harder case has to do with agreements to modify the limited grounds for vacatur of arbitral awards in FAA section 10. Prior to *Hall Street*, the circuit courts had split sharply on this issue. Some courts enforced such agreements on freedom-based considerations²¹⁰ while others refused to do so, reasoning that customization would confer on private parties a rather extravagant power to dictate how federal courts should review arbitral awards—a power that, among other things, could significantly change the workload of courts and threaten other institutional values.²¹¹ Although the Court endorsed the latter view on narrow statutory-interpretation grounds,²¹² the ensuing debate among commentators refocused the issues on the relationship between the autonomy thesis and enforcement.

Most scholars argued that by refusing to enforce the agreement in *Hall Street*, the Court was *ipso facto* retreating from the autonomy thesis.²¹³ Ware, for instance, declared *Hall Street* “an affront to party autonomy, the core policy of arbitration law. Who is in a position to tell the parties that they are better off with litigation than with arbitration followed by judicial review? Let them decide that for themselves.”²¹⁴ These arguments assume that the state reduces freedom when it fails to promote a

208. Critics of so-called mandatory binding arbitration can be understood as making a similar argument. The thrust of their objection is that consumers and employees are not in any meaningful sense “free” in an arbitration proceeding because of the many process deficiencies of arbitration. The implication is that they are actually freer in a judicial proceeding governed by mandatory rules—that is, a proceeding in which fewer process choices are available. Here, too, the sheer number of opportunities is not the measure of freedom; instead, assessments about freedom turn on judgments about the comparative worth or value of arbitration as against litigation.

209. TAYLOR, *supra* note 34, at 218.

210. See *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995), *abrogated by* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

211. See *Kyocera Corp. v. Prudential-Bache Trade Servs. Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc), *cert. dismissed*, 540 U.S. 1098 (2004); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 934–37 (10th Cir. 2001); see also *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997–98 (8th Cir. 1998) (dictum); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *overruled by Kyocera*, 341 F.3d 987.

212. *Hall Street*, 552 U.S. at 585–89 (2008). Whether or not the opinion was correct or desirable is a matter on which I take no position here. My claim is simply that the decision is not obviously inconsistent with the autonomy thesis if “autonomy” is construed as a type of positive liberty.

213. See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1128–33 (2009); Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929, 932 (2010) (describing the view of most commentators that *Hall Street* “seemed to contravene the principles of party autonomy and contractual freedom”).

214. Stephen J. Ware, “*Opt-In*” for *Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act*, 8 AM. REV. INT’L ARB. 263, 271–72 (1997).

particular opportunity (such as judicial review of arbitral agreements) regardless of the opportunity's value or worth.

The trouble is that positive liberty does not work like negative liberty. If freedom is conceived as the sheer absence of external restraints, then it is readily apparent how fewer restrictions on choice implies greater negative liberty almost by definition.²¹⁵ But the argument is far less straightforward if the issue has less to do with what choices the state *prohibits* and more to do with what choices the state fails to *promote*. In this context, it is much harder to retreat into value neutrality by simply counting the number of foreclosed opportunities. Doing so makes it impossible to distinguish, for example, between a regime in which only agreements for vacatur based on legal error are unenforceable and one in which only agreements to submit disputes to a panel of three monkeys are unenforceable. If there are no distinctions of value to be made, regimes that each fail to support one type of agreement leave us equally unfree in the positive sense. Yet most commentators who consider *Hall Street* to be inconsistent with the autonomy thesis would likely perceive the second regime to provide far more real freedom than the first.²¹⁶

From a positive liberty standpoint, therefore, *Hall Street*'s refusal to honor the parties' agreement for judicial review of an arbitrator's legal errors would not necessarily be in tension with the autonomy thesis if such agreements were valueless in the sense that they were not "possible object[s] of reasonable choice."²¹⁷ For if so, they are unlikely to contribute to real freedom in the arbitration process. This is not an entirely unfamiliar argument. Thomas Carbonneau defends something like this view when he argues that parties who contract for judicial review of arbitral awards are "*mistaken* in their choice of arbitration."²¹⁸ On Carbonneau's view, such contracts "thwart the arbitral process by cluttering it with uselessly intricate provisions for

215. See *supra* note 205.

216. Ware might respond that he is not denying the possibility of making distinctions of value in the abstract; rather, his claim is that it is not the place of the state to *force* those value judgments on the parties. This appears to be the thrust of Alan Rau's assessment of *Hall Street* as "extraordinarily officious" because it "impos[ed] the putative 'benefits' of finality and economy on parties" against their will. Rau, *supra* note 78, at 490. It is also implied in Justice Stevens's dissenting opinion in *Hall Street*. Stevens argued that the parties' agreement should be enforced because doing so represents a hands-off approach—what he referred to as "[a] decision '*not to regulate*.'" *Hall Street*, 552 U.S. at 595 (Stevens, J., dissenting) (emphasis in original). The implication is that by refusing to give effect to the parties' voluntary choices, the state is actively interfering with their "freedom."

But as we saw in Part II.A.1, when the state makes arbitration agreements unenforceable (unlike when it makes arbitration illegal), it does not "force" or "impose" anything on the parties; it just withholds the benefit of the state's enforcement machinery, thereby "leav[ing] both parties as it finds them." See *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1907 (2011). The decision to withhold those benefits is based on public values and policies to be sure, but that is not the same as saying that the values are being "imposed" on private parties.

217. Benn & Weinstein, *supra* note 197, at 195.

218. Carbonneau, *Crossroads*, *supra* note 1, at 258 (emphasis added); see also Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates*, 14 CARDOZO J. CONFLICT RESOL. 593, 613 (2012) (suggesting that this type of choice is "ill-considered" and not "responsibl[e]").

arbitration”²¹⁹ and by subjecting it to increased oversight and scrutiny by courts of law.²²⁰ Enforcing them may enable certain choices, but over time it is also likely to frustrate many others that users of arbitration care deeply about: speed, economy, and avoiding “full-bore” judicial proceedings, to name a few.²²¹ At the end of the day, the argument goes, we will find ourselves stuck in a less functional and effective process—and in this sense less free. Thus, rather than see *Hall Street* as in tension with the autonomy thesis, Carbonneau reconciles the two by drawing the following lesson: “parties can choose freely as long as their choices do not lead to an oxymoronic or pathological reference to arbitration.”²²² The upshot is not so much that party autonomy should be subordinated to extra-contractual values such as the institutional integrity of the courts,²²³ but that certain choices are themselves so “pathological” or “oxymoronic” that they do not contribute in any meaningful sense to the actual exercise of freedom. And if so, the autonomy thesis, understood as a claim about positive liberty, would not seem to require encouraging those choices by enforcing them.

Stipanowich makes a similar argument. He believes that agreements such as the one at issue in *Hall Street* sometimes reflect “wrong” or “questionable” choices, either because they end up compromising important process values such as finality or because they suggest a lack of serious, second-order reflection that characterizes autonomy in the thick positive sense.²²⁴ He argues that the fundamental question raised by these provisions is whether they are of any real benefit to end users. He reports that leading arbitration attorneys and arbitrators recently answered this question “with a resounding ‘No!’”²²⁵ The explanation, again, returns us to questions of value: the respondents “viewed such provisions as undermining key conventional benefits of arbitration, including finality, efficiency, economy, and expert decision making.”²²⁶

For those like Stipanowich and Carbonneau who interpret autonomy in positive more so than negative terms, autonomy might not necessarily require the enforcement of arbitration agreements strictly “according to their terms.”²²⁷ For some agreements, if enforced to the letter, will not in any meaningful sense improve our actual freedom in arbitration; indeed, they may make us less free. This seems straightforwardly true for marginal cases such as agreements to arbitrate before a panel of three monkeys or by consulting the entrails of a dead fowl. I take no position on whether this is also true in the case of agreements like the one in *Hall Street* other than to note that reasonable minds such as Ware, Stipanowich, and Carbonneau have actually differed on the issue.

219. Carbonneau, *Contract Freedom*, *supra* note 1, at 1231.

220. Carbonneau, *supra* note 218, at 614.

221. *See Hall Street*, 552 U.S. at 588.

222. Carbonneau, *supra* note 218, at 613.

223. *But see id.* at 594 (describing the “restraints placed upon contract freedom” by *Hall Street*).

224. Stipanowich, *supra* note 100, at 425–26 (citing the CPR Commission on the Future of Arbitration); *id.* at 436.

225. *Id.* at 426.

226. *Id.*

227. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

In sum, as between positive and negative liberty interpretations of the autonomy thesis, the former presents a much more plausible argument against regulating the enforceability of arbitration agreements. But as we saw in this section, positive liberty can sometimes be consistent with such regulation because it cannot be divorced from questions of value. We will disagree about these values to be sure; the important point is just that our assessments about what type of regulation is (or is not) consistent with the autonomy thesis cannot pretend to be value neutral.²²⁸

2. Enforcement Can Promote the Positive Liberty of the Party Who No Longer Wishes To Arbitrate

Of course, even in a case like *Hall Street* one party almost certainly resists enforcement. How, then, does positive liberty help overcome the problem in Part II.A.2—the problem of how forcing a party to arbitrate against her wishes can nonetheless be said to further her positive liberty?

One answer is to concede that enforcement diminishes the freedom of the breaching party but to argue that this diminution is outweighed by the greater freedom made available to others by strengthening the institution of enforcement. I shall defer a consideration of this argument to Part III.

Another answer is to entertain a much thicker conception of positive liberty, not so much as the ability to exercise free choice but as a capacity for self-legislation—what many philosophers would say is the only true autonomy. Autonomy in this sense is not coterminous with the idea of freedom and can sometimes imply just the opposite.²²⁹ Dworkin makes this point with an example from Homer's *Odyssey*:

Not wanting to be lured onto the rocks by the sirens, [Odysseus] commands his men to tie him to the mast and refuse all later orders he will give to be set free. He wants to have his freedom limited so that he can survive. . . . He has a preference about his [future] preferences, a desire not to have or to act upon various desires. He views the desire to move his ship closer to the sirens as something that is no part of him, but alien to him. *In limiting his liberty, in accordance with his wishes, we promote, not hinder, his efforts to define the contours of his life.*²³⁰

Consider that if Odysseus had not been tied down, he would have been free at T_2 to steer (or not to steer) toward the island of the Sirens. But if he had actually done so under the influence of the Sirens' song, we would not think of him as having acted autonomously. Odysseus's autonomy consists instead in the fact that he recognizes that his own first-order choice at T_2 is liable to be misguided, regrettable, or otherwise compromised.²³¹ Rather than sit passively, he has made a second-order

228. See TAYLOR, *supra* note 34, at 218.

229. See, e.g., *id.* at 222 (“[T]he fact that I am doing what I want, in the sense of following my strongest desire, is not sufficient to establish that I am [autonomous].”).

230. DWORKIN, *supra* note 53, at 14–15 (emphasis added).

231. The trouble with a negative liberty or even a thin positive liberty justification for enforcement is that each fails to distinguish between first- and second-order choices. They are therefore disabled from making distinctions about the quality of the agent's decision making

choice at T_1 to be self-directing—to take his fate into his own hands. The fact that this involves restricting rather than expanding his freedom at T_2 does not make him less autonomous; if anything, it makes him more so.

In order for this argument to work, we must feel confident that the quality of the agent's second-order choice at T_1 is somehow superior to her first-order choice at T_2 in the sense that it was both more *independent* and *rational*.²³² If Odysseus had instructed his men to tie him to the mast at T_1 out of an uncritical deference to a trusted advisor, we might think he made the right decision but we would not think of him as having acted independently.²³³ By the same token, if Odysseus had chosen to reject the regimen of his military training in favor of a more spontaneous, “come what may” attitude toward life and as a result instructed his men *not* to restrain him despite the evident risks, we might think of him as enjoying a certain carefree independence but we would not consider him to have acted rationally (particularly if he ended up being lulled to his death). In this case, we would not consider Odysseus more autonomous for sticking to his decision at T_1 to be unrestrained; to the contrary, we would consider him more autonomous if, just before coming within earshot of the Sirens at T_2 , he realizes he has made a terrible mistake and commands his men to strap him.

Now consider someone who enters into a binding predispute arbitration agreement. We can understand this as a type of self-legislation at T_1 if the agent acts (i) independently, insofar as she makes up her own mind to opt out of the litigation default rather than doing so out of laziness, peer pressure, or other internal weakness of will, and (ii) rationally, insofar as she can articulate plausible reasons for doing so, such as anticipated efficiency gains, the ability to select expert decision makers, or quite simply that she is being offered a lower price in exchange for her promise to arbitrate.²³⁴ Only then might holding the agent to this act of self-legislation promote

at T_1 and T_2 . As a result, enforcement can be explained on freedom grounds only by assuming away the existence of a contrary choice at T_2 or by conceding its existence but treating it as normatively irrelevant. By introducing the concept of a second-order choice, it is no longer necessary to elide the coercive nature of contract enforcement. Indeed, the agent's considered choice to subject herself to that coercion at T_2 is *precisely* what makes her decision at T_1 autonomous. It reflects a recognition that she might be under a strong temptation to act out of shortsighted motives and breach the contract at T_2 , but that in the long run she would be better off upholding it.

232. O'Neill, *supra* note 53, at 203–05 (defending a conception of autonomy that combines notions of coherence and independence of the will); *see also* BENN, *supra* note 52, at 176; DWORKIN, *supra* note 53, at 18 (distinguishing between acting from one's “reflective and critical faculties” and acting under “subliminal” or other “ad hoc” influences); GRAY, *supra* note 50, at 57–59 (“[N]o viable conception of liberty can altogether dispense with considerations deriving from the difficult idea of the real or rational will.”).

233. *See, e.g.*, DWORKIN, *supra* note 53, at 16 (arguing that autonomy consists (in part) in being able to “scrutinize critically [one's] first-order motivations”); *see also* BENN, *supra* note 52, at 177 (arguing that the autonomous person does not make choices based on “beliefs he has simply introjected uncritically and unexamined from his social milieu”).

234. Of course, this is a slippery slope. As Berlin warned, once we are in a position to interrogate the plausibility of the agent's reasons, we are in a position to tell the agent that some of her reasons are mistaken or just plain wrong. To some positive liberty theorists, however, making such judgments is intimately bound up with assessments of autonomy.

her autonomy even when she develops a strong first-order preference at T_2 to litigate. Part of the reason why is that we believe her preference to avoid the agreement at T_2 is likely to be short-sighted, less reflective, and in this way less autonomous than the second-order choice she takes at T_1 to pre-commit to forego that preference.²³⁵ But if her choice to avoid the agreement at T_2 were somehow *more* independent and rational than her decision to enter it at T_1 , either because it was taken with better or more complete information, or because the reasons against submitting the dispute to arbitration are vastly more compelling than the reasons in favor of it, then it becomes a serious question whether the autonomy thesis still requires enforcement.²³⁶

The trouble is that in the context of adhesion contracts, at least, it is difficult to describe the decision that most consumers and employees take at T_1 as an act of self-legislation. The point is not the familiar one that such parties are not truly free to choose (and thus do not meaningfully consent) when terms are presented to them on a “take-it-or-leave-it” basis.²³⁷ The futility of consent is principally a claim about

TAYLOR, *supra* note 34, at 226–28 (arguing that the agent cannot be the final arbiter of whether he or she is free).

Gray suggests something of a middle path, which is to say that the agent should be able to articulate “a reason” for her choice—a requirement intended to “disqualif[y] as rational conduct . . . only the behaviour of a delirious agent, where no goal or end may be imputed to [her] which renders intelligible what [s]he does.” GRAY, *supra* note 50, at 59. On this account, we would not consider someone who chooses to arbitrate an important commercial dispute in front of a panel of three monkeys to be acting autonomously, in part because we doubt that an adjudicative process so devoid of value could be a possible object of reasonable choice. For what reasons would such a person offer to explain her choice? What intelligible goals or purposes would the choice further?

235. For example, if she turns out to be the defendant in a subsequent dispute, she may prefer to litigate if she could more effectively drag out the proceedings through plenary discovery and motion practice under the rules of judicial procedure. Likewise, if she turns out to be the plaintiff, she may prefer to plead her case to a jury.

Early twentieth century supporters of the FAA made a similar point in their assault on the common-law revocability doctrine. The problem with revocability, they argued, was that it enabled the short-sighted interests of litigants and their lawyers, who sought to escape predispute arbitration agreements for opportunistic reasons more so than because of an improvident or otherwise compromised choice at T_1 . *See, e.g.*, Aragaki, *supra* note 23, at 1997–99.

236. To be sure, enforcement might nonetheless be justified on fairness or morality grounds—for example, because the other party has relied to her detriment or conferred a benefit, or simply because a promise is a promise. From an autonomy standpoint, however, the reasons against enforcement would appear to outweigh those in favor of it.

237. This critique, of course, has a long pedigree. *See, e.g.*, Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (arguing that “‘freedom of contract’ rarely exists” with respect to “contracts of ‘adhesion’”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (noting that in many situations, the propounder of the preprinted form contract does not expect that the adherent will read or understand it); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151 (1976).

the ability to exercise free choice—that is, a claim about the lack of certain external resources such as time, financial ability, or other incidents of bargaining leverage.²³⁸ Rather, the point is that such parties also typically lack *internal* prerequisites for making a second-order choice about their future choices, such as a full and complete understanding of the procedures to which they are committing themselves,²³⁹ an ability to discuss potential disputes candidly,²⁴⁰ or a motivation to plan for them in advance.²⁴¹ In other words, they are often not “in a position to reflect upon [or] resist” arbitration clauses—capacities that John Christman takes to be a hallmark of autonomy in the thick positive sense.²⁴²

These internal constraints, moreover, do not appear to be unique to the adhesion context. As Stipanowich reports, they are just as likely to afflict sophisticated parties with greater bargaining leverage, many of whom fail to invest independent, critical thought into selecting sensible dispute-resolution options and appear all too willing to delegate those decisions to others.²⁴³ And if so, it is difficult to appreciate how their autonomy is furthered by enforcing the choice they made at T₁ over their revised and more proximate choice at T₂. For the latter is more likely to have been made with greater information about the nature of the dispute, with greater attention paid to the scope of the arbitration agreement, or with advice from a lawyer.

In short, interpreting the autonomy thesis as a claim about autonomy in the thick positive sense has the greatest potential to explain the enforcement of arbitration agreements against unwilling parties as a theoretical matter. But if, as a factual matter, many arbitration agreements (adhesive or otherwise) do not actually manifest the self-legislation characteristic of this type of autonomy, construing the autonomy thesis in this way likely militates *against* enforcement in a variety of circumstances.

This, in turn, puts the autonomy thesis in tension with arbitration law—hardly surprising since the latter’s strong negative liberty orientation prevents it from distinguishing first-order from second-order choice.²⁴⁴ Consider again *Doctor’s*

238. Note this is a claim about the lack of positive rather than negative liberty. Critics of “take-it-or-leave-it” contracts do not, in the main, contend that such contracts amount to external coercion such as duress or even undue influence.

239. Jeff Govern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, “*Whimsy Little Contracts*” with *Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 45–48 (2015) (finding, inter alia, that only 14% of respondents shown an arbitration clause realized that it precluded them from suing in court).

240. See Stipanowich, *supra* note 100, at 390 (explaining that sophisticated parties often fail to make good predispute choices regarding arbitration, in part because they are “reluctant to dwell on the subject of relational conflict”).

241. See Govern et al., *supra* note 239, at 24 (surveying existing empirical studies and concluding that the “[I]ength and density [of standard form contracts] deter consumers from attempting to read contract terms at all, and the terms are unintelligible for most people who attempt to read them”).

242. Christman, *supra* note 49, at 346.

243. See *supra* notes 100–14 and accompanying text. This may explain recent findings that procedural contracting is not as common as we are apt to believe. See generally David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389; W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865 (2015).

244. The same might also be said of contract law, which takes objective rather than

Associates v. Casarotto, which involved a Montana statute that made arbitration clauses unenforceable unless “[n]otice that [the] contract is subject to arbitration” is “typed in underlined capital letters on the first page of the contract.”²⁴⁵ As many argued, the statute was consistent with (and even tended to promote) autonomy in the thick positive sense because it enforced only those arbitration agreements that were at least brought to the attention of the nondrafting party.²⁴⁶ Nonetheless, the Court held that it was preempted by the FAA.²⁴⁷

The upshot is that if we justify enforcement in certain contexts as promoting self-legislation, we will have to part company with arbitration law in other contexts where enforcement—let alone rigorous enforcement—is arguably inconsistent with self-legislation. We will also need to recognize that proposed reforms such as the Arbitration Fairness Act of 2015 may not be so opposed to autonomy *qua* self-legislation and might even help promote it. The crux of the Act is not that arbitration is categorically inappropriate for consumers and employees; instead, it is that it is very difficult for them to make a considered, reflective judgment about binding arbitration—that is, to effectively self-legislate—before an actual dispute has arisen.

III. THE “MAXIMUM NET AUTONOMY” ARGUMENT

In this Part, I consider a final argument that is sometimes used to explain how contract enforcement furthers autonomy even while it restricts the freedom of the breaching party. It goes something like this: the greater freedom that is preserved for others to enter agreements with the confidence that they will be enforced outweighs any unfreedom that inures to breaching parties in particular cases. I refer to this as the “maximum net autonomy” argument.

The argument is not without its supporters. Charles Fried, for instance, describes contract enforcement as beneficial insofar as it produces a net increase in the freedom of all to continue making contracts.²⁴⁸ Smith suggests that restricting the breaching party’s freedom is justified because it “generally increases our options” and “permit[s] us to do things we could not do otherwise”—that is, it produces greater net freedom overall.²⁴⁹ The claim has also been made in the arbitration context. For example, Ware has argued that “[t]he interests of consumers as a group are better

subjective consent as sufficient to bind the promisor even as to boilerplate terms. *See* RADIN, *supra* note 88, at 89–90. The difference is that the rigorous enforcement of arbitration agreements means that any state legislative efforts designed to improve the quality of assent to such agreements are prohibited, whereas contract law readily cedes ground to such efforts in specific adhesive contexts.

245. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (alteration in original) (quoting MONT. CODE ANN. § 27-5-114(4) (1995)).

246. *E.g.*, *Moses*, *supra* note 71, at 542.

247. *Casarotto*, 517 U.S. at 687. The decision has been construed as preventing states from requiring a minimum level of informed consent to arbitration agreements.

248. *See* CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 7–17 (1981).

249. SMITH, *supra* note 66, at 258; *see also* Pettit, *supra* note 62, at 281–83 (arguing that both state regulation *and* enforcement of contracts, while decreasing the freedom of some, may increase the “sum total of freedom of exchange in society”).

served” by enforcing mandatory arbitration clauses because a system that facilitates trading the right to judicial resolution for lower prices will create more options for them generally.²⁵⁰

The maximum net autonomy argument in many ways presents the strongest affirmative rationale for enforcing contracts in general, which is why it deserves some treatment here. But there are two basic problems with it in the arbitration context. First, the argument is directed first and foremost at promoting the *institution* of predispute arbitration agreements. It therefore cannot explain why any particular agreement, such as the one at issue in *AT&T Mobility v. Concepcion*²⁵¹ or in *American Express v. Italian Colors*,²⁵² should be enforced. More importantly, it cannot explain why arbitration agreements are enforced *more* strictly than contracts generally. For example, it cannot explain why arbitration agreements should be enforced even when they are contrary to state legislation or public policy.²⁵³ The reason is that the institution itself can thrive even while a whole host of individual arbitration agreements are denied enforcement, just like the insurance industry thrives even though insurance contracts are one of the most heavily regulated of their kind. Indeed, refusing to enforce particular arbitration agreements, such as agreements to arbitrate before a panel of three monkeys, might actually strengthen the institution’s legitimacy.

Second, because it subordinates the autonomy of the contracting parties to autonomy conceived in much broader terms, it is not strictly speaking a freedom or autonomy argument at all. To understand how this is the case, it will be necessary to unpack the distinction between liberty and autonomy theories, on the one hand, and utilitarian or efficiency theories, on the other.

An example of an efficiency theory is the idea that, because the individual is the best judge of her own welfare, voluntary transactions are almost certain to make at least one person better off and no person worse off (assuming no externalities).²⁵⁴ Promoting such “Pareto superior” exchanges would therefore appear to promote welfare writ large. Another example is cost-benefit theories, which hold that overall welfare can be maximized even if some persons are made worse off so long as others are made better off to a greater degree. For example, Kaldor-Hicks efficiency expresses the idea that a given state of affairs is welfare enhancing if and only if the “winners gain sufficiently so that they *could* compensate the losers with a net gain in welfare,” even if no compensation actually takes place.²⁵⁵

Enforcing a particular arbitration agreement against an unwilling party could be justified as Kaldor-Hicks efficient so long as the costs to that party were outweighed by its benefits to the other.²⁵⁶ The institution of enforcing arbitration agreements

250. Ware, *Consumer Arbitration*, *supra* note 95, at 210–12.

251. 131 S. Ct. 1740 (2011).

252. 133 S. Ct. 2304 (2013).

253. This follows as a consequence of FAA preemption. *See, e.g.*, Aragaki, *supra* note 4, at 1271–72; Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1229–30 (2011).

254. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 7 (1997) (emphasizing that this is only a “presumption”).

255. JULES COLEMAN, *MARKETS, MORALS AND THE LAW* 136 (1998) (emphasis added).

256. By contrast, it is difficult to see how enforcing a contract against an unwilling party

more generally could likewise be justified as long as the aggregate cost to parties who are compelled to arbitrate are outweighed by the aggregate benefits to society in the form of docket clearing, conservation of judicial resources, and savings in cost and time.

The problem, however, is that efficiency arguments and autonomy arguments are very different animals. Kaldor-Hicks efficiency arguments, for instance, entail no special solicitude for private ordering because an arrangement can be Kaldor-Hicks efficient regardless of whether anyone has actually consented to it.²⁵⁷ If it could somehow be proved that using arbitration saves lending institutions and courts far more money than the cost to consumers of forfeiting a judicial forum,²⁵⁸ there would be a strong efficiency-based justification for categorically referring all consumer debt-collection cases to arbitration regardless of the consumer's wishes.²⁵⁹ By the same token, parties have sometimes invoked cost-benefit considerations to argue *against* enforcing arbitration agreements that they had freely entered.²⁶⁰ For example,

is a reliable way to promote Pareto superior moves. Even if the promisor freely consented at T₁, her "revealed" preference at T₂ reflects an assessment that completing the transaction will leave her worse off. The Pareto standard therefore cannot explain why her antecedent choice is more relevant to the utilitarian calculus than her updated choice at the time of enforcement—a problem Michael Trebilcock has dubbed the "Paretian dilemma." TREBILCOCK, *supra* note 254, at 244; *see also* Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 OSGOODE HALL L.J. 273, 284 (1995) (arguing that Pareto efficiency "cannot possibly provide a normative basis for contract"); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 841 (1983) (arguing that contract law favors the breaching party's "prior exercise of autonomy in entering into the agreement over the present exercise of autonomy in disavowing it," which "by definition decreases [her] welfare"); Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 687, 742 (Jules Coleman & Scott Shapiro eds., 2004) ("Pareto efficiency itself cannot explain why the *ex ante* Pareto result that argues for enforcing the agreement should be privileged over the *ex post* Pareto result that argues against enforcing the agreement." (italics omitted)).

257. *See* COLEMAN, *supra* note 255, at 134; TREBILCOCK, *supra* note 254, at 245–48.

The same is not necessarily true of Pareto efficiency, which enjoys a certain synergy with autonomy theories. *See* COLEMAN, *supra* note 255, at 101–05; IAN SHAPIRO, THE MORAL FOUNDATIONS OF POLITICS 43–44 (2003) (arguing that "Pareto's denial of the possibility of interpersonal comparisons had the effect of importing a powerful doctrine of individual autonomy into the core logic of utilitarianism" that "create[d] analytical and moral space for the Enlightenment ideal of individual rights"). For the reasons stated above, however, Pareto efficiency does not provide even a plausible efficiency justification for enforcing a contract over the present objection of one party. *See supra* note 256.

258. PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS 13 (2008) (estimating that if predispute arbitration clauses could not be enforced in consumer debt-collection cases, a "deluge of new cases" would increase the docket of California small-claims courts by roughly 14%).

259. Of course, it is precisely because we value individual liberty that state-mandated arbitration schemes are rare, although not unknown. *See* Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 OR. L. REV. 487, 565–66 (1989).

260. But the autonomy thesis has meant that such efficiency-based arguments are almost always cast aside. *See, e.g.,* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (enforcing arbitration clause despite defendant's argument that doing

in *Dean Witter Reynolds v. Byrd*, the plaintiff argued that the benefits of enforcement were outweighed by the delay and other inefficiencies that would likely result from having to litigate federal-law claims while arbitrating pendent state-law claims.²⁶¹

Cost-benefit arguments are sometimes made to look like autonomy arguments by substituting “autonomy” for “welfare.” This is the gist of the maximum net autonomy argument, which holds that any loss in the breaching party’s autonomy caused by enforcement is outweighed by the greater gain in autonomy that the rest of us enjoy by having a reliable institution of enforcement. But what passes for “autonomy” here is in truth something like utility, to be maximized across individuals even if it means sacrificing the autonomy of some for the greater autonomy of others. It is a slippery slope from the proposition that restricting the breaching party’s freedom creates even more freedom overall to the proposition that restricting freedom in other ways will result in a like increase. This is why the maximum net autonomy argument is not a bona fide autonomy argument. For it gives short shrift to ideas of voluntariness, separateness, and choice that, in one form or other, are central to both negative and positive conceptions of individual freedom.²⁶²

CONCLUSION

In this Article, I have questioned the extent to which the autonomy thesis provides a basis for insisting on the rigorous enforcement of arbitration agreements—that is, for insisting that such agreements are not just enforced but enforced with minimal regulation by the state. If the thesis is construed as a claim about negative liberty, it is difficult to see how autonomy requires either enforcement or minimal regulation. If, following some scholars, it is construed as a claim about positive liberty, the argument in favor of enforcement becomes more persuasive in theory (but less so in practice), while the argument in favor of minimal regulation becomes bound up with questions of value. It thus appears that we face something of a choice going forward: either we continue to claim that autonomy is “the highest priority in the pantheon of arbitration values”²⁶³ but recognize that autonomy cannot fully explain the law’s rigorous enforcement of arbitration agreements, or we insist that arbitration agreements must be rigorously enforced but begin considering what alternative values or policy rationales can be mustered in support of it.

so would create inefficiencies in the form of conflicting rulings on a common issue of law or fact); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (enforcing arbitration clause despite plaintiff’s argument that compelling arbitration was inefficient because it would require related disputes to be resolved in separate arbitral and judicial forums rather than being consolidated before a court of law).

261. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (enforcing an arbitration agreement regardless of whether doing so would be “possibly inefficient”).

262. See *supra* notes 37–41 and accompanying text. Jules Coleman has made a similar point in a different context. Cf. COLEMAN, *supra* note 255, at 138–39 (criticizing consequentialist arguments that treat “deontological categories—rights, justice, fairness, equality and so on—exclusively as objects of preference”).

263. Brunet, *supra* note 16, at 5.