2011 Kansas Law Review Symposium
“Perspectives on the Current State of Arbitration Law”

November, 11, 2011
9:00 – 3:30 p.m.

Green Hall – Room 106
University of Kansas School of Law
Continuing Legal Education Materials
## Schedule:

<table>
<thead>
<tr>
<th>Time</th>
<th>Speaker/Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:00 – 9:05</td>
<td><strong>Introduction and Welcome</strong></td>
</tr>
<tr>
<td>9:05 – 9:50</td>
<td><strong>Professor Kristen Blankley – Taming the Wild West of Arbitration Ethics</strong></td>
</tr>
<tr>
<td></td>
<td>An examination of the criminal law that reins in attorney behavior in the</td>
</tr>
<tr>
<td></td>
<td>litigation forum, including laws criminalizing perjury and tampering with</td>
</tr>
<tr>
<td></td>
<td>witnesses and documents, and the inconsistency with which these statutes apply</td>
</tr>
<tr>
<td></td>
<td>to the arbitral forum and why the criminal law should be amended to apply</td>
</tr>
<tr>
<td></td>
<td>equally to litigation and binding arbitration.</td>
</tr>
<tr>
<td>9:50 – 10:00</td>
<td><strong>Break</strong></td>
</tr>
<tr>
<td>10:00 – 10:45</td>
<td><strong>Professor Maureen Weston – The Future (or Death) of Class Arbitration</strong></td>
</tr>
<tr>
<td></td>
<td>after <em>Concepcion</em></td>
</tr>
<tr>
<td></td>
<td>A review of how the recent 5-4 Supreme Court decision *AT&amp;T Mobility v.</td>
</tr>
<tr>
<td></td>
<td><em>Concepcion</em> impacts class action arbitration, viability of state unconscionability</td>
</tr>
<tr>
<td></td>
<td>law, and preemption of state public policies.</td>
</tr>
<tr>
<td>10:45 – 11:30</td>
<td><strong>Professor David Horton – The Non-Arbitrability Doctrine and Inalienability</strong></td>
</tr>
<tr>
<td></td>
<td>An analysis of the normative foundations of the non-arbitrability doctrine</td>
</tr>
<tr>
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<td>(which exempts claims from the scope of the Federal Arbitration Act if a plaintiff cannot vindicate her rights in arbitration), and an argument that the rule should apply with special force to certain statutes.</td>
</tr>
<tr>
<td>11:30 – 1:00</td>
<td><strong>Lunch Break</strong></td>
</tr>
<tr>
<td>1:00 – 1:45</td>
<td>**Professor Richard Reuben – What If? FAA Jurisprudence Under a Truly</td>
</tr>
<tr>
<td></td>
<td>Conservative Court**</td>
</tr>
<tr>
<td></td>
<td>A look at the Supreme Court as an activist court in arbitration jurisprudence and a “redeciding” of several of those key cases according to true judicial conservatism.</td>
</tr>
<tr>
<td>1:45 – 2:30</td>
<td><strong>Professor Jeffrey Stempel – Crazy, Stupid Love: Arbitral Infatuation in</strong></td>
</tr>
<tr>
<td></td>
<td>Derogation of Sound and Consistent Jurisprudence**</td>
</tr>
<tr>
<td></td>
<td>An examination of the Supreme Court's modern construction of the Federal Arbitration Act as a matter of statutory interpretation jurisprudence and judicial role. The Court has largely failed to follow the Justices' own self-professed rules and beliefs regarding sound jurisprudence, expanded the scope of the FAA in ways inconsistent with the judicial role, and diminished respect for the court throughout wide segments of the legal profession and the public.</td>
</tr>
<tr>
<td>2:30 – 2:40</td>
<td><strong>Break</strong></td>
</tr>
<tr>
<td>2:40 – 3:30</td>
<td><strong>Professor Thomas Stipanowich – Should We Incorporate Due Process</strong></td>
</tr>
<tr>
<td></td>
<td>Standards for Arbitration of Consumer and Employment Disputes in the FAA?</td>
</tr>
<tr>
<td></td>
<td>Consideration of the prospective benefits, costs and limitations of legislated due process guidelines for arbitration in consumer and employment disputes in light of current proposals to outlaw predispute arbitration agreements in various settings or implement the use of regulated arbitration.</td>
</tr>
</tbody>
</table>
Taming the Wild West of Arbitration Ethics

Kristen Blankley

The boundaries of ethical behavior in litigation are well known and understood in the legal community. Attorneys and parties cannot lie under oath, are prohibited from destroying documents, and are prohibited from tampering with witnesses. The criminal law and rules of attorney ethics have long prohibited these practices in order to ensure that the public system of dispute resolution (i.e., court) is fair by ensuring truthfulness and the preservation of relevant evidence. Whether these rules apply in the arbitral forum, however, is unclear, at best. The criminal laws dealing with perjury and tampering of witnesses and documents generally only apply to “official proceedings,” and arbitration likely does not fall within the definition of an “official proceeding.” The revisions to the ethics rules do cover the arbitral forum, but the criminal law has been slow to catch up. This paper recommends revising the definition of “official proceedings” to include the arbitral forum. Such revision would make the arbitral forum fairer, make the ethical rules and the criminal law more congruent, and it would fill an “accountability” gap that arises by operation of the increased application of arbitral immunity laws. Revising the criminal law in such a manner, on a state-by-state basis, would create uniformity across the nation and hold accountable those (attorneys and non-attorneys alike) for engaging in conduct that is properly punishable in the litigation forum.
Kristen Blankley

Kristen M. Blankley is an Assistant Professor at the University of Nebraska College of Law, where she teaches on a wide variety of alternative dispute resolution topics, including negotiation, mediation, and arbitration. She is a 2004 graduate of The Ohio State University Moritz College of Law, where she graduated with a Certificate of Dispute Resolution. Since her graduation, she has been active in the field of Alternative Dispute Resolution, and she is also a mediator. Prior to joining the University of Nebraska, Ms. Blankley was an attorney with the firm Squire, Sanders, and Dempsey, LLP (Columbus, Ohio office), where she focused her practice on business litigation. Ms. Blankley is also an active scholar in the field of Alternative Dispute Resolution, publishing on arbitration, mediation, and ethics in alternative dispute resolution issues. She has written on topics including class action arbitration, judicial review of arbitration awards, mediation ethics, and mediation confidentiality.
The Death of Class Arbitration After Concepcion?

MAUREEN A. WESTON

Abstract

Is the “death knell” of class arbitration found in the fine print? In AT&T Mobility v. Concepcion, the U.S. Supreme Court potentially allowed for the evisceration of class arbitration, and indeed most class actions in consumer and employment settings, where contracts contain a pre-dispute arbitration provision that only authorizes claims bought in an individual capacity or that expressly bans representative class actions in arbitration or court (“class action waivers”).

The Court indirectly addressed the issue of class arbitration in prior cases where it seemed to have implicitly endorsed the concept of arbitral class actions. In Southland v. Keating, the Court held that the FAA preempted a state law that required judicial recourse for franchise claims, yet it acknowledged that these claims would be resolved in a class arbitration procedure. In Bazzle v. Green Tree Services, a plurality of the Court held that where a predispute arbitration contract was silent on the issue of class actions, the arbitrator is to decide whether the parties’ intended to bar or permit the filing of class claims in arbitration or court. In response to Bazzle, arbitration providers such as the American Arbitration Association and JAMS have promulgated comprehensive rules addressing the procedure for class arbitration and proceeded to administer class arbitration for nearly seven years.

But recent arbitration cases before the Roberts Court took a decidedly more critical view of class arbitration, although maintaining a decidedly favorable view of bilateral arbitration. In Stolt-Nielsen SA v. Animalfeeds Int’l Corp., the underlying arbitration agreement was silent on the issue of class arbitration. On the basis that the agreement did not preclude class arbitration, the arbitration panel ordered class arbitration. Ruling that in so doing the arbitrators exceeded his authority or acted in manifest disregard, the Court held that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to class arbitration. In Stolt, the Court expressed a strong distaste for class arbitrations and described at length the presumed differences between bilateral and class arbitrations. Thus, under Stolt, class arbitration requires express agreement by the parties. But what then of contractual provisions that ban class relief altogether?

The debate of class action waivers, which had been percolating in the state and federal courts, came to the forefront after the Court agreed to review the California Supreme Court’s ruling in Discover Bank v. Superior Court, which deemed class action waivers in arbitration agreements unconscionable,

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1 AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011).
exculpatory, and thus illegal under California law.\textsuperscript{6} A “principal purpose” of the FAA is to “ensure that private agreements to arbitrate are enforced according to their terms.”\textsuperscript{7} But Section 2 provides for the judicial enforcement of agreements to arbitrate, “[s]ave upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{8} This “savings clause” has long been interpreted as holding arbitration contracts to the standards of generally applicable state contract law, including defenses applicable to any contract, such as fraud, duress, or unconscionability. Under\textit{ Discover Bank}, the waiver would be struck as unconscionable, but the case permitted to proceed in class arbitration.

Writing for the 5-4 majority in\textit{ Concepcion}, Justice Scalia held that California’s judicial rule, which deemed class action waivers in arbitration agreements unconscionable, “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .”\textsuperscript{9} The FAA preempted the state law invalidating class action waivers as unconscionable.\textsuperscript{10} With considerable force yet little empirical data in support, the majority distinguished the assumed streamlined, efficient, and cheap features offered in bilateral arbitration from the “slower, more costly and more likely to general procedural morass . . . .” of class arbitration.\textsuperscript{11} The Court further noted that class arbitration, with no effective means of judicial review, imposes the higher risks to defendants, “unlikely to bet the company.”\textsuperscript{12} Even if class proceedings are needed to vindicate small-dollar claims that might otherwise go unredressed, according to the Court, the “States cannot require a procedure that is inconsistent with the FAA.”

This Article examines the impact and implications of\textit{ AT&T v. Concepcion} on the future of class proceedings in arbitration and the federalism issues at stake in the Court’s interpretation of FAA preemption and the state of state contract law doctrines post \textit{AT&T}. In light of \textit{AT&T v. Concepcion}, a number of state and federal courts have upheld class action waivers contained in consumer arbitration contracts over objections that the waivers effectively immunize defendants from liability. Yet other courts and commentators are more circumspect in their reading of \textit{Concepcion}, analyzing that the holding may be limited to the unique facts and generous dispute resolution provided in the arbitration procedure of \textit{AT&T}. Perhaps the Court in \textit{AT&T} got it right. But, certainly the FAA was not intended to shield wrongdoers from liability. That risk is present where class action waivers have the effect of having small but widespread illegality claims go unheard. Perhaps \textit{AT&T} will ring louder the calls for legislative reform of the FAA to address concerns of mandatory arbitration and the elimination of an important procedural joinder device of class actions though the strike of a pen. The Article will explore options for how to effectuate the important considerations of consent to arbitration and a meaningful opportunity to vindicate rights.

\textsuperscript{6} 113 P.3d 1100 (Cal. 2005).
\textsuperscript{7} \textit{ATT}, 131 S.Ct. at 1748.
\textsuperscript{8} 9 U.S.C. § 2.
\textsuperscript{9} 131 S.Ct. at 1753.
\textsuperscript{10} 131 S.Ct. at 1753.
\textsuperscript{11} Id. at 1751.
\textsuperscript{12} Id. at 1752.
Maureen Weston

Maureen Weston is Associate Dean of Research and Professor of Law at Pepperdine University School of Law. She received her J.D. from the University of Colorado, and B.A. in Economics/Political Science at the University of Denver. Professor Weston teaches courses on arbitration, mediation, negotiation, international dispute resolution, civil procedure, legal ethics, and sports law. She has taught law at the University of Oklahoma, University of Colorado, University of Las Vegas Nevada, Hamline, and Brasenose College in Oxford, England. Prior to teaching, Weston practiced law with Holme Roberts & Owen and Faegre & Benson in Colorado. She is actively involved in programs furthering opportunities for students to gain experience in negotiation, mediation and arbitration. Her service membership includes subcommittee chair for the ABA, Law School Division, Arbitration Competition subcommittee, former co-chair of the ABA Section on Dispute Resolution Education Committee and ABA, Representation in Mediation Competition. She is a member of the Board at the National Sports Law Institute at Marquette School of Law, University of Colorado School of Law Alumni Board, and serves as Commissioner in Malibu Little League. Weston is a frequent speaker and presenter at conferences on sports law, arbitration, legal ethics, and dispute resolution. She is co-author of casebooks on sports law and arbitration and has written numerous articles in the area of Olympic and International Sports Arbitration, disability law, sports law, and dispute resolution.

The relationship between the Federal Arbitration Act (FAA) and other federal statutes has long been controversial. The FAA requires judges to specifically enforce arbitration clauses unless doing so would violate traditional contract principles. However, the U.S. Supreme Court has never rigidly applied this mandate to federal statutory claims. In fact, for decades, the Court exempted all such claims from the FAA. This approach, known as the non-arbitrability doctrine, rested on a simple premise: because arbitration lacks the procedural and evidentiary safeguards of litigation, Congress could not have meant to subject important public law rights to the FAA. Then, as arbitration matured as a dispute resolution process, the Court reversed course. Declaring that arbitration is outcome-neutral, the Court abolished the non-arbitrability rule. In its place, the Court adopted a fact-specific test that entitles plaintiffs to go to court if they cannot vindicate their federal statutory rights in arbitration.

Although the contours of the vindication of rights doctrine have never been entirely clear, judges and scholars generally agree on two related points. The first is that the Court has placed the onus on plaintiffs to offer concrete, convincing proof that arbitration will thwart their claims. The second is that plaintiffs bear this heavy burden in all cases, without regard to the specifics of their cause of action. Thus, across the broad spectrum of federal rights-claiming, courts require plaintiffs to go beyond “mere speculation” and affirmatively demonstrate that some aspect of the extrajudicial proceeding will chill their rights. Although the caselaw is not entirely consistent, most judges have rejected vindication of rights arguments grounded on the facts that the arbitration clause either (1) saddles the plaintiff with paying arbitral costs, or (2) awards attorneys’ fees to the prevailing party, or (3) says nothing at all about these issues.

This Essay explores the tension between this approach and the unique nature of federal antidiscrimination claims. First, as a normative matter, it argues that courts should relax the showing required under the vindication of rights doctrine for causes of action under Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. These statutes confer rights that are widely-regarded as inalienable at the pre-dispute stage. I explain that the law immunizes these claims from the market for good reason: not only would commodifying
them lead to systemic externalities, but it would do violence to fundamental conceptions of personhood. These concerns justify shifting the burden to defendants to prove that arbitration does not eviscerate these rights. Second, on the positive front, I challenge the conventional wisdom that the Court has instructed lower courts to apply the same onerous burden to all plaintiffs under the vindication of rights doctrine. I contend that this view misreads two seminal opinions (Gilmer v. Interstate/Johnson and Green Tree Fin. Corp. v. Randolph) and glosses over meaningful distinctions between alienable economic rights and inalienable dignitary rights.
ARBITRATION AS DELEGATION

DAVID HORTON*

Hundreds of millions of consumer and employment contracts include arbitration clauses, class arbitration waivers, and other terms that modify the rules of litigation. These provisions ride the wake of the Supreme Court's expansive interpretation of the Federal Arbitration Act (FAA). For decades, scholars have criticized the Court's arbitration jurisprudence for distorting Congress's intent and tilting the scales of justice in favor of powerful corporations. This Article claims that the Court's reading of the FAA suffers from a deeper, more fundamental flaw: It has transformed the statute into a private delegation of legislative power. The nondelegation doctrine forbids Congress from allowing private actors to make law unless they do so through a process that internalizes the wishes of affected parties or that is subject to meaningful state oversight. The FAA as construed by the Court violates this rule. First, companies have invoked the statute to create a parallel system of civil procedure for consumer and employment cases. This river of privately made law not only washes away Congress's procedural rulemaking efforts but dilutes the potency of substantive rights. Second, although businesses ostensibly impose these rules through the mechanism of contracting—a process normally rooted in mutual consent—the Court's arbitration case law deviates from traditional contract principles. It funnels consumers and employees into arbitration even when they truthfully claim that they did not agree to arbitrate. Third, despite the fact that the FAA as enacted mandates robust judicial review of privately made procedural rules, the Court has all but abolished this safeguard. This Article concludes that the Court should recognize that the FAA as interpreted raises grave private delegation issues and should thus limit the statute.

INTRODUCTION .......................................................... 438

I. THE RISE OF PRIVATE PROCEDURAL RULEMAKING .... 444
   A. The FAA as Enacted .............................................. 444
   B. The Separability Doctrine ................................. 449
   C. The Expansion of the FAA .................................. 451
      1. Statutory Rights ........................................... 451
      2. Preemption and Unconscionability ...................... 453
   D. Private Procedural Rulemaking ......................... 456
      1. The Unilateral Amendment .............................. 456
      2. Procedural Rulemaking in Arbitration .............. 460


437

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3. **The Delegation Clause** ................................................. 465

E. **Summary** ................................................................. 468

II. **Arbitration as Delegation** ........................................... 469

A. **The Public Nondelegation Doctrine** ............................. 470

B. **The Private Nondelegation Doctrine** ......................... 472

   1. **The Nature of the Delegation: Transparency and Neutrality** ........ 474

   2. **Whether Affected Parties Are Represented** .................. 477

   3. **State Involvement** ................................................... 479

C. **The FAA as a Private Delegation** ............................... 480

   1. **The Nature of the Delegation: Transparency and Neutrality** ........ 480

   2. **Whether Affected Parties Are Represented** .................. 485

   3. **State Involvement** ................................................... 489

III. **Nondelegation as a Limit on the FAA** ......................... 493

A. **Rethinking the FAA’s Effect on Substantive Rights** ....... 493

B. **Heightened Regulation of Delegation Clauses** ............... 495

C. **The FAA and Constitutional Avoidance** ....................... 496

**CONCLUSION** .................................................................. 498

**INTRODUCTION**

Congress passed the Rules Enabling Act (REA) in 1934.1 The REA, which authorized the Supreme Court to create a single, trans-

substantive procedural regime for federal courts, reflected the ethos of the New Deal: faith in centralized government as a guarantor of social justice.2 The Court delegated its task to an Advisory Committee,3 which set out to draft a procedural code that limited the impact of process itself. By abolishing rigid pleading standards and fusing law and equity, the Committee sought “to get rid of technicali-

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ties and simplify procedure and get to the merits." Its handiwork, the Federal Rules of Civil Procedure, took effect in 1938.

Three-quarters of a century later, procedural rules in many cases stem from a different federal statute—one that turns the REA’s objectives on their head. In 1925, Congress passed the Federal Arbitration Act (FAA), which provided that contracts to arbitrate disputes would be enforceable as a matter of federal law. These agreements were hardly revolutionary: Merchants and trade groups had long employed them to settle conflicts quickly and under industry norms. However, in the last two decades, arbitration has shed its humble, communitarian origins. The Court has dramatically expanded the scope of the FAA. Arbitration has become “the new litigation,” increasingly resembling a parallel judicial system. Arbitration clauses appear in hundreds of millions of consumer and employment contracts. Businesses do not merely use these provisions to funnel cases away from the courts; rather, they seize the opportunity to redefine the parameters of the dispute resolution process—from the scope of discovery, to the right to bring a class action, to the payment of fees and costs. As the touchstone for this massive private procedural rulemaking, the FAA has emerged as the REA’s shadowy twin.

Arbitration’s ascendancy has sparked intense debate. Consumer and employment arbitration has its staunch defenders. Indeed, Justices across the political spectrum fueled the Court’s initial expand-

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8 See infra Part 1 (tracing this development).


10 For example, in a recent petition for a writ of certiorari, AT&T acknowledged that its arbitration clauses were embedded in “tens (if not hundreds) of millions” of wireless service agreements. Reply Brief for the Petitioner at 1, AT&T Mobility LLC v. Concepcion, No. 09-893 (U.S. May 3, 2010), 2010 WL 1787380.

11 See infra notes 132–41 and accompanying text.
sion of the FAA in the 1980s. Moreover, arbitration arguably reduces the judiciary's workload and reduces litigation costs, allowing companies to offer lower prices and higher wages. On the other hand, few niches on the Court's docket have provoked such sustained criticism. Scholars and judges have questioned the accuracy of the Court's interpretation of the FAA and have argued that companies use fine-print dispute-resolution terms in a clandestine effort to tilt the scales of justice.

12 For instance, in Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984), the Court held that the FAA preempts state law. Chief Justice Burger's majority opinion won support from two other Nixon appointees (Justices Powell and Blackmun), a moderate Kennedy appointee (Justice White), and two liberal icons (Justices Marshall and Brennan).

13 See, e.g., Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989) (describing FAA as "therapy for the ailment of the crowded docket"); Chief Justice Urges Greater Use of Arbitration, N.Y. Times, Aug. 22, 1985, at A21 (quoting then-Chief Justice Warren Burger as saying "[a] host of new kinds of cases have flooded the courts: students seeking to litigate a failing mark, professors litigating denial of academic tenure and another great load on the courts, welfare recipients").


15 See, e.g., Allied-Bruce, 513 U.S. at 283 (O'Connor, J., concurring) ("[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."); David S. Schwartz, Enhancing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33, 36 ("The Supreme Court has created a monster.").

16 See, e.g., Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 401 ("[A]rbitration and forum selection clauses in contracts of adhesion are sometimes a method for stripping people of their rights.") (emphasis omitted)); David S. Schwartz, Mandatory Arbitration and Fairness, 84 Notre Dame L. Rev. 1247, 1248 (2009) (calling arbitration "do-it-yourself tort reform"); Jeff Sovern, Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs, 47 WM. & MARY L. Rev. 1635, 1657–58 (2006) ("[S]ome firms . . . place unfavorable terms in small print, or perhaps in the middle of a sea of fine print, to reduce the likelihood that consumers will read the terms . . . ."); Jean R. Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 Stan. L. Rev. 1631, 1648 (2005) ("Empirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read.").
Despite these critiques, the Court continues to expand the ambit of the FAA. In May 2010, the Court held in *Stolt-Nielsen v. AnimalFeeds International Corp.* that the statute forbids arbitrators from hearing class actions if the parties’ contract is “silen[t]” on whether such a procedure is permissible.\(^\text{17}\) A month later, in *Rent-A-Center, West, Inc. v. Jackson*, the Court upheld a “delegation provision”—a clause in an employment contract giving the arbitrator, rather than courts, the exclusive right to resolve the very question of whether the arbitration clause is valid.\(^\text{18}\) And in November 2010, the Court heard oral arguments in *AT&T Mobility LLC v. Concepcion*, which presents the issue of whether the FAA prohibits lower courts from striking down class arbitration waivers under the unconscionability doctrine in certain circumstances.\(^\text{19}\)

In this Article, I argue that the Court’s interpretation of the FAA suffers from a flaw that is deeper and more fundamental than it’s fidelity to congressional intent or its fairness: It allows private parties to engage in lawmaking. Article I, section 1 of the Constitution vests all legislative power in Congress.\(^\text{20}\) The nondelegation doctrine enforces this monopoly by prohibiting Congress from transferring the right to make law to another branch of government without articulating an “intelligible principle” to limit that branch’s discretion.\(^\text{21}\) Yet different, even more forceful rules apply when the recipient of lawmaking power is a private party. Under the private nondelegation doctrine, Congress cannot let private actors make law unless they do so through a process that internalizes the wishes of affected parties or is subject to meaningful state oversight.\(^\text{22}\)

The Court’s interpretation of the FAA does not comply with this constitutional mandate. It gives companies broad discretion to create elaborate procedural codes. Spurred on by the Court’s pronouncement that the statute embodies “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or pro-

\(^{17}\) 130 S. Ct. 1758, 1776, 1775 (2010).

\(^{18}\) 130 S. Ct. 2772 (2010).


\(^{20}\) U.S. Const. art. I, § 1.

\(^{21}\) J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

\(^{22}\) See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down statute for permitting some coal producers and miners to set working conditions for all coal producers and miners in their region); Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1437–40 (2003) (arguing that cases subsequent to *Carter* continued to emphasize significance of government review with respect to private delegation).
cedural policies to the contrary,"23 businesses have developed their own private procedural regimes for consumer and employment cases. This river of privately made law is wide, covering entire industries, and deep, full of complex regulations. And unlike other private delegations, the FAA as interpreted by the Court does not just allow private parties to engage in lawmaking—it allows them to engage in law revision, abrogating Congress’s procedural rulemaking duties and eroding substantive statutory and common law rights.

Admittedly, the Court has not invoked the nondelegation doctrine for decades—inspiring the quip that it should be called the "delegation non-doctrine."24 In addition, at first glance, the nondelegation rule does not seem to apply to the FAA. First, Congress has already delegated its power to make procedural rules to the Court through the REA, and no one seriously claims that this arrangement is unconstitutional.25 Second, although the nondelegation rule bars private parties from making law through a process that excludes affected parties, arbitration supposedly arises out of a consensual, contractual relationship.26 Third, the Court has upheld delegations if Congress has reserved some modicum of state control over the private rulemaker.27 The FAA appears to meet this requirement: It requires judges to resolve disputes about both the enforceability of an arbitration clause and the ultimate arbitral award.28 Finally, the nondelegation doctrine bars private actors from making substantive law, not procedural rules. Perhaps for these reasons, no judge or scholar of whom I am aware has examined whether the FAA raises a nondelegation issue.29

27 See, e.g., Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 400-01 (1940) (upholding delegation on grounds that government was actively involved in creation of rules).
29 See Jean R. Sternlight, Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns, 72 Tul. L. REV. 1, 13 n.38 (1997) (noting possibility of nondelegation problem only in passing). The relationship between arbitration and delegation is not completely foreign terrain. Outside of the FAA context, state and federal statutes sometimes raise nondelegation issues by creating rights that can be enforced only through arbitration. See Harold H. Bruff, Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs, 67 Tex. L. Rev. 441, 444–45 (1989) (describing three broad categories of disputes in which federal agencies are authorized or
Nevertheless, I contend that the FAA as construed by the Court presents a strong case for the revival of nondelegation principles. First, Congress’s transfer of rulemaking power to the Court through the REA is subject to a range of accountability mechanisms that do not govern the private creation of procedural rules. Second, although contracting is usually rooted in mutual consent, the Court’s arbitration case law deviates from contract law in the most elemental way: It shunts consumers and employees into arbitration even when they truthfully claim that they did not agree to arbitrate. Third, although the FAA mandates judicial review of arbitration clauses, the aptly named delegation clause—as fortified by Rent-A-Center—all but eviscerates this safeguard by giving arbitrators the authority to decide whether an arbitration clause is valid.\textsuperscript{30} Finally, the policies underlying the nondelegation doctrine militate in favor of applying it to the production of procedural rules. The nondelegation doctrine serves two purposes: It bars private actors from creating legislation that furthers their own interests, and it ensures congressional transparency.\textsuperscript{31} By allowing private parties to wield Congress’s procedural rulemaking authority, the FAA creates a perverse dynamic in which Congress creates substantive rights and then permits firms to eliminate these rights through the under-the-radar mechanism of procedural reform. These are precisely the evils against which the private nondelegation rule guards.

This Article contains three parts. Part I describes the rise of arbitration hegemony. It reveals that the Court’s expansion of the FAA’s reach has given private parties broad discretion to create procedural rules. It then describes how the Court has construed the statute in a manner that deviates from black letter contract principles,

\textsuperscript{30} Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2779–81 (2010); see also infra Part II.C.3 (conceptualizing delegation clauses as freestanding miniarbitration clauses within larger arbitration clauses that can be challenged on only extraordinarily narrow grounds).

\textsuperscript{31} See infra Part II.B.1 (describing importance of “neutrality” and “transparency” values in nondelegation jurisprudence).
permits the unilateral, nonconsensual imposition of arbitration on consumers and employees, and reduces judicial oversight of arbitration clauses. Part II establishes the parameters of the private nondelegation doctrine. It explains that the Court's reading of the FAA is incompatible with this rule because it permits private parties to alter procedural and substantive rights through a process that neither internalizes the wishes of affected parties nor is subject to meaningful state review. Part III explains how the Court could assuage nondelegation concerns by reconsidering the interplay between arbitration and substantive rights, the rules governing the delegation clause, and the FAA's preemptive ambit.

I

THE RISE OF PRIVATE PROCEDURAL RULEMAKING

Congress passed the FAA in order to provide a forum for merchants to settle fact-bound breach of contract disputes. Gradually, however, the Court transformed the statute into something else: an invitation to the business community to create a parallel procedural regime for consumer and employment cases. In this Part, I describe this metamorphosis, emphasizing three themes that dovetail with my later normative claims. First, the FAA as construed by the Court gives private parties tremendous power. Because it makes arbitration clauses enforceable with few restrictions, it is, in essence, a hollow shell of a statute that companies can fill with their own customized procedural rules. Second, the Court's reading of the FAA has warped the contract law around arbitration. It requires consumers and employees to arbitrate claims even when black letter contract principles would not. Third, although the FAA originally tasked judges with policing arbitration clauses for fairness, the Court has allowed drafters to cut judges out of the loop.

A. The FAA as Enacted

Arbitration has a venerable commercial pedigree. Yet in eighteenth-century England, courts became skeptical of extrajudicial dispute resolution. They invented special rules, such as the ouster

32 See, e.g., Julius Henry Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 281 (1926) ("[The FAA] is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like.").

and revocability doctrines, to nullify contracts to arbitrate.\textsuperscript{34} These unique antiarbitration measures held sway for the next three hundred years, in both England and the United States.\textsuperscript{35}

Finally, in 1925, business groups and the American Bar Association persuaded Congress to pass the FAA to eliminate judicial hostility to arbitration.\textsuperscript{36} The FAA’s centerpiece, section 2, admonishes courts that only traditional contract principles, such as fraud, duress, and unconscionability—and not merely a generalized distrust of arbitration—can be grounds to invalidate an arbitration clause: “[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{37}

However, the FAA did not completely eliminate judges from the equation. If a dispute arises about the scope or validity of the arbitration clause, section 4 tasks courts with resolving the matter.\textsuperscript{38} That provision states that if the “making of the arbitration agreement” is “in issue,” then “the court shall proceed summarily to the trial thereof.”\textsuperscript{39} Section 4 allows a court to grant a motion to compel arbitration only if it is “satisfied that the making of the agreement for arbitration . . . is not in issue.”\textsuperscript{40}

Although Congress’s intent remains fiercely contested in the literature, there is strong evidence that Congress wished to limit the FAA in three crucial ways. First, the vast majority of scholars believe that Congress understood the statute to be a federal procedural rule
that neither applied in state court nor preempted state law.\textsuperscript{41} Indeed, the FAA does not contain an express preemption clause, and its enforcement provisions (such as section 4) govern federal courts exclusively.\textsuperscript{42} Likewise, the statute’s legislative history indicates that it “relate[s] solely to procedure of the [f]ederal courts” and “is no infringement upon the right of each [s]tate.”\textsuperscript{43} In addition, as Ian Macneil has argued, the fact that the FAA passed unanimously belies the notion that Congress perceived it to be a substantive rule that deprived states of the right to regulate arbitration. Such a dramatic expansion of federal power would have provoked at least some congressional opposition.\textsuperscript{44}

Second, Congress likely did not intend the FAA to cover employment agreements. Section 1 excludes “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”\textsuperscript{45} The FAA did not contain this limi-


\textsuperscript{42} See 9 U.S.C. § 4 (describing mechanics of petitioning to compel arbitration in “any United States district court”); see also id. § 3 (allowing “any of the courts of the United States” to stay cases pending outcome of arbitration); id. § 7 (allowing parties to file petition in a “United States district court” to compel attendance at arbitration); id. §§ 9–11 (authorizing parties to enforce or challenge arbitral awards in “United States court”).

\textsuperscript{43} Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 37 (1924) [hereinafter Joint Hearings] (brief of Julius Henry Cohen, Member, American Bar Association); see also id. at 40 (“There is no disposition ... by means of the [f]ederal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.”); H.R. REP. No. 68-96, at 1 (1924) (“The bill declares that [arbitration] agreements shall be recognized and enforced by the courts of the United States.”).

\textsuperscript{44} MACNEIL, supra note 36, at 115–16. In a thoughtful critique, Christopher Drahozal argues that because Congress lacked power to regulate wholly intrastate transactions under the Commerce Clause in 1925, the FAA could not have applied to the states at the time of passage—which might explain the lack of opposition even if Congress understood the statute as applying in state court. See Christopher R. Drahozal, In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act, 78 NOTRE DAME L. REV. 101, 127–30 (2002). Even under this view, however, it is apparent that Congress assumed that the FAA would not apply broadly and thus set out to give arbitration only a modest foothold in a narrow band of transactions.

ARBITRATION AS DELEGATION

May 2011

When it was first introduced into Congress in 1923, but union representatives complained that the statute, as it then stood, would compel enforcement of arbitration clauses in employment cases. In a Senate Judiciary Subcommittee hearing, W.H.H. Piatt, a committed pro-arbitration reformer, responded to this concern by declaring that "[i]t is not intended that this shall be an act referring to labor disputes, at all." Then-Secretary of Commerce Herbert Hoover proposed an amendment to ameliorate what he characterized as an "objection . . . to the inclusion of workers' contracts in the law's scheme." Congress adopted the language of Hoover's suggestion almost verbatim in section 1.

Third, and more generally, even a cursory review of the FAA's legislative history reveals that Congress did not want the statute to apply to contracts between parties with unequal bargaining power. Julius Henry Cohen, the lobbyist who drafted the statute, testified that the ouster and revocability doctrines were justified to the extent they prevented exploitation:

[At the time [antiarbitration rules were] made people were not able to take care of themselves in making contracts, and the stronger men would take advantage of the weaker, and the courts had to come in and protect them. And the courts said, "If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones." And that still is true to a certain extent.]

Cohen's acknowledgement that the rules he wanted to abolish helped to deter overreaching implies that he did not see the statute as presenting any such risks. Likewise, Senator Walsh of Montana asked whether the statute would apply to contracts that are not in fact voluntary because they are offered on a "take it or leave it" basis.

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47 Id.

48 Id.

49 Id. at 14.

50 Compare id. (reporting Hoover's proposal that Congress add words "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce"), with 9 U.S.C. § 1 ("[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

51 Joint Hearings, supra note 43, at 15.

52 Sales and Contracts, supra note 46, at 9.
replied that he "would not favor any kind of legislation that would permit . . . forcing a man to sign that kind of [sic] a contract."53 Piatt then reiterated that an arbitration agreement is merely "a contract between merchants one with another, buying and selling goods."54

Admittedly, the FAA does not expressly limit its scope to bargained-for deals between relative equals. Then again, any such restriction would have been superfluous. When it was enacted, the FAA governed in two situations. First, because the statute was an exercise of Congress's Article III power to create rules for federal courts, it controlled in diversity cases—disputes between citizens of different states that satisfied the minimum amount-in-controversy requirement (then $3000).55 At a time when a new car cost $290,56 most consumer contracts would not have fallen within the statute. Second, because section 2 applies to "contract[s] . . . involving commerce," Congress arguably also drew upon its Commerce Clause authority.57 During this period, however, Congress could not regulate wholly intrastate conduct.58 As a result, regardless of whether the FAA emanated from Congress's Article III or Commerce Clause powers, it would have applied only to parties sophisticated enough to broker deals across state lines.

And indeed, the FAA lurked in relative obscurity for decades despite the centuries of common law it abrogated. Even after the Court expanded Congress's Commerce Clause power59 following the New Deal, it refused to expand the scope of the FAA accordingly.60 As late as 1962, judges declined to enforce arbitration clauses for the

53 Id. at 10 (correction in original); see also 65 CONG. REC. 1931 (1924) (statement of Rep. George S. Graham) (describing bill as applying only to "an agreement to arbitrate, when voluntarily placed in the document by the parties to it").
54 Sales and Contracts, supra note 46, at 10.
55 See MacNeil, supra note 36, at 105.
57 9 U.S.C. § 2 (2006). Compare Drahozal, supra note 44, at 163–64 (arguing that Congress enacted FAA under both its Article III and Commerce Clause powers), with Moses, supra note 41, at 120–21 (arguing that Congress acted primarily under its Article III authority and that references to Commerce Clause were merely "fall-back" justification).
58 See Hammer v. Dagenhart, 247 U.S. 251, 272–73 (1918) (invalidating statute that prohibited child labor on ground that "labor" was not "commerce").
59 See Wickard v. Filburn, 317 U.S. 111, 127–29 (1942) (finding that cumulative effect of purely intrastate activity can affect interstate commerce and trigger Congress's Commerce Clause power).
60 See Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 200–02 (1956) (finding that employment contract between Vermont citizen and New York corporation did not "involv[e] commerce" and thus did not fall under FAA).
sole reason that both contracting parties were citizens of the same state.61

B. The Separability Doctrine

The first glimmer that arbitration would become the juggernaut it is today came in 1967, when the Court decided Prima Paint Corp. v. Flood & Conklin Manufacturing Co.62 In that case, Prima Paint executed a consulting agreement with Flood & Conklin that contained an arbitration clause. Later, Prima Paint sued, alleging that Flood & Conklin had procured the consulting agreement by fraud.63 The issue before the Court was not the merits of Prima Paint’s fraud claim, but the antecedent question of who—a judge or an arbitrator—should decide the merits of that claim. This created a mind-bending dilemma. As noted, section 4 of the FAA requires judges to hear challenges to the validity of an arbitration clause.64 On its face, Prima Paint’s fraud claim was such a challenge since it sought to invalidate the consulting agreement that included the arbitration clause. Then again, the arbitration clause in the agreement also required the arbitrator to resolve all disputes between the parties—and, of course, Prima Paint’s fraud claim was such a dispute.

The Court resolved this tension by creating the “separability” doctrine: the fiction that arbitration clauses are their own, stand-alone minicontracts within larger “container” contracts. According to the Court, any contract that contains an arbitration clause is, in fact, two contracts: (1) a contract to arbitrate disputes and (2) the overarching container contract.65 Thus, the Court held that although section 4 of the FAA requires judges to hear claims that specifically target the enforceability of the arbitration clause, it does not apply to claims that are merely directed at the container contract:

[A]rbitration clauses as a matter of federal law are “separable” from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself,

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61 See, e.g., John W. Johnson, Inc. v. 2500 Wis. Ave., Inc., 231 F.2d 761, 764 (D.C. Cir. 1956) (holding that FAA was not applicable to contract to paint building); Livingston v. Shreveport–Tex. League Baseball Corp., 128 F. Supp. 191, 202 (W.D. La. 1955) (holding that FAA did not apply to minor league baseball manager’s contract even though it was clear that he would travel from state to state); Coles v. Redskins Realty Co., 184 A.2d 923, 927 (D.C. 1962) (ruling that FAA did not apply to settlement agreement stemming from sophisticated real estate deal).


63 Id. at 398.


65 Prima Paint, 388 U.S. at 395.
a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.\textsuperscript{66} Because Prima Paint argued that fraud tainted the overall consulting agreement—and not the arbitration clause within it—the Court sent the claim to arbitration.\textsuperscript{67}

The separability doctrine made it far more likely that disputes would end up in arbitration. If a party asserted that she was defrauded, mistaken, or coerced when she signed a contract that included an arbitration clause, the arbitrator would hear that claim.\textsuperscript{68} Even if she alleged that the contract that included an arbitration clause was illegal, the arbitrator would hear the claim.\textsuperscript{69} Only if she alleged that the arbitration clause itself was somehow defective would a judge decide the issue. It is difficult to imagine a set of facts that would give rise to a fraud or duress claim that centered specifically on the arbitration clause, rather than the container contract. After all, if a drafter had the desire and opportunity to exploit the other party, she would likely manipulate major terms such as price and quantity, rather than those that govern dispute resolution.\textsuperscript{70} Thus, by insulating the arbitration clause within the container contract, the separability doctrine shields the clause from several major contract defenses.

At the time the Court decided \textit{Prima Paint}, arbitration was still a sleepy legal backwater,\textsuperscript{71} and this major departure from traditional

\textsuperscript{66} Id. at 402 (describing and ultimately affirming Second Circuit's approach).

\textsuperscript{67} Id. at 406-07.

\textsuperscript{68} See, e.g., Masco Corp. v. Zurich Am. Ins. Co., 382 F.3d 624, 629 (6th Cir. 2004) ("[M]utual mistake ... amounts to an attack on the underlying liability, and only derivatively on the obligation to arbitrate."). Although the separability doctrine requires parties to arbitrate the issue of whether a traditional contract defense like fraud nullifies the container contract, it does not require parties to arbitrate the claim that the arbitration clause does not apply to them. See, e.g., First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945-47 (1995) (explaining that court, not arbitrator, must decide whether arbitration clause applied to stock trader in his personal capacity after it had been executed by company he owned); Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992) ("The calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration."). For excellent discussions of the difficulties inherent in precisely defining the scope of the separability doctrine, see Richard C. Reuben, First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions, 56 SMU L. REV. 819, 861-71 (2003), and Stephen J. Ware, Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna, 8 Nev. L.J. 107, 114-17 (2007).

\textsuperscript{69} See, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448-49 (2006) (holding that allegation that loan contract was usurious and thus illegal was for arbitrator to decide).

\textsuperscript{70} See Sternlight, supra note 29, at 24 n.87 ("If a party wants to defraud or use duress on its opponent, why not go after something big like the price or quality of the goods or services at issue?").

\textsuperscript{71} See supra text accompanying notes 59-61 (describing Court's disinterest in expanding reach of FAA or in enforcing arbitration clauses for decades after New Deal).
contract principles made little difference. But it proved far more important in subsequent decades, as the Court transformed arbitration into a hallmark of the civil justice system.

C. The Expansion of the FAA

Between 1960 and 1980, the number of cases filed in federal court more than doubled.72 Newspapers and magazines ran stories declaring that lawsuits were this country’s “secular religion”73 and that citizens “in all walks of life [were] being buried under an avalanche of lawsuits.”74 Even judges and law professors described the United States as “the most litigious nation in human history”75 with a population that cannot tolerate “more than five minutes of frustration without submitting to the temptation to sue.”76 Seeking a release valve for this pressure, the Court began to read the FAA broadly. As I explain next, the Court soon held that the FAA required parties to arbitrate statutory claims and preempted state law.

1. Statutory Rights

During the first sixty years of the FAA’s existence, courts uniformly held that a plaintiff could not be compelled to arbitrate statutory causes of action.77 They mandated a judicial forum for claimed violations of the federal securities,78 labor,79 antitrust,80 patent,81 pen-
The reason was simple: Arbitration was "comparatively inferior to judicial processes in the protection of [statutory] rights." Indeed, as the Court flatly declared, "[t]he change from a court of law to an arbitration panel may make a radical difference in ultimate result." Nevertheless, with its 1985 decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., the Court reversed course and held that antitrust claims could be arbitrated. The Court placed the onus on Congress to be clear when it wanted to exclude statutory rights from arbitration. Moreover, in stark contrast to its previous jurisprudence, the Court breezily declared that there was nothing harmful about arbitrating statutory claims because the choice between a judicial and an arbitral forum was outcome neutral:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.

At the same time, the Court added an important caveat: A plaintiff need not arbitrate a statutory claim if she can prove that arbitration prevents her from fully vindicating her rights.

Soon, however, the Court made clear that to invoke this vindication-of-rights exception, a plaintiff had to offer forceful, concrete proof. In Gilmer v. Interstate/Johnson Lane Corp., the Court compelled the plaintiff to arbitrate his claim under the Age Discrimination in Employment Act (ADEA). The plaintiff contended that he could not effectively pursue his ADEA cause of action in arbitration, citing its potentially biased decision makers, limited dis-

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81 See, e.g., Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (reasoning that patent issues "may be unfamiliar to arbitrators").


84 Alexander, 415 U.S. at 57; see also Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222-23 (1985) ("[A]rbitration cannot provide an adequate substitute for a judicial proceeding in protecting . . . federal statutory and constitutional rights . . . ").


87 See id. at 627 (stating that courts will depend on Congress's expressed intent when deciding whether statutory claims are arbitrable).

88 Id. at 628.

89 See id. at 637 (recognizing remedial function of statute through its ability to vindicate claimant's rights).

covery, lack of written opinions, and unavailability of equitable relief.\textsuperscript{91} The Court brushed aside these arguments as "generalized attacks on arbitration" that were based on mere suspicion and were "far out of step with [the Court's] strong endorsement of the federal statutes favoring this method of resolving disputes."\textsuperscript{92}

Later, in \textit{Green Tree Financial Corp. v. Randolph}, the Court rejected a potentially more compelling variation of the vindication-of-rights doctrine.\textsuperscript{93} The plaintiff claimed that she could not pursue her Truth in Lending Act claims because the arbitration clause in her standard form loan contract was silent about who would pay for arbitration.\textsuperscript{94} The Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as [the plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum."\textsuperscript{95} Yet even though the plaintiff had offered evidence that she lacked the resources to pay arbitral filing fees and costs, the Court held that her submission was insufficient and ordered her to arbitrate.\textsuperscript{96}

Thus, the Court moved from forbidding the arbitration of statutory claims to saddling plaintiffs with the burden of proving that they could not vindicate their rights in the extrajudicial forum. Moreover, by predicing this vindication-of-rights defense on a strong showing, the Court announced that it would tolerate a great deal of private procedural rulemaking—even if it likely altered litigants' rights.

\section{Preemption and Unconscionability}

At the same time that the Court opened the door for the arbitration of statutory claims, it also abruptly announced that the FAA preempts state law. Recall that section 2 makes arbitration clauses "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{97} In \textit{Southland Corp. v. Keating}, the Court held that this language set forth the exclusive grounds for refusing to enforce agreements to arbitrate.\textsuperscript{98} The

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\textsuperscript{91} Id. at 30–32.
\textsuperscript{92} Id. at 30 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).
\textsuperscript{93} 531 U.S. 79, 92 (2000) (finding that plaintiff failed to prove that arbitration would be prohibitively expensive).
\textsuperscript{94} See id. at 90 (noting plaintiff's claim that loan agreement's silence about costs and fees made arbitration potentially prohibitively expensive).
\textsuperscript{95} Id.
\textsuperscript{96} See id. at 91 & n.6 (finding that plaintiff failed sufficiently to support her claim).
\textsuperscript{98} 465 U.S. 1, 10–11 (1984). The Court had sown the seeds of \textit{Southland} a year earlier by opining that the FAA expresses "a liberal federal policy favoring arbitration agree-
Court explained that although state courts remained free to invalidate arbitration clauses under principles that apply to "any contract"—such as fraud, duress, and unconscionability—state legislatures could not enact specific anti-arbitration rules.\textsuperscript{99} Applying this logic, the Court held that the FAA preempted a California statute that prohibited arbitration clauses in franchise contracts.\textsuperscript{100}

Three years later, in \textit{Perry v. Thomas}, the Court further enlarged the FAA's preemptive sweep.\textsuperscript{101} The plaintiff argued that an arbitration clause in his employment agreement was invalid under both a California statute that exempted wage disputes from arbitration and the unconscionability doctrine.\textsuperscript{102} Under \textit{Southland}, the Court quickly concluded that the FAA eclipsed the arbitration-specific labor statute.\textsuperscript{103} In addition, the Court found that the plaintiff had waived his unconscionability argument by asserting it for the first time on appeal.\textsuperscript{104} In a lengthy footnote, however, the Court provided guidance for future judges considering unconscionability challenges. It described the FAA as a kind of equal protection clause that barred state courts from applying contract principles in a manner that discriminated against arbitration:

\begin{quote}
[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally... A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.\textsuperscript{105}
\end{quote}

Like the separability doctrine, FAA preemption under \textit{Perry} drove a wedge between arbitration and contract law. Under black letter unconscionability doctrine, the obscure, legalistic nature of an arbitration clause—the fact that it speaks to an issue beyond the ken of most consumers and employees—should tip the scales toward\textsuperscript{105}
unenforceability. Yet now lower courts could not factor “the uniqueness of an agreement to arbitrate” into the unconscionability calculus.

In fact, although the Court soon applied the FAA to claims brought by consumers—neglecting the colorable argument that Congress never intended the FAA to apply to adhesion contracts—it seemed queasy about the notion that arbitration clauses could ever be unconscionable. For instance, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, first-time investors argued that the arbitration clause in their preprinted broker contracts had been presented to them “face down” and thus were “adhesive, . . . substantively unconscionable and beyond the[ir] reasonable expectations.” The Court rejected the argument in one sentence, opining that the record contained insufficient evidence.

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106 For example, in the watershed case of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965), the D.C. Circuit acknowledged that a cross-collateralization clause that permitted a company to repossess all of the furniture it had sold over the years to a customer if she missed one installment payment could be unconscionable. The fact that few consumers could understand the practical effect of this “rather obscure” provision was key to the court’s analysis. *Id.* at 447.

107 Perry, 482 U.S. at 493 n.9. For example, in *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002), the Fourth Circuit summarily belittled the relevance of the plaintiffs’ evidence that they “did not complete high school . . . and did not know what arbitration was when they signed the employment application.”

In addition, the Supreme Court held that the FAA preempts state laws that seek to ensure that agreements to arbitrate are consensual. *See* Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 684, 687 (1996) (invalidating Montana statute that required “[n]otice that [the] contract is subject to arbitration . . . in underlined capital letters on the first page of the contract”) because it “conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally” (quoting *Mont. Code Ann.* § 27-5-114(4) (1995) (amended 2009)).


109 *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (finding that only transportation workers are exempt from FAA and upholding arbitration clause in application for employment at electronics retail store).

110 *See supra* notes 51–61 and accompanying text (arguing that Congress did not intend FAA to apply to adhesion contracts). The term “adhesion contract” refers to preprinted form agreements that are drafted by economically powerful parties and offered on a take-it-or-leave-it basis. *See*, e.g., *Izzy v. Mesquite Country Club*, 231 Cal. Rptr. 315, 318 (Ct. App. 1986) (“A contract of adhesion has been defined as a ‘standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’” (quoting *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Ct. App. 1961)).


112 *Rodriguez de Quijas*, 490 U.S. at 484. Investors in a similar case had argued that their broker contract was “a contract of adhesion” and thus its “purported arbitration clause should not be enforced routinely without close scrutiny by the courts.” Brief for Respondents at 14 n.8, *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987) (No.
Thus, as with the vindication-of-rights doctrine, the Court has calibrated the unconscionability doctrine in a manner that is quite deferential to arbitration. As I discuss next, by doing so, the Court has done more than widen the dominion of federal arbitration law. It has also aggrandized private parties.

D. Private Procedural Rulemaking

As the Court ratcheted up the presumption that arbitration clauses are valid, companies saw an opportunity. The FAA would drape these lenient doctrines and other vigorous pro-arbitration policies over whatever contract terms drafters embedded in an arbitration clause. The statute thus gave firms broad discretion not only to mandate arbitration but also to shape the path of proceedings and dictate the rules under which they must be conducted.

1. The Unilateral Amendment

The Court's transformation of the FAA left banks, retailers, hospitals, franchisors, restaurant chains, software licensors, computer manufacturers, technology startups, credit card issuers, and telecommunications firms scrambling to add compulsory arbitration clauses to their contracts. Yet some of them faced an initial hurdle: They were already locked into agreements for set periods of time with their consumers, franchisees, and employees. And most of these contracts said nothing about extrajudicial dispute resolution.

Undaunted, Bank of America and Wells Fargo placed a notice in the monthly statements of a combined 25.5 million checking and credit card customers informing them that "any controversy with us will be decided . . . by arbitration." Shortly thereafter, American Express, MBNA Corp., Fleet Bank, First USA, Chase, Discover Bank, Citibank, Sears, Shell, Comcast, and a wide range of corporations in

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86-44), 1987 WL 880930. The Court acknowledged that “broker overreaching” could be “grounds for revoking the contract under ordinary principles of contract law” but did not discuss the issue further. Shearson/Am. Express Inc., 482 U.S. at 230–31.

113 See, e.g., Mark Curriden, A Weapon Against Liability: Fine Print Often Removes Jury Resolution as Option for Complaints, DALL. MORNING NEWS, May 7, 2000, at 25A (noting American Bar Association estimate that more than one thousand companies employ arbitration clauses); Tom Lowry, Bill Would Ban Mandatory Wall Street Arbitration, USA TODAY, Mar. 7, 1997, at 2B (noting spread of arbitration clauses in employment agreements); Michelle Quinn, Firms Try Pre-hiring, Pre-firing Accord, PHILA. INQUIRER, June 25, 1996, at F2 ("In an informal survey of a dozen Silicon Valley companies, most said they had recently enacted a mandatory arbitration policy.").

114 Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 277 (Ct. App. 1998); see also Bank of America Is Sued over Arbitration Policy, WALL ST. J., Aug. 5, 1992, at A1 (describing claims by consumer and public interest groups that Bank of America's unilaterally added arbitration clause was illegal).
other industries also slipped arbitration clauses into hundreds of millions of contracts—in all likelihood, billions of contracts—through nondescript bill stuffers.115

As I have discussed in a previous article, the power that drafters drew upon to make these unilateral modifications was not contract law.116 Because firms conferred no benefit on adherents and subjected themselves to no detriment other than agreeing to continue the contractual relationship, the unilateral revisions lacked consideration under the preexisting duty rule.117 Similarly, although many companies gave adherents a minimal opportunity to reject the changes—for example, thirty days to close their accounts—the fact that adherents never affirmatively agreed to the new terms is hard to square with the strong presumption against inferring acceptance by silence.118

Many financial services companies argued that they were merely exercising a boilerplate term in their customer agreements that permitted them to change terms at any time.119 However, the purpose of these change-of-terms clauses was to allow lenders to modify existing terms—such as adjusting interest rates in light of shifts in the financial

115 See, e.g., Joan Lowy, Consumers Losing Right To Sue Without Knowing It, CLEVELAND PLAIN DEALER, May 14, 2000, at 5L (“In January, MBNA Corp. sent a dense notice in small type to its 40 million credit card customers informing them that they were giving up their right to go to court in favor of arbitration unless customers responded in writing within the next three weeks.”); Caroline E. Mayer, Customers Often Are Losing Rights To Sue in the Fine Print, HOUS. CHRON., May 30, 1999, at 7 (“Last month’s notice from American Express seemed routine, even innocuous . . . . But card holders who read the ‘F.Y.I.’ update closely would have discovered that simply by using their card after June 1, they will give up their right to sue the company.”).
118 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (“Acceptance by silence is exceptional.”). For a vivid illustration of why unilateral amendments should be invalid under traditional contract principles, see Thompson v. Chase Bank USA, No. H-07-1642, 2009 WL 290186, at *2 (S.D. Tex. Feb. 5, 2009), which held that a consumer could not unilaterally modify terms of his credit card agreement by writing a letter to the bank because “modifications to an agreement can occur only with the consent of both parties and consideration.”
119 See, e.g., Badie, 79 Cal. Rptr. 2d at 280 (discussing Bank of America’s argument that its unilaterally added arbitration clause “is not really a modification at all because, by entering the original account agreements, the customers agreed ahead of time to be bound by any term the Bank might choose to impose in the future”).
climate—not to authorize them to inject wholly new provisions. As a result, the implied covenant of good faith and fair dealing should have barred the unilateral introduction of a compulsory arbitration clause into these contracts.

For example, in Badie v. Bank of America, a California appellate court refused to enforce a unilaterally added arbitration clause. The bank sought to justify the revision by citing a provision in its customer agreement that allowed it to "change or terminate any terms, conditions, services, or features." The court held that this provision did not allow the bank to add "an entirely new term" that went beyond "any subject, issue, right, or obligation addressed in the original contract." The court reasoned that the contrary conclusion—reading the change-of-terms clause broadly—would render the change-of-terms clause illusory by giving the bank boundless discretion.

Yet the fact that these new "contract" terms were not rooted in contract law did not stop them from spreading widely. At first, a few courts followed Badie and invalidated unilaterally added arbitration clauses as improper modifications. But other judges overlooked the limits of a drafter's ability to change terms on its own. And eventu-

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120 See id. at 281 (interpreting modification clause to authorize only changes, subject matter of which was anticipated by parties at formation).
121 Although the meaning of "bad faith" can fluctuate with the context, most commentators agree that it centers on action that one party takes to gain from the other party what the parties "should have understood to be precluded by the contract at issue." CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 449–50 (6th ed. 2007). In addition, if the implied covenant of good faith did not restrict a drafter's exercise of a change-of-terms clause, then the clause would be an invalid illusory promise. See RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981) ("A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances.").
122 Id. at 284.
123 Id.
124 Id. at 278 (capitalization altered).
125 Id. at 281.
127 For instance, in Herrington v. Union Planters Bank, North America, the Southern District of Mississippi allowed a bank to graft an arbitration clause onto an existing contract. 113 F. Supp. 2d 1026, 1029–31 (S.D. Miss. 2000). The court relied entirely on the fact that the change-of-terms clause permitted the bank to "amend" the contract. Id. at 1031. It did not discuss the possibility that the consideration doctrine or the implied covenant of good faith might limit the bank's discretion to invoke the change-of-terms clause to graft an arbitration clause onto a contract that said nothing about alternative dispute resolution. Likewise, in Beneficial National Bank, U.S.A. v. Payton, another judge in the Southern
ally, banks and credit card issuers realized that they did not need contract law to add or amend dispute resolution terms unilaterally. The Uniform Consumer Credit Code authorizes lenders to “change the terms” of their revolving credit accounts after giving debtors written notice, and several states have adopted its terms by statute.\textsuperscript{128} Despite the fact that these statutes were intended to govern conspicuous clauses such as fees and interest rates,\textsuperscript{129} they contained no textual limitation on the type of provisions to which they applied. Thus, in case after case, banks and credit card issuers claimed that these laws gave them free reign over the terms of their contracts.\textsuperscript{130} These arguments were so successful that even when the drafter was not a commercial lender—and thus did not fall within a change-of-terms statute—courts stopped inquiring whether the drafter had the right to insert or change terms unilaterally.\textsuperscript{131}

\textsuperscript{128} UNIF. CONSUMER CREDIT CODE § 3.205 (1974) (allowing creditors to “change the terms of an open-end credit account” but requiring creditors to give notice before revising finance charges and interest rates). A number of states have adopted this provision. See ALA. CODE § 5-20-5 (LexisNexis 1996); FLA. STAT. ANN. § 658.995(4) (West 2004); GA. CODE ANN. § 7-5-4(c) (2004); IOWA CODE ANN. § 537.3205(1) (West 1997); KAN. STAT. ANN. § 16a-3-204(2) (2007); ME. REV. STAT. ANN. tit. 9-A, § 3-204(2) (2009); NEV. REV. STAT. § 97A.140(4) (2009); N.D. CENT. CODE § 51-14-02 (2007); OHIO REV. CODE ANN. § 1109.20 (West 2010); S.D. CODIFIED LAWS § 54-11-10 (Supp. 2010); TENN. CODE ANN. § 45-2-1907(a) (2007).

\textsuperscript{129} Section 3.205 of the Uniform Consumer Credit Code was drafted long before the rise of arbitration hegemony and explicitly references “finance charge” and “additional charges,” which suggests that its drafters did not imagine that companies would invoke it to add or amend private dispute resolution provisions. UNIF. CONSUMER CREDIT CODE § 3.205 (1974). However, Delaware, Rhode Island, Virginia, and Utah expressly permit lenders to include or change provisions relating to arbitration or other forms of alternative dispute resolution. DEL. CODE ANN. tit. 5, § 952(a) (2001); R.I. GEN. LAWS § 6-26.1-11(a) (Supp. 2009); UTAH CODE ANN. § 70C-4-102(2)(b) (LexisNexis 2009); VA. CODE ANN. § 6.2-433 (2010).


\textsuperscript{131} See, e.g., Kristian v. Comcast Corp., 446 F.3d 25, 30 (1st Cir. 2006) (compelling arbitration despite fact that “[w]hen Plaintiffs first subscribed for cable services, none of their service agreements contained an arbitration provision”); In re Universal Serv. Fund Tel. Billing Practices Litig., 300 F. Supp. 2d 1107, 1122–26, 1136 (D. Kan. 2003) (rejecting claim that arbitration clauses unilaterally added by AT&T and Sprint were unconscionable and not addressing threshold issue of whether either company enjoyed power to add clauses unilaterally in first place).
2. **Procedural Rulemaking in Arbitration**

Companies quickly realized that their ability to shunt claims out of the court system also gave them license to create an alternative procedural universe in arbitration. They laced their arbitration clauses with terms that shortened statutes of limitations, drastically restricted discovery, required confidentiality, specified distant fora, nominated biased arbitrators, made the proceedings prohibitively expensive, and waived plaintiffs' right to recover attorney's fees and other substantive remedies. To be sure, many courts found the most blatantly one-sided among these terms to be unconscionable. But perhaps out of respect for the buffer zone that the Court had created around arbitration clauses, other judges upheld even seemingly unfair terms.

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132 See, e.g., Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894-95 (9th Cir. 2002) (involving arbitration agreement that "imposes a strict one year statute of limitations"); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997) (similar).

133 See, e.g., Estate of Ruszala v. Brookdale Living Cmty., Inc., 1 A.3d 806, 821 (N.J. Super. Ct. App. Div. 2010) (noting that discovery limitations in nursing home contract were "clearly intended to thwart plaintiffs' ability to prosecute a case").

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

135 See, e.g., Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1285 (9th Cir. 2006) (en banc) (involving arbitration clause that required arbitration to be conducted in Boston, "a location considerably more advantageous to [the drafter]").

136 See, e.g., Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) ("[T]he mechanism for selecting a panel of three arbitrators . . . [was] crafted to ensure a biased decisionmaker.").

137 See, e.g., McNulty v. H&R Block, Inc., 843 A.2d 1267, 1274 (Pa. Super. Ct. 2004) ("[T]his arbitration clause requires a consumer to pay $50.00 in the hopes of receiving, at most[,] $37.00.").

138 See, e.g., Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 785 (9th Cir. 2002) ("[T]he arbitration agreement 'compels arbitration of the claims employees are most likely to bring against Countrywide . . . [but] exempts from arbitration the claims Countrywide is most likely to bring against its employees.'” (alterations in original) (quoting Mercuro v. Superior Court, 116 Cal. Rptr. 2d 671, 677 (Ct. App. 2002))).


140 See, e.g., Hooters, 173 F.3d at 938 (nullifying arbitration clause that contained private procedural rules that were "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding"); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 150 (Ct. App. 1997) (striking down arbitration clause that deprived employer of "no common law or statutory remedies," but "severely curtailed employees' remedies").

141 See, e.g., Carter v. Countrywide Credit Indus., 362 F.3d 294, 298-99 (5th Cir. 2004) (upholding potentially onerous discovery and forum selection provisions); Adkins v. Labor
For companies, however, the most advantageous aspect of their control over arbitral procedures was the chance to prohibit class action lawsuits.\(^\text{142}\) Corporate lawyers had long complained about class actions being a form of legalized "blackmail."\(^\text{143}\) In the 1990s, most courts held that the FAA did not allow arbitrators to aggregate claims.\(^\text{144}\) Thus, even without an express class action waiver, an arbitration clause was a "powerful deterrent to class action[s]."\(^\text{145}\)

Yet firms were pressed to take further action after the Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*.\(^\text{146}\) The issue in *Bazzle* was whether an arbitration clause that did not mention class actions allowed an arbitrator to aggregate claims.\(^\text{147}\) A plurality of the Court held that the arbitration clause was ambiguous and thus an issue of contract interpretation for the arbitrator to resolve.\(^\text{148}\) By implicitly sanctioning the idea that arbitrators could conduct class actions in some instances, the plurality suggested that the FAA does not preclude class-wide relief.\(^\text{149}\) As a result, firms realized that arbitration clauses alone would not foreclose class actions. Instead, they needed arbitration clauses that expressly forbade class actions.


\(^{143}\) Panel To Consider Changing Rules on Class Action Suits, Bos. GLOBE, Oct. 12, 1996, at A12. Some judges echoed these views. See, e.g., *In re Rhone-Poulenc Rorer*, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) ("Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973))).


\(^{146}\) 539 U.S. 444 (2003).

\(^{147}\) Id. at 447.

\(^{148}\) Id. at 451–53 (plurality opinion).

\(^{149}\) See also id. at 454–55 (Stevens, J., concurring in judgment) (arguing that FAA contained nothing to override state court's allowance of class arbitration).
Thus, in another wave of unilateral revisions, firms added such terms to their existing contracts.\(1^{50}\)

Needless to say, the plaintiffs' bar did not take this lying down. In a range of cases, attorneys in putative class actions argued that class arbitration waivers are unconscionable. At first, most courts rejected this theory, holding that the contractual relinquishment of the right to bring a class action did not impact substantive rights and thus was not unfair.\(1^{51}\) In 2005, however, the California Supreme Court reached a different conclusion in *Discover Bank v. Superior Court*.\(1^{52}\) The court explained that because class arbitration waivers eliminate any incentive for plaintiffs to prosecute low-value claims, they greatly reduce a defendant's aggregate liability.\(1^{53}\) Accordingly, the court held that class arbitration waivers improperly limit a defendant's exposure to damages when they appear in consumer contracts and are applied to allegations that a defendant cheated many customers out of small amounts of money:

Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because '\([a]\) company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit,' 'the class action is often the only effective way to halt and redress such exploitation.'\(1^{54}\)

Soon other state supreme courts and federal courts of appeals went even further, voiding class arbitration waivers when the cost of litigating dwarfed any individual plaintiff's potential recovery.\(1^{55}\) For


\(1^{51}\) See *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting argument that agreement was unenforceable because of lack of class relief); *Randolph v. Green Tree Fin. Corporation–Alabama*, 244 F.3d 814, 818–19 (11th Cir. 2001) (enforcing arbitration agreement so long as statute's substantive goals could be vindicated through arbitration); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000) (enforcing arbitration agreement and characterizing class action relief as procedural right); *Arnold v. Goldstar Fin. Sys., Inc.*, No. 01 C 7694, 2002 WL 1941546, at *9 (N.D. Ill. Aug. 22, 2002) ("As a general matter, the right to bring a class action in federal court is a procedural right . . . ."); *Sagal v. First USA Bank*, 69 F. Supp. 2d 627, 631 (D. Del. 1999) (holding that availability of other enforcement mechanisms can obviate right to proceed by class action).

\(1^{52}\) 113 P.3d 1100 (Cal. 2005).

\(1^{53}\) *Id.* at 1107–08.

\(1^{54}\) *Id.* at 1108–09 (alteration in original) (quoting *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 38 (Cal. 2000)).

\(1^{55}\) See *Homa v. Am. Express Co.*, 558 F.3d 225, 231 & n.2, 233 (3d Cir. 2009) (holding class arbitration waiver invalid when "the claims at issue are of such a low value as effectively to preclude relief if decided individually"); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d
instance, the New Jersey Supreme Court decided two cases on the same day: one enforcing a class arbitration waiver where each plaintiff sought over $100,000 in damages, and one voiding a waiver where each plaintiff could not win more than $600.

Companies were not satisfied. Even for low-value claims, damages increase exponentially when multiplied by thousands or millions of class members. Determined to eliminate the class action completely, companies turned to the most formidable weapon in their arsenal: their total dominion over contract terms. If judges were chafing at the fact that class arbitration waivers deterred plaintiffs from asserting low-value claims, then drafters would remedy this flaw themselves. In a seemingly counterintuitive gambit, companies began to create elaborate incentives for plaintiffs to sue them individually. With another salvo of “bill stuffers,” they dressed their class arbitration waivers in sheep’s clothing. Much like a legislature subsidizes the prosecution of antitrust or civil rights claims by providing for treble damages or awards of attorney’s fees, businesses sweetened the pot for plaintiffs who arbitrated small-value grievances against them on an individual basis. For example, the Verizon Wireless customer agreement once required consumers to pay Verizon’s fees and costs if they recovered less than seventy-five percent of what Verizon offered to settle the claim. But as courts began to void class arbitration waivers on unconscionability grounds, Verizon changed its terms, promising to pay consumers’ attorney’s fees and a $5000 bonus if consumers agree to arbitrate on an individual basis and ultimately recover

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1213, 1218–19 (9th Cir. 2008) (holding class action waiver substantively unconscionable and thus unenforceable); Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007) (similar); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 274–75 (Ill. 2006) (holding class action waiver unenforceable after concluding that litigation costs were too high); Scott v. Cingular Wireless, 161 P.3d 1000, 1007–08 (Wash. 2007) (en banc) (holding class action waiver unenforceable because it “effectively prevents one party . . . from pursing valid claims”).

156 See Delta Funding Corp. v. Harris, 912 A.2d 104, 115 (N.J. 2006) (“Harris’s claim is not the type of low-value suit that would not be litigated absent the availability of a class proceeding. Harris has adequate incentive to bring her claim as an individual action.”).

157 See Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 99, 100–01 (N.J. 2006) (“[Because plaintiff’s] individual consumer-fraud case involves a small amount of damages, . . . a class-action waiver can act effectively as an exculpatory clause.”).

more than Verizon's last written settlement offer.\(^{159}\) By doing so, Verizon gives itself ammunition to argue in court that because its contract actually *encourages* individual plaintiffs to arbitrate low-value claims, it cannot be unfair to force consumers to waive their right to bring a class action.

These revamped clauses also serve a second purpose: They allow companies to argue that the FAA preempts any ruling that their class arbitration waivers are unconscionable. Recall that the FAA severely limits state regulation of arbitration clauses; state law can invalidate such clauses only under principles that apply with equal strength to all other contracts.\(^{160}\) This antidiscrimination mandate means that state contract law cannot single out arbitration clauses for heightened scrutiny. Therefore, courts can invalidate arbitration clauses under the unconscionability doctrine only if they administer that rule in an even-handed fashion—the same way they do when faced with contracts that do not contain arbitration clauses. Firms like Verizon have a colorable argument that any judge who finds their reward-laden class arbitration waiver to be unconscionable is impermissibly discriminating against arbitration clauses. After all, how can a term be unfair if it seeks to facilitate lawsuits against its drafter?

Sure enough, on May 24, 2010, the Court granted certiorari in *AT&T Mobility LLC v. Concepcion* to decide whether the FAA preempts judges from finding AT&T's class arbitration waiver to be unconscionable.\(^{161}\) Several factors suggest that the Court will (at the very least) further restrict the grounds on which lower courts can refuse to enforce class arbitration waivers. For one, the Court overruled *Bazzle* in April 2010 and held that arbitrators cannot hear class actions when the arbitration clause is silent about whether class arbitration is permissible.\(^{162}\) Moreover, AT&T describes its class arbitration waiver as "the most pro-consumer arbitration provision in the country."\(^{163}\) It lavishes a minimum of $10,000 and double attorney's fees upon plaintiffs who arbitrate on an individual basis and

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\(^{160}\) See supra notes 97–105 and accompanying text (discussing Court's decisions forbidding states from targeting arbitration contracts specifically).

\(^{161}\) 584 F.3d 849 (9th Cir. 2009), cert. granted, 78 U.S.L.W. 3687 (U.S. May 24, 2010) (No. 09-893); see Petition for Writ of Certiorari at (i), AT&T Mobility LLC v. Concepcion, No. 09-893 (Jan. 25, 2010), 2010 WL 304265.

\(^{162}\) See Stolt-Neilsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.").

recover more than AT&T’s last written settlement offer. If the Court does carve out a broad space for class arbitration waivers, it may mean the end of the class action device in consumer and employment cases.

In sum, from initially deploying blunt remedy-stripping terms to eventually adopting nuanced and complex “proconsumer” class action waivers, companies have invoked the FAA to engage in a staggering amount of private procedural rulemaking. They have sought to change arbitration from an alternative to litigation to a parallel, private judicial system in which they make the rules.

3. The Delegation Clause

Finally, the Court’s June 2010 decision in Rent-A-Center, West, Inc. v. Jackson further drives the FAA from its contractual foundations and adds a new dimension to private procedural rulemaking. As discussed above, lower courts have helped keep drafters in check by deeming unfair terms to be unconscionable. Firms may not like this searching judicial review, but section 4 of the FAA mandates it. As noted, section 4 states that “court[s] shall proceed summarily to . . . trial” if “the making of the arbitration agreement . . . [is] in issue.” When plaintiffs argued that a specific component of an arbitration clause was unconscionable, they placed its making in issue and were entitled to a judicial forum to resolve that claim. Or were they? As with unilateral amendments and “proconsumer” class arbitration waivers, clever drafters again capitalized on their dominion over contract terms. First in business-to-business transactions and then expanding to standard form contracts, companies added “delegation

(“The revised arbitration provision is, to [AT&T’s] knowledge, the most pro-consumer arbitration provision in the country.”).


165 See Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 MICH. L. REV. 373, 375-77 (2005) (hypothesizing that widespread adoption of class arbitration waivers, coupled with judicial acceptance of them, may lead to end of class action device).

166 130 S. Ct. 2772 (2010).

167 See supra note 140 and accompanying text (noting that some courts invalidated one-sided arbitration clauses).


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clauses” that gave the arbitrator—not courts—the exclusive ability to resolve the very issue of whether the arbitration clause was valid.\(^{169}\)

**Rent-A-Center** involved a delegation clause in an arbitration contract that an employer required its employees to sign. Both sides, following dicta in previous Court opinions, agreed that delegation clauses could be enforceable if there was “clear and unmistakable” evidence that the parties actually wanted the arbitrator to determine whether the arbitration clause was valid.\(^{170}\) Prior to the Court’s decision in **Rent-A-Center**, the dominant view was that because consumers, franchisees, and employees often do not read fine print terms, the mere fact that one of those individuals had signed a standard form contract that included a delegation clause did not satisfy the “clear and unmistakable” requirement.\(^{171}\)

Nevertheless, in **Rent-A-Center**, the Court, speaking through Justice Scalia, declined to adopt the “clear and unmistakable” rule that it had previously endorsed in dicta. Instead, in a dizzying sleight of hand, the Court held that just as arbitration clauses are their own freestanding minicontracts within larger container contracts, delegation clauses are their own freestanding miniarbitration contracts within larger arbitration clauses.\(^{172}\) As Justice Scalia put it, “[the] delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.”\(^{173}\) Under this logic, delegation clauses are contracts within contracts within contracts: (1) a contract to arbitrate the issue of whether the arbitration clause is enforceable (2) within a contract to arbitrate substantive claims between the parties (3) within the container contract.\(^{174}\)

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\(^{169}\) For cases discussing delegation clauses and upholding the ability of the arbitrator to determine the validity of an arbitration clause, see *Terminix International Co. v. Palmer Ranch Ltd.*, 432 F.3d 1327, 1332-33 (11th Cir. 2005), *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 205, 211 (2d Cir. 2005), and *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472–74 (1st Cir. 1989).


\(^{171}\) See, e.g., Jackson v. Rent-A-Center W., Inc., 581 F.3d 912, 917 (9th Cir. 2009) (holding that employee did not clearly and unmistakably assent to delegation clause even though he signed arbitration clause in which delegation clause was embedded), rev’d, 130 S. Ct. 2772 (2010); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 12–13 (1st Cir. 2009) (holding that courts must review delegation clause for fairness before enforcing).


\(^{173}\) *Id.* at 2777.

\(^{174}\) Justice Stevens’s dissent analogized this approach to “Russian nesting dolls.” *Id.* at 2786 (Stevens, J., dissenting).
In turn, viewing delegation clauses this way triggered the separability doctrine. Recall that Prima Paint decreed that a challenge to the validity of the container contract (but not the arbitration clause) is a matter for the arbitrator to hear. The Court in Rent-A-Center took this principle one step further and held that if an arbitration clause includes a delegation clause, a challenge to the validity of the arbitration clause (but not the delegation clause) is also for the arbitrator to evaluate. As a result, a plaintiff cannot ask a judge to review the fairness of the arbitration clause unless she first proves that the delegation clause is invalid.

The two-tiered framework adopted by the Court doomed plaintiff Antonio Jackson's claim that the delegation provision in Rent-A-Center was unenforceable. In district court, Jackson had argued that the arbitration contract his employer required him to sign was unconscionable because it limited discovery in his fact-sensitive civil rights lawsuit and called for him to pay for a portion of the arbitrator's fees. But he had not offered any reason that the delegation clause itself was invalid. Thus, the Court held that Jackson had conceded the relevant issue and ordered him to arbitrate the question of whether the arbitration clause was unconscionable.

Furthermore, Justice Scalia took pains to point out that even if Jackson had contested the enforceability of the delegation clause, he would have lost. As Justice Scalia noted, the aspects of the arbitration clause that Jackson claimed made it unfair for him to arbitrate his substantive claim—the discovery-limiting and fee-sharing provisions—had little bearing on whether it would be unfair for him to arbitrate the more self-contained question of whether the arbitration clause was unconscionable:

Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the [arbitration clause] is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain .... Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination.

175 See id. at 2779 ("Application of the severability rule does not depend on the substance of the remainder of the contract.").
176 See supra text accompanying notes 65-70.
177 See Rent-A-Center, 130 S. Ct. at 2779 (stating that unless specifically challenged, delegation provisions are treated as valid).
178 Id. at 2780.
179 Id. at 2780-81.
180 Id. at 2780.
Indeed, plaintiffs may never be able to prove that a delegation clause is unconscionable. To be sure, flagrant arbitrator bias or outrageous arbitral fees might give rise to a claim that it would be unfair to force a plaintiff to arbitrate the issue of whether the arbitration clause is valid. But other than these unlikely scenarios, any claim that a delegation clause is unconscionable comes perilously close to being a non sequitur. It is difficult to imagine how a plaintiff could prove that it is unfair to arbitrate the discrete issue of whether the arbitration clause is valid unless she somehow links it to the forfeiture of a substantive right. But to show that a delegation clause imperils a substantive cause of action, a plaintiff must establish not just that the arbitration clause makes it harder to pursue the cause of action, but that the arbitrator will, in fact, enforce the arbitration clause. Most courts will be unlikely to indulge in that kind of speculation. Thus, a delegation clause gives drafters a potent new weapon: a way to strip judges of their traditional role as bulwarks against overreaching arbitration clauses.

E. Summary

The FAA confers broad power on private parties. It is an empty husk that companies can fill with contracts to arbitrate, which then radiate with the “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” Capitalizing on both the Court’s refusal to consider seriously whether arbitration alters substantive rights and the freedom to add and amend arbitration clauses—a power that exceeds the boundaries of contract law itself—businesses have invoked the FAA to create elaborate private procedural regimes. In the next Part, I offer a novel theory as to why the Court’s interpretation of the statute is problematic.

181 If judges push back, drafters can always contract around these rulings as well. For instance, firms could create “double-decker” arbitration clauses: (1) offering to pay all costs and fees associated with arbitrating the issue of whether the arbitration clause is enforceable, but (2) requiring plaintiffs to pay for arbitrating substantive claims. Under Rent-A-Center, the arbitrator would end up deciding whether this arrangement is fair: Courts can focus on only how onerous it would be for the plaintiff to arbitrate whether the arbitration clause is valid, not how onerous it would be for the plaintiff to arbitrate substantive claims. Similarly, firms could embed a delegation clause within a delegation clause and task the arbitrator with deciding whether it would be unconscionable to have the arbitrator decide whether it would be unconscionable to have the arbitrator decide whether the arbitration clause is unconscionable.

II
ARBITRATION AS DELEGATION

The first substantive sentence of the Constitution, Article I, section 1, states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” These words have sparked intense debate. The majority view among scholars, which the Court has implicitly endorsed, is that the phrase “legislative Powers” refers broadly “to the power to make rules for society.” In addition, although the meaning of the “Vesting” Clause remains controversial, the Court has explained that the Clause has both a positive and a negative purpose: It allows Congress to make these rules and then denies this right to anyone else.

The nondelegation doctrine enforces this stricture by prohibiting sweeping transfers of congressional lawmaking authority. While this rule applies most commonly when Congress vests legislative power in other branches of government, it applies with special force when Congress transfers lawmaking authority to private parties. In this Part, I explore the tension between the private nondelegation doctrine and the Court’s reading of the FAA.

184 Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated, 70 U. CHI. L. REV. 1297, 1298 (2003); see also Loving v. United States, 517 U.S. 748, 758 (1996) (“The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.”). But see Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing that “legislative power” means only literal “authority to vote on federal statutes”).
185 See Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001) (“[The] text [of Article I, section 1] permits no delegation of [legislative] powers . . . .”); Gary Lawson, Delegation and Original Meaning, 88 VA. L. REV. 327, 350-51 (2002) (arguing that although Constitution does not contain express nondelegation clause, nondelegation principle arises from text and structure of Constitution). This principle can be traced to John Locke. See John Locke, Two Treatises of Government § 141, at 381 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (claiming that state power “being derived from the People[,] . . . the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands”). Not all authorities agree that Article I, section 1 constrains congressional delegation, however. See, e.g., Whitman, 531 U.S. at 489 (Stevens, J., concurring) (noting that Article I, section 1 does not facially purport to limit Congress’s power to delegate authority); Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 COLUM. L. REV. 2097, 2109 (2004) (proposing understanding of Article I, section 1 that focuses not on fact that Congress cannot delegate lawmaking power, but on fact that agencies lack right to promulgate regulations in absence of congressional transfer of power).
A. The Public Nondelegation Doctrine

In its best-known manifestation, the nondelegation doctrine stands for the proposition that "Congress may not constitutionally delegate its legislative power to another branch of Government."\(^{186}\) This version of the rule comes into play when Congress passes an open-ended statute that gives agencies the freedom to fill the gaps with regulations. I will call this the “public” nondelegation doctrine.

As a matter of black letter law, the Court will strike down a public delegation if Congress has failed to articulate an "intelligible principle" to limit the agency's discretion.\(^{187}\) Although this rule has deep roots,\(^{188}\) the Court has invoked it to nullify only two statutes in the twentieth century.\(^{189}\) Indeed, in light of the practical complexities of modern governance, Congress simply cannot make, interpret, and enforce the laws itself. The Court has responded by repeatedly upholding public delegations, even if they are vast or vague.\(^{190}\) For instance, the Court found an "intelligible principle" in a provision of the Controlled Substances Act that authorized the Attorney General to deem a drug unlawful if “necessary to avoid an imminent hazard to the public safety”\(^{191}\) and in the Clean Air Act's instruction to the Environmental Protection Agency to set air quality standards “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety.”\(^{192}\)

Yet in the last three decades, the public nondelegation doctrine has experienced a scholarly flowering. Several commentators have urged the Court to resuscitate the rule, claiming that it maintains the first principle of representative democracy: ensuring that the govern-

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\(^{188}\) See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”).
\(^{189}\) A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 420–30 (1935). As I discuss, Schechter’s elusive holding can also be seen as applying the private nondelegation doctrine. See infra notes 214–16.
\(^{190}\) Even Justices who might naturally be inclined to resist delegations acknowledge the practical difficulties of barring delegations completely. See, e.g., Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (“[N]o statute can be entirely precise, and . . . some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it . . . .”).
\(^{191}\) Touby, 500 U.S. at 163 (quoting 21 U.S.C. § 811(h) (1988)).
ment is responsive to popular will. Arguably, when elected legislators transfer the right to make policy decisions to unelected bureaucrats, they sever this essential link. In fact, public delegation can be even more pernicious. As David Schoenbrod argues, delegation allows Congress simultaneously to reap the benefits and to avoid the blame of legislating by passing nebulous laws that leave difficult policy choices to agencies, or by pressuring agencies to regulate in ways that appease powerful interest groups. By forcing Congress to accept responsibility for its actions, the nondelegation doctrine serves what I will call the “transparency value.”

On the other hand, some scholars question whether delegation is undemocratic. However, even they generally have no quarrel with the idea that the nondelegation doctrine facilitates transparency. Instead, they argue that there is no need for a special rule to protect this value because other forces constrain agency action. For example, the “presidential control” theory posits that the chief executive, who enjoys a unique position as the one official elected by the entire country, exerts considerable influence over agencies and “establishes an electoral link between the public and the bureaucracy.”

193 See, e.g., Gary Lawson, Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine, 73 GEO. WASH. L. REV. 235, 237 (2005) (“[T]he Constitution contains some limitation on the extent to which Congress can grant discretion to other actors . . . .”); David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 MICH. L. REV. 1223, 1254 (1985) (claiming that nondelegation rule should be understood as prohibiting Congress from enacting abstract “goals statute[s],” which “empower[s] the agency to complete the job by making rules of conduct”).

194 See, e.g., Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (“[T]he nondelegation doctrine . . . ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”); John Hart Ely, Democracy and Distrust 132 (1980) (“[By] refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic.”); Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 MICH. L. REV. 303, 335-36 (1999) (“[T]he [nondelegation] doctrine is designed to promote a distinctive kind of accountability—the kind of accountability that comes from requiring specific decisions from a deliberative body reflecting the views of representatives from various states of the union.”).

195 David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 10 (1993) (“[D]elegation allows legislators to claim credit for the benefits which a regulatory statute promises, yet escape the blame for the burdens it will impose.”).

196 See, e.g., Jerry L. Mashaw, Greed, Chaos, and Governance 139–40 (1997) (arguing that because voters can penalize their representatives for enacting vague statutes, “[t]he notion that vague statutory language somehow severs the electoral connection” is “deeply puzzling”).

197 Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2331–32 (2001). Similarly, others argue that Congress can bring agencies in line through ex ante and ex post oversight mechanisms, such as imposing hard deadlines for agency action and prescribing substantive criteria to guide agency choices. See Sidney A. Shapiro & Robert L.
scholars draw on the tenets of participatory and deliberative democracy to claim that agency rulemaking can actually be superior to legislative rulemaking. According to these accounts, agencies must consider public input and offer reasoned explanations for decisions—requirements that discourage cynical, self-interested political deals and enhance accountability. These powerful normative arguments against strict application of the public nondelegation doctrine, coupled with the prudential recognition that such a rule would topple the sprawling administrative state, likely explain its current dormancy.

B. The Private Nondelegation Doctrine

However, a second, more muscular version of the nondelegation doctrine governs transfers of congressional power to private parties. Private delegations “clearly raise even more troubling constitutional issues than their public counterparts.” Recall that the public nondelegation doctrine serves what I have called the “transparency value”: It prevents Congress from passing vague legislation and thereby transferring the responsibility for making hard policy choices to unelected bureaucrats. Delegations to private parties amplify these transparency concerns. Indeed, the factors that mitigate the potential evils of public delegations do not apply to private delegations. Agencies are subject to presidential oversight; private parties are not. Similarly, while the Administrative Procedure Act helps narrow the democracy gap in agency rulemaking by requiring agencies to hold notice-and-comment periods and justify their decisions, it does not

Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1998 DUKE L.J. 819, 827–28 (discussing how perceived problems with EPA in 1980s spurred Congress to reduce its discretion).

198 See Glen Staszewski, Reason-Giving and Accountability, 93 MINN. L. REV. 1253, 1284 (2009) (“[R]eason-giving can certainly be understood as a viable alternative to elections for purposes of holding public officials democratically accountable for their specific policy choices.”); Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539, 1545 (1988) (“The requirement of appeal to public-regarding reasons may make it more likely that public-regarding legislation will actually be enacted.”).

199 The opinions of Justice Thomas and Justice Stevens illustrate the sharp divide over the viability of the public nondelegation doctrine. Compare Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (arguing that Article I, section 1 flatly forbids delegations of legislative power whether Congress has supplied “intelligible principle” or not), with id. at 489 (Stevens, J., concurring) (arguing that Article I, section 1 “do[es] not purport to limit the authority of [Congress] . . . to delegate authority to others”).

200 Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997); see also United Chiropractors of Wash., Inc. v. State, 578 P.2d 38, 40 (Wash. 1978) (“Delegation to a private organization raises concerns not present in the ordinary delegation of authority to a governmental administrative agency.”).

bind private parties. Thus, even more so than public delegations, private delegations "dilute the people's right to be governed only by their constitutionally chosen representatives."\(^{202}\)

Private delegations also raise abuse of power concerns. Public officials, be they legislators or bureaucrats, are expected to exercise their authority to further "some conception of what is good for the community."\(^{203}\) Private parties, on the other hand, have fundamentally different incentives: They inevitably "select regulation that provides them with maximum benefits without considering the effect on the other regulated parties or the public."\(^{204}\) By checking the self-serving exercise of state power, the private nondelegation doctrine furthers what I will call the "neutrality value."

Unfortunately, the private nondelegation rule is notoriously elusive. For one, its constitutional foundation has never been entirely clear. Courts and commentators have alternatively opined that private delegations violate Article I, section 1,\(^{205}\) the Due Process Clause of

\(^{202}\) Hetherington v. McHale, 329 A.2d 250, 254 (Pa. 1974); see also Boll Weevil, 952 S.W.2d at 469 ("[T]he basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.").


\(^{204}\) Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1428 (2000); see A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution, 50 DUKE L.J. 17, 146 (2000) ("[T]he private nondelegation doctrine focuses on the dangers of arbitrariness, lack of due process, and self-dealing when private parties are given the use of public power without being subjected to the shackles of proper administrative procedure."); Metzger, supra note 22, at 1445 (noting that delegation allows private parties to "wield . . . government powers in ways that raise serious abuse of power concerns"); cf. Paul R. Verkuil, Public Law Limitations on Privatization of Government Functions, 84 N.C. L. REV. 397, 468 (2006) ("When private contractors perform inherent government functions, they jeopardize core values of public law and weaken government's capacity to do the common good.").

\(^{205}\) See, e.g., Crain v. First Nat'l Bank of Or., Portland, 324 F.2d 532, 537 (9th Cir. 1963) (reasoning that, under Article I, section 1, "Congress cannot delegate to private corporations or anyone else the power to enact laws"); Metro Med. Supply, Inc. v. Shalala, 959 F. Supp. 799, 801 (M.D. Tenn. 1996) (considering plaintiff's claim that private nondelegation doctrine comes from Article I, section 1); Hornell Ice & Cold Storage Co. v. United States, 32 F. Supp. 468, 469 (W.D.N.Y. 1940) (same); David N. Wecht, Note, Breaking the Code of Deference: Judicial Review of Private Prisons, 96 YALE L.J. 815, 823–24 (1987) (linking private nondelegation doctrine to Article I, section 1); cf. Merrill, supra note 185, at 2168 (arguing that although text of Article I, section 1 does not speak to private delegations, private nondelegation doctrine stems from "the Constitution's implicit design principle limiting the federal government to three branches"). Similarly, state courts often hold that private delegations violate "vesting clauses" in state constitutions that mirror Article I, section 1. See, e.g., Proctor v. Andrews, 972 S.W.2d 729, 733 (Tex. 1998) (holding that Texas Constitution's legislative vesting clause is "the proper constitutional source for a prohibition of delegations to private entities"); Newport Int'l Univ., Inc. v. Dep't of Educ.,
the Fifth Amendment,\textsuperscript{206} or both.\textsuperscript{207} In addition, the doctrine's contours remain open to debate. Unlike the public nondelegation doctrine, which hinges on the toothless "intelligible principle" test, the private nondelegation rule requires a fact-sensitive examination of whether a statute allows private parties to make law without the safeguards necessary to "inhibit[] arbitrary or self-motivated action."\textsuperscript{208} As I will show, this inquiry primarily revolves around three factors. The first focuses on the nature of the delegation: whether it authorizes private actors to make law in a non-neutral, nontransparent way. The second is whether affected parties are adequately represented in the private lawmaking process. The third is whether the state retains control over the private delegate.

1. The Nature of the Delegation: Transparency and Neutrality

The first and most important variable in the private nondelegation inquiry is whether a statute has given private actors broad discretion to make rules that further their own agendas. The greater leeway the private delegate enjoys, the less work the legislature has done: an abstention that raises transparency issues.\textsuperscript{209} In addition, if the subject matter of the delegation is one in which the private delegate has a

\textsuperscript{206}See, e.g., Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (determining that statute which allowed some miners and coal producers to set terms of labor agreements binding on all miners and coal producers in region was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment"); Donald A. Dripps, \textit{Delegation and Due Process}, 1998 DUKE L.J. 657, 659 ("[D]ue process cases are an enforcement tool for the nondelegation doctrine."). Some courts apply the Due Process Clause of the Fourteenth Amendment to private delegations at the state level. See, e.g., Tucson Woman's Clinic v. Eden, 379 F.3d 531, 555 (9th Cir. 2004) ("When a State delegates its licensing authority to a third party, the delegated authority must satisfy the requirements of due process."); McGuire v. Reilly, 260 F.3d 36, 50 (1st Cir. 2001) ("[T]he Due Process Clause forbids standardless delegations of governmental authority, especially to private parties.").

\textsuperscript{207}See, e.g., Santa Fe Natural Tobacco Co. v. Judge, 963 F. Supp. 437, 440 (M.D. Pa. 1997) (noting that private delegations violate both due process and separation of powers principles); Chester C. Fosgate Co. v. Kirkland, 19 F. Supp. 152, 163 (S.D. Fla. 1937) (holding that Agricultural Adjustment Act was "contrary to [A]rticle [I] of the Federal Constitution, and contrary to the Fifth Amendment to that instrument").


\textsuperscript{209}See, e.g., Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 472 (Tex. 1997) (surveying literature and federal and state case law and noting that important variables include breadth of delegation, powers given to private delegate, and whether "the Legislature [has] provided sufficient standards" to constrain delegate).
financial or political interest, it is more likely that the delegate will exercise its lawmaking prerogative in a non-neutral fashion.\(^{210}\)

The private nondelegation rule emerged in the early twentieth century in the context of zoning regulations that contained gaps that property owners could fill by supermajority vote. For instance, in *Eubank v. City of Richmond*, an ordinance allowed two-thirds of the owners on a street to trigger setback requirements by requesting them in writing.\(^{211}\) The Court held that the ordinance was unconstitutional because rather than regulating directly, "it enable[d] the convenience or purpose of one set of property owners to control the property right of others."\(^{212}\) In turn, the Court explained, this possibility raised the specter that owners might exercise their power "solely for their own interest or even capriciously."\(^{213}\)

During the New Deal, the Court struck down two federal statutes because they gave private parties the freedom to engage in self-interested lawmaking. First, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated a portion of the National Industrial Recovery Act, which allowed trade groups to propose codes of fair competition for their industries that would become effective upon approval by the President.\(^{214}\) The opinion, though not a model of clarity, can be read as emphasizing the values of transparency and neutrality. The Court was troubled by the breadth of the powers that Congress had conferred, a point that Justice Cardozo captured with the phrase "delegation running riot."\(^{215}\) Moreover, the Court noted with consternation that the delegates who enjoyed the right to fill these statutory gaps were not governmental officials, but private firms:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent[?] . . . The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.\(^{216}\)

\(^{210}\) See, e.g., *id.* (noting importance of whether delegate has "a pecuniary or other personal interest that may conflict with his or her public function").

\(^{211}\) 226 U.S. 137, 141 (1912).

\(^{212}\) *Id.* at 144.

\(^{213}\) *Id.; see also* Washington v. Roberge, 298 U.S. 116, 121–22 (1928) (invalidating ordinance that allowed convalescent home to be established in first district where two-thirds of property owners consented).


\(^{215}\) *Id.* at 533 (Cardozo, J., concurring).

\(^{216}\) *Id.* at 537. Despite this condemnation of private parties' exercising lawmaking power, *Schechter's* holding remains notoriously elusive. See, e.g., Bruff, supra note 29, at 456–57 (noting that Court "failed to distinguish clearly between three possible grounds for objecting to the NIRA: that the delegation was too broad to be exercised by anyone, that
Likewise, in *Carter v. Carter Coal Co.*, the Court nullified part of the Bituminous Coal Conservation Act (BCCA).\(^{217}\) The BCCA established twenty-three coal districts. Instead of specifying wage and hour standards within each district, the statute authorized certain high-volume coal producers and a majority of miners to craft these rules by private agreement.\(^{218}\) The Court struck down the statute, describing it as "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."\(^{219}\)

Although the Court has not invalidated a law on private delegation grounds since *Carter*, lower courts continue to invoke the rule. For instance, in *General Electric Co. v. New York State Department of Labor*, a statute required employers who contracted with the state to pay their workers wages that had been established through collective bargaining between unions and employers.\(^{220}\) The plaintiff claimed that the unions and employers had not engaged in adversarial negotiations but instead had conspired to inflate wages on public projects artificially.\(^{221}\) Reversing the district court's grant of summary judgment, the Second Circuit held that these allegations, if proven, would reveal that the statute allowed private parties to further their "arbi-
trary self-interest” and thus would be an impermissible private delegation.222

By the same token, courts have rejected challenges to private delegations that did not raise transparency or neutrality concerns. For instance, in Biener v. Calio, the plaintiff sought to invalidate a Delaware statute that allowed political parties to set filing fees for candidates in primary elections.223 The Third Circuit acknowledged that “[w]ithout sufficient limitations, the delegation of authority can be deemed void for . . . giving unfettered discretion to the private party.”224 Nevertheless, the court noted that by capping the filing fees at one percent of the salary for the particular office, the legislature—not the political parties—had dictated the most important issue: the maximum fee.225 Given this restriction, the court reasoned that the plaintiff had failed to explain how the political parties could “set filing fees selfishly, arbitrarily, or based on will or caprice.”226

In sum, statutes raise private nondelegation issues when they give private actors the freedom to make law in a fashion that furthers their own interests. As I discuss next, lawmakers can ameliorate these concerns by ensuring that affected parties are represented in the decision-making process or by maintaining state control over the private delegate.

2. Whether Affected Parties Are Represented

Delegations to private parties can be valid if they are designed to minimize the risk of self-interested lawmaking. As courts and scholars have noted, one way of preventing private actors from abusing their power to legislate is to establish a private representative process—a decision-making structure that includes all affected constituencies.227 Unlike the BCCA in Carter, which allowed a handful of industry

222 Id. at 1457–58; see also Beary Landscaping Inc. v. Shannon, No. 05 C 5697, 2008 WL 4951189, at *1, *3 (N.D. Ill. Nov. 18, 2008) (denying motion to dismiss similar nondelegation challenge to Illinois Prevailing Wage Act).

223 361 F.3d 206 (3d Cir. 2004).

224 Id. at 216.

225 Id. at 216–17.

226 Id. at 217.

227 See, e.g., Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 472 (Tex. 1997) (listing as critical variable whether “the persons affected by the private delegate’s actions [are] adequately represented in the decision-making process”); Lawrence, supra note 203, at 689 (noting that private delegations are not troubling if they are “to groups that arguably contain all those importantly affected by the set of rules made by the group”).

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players to regulate their competitors, 228 these benign delegations encourage participation and attempt to achieve consensus.

For instance, the private National Fire Protection Association (NFPA) promulgates electrical safety codes. Many state legislatures not only incorporate these guidelines but also permit the NFPA to amend the state laws that incorporate the guidelines. 229 At first blush, the fact that the NFPA enjoys the ability to change existing legislation simply by altering its own standards seems troubling. Yet the NFPA’s drafting process incorporates input from “electrical contractors, inspectors, manufacturers, utilities, testing laboratories, regulatory agencies, insurance organizations, organized labor, and consumer groups”—the full range of parties who have a stake in the matter. 230 As a result, “no single interest is permitted to dominate.” 231

Similarly, federal agencies sometimes engage in negotiated rulemaking. 232 Unlike notice-and-comment rulemaking, where agencies hold themselves open for public input, under “reg neg,” bureaucrats actively seek compromise among all major interest groups. 233 To be sure, this process gives private actors a significant voice in the content of laws. 234 Nevertheless, because it is inclusive and predicated on consent from all affected parties, it dispels transparency and neutrality concerns. Indeed, any time the legislature creates a private representative process, “political accountability exists and there is no need to be wary of delegation because the harm it seeks to avoid has been avoided from the outset.” 235

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228 See Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (“[O]ne person may not be entrusted with the power to regulate the business . . . of a competitor.”).


230 Lawrence, supra note 203, at 689.


233 See, e.g., William Funk, Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, 46 DUKE L.J. 1351, 1351 (1997) (“Rather than conducting arm’s length, adversarial undertakings loaded down with procedural requirements to protect everyone’s interests, affected persons and the agency would sit together and cooperatively seek agreement.”).


3. State Involvement

Finally, after Schechter and Carter, the Court acknowledged another exception to the rule against private nondelegation: Otherwise impermissible private delegations could be valid if the government either participated in, or retained meaningful control over, the private lawmaking. By adding its imprimatur, the state assumes responsibility for the private lawmaking and thereby reduces transparency concerns. In addition, governmental involvement or review can discourage delegates from attempting to wield power in a non-neutral fashion.

For example, in Sunshine Anthracite Coal Co. v. Adkins, the Court considered a revised version of the BCCA that allowed coal producers to generate rules relating to coal sales but subjected these rules to the approval of the government’s Coal Commission. Rejecting a nondelegation challenge, the Court distinguished Carter, noting that the coal producers now “function[ed] subordinately to the Commission.” Similarly, in Currin v. Wallace, the Court upheld the Tobacco Inspection Act, which permitted the Secretary of Agriculture to issue regulations that became binding if two-thirds of the growers in an area approved them. Again, the Court reasoned that because the state determined the content of the rules and the growers merely decided whether to accept them, “[t]his is not a case where a group of producers may make the law and force it upon a minority.” In subsequent decades, executive, legislative, or judicial influence in private lawmaking became a critical litmus test for a delegation’s validity.

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236 See, e.g., Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 472 (Tex. 1997) (noting importance of whether “the private delegate’s actions [are] subject to meaningful review by a state agency or other branch of state government”); George W. Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650, 717–18 (1975) (listing whether “the actions of private delegates [are] subject to no further public or judicial review, or to review only upon attenuated standards such as the substantial evidence rule,” as relevant factor in nondelegation analysis). The precise degree of state oversight necessary to ameliorate nondelegation concerns remains unclear. For instance, in Schechter, the Court struck down section 3 of the National Industrial Recovery Act despite the fact that the President enjoyed the power to veto the privately made “codes of fair competition.” See A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 521–23 (1935).


238 Id. at 399.

239 306 U.S. 1 (1939).

240 Id. at 15.

241 See, e.g., Women’s Med. Prof’l Corp. v. Baird, 438 F.3d 595, 610 (6th Cir. 2006) (upholding statute that allowed private hospitals to veto abortion provider’s license application because state officials possessed power to “make the final decision”); United States v. Frame, 885 F.2d 1119, 1128 (3d Cir. 1989) (finding that Beef Promotion and Research
C. The FAA as a Private Delegation

In this section, I argue that the bloated FAA that the Court has created bears the hallmarks of an impermissible private delegation. First, it gives companies virtually unfettered power to create a parallel system of civil procedure for consumer and employment cases. To be sure, the statute differs from most delegations because it merely allows private parties to create procedural rules rather than substantive law. Nevertheless, the ability to manipulate procedure is also the ability to manipulate substantive outcomes, and the Court has failed to establish a meaningful restriction on private procedural rulemaking that dilutes substantive entitlements. Second, because companies unilaterally dictate and amend arbitration clauses, they do not impose them through a process that internalizes consumers’ and employees’ interests. Finally, although the FAA as enacted mandates judicial review of privately made procedural rules, the Court has all but abolished this safeguard.

1. The Nature of the Delegation: Transparency and Neutrality

Delegations are troubling if they give private parties too much discretion (thus diminishing legislative accountability) and allow the delegate to further its own self-interest (rather than the common good). The FAA as interpreted by the Court raises both concerns.

For starters, the statute gives companies tremendous leeway to tilt the scales of justice in their favor. Unlike the laws in Schechter and Carter, which allowed private parties to define fair competition and set maximum wages and hours for workers—relatively self-contained issues—the FAA gives businesses dominion over the entire sprawling universe of procedural rulemaking. The statute is a hollow shell into which companies can pour privately made rules that govern discovery, statutes of limitations, the aggregation of claims, the permissibility of Act does not improperly delegate legislative power because “the amount of government oversight of the program is considerable”); Cospito v. Heckler, 742 F.2d 72, 88–89 (3d Cir. 1984) (rejecting private delegation challenge to Medicaid and Medicare provisions that allowed private organization to handle accreditation decisions because Secretary of Health, Education, and Welfare “retains ultimate authority over decertification decisions”). Similarly, the Court has relied heavily on the existence of state oversight in the analogous context of an asserted delegation of the executive’s power to enforce the law. In Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000), the Court upheld the citizen-suit provision of the Clean Water Act, which allowed private parties to file lawsuits against polluters even though any damages they might win would be paid to the U.S. Treasury. Although the dissent argued that the citizen-suit provision had “grave implications for democratic governance,” id. at 202 (Scalia, J., dissenting), the majority brushed aside nondelegation concerns, noting that the statute authorized the government to intervene and assume control over any such litigation. See id. at 188 n.4 (majority opinion).
consequential and punitive damages, the payment of arbitral fees and costs, and the scope of judicial review.\textsuperscript{242} In addition, as I have discussed above, there is a well-documented history of companies filling this regulatory gap with self-serving provisions.\textsuperscript{243} Thus, because the FAA as interpreted by the Court confers broad discretion upon private parties to feather their own nests, it raises transparency and neutrality concerns.

One might argue that the FAA differs from previous delegations because it allows private parties to create procedure, not substantive law.\textsuperscript{244} This rejoinder is unpersuasive for two reasons. First, even assuming that procedure and substance are separate, watertight containers, the state has an interest in preventing partiality in procedural rulemaking. Adjudication is one of the most important ways that citizens interface with the state, and a vast literature illustrates that individuals' perceptions of procedural fairness affect "their opinion of legitimate power and legal authority, sometimes even more so than case outcome."\textsuperscript{245} As a result, procedural codes aspire to be impartial

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  \item \textsuperscript{242} Businesses have accepted this invitation on a massive scale. For instance, a recent survey of leading financial services and telecommunications firms found arbitration clauses in almost ninety-three percent of employment agreements and nearly seventy-seven percent of consumer contracts. Theodore Eisenberg et al., \textit{Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts}, 41 U. MICH. J.L. REFORM 871, 882–83 (2008). Another study determined that all nine major wireless service providers and the vast majority of credit card companies use class arbitration waivers. Amy J. Schmitz, \textit{Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms}, 15 HARV. NEGOT. L. REV. 115, 144–50 (2010). These industries provide services to hundreds of millions of customers, a fact which makes lockstep use of arbitration clauses and class arbitration waivers in these industries akin to nationwide legislation.
  \item \textsuperscript{243} \textit{See supra} notes 132–39 and accompanying text (providing examples of these tactics).
  \item \textsuperscript{244} Similarly, one might argue that Congress enjoys greater leeway to transfer its procedural rulemaking powers under Article III than its core legislative powers under Article I. \textit{Cf.} Posner & Vermeule, \textit{supra} note 184, at 1730–31 (noting that Supreme Court has seemingly ignored intelligible principle test when determining whether Congress permissibly delegated its Article III powers under Rules Enabling Act). However, for the reasons I state in the remainder of this subsection, I see the FAA as a delegation of both Article III and Article I powers. The statute allows private parties not just to create procedural rules but to do so in a way that undermines statutes that Congress has created under Article I. The extent to which Article III imposes its own limitations on arbitration lies outside the scope of this Article. For illuminating discussions of that issue, see Peter B. Rutledge, \textit{Arbitration and Article III}, 61 VAND. L. REV. 1189, 1201–04 (2008), which argues that the FAA "strip[s] federal courts of the power to interpret the meaning of federal law" and proposes that Article III requires that federal courts must have a meaningful opportunity to review arbitral awards, and Sternlight, \textit{supra} note 29, at 79, which states that "Congress may not use a general preference for binding arbitration in all cases to reduce the jurisdiction of federal courts."
  \item \textsuperscript{245} Elizabeth Chamblee Burch, \textit{Procedural Justice in Nonclass Aggregation}, 44 WAKE FOREST L. REV. 1, 7 (2009). Burch goes on to argue that, "[I]legal systems that thwart litigants' preferences will have trouble compelling adherence to their judgments, pro-
\end{itemize}
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toward both parties and all types of claims: "an unclogged artery through which substantive rights [can] flow." 246 Allowing private actors to create byzantine procedural rules such as the delegation clause and the "proconsumer" class arbitration waiver undermines this norm. 247

More importantly, nondelegation concerns cannot be dismissed on the grounds that the FAA merely authorizes procedural rulemaking because procedure inevitably affects substantive rights. 248 Congress recognized this fact—and that the dangers of nondelegation flow from transferring its procedural rulemaking duties—when it passed the Rules Enabling Act (REA). The REA authorizes the Court to "prescribe general rules of practice and procedure," but it still prohibits the Court from "abridg[ing], enlarg[ing], or modify[ing] any substantive right." 249 As initially drafted, the REA did not contain this caveat. 250 Senator Cummings of Iowa suggested it as a response to concerns that "Congress could not if it wanted to, confer upon the Supreme Court, legislative power." 251 Accordingly, the REA's drafters believed that only by denying the Court the ability to promulgate procedural rules that impacted substantive rights did they

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246 Janice Toran, 'Tis a Gift To Be Simple: Aesthetics and Procedural Reform, 89 Mich. L. Rev. 352, 376 (1990); see also Mark Spiegel, The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules, 32 Conn. L. Rev. 155, 164 (1999) ("When we look to the Federal Rules of Civil Procedure, . . . we find that the rules are designed not only to ensure an impartial decision maker and the equal treatment of the litigants, but also to be impartial as to type of claim.").

247 In a recent study, fewer than thirty percent of customers who had arbitrated securities claims rated the arbitral panel as "open-minded" and "impartial" or found arbitration to be "fair." Nancy A. Welsh, What Is "(Im)Partial Enough" in a World of Embedded Neutrals?, 52 Ariz. L. Rev. 395, 423–24 (2010).


“immunize[ ] the Act from constitutional scrutiny as an improper delegation.”

Unlike the REA, the FAA does not expressly forbid companies from creating procedural rules that affect substantive rights. The only such limitations are the federal vindication-of-rights doctrine, which empowers courts to nullify arbitration clauses that impact substantive claims, and section 2’s requirement that arbitration clauses conform to traditional contract principles like unconscionability. Yet the Court has structured these rules in a way that is extraordinarily deferential to arbitration. Again and again, the Court has declared that “[b]y agreeing to arbitrate[,] . . . a party does not forgo [any] substantive rights.”

This is an empirical assertion: The Court is not saying that arbitration should not affect substantive rights, it is saying that, absent extraordinary circumstances, it does not affect substantive rights. This assumption significantly weakens both the vindication-of-rights and unconscionability doctrines. In part because the Court presumes that rights-altering arbitration clauses are rare birds, it has insisted on forceful, concrete proof before finding that a plaintiff cannot effectively vindicate her statutory rights. Similarly, the Court has declined to consider whether adhesive contracts are unconscionable in cases involving consumers, investors, and employees, and has forbidden lower courts from “rely[ing] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” By making it so difficult to invalidate an arbitration clause, the Court has encouraged private parties to make procedural rules that almost certainly alter substantive rights—the very result that the REA prohibits.

In fact, the Court’s interpretation of the FAA raises a unique transparency and neutrality issue: It does not just allow private actors to make the law; it allows private actors to change the law. When pri-


254 To be sure, because of significant variation among individual cases, it is extremely difficult to compare a consumer’s or employee’s actual results in arbitration with how they would have done in court. However, there is some evidence that consumers and employees—especially consumer defendants and low-level employee plaintiffs—do not fare as well in arbitration as they do in court. For an excellent collection of the nascent literature, see Welsh, supra note 247, at 419–22.

vate parties legislate under conventional delegations, they write on a blank canvas. For instance, *Carter's* wage and hour regulations and *Schechter's* codes of fair competition governed subject matters in which there was no preexisting, comprehensive statutory scheme. But the FAA occupies the field of procedural rulemaking, where Congress has already spoken. Through the statutory-like mechanism of adhesion contracts, companies re-regulate an area that Congress has already regulated.

Consider the class arbitration waiver. Federal Rule of Civil Procedure 23 entitles plaintiffs to aggregate claims. In response to perceived problems with Rule 23, Congress has flexed its muscle to create procedural rules directly, passing two broad overhauls of the class action device in the last fifteen years. Despite continued vociferous opposition to the very existence of Rule 23, Congress has declined to delete it. Yet when every company in an industry uses a class arbitration waiver, they effectively delete Rule 23 and override this congressional policy choice.

*Rent-A-Center's* delegation clause raises an even starker example of private law reform. Section 4 of the FAA prohibits courts from granting a motion to compel arbitration if there is a dispute about the validity of the arbitration clause. A delegation clause trumps this statutory command by assigning the question of whether an arbitration clause is enforceable to an arbitrator. As I discuss below, delegation clauses have already become fixtures in consumer and

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256 See supra notes 214–19 and accompanying text (discussing *Schechter* and *Carter*).

257 Because binding agreements allow private parties to summon the coercive arm of the state to enforce rights and duties that the third parties themselves designed, such agreements "represent a kind of private lawmakering." Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 Geo. L.J. 77, 100 (2009); see also H.L.A. Hart, *The Concept of Law* 40 (1961) (noting that contracting process transforms individuals into "private legislator[s]"); Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 260, 260 (1909) (opining that contracting makes "a legislative body of any two persons"). Thus, in 1971, David Slawson claimed that standard forms—which allow each drafter to impose unilaterally one overarching set of provisions on all of its contractual relationships—shattered the barrier between contract and statute. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, 530 (1971) ("The privately made law imposed by standard form has not only engulfed the law of contract; it has become a considerable portion of all the law to which we are subject.").


employment contracts. Thus, companies have effectively written section 4 out of the FAA. And unlike Rule 23, section 4 was not promulgated by the Supreme Court under the REA but rather passed through the traditional process of bicameralism and presentment.

By allowing private actors to abolish these rules, the FAA distorts the signal that voters receive from their elected representatives. Scholars have noted that the least polarizing, lowest-profile—and thus least accountable—way for Congress to enact tort reform is by manipulating procedure in lieu of eliminating substantive rights. The FAA, as interpreted by the Court, does Congress one better. It hums along under the radar, weakening statutory entitlements. This dilution allows Congress to have it both ways by creating rights that will be underenforced.

To be clear, I do not fault Congress for the contemporary shape of the FAA: The statute is what it is largely due to the Court’s interpretations and the concerted actions of business groups. My point is simply that the FAA as it now stands makes it difficult to map the contours of the substantive law and truly to assess Congress’s handiwork when it creates rights. Just as delegation adds a layer of opacity when Congress transfers its lawmaking duties to agencies, excessive private procedural rulemaking is inimical to representative democracy.

In sum, the FAA as interpreted by the Court gives companies the freedom to create legal rules that further their own interests. It thus bears the hallmarks of an impermissible private delegation. As I discuss next, flaws in the private lawmaking process—the fact that consumers and employees are not adequately represented and the lack of a meaningful state role—reinforce this conclusion.

2. Whether Affected Parties Are Represented

Even if a statute allows private actors to make law, it does not necessarily violate the private nondelegation doctrine. As noted, some delegations give all affected groups a voice and then seek to achieve consensus among them. This “private representative process” dispels neutrality problems by ensuring that the resulting law does not “favor any private interest at the expense of either some theoretical public interest or other private interests.”

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261 See infra note 289 and accompanying text.
263 Lawrence, supra note 203, at 688.
Again, consider the REA. After receiving its grant of procedural rulemaking authority from Congress, the Court assigned its duties to three administrative bodies: the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, and the Judicial Conference of the United States.\textsuperscript{264} These entities, which consist of judges, lawyers, and professors—not elected officials—draft new rules and amendments.\textsuperscript{265} Yet the institutional design of the rulemaking process assuages nondelegation concerns. Since the 1985 amendments to the REA, Congress has self-consciously sought to “parallel the openness requirements of the House and Senate committees and subcommittees.”\textsuperscript{266} The Advisory Committee must consider proposed new rules or amendments from anyone, including lawyers, judges, public interest groups, and lobbyists.\textsuperscript{267} Once the Advisory Committee obtains approval from the Standing Committee, it circulates the new rule or amendment along with a detailed explanatory note for public comment.\textsuperscript{268} Consistent with the principles of both participatory and deliberative democracy, interested parties actively engage in this dialogue: There are over 10,000 individuals and entities on the Advisory Committee’s mailing list.\textsuperscript{269} Recent proposals have generated hundreds of responses and prompted the Committee to revise its handiwork.\textsuperscript{270} Thus, the REA may be a private delegation, but it is structured to diminish the risk of any particular constituency running roughshod over others.

On its face, the FAA seems to achieve an even more inclusive decision-making regime. The statute simply requires courts to enforce


\textsuperscript{267} Duff, supra note 264.

\textsuperscript{268} Id.

\textsuperscript{269} Id.; see also Bone, supra note 25, at 954 (“Indeed, rulemaking today more closely resembles a legislative process with broad public participation and interest group compromise than the process of principled deliberation it was originally conceived to be.”).

\textsuperscript{270} See Lori A. Johnson, Creating Rules of Procedure for Federal Courts: Administrative Prerogative or Legislative Policymaking?, 24 Just. Sys. J. 23, 27 (2003) (noting that Advisory Committee receives comments from “the American College of Trial Lawyers, numerous state bar association groups, the Federation of Insurance and Corporate Counsels, Public Citizen Litigation Group, the Lawyer’s Committee for Civil Rights Under Law, the FBI, the National Association of Independent Insurers, law professors, individual attorneys, and private citizens”); Struve, supra note 265, at 1111 (noting that proposed amendments to Rule 11 drew responses from more than one hundred individuals and groups).
contracts that modify procedural rules. Indeed, as the Court has repeatedly intoned, the statute is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered."271 Contractual bargaining is the archetypical representative process: It allows parties to custom tailor their rights and duties. And contracts do not arise without mutual consent; they are a pure form of consensus.

But although negotiated deals between equals may be products of a representative process, most consumer and employment contracts are not. Consumers and employees do not bargain over arbitration clauses in preprinted standard forms. In fact, a drafter "does not ordinarily expect his customers to understand or even to read the standard terms."272 Businesses thus enjoy complete control over these contracts. Moreover, contracts scholars have long recognized that an adherent's apparent consent to an adhesion contract cannot be reasonably construed as actual consent to all of the contract's terms:

Instead of thinking about 'assent' to boilerplate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few [negotiated] terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form . . . .273

This attenuated "assent" deviates sharply from the goal of a private representative process, which seeks to achieve a true consensus among affected individuals and groups.274

And even if contracting usually is a representative process, the Court does not apply traditional contract law to arbitration. Consider the gateway issue of whether a party agreed to arbitrate at all. Black letter contract principles would bind a party to such a promise unless a defense to enforcement applied to the container contract. Under the Court's jurisprudence, however, a defense to enforcement makes no difference: The separability doctrine dictates that arbitration clauses are their own freestanding minicontracts within container contracts, and arbitrators (not courts) resolve challenges to the validity of the container contract. As a result of this legal fiction, a party who truthfully claims that she did not consent to the container contract because

274 See Lawrence, supra note 203, at 689 (arguing that promulgation of National Electric Code by National Fire Protection Association meets this requirement of private representative process).
she was defrauded, mistaken, or coerced still ends up in arbitration.\textsuperscript{275} And \textit{Rent-A-Center}'s delegation clause significantly expands the gulf between arbitration and contract law. In that case, the plaintiff argued that "he did not meaningfully assent" to the arbitration clause.\textsuperscript{276} Even accepting this assertion at face value, the Court held that the delegation clause required Jackson to arbitrate the issue unless he could prove that he specifically did not consent to the delegation clause.\textsuperscript{277} The delegation clause—separability squared—quite literally empowers drafters to impose arbitration on others without their consent, an outcome completely contrary to the fundamentals of contract law. This nonconsensual imposition of rights and duties is also the antithesis of a representative process.

Moreover, in the last decade, companies have imposed and unilaterally changed arbitration clauses through "bill stuffers"—a maneuver that is specifically designed to exclude consumers and employees from having any influence in the creation of private procedural rules.\textsuperscript{278} To be sure, firms often give adherents a few weeks to reject unilateral changes by closing their accounts. But drafters deliberately condition the exercise of this right on prohibitive transaction costs—for example, search costs. Adherents who care about their procedural rights must vigilantly monitor their mail for updates to their contractual terms. And once a change-of-terms notice arrives, they must carefully compare the new terms to other companies' provisions. Unlike an initial purchasing choice, they cannot take their time; they must act by the drafter's deadline. Then, in order to refuse the unilateral change, they must incur switching costs. For instance, some wireless companies charge an early termination fee of hundreds of dollars.\textsuperscript{279} Likewise, consumers cannot close a credit card account

\textsuperscript{275} For instance, even Stephen Ware—an eloquent defender of the Court's arbitration jurisprudence—has argued that Congress should abolish the separability doctrine because it deviates from traditional contract law. See Ware, \textit{supra} note 68, at 121 ("[T]he right to litigate (like other rights) [should be alienable] through an \textit{enforceable} contract, but not a contract that is unenforceable due to misrepresentation, duress, illegality, or any other contract-law defense."); Stephen J. Ware, \textit{Employment Arbitration and Voluntary Consent}, 25 \textit{Hofstra L. Rev.} 83, 134–35 (1997) (arguing that separability doctrine "violates a fundamental principle of contract law" because it "enforces a duty assumed through coerced, not voluntary, consent").

\textsuperscript{276} Jackson \textit{v. Rent-A-Center W., Inc.}, 581 F.3d 912, 917 (9th Cir. 2009), \textit{rev'd}, 130 S. Ct. 2772 (2010).


\textsuperscript{278} See Horton, \textit{supra} note 116, at 650–51 (explaining that bill-stuffing gives drafter complete dominion over contractual terms).

\textsuperscript{279} \textit{Id.} at 650.
ARBITRATION AS DELEGATION

without paying off the full balance; in any event, closing an account lowers one’s credit score.280

For these reasons, though contracting may be a private representative process, it is not so in the context of fine print dispute resolution terms. In fact, the Court’s FAA jurisprudence deviates so far from traditional contract principles that it allows companies to impose extrajudicial dispute resolution without securing a consumer’s or employee’s consent. The statute’s supposed foundation in contract law thus does not dispel the neutrality concerns that arise when Congress delegates lawmaking power to private parties.

3. State Involvement

Finally, the state can salvage an otherwise impermissible private delegation by retaining control over the delegate. For instance, the REA gives elected officials the final say over private lawmaking by providing Congress with at least seven months to reject rules or amendments promulgated by the Court.281 Similarly, the FAA as enacted also envisions an active role for the government. Section 4 requires courts to consider challenges to the validity of arbitration clauses before enforcing them.282 Similarly, sections 10 and 11 empower courts to modify and vacate awards for irregularity after the arbitral proceedings.283 At first blush, this double-barreled judicial review seems to eliminate any nondelegation issue.

However, Rent-A-Center’s approach to delegation clauses changes the landscape dramatically. Consider a hypothetical based on the facts of Rent-A-Center and Concepcion. Jackson signs up for wireless service based on the promise of a “free” cellular phone.284 His service agreement contains an arbitration clause that limits all discovery to one set of interrogatories.285 After Jackson’s service begins, he receives a “bill stuffer” with a new arbitration clause that abolishes discovery completely and contains a class arbitration waiver.286 Jackson files a class action complaint in district court, alleging that the

283 Id. §§ 10–11.
284 Cf. Laster v. T-Mobile USA, Inc., No. 05cv1167, 2008 WL 5216255, at *1 (S.D. Cal. 2008). Laster was the trial court opinion in the case that eventually became Concepcion.
wireless service carrier fraudulently charged its customers $100 for the supposedly “free” phone. Before it orders arbitration, the court must determine whether (1) the first version of the arbitration clause is unconscionable because it limits discovery; (2) the second version of the arbitration clause is unconscionable because it limits discovery even more; (3) the class arbitration waiver is unconscionable because it deters the prosecution of low-value claims; and (4) the second version of the arbitration clause is invalid as an improper unilateral amendment.

Now suppose Jackson’s service agreement also contains a delegation clause. The court may decide only the narrow issue of whether the delegation clause is unconscionable. That is it. And the delegation clause most certainly is not unconscionable. The limitations on discovery in the underlying arbitration clause may make it nearly impossible for Jackson to pursue his fact-sensitive substantive claims, but they do not make it burdensome for him to litigate the pure question of law of whether the delegation clause is invalid. Even if the class arbitration waiver, the discovery-limiting arbitration clause, or the “bill stuffer” would almost certainly be invalid, under mandatory authority the court must submit these disputes to arbitration. The court must do so even though arbitrators need not follow precedent and thus can flout controlling law. As such, the delegation clause eviscerates the first layer of judicial review under the FAA and deprives courts of their traditional role as bulwarks against over-reaching arbitration provisions.

Compounding this lack of judicial oversight, virtually all consumer and employee contracts already contain delegation clauses—although virtually no consumers and employees are aware of this fact. Rather than expressly stating that they empower the arbitrator to determine whether the arbitration clause is valid, these contracts incorporate by reference the rules of the American Arbitration Association (AAA). In turn, the AAA’s rules empower the arbitrator to “rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.” Accordingly, in Awuah v. Coverall North America, Inc., the First Circuit held that a standard form franchise contract contained a delegation clause simply because it stated that “arbitration shall be in


accordance with the then current Rules of the American Arbitration Association.”  

The ubiquity of these “ghost” delegation clauses effectively reduces court oversight of the content of arbitration clauses to ex post consideration of the propriety of an arbitrator’s award. This inquiry takes place under “one of the narrowest standards of judicial review in all of American jurisprudence.” Indeed, to preserve arbitration’s efficacy as a dispute resolution mechanism, courts can set aside an arbitrator’s ruling only for extraordinary defects. Under the FAA, these grounds include “[w]here the award was procured by corruption, fraud, or undue means,” where “there was evident partiality or corruption in the arbitrators,” or where “the arbitrators exceeded their powers.” Courts can also vacate an award for “manifest disregard” of law, but “only in ‘those exceedingly rare instances where some egregious impropriety on the part of the arbitrator[ ] is apparent,’” such as when a plaintiff presents convincing proof that the arbitrator “recognized the applicable law and then ignored it.”

Applying these deferential standards, judges are especially unlikely to second-guess an arbitrator’s resolution of fact-sensitive issues such as unconscionability. To return to my hypothetical case involving Jackson’s class action, suppose it arose in California. The

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290 Lattimer-Stevens v. United Steelworkers of Am., 913 F.2d 1166, 1169 (6th Cir. 1990).

291 See, e.g., Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (“Limited judicial review is necessary to encourage the use of arbitration as an alternative to formal litigation.”); Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) (“Arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.”).


discovery-abolishing arbitration clause would almost certainly be invalid, since the California Supreme Court has held that plaintiffs are entitled to “discovery sufficient to arbitrate their . . . claim[s].”

Likewise, the class arbitration waiver would fail because individual consumers lack incentives to prosecute $100 claims on an individual basis. Nevertheless, suppose that the arbitrator enforced both provisions. Given the amorphous nature of unconscionability—a doctrine built around inherently subjective notions of fairness—one will almost always be able to argue with a straight face that the arbitrator was correct. For instance, the defendant in Jackson’s case could bolster the arbitrator’s ruling by analogizing to California cases that have both upheld severe limitations on discovery and rejected unconscionability challenges to class arbitration waivers on the grounds that several hundred dollars in damages is “not . . . a small amount of money.” Even if these arguments would not survive traditional appellate review, they likely are strong enough to disprove that the arbitrator “ignored” controlling law and to immunize the arbitrator’s award in district court.

In sum, the delegation clause all but abolishes court oversight of private procedural rulemaking. Courts once struck down flagrantly one-sided arbitration clauses rather than granting motions to compel arbitration; now they must defer to the arbitrator’s determination of whether the arbitration itself is fair. This meager form of judicial review is a far cry from the direct veto of privately made law that the Court has previously upheld in private nondelegation challenges. The

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296 See Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (holding that class arbitration waivers in contracts of adhesion are unenforceable when individual damage awards will be small).
297 See, e.g., Dotson v. Amgen, Inc., 104 Cal. Rptr. 3d 341, 349 (Ct. App. 2010) (upholding arbitration clause that “purports to limit discovery to one deposition of a natural person”).
299 The only cases of which I am aware in which a court confronted an arbitrator’s assessment of unconscionability have upheld the award. Some of these cases affirmed an arbitrator’s decision that a term was unconscionable. See, e.g., Jacada (Eur.), Ltd. v. Int’l Mktg. Strategies, Inc., 401 F.3d 701, 713 (6th Cir. 2005) (affirming arbitrator’s decision to strike liability-limiting clause), overruled on other grounds by Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576 (2008). Other cases affirmed an arbitrator’s decision that a term was not unconscionable. See, e.g., Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 265 (Tex. App. 2003) (“[T]he failure to find that the Lawyers’ fees were unconscionable is not in manifest disregard of the law.”). Given the extreme pliability of unconscionability doctrine, it seems reasonable to assume that courts will continue to exhibit this level of deference to arbitrators who decline to invalidate contract terms.
Court's reading of the FAA thus allows private actors to create rights-altering procedural rules through a process that neither internalizes the wishes of affected parties nor is subject to meaningful governmental control.

III
NONDELEGATION AS A LIMIT ON THE FAA

In this Part, I argue that recognizing that the FAA raises nondelegation issues should lead the Court to reconsider two important policy issues: (1) the intersection of private procedural rulemaking and substantive rights and (2) the rules governing delegation clauses. Using the specific example of FAA preemption, I also explore how future judges and litigants might combine the private nondelegation rule and the canon of constitutional avoidance to reject expansive readings of the statute.

A. Rethinking the FAA's Effect on Substantive Rights

From a nondelegation perspective, the most glaring flaw in the Court's jurisprudence is its assumption that excessive private procedural rulemaking does not alter substantive outcomes in consumer and employment cases. As I have explained above, the Court has made it exceedingly difficult for plaintiffs to invalidate arbitration clauses under the vindication-of-rights and unconscionability doctrines.\(^{300}\) In response, companies have transformed the FAA into what the nondelegation doctrine forbids: a private liability reform statute. Acknowledging the nondelegation issue might prompt the Court to reconsider the interplay between modified procedural rules and the substantive law. In an article written just before his recent, untimely death, Richard Nagareda notes that the Court's rosy view of procedural rulemaking under the REA mirrors its rosy view of procedural rulemaking under the FAA.\(^{301}\) The Court has never found a rule promulgated by the Advisory Committee improperly to "abridge, enlarge, or modify any substantive right."\(^{302}\) Instead, the Court has created a lenient test that asks only if rules are "rationally capable" of being classified as procedural.\(^{303}\) Nagareda calls this the "Will Rogers

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\(^{300}\) See supra notes 253–55 and accompanying text.


\(^{302}\) 28 U.S.C. § 2072(b) (2006); see also Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) ("[W]e have rejected every statutory challenge to a Federal Rule that has come before us.").

theory of the [REA]—one whereby the Court has never yet met a Federal Rule that it didn’t like.”304 He detects the same sanguinity about procedure and substance in the Court’s repeated denials that the FAA affects substantive rights.305

Nondelegation analysis reveals the fallacy of the Court’s symmetrical treatment of the REA and FAA. Even if federal procedural rulemaking does impact substantive laws—making the REA a potentially troubling private delegation—the representativeness of the rulemaking process and Congress’s veto power over the Advisory Committee assuage transparency and neutrality concerns. The FAA contains no such safeguards. Thus, the Court’s “Will Rogers” approach to the FAA overlooks the fact that rights-altering private procedural rules are more troubling than rights-altering public procedural rules.

The Court could acknowledge the FAA’s special delegation dangers in two ways. First, it could throttle back on the showing required to invalidate an arbitration clause. In Green Tree Financial Corporation-Alabama v. Randolph, the leading vindication-of-rights case, the plaintiff argued that because the arbitration clause said nothing about fees and costs, it created the risk that arbitration would be prohibitively expensive.306 The Court rejected this argument but left the door open for future plaintiffs to assert the same theory on a better-developed factual record.307 The Court could grant certiorari in precisely such a case and establish a summary judgment-like standard entitled a plaintiff to a judicial forum if she introduces sufficient evidence to support a reasonable inference that arbitration prevents her from effectively vindicating her statutory rights.

Second, in order to restrict the FAA’s impact on substantive rights, the Court should seize the opportunity in Concepcion to preserve class arbitration. There are indications that the Court will do just the opposite. In its recent decision in Stolt-Nielsen v. AnimalFeeds International Corp., the Court strongly implied that class arbitration is inconsistent with the FAA.308 According to the Court, class arbitration “changes the nature of arbitration to such a degree that it cannot

304 Nagareda, supra note 301 (manuscript at 17).
305 Id. (manuscript at 21) (noting modern Court’s opinion that arbitration amounts to “a mere change of forum” that does not affect substantive rights). Nagareda notes that the similar treatment of the REA and FAA appears anomalous, as “private contracts do not go through anything like the Rules Enabling Act process.” Id. (manuscript at 22).
307 Id. at 92 (“How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss.”).
308 130 S. Ct. 1758 (2010).
be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."\(^3\)\(^{309}\) This language suggests that the FAA forbids class arbitration unless the parties affirmatively agree to it, a conclusion which would make class arbitration waivers superfluous.

However, importing this logic into the context of consumer and employment contracts would magnify arbitration’s effect on substantive rights and thus would push the FAA deeper into nondelegation terrain. Just as excessive arbitral costs can thwart the exercise of rights, mandating that all arbitration take place on an individualized basis deters plaintiffs from prosecuting low-value claims.\(^3\)\(^{310}\) Indeed, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.”\(^3\)\(^{311}\) And when statutory rights are at issue, the problem is not simply that class arbitration waivers are unfair. It is that, in the aggregate, they “write private enforcement out of the underlying statute.”\(^3\)\(^{312}\) Allowing the FAA to swallow the class action device would thus allow private parties to rewrite substantive laws. The Court should hold that the FAA does not preclude class arbitration of low-value consumer and employment disputes.

B. Heightened Regulation of Delegation Clauses

To sidestep constitutional concerns, the Court could also reconsider the way it has conceptualized delegation clauses. Giving companies the virtually unfettered right to assign to the arbitrator the question of whether the arbitration clause is valid impacts the second and third factors in the private nondelegation test. It distorts the representative, consensual nature of the contracting process by forcing consumers and employees to arbitrate even when they truthfully deny having agreed to do so. In addition, it eradicates state oversight of arbitration clauses for fairness.

An important move in the right direction would be for the Court to limit its dicta in Rent-A-Center about the exceedingly narrow scope of judicial review of a delegation clause. Recall Justice Scalia’s explanation that Jackson would almost certainly have lost had he argued that the underlying arbitration clause’s discovery limitations and fee-

\(^{309}\) Id. at 1775 (citations omitted).
\(^{310}\) See supra note 153 and accompanying text (discussing California Supreme Court’s reasoning in Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005)).
splitting provisions made it unfair for him to arbitrate the issue of the arbitration clause's validity. According to Justice Scalia, then, a court's role in assessing whether a delegation clause is unconscionable turns solely on how onerous it would be for a plaintiff to arbitrate the issue of the arbitration clause's enforceability. Scalia's approach removes from court supervision terms that are exceedingly likely to impair a plaintiff's ability to vindicate her rights—for example, a class action waiver—but that do not bear on the discrete issue of whether it is fair to arbitrate the validity of the arbitration clause.

The Court could remedy this problem by recognizing a "look through" doctrine that expands the scope of judicial review beyond the question of how difficult it is for the plaintiff to arbitrate the arbitration clause's validity. Under this rule, courts could consider the content of the underlying arbitration clause when deciding whether to enforce a delegation clause. Out of deference to the delegation clause, courts need not apply full-on unconscionability analysis when they review the underlying arbitration clause; rather, they could apply a modified version of the doctrine that smokes out flagrant unfairness. For instance, a court could enforce borderline clauses and invalidate delegation clauses only when the underlying arbitration clause contains multiple remedy-stripping provisions or other terms that controlling precedent forbids. By ensuring that judges continue to police arbitration clauses for fairness, the "look through" rule would add a prophylactic layer of governmental review to proceedings under the FAA, thus diminishing private delegation concerns.

C. The FAA and Constitutional Avoidance

Finally, at the very least, judges and litigants should invoke the nondelegation doctrine in the future to limit the FAA's scope. Even if the Court has not invalidated a statute on nondelegation grounds since Carter, it has repeatedly invoked the rule in conjunction with the canon of constitutional avoidance "to giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." Likewise, federal appellate courts continue to read a

315 See supra notes 217–22 and accompanying text (discussing Carter and its treatment by lower courts).
316 Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); see also Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (rejecting government's argument that Occupational Safety and Health Act allowed Secretary of Labor to regulate exposure to even insignificant amounts of chemical benzene in workplace on grounds that reading statute so broadly would transform it into "sweeping delegation of legislative power").
wide array of laws narrowly to sidestep thorny nondelegation questions. Thus, if nothing else, the nondelegation doctrine lives on as a tool of statutory interpretation—a force that counsels against interpreting statutes to authorize expansive grants of legislative power.

For instance, the canon of constitutional avoidance could be valuable in the brewing storm over the scope of FAA preemption. The extent to which the statute trumps state law has never been clear. On the one hand, it undeniably eclipses state regulation that singles out arbitration clauses for invalidity. For example, Alabama cannot outlaw predispute arbitration clauses, and Montana cannot condition the validity of such clauses on drafters complying with idiosyncratic notice requirements. On the other hand, there is no definitive answer as to whether, and under what circumstances, the FAA overrides state statutes that are capable of nullifying arbitration clauses but are also capable of nullifying other kinds of contracts. Do these laws yield to the FAA because they are not “grounds as exist at law or in equity for the revocation of any contract” —i.e., traditional contract defenses such as fraud, duress, and unconscionability? Or do these laws survive because they do not apply exclusively to arbitration clauses and thus do not “place[] [such clauses] in a class apart from ‘any contract’”?

For example, California’s Consumers Legal Remedies Act (CLRA) governs agreements for “the sale or lease of goods or services to any consumer.” It expressly permits class actions and for-
bids “[a]ny waiver by a consumer of the provisions of this title.” Does the FAA preempt the CLRA’s nonwaivable right to assert a class action when a drafter employs a class arbitration waiver in a consumer contract? In 2003, the Ninth Circuit held that because the CLRA relates only to consumer contracts—and not “any contract” in the language of the FAA—it was preempted. In 2010, however, a California appellate court reached the opposite conclusion, reasoning that the CLRA did not discriminate against arbitration because it preserved the class action device in both arbitration and nonarbitration contracts. Which view is correct?

Reading the FAA as overriding the CLRA would raise private nondelegation concerns. As I have argued above, class arbitration waivers in consumer contracts are a form of private law revision, insofar as they eliminate the class action device and warp substantive laws. In fact, to the extent that the private nondelegation doctrine stands for the proposition that Congress cannot assign lawmaking responsibility to self-interested, unelected private parties, a robust FAA preemption doctrine would be a double whammy: It would enable companies not only to serve their own ends but also to thwart the wishes of democratically accountable state legislatures. The desire to avoid grappling with the constitutionality of such a rule should prompt courts to adopt a relatively modest view of FAA preemption in the context of state legislation that does not apply only to arbitration clauses.

### Conclusion

Two statements recur time and time again in the Court’s arbitration decisions. The first is that arbitration “is a matter of consent, not coercion.” But even the bare choice to arbitrate is often nonconsensual. That conclusion follows no matter one’s political beliefs or views of adhesion contracts; indeed, it is woven into arbitration jurisprudence through the separability doctrine and the delegation clause. Second, the Court often asserts that “by agreeing to arbitrate[,] . . . a party does not forgo [any] substantive rights.” That is a dubious

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324 Id. § 1781(a).
325 Id. § 1751.
326 Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir. 2003).
327 Fisher v. DCH Temecula Imps. LLC, 114 Cal. Rptr. 3d 24, 34 (Ct. App. 2010).
328 See supra text accompanying notes 256–62.
330 See cases cited supra note 253.
normative judgment masquerading as an empirical claim. What the Court is really saying is that under the FAA, arbitration is rooted in consent (even when it is not) and does not affect substantive rights (even when it does).

This understanding of the statute violates the private nondelegation rule. First, it gives private parties wide leeway to create procedural rules—even when rampant private procedural rulemaking likely dilutes substantive rights. Second, it allows businesses to impose these rules on consumers and employees through a process that does not internalize their interests. Finally, it dispenses with meaningful state oversight. Going forward, the Court should either explain how the FAA is consistent with the private delegation doctrine or limit the statute.
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What If? FAA Jurisprudence Under a Truly Conservative Court

Richard Reuben

Over the last half century, conservatives have often criticized the U.S. Supreme Court for its liberal activism, and Republican presidents have responded by putting several justices on the court who are more committed to a conservative judicial philosophy. Yet, many commentators have argued that the Supreme Court’s arbitration jurisprudence has been anything but conservative. They would contend that the court has manipulated the Federal Arbitration Act to serve as a docket-clearing device, allocating many civil cases to arbitration that historically would have been decided by courts of law. In this article, I will conduct a bit of a thought experiment, looking at several key Supreme Court cases that have been criticized as activist and asking what the present state of arbitration and arbitration law might be if the court had decided them under well-recognized principles of conservative jurisprudence. Those cases include: Prima Paint v. Flood & Conklin, Southland v. Keating, Gilmer v. Interstate/Johnson Lane, Circuit City v. Adams, and AT&T v. Concepcion.
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A Senior Fellow at the Law School’s Center for the Study of Dispute Resolution, Professor Reuben is the co-author of one of the country’s leading ADR law school casebooks, *Dispute Resolution & Lawyers* (4th ed. 2009) (with Leonard L. Riskin, James Westbrook, Chris Guthrie, Jennifer K. Robbennolt, and Nancy Welsh). His research emphasizes the relationship between dispute resolution and law, as well as democratic governance, and often uses arbitration as a context for exploring the issues. He is also one of the nation’s leading authorities on confidentiality in ADR processes, and served as a Reporter for the Uniform Mediation Act, which has already been adopted in several states. Professor Reuben’s articles have appeared in *the California Law Review, UCLA Law Review, Harvard Negotiation Law Review, Law & Contemporary Problems* (Duke), and the *SMU Law Review*, among others.

He was the Editor of *Dispute Resolution Magazine*, a quarterly publication of the American Bar Association, from 1996-2007, and currently serves on its Board of Directors. Professor Reuben also serves as the founding chair of the ABA Section of Dispute Resolution’s Committee on Public Policy, Participation, and Democracy. He served for two years as the Associate Director of the Stanford Center for Conflict and Negotiation at Stanford University, the William and Flora Hewlett Senior Fellow in Dispute Resolution at Harvard Law School for two years, and on the Board of Directors of the Conflict Resolution Information Project for five years. He regularly serves as a judge for national competitions for scholarly achievement in dispute resolution, has consulted with a number of governmental and non-governmental organizations, including the Missouri Supreme Court, the U.S. Department of Justice, and the World Bank International Finance Corporation.

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Professor Reuben received a BA in History from the University of Georgia, a BA in Journalism from Georgia State University, a Juris Doctorate from the Georgia State University College of Law, a Masters in the Science of Law from Stanford Law School, and a Doctor of Laws from Stanford Law School.
Crazy, Stupid Love
Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence

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But most striking of all [in experiments measuring neurological response through functional magnetic resonance imaging] was the flurry of activation in the insular cortex of the brain, which is associated with feelings of love and compassion. The subjects’ brains responded to the sound of their phones as they would respond to the presence or proximity of a girlfriend, boyfriend, or family member.

In short, the subjects didn’t demonstrate the classic brain based signs of addiction. Instead, they loved their iPhones.

Martin Lindstrom, You Love Your iPhone. Literally., N.Y. TIMES, Oct. 1, 2011 at A10, col. 4.1

Infatuate 1: to cause to be foolish: deprive of sound judgment 2: to inspire with a foolish or extravagant love or admiration. – infatuation, n.


Love 1 a (1): a strong affection for another arising out of kinship or personal ties . . . (3): affection based on admiration, benevolence, or common interests . . . 2: warm attachment, enthusiasm, or devotion . . . 3 a: the object of attachment, devotion, or admiration.


Collectively, the U.S. Supreme Court, even if not “in love” with arbitration, appears to at least have iphone-like attachments to arbitration, subject to revision only in the service of other questionable preferences such as support for the comparatively richer and more powerful litigant.

1 See also id. at A10 at col. 2 (“Friends who have accidentally left home without their iPhones tell me they feel stressed-out, cut off and somehow un-whole. That sounds a lot like separation anxiety to me. Not long ago, I headed an effort to identify the 10 most powerful, affecting sounds in the world: I found that a vibrating phone came in third, behind only the Intel chime and the sound of a baby giggling. Phone vibration syndrome is the term I use to describe our habit of scrambling for a cellphone we feel rippling in our pocket, only to find out we are mistaken.”)

2 I have edited the dictionary definition of “love” to exclude, among other irrelevant definitions “attraction based on sexual desire.” See id. at 690. My view of the Supreme Court’s embrace of arbitration is very critical, but I am not accusing the Justices of literally being hot for arbitration.
Infatuation, at least in adjudication, is perhaps something worse than love (filial, deep, complex, or romantic) in that infatuation connotes the type of head-over-heels, uncritically high regard or worship one associates with a “crush” or placing an object of affection on a figurative pedestal.

During the past three decades, the U.S. Supreme Court’s approach to arbitration disputes has been more than just mere affection for arbitration but also lacks the nuanced understanding and realistic appraisal of true love. Rather, the Court’s arbitration decisions have reflected something more like a crush or obsession that tends to distort judgment as the person in the grip of infatuation views the object of affection as though it had no faults and with blinders as to the contextual realities surrounding this outpouring of often one-sided emotion.

This uncritical amore for arbitration – and a corresponding if subconscious derogation of litigation, at least if resorted to by consumers or employees – has produced a body of Federal Arbitration Act jurisprudence that has been something far short of the U.S. Supreme Court’s finest hour. It seems that the only time the Court does not make figurative goo-goo eyes about the wonder of arbitration is when the Court arbitration becomes too close to litigation by seeking classwide treatment of disputes, something largely opposed by the business community with which the Court is arguably even more infatuated.

Fifteen years ago, the Court’s preference for arbitration was so pronounced that I described it as the Court ignoring important issues of consent in contracting. See Jeffrey W. Stempel, Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent, 62 BROOK. L. REV. 1381 (1996).

At that time, the Court’s uncritical embrace of arbitration was only a dozen years old, a pre-teen crush of sorts. The Court’s strongly pro-arbitration jurisprudence, which began in 1983 or 1984 (depending on which arbitration critic you read) or perhaps earlier, is now in its late 20s, a time when even the most romantic young man or woman has tended to have grown up emotionally, or at least been stripped of adolescent naivety.

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3 I talk of the “Court” primarily as a matter of shorthand, recognizing of course that many of the Court’s arbitration decisions have involved a division among the Justices, including some 5-4 votes on important issues. To be sure, some of the Justices are not under the spell of arbitration – but the Court as a whole appears to be.


5 See discussion of pre-Moses H. Cone cases, infra.
But the Court’s relentless veneration of arbitration continues unabated, as reflected most recently and disturbingly in *AT&T Mobility, Inc. v. Concepcion*, 131 S. Ct. 1740 (2011). In *Concepcion*, the Court struck down a decision refusing to uphold an arbitration clause restricting class actions based on California state contract law that deemed unconscionable such contractual limitations on consumer remedies. As discussed below, *Concepcion* is a particularly glaring display (by a bare 5-4 majority vote) of the Court’s infatuation over arbitration overcoming what should have been its fidelity to the language, legislative intent, and purpose of the Arbitration Act as well as adequate appreciation of states’ rights and the legal system’s commitment to making the class action remedy available in apt cases.

Rather than solely picking on *Concepcion* as a particularly egregious example of the continued swoon of the Court (or at least five members of the Court) regarding arbitration or attacking many of the Court’s modern arbitration decisions on their outcomes alone, I want to focus on the degree to which the Court’s arbitration jurisprudence has been disturbing not merely because it is often wrong (at least in my eyes, those of many or most academic commentators, and the dissenting Justices) but because it also has so frequently been at odds with the professed jurisprudential principles of the very Justices who have favored outcomes of enforced arbitrability.

When the arbitration decisions of the past three decades are examined under the majoritarian Justices’ own standards of jurisprudence and statutory construction – widely accepted principles of jurisprudence and statutory interpretation – the decisions frequently fail the test of consistency and principle. In arbitration case after arbitration case, a majority of the Court has consistently been willing to jettison its alleged polestar jurisprudential principles in favor of compelling arbitration. It has been result-oriented adjudication that ranks among the worst examples in the Court’s history.

As a result, the Court has expanded the scope of the Federal Arbitration Act in ways that are inconsistent with the role of the judiciary as fair and principled stewards of the “rule of law.” Instead of consistent application of bedrock legal principles, the pro-arbitration Court decisions of the modern era have been just that – pro-arbitration decisions fueled by infatuation with arbitration (or concern that arbitration remain different than litigation) rather than the type of reflective assessment one expects from the bench.

In “going gaga” over arbitration, the Court has diminished itself in the eyes of wide segments of the academy, the legal profession, and the public. As Justice Jackson famously observed, the Court is not infallible but it is final. As a result, American law is for the moment “stuck” with the Court’s arbitration decisions. But they have been controversial enough to fuel at least some non-trivial efforts at a legislative response, something that could become reality should the Democratic Party regain control of Congress. Further, many of the arbitration precedents were either analytically infirm or the result of a closely divided Court. They remain vulnerable to overruling depending on the luck of incumbent longevity and whether retirements or deaths take place during the term of a Republican or Democratic president.
Although many questions of law are sufficiently political to engender opposition thoughts of turning the tables in the future, the arbitration precedents are a particular lightning rod for criticism as well as possible legislative reform. They are (at least in my view) particularly bad Court decisions not solely because of their outcomes (e.g., requiring employees to arbitrate, shunting disputes to potentially unfair forums, or preventing class action treatment for the very types of cases for which they were designed). Rather, the Court’s arbitration decisions may perhaps be most condemnable because they reflect Court majorities in which the prevailing Justices were so attracted to arbitration (consciously or subconsciously) on grounds of personal preference (or perhaps public policy) that they acted in derogation of their own asserted long-time jurisprudence of adjudication and correct construction of positive law.

The Jurisprudence of the Justices

The Justices in general, and particularly the Justices frequently in the majority of decisions supporting arbitration generally embrace – or at least say that they embrace – mainstream judicial approaches, albeit with a conservative slant in many cases, particularly in matters of statutory interpretation. Although the Court’s major arbitration cases present a range of legal questions, all are in the main statutory construction cases. Regarding statutory construction, the Supreme Court during the same period that it longingly embraced arbitration, has also professed fidelity to a statutory construction regime emphasizing the following interpretative tools.

Statutory Text

The Court has repeatedly stated that the starting point for assessing a statute such as the Arbitration Act is its text. Justice Antonin Scalia is famous for his heavily textualist brand of statutory construction that looks almost exclusively at the text of the statute and eschews examination of the legislative history of the law or its overall purpose. But even non-textualists such as Justice Stephen Breyer (a comparative fan of legislative history and deferring to agency constructions of a statute) agree that the text of the law is the most important consideration and the place at which statutory construction must begin. Chief Justice Roberts (and Chief Justices William Rehnquist and Warren Burger before him) and the other Justices all appear to agree on this point, with Justices Kennedy, Thomas, and Alito appearing closer to Justice Scalia’s highly textual orientation. Other Justices serving during the modern pro-Arbitration era of the Court (Justices Blackmun, O’Connor, Souter) also reflected the legal profession’s general preference for the primacy of text in statutory construction, even if the primacy is at times a “soft” one for some Justices.

Legislative Intent

All members of the Court during the modern pro-arbitration era, except Justice Scalia, acknowledge that the drafting history and legislative intent of a statute are relevant to determining the meaning and application of a statute in particular contexts. The Justices vary to the degree with which they will end their inquiry if the text appears to direct a result. Some appear to see legislative history as inappropriate unless the statutory text is ambiguous while others appear willing to consult legislative history as a check on their reading of the text. A few
may on occasion even suggest that sufficiently clear legislative intent may be invoked to
determine if seemingly clear statutory language is a mistake of drafting error. The Justices also
frequently differ, of course, as to whether particular language is ambiguous.

**Legislative Purpose**

Legislative intent connotes a relatively specific intent of the legislature to achieve a
particular result or that statutory language be applied in a rather specific way in a situation
envisioned by the drafters. Legislative purpose connotes more general goals of the statute. For
example, where the legislative history reflects congressional consensus that particular legal
precedents be overturned, this is a matter of legislative intent. The Pregnancy Discrimination
Act, for example, was designed specifically to overrule the Court’s 1976 *General Electric*
decision and deem pregnancy discrimination a violation of Title VII.

Where, by contrast, the legislative history reflects more general congressional desire to
achieve certain results to prevent or discourage undesirable results, this is a matter of legislative
purpose. For example, the Private Securities Litigation Reform Act of 1995 was designed to
make it more difficult to bring securities violation lawsuits on the basis of hunch and therefore
required more particularized pleading. But the statute did not specifically state whether the
specified pleading standards found in caselaw applying Fed. R. Civ. P. 9(b) were adequate.
Based on the legislative purpose of the law and its enactment notwithstanding the existence of
Rule 9(b), a judge might view the legislative purpose as requiring more particularized pleading
than found under the Rule in cases subject to the Act. Conversely, a judge might find
congressional silence on the issue an indication that Congress, despite its general concerns over
weak securities claims filed on a hunch, was simply wanting something more than mere notice
pleading and wider application of cases taking a strong view of Rule 9(b).6

Another example is provided by the Sherman and Clayton Antitrust Acts, which were
both designed to fight monopolization and to forbid contracts, combinations and conspiracies in
restraint of trade – but Congress was relatively vague about how that should be done. Although
there is some legislative history suggesting that the laws were designed to prevent specific
behemoths such as the Sugar Trust or the domination of the oil industry reflected by John D.
Rockefeller’s Standard Oil Company (prior to its becoming Amoco, Esso, Enco, Standard Oil,
etc.), the statutes are in the main laws expressing general purposive guidelines. As a result, the
courts have tended to apply “rules of reason” rather than per se rules in many cases challenging
alleged anti-competitive conduct. Judge Posner has characterized the Sherman Act as something

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6 Justice Stevens was perhaps the best known exponent of what is sometimes called the “dog didn’t bark”
approach to statutory construction. Under this view, congressional silence can be regarded as meaningful and
frequently is invoked to suggest that a newly enacted statute was not designed to overturn an established practice
touching on the area of statutory concern. If Congress had wanted to make a change, it logically would have said so
on the face of the statute or in the legislative history. That Congress did not speak implies it intended no such
change. The metaphor is taken from the Sherlock Holmes story involving the theft of a prize racehorse at night from
the stable in which the family dog did not bark despite this burglary. Holmes correctly discerns that the thief must
have been someone well-enough known to the dog such that the animal was not alarmed enough to bark. *See* Arthur
Conan Doyle, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* (various editions and dates).
of a common law statute, one that seems to invite judicial application because of the absence of specific directives in the law’s text or legislative history.

In its use of legislative purpose in construing the antitrust laws, the Court has used legislative purpose to trump the actual text of the law. For example, if the Sherman Act were read literality and applied to “any” contract restraining trade, franchises and licenses would be forbidden. This view can also be considered akin to the “absurd result” canon of statutory construction, a principle positing that statutory text will not be applied so literally as to render an absurd result.

**The Hierarchy of Legislative History**

Not all legislative history is created equal. In general, there is a preference, in roughly the following order, for

- Committee Reports
- Statements by the Chief Authors of the Legislation
- Constructions Consistent with Hearing Testimony and Congressional Reaction
- Floor Statements
- Contemporary Accounts of Enactment of the Legislation

**Canons of Construction**

Canons of statutory construction are general rules for interpreting the laws and are derived from common understandings of drafting conventions, the legislative process, public policy, or jurisprudence. Although varying in their affection for particular canons, all of the Justices appear to find them potentially useful in particular situations. Among the more commonly invoked canons are:

**Canons of Textual Construction**

- The Plain Meaning Rule: This requires adherence to the clear linguistic meaning of statutory text unless this would bring about an absurd result or there is evidence that the text is in error in departing from the specific intent of the legislature.

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7 This discussion of canons of construction is drawn largely from Appendix B to William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy (4th ed. 2007), which presents an exhaustive review of the canons. This outline’s list, although probably far longer than necessary for examining the Supreme Court’s arbitration cases, of necessity eliminates listing of canons that have not played a role in the Court’s enforcement of the Federal Arbitration Act.
• *Expressio unius exclusio alterius*: The expression of one thing suggests the exclusion of things not included in the list or catalog.

• *Nocitur a sociis*: A general term is construed in a manner consistent with similar specific terms in a statute.

• *Ejusdem generis*: A general term is construed to reflect the class of objects shown in exemplary or specific terms used in the statute.

• Preference for Ordinary Meaning Over Technical or Specialist Meaning (unless there is strong legislative history indicating congressional preference for the specialized meaning).

• Continued use of the settled meaning of terms previously defined in adjudication.

• Use of dictionary definitions (unless there is evidence to suggest this was not intended by Congress).

• Deference to experts, such as administrative agencies, regarding the meaning of a term.

• In the absence of information to establish a definition, resort to the default definitions of terms set forth in the Rules of Construction Act, 1 U.S.C. §1 if available.

**Grammar and Syntax Canons**

• Punctuation Rule

• Grammar Rule

• Rule of the last antecedent

• “May” implies discretion while “shall implies that something is mandatory or less discretionary.

• “Or” means in the alternative and is disjunctive rather than conjunctive.

**Canons of Structural Integrity of the Statute**

• The Whole Act Rule: This provides that particular terms or provisions of a statute must be construed with reference to the entire statute and commands and goals of the legislation.
**Presumption of Purposive Amendment:** A view that amendments to a statute, unless specifically denominated as “housekeeping” amendments, are designed to have a significant substantive impact on the statute and its meaning.

**Avoidance broad constructions of the statute unless justified by the statutory language or indications that Congress intended the statute to have broad construction.** This canon sometimes comes into tension with the canon that remedial legislation is to be liberally construed to effect its purpose.

**Specific terms of a statute designed to deal with a particular issue are generally given greater weight than more general provisions of the statute.**

**Exceptions to the reach of the statute expressed by the legislature should be strictly construed in order to prevent evisceration of the statute through expansive application of exceptions.**

**Canons Expressing a Preference for Continuity in Law**

**A Presumption of Stare Decisis**

**But wrongly decided precedents can be overruled.**

**A presumption against repeals by implication.**

**A presumption that statutory terms are used consistently across statutes.** Related to this is the *in pari materia* rule providing that the use of similar statutory provisions in comparable statutes will be applied in the same way.

**Views of a later Congress are generally not seen as illuminating the views of an enacting Congress.**

**Canons Reflecting Substantive Policy Generally Embraced by the Courts**

**Federalism Canons**

**A strong presumption against statutory construction that would alter the federal-state balance of power, including a “super strong” rule against federal invasion of core state functions.**

**A presumption against federal preemption of traditional state regulation, although this presumption can be overcome by clear statutory language or evidence of clear congressional purpose, so long as Congress has authority to so act pursuant to the Supremacy Clause.**

**Due Process Canons and Canons Derived from Common Law**
• A presumption against construing statutes in a manner that works to deny a jury trial otherwise available under the Constitution.

• A presumption in favor of judicial review.

• A presumption in favor of enforcing forum selection clauses.

Although, as discussed below, my view is that the bulk of these canons or other conventions of statutory construction weigh against the most pre-arbitration jurisprudence of the modern Court, the Court’s support of arbitration is now sufficiently established that legal scholars have posited that we now also have canons of construction favoring arbitration. See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy App. B. at 38 (4th ed. 2007) (noting that there is “[f]ederal court deference to arbitral awards, even where the Federal Arbitration Act is not by its terms applicable” (citing United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 36-37 (1987)) and that there exists a “[s]trong presumption in favor of arbitration” (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) and Groves v. Ring Screw Works, Ferndale Fastener Div’n, 498 U.S. 168, 173 (1990) and a “[r]ule favoring arbitration of federal statutory claims.” (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-27 (1987)).

As one might expect based on the title of this outline, I do not accept the premise that we have now entered an era where there legitimately exists a “pro-arbitration” canon or set of canons because in my view so much of the pro-arbitration jurisprudence of the last thirty years has emerged because the Court failed to faithfully apply more long-standing canons and principles of statutory construction. In particular, I am critical of the Court’s unwillingness to follow statutory text or legislative history when it augured against arbitration and the Court’s failure to appreciate the federalism implications of Court decisions riding roughshod over the states’ traditional powers of contract construction and policing of allegedly unfair contracts. In addition, the Court has tended to favor arbitration over litigation even when there are strong indications that federal government actors recognized and supported the importance of the litigation option.

Although there has not been a great amount of systematic empirical analysis of the individual Justices’ use of the canons, it appears that the more politically and jurisprudentially conservative Justices make more frequent use of the canons, perhaps as an alternative to greater resort to legislative history or more open-ended public policy analyses. For example, Justice Scalia has made use of the canons, presumably because this permits him to better construe statutory language without resort to legislative history.

More Controversial Approaches to Statutory Construction

As noted above, the mainstream approach to statutory construction embraced by the Justices generally begins with and emphasizes text but also considers legislative intent and purpose to the degree appropriate so long as it does not strain the reading of the text. The Court
as a whole has been less willing or perhaps even unwilling to endorse some of the less
established modes of statutory interpretation, which enjoy significant support in the academy.
Among these are considerations of public policy, appreciation of the interest group influence in
legislation, and the view that construction of legislation should evolve with changing
circumstances. See, e.g., William N. Eskridge, Jr., Dynamic Statutory Interpretation
(1997)(arguing that construction of statutes should evolve in manner consistent with purposes of
enacting legislature to fit changes in society, economics, business); Guido Calabresi, A
Common Law for the Age of Statues (1982)(suggesting that older statutes should be treated
like common law precedents that can, in compelling cases, be “overruled” by courts). See also
William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007
(1989)(public policy considerations frequently if tacitly used by courts in deciding cases; finding
such use appropriate and legitimate but questioning particular values emphasized in certain
decisions); Richard Stewart, The Reformation of Administrative Law, 88 Harv. L. Rev. 1669
(1975)(noting rising interest group influence on modern legislation and administrative agency
action but diffuse as to recommended reaction). See generally William N. Eskridge, Jr.,
Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes
and the Creation of Public Policy Chs. 6-8 (4th ed. 2007)(reviewing approaches to statutory
construction).

In practice, it appears that courts use a variety of approaches that permits courts more
ability to exercise personal preferences than courts willing to acknowledge. See William
Eskridge, Jr. & Philip Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan.
L. Rev. 321 (1990). In addition, there are questions of the role of the executive branch and
administrative agencies in the construction of statutes. See Cass Sunstein, Interpreting Statutes

Against this backdrop of the generally agreed groundrules of statutory construction, the
Court’s jurisprudence (even when it was less enamored of arbitration) is not a particularly fine
example of judicial craft.

Under “normal” circumstances where the Justices were consistently applying the agreed
rules of statutory interpretation, one would expect to see consistent fidelity to clear text, an effort
to vindicate any fairly discernable specific intent of the enacting Congress, decisions consistent
with the overall purpose of the statute, and respect for traditional state law prerogatives unless
areas of state autonomy were clearly superseded by a valid exercise of congressional power.

Instead, we see a mixed pattern of decisionmaking during the first six decades of the Act,
followed by growing infatuation with arbitration, reduced adherence to the traditional
groundrules of statutory construction, and finally an appallingly bad decision (AT&T v.
Concepcion) that tramples upon traditional state contract prerogatives, federal civil disputing
policy, and the legislative intent and purpose underlying the Act.

Tracking the Court on Arbitration: History Seriatim

Before Infatuation, There Was Distrust, Distain and Division
Rederiaktiebolaget Atlanten v. Aktieselskabet Korn-Og Foderstof Kompagniet, 252 U.S. 313 (1920) (often also known as The Atlanten or Korn-Og)(the latter my preference).

In this case decided shortly before enactment of the Federal Arbitration Act, the Court, (affirming a Learned Hand trial court decision and a Second Circuit decision) holds that even what appears to be a broadly worded arbitration clause in a shipping contract between merchants (with no discernable issues of consumer protection, consent, etc.) does not require arbitration. The reason: because one party sought to arbitrate an issue of breach of contract, the arbitration clause was inapplicable because the claim did not arise out of the performance of the contract because (you guessed it) the contract was not being performed due to the breach. (I’m not making this up).

The Federal Arbitration Act

Cases like Korn-Og were not that unusual. English courts resisted specific enforcement of arbitration clauses on the ground that these improperly ousted courts of their rightful jurisdiction, a view that was largely adopted in the United States. In reaction, the commercial community sought corrective legislation and obtained it with passage of the Act, now codified at 9 U.S.C. §§1-16. See Jeffrey W. Stempel, Pitfalls of Public Policy: The Case of Arbitration Agreements, 22 St. Mary’s L.J. 259, 321-23 (1990) (summarizing pre-Act common law resistant to arbitration and gestation and passage of Act.

The Act itself, passed in 1925 with an effective date of January 1, 1926 (9 U.S.C. §14), is rather short and straight-forward. After defining key terms such as “commerce” and “maritime,” the Act states

A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.


Section 3 of the statute (9 U.S.C. §3) provides that courts may issue a stay of judicial proceedings in order to permit arbitration to proceed pursuant to an enforceable agreement. Section 4 (9 U.S.C. §4) gives federal courts authority to enter an order compelling arbitration if the petitioning party to a valid arbitration agreement is “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate.”

Several sections of the Act deal with procedural matters. See, e.g., 9 U.S.C. §5 (governing the appointment of arbitrators); 9 U.S.C. §6 (providing that applications for relief are treated as motions; 9 U.S.C. §7 (governing witnesses, fees, and subpoenas; 9 U.S.C. §8 (governing admiralty matters such as seizure of vessels); 9 U.S.C. §11 (regulating modification

The Act provides strong support for enforcing arbitration awards, specifying that federal courts may confirm awards and enter judgment based on the award (9 U.S.C. §9), which in turn gives the prevailing arbitration party the normal range of judgment collection tool under applicable procedural law. Section 10 of the Act (9 U.S.C. §10) permits arbitration awards to be challenged, but on grounds considerably narrower than those available in litigation, specifically

- where the award was “procured by corruption, fraud, or undue means;
- where there was evident partiality or corruption in the arbitrators, or either of them;
- where the arbitrators erred by refusing to delay a hearing for good cause or to hear “pertinent and material evidence” or where “any other misbehavior” prejudicing the rights of the parties; or
- where the arbitrators exceeded the scope of their power in light of the matter submitted to them or “so imperfectly” executed their power “that a mutual, final, and definite award upon the subject matter submitted was not made;”

See 9 U.S.C. §10 (also specifically providing that reviewing court may direct a rehearing by the arbitrators if ground for vacating award is shown).

The final section of the Act (9 U.S.C. §16) governs appeals and reflects congressional preference (largely through 1990 amendments rather than the original 1925 enactment) to reduce appellate challenge to pro-arbitration orders but permit appellate review of orders refusing to compel arbitration or refusing to stay judicial proceedings pending arbitration.

Despite passage of the Act, there remained some judicial resistance to arbitration, as occasionally reflected in caselaw over the next 50 years.


The Court held – seemingly out of the blue – that claims arising under the Securities Act of 1933 were not subject to arbitration, regardless of the clarity of the arbitration clause, the knowing and voluntary consent of the parties, the standard practice of the industry, or the expectations of the parties.

*Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956)

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8 Section 16 states that “an appeal may not be taken from an interlocutory order” granting a stay of litigation, directing/compelling arbitration, or refusing to enjoin an arbitration except pursuant to 28 U.S.C. § 1292(b), which permits trial courts to certify for immediate review decisions involving close legal questions where the judge believes earlier appellate review will expedite ultimate disposition of the matter.
The Court held that the Arbitration Act was procedural rather than substantive and consequently was subject to the Erie doctrine, which made Vermont law applicable in the instant case. Under Vermont law, arbitration agreements of this type were unenforceable. Hence, arbitration was not required regardless of the surrounding contracting circumstances.

**Then Came Acceptance and Restrained, Realistic Affection**


Some may argue that these cases comprise the inauguration of the modern era of Supreme Court precedent favoring arbitration. In *American Mfg.* and *Warrior & Gulf*, the Court enforced arbitration agreements. In *Enterprise Wheel & Car*, the Court announced a very deferential standard for the review of labor arbitration decisions, holding that the decision would be confirmed by courts so long as the arbitrator’s decision “drew its essence” from the agreement. A cynic might note that even a horribly erroneous decision can still be one dealing with the essence or core of the agreement giving rise to the dispute.

Because these three cases were so focused on labor arbitration rather than commercial or consumer arbitration, I consider them to be precursors to the modern era. To be sure, the Court is showing signs of greater affection for arbitration but this results largely from the Court’s view that arbitration is a particularly critical component of the collective bargaining process and an established means by which labor peace is preserved. As the following cases show, the Court continued to have doubts about arbitration in other arenas.


Here, a plumbing/heating subcontractor filed suit in Georgia to collect funds allegedly owed it by the general contractor for a United States government missile site and successfully resisted arbitration even though the contractor had previously filed an action in New York seeking to enforce the arbitration clause. The Court found that the subcontractor had adequately alleged an issue regarding possible fraud regarding the procurement of the arbitration agreement. This seems a relatively classic case of what I have termed “old” or traditional commercial arbitration rather than the “new” or “mass” arbitration of retail consumer matters that has troubled many (*See Jeffrey W. Stempel, Mandating Minimum Quality in Mass Arbitration, 76 U. CINN. L. REV. 383 (2006)*). However, one might argue that the terms of the arbitration agreement unfairly subjected the subcontractor to a seriously inconvenient forum. *See Jeffrey W. Stempel, A Better Approach to Arbitrability, 65 TULANE L. REV. 1377, 1397 (1991)(discussing Moseley in detail)*. Notwithstanding the Steelworkers Trilogy, Moseley suggested continuing wariness toward arbitration by the court.

In *Prima Paint*, the Court held (arguably overruling *Moseley*) that a question of fraudulent inducement into the contract containing an arbitration clause was in first instance a question for the arbitrator. By giving arbitrator’s “first dibs” on these questions, the Court appeared to move toward a more favorable attitude toward arbitration. See Stempel, *Better Approach*, at 1390-92 (discussing *Prima Paint*).


The Court enforced a forum selection clause in a maritime towing agreement, even though the party adhering to the towing contract had relatively little bargaining power in light of the disabled condition of its vessel. The case was correctly regarded by observers as a sign that the Court was beginning to look more favorably on such agreements and in turn would tend in the future to look more favorably upon arbitration agreements as a specialized type of forum selection clause. But again, this was a case of traditional commercial arbitration rather than of new mass arbitration affecting consumers.


In a dispute over wage claims, the Court refused to enforce the standard arbitration clause signed by workers in the financial services industry as a condition of their employment because of a state law prohibiting arbitration of wage claims. Although this decision is now effectively overruled the cases are arguably distinguishable in that the state law in *Ware* appears more directly aimed against arbitration while the state law in *Southland* was made inapplicable any contract provisions waiving substantive rights as a condition of obtaining a franchise.


The Court enforced an arbitration clause – one calling for arbitration in France no less – contained in a sale-of-business agreement between a businessperson and a large multinational company. Although traveling to Paris is hardly the greatest dispute resolution burden one might face, the Court’s enforcement reflects its general comfort with arbitration, at least in the commercial context. But at this point, the Court continues to deal with old style commercial arbitration and not the new mass arbitration of consumer complaints that would arise as a consequence of the Court’s pro-arbitration jurisprudence.

**Greater Acceptance of Arbitration but Some Continuing Hostility Remains**


The Title VII claim of a union employee is held to be beyond the scope of the arbitration clause contained in the collective bargaining agreement to which he was subject. Although the decision can be fairly regarded as one merely interpreting the scope of the arbitration clause and the nature of union-management dispute resolution as opposed to a civil rights claim, the decision can also be read as one applying a statutory or public policy exception to the Arbitration Act. See Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22
ST. MARY’S L.J. 259, 321-23 (1990). In any event, it suggests that the Court remains in something less than a swoon over arbitration.


The Court held that a broadly worked arbitration clause in a collective bargaining agreement did not apply to the worker’s Fair Labor Standards Act Claims. The case stands pretty clearly as a case applying a “statutory” claims exception to arbitration in the manner of Wilko v. Swan (discussed above). The Court, although not overtly hostile to arbitration, continues to limit its reach and deny arbitrability for certain types of cases. See also Stempel, Pitfalls, supra, at 308-19 (discussing Barrentine at greater length).


In a fashion quite similar to Barrentine, the Court refuses to compel arbitration of civil rights claims made pursuant to 42 U.S.C. 1983, suggesting that the Court is not yet in full embrace of arbitration as a concept. See also Stempel, Pitfalls, supra, at 323-27(discussing McDonald v. West Branch at greater length).

Then, The Court’s Infatuation with Arbitration Took Hold and Grew

Sometimes, emotions are mixed and it remains uncertain which emotion will triumph. Hate can turn to love and vice versa. A mild interest can become an infatuation. Despite 1980s such as Barrentine and West Branch that reflected continued wariness about arbitration, the Court by the mid-1980s certainly was interested in arbitration in what would come to be a near-romantic way.


In a dispute over a construction project between the buyer Hospital and the general contractor, the Hospital sought a state court order staying arbitration proceedings notwithstanding that the construction contract, like most such contracts, contained a broadly worded arbitration clause committing such all contracts-related disputes to arbitration. The Court’s decision compelling arbitration and rejecting the view that “Colorado River” abstention by the federal court was required by notions of deference to ongoing state proceedings made eminent sense and is defensible. See 460 U.S. at 13-23. In dissent, however, Chief Justice Burger and Justices Rehnquist and O’Connor argued that in its zeal to render the pro-arbitration ruling, the majority had been too quick to find a sufficiently final order that permitted appeal. See 460 U.S. at 30 (Rehnquist, J., dissenting).

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But what prompts some to see *Moses H. Cone* as the dawn of the modern pro-arbitration era is its rhetoric favoring arbitration. *See, e.g.*, 460 U.S. at 24 (viewing 9 U.S.C. § 2 of the Act as “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”); 460 U.S. at 24-25 (“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . .” “The Arbitration Act established that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”).

More substantively, the *Moses Cone* majority states that the Act “create[s] a substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act.” *See* 460 U.S. at 24. In other words, the Act would appear to apply in state courts as well as in federal court. But this issue was not prominently addressed until the Court’s next important arbitration case. Although the *Moses Cone* decision favored arbitration, it was not full-fledged infatuation.


*Southland* involved a dispute between the convenience store chain 7-Eleven and a California franchisee. The franchise agreement contained a broadly worded arbitration clause the franchisor sought to enforce to compel arbitration of the dispute. The franchisee resisted, citing as support a portion of the state’s franchise law that forbade enforcement of waivers of franchisee rights. The California Supreme Court reasoned that an arbitration clause was in effect a waiver of the franchisee’s right to seek judicial relief in the event of a controversy over the franchise agreement. The U.S. Supreme Court reversed. *See* 465 U.S. at 6.

*Southland* thus presented in starker relief than *Moses Cone* the issue of whether the Arbitration Act was substantive federal law that took precedence over contrary state law. The Supreme Court could not alter the construction of a state statute declared by the state’s highest court, even if it found the reasoning (that agreement to arbitration was a sufficient waiver of substantive rights to be forbidden under state franchise law). If the decision was to be reversed, it had to be because the state law was powerless against a federal law commanding arbitration – and the *Southland* Court so found, over the dissents of Justice Stevens (465 U.S. at 17) and Justice O’Connor joined by Justice Rehnquist (465 U.S. at 21).

The *Southland* majority embraced the now-modern view of the Act as federal substantive law, bootstrapping in part on the passing statement to that effect in Justice Brennan’s *Moses Cone* opinion (see 465 U.S. at 14). Although acknowledging that “the legislative history [of the Act] is not without ambiguities,” the Court found that “there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts.” The Court further found that “[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” Thus, the Court held “that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.” *See* 465 U.S. at 16.
Like *Moses Cone*, *Southland* can be defended as a reasonable decision that does not reflect excessive swooning over arbitration as a forum preferable to court. The text of the statute (9 U.S.C. § 2) certainly admits of a substantive law construction even if it does not compel the *Southland* result. The case was a commercial dispute akin to the type of paradigmatic vendor-customer disputes proponents of the Act had in mind when lobbying for the legislation.

Although franchisees typically are smaller, poorer, and have less leverage than franchisors – at least once the relationship commences, franchisees are usually competent and often experienced businesspersons or they never would have been awarded the franchise. They cannot credibly claim to be particularly surprised by the presence of an arbitration clause in the franchise agreement given the ubiquity of such clauses in business-to-business contracts throughout the Twentieth Century.

And unlike consumers signing form receipts before hurrying away from a cash register or continuing to pay bills without reading inserted brochures, franchisees would seem rather certain to have actually read any arbitration clause in the franchise agreement. Becoming a franchisee is a major event in one’s working life that logically prompts some study of the agreement insisted upon by the franchise chain.

And to perhaps state the obvious: no one forces a franchisee to become a franchisee. If a franchisor’s terms are too unfavorable, a prospective franchisee continues to have what appears to be the fine option of hanging on to his or her savings, avoiding the risk of a failed franchise, and continuing to work at whatever had provided the prospective franchisee with the funds that made him eligible for a franchise in the first place.

In short, it is hard to cry very hard for the losing franchisee in *Southland*, provided that the arbitration forum in which the dispute is heard is a fair one and the procedures available permit adequate factual development of issues involved in the dispute. *Southland* only required arbitration. It did not declare that 7-Eleven was certain to win.

*Southland* can thus be defended as a fair result consistent with the general support for arbitration reflected in the Act and motivated by reasonable public policy concerns in favor of consistency among state and federal courts regarding enforcement of predispute arbitration agreements. *Southland* may reflect love for arbitration, but not the “crazy, stupid” love the court would later shower upon arbitration.

But neither is *Southland* a particularly encouraging example of the High Court in action. Although the majority has a plausible textual construction of the Act, it can also be argued that the Act’s language stating that arbitration agreements may be avoided on “grounds as exist at law or in equity for the revocation of any contract” (9 U.S.C. §2) includes illegality under applicable state law such as the California Franchise Investment Act. Although it would not be well articulated for another decade or so, this language also clearly encompasses state contract law concepts such as fraud, misrepresentation, and unconscionability (both procedural and substantive) that can support setting aside contract terms such as arbitration clauses if they are deemed sufficiently oppressive.
The majority also has a plausible view of the legislative history. But Justice O’Connor’s dissent is much more thorough in its exploration of legislative history and quite convincing in its argument that the Act was always intended by Congress only to apply to federal court proceedings, which were at the time the proceedings about which the commercial proponents of the Act were concerned. See 465 U.S. at 24.

In an important illumination of the result-orientation of the Southland majority, the O’Connor dissent notes that Southland is effectively overruling Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956)(discussed above), which found viewed the Arbitration Act as procedural and thus applied Erie v. Tompkins, 304 U.S. 64 (1938) to require that the validity and enforceability of an arbitration clause litigated in Vermont state court be decided by Vermont law. But the majority does not even cite Bernhardt, let alone address it and explain why it’s reasoning some 30 years ago (and much closer to the time the Arbitration Act was passed) is in error.

Even if one agrees with the Southland majority that the time had come to consider the Arbitration Act as substantive federal law applicable in state court, the Bernhardt/Erie question at least needed to be addressed. Instead, the Southland majority dodged the issue – another indication of the Court’s rush to embrace arbitration notwithstanding the normal rules of adjudication in the face of contrary precedent.

Both the O’Connor dissent and the Stevens concurrence/dissent also make a strong case that the majority’s application of the Act is inconsistent with the federalism and states’ rights concerns that not only constantly animate American law but also appear to have been on the mind of the enacting Congress. Justice Stevens, in addition to noting Justice O’Connor’s compelling review of the legislative history of the Act, focuses on the importance of states’ rights and federalism as a strong background norm of statutory interpretation.

The general rule [set forth in the Act] is that arbitration clauses in contracts involving interstate transactions are enforceable as a matter of federal law. That general rule, however, is subject to an exception based on “such grounds as exist at law or in equity for the revocation of any contract.” I believe that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses.

The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress

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The limited objective of the Federal Arbitration Act was to abrogate the general common-law rule against specific enforcement of arbitration agreements. . . . [B]eyond this conclusion, which seems compelled by the language [of the Act and interpretative case law to date] it is by no means clear that Congress intended entirely to displace state authority in this field. . . . “We must be cautious in
construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states.” [quoting Metro Indus. Painting Corp. v. Terminal Const. Co., 287 F.2d 382, 386 (2d Cir. 1961)(Lumbard, C.J., concurring).

* * *

The existence of a federal statute enunciating a substantive federal policy does not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens. . . . Indeed, the lower courts generally look to state law regarding questions of formation of the arbitration agreement [under the Act]. . . .

A Contract which is deemed void is surely revocable at law or in equity, and the California Legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Investment Law, including but not limited to arbitration provisions, void as a matter of public policy. Given the importance to the state of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purpose of the California Act, I believe this declaration of state policy is entitled to respect.

See 465 U.S. at 17, 18—20.

The Stevens dissent, like much of his judicial work, makes its insights concisely but powerfully and stakes out a moderate position consistent with his overall approach to law. He respects the text of the statute but does not read it woodenly or hyper-literally. Instead, he reads the text with a healthy reverence for the legislative history of the law that may shed light on specific legislative intent. He is mindful of the purpose of the statute and practical realities of modern commerce and regulation. He respects state prerogatives in an area of traditional state autonomy and the federalist model of American government and law. He is willing to read the Act as laying down substantive law applicable in state as well as federal court but gives breathing space to state contract law and regulation. He appreciates that the California franchise law is not an anti-arbitration law but a franchisee protection law, which arguably takes it out of the broad reach of 9 U.S.C. 2’s compelling of arbitration and puts it into the savings clause of this portion of the Act.

Justices Stevens also correctly recognizes, in light of Justice O’Connor’s strong arguments based on legislative history, that the Southland majority is engaging in what might be termed “dynamic” or “evolutive” statutory construction by adapting the 1925 legislation to 1984 commercial reality. “Although Justice O’Connor’s review of the legislative history . . . demonstrates that the 1925 Congress that enacted the statute viewed the statute as essentially procedural in nature, I am persuaded that the intervening developments in the law compel the
conclusion that the Court has reached” as to the Act being substantive law, even if not as to the applicability of the California Franchise Investment Act. *See* 465 U.S. at 17.

The Stevens concurrence/dissent in *Southland* sets a standard by which we can assess the Court’s arbitration jurisprudence in the emerging modern pro-arbitration or “infatuation” era. Unlike the majority, Justice Stevens assessment of the instant cases is consistent with his overall jurisprudential views and mainstream statutory construction, save perhaps that dynamic or evolutive statutory construction has not been expressly embraced by the Court, even when though the Court sometimes applies it implicitly, as did the Southland majority.

Rightly or wrongly, *Southland* is an example of dynamic or evolutionary statutory construction in which the majority is expanding the reach of the statute beyond the specific intent of the enacting Congress and beyond the basic purpose of the statute, although the *Southland* result can be defended in part on broad legislative grounds (i.e., general congressional support for arbitration). But in its sub silentio dynamism, the *Southland* majority arguably overreads the text of the Act and clearly minimizes or even ignores traditional mainstream concerns of federalism, historical practice, restraint in expanding congressional power absent a clear statement, and deference to traditional state prerogatives.

That the Southland majority was at least partially “blinded by love” because of its substantive attraction to arbitration seems clear in light of the membership of the *Southland* majority. Majority opinion author Chief Justice Burger is correctly widely regarded as a jurisprudential conservative, one who would never embrace dynamic or evolutive statutory construction. Similarly, he was a supporter of states’ rights.

But *Southland* finds him pretending that the legislative history clearly favors compelled arbitration, an unpersuasive argument even if one likes the outcome in *Southland*. He similarly reads the text of the law in a manner friendly to the party desiring arbitration rather than a manner supportive of the State of California. But under the rules of the game, California is supposed to have more judicial deference than 7-Eleven.

Justice Burger in *Southland* was not being true to his jurisprudential self. He was however, being true to his personal preference/public policy self. The Chief had long been a strong supporter of alternative dispute resolution and a strong critic of what he perceived as an unwise litigation explosion. *See* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOKLYN L. REV. 659 (1993) (noting anti-litigation turn taken by legal elites in part as a response to Chief Justice Burger’s efforts, including the 1976 Pound Conference, which criticized litigation as wasteful and inefficient and extolled the virtues of alternative dispute resolution, including arbitration).

The other Justices in the majority can similarly be credibly accused of inconsistency driven by a personal preference for more arbitration and less litigation or out of a view that the time, expense, and procedural protection of litigation, including lay jury trials, offers an unfair advantage to deadbeat franchisees or saddles businesses with undue transaction costs in seeking
to enforce their franchise agreements. Joining the Southland majority opinion were Justices William Brennan, Byron White, Harry Blackman, Lewis Powell.

With the exception of Justice Brennan, who espoused support for a “living Constitution” that was interpreted consistent with changes in American society (but who never embraced statutory dynamism with equivalent zeal) and who tended to favor federal authority over state authority in many cases, these Justices were traditionalists who eschewed dynamism for original legislative intent and federalism over unitary control by a central government. But here they are embracing in Southland a result at odds with their professed jurisprudential philosophies. The logical catalyst for this departure from their traditional moorings in Southland is a substantive preference for arbitration, even if this group was not as overtly cheerleading for ADR and decrying litigation as was the Chief.


In Byrd, the Court continued in a pro-arbitration vein, but quite a defensible one. The issue was whether a customer’s mixture of federal securities claims (not arbitrable because of Wilko v. Swan, 346 U.S. 427 (1953) and state law claims (clearly arbitrable under the Act if sued on alone) prevented arbitration of the state claims because they were intertwined with the non-arbitrable federal claim.

Resolving a split in the circuits, the Court rejected the intertwinement doctrine that had required all claims to go to litigation in some circuits, holding that arbitration of the state law claims could be compelled and need not await resolution of the securities claims. The Court recognized that there could be preclusion issues depending on which adjudication (and arbitration is really adjudication by a forum other than a court) took place first but did not attempt to provide guidance on that issue.

The decision is unanimous, a reflection of its reasonableness under the circumstances (saddled with the Wilko precedent that was steadily falling out of fashion). The opinion supports more arbitration rather than less arbitration but can hardly be said to be a decision unduly colored by personal preferences for arbitration.

Concurring separately, Justice White (a member of the Moses Cone and Southland majorities and a consistent supporter of arbitration during his time on the Court) criticized Wilko and noted that its holding involved only claims under the Securities Act of 1933 and that too many courts and commentators had assumed the same reasoning applied to claims brought pursuant to the Securities Exchange Act of 1934. Justice White argued that there were sufficient differences between the laws such that Wilko’s restriction on arbitration should be confined strictly to 1933 Act claims. Although Justice White’s attempt to differentiate the statutes is not particularly persuasive (at least not to me), it is an important small step on the way to overruling Wilko and removing this and other statutory restrictions on arbitration.

The Court again supports arbitration, dealing an implicit blow to cases like Wilko, Alexander v. Gardner-Denver, Barrentine v. Arkansas-Best, and McDonald v. West Branch that restricted arbitration for statutory claims. The Court found no legal barrier to requiring arbitration of antitrust claims raised by an automobile retailer in its dispute with the manufacturer. The contract between the retailer and the manufacturer, as might be expected in this commercial setting, contained a broadly worded arbitration clause.

Writing for the majority, Justice Harry Blackman found no basis in statutory text, legislative intent or purpose, or public policy concerns for cutting back the scope of the arbitration agreement merely because one of the bases of dispute involved a federal statute. In reaching this result, the Court sounded more loudly the death knell of Wilko and similar cases. “We find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims,” wrote Justice Blackmun. See 473 U.S. at 626. The majority opinion reiterated much of the pro-arbitration rhetoric of Moses Cone, Southland, and Prima Paint about the strong federal policy favoring arbitration. See 473 U.S. at 625-26.

Lost in some of the rhetoric was the better view that Congress intended to mandate enforcement of validly made arbitration agreements more than it was making a general endorsement of arbitration under all circumstances. But the arbitration clause at issue between these merchants was not one raising serious issues of consent, construction, fraud, coercion, or other bases for setting aside the agreement. The party resisting arbitration was hoping that the Court, like some lower courts, would find antitrust law too sacred to be submitted to arbitrators, even at the request of the parties.

Soler Chrysler-Plymouth can thus be seen as part of the arbitration trend of the 1980s but not a case where the court is unduly infatuated with arbitration. Certainly, the entire Court was not infatuated. See 473 U.S. at 640 (Stevens, J., joined by Brennan and Marshall, dissenting)(Justice Powell did not participate in the decision). Thus, the Court’s rejection of a statutory claim defense to arbitration was rejected by only a 5-3 majority. And at this juncture, one can argue it is the dissenters who are unfaithful to their normal jurisprudential approaches.

Justice Brennan, the author of Moses Cone and a part of the Southland majority suddenly is against arbitration merely because it involves an antitrust claim. Justice Marshall had also been part of the Moses Cone and Southland majorities. Justice Stevens is arguably more consistent but the issues in Southland are distinct from the statutory exception question presented in Soler Chrysler-Plymouth and prior cases such Wilko, Alexander, Barrentine, and McDonald. But Justice Stevens is also arguably consistent in his respect for stare decisis. He often took the position that precedents, even precedents he viewed as incorrect at the time decided, should be respected going forward absent very strong intervening events counseling overruling. The Stevens dissent can be defended as merely seeking to treat antitrust claims the same as 1933 Securities Act claims (and perhaps 1934 Act claims as well), Title VII claims, Fair Labor Standards Act Claims, and 42 U.S.C. §1983 claims. At this juncture, he is willing to embrace the statutory exception perhaps as much for its pedigree as for its rationale.
But Justice Stevens in this dissent appears to be more than just a reluctant follower of precedent. He seems to enthusiastically embrace the notion that there is something different about statutory claims that makes them unsuitable for arbitration – or at least outside the intended scope of the Arbitration Act. Justice Stevens, whose Southland dissent was so good, has a tough position to defend in *Soler Chrysler-Plymouth*, where the dissent is considerably less convincing. The text of the Arbitration Act contains no restraint on statutory claims. The legislative history reflects no congressional aversion to arbitration of such claims. The purpose and background of the statute, although contract focused and praising commercial actor expertise, do not suggest that Congress viewed arbitrators as incompetent on statutory claims. Pragmatically, it would also appear odd and inefficient to peel off antitrust claims for the rest of a dispute that arbitrators must hear in any event.

But whatever one’s views on the merits, *Byrd* is pro-arbitration but does not reflect unbridled infatuated with arbitration.


*AT&T v. Communication Workers* is a bit of driftwood on the generally rising tide of arbitration. Although continuing to give rhetorical support to arbitration, the Court finds the instant labor-management dispute not to fall within the scope of what (at least to me) appears to be a very broadly worded arbitration clause – at least it did not fall within the confines of *Prima Paint*, which requires that questions regarding defenses to the contract are in first instance for the arbitrator. Instead, the Court found that it was the trial court that should initially assess the scope of the arbitration clause in the collective bargaining agreement at issue.

The Court was unanimous, with Justice Byron White authoring the majority opinion and Justice Brennan concurring in an opinion joined by Justices Burger and Marshall.


Picking up on Justice White’s concurrence in *Dean Witter Reynolds v. Byrd*, the Court refuses to extend the securities law statutory exception of *Wilko v. Swan* to claims made pursuant to the Securities Exchange Act of 1934. Although the 1933 Act exception of *Wilko* is not dead yet, it is living on borrowed time in that the rationale for refusing a statutory claim exception in *McMahon* is equally applicable and powerful as regards 1933 Act claims. The *McMahon* Court also rejected the argument that claims made pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) were exempt from arbitration, a view shared by the entire Court.

*McMahon* is thus an important pro-arbitration opinion in the sense that it limits and sets the stage for further curtailment of the statutory claims exception to arbitrability. Symbolically, Justice O’Connor, who dissented so strongly in *Southland v. Keating*, writes the *McMahon* majority opinion. To be fair, her view in *McMahon* is not inconsistent with her *Southland* view that the Act applies only in federal court proceedings (*McMahon* was federal court litigation). But her emerging enthusiasm for arbitration at least looks a little odd when compared to her resistance to it just three years earlier.
Justice Blackmun (joined by Justices Brennan and Marshall) dissented, arguing that the 1934 Act was sufficiently similar to the 1933 Act that the McMahon claim should enjoy the protection of Wilko v. Swan. See 482 U.S. at 243. Scoring some points in opposition to arbitration, the dissent noted that Congress had during 1975 made extensive amendments to the 1934 Act and that it would appear from the legislative history that “Congress did not want the amendments to overrule Wilko” and that “[legislative history of] an amendment to the Exchange Act suggests that Congress was aware of [and approved] the extension of Wilko to 10(b) claims [made under the 1934 Act].” See 482 U.S. at 246.

Although on the losing side of this significant battle, the dissenters found hard against the constriction and foreshadowed demise of Wilko. The dissent is longer than the majority opinion. But the decision has some reasonable jurisprudential support in seeking to treat all claims as equal for purposes of arbitrability. The decision is not one enamored of arbitration so much as it reflects the absence of fear that arbitration might be too inferior a process for resolving statutory claims. The Court is not hostile to arbitration but neither is it in its thrall.

Perry v. Thomas, 482 U.S. 483 (1987)

The Court, in a Justice Marshall opinion, compels arbitration of a wage claim in the face of a state law exempting wage claims from arbitration. In effect, Merrill Lynch v. Ware, 414 U.S. 117 (1973) is overruled while Southland v. Keating, 465 U.S. 1 (1984) is affirmed, shoring up the strength of the modern, pro-arbitration working majority of the Court. Perry continues the Court’s embrace of arbitration on the rhetorical level and makes substantial citation of the Court’s more recent cases with pro-arbitration outcomes. See 482 U.S. at 489-91. The message to even the casual reader is pretty clear. Arbitration is generally strongly supported by the Court, even in the face of contrary state law.

Perry is generally susceptible to the same bases of praise or scorn one might heap on Southland. The majority (Justices Marshall, Burger, Blackman, Brennan, White) is a group purporting to embrace mainstream jurisprudence but arguably neglecting to consider federalism, state prerogatives of contract regulation, legislative intent and purpose, and reading the Arbitration Act’s text too broadly.

But Perry may perhaps be better defended than Southland in that the California Labor Code § 229 appears more directly aimed at arbitration (and thus in conflict with the now-deemed-substantive federal law) while the California Franchise Investment Act was a broader prohibition against waivers of all types, not solely arbitration clauses. See Cal. Lab. Code Ann. § 229 (specifically stating that actions for payment of wages may be maintained “without regard to the existence of any private agreement to arbitrate”).

Only Justices Stevens and O’Conner dissented, each in separate opinions. Justice O’Connor reiterated her view that the enacting Congress did not intend the Arbitration Act to create substantive federal law applicable to state proceedings and echoed the Stevens view from Southland that the Act’s own language permits refusal to order arbitration if there were other bases under state law preventing enforcement of the contract. See 482 U.S. at 493 (O’Connor, J., dissenting).
Justice Stevens made a similar argument of legislative intent and purpose and defended an originalist notion of statutory interpretation even though his *Southland* dissent had been relatively dynamic or evolutive in its approach to the statute.

Even though the Arbitration Act had been on the books for almost 50 years in 1973, apparently neither the Court nor the litigant even considered the possibility that the Act had pre-empted state-created rights. It is only in the last few years that the Court has effectively rewritten the statute to give it a pre-emptive scope that Congress certainly did not intend.

482 U.S. at 493 (Steven, J., dissenting)(citing to his *Southland* dissent)(also contending that “the States’ power to except certain categories of disputes from arbitration should be preserved unless Congress decides otherwise”).

Whatever the merits of the pro- and anti-arbitration perspectives clashing in *Perry v. Thomas*, it seem odd that the Court majority did so little to defend its position against the contention that the majority had been unfaithful to the legislative intent and purpose of the law as well as the rights of the sovereign states to regulate contractual undertakings. In essence, the Perry majority is resting on the analysis of *Southland*, which makes Perry subject to the same criticisms and the same concern that enthusiasm for arbitration has overwhelmed the Court’s ordinary concern about the intent and goals of the enacting Congress and protection of the states.


In what could be regarded as a retreat from its ordinary preference for arbitration, the Court holds that where the same contract containing an arbitration clause also selects specific state law as applicable to the dispute, the state’s law regulating arbitration agreements supplants the federal act. In this case, that meant that California state law restrictions on arbitration controlled and could prohibit enforcement of an arbitration agreement otherwise enforceable under federal law.

The decision prompted the ire of Justice Brennan, who dissented (joined by Justice Marshall), contending that the ruling was a threat to the overall enforceability of the federal law. See 489 U.S. at 479 (Brennan, J., dissenting)(Justice O’Connor did not participate in the decision). The dissent’s argument is that most of the same contracts that contain arbitration clauses contain choice of law clauses as well. Consequently, the dissent saw the decision as a threat to the enforcement of a host of arbitration agreements, seeming to overlook that contract drafters could fairly easily write their way around any potential problems by providing that federal law controlled questions of arbitrability.

Although the dissent may be consistent with Justice Brennan’s generally pro-arbitration views, it seems inconsistent with their dissents in other cases. In any event, *Volt v. Stanford* as a whole is hardly a reflection of arbitral infatuation.

In *Rodriguez*, the Court completes the process begun in Byrd and McMahon and formally overrules *Wilko v. Swan*. The Court has now eliminated the rationale for a statutory claims exception to arbitration as well as making 1933 Act claims subject to arbitration. Although the arbitral exceptions for Title VII, FLSA, and Section 1983 claims are not overturned, they would appear in jeopardy. But in *Gilmer v. Interstate/Johnson Lane*, 400 U.S. 20 (1991), the Court reaffirmed its apparently continuing commitment to these public policy exceptions to arbitrability by distinguishing from ADEA claims, for which the Court found no such exception.


Notwithstanding its arguable support for exceptions from arbitration for Title VII, FLSA and Section 1983 claims, arbitral infatuation is dramatically present and ascendant in *Gilmer*. The case involved a securities industry employee making an Age Discrimination in Employment Act (ADEA) claim against the brokerage house that fired him at age 62. The *Gilmer* majority, in an opinion by Justice White, treats the case as simply one of whether a statutory exception exists for ADEA claims and determines the answer is “no,” as per *Rodriguez*, *McMahon*, and *Soler Chrysler-Plymouth*.

The Court gives only the figurative back of its hand (in part because the issue was raised late in the proceedings by Gilmer’s amici)\(^\text{10}\) to a much stronger argument: the Act itself in its clear text states that arbitration clauses in employment contracts are not enforceable, at least for workers engaged in interstate commerce.\(^\text{11}\) See 9 U.S.C. § 1 (“nothing herein contained [in the Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”).

Rather than simply refusing to consider the Section 1 argument because of waiver, the Gilmer majority used a bit of linguistic sleight of hand to avoid the issue.

In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. . . . The record before us does not show, and the parties do not contend , that Gilmer’s employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer’s securities

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\(^{10}\) See 500 U.S. 20, at 24, n. 2 ("Several *amici curiae* in support of Gilmer argue that [Section 1 of the Act] excluded from the coverage of the FAA all “contracts of employment.” Gilmer, however, did not raise the issue in the courts below: it was not addressed there; and it was not among the questions presented in the petition for certiorari.").

\(^{11}\) Okay, so perhaps I’m now the one taking some liberty with statutory text. Section 1 speaks of a “class of workers engaged in foreign or interstate commerce,” giving seamen and railroad employees as illustrative examples. Although an individual worker may be engaged in interstate commerce, he or she might not be part of a class of workers regularly engaged in such commerce. Gilmer, however, as a stock broker, surely falls within a common sense meaning of the words of Section 1 in that securities brokers, dealers, agents, sales and servicing employees most certainly are as a group engaged in interstate commerce because of the nature of financial markets and the common use of wire, mail, and telephone communications as part of their activities.
registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts that the exclusionary clause in §1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. . . . Unlike the dissent, we chose to follow the plain language of the FAA and the weight of authority, and we therefore hold that §1’s exclusionary clause does not apply to Gilmer’s arbitration agreement. Consequently, we leave for another day the issue raised by amici curiae.

See 500 U.S. at 24, n. 2 (citations omitted).\(^{12}\)

The Gilmer majority’s dismissive footnote of course begs the question of how an arbitration clause can be sufficiently subject to the Act to be enforceable by the employer if it is not contained in a contract between them. The success of the securities industry in requiring that all its licensed brokers sign arbitration agreements would logically make out a stronger case for extending §1 protections to those workers, who clearly must agree as a condition of employment and where it appears that there is no reasonable alternative for the prospective employee other than submitting to the arbitration clause. Instead, the Gilmer Court defines the problem away through a legal fiction of sorts.

In dissent, Justice Stevens, who raised troubling objections to the Court’s embrace of arbitration rather than federalism or legislative history in Southland, offers a rather devastating rebuttal. He points out that the Court on many occasions has not strictly enforced the concept of waiver in order to render a full assessment of a case before it. See 500 U.S. at 37. He then notes that narrowness of the Court’s concept of what constitutes a “contract of employment.”

Given that the FAA specifically was intended to exclude arbitration agreements between employees and employers, I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled “Contract of Employment.” In this case, the parties conceded at oral argument that Gilmer had no “contact of employment as such with respondent. Gilmer was, however, required as a condition of his employment to become a registered representative of several stock exchanges, including the New York Stock Exchange (NYSE) Just because his agreement to arbitrate any dispute, claim or controversy” with his employer that arose out of the employment relationship was contained in his application for registration before the NYSE rather than a specific contract of employment with his employer, I do not think that Gilmer can be compelled pursuant to the FAA to arbitrate his employment-related dispute. Rather, in my opinion the exclusion in §1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment.

\(^{12}\) “Another day” came a decade later when the Court decided Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)(discussed infra), holding that even where the arbitration agreement was in a direct contract between employer and employee asserting a Title VII claim, §1 was inapplicable because the employee, a retail electronics salesperson and manager, was not part of a class of workers engaged in interstate commerce.
See 500 U.S. at 40. The Stevens dissent then marshals history and precedent supporting a broad reading of the term contract of employment.

On the issue of the meaning of §1, Justice Stevens marshals equally compelling evidence of legislative intent and purpose to protect workers from unwanted arbitration agreements that could not realistically be avoided because of the vulnerability of workers seeking work. See 500 U.S. at 40. Although the discussion during the legislative history focused on what workers who were constantly and visibly involved in physical movement across state lines, this was a mere consequence of the involvement of the leadership of the Seaman’s Union, which understandably used seaman as their paradigmatic example of workers who should not be unfairly saddled with nonconsensual arbitration agreements. See Jeffrey W. Stempel, Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision, 1991 J. DISP. RES. 259 (1991)(reviewing origin of the statutory provision and caselaw, arguing for construction of §1 applicable to all workers involved in interstate commerce, rather than narrow railroad-trucker-seaman only construction provided by some courts).

Although the discussion of the employment exception in Gilmer is necessarily truncated, it foreshadows the Court’s ultimate unfortunate crabbed reading of §1 in Circuit City v. Adams (discussed below). In taking a narrow view of §1, the Court tends to downplay the text of the Arbitration Act, congressional intent, statutory purpose, and the federalism concerns of the states in protecting workers from potentially unfair tribunals that might be imposed upon the workers without their consent due to the great leverage held by employers.

There is of course a jurisprudential inconsistency of the Court’s broad and aggressive (and dynamic and evolutive as well) reading of §2 of the act regarding the enforceability of arbitration coupled with the Court’s very narrow reading of §1 of the Act, which logically should get the same treatment. Given the legislative intent and statutory purpose of enforcing commercial arbitration agreements between merchants and halting judicial reluctant to specifically enforce clearly consensual arbitration clauses, there is nothing inconsistent with a pro-arbitration view of the Act that also recognizes that the Act does not extend its support of arbitration into the employment context.

Despite the tangential treatment of §1 in Gilmer, the decision (with only Justices Stevens and Marshall in dissent) suggests a Court becoming more committed to arbitration as a process and willing to depart from standard statutory construction to support this favored process. Allied-Bruce Terminex Companies, Inc. v. Dobson, 513 U.S. 265 (1995).

In a divided opinion, the court holds that the Arbitration Act reaches as broadly as the limits of congressional power under the Commerce Clause. The division of the Court revolves around more technical issues of word meaning and procedure rather than over basic orientation toward the Act. See 513 U.S. at 267 (words of the Act referring to “a contract evidencing a transaction involving commerce” merit broad reading and do not restrict full reach of Commerce Clause power).
The decision supports arbitration but is hardly a shocking break with expectations, at least now that the Act has been considered substantive law for ten years since Southland and because the Court has given a broad construction to the concept of interstate commerce at least since the New Deal. Dobson continues the Court’s support for arbitration but is not a decision particularly gripped by infatuation.

Justice Scalia and Justice Thomas are moved to dissent (at length in the case of Justice Thomas), arguing that Southland was wrongly decided. See 513 U.S. at 24 (Scalia, J., dissenting); 513 U.S. at 285 (Thomas, J., dissenting)(joined by Scalia). By this juncture, however, Justice O’Connor appears to have thrown in the towel. She still thinks Southland was wrongly decided but acknowledges its precedential authority and concurs in the Dobson decision.

Were we writing on a clean slate, I would adhere to that view and affirm the Alabama court’s decision [that the Act did not apply because the pest control transaction giving rise to the dispute was not sufficient interstate commercial activity]. But, as the Court points out, more than 10 years have passed since Southland, several subsequent cases have built upon its reasoning, and parties have undoubtedly made contracts in reliance on the Court’s interpretation of the Act in the interim. After reflection, I am persuaded by consideration of stare decisis, which we have said “have special force in the area of statutory interpretation,” [citing to Patterson v. McLean Credit Union, 491 U.S. 164 (1989)] to acquiesce in today’s judgment. Though wrong, Southland has not proved unworkable, and, as always, “Congress remains free to alter what we have done.” Ibid.

Today’s decision caps this Court’s effort to expand the Federal Arbitration Act. Although each decision has built logically upon the decisions preceding it, the initial building block in Southland laid a faulty foundation. I acquiesce in today’s judgment because there is no “special justification” to overrule Southland. . . . It remains now for Congress to correct this interpretation if it wishes to preserve state autonomy in state courts.

See 513 U.S. at 282, 283 (O’Connor, J., dissenting)(one citation omitted).

As discussed below, Dodson was hardly the end of the Court’s “effort to expand the Federal Arbitration Act.” That would await Justice O’Connor’s retirement and the personnel changes of the Roberts Court, which produced more infatuatedly and dramatically divisive pro-arbitration opinion restricting class action litigation and even class action arbitration.13

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13 Interestingly and ironically, Justice O’Connor quotes Patterson v. McLean Credit Union for the proposition that stare decisis deserves particular regard in statutory cases because of Congressional power to amend the statute and thus legislatively overrule the Supreme Court. I have previously argued that this view is a bit too glib in light of the difficulty of enacting legislation, particularly when corrective amendment responding to a Supreme Court decision is opposed by powerful interest groups that have benefitted from the decision. See Jeffrey W. Stempel, The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy, 22 U.
The decision refused to limit the arbitrator’s authority to award punitive damages in a case that turned largely on choice of law principles and the peculiar New York rule that punitive damages could not be awarded in arbitration. To an extent, the decision is pro-arbitration in that it favors greater remedial powers for arbitrators (although that would not have been the case had the agreement in question properly imported New York substantive law). But the decision also is pro-consumer in that it provides the prospect of greater remedies in the arbitrations into which more and more matters are being funneled.

On the whole, Mastrobuono is not a moment when the Court’s infatuation with arbitration is not on display and the case is resolved on more technocratic grounds. The uncontroversial nature of the ruling is reflected in the 8-1 vote of the Court, with Justice Thomas dissenting on the ground that the choice of law provision at issue in the case is not materially different than the one in Volt v. Stanford, 489 U.S. 468 (1989)(discussed above), which required application of California law at odds with the federal common law of arbitration. Justice Thomas saw the New York law sought by the brokerage house as insufficiently different to avoid the reach of New York’s prohibition on punitive damages in arbitration. See 514 U.S. at 64 (Thomas, J. dissenting. See also Garrity v. Lyle Stuart, Inc., 353 N.E.2d 793 (1976)(forbidding award of punitive damages in arbitration).


The Court in this case reaffirms the general rule that, notwithstanding the federal policy favoring arbitration, the question of whether an agreement requires arbitration is for the courts and not the arbitrator. By contrast, general questions going to the contract as a whole are initially for the arbitrators as provided in Prima Paint and its progeny. The actual decisionmaking in such cases turns on whether a party resisting arbitration has a challenge to the arbitration agreement itself or merely a defense to the contract as a whole or some portion of the contract other than the arbitration clause. The Court held that “because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.” See 514 U.S. at 947.

Regarding standards of review, the First Options Court unanimously held that

TOLEDO L. REV. 582 (1991). Patterson v. McLean Credit Union was part of a number of Court decisions concerning employment discrimination and civil rights during the Court’s 1988 term that were widely criticized and eventually largely overturned with passage of the Civil Rights Act of 1991. Thus, contrary to my pessimism, Congress did act in response to disfavored decisions, supporting Justice O’Connor’s analysis. But in view of the current political climate where legislating is generally difficult and where entities favoring mass arbitration of consumer disputes (e.g., cellphone service providers, banks and credit card issuers, retailers), I remain pessimistic, about the prospect of legislative correction of the most problematic Court decisions preferring arbitration to other values or jurisprudential norms. See generally Jeffrey W. Stempel, Mandating Minimum Fairness in Mass Arbitration, 76 U. CINN. L. REV. 383 (2008); Jeffrey W. Stempel, Keeping Arbitrations from Becoming Kangaroo Courts, 8 NEV. L.J. 251 (2007).
There is no special standard governing [appellate] review of a district court’s decision [to confirm or vacate an arbitration award]. Rather, review of, for example, a district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration, should proceed like review of any other district court decision finding an agreement between parties, e.g., accepting finding of fact that are not “clearly erroneous” but deciding questions of law de novo.

See 514 U.S. at 947-48 (italics in original).

First Options tends to avoid the excesses of arbitral infatuation and is a moment of relative lack of passion by the Court regarding arbitration.


In Sky Reefer, the Court displays more of its pro-arbitration amore in refusing to apply the Carriage of Goods by Sea Act (COGSA) to prevent arbitration of a dispute in Japan pursuant to a clause in a bill of lading for a shipment of oranges from Morocco to Boston, which also included a Japanese choice of law provision. COGSA provides that

[a]ny clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

46 U.S.C. App. § 1303(8).

The majority avoided this seeming command of the statute by holding that the arbitration and choice of law clauses were not provisions “lessening liability. As Justice Stevens explained in dissent:

The foreign-arbitration clause imposes potentially prohibitive costs on the shipper, who must travel – and bring his lawyers, witnesses, and exhibits – to a distant country in order to seek redress.

* * *

The Court assumes that the words “lessening such liability” must be narrowly construed to refer only to the substantive rules that define the carrier’s legal obligations. Under this view, contractual provisions that lessen the amount of the consignee’s net recovery, or that lessen the likelihood that it will make any recovery at all, are [erroneously placed] beyond the scope of the statutes. . . . In my opinion, this view is flatly inconsistent with the purpose of COGSA . . . .
See 515 U.S. at 549-50.

In effect, the Court majority through its minimization of the practical impact of the arbitration clause dictating a distant and inconvenient forum and applicable law, held that COGSA, enacted in 1936, a decade after the Arbitration Act, was trumped by the Act notwithstanding that COGSA would appear to be substantive law every bit as much as is the Act. Further, the facts of the case presented a rather sympathetic cases of a shipper forced to adhere to a seemingly one-sided contract that might well fail unconscionability analysis under state law. As the Stevens dissent noted, COGSA was enacted to correct just such problems. See 515 U.S. at 542, 543 (Stevens, J., dissenting). See also 515 U.S. at 545 (noting academic support for enforcing COGSA and similar precedent authored by respected Second Circuit Judge Henry Friendly).

Reviewing once again Section 2 of the Arbitration Act, which makes arbitration clauses specifically enforceable “save upon such grounds as exist at law or in equity for the revocation fo any contract, Justice Stevens observed that

[t]his language plainly intends to place arbitration clauses upon the same footing as all other contractual clauses. Thus, like any clause, an arbitration clause is enforceable “save upon such grounds” as would suffice to invalidate any other, nonarbitration clause. The FAA thereby fulfills its policy of jettisoning the prior regime of hostility to arbitration. Like any other contractual clause, then, an arbitration clause may be invalid without violating the FAA if, for example, it is procured through fraud or forgery; there is mutual mistake or impossibility; the provision is unconscionable; or, as in this case, the terms of the clause are illegal under a separate federal statue which does not evidence a hostility to arbitration. Neither the terms nor the policies of the FAA would be thwarted if the Court were to hold today that a foreign arbitration clause in a bill of lading “lessens liability” under COGSA. COGSA does not single out arbitration clauses for disfavored treatment; it invalidates any clause that lessens the carrier’s liability. Illegality under COGSA is therefore an independent ground “for the revocation of any contract,” under FAA § 2. There is no conflict between the two federal statues.

The correctness of this construction becomes even more apparent when one considers the policies of the two statutes. COGSA seeks to ameliorate the inequality in bargaining power that comes from a particular form of adhesion contract. The FAA seeks to ensure enforcement of freely negotiated agreements to arbitrate. . . . [F]oreign arbitration clauses in bills of lading are not freely negotiated. COGSA’s policy is thus directly served by making these clauses illegal; and the FAA’s policy is not disserved thereby. In contrast, allowing such adhesionary clauses to stand serves the goals of neither statute.

See 515 U.S. at 555-56.

Justice Stevens attributed the majority’s error to “overzealous formalism” (515 U.S. at 556) but the decision appears just as much to be preference for arbitration regardless of the text,
intent, or purpose of the Arbitration Act, a preference embraced in spite of the Act’s direction that arbitration agreements be subject to the very same contract-based defenses to enforcement listed by Justice Stevens.

Just as disturbingly, Justice Stevens dissented alone. A super-majority of the Court was sufficiently infatuated by arbitration that it pursued it even in the face of contrary substantive law.


A Subway sandwich shop franchisee sought to avoid arbitration of his dispute with the franchiser based on the failure of the arbitration clause in the agreement to comply with the requirements of a Montana statute (Mont. Code. Ann. § 27—1144), which provided that “Notice that a contract is subject to arbitration. . . shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.”

Reversing the Montana Supreme Court, the U.S. Supreme Court held that the provision was, because of its focus on arbitration, in violation of the Arbitration Act because the state law did not apply to the revocation of “any” contract but only to arbitration agreements. Justice Ruth Bader Ginsburg’s majority opinion enjoyed a supermajority, with only Justice Thomas in dissent (517 U.S. at 690), reiterating his view that _Southland_ was wrongly decided.

Notwithstanding the strength of the Court’s vote and its consistency with federal appeals court decisions taking a similarly dim view of similar state laws, _Casarotto_ to me reads like an opinion written by a Court in the sway of arbitration and wishing to promote it in spite of countervailing state goals that are completely consistent with the views of the Congress that enacted the FAA. The Montana statute is not a ban on specific enforcement of arbitration clauses but simply a means of forcing disclosure to attempt to ensure that arbitration agreements are consensual.

The Montana law was, of course, vulnerable to pre-emption because it singles out arbitration. But this presumably reflected state concern that arbitration agreements presented particularly pressing problems of consent and fairness. A Court less infatuated with arbitration could have respected this state policymaking in the traditional state domain of contract law and been consistent with the Act. Further, a Court less driven to require arbitration could have considered other contract based defenses to arbitrability and whether Montana’s information-forcing statute was simply a form of that sort of state-centered policing of contracts. _See_ Stephen Ware, _Arbitration and Unconscionability After Doctor’s Associates v. Casarotto_, 31 _Wake Forest L. Rev._ 1001 (2000).


In a unanimous and uncontroversial decision, the Court held that the venue provisions of the Arbitration Act are permissive and allow a motion for confirming, vacating, or modifying an
arbitration award to be filed either in a federal judicial district where the award was made or in any other federal district where venue is proper under the general venue statute.


The Court ruled that an arbitration agreement that does not specifically set forth information about the costs and fees of arbitration is nonetheless enforceable. The Court in effect rejected the view that such silence was per se unconscionable as a matter of federal common law. Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, concurred and dissented, arguing that instead of making a definitive pronouncement on the issue, the Court should have remanded the case for “closer consideration of the arbitral forum’s accessibility” and potential unconscionability in light of the lack of disclosure about costs and fees. See 531 U.S. 94, 95 (Ginsburg, J., dissenting).

This decision continues the Court’s affection for arbitration and reflects some division within the Court as well as the Court’s overall resistance to unconscionability analysis.


In *Circuit City,* the Court addressed the issue it had dodged in *Gilmer v. Interstate/Johnson Lane,* supra, ruling that § 1 of the Act, which prohibited enforcement of arbitration clauses in employment contracts, did not apply to all workers engaged in activity affecting commerce but only applied to those directly involved in interstate movement of goods. In reaching this result, the Court took a narrow construction of § 1 and limited the protections of this part of the Act to only transportation workers.

As he had in *Gilmer,* Justice Stevens dissented, this time enjoying support from Justices Ginsburg, Breyer and Souter. See 532 U.S. at 124. As in *Gilmer,* Justice Stevens reviewed the legislative history of the Act and convincingly showed congressional desire to protect workers subject to adhesionary contracts containing arbitration clauses. Although the language of § 1 could have been broader, it not only singles out seamen and railroad workers, the catchall of “any other class of workers engaged in foreign or interstate commerce” was broad enough to encompass workers involved in non-transportation activities implicating interstate commerce. Early cases construing § 1 took this view and it was not until *Tenney Eng., Inc. v. Electrical Workers,* 207 F.2d 450 (3d Cir. 1954) that a contrary view arose in the circuits, which were still split at the time of the *Circuit City* decision.

In addition to criticizing the majority’s pre-arbitration reading of § 1, Justice Stevens made a persuasive case that the majority ignored both congressional intent and legislative purpose underlying the statute.

It is not necessarily wrong for the Court to put its own imprint on a statue. But when its refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority. As the history of the legislation indicates, the potential disparity in bargaining power
between individual employees and large employers was the source of organized labor’s opposition to the Act, which it feared would require courts to enforce unfair employment contrasts. . . . When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.

* * *

A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court’s own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.

See 532 U.S. at 132.

Justice Souter’s dissent, also joined by the other three dissenters, noted the difficult-to-defend inconsistency of the Court’s broad construction of § 2, which makes arbitration agreements specifically enforceable save for contract-based revocation defenses, and the Court’s narrow construction of § 1 so as to limit employee protection to only transportation workers. See 432 U.S. at 133, 133-35.

The Stevens and Souter dissents persuasively argue that the Circuit City majority has largely turned its back on considerations based on legislative history in favor of reading statutory text in a manner designed to implement the majority’s policy preference for arbitration of employment disputes and perhaps large scale privatization of worker-management dispute resolution. In effect, the four dissenters accuse the five justices in the majority of spurning traditional statutory interpretation jurisprudence that all of the majority judges (Rehnquist, Kennedy, O’Connor, Scalia, Thomas) profess to embrace in favor of imposition of the majority’s personal preferences in favor of private ordering and reduced litigation.


The Court, in an opinion by Justice Stevens, held that an arbitration agreement between an employee and his restaurant employer did not bind the Equal Employment Opportunity Commission from seeking relief in court for the employee as the EEOC was not a party to the arbitration clause or its container contract. Justice Thomas, joined by Justices Rehnquist and Scalia, objected, arguing that the Arbitration Act required enforceability and that the EEOC was bound by the agreements made by the plaintiffs whose causes it may take up in litigation. See 531 U.S. at 298 (Thomas, J., dissenting).


The Court held that the meaning of a limitation provision in the National Association of Securities Dealers (NASD) Code of Arbitration Procedure was a matter to be determined by the arbitrator rather than the court.

In per curiam opinion consistent with Allied-Bruce v. Terminex, the Court held that debt restructuring agreements made in Alabama between Alabama residents nonetheless had a sufficient connection to interstate commerce to fall within the Arbitration Act. The agreements were contracts evidencing a transaction involving commerce within the meaning of the Act.


Reviewing state court decisions permitting an arbitrator to accord class action treatment to homeowners contending that their commercial lender had violated the South Carolina Consumer Protection Code, the Court vacated the South Carolina high court’s ruling, holding that although the Arbitration Act did not clearly preclude class arbitration, the matter required more scrutiny according to state contract law. The decision is odd and seems not to accomplish much other than falling short of finding a wholesale prohibition on class arbitration in the Arbitration Act. To that extent, it is not particularly indicative of either affection for or opposition to arbitration. Surprisingly, the decision engendered dissents by Justice Rehnquist (joined by Justices O’Connor and Kennedy) and Justice Thomas as well as a concurrence and dissent by Justice Stevens.

Justice Stevens would have simply affirmed, in part because the petitioner did not appear to preserve a challenge of this issue of whether the state courts improperly decided a question of class arbitration that should have been for the arbitrator in first instance. See 539 U.S. at 454, 455 (Stevens, J., concurring in the judgment and dissenting in part). Justice Thomas again reiterated his view that Southland was wrongly decided. See 539 U.S. at 460 (Thomas, J., dissenting).

Justices Rehnquist, O’Connor and Kennedy thought reversal was the apt remedy because the matter was one for the courts rather than the arbitrator and in their view the contract in question did not permit class arbitration, making the state court decision a violation of the federal Act. See 539 U.S. at 455, 456 (Rehnquist, C.J., dissenting).


In Buckeye, the Court addressed a variant of the Prima Paint issue of allocation of initial interpretative authority between court and arbitrator. The Court held that an issue of whether an allegedly usurious contract containing an arbitration clause was illegal and that void and unenforceable was for the arbitrator, a result that can be justified under Prima Paint even if incorrect or unwise. Buckeye is thus an example of continued affection for arbitration and a desire to keep more disputing resolution activity before the arbitrator rather than the courts. But it is not an outrageous example of the Court swooning over arbitration. Justice Thomas was again a voice in the wilderness, contending that the Act if properly interpreted applied only in federal courts. See 546 U.S. at 418 (Thomas, J., dissenting). Justice Alito did not participate.

In Preston, the Court, with only Justice Thomas in lone dissent (552 U.S. at 363)(again arguing that the Act did not apply in state court proceedings), held that the Arbitration Act supercedes state law that would in the absence of arbitration rest primary jurisdiction over a dispute in an administrative forum. The Court viewed the state law requiring exhaustion of administrative remedies as a prerequisite to arbitration as an obstacle to arbitration in conflict with the Federal Act.

In the instant case (ironically involving a dispute between a television “judge” and his attorney/agent), the celluloid judge sought to have the matter determined by the California Labor Commissioner rather than an arbitrator. The California appellate court had supported this request, finding Buckeye Check Cashing inapposite because there had been no question of primary administrative agency jurisdiction in Buckeye. The Court rejected the distinction in an opinion that continued the Court’s infatuation with arbitration, but no more so that decisions like Prima Paint and Buckeye.


Hall Street held that parties to an arbitration agreement could not stipulate to more searching judicial review of any resulting award, in particular de novo review of the arbitrator’s legal determinations rather than the more limited menu of grounds for vacating an award set forth in 9 U.S.C. § 10. The Court viewed this as improper attempts by disputants to change the applicable law or to attempt to control the courts.

Justices Stevens, Kennedy and Breyer dissented. See 552 U.S. at 592 (Stevens, J., dissenting, joined by Kennedy); 552 U.S. at 596 (Breyer, J. dissenting). All essentially argued that the Arbitration Act did not preclude such agreements to enlarge the scope of review. The Stevens dissent noted that there was precedent permitting such agreements prior to the Act and that neither the text nor the legislative history of the Act suggested that Congress intended to overturn these precedents.

Hall Street, however interesting, does not give a clear signal regarding the Court’s preferences for arbitration over litigation. The decision can perhaps be understood as one strengthening the power of arbitration by preventing judicial review in excess of that provided by § 10 of the Act rather than one protecting the courts from litigant efforts to control their discharge of statutory duty.


In another decision without clear evidence of the Court’s substantive preference for arbitration, the Court holds that judges may look through a petition to compel arbitration to determine whether the court has jurisdiction over the matter rather than relying solely on the averments of the petition. Vaden is thus probably more of a vindication of judicial authority than a reflection of arbitral infatuation.

In *Carlisle*, the Court held that an entity or person not party to the underlying agreement containing an arbitration clause nonetheless had standing to request a stay of court action on a matter pending arbitration. By expanding standing to seek judicial relief in support of arbitration, the decision continues the Court’s tendency to embrace arbitration. Justice Souter (joined by Justices Rehnquist and Stevens) dissented on grounds that the matter was not ripe for appeal but appeared not to disagree with the majority’s substantive decision regarding the Arbitration Act.


With *Stolt-Nielsen v. Animal Feeds*, the Court’s recent arbitration jurisprudence becomes particularly problematic and unsatisfying, in part because its romance with arbitration begins to appear fickle or at least compromised by favoritism depending on who is seeking to pursue arbitration combined with some significant but unfounded aversion to class action treatment of cases.

In *Animal Feeds*, a customer sought class action proceedings in its arbitration with the shipper when accusing the shipper of illegal price fixing. The arbitration clause of the shipping contract (a/k/a charter party) used broad language and no one contested that the matter was subject to arbitration. *See* 130 S. Ct. at 1765. But the shipper was strongly opposed to class action treatment of the claim. The appointed arbitrators considered the issue and after hearing determined to proceed with class treatment of the case but stayed proceedings pending judicial review. *See* 130 S. Ct. at 1766.

The federal district court vacated this “award” (which, as Justice Ginsburg pointed out in dissent, was not really what one thinks of as an arbitration award since it was not a final ruling on the merits and did not order any relief on the merits of the underlying claim) on the ground that the arbitrators had shown “manifest disregard” of law because they had failed to conduct a choice of law analysis. *Id.* at 1766. The Second Circuit reversed and reinstated the arbitration panel decision. *Id.* at 1766. Subsequently, the Supreme Court vacated the decision to proceed on a class basis, holding that class treatment was improper absent sufficient proof that the shipper (Stolt-Nielsen) had affirmatively consented to class action arbitration even though it was uncontested that it had consented to arbitration in general. *See* 130 S. Ct. at 1767-68.

*Animal Feeds*, a reasonably close, 6-3 decision, can be viewed as a curtailment of the Court’s general affinity for arbitration. The decision, after all, has the immediate practical effect of limiting an arbitration panel’s power over a dispute. But *Animal Feeds* reveals that the Court’s love of arbitration is a reckless and irresponsible affair. In most of the cases of the modern (post-*Southland*) era, the Court has given no serious consideration to issues of consent in the formation of an arbitration agreement. But in *Animal Feeds*, where the party resisting broader arbitration is the party with greater commercial power and where the relief requested would empower claimants, the Court is suddenly gripped with concern over whether there exists sufficient consent to arbitrate. *See* 130 S. Ct. at 1773-75. *See, e.g.*, 130 S. Ct. at 1774 (emphasizing “consensual nature of private dispute resolution”) at 1775 (“a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”)
Perhaps the Court hates antitrust claimants or class action treatment of disputes even more than it loves arbitration. But this hardly makes for sound adjudication. Rather, it exposes the Court’s own inconsistency and favoritism. More sound and persuasive is the Justice Ginsburg’s dissent (joined by Justices Stevens and Breyer). In addition to making the unassailable argument that the matter was not a final award subject to review under the Act (9 U.S.C. § 10)(see 130 S.Ct. at 1777-78), the dissent took the sensible view that an agreement to arbitration ordinarily carries with it an agreement to arbitrate according to whatever rules govern the proceeding as applied by the arbitrators.

Even if Stolt-Nielsen had a plea ripe for judicial review, the Court should reject it on the merits. Recall that the parties jointly asked the arbitrator to decide, initially, whether the arbitration clause in their shipping contracts permitted class proceedings. . . . The panel did just what it was commissioned to do. It construed the broad arbitration clause (covering “[a]ny dispute arising from the making, performance or termination of this Charter Party,” . . . and ruled, expressly and only, that the clause permitted class arbitration. The Court acts without warrant in allowing Stolt-Nielsen essentially to repudiate its submission of the contract-construction issue to the arbitration panel, and to gain, in place of the arbitrators’ judgment, this Court’s de novo determination.

The controlling FAA prescription, § 10(a) authorizes a court to vacate an arbitration panel’s decision only in very unusual circumstances.”

130 U.S. at 1779-80 (citations omitted).

As the dissent also accurately noted, the majority unfairly and inaccurately characterized the arbitration panel decision as being one of policy preference for class action treatment despite that the words “policy” or “public policy” are “not so much mentioned” by the panel, which instead “tied its conclusion that the arbitration clause permitted class arbitration” based on contract language, historical practices, applicable rule, and the record as informed by expert testimony. See 130 S. Ct. at 1780-81.

“The question properly before the Court is not whether the arbitrators’ ruling was erroneous but whether the arbitrators ‘exceeded their powers.’ [under 9 U.S.C. 10(a)(4). The arbitrators decided a threshold issue, explicitly committed to them, about the procedural mode available for presentation of AnimalFeeds’ antitrust claims.” 130 S. Ct. at 1781 (Ginburg, J., dissenting). Making good use of the Court’s then-recent opinion in Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. __, 130 S. Ct. 1431 (2010), which permitted application of class action litigation against an Erie challenge, the dissent noted that “[r]ules allowing multiple claims (and claims by or against multiple parties) to be litigate together –

\[^{14}\] “The Court . . . does not persuasively justify judicial intervention so early in the game, or convincingly reconcile its adjudication with the firm final-judgment rule prevailing in the federal court system.” 130 S.Ct. at 1778. “No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator’s decision, as preliminary as the ‘partial award’ made in this case.” 130 S. Ct. at 1779 (footnote omitted).
neither change plaintiffs’ separate entitlements to relief nor abridge defendants’ rights; they alter only how the claims are processed.” See 130 S.Ct. at 1781-82. The author of Shady Grove was Justice Scalia, a member of the AnimalFeeds majority.

Succinctly noting the logical flaw of the majority’s reasoning, the dissent observed: “For arbitrators to consider whether a claim should proceed on a class basis, the Court apparently demands contractual language one can read as affirmatively authorizing class arbitration. . . . The breadth of the arbitration clause, and the absence of any provision waiving or banning class proceedings, will not do.” 130 U.S. at 1782. But the law of arbitrability, especially in the pro-arbitration modern era, has been broad construction of broadly worded arbitration agreements and the presumption that unless stated to the contrary, arbitration generally should be able to accord the same remedies that are available in litigation.

As the dissent also noted, the right question to ask in cases like AnimalFeeds is “the proper default rule when there is no stipulation.” See 130 S. Ct. at 1783. Where industry-wide arbitration is the norm, one would logically expect the dispute resolution norm to be one of according full remedies commensurate with the dispute. And, as the dissent also noted “[w]hen adjudication is costly and individual claims are no more than modest in size, class proceedings may be “the thin,” i.e., without them, potential claimants will have little, if any, incentive to seek vindication of their rights. See 130 S. Ct. at 1783 (citations omitted).


In Rent-A-Center, the Court was back in strong pro-arbitration mode, holding that an arbitration clause challenged as unconscionable by a former employee bringing a 42 U.S.C. § 1981 discrimination suit must first be assessed by the arbitrator rather than the court. The clause was broadly drafted, stating that the arbitrator “and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation” of the agreement that was “not limited to any claim that all or any part of” the agreement was void or voidable. See 130 S. Ct. at 2775. But by reading the clause broadly and literally to preclude judicial assessment of the fairness of the provision, the Court ignored the very language of §2 of the Act, which permits contract-based claims for revocation of an arbitration agreement.

Coming less than two months after the Court’s touching concern in Stolt-Nielsen v. AnimalFeeds over whether a large shipping company had adequately “consented” to class treatment of allegations that it had engaged in price fixing, it is a little jarring, even from a pro-business, pro-arbitration Court, to see little or no concern over the employee’s “consent” to a clause that truly does seek to oust courts from even the jurisdiction left to them by the drafters of the Arbitration Act. Similarly odd is the Rent-A-Center Court’s willingness to permit this when it only two years earlier was unwilling to permit the expanded judicial review of arbitration awards sought by the contracting parties in Hall Street v. Mattel.\textsuperscript{15} The decisions seem

\textsuperscript{15} Three days after issuing Rent-A-Center, the Court in Granite Rock Co. v. Int’l Brotherhood of Teamsters, 130 S. Ct. 2847 (2010) held that a dispute over the ratification date of the collective bargaining agreement at issue was a matter for the court rather than an arbitrator and that the employer did not implicitly consent to arbitration and that a claim of tortious interference fell
irreconcilable except by reference to a raw preference for arbitration with limited judicial involvement— but (per AnimalFeeds) piecemeal arbitration of claims rather than class treatment.

The majority’s reasoning is circular in that it prevents (until after an award and a §10 challenge to the award) judicial scrutiny of the arbitration clause even though the worker’s very argument is that the clause was obtained through improper means (procedural unconscionability) or was unreasonably favorable to the employer (substantive unconscionability). In particular, the arbitration clause contained a fee-sharing provision that the trial had determined was not substantively unconscionable and which had been affirmed by the Ninth Circuit, with other unconscionability arguments pending review had the Supreme Court not intervened. 16

The Rent-A-Center majority justified its holding as a natural extension of Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) and Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), which held that attacks on the contract containing an arbitration clause are for the arbitrator because such attacks do not question the validity of the arbitration clause. But allowing arbitrators to assess contract revocation defenses that do not focus on arbitration is one thing while allowing boilerplate arbitration agreements imposed on employees (who would be free of such clauses had the Court decided Gilmer or Circuit City correctly).

With Rent-A-Center, the current Court makes a big move toward further infatuated embrace of arbitration. Under Rent-A-Center, it is not enough to require judicial enforcement of arbitration clauses after judicial investigation determines they apply to the dispute and are not subject to a revocation defense under §2. Now, parties favoring arbitration, even the highly problematic mass arbitration that was foreign to the drafters of the Act, can remove courts from inquiry altogether, restricting the judicial role to its limited authority to police arbitration awards after the fact.

The pro-arbitration aggressiveness of Rent-A-Center engendered a 5-4 split in the Court. As in so many of the Court’s arbitration decisions of the past twenty years, the dissenting arguments appear more consistent with statutory text, legislative intent and purpose, and deference to state contract law. In addition, the dissent holds truer to judicial precedent.

The Court’s decision today goes beyond Prima Paint. Its breezy assertion that the subject matter of the contract at issue—in this case, an arbitration agreement and nothing more—“makes no difference” is simply wrong. This written arbitration agreement is but one part of a broader employment agreement between the parties, just as the arbitration clause in Prima Paint was but one part of a broader contract for services between those parties. Thus, that the subject matter of the agreement is exclusively arbitration makes all the difference in the Prima Paint analysis.

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16 The trial court had made the ruling of no substantive unconscionability as an alternative holding should its determination that the issue was for the arbitrator be disturbed on review. See 130 S. Ct. at 2776.
See 130 S. Ct. at 2781 (Stevens, J., dissenting)(joined by Justices Ginsburg, Breyer and Sotomayor)(citations omitted; italics in original). See also 130 S. Ct. at 2782 (the question of arbitrability, including defenses to arbitrability, is “an issue the FAA assigns to the courts.”)(footnote omitted).


As the Court’s reckless love for arbitration runs its course, at least for the moment, the Court may have saved its worst for last. Of the many problematic arbitration decisions that seem to run roughshod over settled legal principles, Concepcion is by far the worst in that it is in such direct opposition to the Act’s text, legislative history, and architecture as well as so disregarding of the rights of the states concerning regulation of contracts.

Vincent and Lisa Concepcion, like most other Americans have mobile phones, in this case cellphones subject to an AT&T service contract. And like most cellphone service contracts, the AT&T contract provided for arbitration, including the right of AT&T to “make unilateral amendments, which it did to the arbitration provisions on several occasions.” 131 S. Ct. at 1744. The Concepcions brought litigation alleging improper charging of $30.22 in sales tax on the supposedly “free” phones they received from AT&T as part of the service agreement, a complaint that was consolidated with a putative class action alleging fraud and false advertising in that the company had advertised the phones as “free” as part of the service arrangement. See 131 S. Ct. at 1744.

AT&T in turn moved to compel arbitration of the Concepcion claim. The Concepcions resisted, asserting that the arbitration agreement was unconscionable and “unlawfully exculpatory under California law because it disallowed classwide procedures.” 131 S. Ct. at 1745. Because the arbitration clause forbid class action treatment of claims, the trial court and the Ninth Circuit found it unconscionable under California law on the strength of Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), which held that limitations on remedies such as a ban on class actions were unconscionable contract provisions.

Notwithstanding that Discover Bank and earlier class action precedent such as Armendiraz (Cal. 1999) can reasonably be characterized as unconscionability decisions in which the unreasonably fair terms simply happened contained in an arbitration clause, the Concepcion majority characterized California law as specifically anti-arbitration law that was precluded by the Act. “The question in this case is whether § 2 pre-empts California’s rule classifying most collective arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the Discover Bank rule. . . . California courts have frequently applied this rule [that waivers in consumer contracts that limit consumer remedies are unconscionable] to find arbitration agreements unconscionable.” See 131 S. Ct. at 1746.

The Concepcion majority construed Discover Bank to be a restriction on arbitration rather than an unconscionability rule of which the AT&T arbitration agreement ran afoul. In doing so, it embraced the view of critics who had opposed this application of California unconscionability

The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

131 S. Ct. at 1748.

Beyond this formalist but erroneous analysis (in error because it so misread the statutory language and congressional intent and purpose as well as ignoring federalism concerns), the Concepcion majority could not resist displaying its infatuation for arbitration as a mode of dispute resolution differing from litigation. In particular, the majority saw California unconscionability law as a barrier that must be dismantled out of a view that arbitration works best when bilateral and that “[a]rbitration is poorly suited to the higher states of class litigation.” See 131 S. Ct. at 1751-52. Once again, the Court is embracing arbitration when it serves the interest of the business establishment but bad-mouthing arbitration (relative to Fed. R. Civ. P. 23) if necessary to support its decision.

Yet again, the dissenters reflect a stronger commitment to the standard rules of adjudication and a more realistic picture of the practical implications of the decision to which they object. In the main, however, the dissenters are simply truer than the majority to both federalism concerns and legislative intent and purpose.

The Discover Bank rule does not create a “blanket policy in California against class action waivers in the consumer context.” Instead, it represents the “application of a more general [unconscionability] principle.” Court’s applying California law have enforced class-action waivers where they satisfy general unconscionability standards. And even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms that, in context, will not prove unconscionable.

*       *       *

The Discover Bank rule is consistent with the federal Act’s language.

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*       *       *

The Discover Bank rule is also consistent with the basic “purpose behind” the Act.
Congress was fully aware that arbitration could provide procedural and cost advantages.

* * *

But we have also cautioned against thinking that Congress’ primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the “enforcement” of agreements to arbitrate.

* * *

Class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere.

* * *

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

* * *

The majority’s related claim that the Discover Bank rule will discourage the use of arbitration because “[a]rbitration is poorly suited to . . . higher stakes” lacks empirical support.

* * *

Further, even though contract defense, e.g., duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States.

* * *

Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law
of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

* * *

Finally, the majority can find no meaningful support for its views in this Court’s precedent. The federal Act has been in force for nearly a century. We have decided dozens of cases about its requirements. We have reached results that authorize complex arbitration procedures. We have upheld nondiscriminating state laws that slow down arbitration proceedings. But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings.

At the same time, we have repeatedly referred to the Act’s basic objective as assuring that courts treat arbitration agreements “like all other contracts.” [citing cases]. And we have recognized that “[i]mmunize an arbitration agreement from judicial challenge” on grounds applicable to all other contracts “would be to elevate it over other forms of contract.”


But the dissenters, like the majority, also could not resist a public policy argument. But that of the dissenters is simply so much better than that of the majority, as well as reflecting the type of respect for traditional state contract law prerogatives reflected in the text of the Act and its legislative history.

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?” In California’s perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). Discover Bank sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement’s author from liability for its own frauds by “deliberately cheating large numbers of consumer out of individually small sums of money.” Why is this kind of decision – weighing the pros and cons of all class proceedings alike – note California’s to make?

131 S. Ct. at 1761 (citations omitted).

Emphasizing their legislative intent and purpose advantages over the majority, the dissenters also noted that it was quite clear that in passing the Act, Congress was focused on merchants acting “under the customs of their industries, where the parties possessed roughly equivalent bargaining power.” See 131 S. Ct. at 1759 (citing legislative history materials).
In a separate solo concurrence, Justice Thomas stakes out a strained position, one that is particularly surprising coming from the Justice who had until recently continued to argue that Southland was wrongly decided and that the Federal Act did not apply in state court. According to the Thomas concurrence, Discover Bank’s brand of unconscionability could not thwart the arbitration sought by AT&T because it “does not relate to defects in the making of the agreement.” See 131 S. Ct. at 1753, 1753 (Thomas, J., concurring). Surely this view is incorrect. Section 2 of the Act speaks of any contract doctrine that relates to revocation. A contract can be revocable for infirmities other than those going directly to the contracting process.

The Continuation of the Affair

Looking back on nearly thirty years of Supreme Court affection for arbitration, the record is not a particularly attractive one for proponents of the rule of law or fans of constrained judging that does not unduly reflect the personal political, social, economic, and ideological preferences of the bench.

For the most part, the Court has been caught up in the uncritical support for arbitration that has also characterized society during the same time period. Business is in vogue while government is out of favor. Litigation is considered the wasteful playground of a few while private ordering is revered. Arbitration is enforced even under circumstances where reasonable persons might wonder about the degree of assent to boilerplate arbitration clauses in standardized contracts of adhesion.

Courts – particularly the Supreme Court – have tended to view arbitration as if it were still the type of guild-like expert resolution among merchants that animated support for the 1925 Federal Act while ignoring the degree to which post-Southland forms of mass consumer arbitration have moved far away from congressional intent and purpose.

In the process, the Court has been willing to ignore seemingly clear statutory text favorable to workers resisting mandatory arbitration of job-related disputes and viewed traditional state contract regulation as some sort of insurgency threatening federal power and the core of American business.

This kind of adjudication is far removed from the traditional judicial commitment to fair reading of text, close attention to legislative intent and purpose, and respect for traditional state authority. Even without considering the practice David-vs-Goliath aspects of many arbitration disputes and the practical consequences of enforced private ordering, the Court’s arbitration jurisprudence has been so disappointing as to suggest undue infatuation with arbitration.

But in selected cases, the Court has been willing to disparage arbitration (e.g., for classwide resolution of claims in Concepcion and AnimalFeeds) when necessary to prevent it from benefitting consumers or less powerful commercial actors. Perhaps the Court loves some things (e.g., litigants with more money, power, or leverage) even more than it admires arbitration or hates some things (e.g., class actions, consumer demands, assertion of “anti-business”
remedial legislation or common law) enough to restrict arbitration in some cases. But neither of these reasons provides any better justification for the Court’s disappointing case law about arbitration than infatuation with the arbitration mechanism.
1-1-1996

Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent

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Recommended Citation

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BOOTSTRAPPING AND SLOUCHING TOWARD GOMORRAH: ARBITRAL INFATUATION AND THE DECLINE OF CONSENT

Jeffrey W. Stempel


Richard Speidel's contribution to the Symposium, like his work throughout the area of arbitration, leaves little with which a reasonable person might disagree. In particular, his prime thesis makes sense in the context of securities arbitration. Professor Speidel concludes that consent has gone the way of the dodo bird for securities arbitration and that the law should focus on substantive regulation to encourage fairness in arbitration. I do not dispute this assessment so much as I want to supplement it: There remains a valuable role for consent concepts to play in securities arbitration, if only the courts will allow it.

Beyond this picking at the edges of Professor Speidel's assessment, however, his paper raises a more profound issue affecting securities arbitration and other forms of arbitration. The matter of consent has implications not only for all forms of arbitration and alternative dispute resolution ("ADR"), but for contract law and jurisprudence in general. Because of both the overriding importance of the law's treatment of consent and

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Fonvielle & Hinkle Professor of Litigation, Florida State University College of Law. Thanks to Jim Alfini, Adam Hirsch, John Larson, Ann McGinley, Jean Sternlight for insights and assistance, and special thanks to Stephen Ware, who graciously reviewed a draft of this Comment, as well as to the Symposium participants, particularly Ed Brunet and fellow panelists Richard Speidel, Richard Shell and moderator Clark Remington. Thanks also to Dean Donald J. Weidner and Florida State College of Law for research leave and support. Special thanks as well to my former Brooklyn Law School colleagues, especially Symposium organizer Professor Norman Poser, to whom this Comment is dedicated in the probably vain hope that he finds some progression of my analysis of arbitration during the decade we have debated it.

1381
my lack of any major criticism of Professor Speidel’s assessment of the current state of securities arbitration and the Ruder Report, my focus is instead directed to questions Professor Speidel essentially leaves for another day after having set the stage for further conversation: whither consent? This Comment addresses overarching jurisprudential concerns regarding party autonomy and legal legitimacy. Specifically, I suggest modifying modern arbitrability doctrine to take consent seriously. The Federal Arbitration Act (“FAA”) should be construed through a functional brand of flexible interpretation. Such an interpretation would be evenhanded in its application to consumers, employees, and franchisees as well as to the securities industry and larger business community.

Although I am perhaps the last person in legal academia to endorse Robert Bork’s world view or find in his writings a muse, his recent book *Slouching Towards Gomorrah,* provided a catalyst for organizing my misgivings about modern arbitration doctrine and my concern that leading authorities like Professor Speidel have too quickly abandoned defense of the consent paradigm of contract in the context of dispute resolution. As readers of the popular press are aware, Judge Bork argues that by relaxing our commitment to bedrock values and legal principles, we as a society have “slouched” toward a world of moral relativism that has diminished our society in both tangible and intangible ways. According to Judge Bork, the “Gomorrah” comparison is not farfetched because our society is an America in “decline” that, like the biblical Gomorrah, shows signs of becoming both more sinful and more tolerant of sin.

But despite its marquee value, Judge Bork never really develops the Gomorrah metaphor. He assumes that Gomorrah

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2 Although arbitration involving investors raises serious issues of consent, for reasons set forth below, I find the consent aspects of broker-investor arbitration considerably less troublesome than those afflicting brokerage house-employee arbitration and other instances of essentially mandated arbitration or forum selection. See Jeffrey W. Stempel, A Better Approach to Arbitrability, 65 Tul. L. Rev. 1377, 1447-60 (1991) [hereinafter Better Approach].
4 Id. at 6-9.
5 Id. at 2.
is bad and thus serves as a useful rhetorical foil. But sin comes in many varieties, including a rush to ride roughshod over individual rights and basic notions of fairness in the heat of pursuing a popular current goal. In essence, this is the indictment Bork levels at modern liberalism as he characterizes it. A similar criticism can be leveled at arbitration zealots of the 1980s and 1990s, including most of the Supreme Court.

The securities industry pursues uniform arbitration to lower the disputing costs associated with litigation and gain the benefit of expert decisionmaking. But the industry also seeks through arbitration to prevent full public viewing of some practices or episodes, to eliminate juries, to lower the possibility of punitive damages awards, and to prevent the establishment and publication of adverse precedent. Let me be clear. I see nothing inherently wrong with an industry pursuing these goals, so long as it does so through legitimate and noncoercive means. As former U.S. Senator S.I. Hayakawa once remarked about America's acquisition of the Panama Canal through a series of crafty colonial imperialist moves, "We stole it fair and square." I am not naive enough to suggest that private business consistently (or perhaps ever) put altruism before profitability. However, the legal system should require that business, when pursuing profit at the close of this century, do so within the rules of the game regarding contract and social regulation in general. Consequently, consent retains a useful role in regulating the ability of business to pursue self-interest through contract.

In the case of the securities industry, a Gomorrah of sorts emerges from the shoving of nonconsensual arbitration down the figurative throats of customers and employees. For reasons discussed further below and at length in other writings, broker-customer arbitration comes close to satisfying a consent-based model of arbitrability, but some arbitration "agreements" so lack consent as to embarrass the courts.

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Imagine the potential for enforced arbitration throughout society if the courts treat new uses of arbitration clauses as they have securities arbitration “agreements.” A customer purchases a coffee pot with a major credit card and signs the purchase form, which on the back contains an arbitration


To the common sense of the public, shrink-wrap contract cases like ProCD seem so wrongly decided that they have become fodder for Dilbert cartoons. See, e.g., Scott Adams, Dilbert, TALLAHASSEE DEMOCRAT, Jan. 14, 1997, at C7 (Dilbert: “I didn't read all of the shrink-wrap license agreement on my new software until after I opened it. Apparently, I agreed to spend the rest of my life as a towel boy in Bill Gates's new mansion.”).

The Gateway court cited with approval Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), enforcing a forum selection clause in fine print on the back of a ticket, a case Professor Shell cites as the optimal illustration of the depths to which the Supreme Court has descended and that the Court “has abandoned any role in policing contracts for fair play.” See G. Richard Shell, Fair Play, Consent and Securities Arbitration: A Comment on Speidel, 62 BROOK. L. REV. 1365, 1372-74 (1996).

In the articles cited above, Professor Ware largely defends the Supreme Court's approach to contract questions and defends a more formal and objective theory of contract than I advance in this Comment. However, Professor Ware ultimately concludes that the arbitration required of securities industry employees lacks sufficient vitiolation and also suggests reversal of the separability doctrine. This doctrine permits arbitrators to decide in the first instance issues related to defenses to enforcement of the contract as a whole where the scope of the written arbitration agreement ostensibly encompasses the dispute.

I find Professor Ware’s argument for overruling Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), most interesting and worth further exploration. The separability doctrine is problematic. See Stempel, Better Approach, supra note 2, at 1390-92 (referring to Prima Paint “problem”). Preliminarily, however, I am inclined to retain Prima Paint so long as the judiciary continues to adhere to the unrealistic, formal and narrow view of contract consent and meaning demonstrated in recent cases. Although I agree with much of Professor Ware’s analysis, he endorses an excessively narrow view of contract consent that admits of relief for the targeted party under too few circumstances. For example, by placing undue emphasis on the distinction between private and public conduct, Professor Ware would refuse enforcement of the U-4 arbitration forms executed by securities employees but bind nonsecurities employees to mandated arbitration when virtually all employees are similarly deprived of a position to effect real voluntary consent to arbitration.
clause. If the coffee pot ignites a fire that destroys his house and kills members of his family, should he really be required to arbitrate a claim against the manufacturer? What if the customer buys the product via mail order? Is a written arbitration clause contained in the shipping box binding on the purchaser? When a diner in a restaurant receives a check that contains an arbitration clause on the back, is the diner confined to arbitration if ptomaine or salmonella strike?

The average person’s initial reaction to these suggestions is likely to be that this parade of horribles conjures the ridiculous. Perhaps. I hope so. But judicial treatment of consent issues found in securities arbitration and other arbitration contexts in recent years suggests no readily apparent means of distinguishing current application of the Federal Arbitration Act from the hypotheticals outlined above.

By drifting away from, or perhaps abandoning altogether, society’s traditional notions of meaningful consent, the judiciary has slouched toward a Gomorrah of enforcing agreements that appear to lack real consent. This should raise at least as much concern for us as the licentiousness of Gomorrah seems to raise for Judge Bork and other conservatives. Although some may disagree, I find the erosion of the role of consent in contract law at least as troubling as the nonviolent evils of Gomorrah. A legal system that glosses over serious questions of consent in its contract and dispute resolution jurisprudence reduces its claim to legitimacy and begins to look less like the Anglo-American system we have been raised to revere and more like totalitarian or other systems which place little emphasis on individual rights.

One might well accuse the American judiciary of having taken both the low road of neglect and slouching, as well as the more ambitious path of bootstrapping toward Gomorrah. In its zeal to expand the availability to compulsory arbitration as a partial solution to a perceived litigation caseload crisis, the Supreme Court has labored mightily to interpret the 1926 Federal Arbitration Act\(^9\) in an evolutionary manner that has expanded the scope and power of the Act.\(^10\) Much of the fruit of this effort has benefitted the judicial system and the Ameri-

can public by eliminating erroneously constructed barriers to, or prejudices toward, arbitration. The largest beneficiaries appear, however, to be America's business elite, particularly the securities industry. Irrespective of the distributive consequences, there is no denying that the expansion of arbitration has been substantially fueled not only through the rejection of suspect precedents\textsuperscript{11} but also through reinterpretation of the Act via a more flexible and evolutive form of statutory interpretation to which many judges and Justices claim not to subscribe.\textsuperscript{12}

In a sense, the Court has employed an evolutive, purposive and goal oriented mode of statutory interpretation ostensibly eschewed by many members of the Court and thus has "bootstrapped" arbitration into a position of greater prominence. In its rush to empower arbitration, the Court has overlooked traditional bedrock values of our legal system: consent, unconscionability, disclosure, fairness and federalism. Worse yet, in defending the beachhead of the new arbitration established by dynamic statutory interpretation, the Court and lower courts have frequently relied on a formalist and hypertechnical form of statutory interpretation totally at odds with the flexible, policy oriented approach utilized to expand arbitration. This inconsistent approach has, among other things, reduced consent to a mere legal fiction, a shadow of its former self.\textsuperscript{13}


\textsuperscript{12} For example, Former Chief Justice Warren E. Burger was generally regarded as a judicial conservative disinclined to increase the scope of legislation by giving broad or judicially expanded construction to statutes. However, he authored the majority opinion in Southland Corp. v. Keating, 465 U.S. 1 (1984), a key case that dramatically expanded the reach of the Federal Arbitration Act by construing the statute to create substantive federal law applicable in state as well as federal courts. Current Chief Justice William H. Rehnquist is generally regarded not only as a judicial conservative but also an originalist and a textualist in matters of statutory interpretation. A Justice employing this philosophy will enforce the literal language of a statute but prefers not to expand statutory reach beyond the specific intent of the enacting legislature. But Chief Justice Rehnquist has, with only modest exception, supported the Court's modern, judicially driven expansion of the Act, as has Justice Antonin Scalia, another Justice commonly associated with textualist and originalist values. See infra pp. 1417-28.

\textsuperscript{13} See Richard E. Speidel, \textit{Contract Theory and Securities Arbitration: Whither
Although Professor Speidel's paper is even in approach and emphasis, the reader cannot help but sense that he has tacitly accepted the view that reflective, case-by-case adjudication of consent has become a luxury that the American judicial system either cannot afford or will not support. He concludes his insightful analysis with the disturbing peroration that

it is unlikely that informed consent, bargaining and realistic market opportunities can be easily restored, the answer points toward a more overtly public system of dispute resolution in the securities industry. That system, which has yet to be designed, can require informed consent but cannot rely upon consent as a primary method of regulating the federal contract to arbitration.14

Although one realizes that Professor Speidel continues to harbor a warm spot in his legal heart for consent, his legal cerebrum thinks modern relative preferences and sociopolitical reality require that arbitral fairness be pursued through regulation rather than any serious effort to resuscitate a meaningful approach to consent.

It is quite possible, of course, that Professor Speidel is correct. If the courts, particularly the Supreme Court, apply a wooden, Lochnerized version of contracting15 to issues of arbitrability, superficial remnants of the consent paradigm are of little value. Better to retreat from the consent battlefield altogether and regroup to seek substantive regulation.

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14 See Speidel, Whither Consent?, supra note 13, at 1362-63.
15 The Court's contract jurisprudence has been criticized as advocating an unrealistic model of alleged freedom of contract and limited government involvement reminiscent of the "Lochner era," so named for the Court's decision in Lochner v. New York, 198 U.S. 45 (1905), which struck down a state wage and hour regulation as impermissibly interfering with freedom of contract. The result in Lochner probably was not cheered by the 80-hour-per-week employees whose "freedom" was upheld by the Court to override the legislature's attempt to protect them from sweatshop working conditions. See, e.g., Catherine L. Fisk, Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits, 56 OHIO ST. L.J. 153 (1995); G. Richard Shell, Contracts in the Modern Supreme Court, 81 CAL. L. REV. 433, 436 (1993) (stating that the Court's notions of contract are part of sweeping, "even radical, pro-market jurisprudence").
I do not dispute Professor Speidel or others who support substantial government regulation of the arbitral process. The American disputing system requires substantial government standard-setting and policing of dispute resolution. The more disputes are resolved apart from courts and other government agencies, the more government needs to regulate those disputes to ensure the basic integrity of both disputing processes and outcomes. Although the presumptive government stance should be one of noninterference with private agreements, some baseline of control to ensure fairness is required. More arbitration and ADR may mean less government provision of traditional adjudication, but it does not mean less government involvement. Rather, the ADR revolution implies a different type of government involvement that avoids hamhanded meddling in the arbitral process but provides basic guarantees of justice and a means for enforcing them.\(^{16}\)

One can have both a judiciary meaningfully committed to consent jurisprudence and a set of regulations designed to achieve desired substantive policy for parties who consent to dispute via arbitration rather than litigation. The two concepts are inconsistent only if the nation adopts a public policy that prefers arbitration far more than it prefers consent.\(^{17}\) To the

\(^{16}\) To the extent that arbitration (or any other ADR method) becomes an externally imposed system replacing civil litigation, it cannot truly be considered the sort of private ordering that should fully or nearly fully replace government administration. For example, a multilateral arbitration agreement among similarly situated entities (e.g., a mythical "Alliance for Insurance Coverage Apportionment") would probably qualify as the type of truly consensual, mutually beneficial, efficient effort to resolve disputes with a minimum of government entanglements that constitutes the sort of "private ordering" that actually transplants the prior government-operated status quo. For example, insurers unable to resolve disputes over allocation or apportionment of insurance benefits are faced with the prospect of litigating these issues in both state and federal courts, with the outcomes controlled by the 50 different state laws on the subject, with substantial expenses in legal fees and pretrial fact development. See Jeffrey W. Stempl, Interpretation of Insurance Contracts § 3.4 (1994 & Supp. 1995) (discussing issues of insurance coverage and allocation among multiple insurers with coverage responsibilities).

At virtually the other end of the spectrum from the consensual industry agreement hypothesized above is modern American securities arbitration, which results not from any consensus among the affected contracting parties but from one party's imposition of an alternative system on the other parties to their contracts.

\(^{17}\) As one commentator observed, our legal system values contract law because "we value the consent and the autonomy it presupposes. However, we do not have
extent one can find any fault in Professor Speidel's assessment, it is that he arguably throws consent overboard too quickly in order to attempt to keep substantive justice afloat. A revived consent jurisprudence and substantive regulation of arbitration both are essential ingredients to achieving and maintaining justice in ADR.  

I. THE CONTINUED RELEVANCE OF CONSENT

Although the judicial developments reviewed by Professor Speidel suggest that courts have jettisoned the concept of consent from the judicial lexicon, attempts to relegate consent to the dustbin of either contract or ADR law are misguided. For a variety of reasons, consent remains a vital part of the law even if federal courts today seem to have forgotten this essential truth. Consent offers several distinct benefits if meaningfully incorporated with modern arbitration jurisprudence.

A. Consent as the Basis for the Constitutionality of Arbitration

The Seventh Amendment to the Constitution preserves for litigants a right to a jury trial in actions at law. The right to a jury trial does not attach for equitable actions, but in cases presenting claims for both legal and equitable relief a right to

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autonomy and consent because of contract; it is the other way around—we have contract because we value autonomy and consent.” Dennis Patterson, Good Faith in Tort and Contract Law: A Comment, 72 TEx. L. Rev. 1291, 1292 (1994) (emphasis added). Professor Patterson appears to use the term “consent” as necessarily requiring that the activity be volitional to be consensual. Unfortunately, too many lawyers, judges and politicians appear to have forgotten this simple but elegant truth. In this Comment, I am also using consent as a broad term meaning voluntary agreement. But see Ware, Arbitration and Unconscionability, supra note 8 (suggesting distinction between voluntary consent given without reservation and involuntary consent given grudgingly).

19 I generally support the ADR expansion of the past quarter century, viewed arbitration positively when in private practice, and have served as an arbitrator. But because my association with arbitration has been both actual and theoretical, I harbor few illusions. If arbitration continues to be imposed without meaningful consent or is inadequately policed by the judiciary, injustice will result.

18 U.S. CONST. amend. VII specifically states:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
a jury trial exists for common questions of fact. Although many modern statutes and claims did not exist in 1791, the Amendment has been interpreted to require a jury trial of statutory claims seeking monetary damages, the classic form of legal relief, so long as there is a relatively apt analogy between the modern statutory claim and a historical action for damages. A limited rejection of the right to jury trial exists for statutory matters distinct from common law actions and designed to vindicate "public rights" rather than private claims. Historically, courts conducting essentially equitable

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20 See Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (Seventh Amendment prohibits court from conducting bench trial of equitable claims prior to jury trial of legal claims in case where judge's factual determinations will create issue preclusion of the jury-triable claims). The Beacon Theatres holding was something of a breakthrough decision that operated to expand the right to a jury trial at least as much as to preserve it, because the 1938 merger of law and equity in the Federal Civil Rules as interpreted in Beacon Theatres operated to ensure that henceforth juries would make findings of fact in what had previously been regarded as equitable matters tried solely to the court. See id. at 515 (Stewart, J., with Harlan and Whitaker, JJ., dissenting on ground majority holding expands jury trial right rather than "preserving" it as required by Seventh Amendment). But see John McCoid, Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres v. Westover, 116 U. Pa. L. Rev. 1, 11 (1967) (praising Beacon Theatres as a good example of construing Constitution as flexible document for evolving society).

Despite its arguably revolutionary status, Beacon Theatres remains good law and has been repeatedly affirmed by the Court. See, e.g., Lytle v. Household Mfg., Inc., 494 U.S. 545, 550 (1990) (The Court applied Beacon Theatres and Dairy Queen to require jury trial of erroneously dismissed § 1981 claim and prohibited issue preclusion of common fact determinations based on bench trial of (then equitable) Title VII claim); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (holding that in action involving franchisor's claim for equitable accounting and franchisee's legal claim for antitrust damages, bench trial of accounting prior to antitrust claim violates Seventh Amendment).


22 See, e.g., Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 450 (1977) (Seventh Amendment does not prohibit Congress from establishing statutory claims or duties and designating administrative agency as factfinder where statutory scheme seeks to establish and protect public
proceedings possessed some power to resolve disputed facts through a bench trial as part of the effort to “clean-up” resolution of the matter even if the facts decided touch on a legal claim.23 However, this exception and some of its precedents have been constricted by modern decisions.24

Applied to the typical securities dispute, the Seventh Amendment ordinarily provides a clear default rule in favor of jury trial upon demand of any party.25 Consequently, claims under the Securities Exchange Act of 1934 would ordinarily be subject to jury trial.26 Starting at ground zero, investors possess a seventh amendment right to jury trial in claims against their brokers and vice versa. Because the jury trial right in these cases is constitutional, it cannot be abrogated by legislative enactment, executive order, widely held reservations about juries or enthusiasm for alternative dispute resolution. Only actions by the parties, such as a waiver of the right to jury trial27 or a desire to substitute some other proceeding in lieu of jury trial, can divest a disputant of seventh amendment rights.28

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23 See Katchen v. Landy, 382 U.S. 323, 337 (1966) (Seventh Amendment does not require jury trial where trustee sues former creditor to recover payments made by alleged voidable preference).


26 See, e.g., Service Group, Inc. v. Essex Int’l, Inc., 74 F.R.D. 379, 382 (D. Del. 1977) (jury trial required for damage claims under 1934 Securities Exchange Act). This principle is so well established that there are literally no cases dated after 1977 in the Civil Procedure volume (Rule 38) of the United States Code Annotated. Since 1977, the Supreme Court has, in general, acted to expand rather than contract seventh amendment rights. See infra note 28 and accompanying text.

27 See, e.g., Fed. R. Civ. P. 38(d) (“Failure of a party to serve and file a demand [for jury trial] as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.”).

28 See, e.g., In re Balsam Corp., 185 B.R. 54, 58 (E.D. Mo. 1995) (parties can by agreement abrogate right to jury trial).
It follows, of course, that claims are arbitrable only when the disputants have evidenced sufficient consent to arbitration to overcome seventh amendment concerns. This axiom is both simple and seemingly overlooked or underappreciated in the modern ADR debate. The oversight probably results from the judicial tendency to find consent upon the slimmest of reeds.29

Although a serious examination of consent in some of these cases could have resulted in a finding of sufficient consent, it is more than a little disturbing that the Court seems unwilling to make a sustained examination of consent issues. The Court’s disinterest in consent issues is disturbing enough. Its refusal to apply a realistic notion of consent is shameful.30

29 See Edward Brunet, Arbitration and Constitutional Rights, 71 N.C. L. REV. 81, 107-10 (1992); Edward L. Rubin, Toward a General Theory of Waiver, 28 UCLA L. REV. 478, 512-63 (1981) (generally prevailing contract law finds waiver on the basis of external indicia of acceptance of transaction rather than requiring specific proof of voluntary and knowledgeable choice among actually existing alternatives). For example, the Supreme Court has expressly or implicitly found adequate consent in a variety of suspicious circumstances. Perhaps most infamously, an employee is found to have consented to arbitrate and forgo constitutional rights on the basis of executing forms required as a condition of work. See Gilmer v. Interstate/Johnson Lane Co., 500 U.S. 20 (1991) (broker required to sign New York Stock Exchange form agreeing to arbitrate any disputes arising out of employment held to agreement without serious analysis of consent issue; application of § 1 of the Federal Arbitration Act, which provides that Act does not apply to contract of employment, and rejecting claim). Vacationers have been held to forum selection clauses printed on the back of ocean liner tickets. See Shute v. Carnival Cruise Lines, Ltd., 499 U.S. 585 (1991) (Washington State residents required to bring claim for personal injuries arising out of ocean liner vacation in Florida due to choice of forum language in small print on back of tickets received after purchase and shortly before departure). Disabled vessels have been bound by the forum selection clauses in the form contract signed as a condition of obtaining a tow for the drifting vessel. See Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Franchisees have been held to arbitration provisions in franchise agreements without any serious focus on issues of consent. See, e.g., Doctor’s Associates, Inc. v. Casarotto, 116 S. Ct. 1652 (1996) (Subway sandwich shop franchisee subject to arbitration clause despite state law requiring disclosure of arbitration provisions); Soler Chrysler-Plymouth v. Mitsubishi, 473 U.S. 614 (1985) (automobile dealer required to arbitrate due to clause required by manufacturer as a condition of relationship).

30 How many of us “agree” to whatever is on the back of a ticket stub or a parking lot sign? How many of us are willing to risk losing a promised job when the employer at the last minute requests/demands execution of an arbitration agreement in conjunction with the W-4 Form? Fortunately, not all courts are as blind to this concrete problem as is the Supreme Court. See, e.g., Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994), cert. denied, 116 S. Ct. 61 (1995) (arbitration clause signed by securities industry worker unenforceable in Title VII claim in light of context of execution of agreement; arbitration form rushed by
There are troubling consent issues lurking at the periphery of arbitrability decisions. Although a sustained examination may result in defensible enforcement of these arbitration clauses, the Court's sweeping away of consent considerations truncates analysis and robs the case law of content it should contain: i.e., what should the law require by way of consent to make for an enforceable agreement, and does the standard vary according the stakes of the case?

Because, as Professor Speidel has noted, we have moved toward a system of mandatory arbitration where consent is treated as a mere legal fiction, arbitrability case law lacks serious consent analysis. But without consent the entire edifice of enforcement of arbitration agreements falls before the Seventh Amendment. Although the current Court is unlikely to have a vision of consent on its arbitral road to Damascus or Gomorrah, this should provide limited comfort even to arbitration proponents. Were the Court to become more seriously focused on consent, entire arbitration systems might in the future be invalidated for failure to obtain meaningful consent of the contracting parties. A shift in judicial thinking might invalidate entire regimes of arbitration erected during the Court's current obliviousness to consent issues. In addition, arbitration under these circumstances will remain politically suspect and more ripe for extensive regulation to the extent it is imposed by fiat or duress-like leverage without disclosure and consent.

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Professor Ware criticizes *Lai* for tacitly making the right to litigate employment disputes less alienable than other rights. See Ware, *Arbitration and Unconscionability*, supra note 8. I disagree to some extent in that the *Lai* focus is on actual consent rather than ostensible consent. The *Lai* approach should be the norm for policing all contracts, not only arbitration agreements, although mutual consent can be proven by outward acts. In addition, even if Professor Ware's assessment is correct, courts should impose a more searching standard of inquiry where the right allegedly waived potentially implicates the party's ability to enforce a host of other rights. See generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1981) (arguing for limited judicial intervention in policing law except where structural barriers prevent political process from adequately considering claims of entity challenging law).
B. Prudential Reasons for Retaining a Vigorous Concept of Consent

Although the Seventh Amendment raises additional concerns and makes for a massive system of mandated arbitration built on feet of clay, the constitutional concerns about enforced arbitration are but one reason to insist that courts take the issue of arbitral consent seriously. A number of prudential concerns flowing from contract law, litigation procedure and jurisprudence also counsel continuing concern for consent.

1. Emphasizing Consent Is Most Consistent with Contract Law

For the most part, contract is about consent. The concept of contract is best explained by notions of consent, and contract law is most legitimately supported by consent. Although consent based contract theory has been debated as excessively libertarian, such attacks are misguided, even if one finds

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33 For example, Professor Kastely’s attack on Professor Barnett misses the mark by pulling from the context of his consent theory article a specific illustration, which is then attacked, assertedly for taking a position Professor Barnett seems to me not to have endorsed, and then labeling “absurd” the conclusions Barnett did not reach. See Kastely, supra note 32, at 150-51. Most distressingly, Professor Barnett’s consent theory is portrayed as more libertarian than a fair reading permits. A more balanced view treats Barnett-style consent theory as both libertarian and “formalist” while also emphasizing the protective, almost paternalistic nature of consent theory in protecting individuals’ “freedom from contract.” See, e.g., Richard E. Speidel, Afterword: The Shifting Domain of Contract, 90 NW. U. L. REV. 254, 252-63 (1995) [hereinafter Afterword]. However, even if Professor Barnett’s vision of a consent theory is largely libertarian, it does not follow that the consent basis of contract is strictly libertarian. Requiring consent as a prerequisite to legal enforcement seems at least as communitarian as it is libertarian.
consent insufficient to provide the overarching theory of contract. Although one might argue that other aspects of contract—bargain, reliance, promise, efficiency, mobility of resources, etc.—are more central to contract, no serious observer can deny that consent and assent at least lie near the core of contractual values. Even if consent is not sufficient to support a theory, it remains a most important criterion for determining the validity and scope of contracts. One need not be particularly libertarian to appreciate the importance of consent.

To the extent that contracts generally rest in large part on consent, it is at least equally true that consent is central to the arbitration contract, which touches more closely on fundamental values of civic rights and access to the courts than does the average contract. In the absence of an agreement indicating consent to arbitrate disputes, the "default rule" is civil litigation in courts of general jurisdiction. Subject to limits of illegality or unconscionability, parties may generally make a voluntary agreement to contract out of default rules and into something else. The key word, of course, is voluntary. Involuntary agreements are not, generally speaking, enforceable contracts. Voluntarism presumes consent, although both voluntarism and consent may be found constructively and under circumstances where the consent is grudging, if sufficiently informed and noncoercive. An agreement lacking at least minimal indicia of informed consent is really not a contract and ordinarily does not deserve enforcement.

Arbitration contracts are particularly problematic, as Professor Speidel has noted previously:

[The alternative dispute resolution (ADR) phenomenon requires a very close look. A mediated or agreed settlement and a final arbitra-

More specifically, even if one accepts the standard view that "intent" is irrelevant so long as the buyer has an opportunity to review adhesion contract terms, the credit card, boat ticket, shrink wrap, and packaging cases are wrongly decided because the inadequate opportunity for review precludes even constructive consent. See supra notes 8, 29-31; Speidel, Whither Consent?, supra note 13, at 1350 n.58.

34 See generally Todd Rakoff, Too Many Theories, 94 Mich. L. Rev. 1799 (1996) (contract scholars have been excessively entrepreneurial in advancing preferred unifying theories of contract with little benefit to our actual understanding of contract).

35 At bottom, the consent criterion in contract stems from the simple notion that people should keep their promises but not be legally constrained by promises they did not truly make.
tion award resolve disputes with finality. Although the process of settlement or award may be reviewed, the merits are normally insulated. The pro-ADR rhetoric is strong and, frequently, justice between the parties is done. Where these outcomes are beyond the scope of regulatory law and no third party interests are involved, the process can and should be defended. But there is a potential dark side to ADR, especially where regulated organizations are able to insist upon arbitration to resolve all claims arising from or relating to a contract, including statutory and punitive damage claims against them.\textsuperscript{36}

Having noted the “dark side” of arbitration in this Symposium and in his prior work, Professor Speidel urges substantive regulation as the means for controlling the arbitral beast, too quickly eschewing a role for serious consent based scrutiny by the courts. If arbitration is to continue as a contract driven mode of ADR, it must be adjudicated with ample respect for the importance of consent in contract law.

2. Deferring to Experience: A Burkean\textsuperscript{37} Perspective on Consent

As noted above, consent is and has long been at least a major underpinning of Anglo-American contract doctrine even if it is not the major underpinning of contract. Furthermore, courts have for some time been in the business of adjudicating contracts on the basis of consent, assent, voluntarism and fairness as well as text and evidence of bargaining.\textsuperscript{38} Even

\textsuperscript{36} Speidel, Afterword, supra note 33, at 265.

\textsuperscript{37} By “Burkean,” I mean a conservative perspective reluctant to depart from traditional values and activity unless those advocating change have made a highly convincing case for change. Edmund Burke, the paradigmatic form of this sort of conservative, placed a high value on success proven by experience and was skeptical of reformers who merely hypothesized that the traditional means of organizing society could be improved upon in light of tradition’s past effectiveness. See Bailey Kuklin & Jeffrey W. Stempel, Foundations of the Law 55-56 (1994).

\textsuperscript{38} See E. Allan Farnsworth, Contracts chs. 1-3 (2d ed. 1990) (viewing promise and assent, both of which involve consent, as central to contract, but recognizing that courts find enforceable assent even where resisting party claims to have lacked complete appreciation of agreement or equal bargaining power); Jean Braucher, The Afterlife of Contract, 90 NW. U. L. Rev. 49, 58-60 (1995) (early twentieth century contract law guru Samuel Williston, although painted as a formalist supporter of laissez-faire notions, supported judicial policing of contracts on bases of both consent and public policy); Robert A. Hillman, The Triumph of Gilmore’s The Death of Contract, 90 NW. U. L. Rev. 32, 33-34 (1995) (Nineteenth
though these tools may have fallen from fashion in the modern Supreme Court, there is no persuasive reason for abandoning them. At a minimum, then, there is a strong argument for retaining consent as a fulcrum of our contract jurisprudence simply because it is the status quo—or at least was until the last few years of the Court’s slouching. Quite frankly, the issue of arbitrability tests whether current conservatives on the bench are “Edmund Burke Conservatives” who resist changes in law and society absent a compelling reason or what might be termed “J.P. Morgan Conservatives” who embrace whatever legal and social goals are sought by commercial interest groups.39

Put in Burkanian terms, the issue becomes whether arbitration partisans have advanced any compelling reason to remove consent from the arbitrability equation. No such case has been made. Arguments for enforcement of boilerplate arbitration agreements follow the simplistic view that the existence of a written arbitration agreement presumes consent irrespective of the actual context of the transaction. Beyond this, arbitration proponents make the theoretical argument that the availability of enforced arbitration without significant burdens of bargain, disclosure or consent will enable industry to offer products or services at a lower cost. This pseudo-empirical argument for enforced arbitration as efficiency suffers from two defects: (1) there is no evidence to suggest any reduction in price flows from enforced arbitration,40 and (2) there is no compelling

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39 See KUKLIN & STEMPLE, supra note 37, at 53-59 (describing leading political philosophers with influence on law and summarizing Burke’s view).

40 Although consumer prices may not have been reduced by arbitration, busi-
normative argument that the Kaldor-Hicks efficiency posited by arbitration's cheerleaders, even if achieved, is more important than protecting the rights of a contract party that did not consent.41

In short, traditional contract law reflects the common sense intuition that society values some things more than lower costs, efficiency or greater aggregate wealth. Default rules and systems reflect a socio-legal judgment as to what should occur in the absence of agreement. Where a default litigation system is supplanted by arbitration, some relatively reliable indicia of agreement to the substitution is logically required. Consent is logically required. If courts insist on adequate consent, there is far less need to "litigationize" arbitra-

ness profits may have been enhanced (although even this article of faith among arbitration proponents has no solid empirical support). But an increase in business profit, although hardly a bad thing, is not the promised consumer benefit that has been used to "sell" arbitration to courts and legislators.

41 For example, in the Badie v. Bank of America litigation, University of Virginia Law School Dean Robert Scott testified as an expert witness for the bank, which had added an arbitration clause in its credit card agreements via an insert to regular customer monthly billings. Continued use of the credit card was to constitute consent to the new arbitration provision. According to Dean Scott, creation of an enforceable arbitration clause through this attenuated method of contracting vindicated the public interest because it would enable the bank to offer credit card services at a lower fee or interest charges. This view is fine in theory, but it appears that neither Dean Scott nor any other bank witness introduced any evidence of a reduction in charges accompanying the bank's switch to arbitration nor any evidence of price reductions wrought through other mandatory arbitration programs. Notwithstanding the absence of empirical proof, the court, beguiled by the theoretical gains, ruled the bank's "arbitration by junk mail" contract enforceable. See Badie v. Bank of America, No. 94-4916, 1994 WL 660730, at *1 (Cal. App. Dept Super. Ct. Aug. 18, 1994).

Moreover, even a world of lower aggregate prices does not in itself support a rejection of consent in contract law. Put differently, should even a relatively small group of people be directed toward a dispute resolution forum not of their choosing simply because this may lower the interest rate on the unpaid balance of a credit card by one-tenth of one percent? In the specific context of securities arbitration, the potential trade-off is starker still. Should even a relatively small number of investors be forced to arbitrate unwittingly or without promise or assent in return for at best marginal savings in commission expenses? If arbitration results in reduced detection and punishment of fraud, churning or unduly risky broker behavior, the trade-off becomes a poor one irrespective of the aggregate savings to consumers as a whole, the majority of whom are not defrauded by even the most corrupt of industries. See Lynn A. Stout, Type I Error, Type II Error, and the Private Securities Litigation Reform Act, 38 ARIZ. L. REV. 711, 714 (1996) (costs of even a small increase in securities fraud dwarf any savings from reducing procedural expenses in view of sheer size of American capital markets).
tion. Furthermore, for some claims the judicial mechanisms for assessing truth are more likely to be effective than those of arbitration. In these classes of cases, courts should insist on a high quality of consent as a prerequisite to enforcing arbitration agreements.

In addition, the notion of consent is central to much of our jurisprudence. Our litigation system is an adversarial one premised on disputants retaining counsel. In civil and even criminal litigation, disputants can do much to shape the conduct and outcome of litigation through consent: waiver, stipulations, and settlement (partial or complete). Exiting of the system via consensual settlement is permitted even on the metaphorical steps of the Supreme Court. But even in this arena of sharpened adversity, where the parties ordinarily have counsel and are acutely aware of the dangers of being held to a constructive agreement through failure to speak or act decisively, courts ordinarily require some meaningful degree of consent before attaching legal consequences.

3. Consent, Judicial Competence and Improving Arbitrability Adjudications

A more vigorous consent regime of arbitrability holds potential to provide procedural and other adjudication advantages over the current practice of mandatory arbitration.

a. A consent paradigm for arbitration is articulable, feasible and affordable.

One ground for ejecting consent from the arbitrability branch of contract law posits that serious attention to consent

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42 See Bruce M. Selya, Arbitration Unbound?: The Legacy of McMahon, 62 Brook. L. Rev. 1433, 1445-46 (1996) (criticizing increasing formalization of arbitration procedures as negating speed, cost and efficiency advantages traditionally enjoyed by arbitration over litigation).

43 See Selya, supra note 42, at 1456-57 (suggesting that courts are more competent to determine discrimination claims but no better than arbitration panels for assessing securities disputes).

44 See, e.g., Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866 (9th Cir.), cert. denied, 444 U.S. 981 (1979) (parties settle antitrust dispute with petition for certiorari pending, leading to dispute over apt fee owed petitioner's counsel under unusual contingency fee agreement).
issues interjects too much unpredictability and subjectivity, thereby undermining the Federal Arbitration Act\textsuperscript{46} and its attendant national policy.\textsuperscript{46} The charge is at best overstated.

\textsuperscript{46} This argument has not been stated quite this openly in arbitrability litigation or adjudication but is discernable in the Court's tendency to resist serious inquiry regarding consent issues in arbitrability cases. Even when the Court holds an arbitration clause unenforceable, it tends to do so based only on formal or superficial reasons rather than a full contextual inquiry into the agreement.

For example, in First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1216 (1995), the Court refused to require the Kaplans to arbitrate although they had guaranteed the commodity trading obligations of a company they controlled, which had entered into an arbitration agreement. The Court's reasoning: the Kaplans individually were different entities from their company, the entity that signed the arbitration agreement and that was that. Id. at 1218-19. Although this may have been the right result and certainly is in part a welcome tip of the judicial hat toward consent, it is nonetheless a suboptimal arbitration decision. A serious inquiry would have examined whether in the context of the transaction the Kaplans as personal guarantors of a closely held company they owned reasonably expected any commodity trading disputes to be resolved in an arbitration proceeding.

In Mastrobuono v. Shearson Lehman Hutton, Inc., 116 S. Ct. 1212, 1216 (1996), the Court essentially decided that investors should not be held to the unfairly surprising terms of a choice of law agreement in a securities brokerage contract providing for arbitration where the chosen law, that of New York, was unusual in its prohibition against arbitrators awarding punitive damages no matter how egregious a defendant's conduct. But even Mastrobuono, by far the best of the Court's recent arbitration decisions, was decided on the basis of rough theorizing about the matter—positing that the Mastrobuonos, academics, were insufficiently sophisticated to appreciate the limitations of New York remedies law—rather than any actual inquiry as to the intent, understanding and agreement of the parties to the contract.


[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

\textit{See also} Jean R. Sternlight, \textit{Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration}, 74 \textit{WASH. U. L.Q.} 637, 660 (1996) (identifying Moses H. Cone as initial case placing Court on record as favoring arbitration as a matter of national policy).

Professor Sternlight's assessment is perhaps overstated in two facets, however. First, the Court's interpretation of the Act as an endorsement of arbitration as well as a statute mandating an end to discrimination against arbitration as a matter of contract enforcement can be seen at least tautly in cases such as the 1960 Steelworker's Trilogy, even though these were labor arbitration cases and the Court's enthusiasm for labor arbitration predates its embrace of commercial arbitration. The Steelworker's Trilogy consists of United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp.,
The Act reflects a national policy of enforcing arbitration agreements. It does not reflect a national policy in favor of arbitration over litigation or any other form of dispute resolution. The intent of the Arbitration Act was to override a judge-made rule refusing to give specific enforcement to predispute arbitration agreements. A proper application of the Act would preserve traditional contract doctrine, including the consent concept. Reviewing, enforcing, and policing arbitration


Second, Moses H. Cone and its progeny have emphasized that the perceived national policy favoring arbitration mandates a deferential view of the scope of an arbitration agreement but not necessarily a similarly relaxed notion of consent. See, e.g., AT&T Technologies, Inc. v. Communication Workers of Am., 475 U.S. 643 (1986) (refusing to compel arbitration of particular work dispute where particular type of dispute is not mentioned on face of labor arbitration agreement). The insidiousness of the Court's consent jurisprudence has not been its express rejection of the consent concept, but rather the implicit rejection of consent through a hair trigger tendency to deem an arbitration agreement consensual under even the most coercive circumstances.

47 See IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992) [hereinafter AMERICAN ARBITRATION LAW] (reviewing origins and enactment of the Act; chapter 9, Analysis of Legislative History, is particularly focused on the intent of the Act as passed); Stempel, The Employment Exclusion, supra note 7, at 288-93.

The House Judiciary Committee stated the following with regard to the Act: "The bill declares that such agreements shall be recognized and enforced by the courts of the United States." H.R. REP. NO. 96, 68th Congress, 1st Sess. (1926) (quoted in MACNEIL, supra, at 117). Nothing is said to suggest that the Act in any way disturbs normal tenets of contract law. Rather, the Act appears an effort to require federal courts to enforce arbitration agreements that meet the standards by which other contracts are enforced by federal courts. See Stempel, Pitfalls, supra note 11, at 271-74 (prior to Act, federal courts and many state courts exhibited jealousy of jurisdiction and refusal to enforce arbitration agreements merely because this would divert dispute to nonjudicial forum).

48 As Professor Sternlight observes:

The practice of interpreting ambiguities to favor arbitration, which the Court first enunciated in Moses H. Cone in 1983, is nothing less than a means of spreading binding arbitration by Supreme Court fiat. Some courts have used this interpretive power boldly to require consumers, employees and others who likely had no idea arbitration would be relevant to a given issue to submit the problem to arbitration. However, no policy supports the Court's practice of interpreting an ambiguous arbitration agreement any differently from any other ambiguous contract . . . . Congress never authorized the Court to put its thumb on the scale to favor arbitration in the commercial or consumer context, and such bias also lacks support as a matter of policy.

Sternlight, supra note 46, at 704-05 (footnotes omitted); see supra note 46 (suggesting Court's expansion of Act to create national policy favoring arbitration rather than merely commanding courts not to discriminate against arbitration con-
agreements according to the quality of consent evidenced in the matter admits of workable judicial standards.\(^49\)

\(^{49}\) In particular, through the application of traditional adjudication, courts could ensure that arbitration agreements qualify as enforceable contracts meeting the consent criterion. Written agreements to arbitrate would be treated as presumptively enforceable, but the presumption would be rebuttable upon a showing of any of the following:

1. **Blameless Ignorance.** [The party resisting arbitration] was not adequately aware of the arbitration clause or the nature of arbitration as opposed to litigation, made reasonable efforts to acquire sufficient awareness, and would not have consented to a contract with the instant arbitration clause if aware of the differences between arbitration and litigation;

2. **Dirty-Dealing.** The arbitration agreement or the contract as a whole was procured through fraud, misrepresentation, or coercion and the objecting party cannot be said to have constructively consented to arbitration;

3. **Inescapable Adhesion.** The arbitration clause is part of a contract of adhesion and the subject matter of the contract is vital to contemporary human existence, similar to those things that the law of contracting by minors has traditionally labeled as “necessary,” and [the party resisting arbitration] had no reasonable means of obtaining the good or service or its substantial equivalent from another source;

4. **Substantive Unconscionability.** The arbitration forum, system, or chosen process decreed by the clause is so unreasonably favorable to the drafter as to be substantively unconscionable [such] that the courts will not enforce the agreement;

5. **Defective Agency.** The [party resisting arbitration] did not sign the arbitration agreement and the signer was not an agent . . . authorized to commit the subject matter of the instant dispute to arbitration or, if authorized, breached its fiduciary duty to the opponent in signing an arbitration agreement of such breadth.

Stampel, Better Approach, supra note 2, at 1434-35 (footnotes omitted). The five suggested criteria for refusing to enforce ostensible arbitration agreements are developed at greater length in the article, which also reviews the history of arbitrability adjudication and historical grounds for refusing to enforce arbitration clauses.

These five grounds for avoiding an arbitration clause, with minor variants or additions, would provide courts with a sensible yardstick for determining whether a written arbitration provision sufficiently satisfied the consent criteria to merit enforcement. Courts applying this sort of template would not be rejecting arbitration on the basis of judicial hostility to the concept nor interfering with freedom of contract. My proposed typology of consent based defenses to arbitrability has been criticized as merely restating existing defenses available in contract law and thus tending to “reinvent the wheel.” See Ware, Employment Arbitration, supra note 8, at n.138. What I propose is a refinement of the wheel rather than its reinvention. In my view, courts have been clumsy in their treatment of the consent aspects of arbitrability because they have not adapted traditional consent norms of contract to arbitration. Having more specified arbitrability defenses will assist the judicial enterprise.
Although some arbitration proponents might argue that adoption of a consent scrutiny approach is an overdose of due process that makes arbitration enforceability too difficult, the argument is not persuasive. Courts have adjudicated contract matters for centuries. As noted above, even in the purported heyday of classical contract doctrine and the objective theory of contract, courts policed agreements on the bases of the parties' understanding of the stakes and of the bargain, as well as issues of consent and fairness. Reinvigorating these traditional concepts is unlikely to add significantly to the judicial burden. An initial upsurge in judicial resources devoted to this richer review of arbitration contracts is likely to be temporary, with judicial precedents subsequently requiring parties to establish adequate contracting norms and procedures and to conform their behavior to the standards enunciated by the courts.

b. Consent based contract interpretation provides a more useful criteria for determining arbitrability in a manner consistent with judicial competence.

i. A Non-Securities Example of the Dangers of Neglecting Consent Analysis

A meaningful doctrine of consent could operate to relieve courts of the need to engage in more difficult issues that are less susceptible to adjudication such as statutory conflict, pub-

To some extent, I am also proposing an expansion of the wheel in that I clearly envision more court based policing of the quality of consent in contracts than do Professor Ware and other neoclassical contracts scholars. For example, even though Professor Ware and I agree in general that consent should be the focus, his preferred consent doctrine is far more likely to hold parties to mass-imposed form agreements than is mine, at least outside the securities context. Within securities, our positions reverse to some degree since he places greater emphasis than do I upon the semi-public nature of the securities self-regulatory organizations.

Rather, courts using these five grounds for avoiding an arbitration clause would be ensuring that freedom was actually sufficiently present in the context of the asserted arbitration contract. In other words, examination of arbitration clauses according to these criteria would vindicate the longstanding national policy Professor Speidel identifies as "freedom from contract." See Speidel, Whither Consent?, supra note 13; Speidel, Afterword, supra note 33, at 262-64.

See supra notes 32-41 and accompanying text.
lic policy limits on arbitrability or even the historically judicial issue of unconscionability. When focusing on traditional adjudication of contract issues such as offer, acceptance, consideration and consent, courts might well do better than they do when attempting to make broad pronouncements of the law.

Ironically, a recent example, albeit not one from securities arbitration, was relatively recently rendered by the Supreme Court in the commercial ADR area. In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* a fruit distributor shipped its products overseas. The bill of lading issued for the transaction, a shipment from Morocco to Massachusetts, contained a clause stating that the transaction would be governed by Japanese law and that any disputes arising under the arrangement would be arbitrated in Japan before the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc. The vessel was time-chartered to a Japanese company. A dispute arose, but the claimant unsuccessfully resisted arbitration on consent grounds, arguing that the bill of lading was a contract of adhesion. The claimant also lost on the issue on which the Supreme Court granted certiorari: Was the arbitration provision barred by the Carriage of Goods by Sea Act ("COGSA"), a federal statute providing that any limitation on liability contained in a shipping agreement was unenforceable? In particular, did the required arbitration in a distant forum with potentially less favorable contract breach remedies constitute what was in effect a limitation on liability?

The Court held that COGSA did not conflict with the FAA and that an arbitration clause in an arguably inconvenient forum would not constitute a limitation of remedies of the shipper within the meaning of COGSA. Because the Court found arbitration (even in Japan) not to be the functional equivalent of a limitation on liability, the Court found no conflict between COGSA and the Federal Arbitration Act. Had a

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51 Although I have advocated a continued strong role for unconscionability analysis as a means of policing arbitration agreements, a court's determination that an agreement is excessively favorable to one party (a definition of unconscionability) involves the court in more of the semi-legislative determination of regulating private behavior than does adjudication of matters such as the scope of the agreement, the existence of fraud or the presence of consent.


conflict existed, the Court would have been forced to determine which statute controlled. Remarkably, only Justice Stevens 
dissentcd, and only he raised any concern over consent and contracting fairness. Although Justice Stevens appreciated 
general judicial desire to avoid statutory conflicts, he thought the majority had "ignored a much less damaging way 
to harmonize COGSA with the FAA" through a serious consider-
ation of the contractual consent and validity issues presented 
by the oppressive application of the billing of lading.

Justice Stevens is right on two counts. First, as he notes, 
serious contract policing of arbitration agreements would, as in 
Vimar, frequently lead to invalidation or modification of arbi-
tration clauses, thus avoiding some statutory conflicts. In addi-

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54 Justice Stevens also criticized the Court's continued adherence to and expansion of Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), which enforced a ticket stub forum selection clause. Although the contract consent issue was not directly addressed by the majority, Justice Stevens noted the importance of the matter through citation to a similar case involving a different bill of lading provision:

The shipowners stress the consensual nature of the clause, arguing that a bill of lading is not a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all its twenty-eight lengthy paragraphs, of which this is [but one clause in the middle]. This lack of equality of bargaining power has long been recognized in our law; and stipulations for unreasonable exemption of the carrier have not been allowed to stand. Hence so definite a relinquishment of what the law gives the cargo as is found here can hardly be found reasonable without direct authorization of law.

Vimar, 115 S. Ct. at 2335 (quoting United States v. Farr Sugar Corp., 191 F.2d 370, 374 (1951)). Perhaps nostalgically, I note that Justice Stevens quotes from a Second Circuit case decided a half-century before, underscoring the degree to which the modern Court has, but for perhaps Justice Stevens alone, strayed from the commitment to consent and common sense contract construction once exhibited by the American bench. See Braucher, supra note 38, at 60 (modern Court decides contract matters as though hypnotized by "blinding fog" of freedom to contract rhetoric), 72 (in contract cases reviewed by Professor Braucher, Justice Stevens "plays the role of most sensible member of the Supreme Court").

Justice O'Connor concurred "because the District Court has retained jurisdiction over this case while the arbitration proceeds, [so that] any claim of lessening of liability that might arise out of the arbitrators' interpretation of the bill of lading's choice of law clause, or out of their application of COGSA, is premature." Vimar, 115 S. Ct. at 2330. As of this writing, there has been no further reported decision in Vimar.

55 Vimar, 115 S. Ct. at 2337 (Stevens, J., dissenting).
tion, there is a second benefit from focusing on contract first and statute or policy second: Courts are generally better equipped to assess contract or other private law disputes than to determine and evaluate statutory meaning and public policy. Although these latter types of evaluation are unavoidable for modern courts, this hardly requires courts to pursue the potentially sweeping activism of setting forth a general statutory pronouncement or making an interstitial or extrapolated assessment of the American polity's real views about arbitration. Instead, a court might better function as a plain vanilla judiciary and decide contract disputes largely according to the norms of contract, including the consent criterion. Contract policing according to consent and other criteria is an essentially more focused adjudicatory role and less a policymaking role. As such, it should generally be preferred for courts under the norms of the American politico-legal system.

ii. Applying Consent Criteria for Better Determinations of Securities Arbitrability

Under the current regime of softpedaling consent issues and forcing many cases into the problem of conflicting rules and public policy, the legal profession will probably continue to diverge markedly over arbitration issues. If a brokerage house arbitration agreement provides that a Buffalo retiree must arbitrate a churning claim against her New York stockbroker in Vladivostok, reasonable observers would find the arrangement unconscionable or a substantive violation of the 1934 Act or both. But does it violate substantive law for the hypothetical little old lady in tennis shoes to shuffle from Buffalo to Manhattan to arbitrate these claims? Academics and judges may disagree over these matters of legislative reach and public policy. But these same jurists may be considerably more united in addressing the degree of knowing and voluntary consent exhibited in a contracts transaction. Rather than focusing on the convenience and tactical advantages of such disputes, the legal

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66 I emphasize again, however, that my view of the correct contract based application of consent criteria is somewhat more searching than other scholars have found it to be in areas outside of arbitration. See, e.g., Rubin, supra note 29, at 512-63.
system should focus on whether the consumer was adequately informed and agreed to arbitrate in Manhattan. If so, such agreements should ordinarily be enforced. As discussed below, consent based arbitral adjudication would be neither costly nor eviscerating of arbitration.

Courts may be able to reach greater agreement and consistency when adjudicating issues of consent, provided we can agree on the general ground rules regarding what constitutes consent. Of course, continued division is undoubtedly possible, with some Justices willing to find consent in the most cursory signature on boilerplate forms while others may require painstaking explanation and roughly equal bargaining power as prerequisites to a finding of consent. But under a doctrinal regime that makes a reasonably searching inquiry into consent, my prediction is that most courts would agree more often than lawyers agree over issues of statutory conflict, public policy, politics and whether a particular disadvantage created by contract constitutes a substantive diminution of substantive rights.

Consequently, a serious consent doctrine seriously enforced holds the potential for making arbitration law a good deal more consistent and candid. If the primary issue in most arbitrability disputes is consent rather than public policy or statutory conflict, the court's (or arbitrator's) inquiry is the relatively simple one of determining whether the complaining party in fact consented to the arbitration provision of which it complains. This is what courts historically have done well and what historically has been assigned to courts in U.S. polity. When courts must deal with questions of statutory conflict and public policy, they enter a realm closer to, and perhaps overlapping into, the domain of the legislature. Even though assessment of substantive law and fundamental fairness are traditional judicial activities, they are areas of adjudication that more frequently turn on the ideological divisions of the bench.

Applied to securities, a consent regime would worry less about whether a particular arbitration provision was inconsistent with national securities regulation and worry more about whether there was actual consent. If the court finds real consent, it should hesitate to disturb the arbitration arrangement.
unless it finds the arbitration scheme one that creates a substantial danger for national securities regulation policy.

A tougher issue arises when the industry's commitment to arbitration is so uniform and widespread that the only means by which even the best informed consumer can escape securities arbitration is to avoid the securities based financial markets altogether. At the Symposium panel discussion, G. Richard Shell recounted his humorous but troubling episode attempting to avoid the standard arbitration clause in several brokerage agreements he was pursuing on behalf of family members. Because he is a sophisticated lawyer/businessperson/scholar and because he effectively controlled several accounts, the general counsel for the brokerage house was willing to waive the arbitration clause after Professor Shell's relatively mighty efforts to avoid mandatory arbitration. Where average customers are involved, this outcome is unlikely, prompting the question as to whether arbitration clauses insisted upon as a condition of opening an account should be enforced. Symposium participants suggested that a few smaller brokers offered account agreements without arbitration clauses, but these are seemingly too difficult to find for most consumers, including Professor Shell, who found it more effective to argue with a major broker than to shop for a more pliable minor broker.

Six years ago, I argued for enforcement even where the industry offered no nonarbitration version of the discretionary account clause, and I continue to hold to this view concerning this type of brokerage agreement. First, by definition, the discretionary trading account is something for the above-average consumer. Before one buys stocks, let alone needs instantaneous broker discretion, one needs a fair amount of wealth as compared to the average American. Holders of such accounts should not include the proverbial little old lady in tennis shoes. Perhaps the securities industry should not be opening such accounts for average or unsophisticated customers (i.e., even little old ladies with money), but that is an issue dif-

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ferent from arbitrability. My point is that one does not need a discretionary trading account to participate in the American capitalist system. If a typical investor is adequately apprised about the arbitration clause, the investor may not enjoy Professor Shell's success in haggling over the term, but the term is not oppressive so long as the investor can reject the agreement and instead invest in nondiscretionary trade brokerage accounts, mutual funds or direct purchase of stock from the issue company.

The hard questions about adhesion and escape occur if these alternative investment vehicles are uniformly offered on an "arbitration only" basis. Although the investor may in theory spurn an imposed arbitration agreement affecting securities in favor of her local bank or cash in the mattress, these are probably not realistic financial options when certificates of deposit are paying six percent and the stock market has risen at an average annual rate of nearly fifteen percent during the past decade. Worse yet, current Supreme Court jurisprudence admits of no readily ascertainable stopping point for containing the march to mandatory arbitration. After cases like Badie v. Bank of America, allowing arbitration to be "contracted for" by virtue of continuing use of a credit card, it seems only a matter of time before commercial banks insert arbitration clauses in the checking and savings account agreements of their customers. If these are sustained by the judiciary, the

60 Although it obviously helps to have money, access to expertise and negotiating leverage. See, e.g., Diana B. Henriques & Floyd Norris, Wealthy, Helped by Wall St., Find New Ways to Escape Tax on Profits, N.Y. TIMES, Dec. 1, 1996, at A1 (describing proliferation of new transactions designed to avoid or minimize capital gains taxes offered by investment bankers to wealthy, illustrating topic with description of entrepreneur's avoidance of $54 million in capital gains tax). For example, since 1988 the IRS reports that taxpayers with only mutual funds as an investment have reported a 200% increase in capital gains while other investors have reported reduced capital gains. Id.

61 Badie v. Bank of America, No. 94-4916, 1994 WL 660730 (Cal. App. Dept Super. Ct. Aug. 18, 1994) (appellate court sustains trial court ruling that bank credit card customers bound by compulsory arbitration agreements established by notice mailed to customers with regular monthly statements); see Engalla v. Permanente Medical Group, Inc., 43 Cal. Rptr. 2d 621, 638-42 (Cal. Ct. App. 1995) (rejecting fraud defense to arbitration even though clause in medical group's contract promised hearing within 60 days although group aware that 99% of prior claims took nearly two years to receive hearing), review granted and opinion superseded, 905 P.2d 416 (Cal. 1995) (lower court holding subject to change after state supreme court review).

62 See Joseph T. McLaughlin, Arbitrability: Current Trends in the United States,
investor literally has no escape from arbitral adhesion other than the mattress. Without doubt, the judiciary must retain enough vestige of the consent criterion to draw a prohibitive line prior to this state of affairs. My own preference is that the line be drawn in the financial industry. Unless prospective investors have at least a significant opportunity to participate in securities investment without arbitration, there is insufficient meaningful choice to make arbitration clauses enforceable. Mutual funds would suffice, as would brokerage accounts without mandatory arbitration offered by at least two major brokers, so long as this information was not too costly to unearth and so long as the consumer is not pressured away from pursuing the nonarbitration version of the account. Differential pricing would not invalidate such agreements so long as the presumably higher price for retaining the litigation option was not prohibitively expensive.

4. Consent as "Market" Barometer of Fairness

In addition to providing for a sounder approach to determining arbitrability, application of consent criteria can serve the value the Supreme Court claims to have fostered with its sweeping enforcement of arbitration: deference to the private market of transactions. The prevailing economic and legal theory posits that the economic system and private behavior generally will better succeed where the parties are accorded wide latitude in structuring their relations. But the prevailing theory becomes ludicrous when there is no real give and take* between contracting parties. When the securities industry, for

59 Alb. L. Rev. 905, 925-28 (1996) (suggesting that expansion of reach of Federal Arbitration Act and increasing willingness of both federal and state courts to uphold mass imposition of arbitration clauses opens up realistic possibility of arbitration becoming part of even routine consumer contracts). The success of Bank of America’s efforts to “contract” to arbitrate by junk mail and of computer and software makers to “contract” to arbitrate through use of wrapping and packaging suggests that merchants now have a wide array of options for forcing arbitration on customers and that these forms of “contract” will be upheld by many, perhaps most, courts. See supra note 8 (citing computer packaging arbitration cases).

63 I again emphasize that real give and take does not require elaborate bargaining over all aspects of a transaction. Consent may be adequate where the parties have adequate alternatives or are sufficiently aware of the implications of their decision such that they may be held to a conscious decision to “take” a contract term rather than “leave” it.
example, moves massively toward mandatory arbitration, a
free market ceases to exist, at least as to dispute resolution,
unless the customer or the employee has some meaningful
alternatives. The presence of alternatives is part of the essence
of a free market. Without such alternatives, producers and
consumers have no more freedom or incentive to reach optimal
results than would exist if business policy were declared by the
Politburo. In effect, the jurisprudence of the 1980s and 1990s
has permitted a private interest group version of the Politburo
to impose a national policy of mandatory arbitration that
especially eliminates a market for securities disputes for all
but the most affluent investors—and apparently no emplo-
ees—and a few dogged academics like Professor Shell. 64

If the courts were to conduct a significant inquiry into the
indicia of consent and to require a minimally adequate version
of consent as a prerequisite to enforcing arbitration agree-
ments, the securities industry and American business in gener-
al would have a substantial incentive to offer a variety of dis-
pute resolution products among which consumers could choose,
with prices differentiated according to particular disputing
options. In this type of environment, consumer behavior would
provide powerful evidence of the relative preferences for and
value of the disputing alternatives. Perhaps arbitration would
be the dispute resolution means of choice. Perhaps not. But
until the Court actually protects the conditions of free market
exchange by protecting a basic assumption of the market (con-
sensual agreement), there is no real ADR market in contract,
only industry fiat achieved through either monopoly power or
concerted activity. Although the mandated arbitration of the
securities industry is probably not violative of the antitrust
laws—although the issue probably deserves more scrutiny than
it will ever receive—neither is it the sort of free-flowing mar-
ket that justifies judicial deference to the mass-produced arbi-

64 Forgotten in the judiciary's ideological infatuation with markets and arbitra-
tion is the ability of private actors to garner effectively inescapable power rivaling
that of the government. See Robin Toner, Harry and Louise Were Right, Sort Of,
N.Y. TIMES, Nov. 24, 1996, § 4, at 1 (although insurers campaigned against
Clinton Administration health care proposals as stripping consumers of choice, em-
ployer-supported health insurance plans, the major source of health insurance,
increasingly offer no choice among insurers and less choice over terms of selecting
or seeing physicians).
tration clauses found in brokerage agreements and employment papers signed by workers in the securities industry.

In addition, there is another market eliminated by the Supreme Court's recent infatuation with arbitration: the market among states to regulate arbitration agreements in different ways so long as not inconsistent with the Federal Arbitration Act. This shortcoming is discussed below.65

II. THE SUPREME COURT'S SCHIZOPHRENIA AND RESULT-DRIVEN INTERPRETATION OF THE FEDERAL ARBITRATION ACT

A. The Supreme Court's Inconsistent and Partisan Application of Functional and Formal Arbitration Jurisprudence

Although the Court's reconsideration of arbitrability began during the 1970s,66 the 1980s and 1990s saw something of a revolution in the Court's approach to arbitration. In 1983, the Court issued a strong opinion favoring the use of court injunctive power to enforce predispute arbitration agreements.67 In 1984, it went one better by not only requiring arbitrability of a franchise dispute in the face of arguably contrary state law, but also declaring that the Federal Arbitration Act, passed in 1926,68 established substantive federal law applicable in both state and federal proceedings.69 This 1984 decision in Southland v. Keating marked a major change in the Court's reading of the Act, much to the consternation of Justice O'Connor, who viewed the Act as merely setting forth the procedural rules regarding enforcement of arbitration clauses in federal court.70

65 See infra notes 84-90 and accompanying text.
70 See id. at 24 (O'Connor, J., dissenting, joined by Rehnquist, J.). In particu-
During the next dozen years, as chronicled in detail throughout this Symposium, the Court's enthusiasm for arbitration continued to grow. In 1987, the Court signaled another major reversal of the field by holding that claims brought under the 1934 Securities Exchange Act were subject to arbitration. In 1989, it went the next yard and held that claims under the 1933 Securities Act were arbitrable, expressly reversing the 1953 Wilko v. Swan decision and giving some posthumous revenge to Justice Frankfurter, who had strongly dissented.

In 1991, the Court required a broker alleging age discrimination claims to arbitrate even though earlier Court precedent had suggested that civil rights and job discrimination claims were inapt for arbitration, and even though the broker was required by New York Stock Exchange Rules to sign the arbitration agreement as a condition of his employment.

After a decade of substantial change in arbitration law, one might have expected a rest from the Court. However, during the Court's 1994 Term, it decided four arbitration cases.

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lar, Justice O'Connor relied on the Court precedent of Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198 (1956), which held that in diversity jurisdiction cases, state law on arbitration was controlling.

71 See Selya, supra note 42; Steinberg, supra note 58, at 1503-07 (discussing evolution of arbitration jurisprudence and processing of securities disputes by courts and arbitrators).


76 See supra note 1.

77 In addition to the obviously coercive undertones of the arrangement, the Arbitration Act provides that it does not apply to a "contract of employment." 9 U.S.C. § 1 (1994). The Court avoided this limitation through the sort of reasoning that would give most first-year law students a chuckle: The arbitration provision was not part of a "contract of employment" since it was a separate document between the employee and the NYSE. The Court conveniently ignored the employee's compulsion to sign with the NYSE because his employer compelled him to do so as part of the employment relationship. Justice Stevens provided a typically terse and insightful dissent which fell on deaf ears.

Arguably, all were unnecessary in that these decisions did not clarify the law much or reach out to decide pressing national issues. As one commentator summarized:

Taken as a whole, the four cases [decided in 1995] . . . do not generate unusual outcomes. The determinations are characteristically supportive of arbitration; the decisional content of the opinions rehearse and reinforces existing doctrine. A few statements provide new insight into the court's thinking on arbitration, but even these additions only amount to new twists and turns in the Court's fantastic doctrinal constructs on arbitration. The wall of judicial policy that protects arbitration is solid and looms large, and appears increasingly impossible to scale.\textsuperscript{79}

But the 1995 term cases arguably did more than just solidify and inch outward the breadth of pro-arbitration doctrine. In one of the cases, the Court lost sight of its normal solicitude of federalism as well as consent values when it struck down Montana's attempt to require that arbitration clauses be more clearly presented to contracting parties to lessen the danger of a party being bound to arbitrate due to clauses quietly slipped into the fine print of lengthy boilerplate contracts.\textsuperscript{80} Only Justice Thomas dissented, on grounds of states' rights rather than consumer fairness or contractual consent.\textsuperscript{81} Justice O'Connor, apparently weary of the fight to hold the Arbitration Act to its pre-1984 meaning, did not even join the dissent.

Much of the past decade's judicial receptiveness toward arbitration is worth applause. For the most part, arbitration is a fair and effective means of dispute resolution.\textsuperscript{82} On the whole, society should be happy to see the demise of older precedents regarding ADR as evil and courts as sublime. Prior to the court's quiet revolution on arbitration, contracting parties frequently used judge made "exceptions" to arbitrability simply as tactical ploys for forum shopping or other efforts to gain a step on litigation opponents.\textsuperscript{83}

\textsuperscript{79} See Thomas E. Carboneau, Beyond Trilogies: A New Bill of Rights and Law Practice Through the Contract of Arbitration, 6 AM. J. INT'L ARB. 1, 2 (1995) [hereinafter Beyond Trilogies].

\textsuperscript{80} Doctor's Assocs., Inc. v. Casarotto, 116 S. Ct. 1652 (1996).

\textsuperscript{81} Id. at 1662 (Thomas, J., dissenting).

\textsuperscript{82} By way of disclosure, I should add that I have been involved in two commercial arbitrations as counsel and that both were resolved favorably to my former clients. In addition, I have served as both a commercial and securities arbitrator.

\textsuperscript{83} See, e.g., American Safety Equip. Corp. v. J.P. McGuire & Co., 391 F.2d 821
But in its drive to usher in the new era and reduce the court's monopoly on dispute resolution, the Court's decisions have exhibited a disturbing intellectual expediency, an insensitivity to serious problems of consent and fairness. Oddly, the Court has been most interested in departing from its embrace of arbitration largely on behalf of litigants who appear less deserving of a respite from the arbitration juggernaut.

For example, the Court's 1996 decision in Casarotto striking down Montana's full disclosure provision sided with the owners of the Subway sandwich shop chain in a dispute with dissident franchisees. In light of Subway's reputation as a franchise of limited value to its franchisees and the substantial fairness issues that have been raised about franchising generally, arbitration clauses in franchise agreements would seem a particularly good candidate for full disclosure laws such as Montana's. Certainly, the preemptive scope of the Federal Arbitration Act can be read as prohibiting state efforts of this type. But a less formalistic and wooden view of the Act would prohibit state efforts to stand in the way of enforcing arbitration agreements yet nonetheless permit states to provide nonburdensome ground rules for ensuring that arbitration agreements were truly knowing and voluntary, an assumption that was a driving force behind the Federal Arbitration Act along with dispute resolution efficiency.

The Supreme Court, of course, is not alone in its resistance to state law that in any way treats arbitration differently.

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(2d Cir. 1968) (antitrust claims incompatible with arbitration due to statutory nature and public interest).  

85 See supra note 84.

86 I have reviewed the entire legislative history of the Act, which is hardly a major accomplishment in light of its slimness. A fair reading of the congressional materials shows that the states' rights concerns of Justices O'Connor and Thomas cannot be foreclosed, and that the drafters were a good deal more concerned about worker rights to avoid coercion into predispute arbitration clauses than was the Gilmer Court. A more comprehensive examination of the origin of the Act, including prior interest group activity and earlier attempted legislation, comes to a more firmly rooted view that the Act was intended to apply only in federal courts. See MacNeil, American Arbitration Law, supra note 47, chs. 7-9.
than other contracts. Prior to Casarotto, the leading case on the issue, Securities Industry Association v. Connolly, reached the same conclusion. Connolly's author, Judge Bruce Selya, is of course a featured speaker in this Symposium. At the risk of displaying bad manners by criticizing a participant from another panel, it seems inescapable to me that Connolly displays the same excessive formalism and narrow focus regarding the Arbitration Act as does Casarotto, although with the Selya trademark of far more interesting prose. Connolly and Casarotto both adopt the premise that any distinction affecting an arbitration contract is automatically invidious and therefore inconsistent with the Act, a most strident pose in light of the creative manner in which the Act was metamorphosized into substantive law in the 1984 Southland decision. Even without the enacting Congress' likely surprise at the extension of the Act, it hardly follows that a state law seeking to enhance volitional arbitration is fatally inconsistent with the Act. Both Connolly and Casarotto assume that greater disclosure unduly hinders arbitration, inadvertently suggesting that franchisees like the Casarottos or the stock investors Massachusetts sought to protect in Connolly would never have signed an arbitration form had they appreciated what they were doing. This is hardly a strong recommendation for the supposed ADR Elysian Fields of arbitration.

But Connolly is more defensible than Casarotto. The Massachusetts law at issue in Connolly not only required a "conspicuous" presentation of the arbitration clause and a written disclosure of the "legal effect of the pre-dispute arbitration

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87 883 F.2d 1114 (1st Cir. 1989).

88 However, my chutzpa is considerably less than that of Judge Trieweiler, who not only authored the Montana Supreme Court's Casarotto opinions but also concurred especially to attack Judge Selya's Connolly opinion with vigor bordering on the personal. See Casarotto v. Lombardi, 901 P.2d 596 (Mont. 1995) (reaffirming earlier holding after remand for consideration in light of Terminex case); Casarotto v. Lombardi, 886 P.2d 931 (Mont. 1994); Id. at 939 (Trieweiler, J., specially concurring) (finding Connolly opinion "offending[ly]", "naive," "self-serving" and "cynical").

Perhaps excessive in its rhetoric—although one is hard-pressed to bring oneself to pity Judge Selya in a verbal exchange—the Trieweiler concurrence raises serious concerns that went unheeded in the Supreme Court: "[Federal court] decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adherence at least understand the rights they are giving up." Id. at 941 (Trieweiler, J., specially concurring).
contract," but also made it illegal for brokerage houses to require arbitration as a "nonnegotiable condition precedent to account relationships." This last trait seriously hinders arbitration and is perhaps, but not indubitably, adverse to the Federal Act's notion of nondiscrimination against the arbitration agreement. By contrast, the Montana law struck down in Casarotto required only prominent disclosure and explanation. Subway and other franchisers, indeed businesses of all types, continued to be free under the Montana law to insist on arbitration as a condition of doing business. Under those circumstances, a state's legislative insistence on meaningful disclosure is simply not the sort of judicial hostility that prompted Congress to pass the Arbitration Act. In addition, respect for state prerogatives augers in favor of placing reasonable limits on the preemptive reach of the Federal Act. Viewed functionally rather than formally, Montana's law deserved more deference even if Massachusetts' law did not.

B. Jurisprudential Inconsistency and the Felt Necessities of the Time

One of Justice Oliver Wendell Holmes's many pithy quotations posited (in best legal realist fashion thirty years prior to the Legal Realist movement) that judges decide cases not only on the basis of precedent but also based on the "felt necessities of the time." During the past two decades, the United States Supreme Court has devoted a good deal of its energies to the jurisprudence of alternative dispute resolution, most prominently arbitration. Its decisions in this arena comfortably fit Holmes's maxim: There exists a widespread view that society is choking on baroque litigation and needs streamlined dispute

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80 See Connolly, 883 F.2d at 1117 (citing MASS. REGS. CODE tit. 950, § 12.204(G)(1)(a)-(g) (1988)).
89 For example, had the Massachusetts law been upheld, brokers could have satisfied the negotiability standard by offering commissions of X where the customer agreed to arbitrate and 5X where the customer would not execute the arbitration agreement. This sort of dramatic cost differential would undoubtedly prompt most customers to elect arbitration and allow the broker to make handsome profits even if faced with troublesome litigants in the nonarbitration accounts, yet would satisfy the state law standard of ensuring that consumers had some choice regarding arbitration.
91 Oliver Wendell Holmes, The Common Law 3 (1881).
resolution. Not surprisingly, a Supreme Court holding this view can be expected to render decisions promoting arbitration and other forms of ADR. Judicial decisions are not suspect merely because they reflect contemporary attitudes, but the potential always exists for such decisions to sacrifice logic or principle upon the altar of expediency or ideology. The Court's approaches to construing the Federal Arbitration Act, the linchpin of these decisions, has been marred by vacillation between a wooden formalism and a freewheeling sort of purposive dynamic interpretation—some would say a rewriting—of the Act. The Court should resolve this jurisprudential split personality in favor of a consistently purpose-oriented approach to construing the Arbitration Act that promotes arbitration without losing sight of other legal and social values.

For example, *Southland v. Keating* is a pivotal opinion that federalized American arbitration law. As such, it is a controversial opinion which dramatically expanded the reach of the Act and sub silentio overturned a twenty-five-year-old precedent, *Bernhardt v. Polygraphic Co. of America,* 92 which had construed the Act to be procedural in nature and not to override substantive state law otherwise applicable under the *Erie* doctrine.93 The *Southland* majority fails even to mention *Bernhardt,* acting as though it either wrote upon the proverbial clean slate or as if the substantive federal law created by the Act were obvious.94 Only Justice O'Connor, writing for a two-person dissent, cites *Bernhardt,* chiding the majority for failing to come to grips with important adverse precedent.95 As to precedent and stare decisis, there is no doubt that Justice O'Connor's criticism of the *Southland* majority is well-

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93 *Id.* at 202 (citing *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938) (abolishing notion of general federal common law applicable to interstate disputes and requiring that where jurisdiction is based solely on diversity of citizenship federal court must apply state substantive law in resolving dispute)); see *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 387 (1941) (as corollary to *Erie* doctrine, federal court presiding over diversity jurisdiction case must utilize choice of law rules of forum state).
95 *See id.* at 23-24 (O'Connor, J., joined by Rehnquist, J., dissenting) (citing *Bernhardt* as controlling and accusing majority of erroneously ignoring or improperly overruling *Bernhardt* without sufficient explanation).
taken. Bernhardt should have been controlling absent direct refutation by the majority. On the question of legislative meaning and intent, leading scholars, including Professor Speidel, have also sided with O'Connor's perspective, finding the better view that the original intent of Congress was that the Act apply in federal court but not in state court. Professor Macneil is particularly critical of the Southland view of the Act and demonstrates beyond serious question that the Bernhardt reading of the Act is more consistent with original intent. He concludes that the Court's purported legislative history and intent of the Act is "pathological" and illegitimate: "[T]here are some rules of the game [of fair advocacy with statutory history and intent]—violated grievously, I believe, by Chief Justice Burger in Southland Corp. v. Keating ...."

Ironically, the Court has not only turned its back on the more persuasive original reading of the Act, but also negated the enacting Congress' concern that the Act not lead to enforcement of arbitration agreements through contracts of adhesion. As chronicled in Professor Macneil's history of the Act, colloquy over an earlier, unenacted version of the Act reflects congressional concern that a law overcoming historical judicial reluctance to enforce arbitration agreements not result in erosion of consent concerns:

Senator [ ] Walsh then expressed concern about what we might now call the adhesive aspects of arbitration contracts. Having said that he saw no reason "why, when two men voluntarily agree to submit their controversy to arbitration, they should not be compelled to have it decided that way," he went on:

The trouble about the matter is that a great many of these contracts that are entered into are really not vol-


97 See MACNEIL, AMERICAN ARBITRATION LAW, supra note 47, ch. 9; see especially MACNEIL, FEDERAL ARBITRATION LAW, supra note 96, at 117 (quoting House Judiciary Committee Report, H.R. REP. NO. 96, 68th Cong., 1st Sess., at 1 (1926)) (stating that Act is procedural and is designed to ensure enforcement of arbitration agreements by the courts of the United States), 118 (noting Report's focus on federal courts only).

98 MACNEIL, FEDERAL ARBITRATION LAW, supra note 96, at 170.
untarily [sic] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment [the type of agreement in Gilmer]. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

[W.H.H.] Piatt [a witness for the bill from the New York Commerce Association] responded that it was not the intention of the bill to cover insurance cases. Senator Walsh continued to express concern about this problem, giving other examples—freight contracts [the problem in Vimar] and construction contracts—and pressing Piatt on the point. Piatt apparently conceded the need to do something about the problem.99

In other words, there is significant evidence to suggest that the enacting Congress would not have approved of the Act's application to instances of coercive consent. But like the enacting Congress' intent to limit the Act to federal courts and to respect state prerogatives, this dollop of originalism favoring those resisting arbitration has been swept away via the legal fictions of the current Supreme Court.

For many principled legal scholars, of course, a demonstration of departure from original intent would be in itself an irrebuttably damning indictment. Unfortunately, while many of them are on the Court, either initially or ultimately they have receded from any defense of originalism in the interpretation of the Act.100 While there are worse things than philosophical inconsistency, the arbitration cases are something of

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100 Justices O'Connor and Rehnquist initially fought the Southland interpretation but have apparently given up, leaving only Justice Thomas (as of his 1996 dissent in Casarotto) to continue to fight for originalism. Justice Scalia is more textualist than originalist, but one can hardly regard § 2 of the Act as compelling the Southland result. One might have then expected Justice Scalia to follow original intent, or at least to have some interest in correctly discerning it, but he has uniformly supported the expansive application of the Act to all disputes. Justice Kennedy is ordinarily viewed as something of an originalist but has also routinely supported expanded arbitration in the Southland model.
an embarrassment for the Court's conservatives: Faced with a choice between the desires of the business establishment and the original intent of Congress, they have ultimately sided with industry.

But as Ralph Waldo Emerson observed, a foolish consistency is the hobgoblin of small minds. There are substantial reasons why a jurist of any ideology would seek to "think big" and in evolutive fashion about the Arbitration Act. As noted above, a widely held view among lawyers and laypersons posits that society has too much litigation and that laws should be interpreted to further rather than retard ADR initiatives. To be sure, serious scholarship has dramatically undermined the argument that the Act was originally intended to create substantive federal law. In addition, the Arbitration Act predates the 1938 *Erie v. Tompkins* revolution in federal and state judicial relations and the revolutionary broadening in the Court's notions of what constituted interstate commerce that occurred during the 1930s and 1940s. In 1926, the connotation of commerce was sufficiently narrower, making it quite possible, perhaps even likely, that the enacting Congress envisioned that the Act would really only apply in cases otherwise eligible for federal court jurisdiction.

Nonetheless, the Act's text, legislative history and background are hardly crystal clear. The Act is sufficiently indeterminate that its recasting as substantive federal law is at least permissible. Although *Erie* is seen as a decision supporting state autonomy, it is also seen as a decision promoting consistency and attempting to curb undue forum shopping.101 These goals of *Erie* are better met through a federal law that supplants contrary state law.102 With twenty-twenty hindsight, the enacting Congress might well have spelled out a substantive and preemptive reach for the Federal Arbitration Act.

In addition, irrespective of either actual or reconstructed congressional intent, *Southland* can be well defended on the ground that it modernized the Act in a manner consistent with longstanding legal, social and political preferences. Construing

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101 See Hanna v. Plummer, 380 U.S. 460, 468 (1965) ("twin aims" of *Erie* are "discouragement of forum-shopping and avoidance of inequitable administration of the laws").

102 Defined as state law on arbitration that significantly impairs the federal Act's policy of enforcing proper arbitration agreements.
the 1926 Arbitration Act to create substantive federal law "up
dates" and modernizes the statute to make it more useful in an
era of growing caseloads and interest in ADR.103 When con-
fronted with an interpretative fork in the road, there is noth-
ing inherently wrong with the Court using these factors to
decide the case so long as other, more commanding factors do
not compel the court to choose a different path.

Among the Justices deciding Southland, only Justice
Stevens candidly addressed the dynamic statutory inter-
pretation at work in the case, observing that

Justice O'Connor's review of the legislative history of the Federal
Arbitration Act demonstrates that the 1925 Congress that enacted
the statute viewed the statute as essentially procedural in nature,
[however] I am persuaded that the intervening developments in the
law compel the conclusion that the Court has reached.104

Justice Stevens went on to note that treating the Act as sub-
stantive federal law did not require wholesale displacement of
state law because "[t]he limited objective of the Federal Arbitra-
tion Act was to abrogate the general common-law rule
against specific enforcement of arbitration agreements . . . [but
that] beyond this conclusion, which seems compelled by the
language of § 2 [of the Act] and case law concerning the Act, it
is by no means clear that Congress intended entirely to dis-
place state authority in this field."105 Faced with this legal
landscape, Justice Stevens wisely urged that the Court's stan-
dard operating procedure of refraining from unnecessary inval-
idity of state law limit the sweep of the Southland holding.
This approach would have wisely called for a different result in
Casarotto and would have preserved Montana's law requiring
clear disclosure of predispute arbitration agreements. Yet Jus-
tice Stevens was silent in Casarotto, joining in the majority's
curt reversal of the Montana Supreme Court.106 Justice
Stevens is not a strict originalist in matters of statutory inter-
pretation107 and is also something of a pragmatist. Regarding

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103 This appears to have been Justice Stevens's view in his Southland concur-
ring in part and dissenting in part).
104 Id. (Stevens, J., concurring and dissenting).
105 Id. at 18.
107 See William D. Popkin, A Common Law Lawyer on the Supreme Court: The
arbitration, he currently appears to have adopted his now-familiar stance of adhering even to precedent he views as wrongly decided in order to protect the reliance interests of social actors and hence does not argue against the \textit{Southland} expansion of the Act.\textsuperscript{103}

Prior to his apparent fatigue from the fight, Justice Stevens in \textit{Southland} argued for both a "dynamic" view of statutory meaning and a functional or instrumental view of the courts role in giving meaning to statutes. Dynamic statutory interpretation is the view that courts should or do in fact construe statutes in light of contemporary circumstances even in the face of a distinctly contrary original understanding of the enacting legislature.\textsuperscript{109} Dynamic statutory interpretation stresses statutory purpose, application and legal evolution as much or more than the law's text or congressional intent. Defenders of the approach, me among them, view it as an approach that permits courts to assist the lawmaking enterprise, to make statutes (at the risk of paraphrasing Army recruiters) the best they can be in light of congressional goals and contemporary context. Without doubt, however, the approach also holds the potential for judicial arrogation of power over the legislative and executive branches.\textsuperscript{110} While this may be a real


\textsuperscript{103} Id. (noting Justice Stevens's pattern in this regard); see William D. Popkin, \textit{An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation}, 76 MINN. L. REV. 1133 (1992).

\textsuperscript{109} See generally WILLIAM N. ESKRIDGE, JR., \textit{DYNAMIC STATUTORY INTERPRETATION} (1994); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, \textit{CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY} ch. 7 (2d ed. 1995); T. Alexander Aleinikoff, \textit{Updating Statutory Interpretation}, 87 MICH. L. REV. 20 (1988) (describing various versions of evolutive statutory construction); Richard A. Posner, \textit{Legislation and Its Interpretation: A Primer}, 68 NEB. L. REV. 431 (1989); see also GUIDO CALABRESI, \textit{A COMMON LAW FOR THE AGE OF STATUTES} (1982) (arguing that older statutes should be no more binding than common law on current courts); Jeffrey W. Stempel, \textit{The Rehnquist Court, Statutory Interpretation, Inertial Burdens and a Misleading Version of Democracy}, 22 U. TOL. L. REV. 583, 653 (1991); Nicholas Zeppos, \textit{Judicial Candor and Statutory Interpretation}, 78 GEO. L.J. 363, 412 (1989) ("What Calabresi and Eskridge have shown is that in many cases, originalism never really served as the actual basis for deciding statutory cases. For years, judges have been profoundly nonoriginalist in deciding cases but have used originalism as a means for justifying their results.").

danger for certain contemporaneously contested social or economic issues, the dynamism of *Southland* can be defended as legitimate in view of the less than clear text of the law (whatever some members of the Court might assert), similarly murky original congressional intent, the underlying purpose of the statute to encourage enforcement of valid arbitration clauses despite the traditional hesitancy of courts, modern public policy favoring ADR, and "signals" from Congress that it supported arbitration even if it was not readily moving to amend the 1926 Act to make it more sweeping. This sort of judicial activism—and *Southland* is judicial activism on behalf of businesses, demonstrating that judicial activism is not exclusively a liberal enterprise—simply enlists the Court in improving the statute in a manner likely to be consistent with current (and perhaps past) congressional, political and social sentiment.

Consequently, the Court's revisionary expansion of the Act can be defended on principled grounds. What cannot, in my view, be defended, however, is the Court's use of dynamic statutory interpretation to expand the reach of the Act coupled with the Court's unwillingness to give serious attention to issues of consent and its application of a formal and mechanized style of jurisprudence for enforcing the Act even in the face of state efforts to ensure greater fairness and higher quality consent regarding arbitration. Despite Emerson's maxims about foolish inconsistency, it seems only equitable good sense that the Court utilize essentially the same method of statutory construction and adjudicative technique when dealing with arbitration.\(^\text{111}\) To the extent that the Court has "boot-

\(^{111}\) Where fields of law differ substantially in type, origin or goal, different interpretative and adjudicatory methodologies may be in order. For example, a statute such as 42 U.S.C. § 1983 (1994) can be seen as codifying a flexible principle of nondiscrimination, what Judge Richard Posner terms a "common law" statute. *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1987). This type of statute seems a strong candidate for an evolutive, pragmatic, functional and flexible approach by the courts. In contrast, penal laws, tax codes or trade laws may be better viewed as highly specific statutes forming a tighter regulatory framework more constantly updated by Congress or agencies. These sorts of laws would ap-
strapped" the Act into becoming a more far-reaching and powerful law, the Court should presumptively utilize a similarly flexible and functional method of enforcing arbitrability so that the newly expanded law is not abused or applied in a manner that exceeds the permissible bounds of "good" dynamic statutory interpretation. An effective pragmatic approach to policing the Act would seemingly make substantial use of consent criteria. Consent concerns have long been central to contract law. The enacting Congress harbored significant consent concerns, modern society continues to value consent; consent serves to minimize the dangers of expanded arbitrability; consent comports well with judicial competence and role; and consent serves state, federal and market interests implicated in dispute resolution.

The Court's arbitration decisions, although largely useful in reducing judicial monopoly and hostility toward ADR, have failed in part because this body of Court opinions present two different modes of statutory analysis inconsistently applied by the Court. On the one hand are the Court decisions that have interpreted the Arbitration Act to fulfill its purpose and to make it a more useful statute in current times. Other arbitration decisions, however, are marred by a surprising formalism coupled with hyperliteral textual glaucoma regarding the arbitration clauses and contracts under review, with the Court seemingly disinterested in the broader context of the contracts at issue. It is as if an ordinarily stodgy and formalist Court

pear better candidates for a more literal textual approach or a more formal methodology of interpretation and application.

See MACNEIL, AMERICAN ARBITRATION LAW, supra note 47, at 68 (citations omitted):

Early twentieth century American contract law and equity are far from renowned for the protections they afforded against one-sidedness. Nonetheless, such principles as fraud, duress, undue influence, and capacity were significant and direct restraints on unfettered freedom of contract. In addition, covert protection was often afforded by rules relating to consideration and mutuality, and through even more covert techniques such as interpretation. All of these were available to deal with the problems seen by anti-reform advocates. Later, principles in general contract law, such as unconscionability and limitations on the effectiveness of contracts of adhesion, were developed and became potential or actual protections against one-sidedness in arbitration agreements.

See supra notes 92-99 and accompanying text.

See supra notes 19-61 and accompanying text.
temporarily donned dynamic and functional garb in order to strengthen arbitration but quickly reverted to the mechanical method so that continued use of the more nuanced approach would not constrict the newfound reach of arbitration. Whatever the motivation, the chronology suggests that the mechanical perspective has dominated since the Court engaged in judicial expansion of the Act more than a decade ago.

On the question of statutory colloquy, the matter is more complicated. Although Southland can be criticized as judicial activism for certain elements of the business community, the decision need not necessarily be the last word on the reach of the Act. If the Court is "wrong," then Congress has a realistic possibility of correcting the Court's error through legislation. The political entities "harmed" by Southland are the states, a powerful political group that has a realistic means of seeking legislative reversal. The same is not true of the diffuse, disorganized, poorer and weaker employees who are compelled to arbitrate job claims against an employer under Gilmer. States are arguably the losers in the most recent Casarotto Subway sandwich case as well, as they were in the important predecessor case of Connolly,115 but states vary in their support of "full disclosure arbitration laws." Consequently, states are unlikely to storm the ramparts of Congress to legislatively overrule the Court on this point, particularly if the interest group pushing them is a group of diffuse franchisees earning modest incomes rather than the states' business juggernauts. Overall, the Court's conduct has tended to provide select business entities with policies they might well have failed to win in the electoral arena but which can be protected from legislative or executive erosion. This is a potentially troubling aspect of any form of evolutive statutory interpretation and becomes highly problematic where the Court's dynamism is arguably misplaced or is coupled with formalist defense and retrenchment on the heels of dynamic expansion. The Court might well have read the American polity correctly when it concluded that arbitration enjoyed contemporary favor but most likely misread

115 See Securities Indus. Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989) (ruling that Massachusetts statute requiring clear disclosure and explanation of arbitration clause in securities agreement was preempted by federal Act), cert. denied, 495 U.S. 966 (1990).
things badly to think that the polity or its representatives meant to embrace the expansive and aggressive mandatory arbitration of the 1990s. But without the protection of significant consent jurisprudence in the courts, domestic politics is a relatively ineffective vehicle for reforming judicial wrong turns in arbitration law.

And yet the Court appears to compound rather than correct its strides down the wrong fork of the interpretative and adjudicative road. For example, one might ask: If recent Court decisions about arbitration had little import to other cases (a criticism leveled in particular at the 1995 decisions), why did the Supreme Court grant certiorari and decide them? Legal scholars have criticized the Court for taking so many personal jurisdiction cases during the 1980s only to render highly factspecific opinions that did little to increase the doctrinal guidance given to lower courts. The same can be said of the Court's punitive damages cases of the 1980s and 1990s, which indicate, often by one-vote majorities, an increasing resistance to large punitive damages awards but fail to provide readily applied measures for determining whether such awards are excessive.

But the personal jurisdiction and punitive damages cases differ from the arbitration cases in one major respect. The former, even if annoyingly indeterminant, have largely been decided under the same consistently flexible approach that seeks to vindicate important due process values. Even if one disagrees with the Court's personal jurisdiction and punitive damages opinions, the Court is at least trying to decide these cases through the same technique—and probably the right technique: A functional or instrumental approach that seeks to protect defendants but also to permit courts to continue to be used to bring tortfeasors and others to justice. Perhaps the

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116 See Carbeneau, Beyond Trilogies, supra note 79, at 1-2.
Court should have stopped several opinions ago, but at least the Court is trying to be a part of the solution rather than a part of the problem.

By contrast, the Court in arbitration seems increasingly gripped in a wooden methodology of hair-splitting allegiance to the text of adhesion contracts, combined with formalistic syllogism, of which the Gilmer Court’s assertion that employee Gilmer was not really forced to sign an arbitration clause in his contract of employment is only the most embarrassing. As noted above, even in correctly decided cases such as Southland and Mastrobuono, allowing the defrauded customers to retain an arbitrator’s punitive damages award, the decisions are presented in more formalist garb, although they are best explained by a functional and purpose-vindicating analysis.

Generally, the Court ventures into dynamic statutory interpretation in favor of arbitration but resists it in cases where it would likely lead to constricted arbitrability. As one scholar has noted, the Court has a “deregulatory” and “contractualist” view of arbitration. To this assessment, I add with emphasis that there is nothing inherently wrong with being contractualist about arbitration so long as one practices a sensible denomination of contractualism, one that holds a front pew for consent. The type of contractualism I advocate is therefore more inherently regulatory than the caveat emptor/laissez faire brand of contract practiced by the Court. As Professor Speidel suggests, perhaps even enlightened contractualism and consideration of consent are insufficient, and a more overtly regulatory framework is required. But before more judicial ink is spilled on the Arbitration Act, the Court would profit from taking cues from cases where it has avoided formalist solutions.

CONCLUSION

In the post-McMahon world of arbitration between the securities industry and its customers and the post-Gilmer world of arbitration between the industry and its employees, consent concepts have a vital role to play—if only the courts

119 See Carboneau, Beyond Trilogies, supra note 79, at 2 n.9, 23-25.
120 See Braucher, supra note 38; Shell, supra note 15.
will let them. Expecting strong legislative or industry trade
group action to protect small shareholders or employees from
nonconsensual mandatory arbitration is a chimera made not
only unlikely, but virtually impossible by the modern form of
politics, where well-heeled interest groups such as the securi-
ties industry possess at least enough political clout to prevent
adverse legislative and executive outcomes. Without doubt, the
securities industry and the business community generally can
protect the victory provided by the courts. Mandatory arbitra-
tion has become the default rule for securities disputes and
threatens to become the system of imposed dispute resolution
for employment and other controversies. Unless the operation
of arbitration programs is so palpably unfair as to create a
scandal, the collective action problems of organizing consumers
to mount political resistance to imposed arbitration are simply
too great. So long as arbitration programs are not obvious
kangaroo courts, they will not be as strictly regulated by the
industry, legislatures or administrative agencies as one would
optimally hope.

In such a setting, the prudential powers of the judiciary
are particularly necessary. Courts are often accused of being
unelected "counter-majoritarian" institutions. Whatever the
credence to the criticism in other contexts, it is not persuasive
in the area of dispute resolution issues implicating the very
notion of access to the courts. The arbitration revolution of the
past decade is not so much the result of a groundswell of pub-
lic opinion as it is an interest group victory. In a democ-

211 Large institutional customers of the securities industry (e.g., state pension
funds) or wealthy individuals (e.g., Warren Buffett) are an exception: customers
with political clout. But these same entities have the necessary leverage to avoid
arbitration or customize it to their liking in their dealings with the securities in-
dustry. Rationally, they will exercise (and apparently have exercised) this leverage
to help themselves rather than spending additional resources directed toward politi-
cal reform.

212 See Jeffrey W. Stempel, "Reflections on Judicial ADR and the Multi-Door
Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood, 11
Ohio St. J. on Disp. Resol. 297, 310-15 (1996); Stephen N. Subrin, "Teaching
Civil Procedure While You Watch It Disintegrate," 59 Brook. L. Rev. 1155, 1156-58
(1993) (noting degree to which 1976 Pound Conference organized by Chief Justice
Burger operated to establish new orthodoxy that litigation suffered from severe
problems and required widespread use of ADR as partial cure, in part by present-
ing roster of speakers overwhelmingly critical of litigation status quo).
ries so long as their political activity stays within the bounds of the rules. But it certainly does not follow that the arbitration revolution erased centuries of western society’s commitment to consent as a fundamental underpinning of human relations. In other areas of American society, it remains clear that consent and autonomy remain bedrock concepts of human relations.\textsuperscript{123}

Under these circumstances, there remains a vital role for courts in connection with arbitration and other forms of ADR: policing the consensual quality of the agreements. No matter how rational the regulatory framework, no matter how fair arbitration may be in practice, it should never become a virtually inescapable default method of dispute resolution. Only those who have meaningfully consented to arbitration should be required to arbitrate.\textsuperscript{124} Unless courts require meaningful consent, they debase our social norms, the arbitration process and themselves. During the past decade, however, the judiciary has done just that in its rush to embrace arbitration at the expense of the more vital value of consent. Regardless of whether one describes the judicial failure as the result of “slouching” or “bootstrapping,” the result is a disappointing jurisprudence uncleaned by even the most efficacious substantive regulation of arbitration.

In his one-volume examination of the Federal Act, Professor Macneil, Professor Speidel’s treatise collaborator, refers to the expanding evolution of the Act as a jurisprudential “Road to Damascus.”\textsuperscript{125} But the more apt Biblical allusion to the

\textsuperscript{123} Most political rhetoric of the day emphasizes the importance of consent and autonomy: e.g., proposals for school vouchers; calls for reduced government regulation; greater concern for preventing sexual assault even in the relatively ambiguous contexts of date rape and spousal rape; charter schools; and the generally libertarian and antigovernmental rhetoric of the day. Although much of this trend is “pro-market,” it hardly follows that the temper of the times is adverse to serious notions of voluntary consent. On the contrary, coercive markets are not markets at all.

\textsuperscript{124} Even if consent is obtained, the Federal Arbitration Act’s statement that it does not apply to a “contract of employment” requires, in my view, that arbitration agreements are not enforceable against employees. \textit{See} Stempel, \textit{supra} note 47. The judiciary's failure to enforce properly this limitation on arbitrability is so deeply erroneous as to make its securities arbitration jurisprudence shine by comparison.

\textsuperscript{125} \textit{See} MACNEIL, \textit{AMERICAN ARBITRATION LAW}, \textit{supra} note 47, ch. 14 (\textit{The Road to Damascus}). The apostle Paul, then known as Saul, a persecutor of Christians,
Middle East is that of Judge Bork. Notwithstanding the zeitgeist favoring arbitration and ADR over traditional litigation, a world where the courts give greater credence to interest group preferences and unreal notions of market activity than they give to a fair reading of legislation and the existence of consent in contractual relations seems a good deal more like Gomorrah.

was en route to Damascus when suddenly faced with a blinding light. Without sight, he was taken to Damascus and informed by God that he was a “chosen vessel” of the Lord’s work, whereupon, “there fell from his eyes as it had been scales: and he received sight forthwith, and arose, and was baptized.” See The Acts 9:3-18. In light of Professor Macneil’s generally harsh attack on the Court’s poor historicism in interpreting the Federal Arbitration Act, the Damascus analogy is an odd one—but no odder than the evolution of American arbitration law.
Biographical Description: Jeffrey W. Stempel

Jeffrey W. Stempel, the Doris S. & Theodore B. Lee Professor of Law, teaches legal ethics, civil procedure, insurance, and contracts at the William S. Boyd School of Law, University of Nevada Las Vegas. He is the author or co-author of many law journal articles and six previous books, including Fundamentals of Litigation Practice (2011), Fundamentals of Pretrial Litigation (8th ed. 2011), Stempel on Insurance Contracts (3d ed. 2006) and Foundations of the Law (1994). A member of the bar in both Minnesota and Nevada, he has also written extensively about arbitration and dispute resolution. Prior to joining the UNLV law faculty in 1999, he taught at Florida State University College of Law and Brooklyn Law School and has been a practicing attorney and judicial clerk. He is a graduate of the University of Minnesota and the Yale Law School.
PROMOTING DUE PROCESS IN
CONSUMER AND EMPLOYMENT ARBITRATION

Thomas J. Stipanowich

ABSTRACT


Until recently, the Supreme Court's aggressive expansion of arbitration law occurred in the absence of a response by Congress. However, there is now a flurry of legislative activity aimed at prohibiting or regulating pre-dispute agreements to arbitrate employment and consumer disputes. The 2010 Department of Defense Appropriations Act prohibits federal contractors who receive funds under the Act for contracts over $1 million from requiring their employees or independent contractors to arbitrate Title VII or tort claims "arising out of rising out of alleged sexual assault or harassment." Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, a whistle-blowing employee cannot waive his right to a judicial forum. The pending Arbitration Fairness Act of 2011 would amend the FAA to prevent the use and enforceability of pre-dispute arbitration agreements in all consumer and employment contracts, and with respect to claims under disputes under statutes protecting civil rights.

Neither the extreme pro-arbitration position staked out by the Court nor the anti-arbitration stance of some legislators is supported by thoughtful consideration of the capabilities, limitations and real costs of different process choices in different transactional settings. If properly conducted, Dodd-Frank's call for agency review of the operation of arbitration in financial services and securities investment settings may offer one starting point for dispassionate, thoughtful inquiry into the full range of procedural options. This must include discrete consideration of the single most contentious issue, class actions.

In the highly politicized struggle over employment and consumer arbitration, expectations shift dramatically with the political climate. The risks and uncertainties that confront all sides in this debate create the potential for thoughtful, dispassionate consideration of the operation of arbitration in these arenas, and the broader concerns and realities at play in consumer and employment dispute resolution.

Good decisions about the resolution of employment and consumer disputes must begin with a commitment to obtain and act upon better information. We need to move way beyond the meaningless "arbitration is good/arbitration is bad" dichotomy to look at the capabilities, limitations and real costs of different process choices in specific contractual settings. Since the Dodd-Frank Wall Street Reform and Consumer Protection Act decreed that agencies should
examine arbitration in the context of different consumer finance transactions and of securities brokerage disputes, these arenas are obvious starting points. Recent empirical scholarship has given us more insights into these processes, but much more remains to be done.

Looking ahead, there are several alternative process models that ought to be considered by policymakers. For example, some studies indicate that well-administered arbitration under procedural "due process" standards enhances experiences and outcomes for consumers and employees. Such standards were first developed as "Due Process Protocols" in the 1990s, and were subsequently adopted in procedural rules by the American Arbitration Association, inspiring similar efforts by JAMS and other providers. Although the existing models are all privately administered and have legal effect only as elements of the agreement to arbitrate, some have proposed incorporating due process guidelines in the FAA as a minimum standard for the governance of consumer and employment arbitration. Statutory due process standards would provide much more extensive, uniform guidance for judicial policing of arbitration agreements, alleviating some of the concerns associated with the relatively imprecise and malleable primary tool now used by courts, unconscionability.

Such standards could be an effective way of overcoming the dramatic limitations placed by the Court on regulation of adhesion contracts under the rubric of federal preemption. There would, however, still be a role for courts in fleshing out the standards in application to specific factual settings. One would also expect arbitral discretion to remain in play regarding procedural issues like the precise extent of discovery.

Regulated securities arbitration suggests another model to be considered if pre-dispute arbitration agreements are still enforced. The history of securities arbitration under the auspices of securities self-regulatory organizations - now the Financial Industry Regulatory Authority - demonstrates how a framework that combines active agency oversight of rulemaking and administration with ongoing debate between advocates for investors and brokerage companies can engender a dynamic process that promotes greater fairness and response to change. Over the last two decades, the system has undergone procedural reforms affecting every aspect of the arbitration process, and offers a relatively efficient and economical framework for resolving investor claims. While extensive recent studies of securities arbitration present a mixed picture regarding investor claimants' success rates and perceptions, the system continues to evolve under the supervision of the Securities and Exchange Commission. Such regulation, does, however, entail significant costs, much of which today is borne by the securities industry.

A third option is suggested by lemon laws, which provide an abbreviated, speedy, out-of-court arbitration process for disgruntled buyers, along with the option to go on to court if the buyer is unhappy with the result. Because lemon laws preserve the right to trial, they avoid the necessity of producing an effective full-blown substitute for court trial in the initial adjudicative stage. The out-of-court procedures are the essence of simplicity - rough and ready, and well suited to the subject matter. Whether the lemon law model is appropriate for broader application remains to be seen.

What of the litigation option? For most Americans, going to court is the implicit "measuring stick" for justice. But costs and delays have created access to justice concerns - concerns
reinforced by current public budget cutbacks. We must heed the recent report of the American College of Trial Lawyers calling for reform of the "one-size-fits-all" approach to litigation and search for innovative process solutions. For example, some other countries have established public consumer tribunals or administrative employment tribunals that offer relatively efficient, effective alternatives to court.

In assessing current process choices, two important factors deserve special mention: the potential impact of online dispute resolution, and the role of class actions. Although we are only beginning to understand its possibilities and pitfalls, the rapidly developing world of electronic communications offers a completely new way of imagining consumer conflict resolution. Transparency and understanding may be promoted by online access to information about process choices through interactive, user-friendly platforms.

Virtual hearings are a way of overcoming time and distance and reducing the very real costs of adjudication, public or private. A new Online Dispute Resolution Working Group of the United Nations Commission on International Trade Law is exploring the creation of standards for the online resolution of cross-border e-commerce disputes, including business-to-consumer disputes. An important element of the discussion is the creation of a "global case database" available to participants worldwide, and, possibly, a system of universal service represented by a single logo or "trustmark."

Finally, no discussion of arbitration or other process choices, public or private, can ignore the abiding issue of class actions, the policies supporting their use to vindicate the rights of consumers and employees, and the concerns that have motivated businesses to promote enforcement of contractual waivers of the right to sue on behalf of a class. In the arena of consumer and employment arbitration, class action waivers have been the primary point of contention between business and consumer/employee advocates.

In the field of consumer financial services, moreover, the avoidance of class actions are often the primary motivating factor supporting the use of arbitration provisions; there is evidence that, but for the ability to avoid class-wide suits, financial institutions would sooner take their chances in court. Though it is far more than an "arbitration issue," the struggle over the role of class actions is a key element in determining the future role of arbitration and the contours of the broader landscape of civil justice.
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Thomas J. Stipanowich is William H. Webster Chair in Dispute Resolution and Professor of Law at Pepperdine University, as well as Academic Director of the Straus Institute for Dispute Resolution (ranked number one among academic dispute resolution programs each of the last seven years by U.S. News & World Report), and an experienced arbitrator and mediator (now with JAMS). He is co-author, with Professors Ian Macneil and Richard Speidel, of the groundbreaking five-volume treatise Federal Arbitration Law: Agreements, Awards & Remedies Under the Federal Arbitration Act, cited by the United States Supreme Court and many other federal and state courts, and named Best New Legal Book by the Association of American Publishers. He also co-authored Resolving Disputes: Theory, Law and Practice (2nd ed. 2010), a law school course book supplemented by many practical exercises. He is the author of many other much-cited publications on arbitration and dispute resolution, and has twice won the CPR Institute’s First Prize for Professional Articles (1987 and 2009)—most recently for Arbitration: The “New Litigation.” In 2008, he was given the D’Alemberte/Raven Award, the highest honor accorded by the ABA Section on Dispute Resolution, for contributions to the field. In the fall of 2010 he was Scholar-in-Residence at the London office of WilmerHale.

From 2001 to 2006 Stipanowich served as President and CEO of the New York-based International Institute for Conflict Prevention & Resolution (CPR Institute), a coalition of leading corporate general counsel, senior attorneys, scholars and judges, and one of the world’s leading dispute resolution organizations. Under his leadership the Institute expanded its operations in the EU and China and started a number of other new initiatives focused on commercial mediation and dispute resolution here and abroad. He also created CPR’s Corporate Counsel Roundtable and piloted the creation of the first extensive integrated training program on conflict management with a major international law firm. He expanded the CPR Board to include several leading corporate counsel, increased CPR’s annual revenues and moved the organization into larger headquarters in midtown Manhattan.

As William L. Matthews Professor of Law at the University of Kentucky (1984-2001), he led the CPR Institute’s Commission on the Future of Arbitration, producing a book of practice guidelines, Commercial Arbitration at Its Best. He was academic advisor for revisions to the Uniform Arbitration Act and the Uniform Mediation Act, and chief drafter of the Consumer Due Process Protocol (1997) governing consumer ADR programs, which became the basis of the AAA’s consumer arbitration procedures. He served on the Board of Directors of the American Arbitration Association (AAA), and was the first AAA International Visiting Scholar. He helped revise the AAA’s Construction Dispute Resolution Rules. He also served as Public Member and Chair of the Securities Industry Conference on Arbitration (SICA). In 1991, he founded (and was for a time the interim director of) the Mediation Center of Kentucky, a court-connected program still in operation.

He is currently an advisor on the ALI Restatement of U.S. Law on International Arbitration and Editor-in-Chief of the recently published College of Commercial Arbitrators Protocols for Expeditious, Cost Effective Commercial Arbitration (2010). The Protocols received the 2010 Practical Achievement Award from the CPR Institute and the 2011 Lawyer as Problem
Solver Award from the ABA Section on Dispute Resolution. Professor Stipanowich has extensive experience as a commercial and construction arbitrator, mediator, facilitator and special master, with emphasis on large and complex cases in the U.S. and internationally. He is affiliated with JAMS, and has also received appointments through the American Arbitration Association (AAA), the International Center for Dispute Resolution (ICDR), the International Chamber of Commerce (ICC), and the CPR Institute. He has trained arbitrators or mediators for the AAA, CPR, the Chartered Institute of Arbitrators and the Straus Institute; has facilitated internal and inter-organizational problem-solving and consensus-building efforts; and has helped develop corporate and institutional programs for avoiding or resolving disputes. He is also on the arbitration panel of the Beijing Arbitration Commission and has played a major role in the development of their new mediation program. He has participated in several international initiatives aimed at promoting institutional frameworks for the delivery of conflict resolution services in expanding economies.

Stipanowich received his bachelors and masters degrees in architecture (as a National Merit Scholar) with highest honors, winning the American Institute of Architects School Medal, the Ryerson European Traveling Fellowship, and the Allerton American Traveling Fellowship; and a law degree (*magna cum laude*, Order of the Coif) from the University of Illinois. Upon graduation he joined the nation’s leading construction law practice in Atlanta, where he acquired extensive experience with litigation, arbitration and mediation. He received the highest honor (Companionship) of the Chartered Institute of Arbitrators, is a Fellow of the American College of Construction Lawyers, a Founding Fellow of the American College of Commercial Arbitrators, an Honorary Member of the International Academy of Mediators (IAM), and the American College of Civil Trial Mediators (ACCTM), and an Honorary Member of the Garibaldi ADR Inn of Court. He was selected as one of 500 outstanding lawyers in America in a survey conducted by a new legal magazine, LAWDRAGON. This November he will receive the Randolph Lowry Award from the Southern California Mediation Association in recognition of his scholarly contributions in the field of conflict resolution.

Stipanowich is married to the former Sky Yancey and has four children—Laura, Thomas, Nick and Sarah—all of whom are dedicated problem solvers! He enjoys sketching, painting and singing, and has worked as an illustrator and graphic designer, as well as a tenor soloist with various vocal groups.
STOLT-NIELSEN S.A. V. ANIMALFEEDS INT’L CORP.
United States Supreme Court
130 S. Ct. 1758 (2010)

JUSTICE ALITO delivered the opinion of the Court.

We granted certiorari in this case to decide whether imposing class arbitration on parties whose arbitration clauses are “silent” on that issue is consistent with the Federal Arbitration Act (FAA).

I

A

Petitioners are shipping companies that serve a large share of the world market for parcel tankers – seagoing vessels with compartments that are separately chartered to customers wishing to ship liquids in small quantities. One of those customers is AnimalFeeds International Corp. (hereinafter AnimalFeeds), which supplies raw ingredients, such as fish oil, to animal-feed producers around the world. AnimalFeeds ships its goods pursuant to a standard contract known in the maritime trade as a charter party. Numerous charter parties are in regular use, and the charter party that AnimalFeeds uses is known as the “Vegoilvoy” charter party....

Adopted in 1950, the Vegoilvoy charter party contains the following arbitration clause:

Arbitration. Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [i.e., the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.

In 2003, a Department of Justice criminal investigation revealed that petitioners were engaging in an illegal price-fixing conspiracy. When AnimalFeeds learned of this, it brought a putative class action against petitioners in the District Court for the Eastern District of Pennsylvania, asserting antitrust claims for supracompetitive prices that petitioners allegedly charged their customers over a period of several years.
The parties agree that ... AnimalFeeds and petitioners must arbitrate their antitrust dispute.

B

In 2005, AnimalFeeds served petitioners with a demand for class arbitration, designating New York City as the place of arbitration and seeking to represent a class of “[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] at any time during the period from August 1, 1998, to November 30, 2002.” The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators who were to “follow and be bound by Rules 3 through 7 of the American Arbitration Association’s Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003).” These rules (hereinafter Class Rules) were developed by the American Arbitration Association (AAA) after our decision in Green Tree Financial Corp. v. Bazzle), and Class Rule 3, in accordance with the plurality opinion in that case, requires an arbitrator, as a threshold matter, to determine “whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”

The parties selected a panel of arbitrators and stipulated that the arbitration clause was “silent” with respect to class arbitration. Counsel for AnimalFeeds explained to the arbitration panel that the term “silent” did not simply mean that the clause made no express reference to class arbitration. Rather, he said, “[a]ll the parties agree that when a contract is silent on an issue there’s been no agreement that has been reached on that issue.”

After hearing argument and evidence, including testimony from petitioners’ experts regarding arbitration customs and usage in the maritime trade, the arbitrators concluded that the arbitration clause allowed for class arbitration. They found persuasive the fact that other arbitrators ruling after Bazzle had construed “a wide variety of clauses in a wide variety of settings as allowing for class arbitration,” but the panel acknowledged that none of these decisions was “exactly comparable” to the present dispute. Petitioners’ expert evidence did not show an “inten[t] to preclude class arbitration,” the arbitrators reasoned, and petitioners’ argument would leave “no basis for a class action absent express agreement among all parties and the putative class members.”

The arbitrators stayed the proceeding to allow the parties to seek judicial review, and petitioners filed an application to vacate the arbitrators’ award in the District Court for the Southern District of New York. The District Court vacated the award, concluding that the arbitrators’ decision was made in “manifest disregard” of the law insofar as the arbitrators failed to conduct a choice-of-law analysis. Had such an analysis been conducted, the District Court held, the arbitrators would
have applied the rule of federal maritime law requiring that contracts be interpreted in light of custom and usage.

AnimalFeeds appealed to the Court of Appeals, which reversed. As an initial matter, the Court of Appeals held that the “manifest disregard” standard survived our decision in Hall Street Associates, L. L. C. v. Mattel, Inc., as a “judicial gloss” on the enumerated grounds for vacatur of arbitration awards under 9 U.S.C. § 10. Nonetheless, the Court of Appeals concluded that, because petitioners had cited no authority applying a federal maritime rule of custom and usage against class arbitration, the arbitrators’ decision was not in manifest disregard of federal maritime law. Nor had the arbitrators manifestly disregarded New York law, the Court of Appeals continued, since nothing in New York case law established a rule against class arbitration.

We granted certiorari.

II

A

Petitioners contend that the decision of the arbitration panel must be vacated, but in order to obtain that relief, they must clear a high hurdle. It is not enough for petitioners to show that the panel committed an error – or even a serious error. “It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.” Major League Baseball Players Assn. v. Garvey, 532 U.S. 504, 509 (2001) (per curiam) (quoting Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator “exceeded [his] powers,” for the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we must conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.3

B

...
Rather than inquiring whether the FAA, maritime law, or New York law contains a “default rule” under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post-\textit{Bazzle} consensus among arbitrators that class arbitration is beneficial in “a wide variety of settings,” the panel considered only whether there was any good reason not to follow that consensus in this case. The panel was not persuaded by “court cases denying consolidation of arbitrations,” by undisputed evidence that the Vegoilvoy charter party had “never been the basis of a class action,” or by expert opinion that “sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration.” Accordingly, finding no convincing ground for departing from the post-\textit{Bazzle} arbitral consensus, the panel held that class arbitration was permitted in this case. The conclusion is inescapable that the panel simply imposed its own conception of sound policy.

... As a result, under § 10(b) of the FAA, we must either “direct a rehearing by the arbitrators” or decide the question that was originally referred to the panel. Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators.

III

A

The arbitration panel thought that \textit{Bazzle} “controlled” the “resolution” of the question whether the Vegoilvoy charter party “permit[s] this arbitration to proceed on behalf of a class,” but that understanding was incorrect.

... When \textit{Bazzle} reached this Court, no single rationale commanded a majority. The opinions of the Justices who joined the judgment – that is, the plurality opinion and JUSTICE STEVENS’ opinion – collectively addressed three separate questions. The first was which decision maker (court or arbitrator) should decide whether the contracts in question were “silent” on the issue of class arbitration. The second was what standard the appropriate decision maker should apply in determining whether a contract allows class arbitration. (For example, does the FAA entirely preclude class arbitration? Does the FAA permit class arbitration only under limited circumstances, such as when the contract expressly so provides? Or is this question left entirely to state law?) The final question was whether, under whatever standard is appropriate, class arbitration had been properly ordered in the case at hand.

The plurality opinion decided only the first question, concluding that the arbitrator and not a court should decide whether the contracts were indeed “silent”
on the issue of class arbitration. ... The plurality therefore concluded that the
decision of the State Supreme Court should be vacated and that the case should be
remanded for a decision by the arbitrator on the question whether the contracts
were indeed “silent.” The plurality did not decide either the second or the third
question noted above.

JUSTICE STEVENS concurred in the judgment vacating and remanding
because otherwise there would have been “no controlling judgment of the Court,”
but he did not endorse the plurality’s rationale. He did not take a definitive position
on the first question, stating only that “[a]rguably the interpretation of the parties’
agreement should have been made in the first instance by the arbitrator.”
(emphasis added). But because he did not believe that Green Tree had raised the
question of the appropriate decision maker, he preferred not to reach that question
and, instead, would have affirmed the decision of the State Supreme Court on the
ground that “the decision to conduct a class-action arbitration was correct as a
matter of law.” Accordingly, his analysis bypassed the first question noted above
and rested instead on his resolution of the second and third questions. Thus, *Bazzle*
did not yield a majority decision on any of the three questions.

B

Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in
this case at the time of the arbitration proceeding. For one thing, the parties appear
to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to
decide whether a contract permits class arbitration. In fact, however, only the
plurality decided that question. But we need not revisit that question here because
the parties’ supplemental agreement expressly assigned this issue to the arbitration
panel, and no party argues that this assignment was impermissible.

Unfortunately, however, both the parties and the arbitration panel seem to
have misunderstood *Bazzle* in another respect, namely, that it established the
standard to be applied by a decision maker in determining whether a contract may
permissibly be interpreted to allow class arbitration. The arbitration panel began
its discussion by stating that the parties “differ regarding *the rule of interpretation*
to be gleaned from [the *Bazzle*] decision.” The panel continued:

Claimants argue that *Bazzle* requires clear language that forbids class
arbitration in order to bar a class action. The Panel, however, agrees
with Respondents that the test is a more general one – arbitrators
must look to the language of the parties’ agreement to ascertain the
parties’ intention whether they intended to permit or to preclude class
action.
As we have explained, however, *Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted. The decision in *Bazzle* left that question open, and we turn to it now.

IV

While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration “is a matter of consent, not coercion.” *Volt*.

A

... Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must “give effect to the contractual rights and expectations of the parties.” In this endeavor, “as with any other contract, the parties’ intentions control.” This is because an arbitrator derives his or her powers from the parties’ agreement to forgo the legal process and submit their disputes to private dispute resolution.

Underscoring the consensual nature of private dispute resolution, we have held that parties are “generally free to structure their arbitration agreements as they see fit.” For example, we have held that parties 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.

We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes. It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.

B

From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached “no agreement” on that issue. The critical point, in the view of the arbitration panel, was that petitioners did not “establish that the parties to the charter agreements intended to *preclude* class arbitration.” Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement’s silence on the question of class arbitration as
dispositive. The panel’s conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties’ agreement. Thus, we have said that “‘procedural’ questions which grow out of the dispute and bear on its final disposition’ are presumptively not for the judge, but for an arbitrator, to decide.” Howsam (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964)). This recognition is grounded in the background principle that “[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.” Restatement (Second) of Contracts § 204 (1979).

An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes through class-wide arbitration.

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure, no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, “the presumption of privacy and confidentiality” that applies in many bilateral arbitrations “shall not apply in class arbitrations,” thus potentially frustrating the parties’ assumptions when they agreed to arbitrate. The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence
on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.\(^\text{10}\)

The dissent minimizes these crucial differences by characterizing the question before the arbitrators as being merely what “procedural mode” was available to present AnimalFeeds’ claims. If the question were that simple, there would be no need to consider the parties’ intent with respect to class arbitration. See Howsam (committing “procedural questions” presumptively to the arbitrator’s discretion). But the FAA requires more. Contrary to the dissent, but consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties agreed to authorize class arbitration. Here, where the parties stipulated that there was “no agreement” on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.

V

For these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

[Dissenting opinion omitted.]

\(^{10}\) We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was “no agreement” on the issue of class-action arbitration.
RENT-A-CENTER, WEST, INC. v. JACKSON
United States Supreme Court
130 S. Ct. 2772 (2010)

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether, under the Federal Arbitration Act ..., a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.

I

On February 1, 2007, the respondent here, Antonio Jackson, filed an employment-discrimination suit ... against his former employer in the United States District Court for the District of Nevada. The defendant and petitioner here, Rent-A-Center, West, Inc., filed a motion under the FAA to dismiss or stay the proceedings and to compel arbitration. Rent-A-Center argued that the Mutual Agreement to Arbitrate Claims (Agreement), which Jackson signed on February 24, 2003 as a condition of his employment there, precluded Jackson from pursuing his claims in court. The Agreement provided for arbitration of all “past, present or future” disputes arising out of Jackson’s employment with Rent-A-Center, including “claims for discrimination” and “claims for violation of any federal ... law.” It also provided that “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”

Jackson opposed the motion on the ground that “the arbitration agreement in question is clearly unenforceable in that it is unconscionable” under Nevada law. Rent-A-Center responded that Jackson’s unconscionability claim was not properly before the court because Jackson had expressly agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the Agreement. It also disputed the merits of Jackson’s unconscionability claims.

The District Court granted Rent-A-Center’s motion to dismiss the proceedings and to compel arbitration. The court found that the Agreement ““clearly and unmistakly [sic]”” gives the arbitrator exclusive authority to decide whether the Agreement is enforceable, and, because Jackson challenged the validity of the Agreement as a whole, the issue was for the arbitrator....

Without oral argument, a divided panel of the Court of Appeals for the Ninth Circuit ... reversed on the question of who (the court or arbitrator) had the authority to decide whether the Agreement is enforceable. It noted that “Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator,” but held that where “a party challenges an
arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.” ... Judge Hall dissented on the ground that “the question of the arbitration agreement’s validity should have gone to the arbitrator, as the parties ‘clearly and unmistakably provide[d]’ in their agreement.”

We granted certiorari.

II

A

The Agreement here contains multiple “written provision[s]” to “settle by arbitration a controversy.” § 2. Two are relevant to our discussion. First, the section titled “Claims Covered By The Agreement” provides for arbitration of all “past, present or future” disputes arising out of Jackson’s employment with Rent-A-Center. Second, the section titled “Arbitration Procedures” provides that “[t]he Arbitrator ... shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” The current “controversy” between the parties is whether the Agreement is unconscionable. It is the second provision, which delegates resolution of that controversy to the arbitrator, that Rent-A-Center seeks to enforce. Adopting the terminology used by the parties, we will refer to it as the delegation provision.

The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate “gateway” questions of “arbitrability,” such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. ... An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. The additional agreement is valid under § 2 “save upon such grounds as exist at law or in equity for the revocation of any contract,” and federal courts can enforce the agreement by staying federal litigation under § 3 and compelling arbitration under § 4. The question before us, then, is whether the delegation provision is valid under § 2.

B

There are two types of validity challenges under § 2: “One type challenges specifically the validity of the agreement to arbitrate,” and “[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the
illegality of one of the contract’s provisions renders the whole contract invalid.” In a line of cases neither party has asked us to overrule, we held that only the first type of challenge is relevant to a court’s determination whether the arbitration agreement at issue is enforceable.² See Prima Paint Corp. v. Flood & Conklin Mfg. Co.; Buckeye; Preston v. Ferrer. That is because § 2 states that a “written provision” “to settle by arbitration a controversy” is “valid, irrevocable, and enforceable” without mention of the validity of the contract in which it is contained. Thus, a party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. “[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” Buckeye.

Here, the “written provision . . . to settle by arbitration a controversy” that Rent-A-Center asks us to enforce is the delegation provision – the provision that gave the arbitrator “exclusive authority to resolve any dispute relating to the . . . enforceability . . of this Agreement.” The “remainder of the contract” is the rest of the agreement to arbitrate claims arising out of Jackson’s employment with Rent-A-Center. To be sure this case differs from Prima Paint, Buckeye, and Preston, in that the arbitration provisions sought to be enforced in those cases were contained in contracts unrelated to arbitration — contracts for consulting services, see Prima Paint, check-cashing services, see Buckeye, and “personal management” or “talent agent” services, see Preston. In this case, the underlying contract is itself an arbitration agreement. But that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract. Section 2 operates on the specific “written provision” to “settle by arbitration a controversy” that the party seeks to enforce. Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.

C

The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole. Nowhere in his opposition to Rent-A-Center’s motion to compel arbitration did he even mention the delegation provision....

... As required to make out a claim of unconscionability under Nevada law, he contended that the Agreement was both procedurally and substantively unconscionable. It was procedurally unconscionable, he argued, because it “was imposed as a condition of employment and was non-negotiable.” But we need not

² The issue of the agreement’s “validity” is different from the issue whether any agreement between the parties “was ever concluded,” and, as in Buckeye Check Cashing, Inc. v. Cardegna, we address only the former.
consider that claim because none of Jackson’s substantive unconscionability challenges was specific to the delegation provision. First, he argued that the Agreement’s coverage was one sided in that it required arbitration of claims an employee was likely to bring – contract, tort, discrimination, and statutory claims — but did not require arbitration of claims Rent-A-Center was likely to bring — intellectual property, unfair competition, and trade secrets claims. This one-sided-coverage argument clearly did not go to the validity of the delegation provision.

Jackson’s other two substantive unconscionability arguments assailed arbitration procedures called for by the contract – the fee-splitting arrangement and the limitations on discovery — procedures that were to be used during arbitration under both the agreement to arbitrate employment-related disputes and the delegation provision. It may be that had Jackson challenged the delegation provision by arguing that these common procedures as applied to the delegation provision rendered that provision unconscionable, the challenge should have been considered by the court. To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable. That would be, of course, a much more difficult argument to sustain than the argument that the same limitation renders arbitration of his fact-bound employment-discrimination claim unconscionable. Likewise, the unfairness of the fee-splitting arrangement may be more difficult to establish for the arbitration of enforceability than for arbitration of more complex and fact-related aspects of the alleged employment discrimination. Jackson, however, did not make any arguments specific to the delegation provision; he argued that the fee-sharing and discovery procedures rendered the entire Agreement invalid.

* * *

We reverse the judgment of the Court of Appeals for the Ninth Circuit.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

Neither petitioner nor respondent has urged us to adopt the rule the Court does today: Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge to the arbitrator unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator — the so-called “delegation clause.”

... 

* * *

Prima Paint and its progeny allow a court to pluck from a potentially invalid contract a potentially valid arbitration agreement. Today the Court adds a new
layer of severability – something akin to Russian nesting dolls – into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator. I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity. But even assuming otherwise, I certainly would not hold that the Prima Paint rule extends this far.

In my view, a general revocation challenge to a standalone arbitration agreement is, invariably, a challenge to the “making” of the arbitration agreement itself, and therefore, under Prima Paint, must be decided by the court. A claim of procedural unconscionability aims to undermine the formation of the arbitration agreement, much like a claim of unconscionability aims to undermine the clear-and-unmistakable-intent requirement necessary for a valid delegation of a “discrete” challenge to the validity of the arbitration agreement itself. Moreover, because we are dealing in this case with a challenge to an independently executed arbitration agreement – rather than a clause contained in a contract related to another subject matter – any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement. They are one and the same.

... [T]he Court now declares that Prima Paint’s pleading rule requires more: A party must lodge a challenge with even greater specificity than what would have satisfied the Prima Paint Court. A claim that an entire arbitration agreement is invalid will not go to the court unless the party challenges the particular sentences that delegate such claims to the arbitrator, on some contract ground that is particular and unique to those sentences.

...
JUSTICE SCALIA delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LLC (AT&T). The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” ...

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T’s Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T’s Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney’s fees, and, in the event that a customer receives an arbitration award greater than AT&T’s last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant’s attorney’s fees. [The guaranteed minimum recovery was increased in 2009 to $10,000.]

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged $30.22 in sales tax based on the phones’ retail value. In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a
putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT&T’s motion. It described AT&T’s arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was “quick, easy to use” and likely to “prompt[ ] full or . . . even excess payment to the customer without the need to arbitrate or litigate”; that the $7,500 premium functioned as “a substantial inducement for the consumer to pursue the claim in arbitration” if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. Nevertheless, relying on the California Supreme Court’s decision in Discover Bank v. Superior Court, 113 P. 3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in Discover Bank. It also held that the Discover Bank rule was not preempted by the FAA because that rule was simply “a refinement of the unconscionability analysis applicable to contracts generally in California.”...

We granted certiorari ....

...  

III

A

The Concepcions argue that the Discover Bank rule, given its origins in California’s unconscionability doctrine and California’s policy against exculpation, is a ground that “exist[s] at law or in equity for the revocation of any contract” under FAA § 2. Moreover, they argue that even if we construe the Discover Bank rule as a prohibition on collective-action waivers rather than simply an application of unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well.

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In Perry v. Thomas, 482 U.S. 483 (1987), for example, we noted that the FAA’s preemptive effect might extend even to grounds traditionally thought to exist “at law or in
equity for the revocation of any contract.” We said that a court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.”

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in Discover Bank. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory — restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to “any” contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed “a panel of twelve lay arbitrators” to help avoid preemption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in “a great variety of “devices and formulas” declaring arbitration against public policy. And although these statistics are not definitive, it is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.

The Concepcions suggest that all this is just a parade of horribles, and no genuine worry. “Rules aimed at destroying arbitration” or “demanding procedures incompatible with arbitration,” they concede, “would be preempted by the FAA because they cannot sensibly be reconciled with Section 2.” The “grounds” available under § 2’s saving clause, they admit, “should not be construed to include a State’s mere preference for procedures that are incompatible with arbitration and ‘would wholly eviscerate arbitration agreements.’”

We largely agree. Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives....

We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored
discovery or adherence to the Federal Rules of Evidence are “a far cry from this case.” The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

The “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms.” Volt.... The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.... Thus, in Preston v. Ferrer, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: “A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'“ which objective would be “frustrated” by requiring a dispute to be heard by an agency first. That rule, we said, would “at the least, hinder speedy resolution of the controversy.”

California’s Discover Bank rule similarly interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post. The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past. The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. The former requirement, however, is toothless and malleable (the Ninth Circuit has held that damages of $4,000 are sufficiently small, and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under Discover Bank, and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

Although we have had little occasion to examine classwide arbitration, our decision in Stolt-Nielsen is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some

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6 Of course States remain free to take steps addressing the concerns that attend contracts of adhesion — for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.
background principle of contract law that would affect its interpretation. We then
held that the agreement at issue, which was silent on the question of class
procedures, could not be interpreted to allow them because the “changes brought
about by the shift from bilateral arbitration to class-action arbitration” are
“fundamental.” This is obvious as a structural matter: Classwide arbitration
includes absent parties, necessitating additional and different procedures and
involving higher stakes. Confidentiality becomes more difficult. And while it is
theoretically possible to select an arbitrator with some expertise relevant to the
class-certification question, arbitrators are not generally knowledgeable in the
often-dominant procedural aspects of certification, such as the protection of absent
parties. The conclusion follows that class arbitration, to the extent it is
manufactured by Discover Bank rather than consensual, is inconsistent with the
FAA.

First, the switch from bilateral to class arbitration sacrifices the principal
advantage of arbitration — its informality — and makes the process slower, more
costly, and more likely to generate procedural morass than final judgment....

Second, class arbitration requires procedural formality. The AAA’s rules
governing class arbitrations mimic the Federal Rules of Civil Procedure for class
litigation. And while parties can alter those procedures by contract, an alternative
is not obvious....

We find it unlikely that in passing the FAA Congress meant to leave the
disposition of these procedural requirements to an arbitrator. Indeed, class
arbitration was not even envisioned by Congress when it passed the FAA in 1925;
as the California Supreme Court admitted in Discover Bank, class arbitration is a
“relatively recent development.” And it is at the very least odd to think that an
arbitrator would be entrusted with ensuring that third parties’ due process rights
are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal
procedures do of course have a cost: The absence of multilayered review makes it
more likely that errors will go uncorrected. Defendants are willing to accept the
costs of these errors in arbitration, since their impact is limited to the size of
individual disputes, and presumably outweighed by savings from avoiding the
courts. But when damages allegedly owed to tens of thousands of potential
claimants are aggregated and decided at once, the risk of an error will often become
unacceptable. Faced with even a small chance of a devastating loss, defendants will
be pressured into settling questionable claims. Other courts have noted the risk of
“in terrorem” settlements that class actions entail, and class arbitration would be no
different.
Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award “was procured by corruption, fraud, or undue means”; “there was evident partiality or corruption in the arbitrators”; “the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced”; or if the “arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made.” The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. *Hall Street Assocs.* We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

... The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT&T’s last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be “essentially guarant[e]d” to be made whole. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which “could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.”

***

Because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” California’s *Discover Bank* rule is preempted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*
JUSTICE THOMAS, concurring.

... Section 2 provides that “[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Significantly, the statute does not parallel the words “valid, irrevocable, and enforceable” by referencing the grounds as exist for the “invalidation, revocation, or nonenforcement” of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforceability. The use of only “revocation” and the conspicuous omission of “invalidation” and “nonenforcement” suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses.

...

Examining the broader statutory scheme, § 4 can be read to clarify the scope of § 2’s exception to the enforcement of arbitration agreements. When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,” the court must order arbitration “in accordance with the terms of the agreement.”

Reading §§ 2 and 4 harmoniously, the “grounds . . . for the revocation” preserved in § 2 would mean grounds related to the making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. Contract defenses unrelated to the making of the agreement — such as public policy — could not be the basis for declining to enforce an arbitration clause.

II

Under this reading, the question here would be whether California’s Discover Bank rule relates to the making of an agreement. I think it does not.

...

The court’s analysis and conclusion that the arbitration agreement was exculpatory reveals that the Discover Bank rule does not concern the making of the arbitration agreement. Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy.... Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

...

[Dissenting opinion of JUSTICE BREYER, joined by JUSTICES GINSBURG, SOTOMAYOR and KAGAN, omitted.]
Statement for the Record of
Christopher R. Drahozal
John M. Rounds Professor of Law
University of Kansas School of Law

October 13, 2011

Senate Judiciary Committee

Hearing on
Arbitration: Is It Fair When Forced?
Chairman Franken, Ranking Member Cornyn, and Members of the Committee:
I am pleased to submit this statement for the record addressing the use of arbitration to resolve consumer and employment disputes. I am the John M. Rounds Professor of Law at the University of Kansas School of Law and an Associate Reporter for the Restatement, Third, of the U.S. Law of International Commercial Arbitration. I also served as the Chair of the Consumer Arbitration Task Force of the Searle Civil Justice Institute, and in that capacity was an author of the “Searle study,” which examined in detail consumer arbitration cases administered by the American Arbitration Association (“AAA”). I submit this statement, not on behalf of any of those entities, but as an individual scholar who specializes in arbitration law.

I. Overview: Empirical Research and the Fairness of Consumer Arbitration

Both sides in the debate over the fairness of consumer and employment arbitration have recognized the importance of empirical research. Indeed, even Public Citizen, a vocal critic of consumer arbitration, has stated that it “agree[s]” that “congressional scrutiny of arbitration ‘can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.’” According to Professor Peter B. Rutledge, “it now appears to be common ground that the policy debate over the Arbitration Fairness Act should focus on empirical data.” If so, that is an important and valuable development. Anecdotes alone do not provide a solid basis for legislative action.

But of course one must be cautious in evaluating empirical data as well. Even the best empirical studies have limits or are subject to qualifications. And numbers can be misleading if misinterpreted. So empirical studies must be used thoughtfully as a basis for making policy, recognizing both their value and their limitations. My goal in this statement is to describe the empirical literature on consumer arbitration (which is what my research has focused on), highlighting both insights that the literature provides and circumstances in which it has been misconstrued.

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3 Peter B. Rutledge, The Case Against the Arbitration Fairness Act, DISP. RESOL. MAG., Fall 2009, at 4, 4; see also Peter B. Rutledge, Common Ground in the Arbitration Debate, 1Y.B. ARB. & MED. 1, 8 (2009) (“there now appears to be a consensus that the future of arbitration should be decided by data, not anecdote”) (emphasis omitted).

4 For a discussion of the limitations of the data used in the Searle study, for example, see Drahozal & Zyontz, AAA Consumer Arbitration, supra note 1, at 846, 896-97.
The following summarizes the key points in the statement below:

- Most consumer contracts do not include arbitration clauses, and even most credit card issuers do not, and never have, included arbitration clauses in their cardholder agreements.

- High business win rates in arbitration do not show that arbitration is biased against consumers. Business win rates are as high, if not higher, in comparable court cases as they are in arbitration.

- Higher win rates of repeat businesses in arbitration are likely due to their better ability to screen cases and not due to biased decision-making by arbitrators.

- Many consumer arbitration clauses do not include class arbitration waivers, and it is unlikely that all businesses — or even all credit card issuers — will respond to the Supreme Court’s decision in AT&T Mobility v. Concepcion by switching to arbitration.

- Restricting the enforcement of pre-dispute arbitration clauses is likely to have unanticipated consequences, harming rather than helping at least some if not many consumers.

II. Consumer Choice and Pre-Dispute Arbitration Agreements

A central theme in criticisms of consumer arbitration is that consumers do not have any choice if they want to avoid arbitration. But it emphatically is not the case that all consumer contracts include arbitration clauses. To the contrary, the best available empirical evidence, although now somewhat dated, is that most consumer contracts do not include arbitration clauses. Rather, it is only particular types of consumer contracts that include arbitration clauses.

Credit card agreements are commonly cited as a type of contract as to which consumers have no choice but to agree to arbitration. In a 2009 House Hearing on the use of arbitration clauses by credit card issuers, Congressman Cohen (Tenn.) stated the commonly held view that

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6 Linda J. Demaine & Deborah R. Hensler, “Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004) (“Across the industries studied, fifty-seven of the 161 sampled businesses (35.4%) included arbitration clauses in their consumer contracts.”). The use of arbitration clauses varied widely by type of industry. Id. at 63.
7 Other studies of the use of arbitration clauses in consumer contacts include Florencia Marotta-Wurgler, “Unfair Dispute Resolution Clauses: Much Ado About Nothing?, in BOILERPLATE: THE FOUNDATIONS OF MARKET CONTRACTS 45 (Omri Ben-Shahar ed., 2007) (finding that only 6.0% of software license agreements studied included arbitration clauses, although noting that some of the contracts studied were commercial rather than consumer contracts); and Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts, 41 U. Mich. J.L. Reform 871, 883 (2008) (finding that 20 of 26, or 76.9%, of sample of consumer contracts included arbitration clauses; sample included consumer financial services and telecommunications contracts).
“[n]early every credit card issuer includes an arbitration agreement in [its] ... contracts with cardholders.” David Arkush of Public Citizen has stated that “[n]early every consumer lender puts a clause in the standard-form contract saying that the consumer can never sue the company, for anything.”

In fact, it has never been the case that “[n]early every credit card issuer” uses arbitration clauses. As of December 31, 2009, over 80 percent (247 of 298, or 82.9%) of credit card issuers did not use arbitration clauses in their cardholder agreements. Many, but not all, of those issuers were credit unions that offered credit cards to their members. Barely 17 percent (51 of 298, or 17.1%) of issuers used arbitration clauses in their credit card agreements.

The reason for the perception that consumers had limited choice as to credit cards was that almost all of the very large credit card issuers used arbitration clauses. But even that has changed. As of December 31, 2009, just over 95 percent of credit card loans outstanding were by issuers that used arbitration clauses in their cardholder agreements. One year later, as of December 31, 2010, that percentage had declined to 48 percent. The most recent data thus suggest that consumers have a much larger degree of choice (and, indeed, always have had a much larger degree of choice) than commonly perceived.

One additional point: critics assert that if arbitration is “fair,” consumers will agree to it after a dispute arises, implying that the only reason for businesses to use pre-dispute arbitration agreements (and deny consumers the choice of going to court) is to take advantage of consumers. That is not the case: pre-dispute arbitration clauses permit consumers and businesses to enter into deals that make them both better off, deals that they could not enter into after a dispute arises. As I have explained in prior writing:

[T]hat an individual who agreed to arbitrate before a dispute arose changes his or her mind [after a dispute arises] does not necessarily mean that enforcing the

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12 Peter B. Rutledge & Christopher R. Drahozal, Contract and Choice 5 (Sept. 26, 2011) (work in progress; preliminary results). Most of the decline appears to be due to two factors: (1) the decision of the National Arbitration Forum to cease administering new consumer arbitrations in settlement of Minnesota Attorney General Swanson’s consumer fraud suit against the NAF; and (2) the decision of four large issuers to settle an antitrust suit against them by agreeing to remove arbitration clauses from their cardholder agreements for three-and-one-half years. Id. at 4. Whether those issuers will resume use of arbitration clauses after that period expires is unknown.
predispute arbitration agreement is unfair. The individual may have been willing to give up the right to bring high-dollar but rare claims before a jury in exchange for the ability to pursue low-dollar but more common claims in arbitration. Such a deal is possible only before a dispute arises, when there is uncertainty as to what type of claim (if any) will materialize. Once the individual knows what type of claim he or she has (either high-value or low-value), either the individual may be unwilling to arbitrate (if it is a high-value claim) or the corporation may be unwilling to arbitrate (if it is a low-value claim that could not economically be brought in court). By entering into a predispute arbitration agreement in such circumstances, the parties can enter into a deal that makes both of them better off. Permitting the individual (or the corporation for that matter) later to avoid arbitration would effectively preclude such deals from being made, making the parties worse off. Enforcement of the predispute arbitration agreement in this sort of case would be the fair, not the unfair, approach.\textsuperscript{13}

The empirical evidence, while not decisive, is consistent with this view. The vast majority of consumer and employment arbitrations arise out of pre-dispute, not post-dispute, arbitration agreements.\textsuperscript{14} That is true even for international arbitrations — a setting in which no one contends that arbitration is being used to take advantage of a weaker party.\textsuperscript{15} The rarity of post-dispute arbitration agreements, even in international arbitration, suggests that parties can more readily enter into pre-dispute arbitration agreements than post-dispute agreements. Precluding parties from using pre-dispute arbitration agreements thus is likely to reduce, possibly dramatically, the use of arbitration to resolve consumer and employment disputes.

### III. Outcomes in Consumer Arbitration

Critics of consumer arbitration have cited what they see as excessively high win rates for businesses as evidence that arbitration is unfair to consumers.\textsuperscript{16} While I applaud their reliance on data rather than anecdotes, the conclusions critics draw from that data are incorrect.


\textsuperscript{14} Drahozal & Zyontz, Private Regulation, supra note 1, at 49 (“Indeed, virtually all of the 301 cases in the [consumer] case file sample — 290 (or 96.3%) — arose out of pre-dispute agreements: 11 (or 3.7%) arose out of post-dispute agreements to arbitrate.”); Lewis L. Maltby, Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements, 30 WM. MITCHELL L. REV. 313, 319 (2003) (“AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).”).

\textsuperscript{15} Stephen R. Bond, How to Draft an Arbitration Clause (Revisited), 1(2) ICC INT’L CT. ARB. BULL. 14 (1990), reprinted in CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 67 (2005) (“Of the cases submitted to the ICC Court, only four [of 237] in 1987 and six [of 215] in 1989 resulted from a compromis, that is, an agreement to submit an already-existing dispute to arbitration.”).

First, win rates in consumer arbitration vary depending on the type of case being resolved and numerous other factors. Businesses do not always win in arbitration. For example, the Searle study found that consumer claimants won some relief in 53.3 percent of the AAA consumer arbitrations studied, and that, in those cases, consumers were awarded 52.1 percent of the amount they sought.17

Second, and more fundamentally, evaluating whether a win rate is too high (or too low) cannot be done in the abstract. It must be based on a comparison to a base line — or, in other words, you need to have a control group. The obvious control group to use here is courts: outcomes in arbitration cases need to be compared to outcomes in comparable cases in court in order to draw any conclusions about how consumers fare.18 This is easier said than done, of course. It is hard to control for differences across types of cases. Important differences, such as the legal and factual strength of the case, are difficult to observe. That said, there is one type of case in which the characteristics of the cases are likely to be at least roughly comparable in arbitration and in court: debt collection cases brought by businesses — which happens to be the exact type of case cited by the critics as showing a high business win rate in arbitration.

So how do consumers fare in debt collection cases? In arbitration, as the data cited above suggest, businesses win the vast majority of the cases. The Searle study, for example, found that “[c]reditors won some relief in 86.2 percent of the individual AAA debt collection arbitrations and 97.1 percent of the AAA debt collection program arbitrations that went to an award.”19 But the study found that creditors won some relief at an even higher rate (ranging from 98.4 percent to 100.0 percent of the cases) in debt collection cases in court.20 Likewise, while prevailing creditors were awarded from 92.9 percent to 99.2 percent of the amount sought in AAA arbitrations, they were awarded from 96.2 percent to 99.5 percent of the amount sought in debt collection cases in court.21

have found the arbitrators find for companies against consumers 94 to 96% of the time, suggesting that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts.”).

17 Drahoszal & Zyontz, AAA Consumer Arbitration, supra note 1, at 897-99. By comparison, business claimants won some relief in 83.6% of the AAA arbitrations studied, and in those cases recovered 93.0% of the amount sought. Id. at 898-99. The reason for the difference, as stated in the study, is not that arbitration is biased in favor of businesses but rather that businesses bring different types of claims than consumers. Id. at 901 (“Business claimants usually bring claims for specific monetary amounts representing debts for goods provided or services rendered. Many of the cases are resolved ex parte, with the consumer failing to appear. By comparison, cases with consumer claimants are much less likely to involve liquidated amounts and more likely to be contested by businesses.”).

18 E.g., Maine Bureau of Consumer Credit Protection, Report to Committee: Compilation of Information Provided by Consumer Arbitration Providers 7 (Apr. 1, 2009) (“[A]lthough credit card banks or assignees prevail in most arbitrations, this fact alone does not necessarily indicate unfairness to consumers. The fact is that the primary alternative to arbitration (a civil action in court) also commonly results in judgment for the plaintiff.”), available at http://www.maine.gov/pfr/consumercredit/documents/ArbitrationProvidersReport.rtf.

19 Drahoszal & Zyontz, Creditor Claims, supra note 1, at 80.

20 Id. For data availability reasons, the study examined debt collection cases in Oklahoma and Virginia state courts, and student loan collection cases in federal court. I have every reason to believe the results would have been the same if we had studied other courts instead.

21 Id. at 80-81. Controlling for confounding factors using multiple regression analysis did not change the results. Id. at 98-101.
I certainly do not claim that these data show that arbitration is better for consumers than litigation. But likewise the data provide no support for the view that consumers fare worse in arbitration than they do in comparable cases in court. And the data show definitively that high business win rates in arbitration do not in and of themselves prove that arbitration is unfair to consumers.

IV. Incentives of Arbitrators and Arbitration Providers

A more specific concern about outcomes in arbitration is the view that the structure of the arbitration process results in decisions that are biased in favor of businesses. Because arbitrators get paid only when they are selected to serve, rather than being paid salaries like judges are, critics assert that arbitrators will tend to favor “repeat players” — parties that will likely appear in arbitration on multiple occasions and so have more opportunities to appoint arbitrators than non-repeat players. Indeed, some have extended the criticism to providers of arbitration services, which are alleged to favor businesses (repeat players) over consumers in appointing arbitrators or otherwise structuring the arbitral process.

The evidence on whether repeat players have a higher success rate in arbitration is mixed. As noted above, businesses do have a higher win rate in arbitration than consumers, but that is likely due to the different types of claims businesses assert. The usual test for the existence of a repeat-player effect has been to compare win rates for repeat businesses in arbitration to win rates for non-repeat businesses in arbitration. For example, the Searle study, for example, found that under this usual approach, repeat businesses had a slightly higher win rate against consumers than non-repeat businesses, but that the difference was not statistically significant. Under an alternative definition of repeat business, the study found a greater repeat-player effect, albeit even then one that was only weakly statistically significant. Other studies, usually of AAA employment arbitrations, also have found that repeat businesses have a higher win rate in arbitration than non-repeat businesses.

22 For evidence on comparative outcomes in employment cases in arbitration and court, see, e.g., Theodore Eisenberg & Elizabeth Hill, Arbitration and Litigation of Employment Claims: An Empirical Comparison, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 53 (“These results are consistent with arbitrators, at least those participating in AAA-sponsored arbitration, not acting in a materially different fashion than in-court adjudicators.”). However, it is much more difficult to be confident that the cases being compared are actually comparable in the employment setting than in the debt collection setting.


But bias is not the only, or even the most likely, explanation for such a repeat-player effect. Repeat businesses are likely to be more sophisticated at screening cases and settling disputes than non-repeat businesses. As such, one would expect them to be more likely than non-repeat businesses to settle the strong claims against them and arbitrate only the weak claims. If so, one would expect to find exactly the pattern described above: that repeat businesses have higher win rates than non-repeat businesses. One implication of this alternative theory is that repeat businesses will likely settle cases at a higher rate than non-repeat businesses. And that is exactly what the Searle study found: “that repeat businesses are more likely to settle or otherwise close cases before an award than non-repeat businesses.” Accordingly, the study concludes, “the repeat-player effect is more likely due to case screening by repeat businesses than arbitrator (or other) bias.”

As for alleged bias by arbitration providers in favor of businesses, such allegations seem belied by the adoption and enforcement of “due process protocols” by the two leading providers of arbitration services in the United States (the AAA and JAMS). Due process protocols are private fairness standards designed to enhance the fairness of arbitration for consumers and employees. Arbitration providers enforce the due process protocols by refusing to administer arbitrations under agreements that do not comply with the applicable protocol.

The Searle study examined the AAA’s enforcement of the Consumer Due Process Protocol, and concluded that the AAA “appears to be effective at identifying and responding to those clauses with protocol violations.” The study found that the arbitration clauses in 98.2% of the AAA cases studied either complied with the Due Process Protocol or that the AAA properly identified and responded to any non-compliance. In addition, the AAA refused to

27 Drahozal & Zyontz, AAA Consumer Arbitration, supra note 1, at 913.
28 Id. at 916. Lisa Bingham likewise concludes that the repeat-player effect was likely due, not to bias, but rather to better case screening by businesses. Lisa B. Bingham & Shimon Sarraf, Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference, in ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53rd ANNUAL CONFERENCE ON LABOR 303, 323 tbl. 2 (Samuel Estreicher & David Sherwyn eds. 2004).
29 Most of the criticisms of arbitration providers were directed at the National Arbitration Forum, which no longer administers consumer arbitrations. As noted above, the NAF settled a consumer fraud suit brought against it by Minnesota Attorney General Swanson by agreeing not to administer new consumer arbitration cases. See supra note 12.
32 Id. at 5.
33 Id. The Searle study did not examine AAA enforcement of the employment due process protocol, but the available evidence suggests that AAA enforcement is effective in the employment context as well. See Bingham &
administer at least 85 consumer cases (constituting 9.4 percent of its consumer caseload) because of protocol violations during the period studied, and over 150 businesses have waived problematic provisions or revised their arbitration clauses as a result of AAA protocol compliance review.\textsuperscript{34} It is hard to square the AAA’s enforcement of the Consumer Due Process Protocol with the suggestion that arbitration providers are systematically biased in favor of businesses.\textsuperscript{35}

V. Arbitration Clauses and Class Arbitration Waivers

An important and as yet unanswered question is the effect of the Supreme Court’s recent decision in \textit{AT&T Mobility LLC v. Concepcion} on the use of arbitration clauses.\textsuperscript{36} In \textit{Concepcion}, the Court held that the Federal Arbitration Act preempts California’s ability to use its unconscionability doctrine to invalidate arbitration clauses with class arbitration waivers — provisions that require arbitration to proceed on an individual rather than a class basis.\textsuperscript{37} It is too soon after the decision in \textit{Concepcion} to be able to evaluate empirically its effects. But the available empirical evidence does suggest a couple of possibilities worth noting.

First, prior to \textit{Concepcion}, the use of class arbitration waivers varied by widely by industry, and many consumer arbitration agreements did not include class arbitration waivers at all. The Searle study found that of the arbitration clauses giving rise to AAA consumer arbitrations during the time period studied, only 36.5 percent (109 or 299) included class arbitration waivers.\textsuperscript{38} All of the cell phone contracts included class arbitration waivers, as did all of the credit card contracts. But none of the insurance contracts and none of the real estate brokerage agreements included class arbitration waivers. And somewhat over half of the car sale contracts (53.1%) and home builder contracts (64.7%) included class arbitration waivers.\textsuperscript{39}

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\textsuperscript{34} Drahozal & Zyontz, \textit{Private Regulation}, supra note 1, at 5. To be clear, the number of businesses waiving or revising problematic provisions is over the entire course of AAA application of the protocol, not just during the time period studied.

\textsuperscript{35} Certainly there are other arbitration providers than the AAA and JAMS. Any concerns about those providers not following a due process protocol could be dealt with by legislation such as S.1186, the Fair Arbitration Act of 2011, 112\textsuperscript{th} Cong. (2011), rather than a total prohibition of pre-dispute arbitration clauses in consumer and employment contracts.

\textsuperscript{36} 131 S. Ct. 1740 (2011).

\textsuperscript{37} Id. at 1753.

\textsuperscript{38} Drahozal & Zyontz, \textit{Private Regulation}, supra note 1, at 51.

\textsuperscript{39} Id. One implication of this data is that making all consumer arbitration clauses unenforceable because of concerns about the availability of class relief would be overbroad. \textit{See} Christopher Drahozal, \textit{Concepcion and the Arbitration Fairness Act}, SCOTUSBLOG (Sep. 13, 2011, 11:46 AM), http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/.
Second, even after Concepcion, it is unlikely that all consumer contracts — or even all credit card contracts, which ordinarily include class arbitration waivers when they include arbitration clauses — will begin using arbitration clauses. As Professor Rutledge and I conclude in a recent paper:

Our finding that issuers are less likely to use arbitration clauses when located in states that (prior to Concepcion) had held class arbitration waivers unenforceable suggests that the use of arbitration clauses will increase as a result of Concepcion. But the significance of other variables in the model (the riskiness of the credit card portfolio, the degree of specialization in credit card loans, the size of the issuer, and the issuer’s organizational form) suggests that not all credit card issuers are likely to use arbitration clauses following the decision in Concepcion. 40

To illustrate the point: very few credit card issuers (5 of 97, or 5.2%) located in states that had held class arbitration waivers unenforceable prior to Concepcion used arbitration clauses. But even in states that had held class arbitration waivers enforceable prior to Concepcion, only a minority of credit card issuers (23 of 103, or 22.3%) used arbitration clauses. 41 That percentage likely will increase after Concepcion. But given the other factors that seem to explain the use of arbitration clauses by credit card issuers, these data suggest that the use of arbitration clauses will not become ubiquitous after Concepcion, even in the credit card industry.

VI. Unintended Consequences of Restrictions on Consumer Arbitration Clauses

After teaching contract law for seventeen years, it is clear to me that when parties face restrictions on one type of contract term, such as an arbitration clause, they often respond by changing other terms of their contract. And, in some cases, they might even respond by refusing to enter into a contract altogether. Too often decision makers do not consider these sorts of unintended consequences in evaluating the costs and benefits of proposed laws.

Several such unintended consequences might result from the adoption of restrictions on the use of pre-dispute arbitration clauses in consumer and employment contracts.

First, consumers and employees without disputes — who have no complaint with their treatment by a business — likely will be made worse off by legal restrictions on the use of arbitration. The cost savings that businesses achieve through arbitration benefit consumers by enabling the businesses to reduce prices and employers to increase wages. 42 Removing those cost savings by restricting the use of arbitration will have the opposite effect. The effect is likely to be particularly pronounced for those least able to afford it. For example, the consumers most likely to be affected by restrictions on the use of arbitration clauses in credit card agreements are those with low credit ratings who have few alternative sources of credit. A statistical examination of the factors explaining the use of arbitration clauses by credit card issuers finds a

40 Drahozal & Rutledge, Consumer Credit, supra note 11, at 23.
41 Id. at 23 & tbl. 8.
42 E.g., Ware, supra note 13, at 254-57.
strong correlation between the riskiness of the issuer’s credit card portfolio and its use of arbitration clauses.\textsuperscript{43} If credit card issuers can no longer include arbitration clauses in their cardholder agreements, they may become less willing to lend to those higher risk consumers.

Second, restrictions on the enforceability of arbitration agreements may reduce rather than enhance the ability of some consumers and employees to have their claims heard. The available empirical evidence suggests that for relatively low-dollar claims, arbitration may be a more accessible forum than court.\textsuperscript{44} Employment lawyer Lewis Maltby makes the point bluntly in the context of employment arbitration: “[M]ost employees will not be able to secure their employer’s agreement to arbitrate once a dispute arises. The vast majority of employment disputes, however, do not involve enough damages to support contingent fee litigation. Therefore, outlawing pre-dispute agreements to arbitrate will leave many employees with no access to justice.”\textsuperscript{45}

Finally, some consumers will be less able to have their cases actually heard if the availability of arbitration is restricted. Very few court cases actually make it trial. Indeed, in 2009, only 1.2 percent of federal court dispositions were by either jury trial or bench trial.\textsuperscript{46} Most court cases are resolved instead by dispositive motions or settlement. Consumers who bring those cases never have a “day in court” to tell their story to a judge or jury. By comparison, the Searle study found that over 50 percent of consumer claims in AAA arbitrations made it to a hearing before an arbitrator, and over 30 percent were resolved by the issuance of an award after a hearing.\textsuperscript{47} To the extent there is value in consumers actually being able to present their claim to a neutral decision maker, restricting the availability of arbitration will deprive consumers of that value.

VII. Conclusions

To reiterate: my view is that sound public policy should be based on careful empirical study and not simply anecdotal reports. The available empirical evidence does not support the view that arbitration is necessarily unfair to consumers. Rather, that evidence suggests that pre-dispute arbitration clauses make some, if not many, consumers better off, and that broad-ranging restrictions on arbitration may well be counter-productive.

\begin{itemize}
\item \textsuperscript{43} Drahozal & Rutledge, \textit{Consumer Credit}, supra note 11, at 23.
\item \textsuperscript{44} Eisenberg & Hill, supra note 22, at 53.
\item \textsuperscript{45} Maltby, \textit{supra} note 14, at 314.
\item \textsuperscript{47} Drahozal & Zyontz, \textit{AAA Consumer Arbitration}, supra note 1, at 881 fig. 5. Of the hearings in the consumer cases studied, 62.1% were either in person or by telephone; the remaining cases involved document-only hearings. \textit{Id.} at 893. But in the cases with document-only hearings, the consumer had the right to request an in-person or telephone hearing and evidently did not do so. \textit{Id.} at 865 (“For claims seeking $10,000 or less, the default rule is that the case will be resolved on the basis of documents only. Either party may request a telephone or in-person hearing if he or she decides one is necessary. For claims seeking over $10,000, the default rule is that the arbitrator will hold either a telephone or in-person hearing unless the parties agree otherwise.”).
\end{itemize}
ATTACHMENT 1:

CONSUMER ARBITRATION
BEFORE THE AMERICAN ARBITRATION ASSOCIATION

Executive Summary
March 2009

Issues and Background

Empirical evidence has become a central focus of the policy debate over consumer and employment arbitration. Both supporters and opponents of the proposed Arbitration Fairness Act, which would make pre-dispute arbitration clauses unenforceable in consumer and employment (and franchise) agreements, have recognized that empirical evidence on the fairness and integrity of consumer and employment arbitration proceedings is essential to making an informed decision on the bill. Yet the empirical record, particularly on consumer arbitration, has critical gaps.

One set of issues on which further empirical research would be helpful is the costs, speed, and outcomes of consumer arbitrations. How much do consumers pay to bring claims in arbitration? How long do consumer arbitrations take to resolve? How do consumers fare in arbitration, particularly against businesses that are repeat users of arbitrators and arbitration providers? While a number of important studies on employment arbitration have been provided, the empirical record on these issues in consumer arbitrations is sparse.

A second set of issues of interest involves the enforcement of arbitration due process protocols -- privately created standards setting out minimum requirements of procedural fairness for consumer and employment arbitrations. Due process protocols commonly require independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court. Leading arbitration providers have pledged not to administer arbitrations arising out of arbitration clauses that violate the protocols. But empirical evidence on the effectiveness of these private enforcement efforts is lacking.

Searle Civil Justice Institute Task Force on Consumer Arbitration

To shed light on these issues, the Searle Civil Justice Institute (SCJI) undertook a large-scale study of consumer arbitrations administered by the American Arbitration Association (AAA). The AAA is a leading provider of arbitration services, including arbitrations between consumers and businesses. SCJI commissioned a Task Force to advise and lead this study of consumer arbitrations. Although the study will ultimately examine many aspects of AAA consumer arbitrations, the initial research inquiries were directed at two topics:

1. Costs, Speed, and Outcomes of AAA Consumer Arbitrations. This aspect of the Preliminary Report assesses key characteristics of the AAA consumer arbitration process. In particular, it examines the following research questions:
• General characteristics of AAA consumer arbitration cases including claimant type (i.e., consumer or business), types of businesses involved, and amounts claimed.
• Costs of consumer arbitration (arbitrator fees plus AAA administrative fees), including the impact of the arbitrator’s power to reallocate such fees in the award.
• Speed of the arbitration process from filing to award, in the aggregate and by claimant type (i.e., consumer or business).
• Various measures of outcomes such as win-rates, damages awarded, and evidence of as well as possible explanations for any repeat-player effects.

In addition to these broad research questions, SCJI also examined the extent to which consumer arbitrations are resolved ex parte; the frequency with which arbitrators award attorneys’ fees, punitive damages, and interest; and results for consumers proceeding pro se.

2. **AAA Enforcement of the Consumer Due Process Protocol.** This aspect of the Preliminary Report provides an empirical analysis of how effectively the AAA enforces compliance with the Consumer Due Process Protocol. It considers a number of key research questions including:

- To what extent do the consumer arbitration clauses comply, in their own right, with the Due Process Protocol?
- How effective is AAA review of arbitration clauses for compliance with the Due Process Protocol?
- To what extent does the AAA refuse to administer consumer cases because of the failure of businesses to comply with the Due Process Protocol?
- How do businesses respond to AAA enforcement of the Protocol?

In addition to these research questions, SCJI examined several other issues that arise in connection with the Due Process Protocols.

**Data and Methodology**

SCJI reviewed a sample of AAA case files involving consumer arbitrations. The primary dataset consists of 301 AAA consumer arbitrations that were closed by an award between April and December of 2007. (The focus on cases closed by an award during this particular timeframe is based on the availability of the original case files.) This sample of cases was then coded for approximately 200 variables describing various aspects of the arbitration process, including a review of the arbitration clause in the file. In addition, when possible a broader AAA dataset comprising all consumer cases closed between 2005 and 2007 was utilized. The AAA maintains this dataset in the ordinary course of its business, collecting data for internal purposes but not recording all variables of interest to SCJI. The data were analyzed using standard statistical methods in order to describe and evaluate consumer arbitrations as administered by the AAA.
Key Findings – Costs, Speed, and Outcomes of AAA Consumer Arbitrations

The upfront cost of arbitration for consumer claimants in cases administered by the AAA appears to be quite low.

In cases with claims seeking less than $10,000, consumer claimants paid an average of $96 ($1 administrative fees + $95 arbitrator fees). This amount increases to $219 ($15 administrative fees + $204 arbitrator fees) for claims between $10,000 and $75,000. These amounts fall below levels specified in the AAA fee schedule for low-cost arbitrations, and are a result of arbitrators reallocating consumer costs to businesses.

AAA consumer arbitration seems to be an expeditious way to resolve disputes.

The average time from filing to final award for the consumer arbitrations studied was 6.9 months. Cases with business claimants were resolved on average in 6.6 months and cases with consumer claimants were resolved on average in 7.0 months.

Consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255; business claimants won some relief in 83.6% of their cases and recovered an average of $20,648.

The average award to a successful consumer claimant in the sample was 52.1% of the amount claimed and to a successful business claimant was 93.0% of the amount claimed. This result appears to be driven by differences in types of claims initiated by consumers and business. Business claims are almost exclusively for payment of goods and services while consumer claims are seeking recovery for non-delivery, breach of warranty, and consumer protection violations.

No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business.

Consumer claimants won some relief in 51.8% of cases against repeat businesses under a traditional definition (i.e., businesses who appear more than once in the AAA dataset) and 55.3% against non-repeat businesses – a difference that is not statistically significant.

Utilizing an alternative definition of repeat player, some evidence of a repeat-player effect was identified; the data suggests this result may be due to better case screening by repeat players.

Consumer claimants won some relief in 43.4% of cases against repeat businesses and 56.1% against non-repeat businesses under an alternative definition (based on the AAA’s categorization of businesses in enforcing the Consumer Due Process Protocol) – a difference that is statistically significant at the 10% level. However, 71.1% of consumer claims against repeat businesses so defined were resolved prior to an award, while only 54.6% of claims against non-repeat businesses were resolved prior to an award. This suggests that such effect is attributable to better
Arbitrators awarded attorneys’ fees to prevailing consumer claimants in 63.1% of cases in which the consumer sought such an award.

Consumer claimants sought to recover attorneys’ fees in over 50% of the cases in which they were awarded damages and were awarded attorneys’ fees in 63.1% of those cases. In those cases in which the award of attorneys’ fees specified a dollar amount, the average attorneys’ fee award was $14,574.

Key Findings – AAA Enforcement of the Due Process Protocol

A substantial majority of consumer arbitration clauses in the sample (76.6%) fully complied with the Due Process Protocol when the case was filed.

Most arbitration clauses in consumer contracts that come before the AAA are consistent with the Consumer Due Process Protocol as applied by the AAA. The same is true for cases in which protocol compliance was a matter for the arbitrator to enforce.

AAA’s review of arbitration clauses for protocol compliance was effective at identifying and responding to clauses with protocol violations.

In 98.2% of cases in the sample subject to AAA protocol compliance review, the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

The AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses.

In 2007, the AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its consumer case load), because the business failed to comply with the Consumer Due Process Protocol. The most common reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business’s failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.

As a result of AAA’s protocol compliance review, some businesses modify their arbitration clauses to make them consistent with the Consumer Due Process Protocol.

In response to AAA review, more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. This is in addition to the more than 1550 businesses identified by the AAA as having arbitration clauses that comply with the Protocol. By comparison, AAA has identified 647 businesses for which it will not administer arbitrations because of Protocol violations.
Policy Implications and Next Steps

The empirical findings in the SCJI Preliminary Report on AAA consumer arbitrations have important implications for those interested in discussing and formulating public policy regarding arbitration.

1. Not all consumer arbitrations, arbitration providers, or arbitration clauses are alike. Differing results from empirical studies of arbitration may reflect variations associated with case mix, type of claimant, or provider review processes. This suggests the need for a nuanced approach to public policy concerning arbitration.

2. Private regulation complements existing public regulation of the fairness of consumer arbitration clauses. Policy makers should not ignore the role that arbitration providers can play in promoting fairness on behalf of consumers.

3. Courts could usefully reinforce the AAA’s enforcement of the Consumer Due Process Protocol by declining to enforce an arbitration clause when the AAA has refused to administer an arbitration arising out of the clause or by otherwise reinforcing the role of the Due Process Protocol.

4. Arbitration may be less expensive for consumers than sometimes believed. For many consumers, the AAA arbitration process costs less than the amount specified in the AAA rules because arbitrators often shift some portion of the costs to businesses. Moreover, arbitrators award attorneys’ fees to a substantial proportion of prevailing consumers in AAA consumer arbitrations.

5. Empirical studies have tended to find that repeat players fare better in arbitration than non-repeat players. To the extent such a repeat-player effect exists in arbitration, the critical policy question is what causes it. Our findings are consistent with prior studies in suggesting that any repeat-player effect is likely caused by better case screening by repeat players rather than arbitrator (or other) bias in favor of repeat players. A further as yet unresolved question is whether a repeat-player effect exists in litigation, and, if so, how litigation compares to arbitration in this regard.

While the empirical results presented in the SCJI Preliminary Report on Consumer Arbitration may usefully inform the policy debate on consumer arbitration, the Report nonetheless has limitations. First, its findings are limited to AAA consumer arbitrations. Empirical results from studying AAA consumer arbitration do not necessarily apply to other arbitration providers. Second, its findings on the costs, speed, and outcomes of AAA consumer arbitrations are difficult to interpret without a baseline for comparison, such as the procedures and practices in traditional court proceedings. A future phase of this research project by the Searle Civil Justice Institute’s Task Force on Consumer Arbitration will undertake that comparison. It will seek to compare the procedures in AAA consumer arbitration with procedures available for consumers in court as well as comparing empirically key process characteristics of courts and arbitration.
ATTACHMENT 2:

CREDITOR CLAIMS IN ARBITRATION AND IN COURT
INTERIM REPORT NO. 1

Executive Summary
November 2009

Issues and Background

With the recent settlement of a lawsuit brought by the Minnesota Attorney General against the National Arbitration Forum alleging fraud and deceptive practices, debt collection arbitration has again become a central focus of the policy debate over consumer arbitration. Some critics of consumer arbitration assert that the high win rate of business claimants in debt collection arbitrations alone shows that arbitration is biased in favor of businesses. Others compare the win rate of business claimants in arbitration to the win rate of consumer claimants in arbitration, concluding that the higher win rate of business claimants provides evidence of bias. Neither of these measures, however, necessarily shows bias in arbitration. Instead, the proper comparison is between outcomes for business claimants in arbitration and outcomes for business claimants in comparable cases in court. But despite the need for such a comparison, on this issue, as with many issues in consumer arbitration, empirical studies are lacking.

This Interim Report builds on the Preliminary Report, Consumer Arbitration Before the American Arbitration Association, issued in March 2009 by the Searle Civil Justice Institute's Consumer Arbitration Task Force ("SCJI Task Force"). It seeks to compare the outcomes of AAA debt collection arbitrations to the outcomes of debt collection cases in court to help in evaluating arbitration as a means of resolving consumer disputes.

Data and Methodology

The arbitration cases examined by the SCJI Task Force are 105 debt collection cases closed from April through December 2007 and included among the cases analyzed in the Preliminary Report (the “individual AAA debt collection arbitrations”). These cases are supplemented by 47,124 cases closed from March 2008 through June 2009 and brought by a single debt buyer as part of a consumer debt collection program administered by the AAA (the “AAA debt collection program arbitrations”).

The court cases examined by the SCJI Task Force are 382 cases terminated between late 2006 and late 2007 seeking collection of unpaid student loans in federal court; 749 debt collection cases closed between April and December 2007 from Oklahoma state courts; and 283 debt collection cases closed in 2005 from Virginia state courts. The court systems included in the study were chosen solely for reasons of data availability.
The Task Force focused on debt collection cases because debt collection cases tend to present relatively simple legal and factual issues and thus are relatively comparable in arbitration and in court. The data were analyzed using standard statistical methods to control for other identifiable differences among the cases, such as the amount claimed, the type of creditor, and whether the consumer appeared.

Key Findings

Creditors prevailed less often (that is, consumers prevailed more often) in the arbitrations studied than in court.

In the cases studied, creditors won some relief in 86.2% of the individual AAA debt collection arbitrations and 97.1% of the AAA debt collection program arbitrations that went to an award. By comparison, creditors won some relief in 98.4% to 100.0% of the debt collection cases in court that went to judgment. This finding still holds even after controlling for differences among the types of cases and the venue in which they were brought.

Creditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court.

In the cases studied, prevailing creditors were awarded 92.9% of the amount sought in the individual AAA debt collection arbitrations and 99.2% of the amount sought in the AAA debt collection program arbitrations. By comparison, prevailing creditors were awarded from 96.2% to 99.5% of the amount sought in the debt collection cases in court. Even after controlling for differences among the cases, there was no statistically significant difference between creditor recovery rates in arbitration and in court.

Consumer response rates in the arbitrations studied did not differ systematically from consumer response rates in court.

In the individual AAA debt collection cases studied, consumers responded (i.e., did not default) in between 65.7% and 79.0% of the cases. In the AAA debt collection program arbitrations studied, consumers responded in between 1.9% and 14.8% of the cases. By comparison, the consumer response rate in the court cases studied ranged from 6.9% to 41.2%.

The rate of other case dispositions (e.g., dismissals and settlements) did not differ systematically between the arbitration and court cases studied.

Just under half (44.8%) of the individual AAA debt collection arbitrations studied were disposed of other than by award (e.g., by dismissal, withdrawal, or settlement), while 13.2% of the AAA debt collection program arbitrations studied were disposed of other than by award. By comparison, 22.1% to 35.0% of the debt collection cases in court were disposed of other than by judgment.
Policy Implications

The empirical findings in the SCJI Interim Report have important implications for the formulation of public policy regarding arbitration.

1. These empirical findings should dispel the notion that high creditor win rates and recovery rates in debt collection arbitrations in and of themselves show that arbitration is biased in favor of businesses. In fact, in the cases studied, creditor win rates and recovery rates were as high or higher in court than in arbitration.

2. High creditor win rates and recovery rates appear to be due to characteristics of debt collection cases rather than the venue – court or arbitration – in which those cases are resolved. Accordingly, it would appear that any policy prescriptions to deal with such concerns should focus on the process of debt collection rather than on dispute resolution venue.

3. Consumer response rates may also be due to characteristics of debt collection cases rather than the venue in which those cases are resolved. While the consumer response rate in AAA debt collection program arbitrations was low, the response rate in individual AAA debt collection arbitrations was higher – indeed, higher than the response rate in debt collection cases in court. Nonetheless, the low consumer response rate in debt collection cases in some venues suggests that further research into the reasons for the low response rate may be important to formulating policy in this area.

While the empirical results presented in the Interim Report may usefully inform the policy debate on consumer arbitration, the Report nonetheless has limitations. First, empirical results from studying AAA debt collection arbitrations do not necessarily apply to other types of arbitration or other arbitration providers. But in setting national policy concerning arbitration, information on consumer arbitrations administered by the AAA is necessary for making an informed decision. Second, the findings on debt collection actions in court necessarily are limited to the courts studied, but those findings appear broadly consistent with previous studies of debt collection cases in court. Third, to the extent we focus on court judgments and arbitration awards, differential settlement rates among the venues might bias our results. Fourth, cases are not selected into arbitration randomly; thus, finding truly comparable cases between court and arbitration is extremely difficult. Despite these limitations, however, the report furthers our empirical understanding of arbitration as a means of resolving consumer disputes, and contributes new information to the policy debate.
PRINCIPLES
OF
ALTERNATIVE
DISPUTE RESOLUTION

Second Edition

By

Stephen J. Ware
Professor of Law
University of Kansas

CONCISE HORNBOOK SERIES®

THOMSON
WEST
Chapter 2

ARBITRATION AND SIMILAR PROCESSES

Table of Sections

Sec.

A. OVERVIEW

2.1 Arbitration Defined
2.2 Contractual Arbitration and Non-Contractual Arbitration; Constitutional Right to Jury Trial
2.3 Arbitration Law Summarized
   (a) Post-Dispute and Pre-Dispute Agreements to Arbitrate
   (b) Enforcement of Arbitration Agreements
   (c) The Arbitration Process
   (d) Enforcement of Arbitrator’s Decision or “Award”

B. SOURCES OF CONTEMPORARY AMERICAN ARBITRATION LAW

2.4 Federal Law
   (a) Pro-Contract
   (b) Court Orders to Arbitrate; Specific Performance of Arbitration Agreements
   (c) Broad Applicability
2.5 State Law
   (a) Arbitration Law
   (b) Non-Arbitration Law

C. FAA PREEMPTION OF STATE LAW

1. THE EVOLUTION OF CASE LAW ON FAA PREEMPTION

2.6 Federal Arbitration Law as (Non-Preemptive) Procedural Law
2.7 Federal Arbitration Law as (Preemptive) Substantive Law
2.8 The FAA Creates No Federal Jurisdiction

2. PREEMPTION OF STATE LAW IMPEDING CONTRACT ENFORCEMENT

2.9 Generally
2.10 State Law Prohibiting Courts From Enforcing Arbitration Agreements
2.11 State Law Prohibiting Courts From Enforcing Arbitration Agreements With the Remedy of Specific Performance
2.12 State Law Making Arbitration Agreements Unenforceable With Respect to Certain Claims
Sec.
2.13 State Law Making Arbitration Agreements in Certain Types of Transactions Unenforceable
2.14 State Law Raising the Standard of Assent for Contract Formation

3. CHOICE-OF-LAW CLAUSES
2.15 Introduction
2.16 The Volt Case
2.17 The Mastrobuono Case

4. INSURANCE ARBITRATION
2.18 McCarran–Ferguson and the FAA

D. FORMATION OF ENFORCEABLE ARBITRATION AGREEMENTS

1. SEPARABILITY
2.19 The Prima Paint Case
2.20 The Buckeye Case
2.21 Applications of Separability

2. FORMATION
2.22 Mutual Manifestations of Assent
   (a) Contract Law’s Objective Approach
   (b) Recurring Fact Patterns
2.23 Consideration

3. CONTRACT LAW DEFENSES TO ENFORCEMENT
2.24 Defenses Subject to Separability Doctrine
2.25 Unconscionability
   (a) Generally
   (b) The FAA’s Constraint on the Scope of the Unconscionability Doctrine
   (c) Arbitration Organizations’ Policing Against Unconscionability
   (d) Public Policy and Child Custody
2.26 Waiver of the Right to Arbitrate

4. NON-CONTRACT LAW DEFENSES TO ENFORCEMENT:
   FEDERAL STATUTORY CLAIMS AND PUBLIC POLICY
2.27 Toward Universal Arbitrability
2.28 Current Inarbitrability
   (a) Simple Inarbitrability
      (1) Labor Arbitration
      (2) Automobile Dealers and Military Personnel
   (b) Arbitrability With Strings Attached: The “Effectively Vindicate” Doctrine

E. INTERPRETATION OF ARBITRATION AGREEMENTS

1. CONTRACTUAL ARBITRABILITY
2.29 Introduction
2.30 Generally Decided by Courts
2.31 Contractual and Non-Contractual Approaches

2. MULTI-PARTY DISPUTES
2.32 Claims By or Against Those Not Party to the Arbitration Agree-
Sec.
(a) Party Plaintiff vs. Non–Party Defendant
(b) Non–Party Plaintiff vs. Party Defendant

2.33 Consolidation of, and Stays Pending, Related Proceedings
2.34 Class Actions

3. ARBITRATION PROCEDURE

2.35 Overview
2.36 Pre–Hearing
(a) Selection of Arbitrator(s)
   (1) Methods of Selection
   (2) Arbitrator Fees
   (3) Judicial and Regulatory Constraints on Party Selection of Arbitrator(s)
(b) Pleadings
(c) Filing Fees (and Un–Administered Arbitration)
(d) Discovery

2.37 Hearing
(a) General Comparison With Trial
(b) Role of Lawyers
(c) Rules of Evidence
(d) No Hearing; Dispositive Motions
(e) Written Awards; Reasoned Opinions

2.38 Remedies
(a) Determined by Contract, Within Limitations
   (1) Generally Determined by Contract; the Mastrobuono Case
   (2) Limitations on Contract; the Book Case
(b) Typical Contract Terms
(c) Consequences of Limiting Remedies in Arbitration

4. GOVERNING SUBSTANTIVE LAW, IF ANY

2.39 Substantive Law Applied in Arbitration

F. EFFECT OF ARBITRATION AWARD

1. ENFORCEMENT OF ARBITRATION AWARD

2.40 Confirmation
2.41 Claim Preclusion (Res Judicata)
(a) Generally Applicable
(b) The Labor Exception

2.42 Issue Preclusion (Collateral Estoppel)

2. VACATUR OF ARBITRATION AWARD

2.43 Introduction
(a) Vacatur is Rare
(b) Statutory and Non–Statutory Grounds

2.44 Statutory Grounds
(a) Corruption, Fraud or Undue Means
(b) Evident Partiality or Corruption
(c) Fundamentally Fair Hearing
(d) Exceeded Powers

2.45 Non–Statutory Grounds
(a) Error of Law, Including Manifest Disregard
   (1) Narrow Ground for Vacatur
   (2) Recent Expansion
(b) Public Policy
Sec.
(c) Grounds Created by Contract
2.46 Federal Preemption of State Law
  (a) State Grounds for Vacatur Broader Than Federal
  (b) State Grounds for Vacatur Narrower Than Federal

G. INTERNATIONAL ARBITRATION
2.47 Introduction: Public Law Arbitration and Commercial Arbitration
2.48 The New York Convention
  (a) Basic Provisions
  (b) Effect of United States Ratification
  (c) Significance
2.49 The Practice of International Commercial Arbitration

H. EMPLOYMENT ARBITRATION AND LABOR ARBITRATION
2.50 The Conventional Distinction Between “Employment” and “Labor”
2.51 The FAA’s Exclusion of Certain “Contracts of Employment”
2.52 Employment Arbitration
2.53 Labor Arbitration
  (a) LMRA Rather Than FAA
  (b) The Practice of Labor Arbitration
    (1) Two Peculiarities
    (2) Labor Law and CBAs
  (c) Few Arbitrable Claims
    (1) The Law
    (2) Union, Not Employee, Controls Arbitration
    (3) Narrowly Drafted Arbitration Clauses
  (d) Interest Arbitration

I. PROCESSES SIMILAR TO ARBITRATION
2.54 Private Judging (“Rent-A-Judge”)
2.55 Non-Contractual, Yet Binding, Arbitration
  (a) Introduction
  (b) Examples
    (1) Federal Programs
    (2) Government Employees—Federal
    (3) Government Employees—State and Local
    (4) Railway Labor Act
    (5) State “Lemon” Laws
    (6) State Auto Insurance Laws
    (7) Attorney Fee Disputes

A. OVERVIEW

Table of Sections
§ 2.2 CONTRACTUAL & NON-CONTRACTUAL ARBITRATION

Sec.
(b) Enforcement of Arbitration Agreements
(c) The Arbitration Process
(d) Enforcement of Arbitrator's Decision or "Award"

§ 2.1 Arbitration Defined

Arbitration is private adjudication. Adjudication is a process by which somebody (the adjudicator) decides the result of a dispute. Rather than the disputing parties agreeing on the result of the dispute, as in negotiation or mediation, adjudication is the adjudicator telling the parties the result. Judges and jurors are the adjudicators in litigation, which is adjudication in a government forum, a court. Arbitration is adjudication in a private (non-government) forum.

In addition to being "private" in the sense of non-governmental, arbitration is also usually "private" in the sense of secret or confidential. But it does not have to be. Arbitration could occur on a busy city sidewalk in full view of the public. It would still be private adjudication. In short, the essence of arbitration is that it is a private-sector alternative to government courts. It is to the court system what private schools are to public schools, or what private housing is to government housing.

§ 2.2 Contractual Arbitration and Non-Contractual Arbitration; Constitutional Right to Jury Trial

There are two types of arbitration, contractual and non-contractual. The duty to arbitrate a dispute can be created by contract or by other law. If the duty to arbitrate is created by contract, then the enforcement of that duty is unlikely to violate the constitutional right to a jury trial. Courts typically hold that, by forming a contract to arbitrate, a party waives its right to a trial by jury. In

§ 2.1
2. See § 1.5(a), n.12.
3. See Chapter 3.
4. See Chapter 4.
5. See § 2.37(a).

§ 2.2
6. See § 2.55(a).
7. See, e.g., American Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir.2002) ("[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.") (quoting Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F.Supp. 1460, 1471 (N.D.Ill.1997)); Geldermann, Inc. v. Commodity Futures Trading Comm'n, 836 F.2d 310, 323-24 (7th Cir.1987) ("In a non-Article III forum the Seventh Amendment simply does not apply. Because we hold that Geldermann is not entitled to an Article III forum, the Seventh Amendment is not implicated.") (citations omitted);
contrast, the parties to non-contractual arbitration have rarely waived the right to a jury trial. Therefore, non-contractual arbitration generally must be non-binding to avoid violating this right.\footnote{8}

Non-Contractual, yet binding, arbitration is discussed at the end of this chapter, under the heading "Processes Similar to Arbitration."\footnote{9} Otherwise, the term "arbitration" is used throughout this chapter to mean "contractual arbitration."

Non-binding arbitration has less in common with arbitration than it does with mediation and other processes in aid of negotiation. Accordingly, non-binding arbitration is discussed, not in this chapter, but in Chapter 4.\footnote{10}

§ 2.3 Arbitration Law Summarized

(a) Post-Dispute and Pre-Dispute Agreements to Arbitrate

A dispute goes to arbitration only when the parties have contracted to send it there.\footnote{11} Sometimes parties with an existing dispute contract to send that dispute to arbitration. Such post-dispute arbitration agreements (or "submission agreements") are relatively rare and non-controversial.\footnote{12} More common, and more

Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d 302, 307 (4th Cir.2001) ("the right to a jury trial attaches in the context of judicial proceedings after it is determined that litigation should proceed before a court."); Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 961 F.2d 1148, 1155 n.12 (5th Cir.1992);

The Seventh Amendment, preserving the right to jury trial, is one of the few provisions of the Bill of Rights that constrains only federal, not state, government. See Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974). The Seventh Amendment applies in federal, not state, court. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 418 (1996); GTFM, LLC v. TKN Sales, Inc., 257 F.3d 235, 245 (2d Cir.2001). While many state constitutions contain a provision that similarly protects the right to trial by jury, see Martin H. Redish, Legislative Response to Medical Malpractice Insurance Crisis: Constitutional Implications, 55

Tex.L.Rev. 759, 797 (1977), the Federal Arbitration Act prevails in a conflict between it and a state constitutional provision. See U.S. Const. art. VI, § 2 (the Supremacy Clause). Thus, an arbitration agreement’s effectiveness as a waiver of the right to jury trial is determined solely by federal, rather than state, law unless the arbitration agreement is one of the few not governed by the FAA. See § 2.4(c).

8. See § 2.55.
9. See id.
10. See § 4.32.

§ 2.3


12. Post-dispute arbitration agreements resemble settlement agreements, which are discussed in Chapter 3. By
controversial, are *pre-dispute* arbitration agreements. These are contracts containing a clause providing that, if a dispute arises, the parties will resolve that dispute in arbitration, rather than litigation. These arbitration clauses typically are written broadly to cover any dispute the parties’ transaction might produce, but also can be written more narrowly to cover just some potential disputes.\(^\text{13}\) Arbitration clauses appear in a wide variety of contracts including those relating to employment, credit, goods, services and real estate.

(b) Enforcement of Arbitration Agreements

In the case of most contracts containing arbitration clauses, like most contracts generally, the parties never have any dispute. If the parties do have a dispute, however, the arbitration clause likely will be enforceable, so that a party who would rather litigate than arbitrate will have to perform its agreement to arbitrate. If, for example, Seller sues Buyer despite an arbitration agreement between them, Buyer can get a court to stay or dismiss Seller’s lawsuit.\(^\text{14}\) The court enforces Seller’s agreement to arbitrate by relegating Seller’s claim to arbitration; Seller’s only forum to pursue its claim is arbitration.\(^\text{15}\) Another possibility is that Seller asserts a claim against Buyer in arbitration but Buyer simply refuses to participate in arbitration. Seller can get a court order compelling Buyer to participate.\(^\text{16}\) In this manner, the court enforces Buyer’s agreement to arbitrate.

(c) The Arbitration Process

Not only does the parties’ contract determine whether a dispute goes to arbitration, the contract also determines what occurs during arbitration.\(^\text{17}\) Arbitration, like any *adjudication*,\(^\text{18}\) involves the presentation of evidence and argument to the adjudicator. The presentation of evidence and argument in *litigation* is governed by rules of procedure and evidence enacted by government. In contrast, the rules of procedure and evidence in arbitration are, with few exceptions, whatever the contract says they are.\(^\text{19}\) Arbitration agreements commonly provide for less discovery and motion practice than is

agreeing to arbitrate a particular dispute that has already arisen, the plaintiff agrees to give up her claim against the defendant in exchange, not for something certain, but for whatever the arbitrator decides to give her.

\(^{13}\) See §§ 2.29—2.31 & 2.53(c)(3).

\(^{14}\) See § 2.4(b).

\(^{15}\) With respect to this dispute, arbitration has replaced litigation as the default process of dispute resolution.

\(^{16}\) See § 2.4(b).

\(^{17}\) See §§ 2.35—2.39.

\(^{18}\) See § 1.5(a), n.12.

\(^{19}\) See §§ 2.36, 2.37.
typical of litigation and commonly provide for fewer rules of evidence than are typical in litigation. But the parties are free to draft their agreement almost any way they like. Arbitration privatizes procedural law by allowing parties to create their own customized rules of procedure and evidence. In short, arbitration is a creature of contract.

(d) Enforcement of Arbitrator’s Decision or “Award”

Once an arbitrator renders a decision, that decision can be enforced in court. Judicial enforcement may not be needed because the party losing at arbitration often voluntarily complies with the arbitrator’s decision. Nevertheless, the winning party can get a court order confirming the arbitration award; confirmation converts the award into a judgment of the court. A confirmed arbitration award in favor of the plaintiff (or “claimant”) is enforced in the same manner as other court judgments, through judgment liens, execution, garnishment, etc. Arbitration awards also are enforced through the preclusion of subsequent court actions. An arbitration award in favor of the defendant (or “respondent”) precludes the plaintiff from litigating the claim that was already resolved in arbitration.

Judicial enforcement of arbitrators’ decisions is simply an example of courts enforcing contracts. The parties agreed to comply with the arbitrator’s decision and if a party refuses to do so then that party is in breach of contract. To put it another way, the arbitrator’s decision is, with few exceptions, final and binding.

B. SOURCES OF CONTEMPORARY AMERICAN ARBITRATION LAW

Table of Sections

Sec. 2.4 Federal Law
(a) Pro-Contract
(b) Court Orders to Arbitrate; Specific Performance of Arbitration Agreements
(c) Broad Applicability

2.5 State Law
(a) Arbitration Law
(b) Non-Arbitration Law

20. Id. 22. See § 2.41.
21. See § 2.40. 23. See §§ 2.43—2.46.
§ 2.4 Federal Law

The Federal Arbitration Act ("FAA")\textsuperscript{24} is by far the most important source of arbitration law. There are other sources of federal arbitration law but they govern only specific types of arbitration, such as labor arbitration\textsuperscript{25} and international arbitration.\textsuperscript{26} State arbitration law is much less important than the FAA because the FAA has a broad reach and preempts conflicting state law.\textsuperscript{27}

(a) Pro–Contract

The FAA, enacted in 1925, is resolutely pro-contract. FAA § 2 says that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{28} This language reflects an intent to place arbitration agreements "upon the same footing as other contracts" and to reverse judicial hostility to the enforcement of arbitration agreements.\textsuperscript{29} The FAA's enactment was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."\textsuperscript{30}

(b) Court Orders to Arbitrate; Specific Performance of Arbitration Agreements

The FAA requires courts to use an especially powerful remedy in enforcing arbitration agreements. While money damages are the ordinary remedy for breach of contract,\textsuperscript{31} specific performance is the FAA's remedy for breach of an arbitration agreement. An example will illuminate the point.

Suppose that Seller sues Buyer despite an arbitration agreement between them. If Seller's suit occurred prior to the enactment of the FAA,\textsuperscript{32} the court would allow Seller's litigation to proceed.\textsuperscript{33}

\textsuperscript{24} 9 U.S.C. §§ 1–16, 201–08, 301–07 (2000).
\textsuperscript{25} See § 2.53.
\textsuperscript{26} See § 2.48.
\textsuperscript{27} See §§ 2.6–2.18.
\textsuperscript{28} The full text of § 2 is as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

\textsuperscript{32} Suits brought in the courts of two states, New York and New Jersey, are exceptions to this generalization. These two states enacted statutes providing specific enforcement for arbitration agreements a few years before the FAA's 1925 enactment. See Ian R. Mac-
The court would deny Buyer’s motion to stay or dismiss Seller’s case. The only remedy available to Buyer for Seller’s breach of the arbitration agreement would be money damages. But how would the amount of those damages be calculated? To put the non-breaching party in the position it would have been in had the contract been performed, the court would have to predict the results of both arbitration and litigation, then award as damages the difference (in terms of value to the non-breaching party) between the two. The speculative nature of such an approach is daunting. And courts did not use such an approach. A court might award nominal damages of one dollar or so, but Buyer would receive no meaningful remedy for Seller’s breach. In short, Seller could breach its arbitration agreement without legal consequence.

Alternatively, suppose that Seller asserted a claim against Buyer in arbitration but Buyer simply refused to participate in arbitration. Prior to the FAA, Seller could not get a court order compelling Buyer to participate in arbitration. If Seller wanted to pursue its claim against Buyer, Seller would have to do so in litigation. There would be no meaningful remedy for Buyer’s breach of the arbitration agreement. Buyer could breach its arbitration agreement with impunity.

The FAA changes the result in both of the Seller/Buyer scenarios. Under the FAA, the remedy for breach of an arbitration agreement is specific performance, that is, an order to arbitrate.

Consider, first, Seller’s suit against Buyer. A plaintiff who sues, despite an arbitration agreement with the defendant, is in breach of that agreement. By staying the lawsuit, a court effectively orders the plaintiff to perform the agreement to arbitrate. This stay follows from FAA § 3, which says:

33. See Macneil, Speidel & Stipanowich, supra note 1, § 4.3.2.2 (explaining that in the period 1800–1920, agreements to arbitrate future disputes were not enforced with remedy of specific performance); Wesley A. Sturges, Commercial Arbitration and Awards § 87 (1930).

34. This is the way to calculate the “expectation damages” normally awarded for breach of contract. See Restatement (Second) of Contracts §§ 344 & 347 (1981).

35. See Munson v. Straits of Dover S.S. Co., 102 F. 926 (2d Cir. 1900) (holding that plaintiff, who sought damages in the form of lawyer’s fees and costs incurred in defending a lawsuit for breach of agreement to arbitrate, was entitled to nominal damages only.)

36. Two states, New York and New Jersey, enacted statutes providing specific enforcement for arbitration agreements a few years before the FAA’s 1925 enactment. See Macneil, supra note 32.

37. Some courts stay the lawsuit while others dismiss it, a significant difference because dismissals are immediately appealable but, under FAA § 16(b)(1), stays are not. Compare, e.g., Lloyd v. Hovensa, LLC., 369 F.3d 263, 269 (3d Cir. 2004) (“the plain language of § 3 affords a district court no discretion to dismiss a case where one of the parties applies for a stay pending arbitration.”); Adair Bus Sales, Inc. v. Blue Bird Corp., 25 F.3d 953, 955 (10th Cir.
If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.\textsuperscript{38}

Now consider the second scenario, Buyer's refusal to arbitrate Seller's claim against it. A defendant who refuses to participate in arbitration will be ordered by a court to do so. This order follows from FAA § 4, which says, in part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court * * * for an order directing that such arbitration proceed in the manner provided for in such agreement * * *. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement * * *.\textsuperscript{39}

To summarize, FAA §§ 3 and 4 require courts to enforce arbitration agreements with orders of specific performance. Rather than ordering the payment of money, courts order parties in breach of arbitration agreements to perform their agreements, that is, to arbitrate. Failure to obey such an order is contempt of court,\textsuperscript{40} punishable by financial sanctions or even imprisonment.

\textsuperscript{40} See Wal-Mart Stores, Inc. v. PT Multipolar Corp., 202 F.3d 280, 1999 WL 1079625, *2 (9th Cir.1999).
(c) Broad Applicability

The FAA applies to a written arbitration agreement “in any maritime transaction or a contract evidencing a transaction involving commerce.”\(^{42}\) FAA § 1 defines “commerce” to mean interstate or international commerce.\(^{43}\) The Supreme Court interprets this language broadly to reach all transactions affecting interstate or international commerce.\(^{44}\) So interpreted, FAA § 1’s definition of commerce is extremely broad, bringing the vast majority of arbitration agreements within the coverage of the FAA.\(^{45}\)

There is, however, an exception to the extremely broad reach of the FAA. FAA § 1 says “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”\(^{46}\) Arbitration agreements falling within this “employment exclusion” are not governed by the FAA.\(^{47}\) On the other hand, collective

\(^{41}\) An oral arbitration agreement may be unenforceable. The FAA requires courts to enforce only “written” arbitration agreements, as do most state arbitration statutes. See Unif. Arbitration Act (1956) §§ 1, 2, 7 U.L.A. 102, 240 (2005). But another federal statute, the Electronic Signatures in Global and National Commerce Act, has been interpreted as amending the FAA to require enforcement of electronic, as well as written, agreements. See Campbell v. General Dynamics Gov’t Systems Corp., 407 F.3d 546, 556 (1st Cir.2005). And the Revised Uniform Arbitration Act uses the word “record” instead of “writing” and defines “record” to mean “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” Unif. Arbitration Act (2000) §§ 1, 6(a) & cmt. 1, 7 U.L.A. 10, 22–23 (2005).

“The writing requirement of the FAA is distinct from any statute of frauds that might otherwise apply to the transaction.” Christopher R. Drahozal, Commercial Arbitration: Cases and Problems 93 (2d ed.2006).


\(^{43}\) “Commerce” is defined as: commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.


\(^{45}\) Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56–57 (2003) (“Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control. Only that general practice need bear on interstate commerce in a substantial way.”) (internal quotes and citations omitted). See also Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 281–82 (1995).


\(^{47}\) Most employment arbitration agreements do not fall within this exclusion. In other words, most employment arbitration agreements are governed by the FAA. See § 2.51.
bargaining arbitration agreements falling within this exclusion are made enforceable by another federal statute, the Labor Management Relations Act ("LMRA").\textsuperscript{48} The important area of labor arbitration is governed primarily by the LMRA, rather than the FAA.

\section*{\textsection 2.5 State Law}

\textbf{(a) Arbitration Law}

Prior to the 1925 enactment of the FAA, only two states required courts to enforce pre-dispute arbitration agreements with the remedy of specific performance, that is, orders to arbitrate.\textsuperscript{49} The 1925 law in all other states provided no meaningful remedy against a party in breach of its promise to arbitrate. Since 1925, nearly every state has changed its law to require courts to order performance of arbitration agreements. Now, only Alabama still refuses such enforcement of pre-dispute arbitration agreements.\textsuperscript{50}

Many states have adopted the Uniform Arbitration Act ("UAA"), drafted in 1955, or the Revised Uniform Arbitration Act ("RUAA"), drafted in 2000.\textsuperscript{51} The UAA and RUAA are both similar to the FAA. There are few, if any, inconsistencies between either uniform act and the FAA. But the UAA, and especially the RUAA, are longer than the FAA, covering some topics not addressed by the FAA.\textsuperscript{52}

This book discusses state arbitration law only where that law differs from federal law. Where state and federal arbitration law are the same, nothing turns on the question of which applies.

\textbf{(b) Non-Arbitration Law}

The FAA, UAA and RUAA are not a complete statement of all the law governing arbitration.\textsuperscript{53} These statutes presuppose, and

\textsuperscript{48} See \textsection 2.53.

\textsection 2.5

\textsuperscript{49} Macneil, supra note 32, at 34–47.

\textsuperscript{50} Id. at 57 ("only three states—Alabama, Mississippi, and West Virginia—have yet to adopt modern arbitration statutes", that is, statutes making pre-dispute arbitration agreements specifically enforceable). See Ala. Code \textsection 8–1–41(3) (1975) ("The following obligations cannot be specifically enforced: * * * An agreement to submit a controversy to arbitration"). Mississippi and West Virginia state law now seems to provide for such enforcement. IP Timberlands Oper. Co. v. Denmiss Corp., 726 So.2d 96, 104 (Miss.1998) ("this Court will respect the right of an individual or an entity to agree in advance of a dispute to arbitration"); Bd. of Educ. v. W. Harely Miller, Inc., 236 S.E.2d 439, 447–48 (W.Va.1977) ("all arbitration provisions in all contracts which indicate that the parties intended to arbitrate their differences rather than litigate them are presumptively binding, and specifically enforceable.").


\textsuperscript{52} Macneil, Speidel & Stipanowich, supra note 1, \textsection 5.4.2 (regarding the UAA).

\textsuperscript{53} Id. \textsection 10.6.2.1 (Supp.1999).
often incorporate, existing law in areas such as contract, property, agency and tort. In other words, lots of non-arbitration law applies to arbitration. Most of this non-arbitration law is state common law. The common law of contracts is especially important to arbitration. Much of arbitration law is merely an application of general contract law to a particular sort of contract, the arbitration agreement.

C. FAA PREEMPTION OF STATE LAW

Table of Sections

Sec.

1. THE EVOLUTION OF CASE LAW ON FAA PREEMPTION

2.6 Federal Arbitration Law as (Non–Preemptive) Procedural Law

2.7 Federal Arbitration Law as (Preemptive) Substantive Law

2.8 The FAA Creates No Federal Jurisdiction

2. PREEMPTION OF STATE LAW IMPEDING CONTRACT ENFORCEMENT

2.9 Generally

2.10 State Law Prohibiting Courts From Enforcing Arbitration Agreements

2.11 State Law Prohibiting Courts From Enforcing Arbitration Agreements With the Remedy of Specific Performance

2.12 State Law Making Arbitration Agreements Unenforceable With Respect to Certain Claims

2.13 State Law Making Arbitration Agreements in Certain Types of Transactions Unenforceable

2.14 State Law Raising the Standard of Assent for Contract Formation

3. CHOICE-OF-LAW CLAUSES

2.15 Introduction

2.16 The Volt Case

2.17 The Mastrobuono Case

4. INSURANCE ARBITRATION

2.18 McCarran–Ferguson and the FAA

1. THE EVOLUTION OF CASE LAW ON FAA PREEMPTION

Table of Sections

Sec.

2.6 Federal Arbitration Law as (Non–Preemptive) Procedural Law

54. Id.

55. See §§ 2.19—2.46. For that reason, much of the language of this chapter and even some of its organization is borrowed from contract law.
§ 2.6 Federal Arbitration Law as (Non-Preemptive) Procedural Law

The relationship between federal and state law is one of the most important and complex topics in arbitration law. The starting point is the Supremacy Clause of the United States Constitution, which says that federal law is supreme over state law.\(^\text{56}\) In a conflict between federal and state law, the federal law governs. Consider, for example, a case in which Defendant is liable to Plaintiff under state tort and contract law. If Defendant can show that enforcement of that state law would conflict with a federal statute, such as the Employee Retirement Income Security Act ("ERISA"), then Defendant wins the case.\(^\text{57}\) What would have been the result under state law is reversed by federal law. What has just been said about the preemptive effect of ERISA can also be said about all federal substantive law. Federal substantive law preempts inconsistent state law, and this is true whether the case is heard in federal or state court. In contrast, federal procedural law does not preempt state law. For instance, the Federal Rules of Civil Procedure do not preempt inconsistent state law because the Federal Rules of Civil Procedure only apply in federal court and the "inconsistent" state law, the state rules of civil procedure, only apply in state court. There is no conflict because each governs in its own forum.

The same was true of federal and state arbitration law prior to the FAA's 1925 enactment. Federal arbitration law governed only in federal court and state arbitration law governed only in state court.\(^\text{58}\) Scholars disagree about whether the FAA was designed to preserve or change this state of affairs. While many believe that the FAA was designed to be merely a procedural law governing only in federal courts, some evidence suggests that those who enacted the FAA intended it to be substantive federal law governing in both federal and state courts.\(^\text{59}\) Whatever the original understanding at the time of the FAA's enactment, all agree that many decades passed before courts began to hold that the FAA applies in state court and thus preempts inconsistent state law.

\(^{56}\) U.S. Const. art. VI, cl. 2.


\(^{58}\) Macneil, supra note 32, at 21–24; Macneil, Speidel & Stipanowich, supra note 1, § 10.1 (Supp.1999).

§ 2.7 Federal Arbitration Law as (Preemptive) Substantive Law

Until the late 1950's, no case held that the FAA applies in state court or preempts inconsistent state law. In 1959, the Second Circuit held that the FAA was "federal substantive law equally applicable in state or federal court." And it was not until 1984, that the Supreme Court applied the FAA to a state court case, Southland Corp. v. Keating, and held that the FAA's substantive provisions preempt inconsistent state law.

The Southland case, discussed in a later section, was reaffirmed in a 1995 Supreme Court case, Allied-Bruce Terminix Cos. v. Dobson. Nevertheless, some sections of the FAA indicate that they apply only in federal, not state, court, and the Supreme Court still has not decided whether all provisions of the FAA apply in state court, or just some of them.

§ 2.8 The FAA Creates No Federal Jurisdiction

While the Supreme Court has established that the FAA is substantive law, it is unusual federal substantive law in that it creates no federal jurisdiction. Ordinarily, a party asserting its federal rights is entitled to have a federal court hear its claims. But that is not true of parties asserting their FAA rights. These parties are relegated to state court unless they can point to some other source of federal jurisdiction. Federal appellate courts disagree on the relevant test for federal-question jurisdiction. Some courts hold that "the presence of a federal question in the underlying dispute is

§ 2.7

60. Macneil, supra note 32, at 122–38.
63. See § 2.12.
65. The cases discussed throughout §§ 2.9–2.14 clearly hold that FAA § 2 applies in state court. Whether FAA §§ 3 and 4 apply in state court is discussed in § 2.11.

§ 2.8

66. See § 2.7.
68. See Macneil, Speidel & Stipanovich, supra note 1, § 9.2.1.
sufficient to support [federal] subject matter jurisdiction," while others hold that the federal question must be evident on the face of the petition to compel arbitration itself.

2. PREEMPTION OF STATE LAW IMPEDING CONTRACT ENFORCEMENT

Table of Sections

Sec. 2.9 Generally
2.10 State Law Prohibiting Courts From Enforcing Arbitration Agreements
2.11 State Law Prohibiting Courts From Enforcing Arbitration Agreements With the Remedy of Specific Performance
2.12 State Law Making Arbitration Agreements Unenforceable With Respect to Certain Claims
2.13 State Law Making Arbitration Agreements in Certain Types of Transactions Unenforceable
2.14 State Law Raising the Standard of Assent for Contract Formation

§ 2.9 Generally

The FAA is resolutely pro-contract. FAA § 2 says that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." This language reflects an intent to place arbitration agreements "upon the same footing as other contracts" and to reverse judicial hostility to arbitration agreements. The FAA's enactment was "motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." Accordingly, the Supreme Court has repeatedly emphasized that it seeks "to ensure the enforceability, according to their terms, of private agreements to arbitrate." 

69. Discover Bank v. Vaden, 396 F.3d 366, 367 (4th Cir.2005) ("when a party comes to federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction"). See also Tamiami Partners, Ltd. v. Miccosukee Tribe, 177 F.3d 1212, 1223 n. 11 (11th Cir.1999) (finding it "appropriate * * * to 'look through' [an] arbitration request at the underlying * * * dispute in order to determine whether [the] complaint states a federal question").

70. Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 264 (2d Cir.1996) (concluding that an FAA petition which "does not allege an adequate independent basis for federal question or diversity jurisdiction [is] properly dismissed * * * for lack of subject matter jurisdiction"); Prudential–Bache Sec., Inc. v. Fitch, 966 F.2d 981 (5th Cir.1992).

§ 2.9


The resolutely pro-contract stance of the FAA frequently conflicts with state law. In the event of such a conflict, the state law is unenforceable because it is preempted by the FAA.\textsuperscript{75}

The following sections discuss the most important area of FAA preemption, the enforceability of executory arbitration agreements.\textsuperscript{76} Other issues relating to FAA preemption of state law are discussed throughout this chapter as they arise amidst various topics.

\textbf{§ 2.10 State Law Prohibiting Courts From Enforcing Arbitration Agreements}

The clearest case for FAA preemption is state law making arbitration agreements unenforceable. For example, Alabama courts have declared that pre-dispute arbitration agreements are “void.”\textsuperscript{77} The Supreme Court held in \textit{Allied-Bruce Terminix Cos., Inc. v. Dobson},\textsuperscript{78} that the FAA preempts this Alabama law.\textsuperscript{79}

\textbf{§ 2.11 State Law Prohibiting Courts From Enforcing Arbitration Agreements With the Remedy of Specific Performance}

Alabama has a statute prohibiting courts from enforcing arbitration agreements with the remedy of specific performance, that is, orders to arbitrate.\textsuperscript{80} The Supreme Court held in \textit{Allied-Bruce Terminix Cos., Inc. v. Dobson}, that the FAA preempts this Alabama statute.\textsuperscript{81} Justice Thomas’s dissent in \textit{Allied-Bruce} pointed out that this Alabama statute does not, by its terms, make arbitration agreements unenforceable but merely limits the remedies courts can use in enforcing arbitration agreements.\textsuperscript{82} For example, the Alabama statute permits courts to award money damages for

\textsuperscript{75} U.S. Const. art. VI, cl. 2 (the Supremacy Clause).
\textsuperscript{76} See §§ 2.10—2.14.
\textsuperscript{77} See, e.g., Wells v. Mobile County Bd. of Realtors, 387 So.2d 140, 144 (Ala. 1980).
\textsuperscript{78} 513 U.S. 265 (1995).
\textsuperscript{79} Id. at 281. See also State ex rel. Wells v. Matish, 600 S.E.2d 583, 591 n. 7 (W.Va.2004) (“The Federal Arbitration Act pre-empts state law *** state courts cannot apply state statutes that invalidate arbitration agreements.”) (citation omitted)).
\textsuperscript{80} Ala.Code § 8-1-41(3) (1975) (“The following obligations cannot be specifically enforced: ** An agreement to submit a controversy to arbitration.”).
\textsuperscript{81} See 513 U.S. at 293 (Thomas, J. dissenting) (“A contract surely can be ‘valid, irrevocable, and enforceable’ even though it can be enforced only through actions for damages.”); id. at 294 (“the [Alabama] statute does not itself make executory arbitration agreements invalid, revocable, or unenforceable”)}.
breach of an arbitration agreement. Therefore, Justice Thomas concluded, the Alabama statute does not conflict with the FAA’s requirement that arbitration agreements be “valid, irrevocable and enforceable.”

On behalf of the Allied-Bruce majority, one can note that the ineffectiveness of money damages as a remedy for breach of arbitration agreements is the very problem the FAA was enacted to solve. Central to the FAA is its requirement that courts enforce arbitration agreements with the remedy of specific performance. Accordingly, the FAA directly conflicts with, and therefore preempts, a state law precluding specific performance as a remedy for breach of an arbitration agreement.

Here, however, the text of the FAA cuts against preemption. The portions of the FAA requiring courts to enforce arbitration agreements with the remedy of specific performance are FAA §§ 3 and 4. The text of these provisions indicates that they apply only in federal, not state, court. FAA § 3 covers “any suit or proceeding * * * brought in any of the courts of the United States.” FAA § 4 is even clearer, applying to “any United States district court.”

The Supreme Court has not directly resolved the question of whether FAA §§ 3 and 4 apply in state court. In 1984, the Supreme Court first applied section 2 of the FAA to a state court case, Southland Corp. v. Keating. In 1983, the year preceding Southland, the Court said that “state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Act.” But Southland backtracked: “we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts.” And in 1989, the Supreme Court stated: “we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court.” The 1995 Allied-Bruce case reaffirmed Southland but did not discuss whether FAA §§ 3 and 4 apply in state court. However, the effect of Southland and Allied-Bruce is to require state courts to enforce arbitration agreements with the remedy of specific performance, that is, orders to arbitrate. In effect, Southland and Allied-Bruce have made the core of FAA §§ 3 and 4 applicable in state court even while

84. See § 2.4(b).
85. See id.
maintaining that it is still an open question whether those provisions technically apply in state court.92

§ 2.12 State Law Making Arbitration Agreements Unenforceable With Respect to Certain Claims

The FAA preempts state law making arbitration agreements unenforceable with respect to certain claims. An example of such a law appeared in Southland Corp. v. Keating,93 which involved an arbitration clause in a franchise agreement for a convenience store. Franchisees sued Southland alleging a variety of claims including torts, breach of contract, and breach of the disclosure requirements of a California statute, the California Franchise Investment Law ("CFIL").94 The trial court granted Southland’s motion to compel arbitration of all claims except those based on the CFIL.95 The trial court ruled that the dispute should be split, with one claim litigated and other claims arbitrated.96 The Supreme Court of California agreed, enforcing the arbitration agreement with respect to all claims except for one.97 In other words, it held that the franchisees’ tort and contract claims were arbitrable but their CFIL claims were not.98

The California courts’ rationale for treating CFIL claims differently from tort or contract claims is the language of the CFIL, which says that “any stipulation purporting to waive compliance with any provision of this law is void.”99 The California Supreme Court interpreted this language to void an agreement to arbitrate

92. See Southland, 465 U.S. at 24 (O’Connor, J., dissenting) (“the Court reads [FAA] § 2 to require state courts to enforce § 2 rights using procedures that mimic those specified for federal courts by FAA §§ 3 and 4.”); Macneil, Speidel & Stipanowich, supra note 1, § 10.8.2.4, at 10:91—10:92 (Supp.1999) (“although the Court holds that FAA §§ 3 and 4 do not govern state courts, it is equally clear that FAA § 2, which does govern them, carries with it duties indistinguishable from those imposed on federal courts by FAA §§ 3 and 4.”).


95. 465 U.S. at 4.

96. This raises questions about whether one action should be stayed while the other proceeds and about possible conflicting rulings in the two actions. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).

97. 465 U.S. at 5.

98. This is an issue of statutory arbitrability, not contractual arbitrability. While state inarbitrability law is preempted by the FAA, federal inarbitrability law is not. See § 2.27. Contractual arbitrability is discussed in §§ 2.29—2.31.

CFIL claims.\textsuperscript{100} Whether the California court was correct in treating an arbitration clause as a waiver of statutory compliance is an interesting question,\textsuperscript{101} but the United States Supreme Court did not address it in \textit{Southland}. The United States Supreme Court deferred to the California Supreme Court as the highest interpreter of California statutes. The United States Supreme Court considered only whether the California statute, as interpreted by California’s highest court, was preempted by federal law.

The United States Supreme Court concluded in \textit{Southland} that the California statute, as interpreted by California’s highest court, was preempted by the FAA. FAA § 2 says that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{102} The Supreme Court in \textit{Southland} explained that the CFIL conflicts with, and is therefore preempted by, FAA § 2.

We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity “for the revocation of any contract” but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.\textsuperscript{103}

Justice Stevens’ dissent in \textit{Southland} argued that “a state policy of providing special protection for franchisees * * * can be recognized without impairing the basic purposes of the federal statute.”\textsuperscript{104} The majority rebutted Stevens’ analysis.

If we accepted this analysis, states could wholly eviscerate Congressional intent to place arbitration agreements “upon the same footing as other contracts,” simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.\textsuperscript{105}

Courts may decline to enforce arbitration agreements only on “such grounds as exist at law or in equity for the revocation of any

\begin{itemize}
\item 100. 465 U.S. at 10.
\item 101. Compare § 2.45(a) (courts confirm and enforce arbitration awards that do not apply the law), with Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 229 (1987) (“[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.”)
\item 103. Southland, 465 U.S. at 16 n.11.
\item 104. Southland, 465 U.S. at 21 (Stevens, J., dissenting).
\end{itemize}
contract.” In other words, the FAA requires parties who attack an arbitration agreement to find their weapons in contract law, not in some other body of law.

Many states have law analogous to the California law held preempted in Southland. That is, many states’ laws prohibit enforcement of pre-dispute arbitration agreements with respect to certain categories of claims, such as personal injury claims or medical malpractice claims. These laws are preempted by the FAA because they create a ground for denying enforcement to arbitration agreements that is not a ground “for the revocation of any contract.”

§ 2.13 State Law Making Arbitration Agreements in Certain Types of Transactions Unenforceable

The law of many states prohibits enforcement of arbitration agreements in certain types of transactions. For instance, many states’ laws prohibit enforcement of arbitration clauses in consumer contracts, adhesion contracts, insurance contracts, or employment contracts. These laws (with the possible exceptions of those prohibiting enforcement of pre-dispute arbitration agreements with respect to claims for injunctive relief under certain state statutes. Cruz v. PacifiCare Health Sys., Inc., 66 P.3d 1157 (Cal.2003); Broughton v. Cigna Healthplans, 988 P.2d 67 (Cal.1999). Two federal courts have rejected these California holdings, Arriaga v. Cross Country Bank, 163 F.Supp.2d 1189, 1197-1200 (S.D.Cal. 2001), overruled on other grounds by, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir.2003); Lozano v. AT & T Wireless, 216 F. Supp. 2d 1071, 1076 (C.D.Cal.2002), overruled on other grounds by, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir.2003), and one scholar argues that the federal courts did so “correctly.” Christopher R. Drahozal, Federal Arbitration Act Preemption, 79 Ind. L.J. 393, 416 (2004) (“Broughton and its progeny exhibit the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date.”)

§ 2.13

§ 2.14  PREEMPTION OF STATE LAW

relating to insurance\textsuperscript{110} and employment\textsuperscript{111} are preempted by the FAA because they create a ground for denying enforcement to certain arbitration agreements that is not a ground “for the revocation of any contract.”\textsuperscript{112}

Some state statutes do not go as far as forbidding enforcement of all arbitration agreements in a particular type of transaction, but nevertheless make some arbitration clauses in just that type of transaction unenforceable. For example, a California statute provides: “a provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.”\textsuperscript{113} The Ninth Circuit held that this statute was preempted by the FAA because it applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to “any contract,” as required by FAA § 2.\textsuperscript{114}

§ 2.14  State Law Raising the Standard of Assent for Contract Formation

Formation of a contract requires a manifestation of assent by each party.\textsuperscript{115} Assent is typically manifested by signing a document


\textsuperscript{111} See § 2.18.

\textsuperscript{112} See § 2.51.


In adopting the Revised Uniform Arbitration Act, New Mexico added a provision making a “disabling civil dispute clause”—a provision that provides for a less convenient forum, reduced access to discovery, a limited right to appeal, the inability to join class actions, or the like—voidable by consumers, borrowers, tenants and employees in arbitration. N.M.Stat.Ann. §§ 44–7A–1(b)(4), 44–7A–5 (Supp.2003).

§ 2.14
or saying certain words, but can be accomplished in other ways as well. Mutual manifestation of assent is required to form an arbitration agreement, just as it is required to form any contract.\footnote{\textnormal{116}}

Contract law has long grappled with assent issues in the context of form contracts presented to consumers on a take-it-or-leave-it basis. For example, a comment to the Restatement (Second) of Contracts says that:

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms \textasteriskcentered \textasteriskcentered \textasteriskcentered. Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.\footnote{\textnormal{117}}

One such limitation holds that the consumer does not assent to a form contract term if the “other party has reason to believe that the [consumer] would not have accepted the agreement if he had known that the agreement contained the particular term.”\footnote{\textnormal{118}} This doctrine protects consumers from a form contract term which is “bizarre or oppressive,” “eviscerates the non-standard terms explicitly agreed to,” or “eliminates the dominant purpose of the transaction.”\footnote{\textnormal{119}}

States may apply to arbitration agreements this sort of contract law regarding assent without risking FAA preemption. Because this sort of law applies to all contracts, states may apply it to arbitration agreements while remaining faithful to the FAA’s goal of placing arbitration agreements “upon the same footing as other contracts.”\footnote{\textnormal{120}} Indeed, states would be unfaithful to this goal if they applied a lower standard of assent to arbitration agreements than to other contracts. Conversely, states may not apply a higher standard of assent to arbitration agreements than to other contracts.

For example, the FAA preempts the following Montana statute: “Notice that a contract is subject to arbitration \textasteriskcentered \textasteriskcentered \textasteriskcentered shall be typed in underlined capital letters on the first page of the contract; and unless such notice is displayed thereon, the contract may not be subject to arbitration.”\footnote{\textnormal{121}}\textit{Doctor’s Associates, Inc. v. Casarotto,} \footnote{\textnormal{122}}

\footnote{\textnormal{116}} See § 2.22.\footnote{\textnormal{117}} Restatement (Second) of Contracts § 211 cmt. b (1981).\footnote{\textnormal{118}} Id. § 211 cmt. f.\footnote{\textnormal{119}} Id.\footnote{\textnormal{120}} See § 2.9.\footnote{\textnormal{121}} Mont.Code Ann. § 27-5-114(4) (1995). This language was deleted from the statute in 1997.\footnote{\textnormal{122}} 517 U.S. 681 (1996).
involved a franchise agreement that did not comply with this statute because the arbitration clause was on page nine and in ordinary type. The Supreme Court held that the Montana statute is preempted by the FAA because the Montana statute "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." The FAA "precludes States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' Other state laws preempted on the reasoning of Casarotto are numerous.

After Casarotto, the Montana Supreme Court continues to hold arbitration agreements to a higher standard of assent than it holds contracts generally. The Montana Supreme Court says this is consistent with the FAA because arbitration agreements waive a constitutional right (the right to jury trial) and Montana courts hold all contracts that waive constitutional rights, not just arbitration agreements, to the higher standard of assent, that of "knowing and voluntary." On the other hand, Montana law may be preempted by FAA § 2, which says that to be a permissible ground for the revocation of an arbitration agreement, it must be a ground for the revocation of "any contract." Not "any contract that waives constitutional rights," but "any contract." This issue is not limited to insurance contracts and most likely also applies to employment contracts.

123. Id. at 684–85.
124. Id. at 687.
125. Id.
126. With the possible exceptions of state statutes relating to insurance, see § 2.18, and employment, see § 2.51, other statutes preempted on the reasoning of Casarotto include: Cal.Bus. & Prof. Code § 7191 (Deering Supp.1996) (arbitration clauses in certain residential contracts shall contain prescribed notice in at least ten-point roman boldface type or in red print in at least eight-point boldface type); Colo.Rev.Stat. Ann. § 13–64–403(d) (West Supp.1996) (arbitration clauses in agreements for medical services shall contain prescribed notice in at least ten-point boldface type); Ga. Code Ann. § 9–9–2(2)(6)(8) and (9) (Supp. 1999) (arbitration clause must be initialed); N.Y.Pub. Health Law § 4406–a(2), (3) (McKinney Supp.1996) (arbitration provisions of health maintenance organization contracts must be "in at least twelve point boldface type immediately above spaces for the signature"); R.I.Gen.Laws § 10–3–2 (Supp.1995) (arbitration clauses in insurance contracts must be "immediately before the testi-

128. "Montana law generally applicable to the waiver of constitutional rights, requires that the waiver will not be lightly presumed, that it must be proved to have been made voluntarily, knowingly and intelligently—typically by the party seeking the waiver; and that it will be narrowly construed." Id. at 16.
to Montana; it arises whenever a state (by case law or statute) raises the standard of assent for arbitration agreements and some, but not all, other contracts.¹²⁹