

# THE SUPREME COURT AND THE FUTURE OF ARBITRATION: TOWARDS A PREEMPTIVE FEDERAL ARBITRATION PROCEDURAL PARADIGM?

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## I. INTRODUCTION

Adopted by Congress in 1925, the Federal Arbitration Act (“FAA”)<sup>1</sup> established a federal “pro-arbitration policy.” That much is beyond debate. It would be difficult indeed to find a judicial decision applying the FAA that did not begin its analysis by reciting the policy’s existence. But courts and scholars have been wrestling for decades over what this federal “pro-arbitration policy” actually means. Eliminating traditional judicial hostility toward enforcing arbitration agreements? Ensuring specific enforcement of arbitration agreements in federal court? Establishing substantive federal law for interpreting arbitration agreements? Preventing states from treating arbitration agreements as a disfavored type of contract? Or is it something more?

The United States Supreme Court in recent years has embraced an increasingly robust view of the FAA’s preemptive power in a series of often controversial arbitration law decisions reflecting the Court’s evolving view about the meaning of the federal “pro-arbitration policy.” In 2011, the Court unleashed a furor about the federalism and access to justice implications of its decision in *AT&T Mobility LLC v. Concepcion*,<sup>2</sup> when it held that the FAA preempted the application of California’s *Discover Bank*

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1. 9 U.S.C. §1, *et seq.* (2006).
2. 131 S.Ct. 1740 (2011).

*v. Superior Court*<sup>3</sup> unconscionability rule to the arbitration clause in a consumer cell-phone contract.<sup>4</sup> The *Discover Bank* rule had barred as an unconscionable exculpatory clause under California contract law a consumer adhesion contract arbitration provision that had the effect of prohibiting class arbitration of small dollar amount claims affecting large numbers of disputants.<sup>5</sup> The *Concepcion* decision came on the heels of the Court's 2010 decision in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*<sup>6</sup> barring arbitrators from interpreting arbitration agreements to permit class arbitration if the agreement was "silent" on the issue.<sup>7</sup> *Concepcion* drew criticism because of its perceived enabling of corporations to chill the vindication of statutory rights in small dollar amount disputes by including class arbitration waivers in adhesion contract pre-dispute arbitration agreements.<sup>8</sup>

One component of the Court's reasoning in *Concepcion* has received considerably less attention. To support its conclusion that the FAA preempted the *Discover Bank* rule, the Court found a new purpose behind the FAA:

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. Regulating the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.<sup>9</sup>

With this observation, the Court expanded the preemptive suite of objectives that Congress supposedly had in mind in 1925 when it adopted the FAA. According to *Concepcion*, Congress not only intended to promote private arbitration, but "to facilitate streamlined [arbitration]

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3. 36 Cal. 4th 148 (2005), *abrogated by Concepcion*, 131 S. Ct. 1740 (2011).

4. *Concepcion*, 131 S. Ct. 1740 at 1750-52 (citing *Discover Bank*, 36 Cal. 4th 148 at 162-63).

5. *Discover Bank*, 36 Cal. 4th at 162-63.

6. 130 S. Ct. 1758 (2010).

7. *Stolt-Neilson*, 130 S. Ct. at 1776-77.

8. See e.g., Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 467 (2011) (suggesting that in light of *Concepcion* and *Stolt-Nielsen*, the Court has placed an "insurmountable obstacle in the path of consumer efforts to vindicate low-value claims"); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 710, 714 (2012) (noting that some federal courts have interpreted *Concepcion* broadly to reject the argument that arbitral class action waivers prevent plaintiffs from vindicating their statutory rights); David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 744 (2012) (commenting that by expanding the domain of the FAA, "*Concepcion* may have implicitly undercut the vindication of [statutory] rights doctrine").

9. *Concepcion*, 131 S. Ct. at 1748 (emphasis added).

proceedings”<sup>10</sup> as well. Put another way, the Court in *Concepcion* concluded that when Congress endorsed a “pro-arbitration” policy by adopting the FAA in 1925, it intended to promote a streamlined, commercially attractive type of arbitration and to preempt state law that interfered with this arbitration paradigm.

The federalism implications of such a paradigm could be enormous. If Congress intended to bar state law from interfering with streamlined arbitration proceedings, state efforts to regulate arbitration procedure could be imperiled. For example, a state could require minimum discovery rights in consumer or employment adhesion contract arbitrations, or require judicial review for errors of law in adhesion arbitration<sup>11</sup> awards on statutory rights claims. These statutes would promote procedural fairness; they also would make arbitration less efficient. Now, the FAA could be viewed as preempting state statutes such as these under *Concepcion*’s view that the FAA “pro-arbitration policy” bars state law that would interfere with streamlined arbitration proceedings.<sup>12</sup>

This is a problem. The Court has embraced a preemptive federal arbitration procedural paradigm that expands arbitrator jurisdictional power,<sup>13</sup> minimizes judicial arbitration oversight and marginalizes the role of state contract law and arbitration procedure rules. Repeat arbitration

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10. *Id.* at 1748 (emphasis added).

11. As used in this article, “adhesion arbitration” refers to arbitration required under arbitration agreements contained in contracts of adhesion. Others have used this phrase. *See, e.g.*, Jennifer R. Reynolds, *Games, Dystopia and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 522 (2012); Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 69 (2002).

12. *See, e.g.*, Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 IND. L.J. SUPPLEMENT 31, 50 (2012) (asserting that if the Court’s focus on arbitration in 1925 is “the hallmark of the ‘fundamental attributes of arbitration’ approach, then we must engage in a historical guessing game as to what Congress envisioned with regard to these issues”) (internal citations omitted); *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 278 (W.Va. 2011) (criticizing the *Concepcion* majority for its “tendentious reasoning,” which has “stretched the application of the FAA from being a *procedural* statutory scheme effective only in the federal courts, to being a *substantive* law that preempts state law in both the federal *and* state courts”) (emphasis in original), *cert. granted, judgment vacated sub nom. by Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (holding that the FAA preempted West Virginia’s categorical rule prohibiting enforcement of pre-dispute arbitration agreements in wrongful death or personal injury claims against nursing homes but remanding case to determine if alternative unconscionability holding had been influenced by preempted categorical rule).

13. Some commentators have expressed concern that arbitrators may face a conflict of interest when determining the scope of their own jurisdiction. *See, e.g.*, David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 246 (2012) (cautioning that “an arbitrator has a financial stake” in deciding whether an arbitration agreement is enforceable); *id.* at 249 (finding conclusion that mandatory arbitration is outcome neutral unpersuasive without better data).

players, crafters of adhesion arbitration agreements, and courts with overcrowded dockets might find something welcoming in this trend. On the other hand, such a paradigm further imperils arbitration as a truly voluntary dispute resolution process, undermines arbitration as a reasonable substitute for a judicial forum to vindicate statutory rights in small dollar amount claims, and threatens the role of state contract law and arbitration procedure regulation.

Scant evidence exists that Congress intended to promote any particular type of arbitration process when it enacted the FAA in 1925. Yet in *Concepcion* the Court concluded that Congress sought to preempt state law that would interfere with a streamlined arbitration process.<sup>14</sup> The Court came to this conclusion in the latest of a series of decisions in which the Court, having needlessly embraced a view of the FAA as creating substantive (and preemptive) federal law pursuant to Congress's plenary power to regulate interstate commerce,<sup>15</sup> continues to interpret the FAA by "building an edifice of its own creation"<sup>16</sup> rather than on the basis of the FAA's sparse language or its legislative history.

This Article explores how the Supreme Court's expansive interpretation of the FAA's "pro-arbitration policy" may be leading toward a preemptive federal arbitration procedural paradigm and what can be done in response. After this Introduction, Part Two describes the evolution of the Supreme Court's FAA jurisprudence. Part Three discusses the federalism and access to justice implications of the Court's recent decisions. Finally, Part IV proposes a legislative response to this disturbing trend in the Court's arbitration case law. Specifically, Congress should amend the FAA to exclude from its scope pre-dispute arbitration clauses in consumer and employment adhesion contracts. Rather than making these arbitration agreements unenforceable as a matter of federal law, this proposal would leave pre-dispute arbitration agreements between parties with unequal bargaining power to more accountable state regulation untethered to the Court's interpretation of a federal "pro-arbitration policy." The FAA would continue to govern ad hoc arbitration agreements and pre-dispute

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14. See Marks, *supra* note 12 and accompanying text.

15. See Schwartz, *supra* note 13, at 251 (suggesting that the Court is backing itself into "an untenable position and failing to perceive the need to find a way out"); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 161 (2011) (noting that the *Concepcion* majority was innovative in "fashioning procedural requirements by extrapolations from statutes, rules, and the Constitution").

16. *Allied-Bruce Terminix Companies v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., dissenting) (observing that "[y]et, over the past decade, the 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").

agreements between contracting parties capable of protecting their procedural interests at the bargaining table.

## II. BACKGROUND: THE SUPREME COURT AND FAA PREEMPTION

The history of the Federal Arbitration Act has been well-documented and does not require extensive repetition here.<sup>17</sup> This Part of the Article reviews key Supreme Court decisions addressing the preemptive effect of the FAA to provide context for the federalism and access to justice implications of *Concepcion*'s vision of a federal arbitration procedural paradigm and the FAA amendment proposal in Part Four. In particular, this Part addresses the development of the Supreme Court's FAA jurisprudence regarding (a) the Commerce Clause and FAA preemption; (b) arbitration as an appropriate forum for vindicating statutory rights; (c) judicial review of arbitration awards; (d) when arbitrators rather than judges decide arbitrability issues; and (e) the availability of class arbitration.

### A. *The Commerce Clause and FAA Preemption*

At the heart of the controversy surrounding the scope and preemptive effect of the FAA's pro-arbitration policy is the Supreme Court's conclusion that Congress in 1925 enacted the FAA pursuant to Congress's power to regulate interstate commerce.<sup>18</sup> The Court's view of the FAA's preemptive effect on state law stems from this determination, with the Court expanding the breadth of FAA preemption in a series of cases based as much or more on the Court's view of the federal pro-arbitration policy than the language of the FAA itself.

Ironically, the genesis of the Court's FAA preemption jurisprudence can be traced to its 1956 decision in *Bernhardt v. Polygraphic Company*,<sup>19</sup> a

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17. See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969-994 (1999) (chronicling the history of the Federal Arbitration Act and addressing the evolution of FAA arbitration jurisprudence from embracing a "conception of arbitration as an institution reflective of and embedded in membership in a shared normative community" to a more problematic jurisprudence starting in the late twentieth century applying the FAA "to disputes between wholly unrelated individuals or individuals whose business dealings are on an ad hoc, one-shot basis"); Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 245 (2008) (discussing history of the FAA and noting that the "FAA was enacted . . . to rehabilitate arbitration for groups within the commercial community" and was not intended to be a "comprehensive statute on arbitration").

18. See *infra* notes 30-34, 40-49 and accompanying text.

19. 122 F. Supp. 733 (D. Vt. 1954), *rev'd.*, 218 F.2d 948 (2d Cir. 1955), *rev'd.*, 350 U.S. 198 (1956).

case that held nothing about preemption but instead addressed the *Erie*<sup>20</sup> implications of the FAA. In *Bernhardt*, plaintiff sued his former employer in a Vermont state court for breach of contract.<sup>21</sup> The employer removed the case to federal court and sought to compel arbitration based on an arbitration clause contained in the employment contract.<sup>22</sup> The district court ruled that under *Erie*, the arbitration provision of the employment contract was governed by Vermont law—which made arbitration agreements revocable until issuance of a final award.<sup>23</sup> The Second Circuit reversed.<sup>24</sup> The Supreme Court determined that the FAA did not apply to the arbitration agreement because the employment contract did not evidence a “transaction involving commerce”<sup>25</sup> and thus was outside the scope of the statute.<sup>26</sup> The Court then held that state law applied<sup>27</sup> to the arbitration agreement under *Erie* because, employing the “outcome determinative” test of *Guaranty Trust Co. of New York v. New York*,<sup>28</sup> “[i]f the federal court allows arbitration where the state court would disallow it, the outcome of the litigation might depend on the court-house where suit is brought.”<sup>29</sup>

*Bernhardt* thus called into question whether the FAA could constitutionally be applied in a diversity case, a question that the Court resolved eleven years later in *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*<sup>30</sup> *Prima Paint* sued *Flood & Conklin* in federal court seeking rescission of a consulting agreement on the ground of fraud in the inducement of the contract.<sup>31</sup> *Flood & Conklin*, in turn, moved to stay the rescission action and compel arbitration based on an arbitration provision in the consulting

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20. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

21. *Bernhardt*, 122 F. Supp. 733 (D. Vt. 1954), *rev'd.*, 218 F.2d 948 (2d Cir. 1955), *rev'd.*, 350 U.S. 198 (1956).

22. *Id.*

23. *Id.* at 734-35.

24. *Bernhardt v. Polygraphic Co. of Am.*, 218 F.2d 948, 952 (2d Cir. 1955), *rev'd.*, 350 U.S. 198 (1956).

25. *Bernhardt*, 350 U.S. at 200-01. See 9 U.S.C. § 2 (FAA applies to arbitration agreements in “. . . a contract evidencing a transaction involving commerce . . .”).

26. *Bernhardt*, 350 U.S. at 200-01.

27. *Id.* at 205. Because the defendant argued that New York law (which would enforce the arbitration agreement) applied rather than Vermont law, the court remanded the case to the district court to determine under Vermont conflict of law principles which state law applied to the agreement. *Id.*

28. 326 U.S. 99, 108 (1945) (holding that the choice of a federal court exercising diversity jurisdiction to enforce a state created right may not “substantially affect the enforcement of the right as given by the State”).

29. *Bernhardt*, 350 U.S. at 203.

30. 262 F. Supp. 605 (S.D.N.Y. 1966), *appeal dismissed by* 360 F.2d 315 (2d Cir. 1966), *aff'd.*, 388 U.S. 395 (1967).

31. *Prima Paint*, 262 F. Supp. at 606.

agreement.<sup>32</sup> Prima Paint argued that, in light of *Bernhardt*, the FAA could not be applied in a diversity action.<sup>33</sup> The Supreme Court rejected this *Erie* argument by finding it “clear beyond dispute”<sup>34</sup> that the FAA is based on and confined to “the incontestable federal foundations” of control over interstate commerce and admiralty.<sup>35</sup> Accordingly, the Court concluded that “Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.”<sup>36</sup>

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32. *Id.*

33. *Prima Paint*, 388 U.S. at 404-05.

34. *Id.* at 405. Whatever the merits of the Court’s contention that Congress in 1925 thought it was adopting the FAA pursuant to its power to regulate interstate commerce, this conclusion has not proven to be clear “beyond dispute.” See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 31 (1984) (O’Connor, J., dissenting) (stating that the FAA “should have no application whatsoever in state courts. Assuming, to the contrary, that § 2 *does* create a federal right that the state courts must enforce, state courts should nonetheless be allowed, at least in the first instance, to fashion their own procedures for enforcing the right.” (citation omitted)); *id.* (observing that although “it is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary legal procedure. ‘[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.’ But absent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights.”); *id.* at 25 (“One rarely finds a legislative history as unambiguous as the FAA’s. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.”); *Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting) (arguing that the Court in “*Southland* clearly misconstrued the Federal Arbitration Act” and that “[a]dhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes”); *id.* at 284 (noting that proper application of *stare decisis* would correct the Court’s misapplication of the FAA in *Southland*); *id.* at 285-86 (Thomas, J., dissenting) (noting that *Southland* erred by holding that “§ 2 of the FAA applies in state as well as federal courts and withdraws the power of the states to require a judicial forum in the resolution of claims which the contracting parties agreed to resolve by arbitration”) (internal quotations omitted). See also David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act* 67-SPG LAW & CONTEMP. PROBS. 5, 29 (2004) (“Courts and commentators interpreting the FAA in the decade following its enactment understood the statute as a matter of remedy or procedure applicable in federal court rather than as substantive law.”); Richard C. Reuben, *FAA Law, Without the Activism: What If the Bellwether Cases Were Decided by A Truly Conservative Court?*, 60 U. KAN. L. REV. 883, 908 (2012) (opining that since “no theory of preemption justifies the holding in *Southland* . . . it is not surprising that Chief Justice Burger’s opinion avoided the topic entirely and instead made the argument that preemption was necessary because of Congress’ reliance on the Commerce Power in adopting the FAA”); cf., e.g., Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 149 (2002) (arguing that the FAA’s “congressional materials . . . provide strong indications that Congress intended the FAA to apply in state court”).

35. *Prima Paint*, 488 U.S. at 405.

36. *Id.*

*Prima Paint* thus avoided the *Erie* problem raised in *Bernhardt* by linking the FAA to Congress's plenary power to regulate interstate commerce. But in doing so, the Court also laid the doctrinal groundwork for transforming the FAA into preemptive substantive law. This was foreshadowed in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*,<sup>37</sup> decided in 1983. In *Moses H. Cone*, the Court held that no exceptional circumstances existed to support a district court's decision to stay an FAA Section 4<sup>38</sup> proceeding to compel arbitration during the pendency of parallel state court litigation.<sup>39</sup> The Court stated that:

The basic issue presented in Mercury's federal court suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court . . . . Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.<sup>40</sup>

The preemption language in *Moses H. Cone* was *dicta* because the case did not involve application of the FAA to a state law claim in state court. But just one year later, the Court removed any question about its view that the FAA constitutes preemptive substantive law when it decided *Southland Corporation v. Keating*.<sup>41</sup>

In *Southland*, convenience store franchisees brought a putative class action against the franchisor in California state court alleging a variety of state law tort and contract claims as well as a claim under California's Franchise Investment Law.<sup>42</sup> The franchisor moved to compel arbitration of these claims pursuant to the arbitration provision in the parties' franchise agreement.<sup>43</sup> The California Supreme Court agreed that the contract and tort claims were subject to arbitration but concluded that the California Franchise Investment Law barred enforcement of pre-dispute arbitration claims under that statute.<sup>44</sup> The U.S. Supreme Court reversed, finding that the FAA applied in California state court actions and preempted the

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37. 460 U.S. 1 (1983).

38. 9 U.S.C. § 4 (2006).

39. *Moses H. Cone*, 460 U.S. at 19.

40. *Id.* at 24.

41. 465 U.S. 1 (1984).

42. *Keating v. Superior Court*, 31 Cal. 3d 584, 591-92 (1984), *rev'd in part, appeal dismissed in part sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984).

43. *Keating*, 31 Cal. 3d at 592.

44. *Id.* at 591.

California Franchise Investment Law provision.<sup>45</sup> The Court concluded that “[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>46</sup> The Court relied on its holding in *Prima Paint*<sup>47</sup> in reaching the conclusion that “[t]he [FAA] rests on the authority of Congress to enact substantive rules under the Commerce Clause.”<sup>48</sup> The Court concluded that because “Congress intended to foreclose state attempts to undercut the enforceability of arbitration agreements . . . § 31512 of the California Franchise Investment Law violate[d] the Supremacy Clause.”<sup>49</sup> In *Southland*, the Court thus used *Prima Paint*, a decision that preserved the applicability of the FAA to federal court diversity actions, to transform the FAA into preemptive federal substantive law. And with that, the Court’s anti-federalist FAA jurisprudence was born.

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45. *Southland*, 465 U.S. at 17.

46. *Id.* at 10.

47. *Prima Paint*, 388 U.S. at 405 (stating that the FAA “is based upon . . . the incontestable federal foundations of ‘control over interstate commerce and over admiralty’” (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924))).

48. *Southland*, 465 U.S. at 11. The Court further observed that “[t]he statements of the Court in *Prima Paint* that the [FAA] was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. As Justice Black observed in his [*Prima Paint*] dissent, when Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts.” *Id.* at 12.

49. *Id.* at 16 (footnote omitted). Since *Southland*, the Court has issued a series of decisions embracing an expansive view of the FAA’s scope and preemptive effect. *See, e.g., Allied-Bruce*, 513 U.S. at 273-275 (concluding that the phrase “involving commerce” in § 2 reflects Congress’ intent to exercise the fullest extent of its commerce powers); *accord, e.g., Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-85 (1996) (noting that the FAA established a “broad principle of enforceability”) (internal citations omitted); *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (granting petition for certiorari and vacating Supreme Court of Oklahoma decision that conflicted with the FAA by deciding validity of a covenant not to compete despite arbitration agreement between parties); *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (holding that “when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court”); *cf. Volt Info. Servs., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989) (holding that the FAA did not preempt a California statute permitting a state court to stay an arbitration pending resolution of related court litigation because the parties had incorporated the statute by reference into their arbitration agreement, noting that the “federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate”).

### B. *Vindicating Statutory Rights in Arbitration*

Many of the concerns raised about the Court's evolving expansive pro-arbitration policy jurisprudence can be traced to its acceptance of arbitration under pre-dispute adhesion arbitration agreements to resolve federal statutory claims. Until the 1980s, the Court had not upheld enforcement of a pre-dispute adhesion agreement to arbitrate federal statutory claims. In 1953, for example, the Court in *Wilko v. Swan*<sup>50</sup> refused to require arbitration of a Securities Act of 1933 claim based on the arbitration clause in a customer/broker agreement.<sup>51</sup> The *Wilko* Court based its decision in part on a parade of arbitral horrors that caused the Court to question whether arbitration was a suitable forum to vindicate statutory rights: arbitrators may lack judicial training in the law and may not issue reasoned decisions;<sup>52</sup> arbitration often lacks a complete record of proceedings;<sup>53</sup> and in unrestricted submissions "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for errors in interpretation."<sup>54</sup>

But shortly after *Southland*, the Court reversed course by articulating a full-throated endorsement of arbitration for statutory claims and ultimately overruling *Wilko*.<sup>55</sup> One year after *Southland*, the Court in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*,<sup>56</sup> held that a Sherman Act federal antitrust claim was subject to arbitration pursuant to the arbitration clause in a contract between an automobile dealer and manufacturer.<sup>57</sup> The Court cautioned that "we find no warrant in the [FAA] for implying in every contract within its ken a presumption against arbitration of statutory claims."<sup>58</sup> To the contrary, the Court concluded that:

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

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50. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson-American Express, Inc.*, 490 U.S. 477 (1989).

51. *Wilko*, 346 U.S. at 438.

52. *Id.* at 436.

53. *Id.*

54. *Id.* at 437-38.

55. *See, e.g.*, *Rodriguez de Quijas v. Shearson-American Express, Inc.*, 490 U.S. 477, 485 (1989) (overruling *Wilko*).

56. 473 U.S. 614 (1985).

57. *Mitsubishi*, 473 U.S. at 615.

58. *Id.* at 625.

procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.<sup>59</sup>

The Court further assumed that:

[I]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.<sup>60</sup>

The Court in *Mitsubishi Motors* predicated its endorsement of arbitration as a reasonable substitute for a judicial forum to vindicate statutory rights on the notion that contracting parties should be able to trade courtroom procedures for the relative informality and efficiency of arbitration. In *Gilmer v. Interstate Johnson Lane Corporation*,<sup>61</sup> the Court confirmed that its reasoning extended to pre-dispute arbitration agreements contained in adhesion employment contracts. In *Gilmer*, the Court held that Robert Gilmer's federal Age Discrimination in Employment Act claim was subject to arbitration under New York Stock Exchange (NYSE) rules pursuant to a pre-dispute arbitration agreement required as a condition of Mr. Gilmer's employment.<sup>62</sup> The Court emphasized that Mr. Gilmer, as the party objecting to arbitration of a federal statutory claim, had failed to carry his burden of showing that Congress had intended to preclude waiver of a judicial forum for an ADEA claim.<sup>63</sup>

The Court dismissed Mr. Gilmer's argument that pre-dispute agreements to enforce a statutory claim should not be enforced because there often will be unequal bargaining power between employers and employees, asserting that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."<sup>64</sup> Citing *Mitsubishi Motors*, the Court cautioned that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or

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59. *Id.* at 627.

60. *Id.* (citation omitted).

61. 500 U.S. 20 (1991).

62. *Gilmer*, 500 U.S. at 33.

63. *Id.* at 26. *Accord*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000). The Court in *Randolph* suggested that an objector claimant could avoid arbitration by showing that prohibitively high arbitration costs would prevent the claimant from vindicating her statutory rights, *id.* at 91, but affirmed the order compelling arbitration because Ms. Randolph, the claimant, failed to carry her burden that arbitration would be unsuitable to vindicate her Truth-in-Lending Act claim because she did not show a likelihood of incurring prohibitive costs, *id.* at 92.

64. *Gilmer*, 500 U.S. at 33.

overwhelming economic power that would provide grounds ‘for the revocation of any contract’” as contemplated by FAA Section 2.<sup>65</sup>

The Court also found wanting Mr. Gilmer’s objection that he would not be able to obtain meaningful judicial review of the arbitration award. The Court observed that under NYSE rules the arbitrator was required to render a public, written award that would summarize the issues and describe the award.<sup>66</sup> The Court further noted that judicial “‘review [of arbitration awards] is sufficient to ensure that arbitrators comply with the requirements of the statute’ at issue.”<sup>67</sup>

*Gilmer* did not describe the nature of judicial review that would be sufficient to assure compliance with statutory requirements. In the influential case of *Cole v. Burns International Security Services*,<sup>68</sup> however, the U.S. Court of Appeals for the District of Columbia Circuit expanded on *Gilmer*’s assumption about the adequacy of judicial review in statutory claim arbitration. In *Cole*, the court held that under *Gilmer* a statutory employment discrimination claim was subject to arbitration pursuant to an arbitration agreement required as a condition of employment.<sup>69</sup> The *Cole* court emphasized that “[t]wo assumptions have been central to the [U.S. Supreme] Court’s decisions”<sup>70</sup> approving arbitration for statutory claims: (1) a party does not forego substantive rights afforded by the statute by agreeing to arbitration<sup>71</sup> and (2) judicial review of the ensuing arbitral award is sufficient to ensure that the arbitrators complied with the requirements of the statute.<sup>72</sup> The court concluded that “[t]hese twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.”<sup>73</sup> The court observed that while many statutory employment discrimination disputes are factual in nature, “there will be

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65. *Id.*

66. *Gilmer*, 500 U.S. 20, 31 (1991).

67. *Id.* at 43 n.4 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).

68. 105 F.3d 1465 (D.C. Cir. 1997). See Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review is Not Always Pro-Arbitration*, 77 U. CHI. L. REV. 1013, 1015-16 (2010) (describing *Cole* as a “leading case” regarding increased post-1997 use of the “manifest disregard” vacatur standard in statutory claim cases); Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 872-73 (2011) (noting that *Cole* contemplated more extensive judicial review than normally provided under section 10).

69. *Cole*, 105 F.3d at 1468.

70. *Id.* at 1487.

71. *Id.* (quoting *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628)).

72. *Id.* (quoting *Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232)).

73. *Id.*

some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct."<sup>74</sup>

*Gilmer* and its progeny confirmed the arbitrability of statutory employment law claims pursuant to a pre-dispute arbitration agreement in an employment contract. In *Circuit City Stores, Inc. v. Adams*,<sup>75</sup> decided in 2001, the Court's narrow interpretation of the FAA's employment contract exclusion assured that the FAA applied to a wide range of adhesion employment contract arbitration agreements. In *Adams*, the Court held that Section 1's exclusion from the FAA of arbitration agreements in "contracts of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"<sup>76</sup> essentially covered only transportation workers, using the *ejusdem generis* statutory canon to limit the meaning of "workers engaged in . . . commerce" to include only workers with employment like that of seamen and railroad workers.<sup>77</sup> Because limiting the scope of the Section 1 employment exclusion left most employment contract arbitration clauses within the scope of the FAA, the states were effectively barred from regulating the enforceability of most adhesion and other employment arbitration agreements.

### C. Judicial Review of Awards

The *Concepcion* Court's "streamlined arbitration" paradigm leaves little room for judicial oversight of adhesion arbitration. It also is at odds with part of the underlying rationale for enforcing adhesion arbitration agreements involving federal statutory claims. Indeed, *Gilmer* and *Cole* enforced mandatory arbitration clauses in employment contracts based at least in part on the assumption that a court could provide sufficient review of a statutory claim arbitration award to ensure that the arbitrator properly applied the statute at issue. But the availability of such judicial review under the FAA is not apparent on the face of the statute. FAA Section 10(a) provides very limited grounds for a court to vacate an arbitration award:

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74. *Id.* See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 743 (1999) ("Cole, in essence, converts the 'manifest disregard' standard into a de novo 'error of law' standard, at least with respect to claims under statutory or public law." (footnote omitted)).

75. 532 U.S. 105 (2001).

76. 9 U.S.C. § 1.

77. *Circuit City Stores*, 532 U.S. at 114-115.

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, 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 (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>78</sup>

Pointing to the narrow grounds for vacatur under the FAA, the Supreme Court stated in *Wilko v. Swan*<sup>79</sup> that one reason why arbitration was problematic in statutory claim disputes was that in unrestricted submissions “the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in federal courts, to judicial review for errors in interpretation.”<sup>80</sup> Lower courts interpreted *Wilko*’s reference to “manifest disregard”<sup>81</sup> (a phrase not found in the FAA) as affirmation by the Supreme

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78. 9 U.S.C. § 10(a).

79. *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989).

80. *Wilko*, 346 U.S. at 436-37.

81. See, e.g., Kenneth R. Davis, *The End of an Error: Replacing “Manifest Disregard” with a New Framework for Reviewing Arbitration Awards*, 60 CLEV. ST. L. REV. 87, 92, 94 (2012) (“It is regrettable that the *Wilko* decision resorted to ambiguous dicta, which has spawned confusion persisting to this very day” but “[d]espite the vagueness of the *Wilko dicta*, the circuit courts, one by one, recognized the manifest disregard standard.”); MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 413 (2010) (noting that the doctrine of manifest disregard of the law is a judicially created doctrine that most courts have generally defined “as a refusal to apply a clearly defined legal principle known to the arbitrator to be controlling” (citation omitted)); *id.* (“An arbitration award must meet a three-step analysis for a court to vacate it under the doctrine of manifest disregard of the law. First, the court must determine if a law exists that clearly governs the dispute between the parties. Second, the court must determine if the presiding arbitrator knew of the controlling law and improperly applied it. Finally, the court must determine if the arbitrator consciously disregarded or ignored the applicable law.” (footnotes omitted)); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1113 (2009) (commenting that “most courts have concluded that parties seeking vacatur [for manifest disregard of the law] must show the award was inconsistent with clear controlling law” and that “a mere error of law or failure to apply the law does not rise to the level of manifest disregard of the law”); *San Martine Compania De Navegacion, S.A. v. Saguenary Terminals, Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961) (stating that “it would appear that manifest disregard of the law must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law”); *Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 704 (2d Cir. 1978) (holding that a court will only vacate awards under the manifest disregard standard that lack “even a barely colorable justification”); *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 217 (2d

Court of extra-statutory bases to vacate an award.<sup>82</sup> Similarly, some lower federal courts concluded that arbitrating parties could contractually expand the scope of judicial review beyond the grounds specified in Section 10(a) to also include errors of law.<sup>83</sup>

In 2008, the Court addressed the scope of judicial review under the FAA in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>84</sup> In *Hall Street*, a landlord and tenant agreed to arbitrate one of several claims comprising a

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Cir. 2002) (“A party seeking vacatur must . . . demonstrate that the arbitrator knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.”); *id.* (“It is not enough that . . . the arbitrator was aware of the governing legal principle; there must also be a showing of intent.”).

82. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584-585 (2008) (noting that some lower courts had interpreted *Wilko*’s reference to “manifest disregard” as recognizing “a further ground for vacatur on top of those listed” in FAA Section 10). *See* Pittman, *supra* note 68, at 872-73 (noting that the *Cole* court “asserted that courts should use the manifest disregard of law standard to make certain that the judicial review ‘is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.’ This increased level of judicial review is more extensive than normal judicial review of an arbitrator’s award under § 10 of the FAA” (footnote omitted)); *id.* at 873 (stating that “under *Cole*, the manifest disregard of the law concept is broad enough to include a misrepresentation of a novel question of statutory law”); *id.* at 874 (asserting that “*Cole*’s expansive interpretation of the manifest disregard standard to include a misinterpretation of law should apply to all adhesive, mandatory arbitration agreements” involving consumers and employees with unequal bargaining power).

83. Before the Court’s decision in *Hall Street*, the circuits were divided as to whether parties could contractually expand the scope of judicial review of arbitration awards. *Compare* Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005) (holding that “parties can by contract displace the FAA standard of review, but that displacement can be achieved only by clear contractual language”), *Jacada (Europe), Ltd. v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005) (addressing “whether the parties intended to opt out of the FAA’s standard for vacatur in favor of Michigan’s more thorough standard of review”), *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (holding that “the FAA permits parties to contract for vacatur standards other than the ones provided in the FAA”), *and Gateway Techs., Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (permitting contractual expansion), *with Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (barring contractual expansion), *and Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) (barring contractual expansion). FAA Section 10(a) does not list errors of law as a basis to vacate an arbitration award. 9 U.S.C. § 10(a). *But see* Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT’L ARB. 225, 239 (1997) (observing that a “contract that withdraws errors of law from the authority conferred on the arbitrator – that, in other words, places issues of law ‘beyond the scope of the submission’ to binding arbitration – should, then, allow an aggrieved party on ‘review’ to invoke §10(a)(4)”; Christopher R. Drahozal, *Contracting Around RUA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 433 (2003) (“To the extent the FAA codified the common law grounds for vacating arbitration awards, there is a strong argument that [§ 10(a)(4)] permits parties to contract for expanded judicial review of errors of law.”); *id.* at 432-33 (noting that at common law, “parties could contract for court review of arbitral awards for legal error by requiring them to follow the law” and under such “restricted submissions,” courts could vacate an arbitral award when the arbitrator exceeded his authority by making legal error).

84. 552 U.S. 576 (2008).

federal court civil action.<sup>85</sup> The arbitration agreement, which was then entered as a court order, required that the court vacate the resulting arbitration award for errors of law or factual findings unsupported by substantial evidence.<sup>86</sup> The case eventually reached the Supreme Court, which held that FAA Section 10 provided the exclusive grounds under the FAA to vacate an arbitration award.<sup>87</sup> The Court rejected Hall Street's argument that the FAA permitted extra-statutory grounds for vacatur—such as contractually expanded judicial review—in light of *Wilko*'s apparent recognition of “manifest disregard” as an extra-statutory basis to vacate an award.<sup>88</sup> The Court did not attempt to define what *Wilko*'s reference to “manifest disregard” actually meant, observing only that “maybe”<sup>89</sup> it referred to a new ground for review, a collective reference to all of the Section 10 vacatur grounds, or a shorthand reference to the Section 10(a)(3)<sup>90</sup> and 10(a)(4)<sup>91</sup> grounds for vacatur when an arbitrator is guilty of misconduct or exceeding her powers.<sup>92</sup> The Court did conclude, however, that *Wilko*'s reference to “manifest disregard” failed to establish that parties could contractually expand the Section 10(a)<sup>93</sup> grounds for vacatur.<sup>94</sup> Instead, the Court concluded that the language and structure of FAA Sections 9 through 11 (governing arbitration award confirmation, vacatur and modification, respectively) compelled the conclusion that—under the

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85. *Hall St.*, 552 U.S. at 579.

86. *Id.* at 579.

87. *Id.* at 584.

88. *Id.* at 585.

89. *Id.*

90. 9 U.S.C. § 10 (a)(3).

91. 9 U.S.C. § 10 (a)(4).

92. *Hall St.*, 552 U.S. at 585.

93. 9 U.S.C. § 10(a).

94. *Hall St.*, 552 U.S. at 585. Courts disagree as to whether “manifest disregard” survived *Hall Street* as a ground for vacatur and, if so, what the concept now means. Compare, e.g., *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009) (concluding that “manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA”), and *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 998 (D.Minn. 2008) (interpreting *Hall Street* as barring manifest disregard review), with *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1283 (9th Cir. 2009) (“Hall Street Associates did not undermine the manifest disregard of law ground for vacatur.”), *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 79 (1st Cir. 2008) (vacating an arbitration award on grounds of manifest disregard), and *Parnell v. Tremont Capital Mgmt. Corp.*, Case No. 07-0752-cv, 2008 WL 2229442, at \*1 (2d Cir. May 30, 2008) (recognizing manifest disregard standard). See Davis, *supra* note 81, at 102 (“The circuit courts are divided on whether *Hall Street* abolished the manifest disregard standard.”); Reuben, *supra* note 81, at 1145-46 (noting that that since *Hall Street*, “[s]ome courts have held that the manifest disregard is dead” because it is not a ground that is expressly included among the Section 10(a) grounds for vacatur, while others have held that the doctrine does survive *Hall Street*).

FAA—Section 10(a) provided the exclusive vacatur grounds.<sup>95</sup> To support this conclusion, the Court observed that:

Instead of fighting the text, it makes more sense to see the three provisions, §§ 9–11, as *substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway*. Any other reading *opens the door to the full-bore legal and evidentiary appeals* that can “rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,” and bring arbitration theory to grief in post-arbitration process.<sup>96</sup>

The Court, however, did not hold that Section 10(a) provided the exclusive basis for vacating any arbitration award.<sup>97</sup> Rather, the Court cautioned that it was not addressing whether state law could permit broader vacatur grounds:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.<sup>98</sup>

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95. *Hall St.*, 552 U.S. at 587-88.

96. *Id.* at 588 (citation omitted) (emphasis added).

97. *Id.* at 590.

98. *Hall St.*, 552 U.S. at 590. Courts are divided as to whether the FAA preempts state law providing for more expansive judicial review beyond the Section 10(a) grounds for vacatur. *See, e.g.*, *CableConnection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1354 (2008) (holding that the FAA did not preempt California law permitting parties to contractually expand the scope of judicial review to include errors of law); *cf. McQueen-Starling v. UnitedHealth Group, Inc.*, 654 F. Supp. 2d 154, 163 (S.D.N.Y. 2009) (“[I]t is difficult to see how a contractual agreement by the parties to apply a state law standard of review could change the analysis because contracting around FAA is precisely the maneuver prohibited by *Hall Street* . . .”). Some states have adopted *Hall Street's* approach to analyzing FAA Section 10(a) when interpreting their own state law arbitration statutes. *See, e.g.*, *Pugh's Lawn Landscape Co., Inc. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 258-60 (Tenn. 2010) (concluding that an arbitration agreement may not provide for judicial review of an arbitration award that is broader than the scope of review provided by the Tennessee Uniform Arbitration Act (TUAA) in light of *Hall Street* and the fact that the TUAA grounds for judicial review are analogous to those under the FAA); *accord Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 683 S.E.2d 40, 44-45 (Ga. Ct. App. 2009); *Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795, 798-99 (Tex. App. 2008).

#### D. Arbitrators Deciding Arbitrability

The Court's recent arbitrability decisions exacerbate the *Concepcion* arbitration procedural paradigm's anti-federalist implications. Pre-dispute arbitration clause enforcement often turns on arbitrability issues: (a) did the parties enter into a valid arbitration agreement and, if so, (b) whether the parties' actual dispute falls within the scope of the arbitration agreement. The Court's arbitrability opinions form an important component of its evolving, expansive view of the FAA's pro-arbitration policy, particularly its opinions about determining who decides arbitrability issues.

The starting point for reviewing the Court's modern arbitrability jurisprudence is *Prima Paint*. In addition to its failed *Erie* argument,<sup>99</sup> *Prima Paint* also resisted arbitrating its claims against Flood & Conklin on the ground that Flood & Conklin's alleged fraud in the inducement of the consulting agreement rendered the arbitration agreement contained within it unenforceable.<sup>100</sup>

The Court rejected *Prima Paint*'s fraud in the inducement argument. It pointed to FAA Section 4's command that a federal district court must grant a petition to compel arbitration if "the making of the agreement for arbitration . . . is not in issue,"<sup>101</sup> and concluded that the FAA compelled viewing an agreement to arbitrate as severable from the contract "evidencing a transaction involving commerce"<sup>102</sup> in which it is contained (the "container contract").<sup>103</sup> Because *Prima Paint*'s fraud in the inducement objection was directed at the consulting agreement containing the arbitration clause as a whole and not specifically to the arbitration agreement itself, the Court concluded that the making of the arbitration agreement was not "in issue" within the meaning of FAA Section 4, and the petition to compel arbitration was properly granted.<sup>104</sup>

*Prima Paint* thus established a "severability" doctrine (sometimes referred to as the "separability" doctrine) based on the fiction that an arbitration clause embedded within a larger container contract was a separate agreement.<sup>105</sup> As a result, the general state law contract defenses

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99. See *supra* notes 30-34 and accompanying text.

100. *Prima Paint*, 388 U.S. at 399.

101. 9 U.S.C. § 4.

102. 9 U.S.C. § 2.

103. *Prima Paint*, 388 U.S. at 400.

104. *Id.* at 403-04, 406.

105. As a practical matter, the severability doctrine's fiction of a separate arbitration agreement avoided the problem of a court deciding that the arbitration agreement within a container contract (like the one at issue in *Prima Paint*) was valid because it was not fraudulently induced, which would require the parties to then arbitrate the very same fraud issue in connection

contemplated by the FAA Section 2 savings clause could only prevent enforcement of an arbitration agreement if such a defense was directed at the arbitration clause itself. Most defenses challenging the formation or enforceability of a contract, such as fraud, coercion, or duress, typically address the circumstances surrounding the execution of a container contract (e.g., an employment or car rental contract) as opposed to just the arbitration clause. By contrast, however, challenges to enforcing pre-dispute arbitration agreements on the basis of unconscionability could survive the severability doctrine by attacking the substance of arbitration clauses in adhesion container contracts as opposed to disputing the validity of the container contract as a whole.

The unconscionability defense became an increasingly important basis for challenging pre-dispute mandatory arbitration agreements after the Supreme Court's 2006 decision in *Buckeye Check Cashing v. Cardengna*.<sup>106</sup> In *Buckeye*, borrowers brought a putative class action in a Florida state court against a payday loan company alleging that their borrowing agreements criminally charged usurious interest in violation of Florida law.<sup>107</sup> *Buckeye* moved to compel arbitration based on the arbitration clauses contained in the borrowing agreements; the borrowers resisted arbitration on the ground that the borrowing contracts were void *ab initio* criminal agreements and thus the arbitration agreements they contained were unenforceable.<sup>108</sup> The U.S. Supreme Court reversed the Florida Supreme Court and held that an arbitrator must decide whether the allegedly usurious contracts were void as illegal.<sup>109</sup> The Court rejected the argument that under *Prima Paint* the severability doctrine applied only to federal courts. Instead, it concluded that:

*Prima Paint* and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of those holdings. Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable

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with the container contract rescission and damages claim. See also *infra* notes 118-119 and accompanying text.

106. 546 U.S. 440 (2006).

107. *Buckeye*, 546 U.S. at 443.

108. *Id.*

109. *Id.* at 446.

apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.<sup>110</sup>

The Court reached these conclusions by holding that although *Prima Paint* established the severability doctrine by referring to FAA Section 4, the “rule ultimately arises out of § 2, the FAA’s substantive command that arbitration agreements be treated like all other contracts. The rule of severability establishes how this equal-footing guarantee for ‘a written [arbitration] provision’ is to be implemented.”<sup>111</sup>

But who decides arbitrability challenges that are directed to the arbitration agreement itself and thus escape the severability doctrine? The Supreme Court first addressed this question in 1995 when it decided *First Options of Chicago, Inc. v. Kaplan*.<sup>112</sup> In *First Options*, the Court held that a court decides issues of arbitrability (both as to whether there is a valid arbitration agreement and, if so, whether a dispute falls within the scope of that agreement) unless there is clear and unmistakable<sup>113</sup> evidence that the parties intended an arbitrator to decide arbitrability issues.<sup>114</sup> This conclusion raised relatively little controversy in the context of arbitration agreements that were the product of an arm’s length negotiation. Arbitration clauses found in adhesion contracts that “clearly and unmistakably” state that an arbitrator will decide arbitrability present a more challenging question: Can a party with lesser bargaining power who is required to sign such an arbitration agreement clearly and unmistakably manifest her assent that an arbitrator will decide arbitrability issues?

The Supreme Court addressed this question in 2010 when it decided *Rent-A-Center, West, Inc. v. Jackson*.<sup>115</sup> In *Rent-A-Center*, Antonio Jackson sued his employer in federal court alleging race discrimination and retaliation.<sup>116</sup> The employer moved to compel arbitration pursuant to an arbitration agreement that Mr. Jackson was required to sign as a condition of employment.<sup>117</sup> The arbitration agreement provided that (a) all disputes, including discrimination claims and federal statutory claims, would be resolved by binding arbitration and (b) any dispute relating to the enforceability or formation of the arbitration agreement would be decided

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110. *Id.* at 445-46.

111. *Id.* at 447 (quoting 9 U.S.C. § 2).

112. 514 U.S. 938 (1995).

113. *First Options of Chicago*, 514 U.S. at 944.

114. *Id.*

115. 130 S. Ct. 2772 (2010).

116. *Rent-A-Center*, 130 S. Ct. at 2775.

117. *Id.*

by the arbitrator.<sup>118</sup> Mr. Jackson objected to arbitration on the ground that the entire arbitration agreement was procedurally and substantively unconscionable and contended that a court should decide this arbitrability question.<sup>119</sup> The Supreme Court, however, held that an arbitrator must decide the validity of the arbitration agreement.<sup>120</sup>

First, the Court concluded that the arbitration agreement “clearly and unmistakably” delegated arbitrability decisions to the arbitrator.<sup>121</sup> The Court found of no moment Mr. Jackson’s contention that an adhesion contract could not reflect clear and unmistakable assent to arbitrate anything, with the Court instead noting that the *First Options* “clear and unmistakable” requirement “pertains to the parties’ *manifestation of intent*, not the agreement’s *validity*.”<sup>122</sup>

Second, the Court used the severability doctrine to reject Mr. Jackson’s argument that a court must decide the validity of the agreement to arbitrate arbitrability.<sup>123</sup> Mr. Jackson’s arbitration agreement was a free-standing document; it was not a clause within his employment agreement.<sup>124</sup> Nevertheless, the Court concluded that the “delegation clause” within the arbitration agreement was itself a separate arbitration agreement within the meaning of the severability doctrine.<sup>125</sup> It reasoned further that because Mr. Jackson had not timely asserted an unconscionability or other objection *specifically as to the delegation clause* (as opposed to the arbitration agreement as a whole), the delegation clause would be enforced and the arbitrator would decide the validity of the arbitration agreement as a whole.<sup>126</sup> Dissenting, Justice Stevens objected that the Court was improperly adding a new layer to the severability doctrine (“something akin to Russian nesting dolls”),<sup>127</sup> asserting that the severability doctrine should not apply to clauses within an arbitration agreement because, unlike *Prima Paint*, Mr. Jackson’s arbitrability challenge was not bound up in the underlying employment dispute.<sup>128</sup> The majority, however, concluded that

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118. *Id.*

119. *Id.* at 2775-76, 2779. Mr. Jackson contended that the arbitration agreement was procedurally unconscionable because it was a contract of adhesion and substantively unconscionable because of its fee-splitting and discovery limitation provisions. *Id.*

120. *Id.* at 2779.

121. *Id.*

122. *Id.* at 2777 n.1 (emphasis in original).

123. *Id.* at 2779.

124. *Id.* at 2775, 2787 (Stevens, J., dissenting).

125. *Id.* at 2777-78.

126. *Id.* at 2779.

127. *Id.* at 2786.

128. *Id.* at 2787-88.

it made no difference to the application of the severability doctrine that the underlying container contract itself was an arbitration contract.<sup>129</sup>

*E. Class Arbitration, Stolt-Nielsen and Concepcion*

The Court's recent class arbitration decisions underscore the federalism and access to justice problems presented by the Court's arbitration procedural paradigm. In *Stolt-Nielsen* and *Concepcion*, the Court rejected class-wide arbitration through the use of two complementary devices: (a) creating a federal common law arbitration contract interpretation rule overriding otherwise applicable state contract law and (b) preempting state contract law barring small claim class adjudication waivers as unconscionable because the state law rule would interfere with the FAA's newly discovered FAA streamlined arbitration goal. The combined effect of these decisions: making class-wide arbitration unavailable to vindicate small value claims under adhesion arbitration agreements.<sup>130</sup>

There are many reasons why businesses might wish to include arbitration clauses in adhesion contracts: One of them is to avoid class action lawsuits.<sup>131</sup> That objective (problematic, laudable or otherwise) would be undermined<sup>132</sup> if consumers or others entering into adhesion

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129. *Id.* at 2779.

130. *See infra* notes 195-201 and accompanying text.

131. *See Cole, supra* note 8, at 478 (“Empirical studies of consumer arbitration agreements establish that businesses, particularly credit card and cell phone companies, implement arbitration agreements in order to avoid either class action or class arbitration processes.” (footnote omitted)); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM, 871, 888 (2008) (“Companies prefer individual over aggregate dispute resolution because aggregate treatment creates overwhelming settlement pressure and because few consumers will seek redress on an individual basis due to lack of information or the small amount in dispute.”); *see also* Christopher R. Drahozal, *Why Arbitrate? Substantive Versus Procedural Theories of Private Judging*, 22 AM. REV. INT'L ARB. 163, 177 (2011) (noting that for some types of consumer contracts, “[t]he absence of class relief might make some claims uneconomical to litigate, such that the claims are never brought”).

132. Indeed, these businesses could find class arbitration more objectionable than class action litigation because of arbitration's relative procedural informality, relaxed rules of evidence and limited judicial review. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 410 (2005) (noting that companies may prefer class action litigation because “[i]t is bad enough, from the corporate perspective, to engage in ‘bet-the-company’ class action litigation without having to sacrifice the appellate rights and other safeguards that attend judicial proceedings, including interlocutory appeals of class certification decisions”) (citing Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update: Green Tree Financial Corp. v. Bazzle—Dazzle for Green Tree, Fizzle for Practitioners*, 59 BUS. LAW. 1265, 1272-73 (2004) (“Because courts on the whole are vastly more experienced than arbitrators in administering class action procedures, most companies faced with the prospect of class arbitration would likely prefer to remain in court rather than navigate through the uncharted

contracts containing arbitration clauses could instead proceed with class arbitration. The availability of class arbitration, particularly in the context of adhesion pre-dispute arbitration agreements, implicates important access to justice, contractual freedom, and vindication of statutory rights issues.

The FAA on its face does not expressly discuss class arbitration. The Supreme Court first addressed the intersection of class arbitration and the FAA in 2003 in connection with *Green Tree Financial Corp. v. Bazzle*.<sup>133</sup> *Bazzle* was something of a procedural muddle, involving two consolidated class arbitration proceedings with claims by borrowers against a commercial lender resulting in awards for the claimant classes.<sup>134</sup> The South Carolina Supreme Court had affirmed the class awards, holding that under South Carolina law class-wide arbitration may be ordered when the arbitration agreement is silent on the issue.<sup>135</sup>

The U.S. Supreme Court got no further than the question of who should have decided whether class arbitration could proceed under the parties' arbitration agreements because it was unclear whether the arbitrators or the courts made this determination in the first instance.<sup>136</sup> The Court generated no majority opinion, with five justices voting to remand the matters for arbitrators to decide the class arbitration question.<sup>137</sup> A plurality opinion by Justice Breyer concluded that the arbitrators should have decided whether class-wide arbitration could proceed under the arbitration agreements,<sup>138</sup> while a dissent by Chief Justice Rehnquist contended that the state court should have determined as a matter of law that the agreements only permitted bilateral arbitration.<sup>139</sup> Justice Stevens would have affirmed the South Carolina Supreme Court but joined in the plurality to ensure a

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waters of class-wide arbitration.”); see also Christopher R. Drahozal & Peter B. Rutledge, *Contract And Procedure*, 94 MARQ. L. REV. 1103, 1160 (2011) (stating that the “no class arbitration” default rule adopted in *Stolt-Nielsen* “arguably is defensible as a majoritarian default, at least for commercial contracts” because although “class arbitration has been around for a long time, only in recent years has it become at all common (if sixty-five cases a year counts as being common)”); *id.* (observing that express contract provisions permitting arbitration on a class basis are rare); *cf. id.* (commenting that even though many contracts in industries in which class actions are common include class-arbitration waivers, “arbitrators almost unanimously filled gaps prior to *Stolt-Nielsen* by holding that class arbitration was permissible, and continue to do so in a significant proportion of cases even after *Stolt-Nielsen*”).

133. 539 U.S. 444 (2003).

134. *Green Tree Fin. Corp.*, 539 U.S. at 447-50.

135. *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 266 (2002), *vacated and remanded*, 539 U.S. 444 (2003).

136. *Bazzle*, 539 U.S. at 447.

137. *Id.*

138. *Id.* at 454 (Breyer, J., plurality opinion).

139. *Id.* at 459 (Rehnquist, Ch. J., dissenting).

controlling judgment of the Court.<sup>140</sup> No Justice suggested that the FAA prohibited class arbitration. Moreover, the plurality framed the issue on remand as “whether the arbitration contracts forbid class arbitration.”<sup>141</sup> Neither Justice Stevens nor Chief Justice Rehnquist quarreled with characterizing the relevant inquiry as whether the arbitration contracts forbade class arbitration as opposed to whether they affirmatively provided for it.<sup>142</sup> Class arbitration proceedings became more common following *Bazzele*.<sup>143</sup>

The Court did not revisit class arbitration until 2010 when it decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*<sup>144</sup> In *Stolt-Nielsen*, shipping charterer claimants sought to bring class-wide arbitration antitrust and other claims against the owners of parcel tanker ships under arbitration agreements that did not expressly address the availability of class arbitration.<sup>145</sup> The parties entered into a supplemental arbitration agreement referring to a panel of three arbitrators the issue of whether class-wide arbitration could proceed under arbitration agreements that were “silent” on the issue.<sup>146</sup> The arbitrators found that the original arbitration agreements allowed for class arbitration, a conclusion that ultimately was affirmed by the Second Circuit.<sup>147</sup>

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140. *Id.* at 455 (Stevens, J., concurring in judgment and dissenting in part).

141. *Id.* at 453.

142. The arbitration contracts provided that disputes about commercial lending contracts “shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.” *Id.* at 458 (Rehnquist, Ch. J., dissenting). Chief Justice Rehnquist found that these provisions in the arbitration contracts “make quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer.” *Id.* at 459. Justice Stevens concluded that the parties’ agreement arguably should have been decided in the first instance by the arbitrator, reasoning further that “because the decision to conduct a class-action arbitration was correct as a matter of law” and the petitioner had “merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker, there [was] no need to remand the case to correct that possible error.” *Id.* at 454-55 (Stevens, J., concurring in the judgment and dissenting in part).

143. Drahozal & Rutledge, *supra* note 132, at 1139 (observing that class arbitration became widespread after *Bazzele*); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T, and A Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 206 (2012) (stating that following the *Bazzele* decision, “various U.S. based arbitral institutions promulgated their specialized rules on class arbitration” and since then “[t]he procedure quickly gained momentum . . . with more than 300 class arbitrations known to have been initiated since 2003”).

144. 130 S. Ct. 1758 (2010).

145. *Id.* at 1764-65.

146. *Id.* at 1765-66.

147. *Id.*

The Supreme Court reversed.<sup>148</sup> In doing so, the Court turned on its head the class arbitration inquiry apparently reflected in *Bazzle*. Rather than ask if the arbitration agreements *forbade* class arbitration, the Court in *Stolt-Nielsen* held 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.”<sup>149</sup> The Court found determinative the parties’ stipulation that the arbitration agreement was “silent” about class arbitration, noting a statement by counsel for claimant AnimalFeeds to the arbitration panel that when an agreement is silent on an issue there has been no agreement reached on the issue.<sup>150</sup> The Court determined that the arbitrator’s class arbitration order should be vacated under FAA Section 10(a)(4) because the arbitrators exceeded their powers by ordering class arbitration where an arbitration agreement that was “silent” about class arbitration did not manifest the parties’ agreement to arbitrate on a class-wide basis.<sup>151</sup>

Notably, the *Stolt-Nielsen* Court created a federal default contract interpretation rule regarding class arbitration: “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.’”<sup>152</sup> The Court recognized that “[i]n certain contexts it is appropriate to presume that the 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.”<sup>153</sup> Nevertheless, the Court concluded that:

An implicit agreement to authorize class-action arbitration, however, is not a term that that the arbitrator may infer solely from the fact of the

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148. *Id.* at 1777.

149. *Id.* at 1775 (emphasis in original).

150. *Id.* at 1766, 1770.

151. *Id.* at 1767-68. Justice Ginsburg observed in dissent that the majority’s characterization of the “silence” stipulation ignored the “parties’ supplemental agreement, referring the class arbitration issue to the arbitration panel, undoubtedly empowered the arbitrators to render their clause-construction decision. That scarcely debatable point should resolve this case.” *Id.* at 1780 (Ginsburg, J., dissenting).

152. *Id.* at 1773 (citations omitted). See Richard Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1102-03 (2011) (explaining that “[w]hat is ‘fundamental’ to arbitration in *Stolt-Nielsen* is that which would impede judgment recognition and enforcement in litigation across the international sphere. Again, the point here is not to treat differently domestic and international contracts that contain arbitration clauses but, rather, to recognize that the interpretive principles for such clauses—in particular, what silence on a given matter empowers arbitrators to do—should be selected with an eye toward smooth operation in both spheres.”).

153. *Id.* at 1775.

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.<sup>154</sup>

Contrasting attributes of bilateral arbitration and class arbitration, the Court stated 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.”<sup>155</sup> The Court’s treatment of class arbitration as different in kind from bilateral arbitration laid the groundwork for its next class arbitration decision, *AT&T Mobility, LLC. v. Concepcion*.<sup>156</sup>

Vincent and Liza Concepcion brought a putative class action against AT&T Mobility in a California federal court, asserting false advertising and fraud claims after purchasing AT&T cellular telephone service advertised as including a free phone, only to be charged state sales tax (\$30.22) on the full retail value of the phone.<sup>157</sup> AT&T moved to compel arbitration under the terms of its contract with the Conceptions.<sup>158</sup> The Conceptions opposed the motion on the ground that the arbitration agreement was an

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154. *Id.*

155. *Id.* at 1776. Christopher Drahozal and Peter Rutledge observe that *Stolt-Nielsen* raises important questions about the extent to which arbitrators may interpret the parties’ arbitration agreement to fill gaps in the contract. Drahozal & Rutledge, *supra* note 132, at 1138. Professors Drahozal and Rutledge state that the Court in *Stolt-Nielsen* seems to conclude that “arbitrators can look to statutory or court-developed rules to fill gaps in contracts, but cannot formulate gap-fillers in the same way as a common law court can – and, indeed, an arbitral award will be vacated if the arbitrators do so.” *Id.* at 1146. They point out that before *Stolt-Nielsen* most courts had “not vacated arbitral awards on the basis of a procedural determination by the arbitrator as to a matter where the agreement was silent.” *Id.* at 1148. They further note that *Stolt-Nielsen* left unanswered the extent to which state arbitration procedure law may serve as a gap filler in the face of potential FAA preemption. *Id.* at 1152-53.

156. 131 S. Ct. 1740 (2011). Several commentators have expressed concern that courts invalidating class arbitration waivers by turning individual arbitrations into class arbitrations ignore significant differences between bilateral and class arbitration. *See, e.g.*, Drahozal & Rutledge, *supra* note 132, at 1168 (observing that using unconscionability to turn individual arbitration into class arbitration changes the fundamental nature of the dispute resolution proceeding to which the parties agreed); Schwartz, *supra* note 13, at 259 (arguing that liberal justices on the Supreme Court “should have articulated a theory under which the rules for bilaterally negotiated predispute arbitration agreements between substantial commercial entities are different from claim-suppressing arbitration clauses”); *cf.* Strong, *supra* note 143, at 203-04 (asserting that although “class proceedings do not resemble the traditional view of arbitration as a swift, simple, and pragmatic bilateral procedure . . . it is by no means clear that this classic model of arbitration still holds true in all or even most instances. Instead, the term ‘arbitration’ has been used to describe a wide variety of processes, both bilateral and multilateral”) (footnotes omitted).

157. *Concepcion*, 131 S. Ct. at 1744.

158. *Id.* at 1744-45.

unconscionable exculpatory agreement under California contract law, citing to the California Supreme Court's 2005 decision in *Discover Bank v. Superior Court*.<sup>159</sup> *Discover Bank* applied two California statutes barring enforcement as exculpatory<sup>160</sup> and thus unconscionable<sup>161</sup> a credit card "bill stuffer" arbitration agreement provision containing a class arbitration waiver, to conclude that:

We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced.<sup>162</sup>

The district court found, and the Ninth Circuit affirmed, that the AT&T class arbitration waiver was unconscionable as a matter of general California contract law under *Discover Bank*.<sup>163</sup> Framing the issue as "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures,"<sup>164</sup> the U.S. Supreme Court reversed.<sup>165</sup>

The Court acknowledged that the FAA Section 2 savings clause allows generally applicable state contract law defenses to invalidate arbitration agreements.<sup>166</sup> The Court noted, however, that "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."<sup>167</sup> The Court then took a

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159. *Id.* at 1745 (citing *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005)).

160. *Discover Bank*, 36 Cal. 4th at 161 (citing CAL. CIV. CODE §1668 (West 2012)).

161. *Id.* at 161 (citing CAL. CIV. CODE §1668 (West 2012)).

162. *Id.* at 162-63 (citing CAL. CIV. CODE, § 1668).

163. *Concepcion*, 131 S. Ct. at 1745.

164. *Concepcion*, 131 S. Ct. at 1744.

165. *Id.* at 1753.

166. *Id.* at 1746.

167. *Id.* at 1747. The Court noted that "California courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." *Id.* See Drahozal & Rutledge, *supra* note 132, at 1167-68 (comparing the aggressive use of unconscionability by courts to invalidate arbitration agreements to a return to the ouster doctrine era that the FAA was enacted to stop); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 353 (2011) ("[T]he courts

seemingly uncontroversial premise—that Section 2 does not reflect “an intent to preserve state law rules that stand as an obstacle to the accomplishment of the FAA’s objectives”<sup>168</sup>—and used it to preempt the *Discover Bank* rule and enforce the AT&T class action waiver. It did so by discovering a FAA streamlined arbitration procedure objective with the power to preempt conflicting state law:

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.<sup>169</sup>

The Court harkened back to *Stolt-Nielsen* to support the proposition that “class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA,”<sup>170</sup> contrasting class arbitration with bilateral arbitration<sup>171</sup> as less informal, slower, costlier, procedurally more complex, and unduly risky for defendants.<sup>172</sup>

Finally, the Court dismissed the *Concepcions*’ argument that class procedures are not incompatible with arbitration because parties sometimes agree to aggregation.<sup>173</sup> The Court noted that parties “*could* agree to arbitration pursuant to the Federal Rules of Civil Procedure or pursuant to a discovery process rivaling that in litigation.”<sup>174</sup> Most tellingly, the Court cautioned that “what the parties in the aforementioned examples would have agreed to *is not arbitration as envisioned by the FAA, lacks its*

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of some states, notably California, have been considerably more energetic in developing unconscionability doctrine than others.”)

168. *Concepcion*, 131 S. Ct. at 1748.

169. *Id.* at 1748. To illustrate this newly-identified FAA preemptive streamlined arbitration procedure objective, the Court created several procedural straw men, positing as “obvious” illustrations of state procedural law disfavoring arbitration hypothetical statutes that would find unconscionable or against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery or arbitration agreements that did not abide by the Federal Rules of Evidence. *Id.* at 1747.

170. *Concepcion*, 131 S. Ct. at 1747, 1751.

171. *Id.* at 1747, 1751-53. Justice Breyer objected to this comparison in his dissenting opinion, contending that the more apt comparison was between class arbitration and class action court litigation. *Id.* at 1759 (Breyer, J., dissenting).

172. *Id.* at 1751-52. The Court found it “unlikely that in passing the FAA Congress meant to leave the disposition of [class action] procedural requirements to an arbitrator.” *Id.* at 1751. This may well be true; however, it may be similarly unlikely that Congress in 1925 anticipated enforcing arbitration agreements embedded in adhesion employment or consumer contracts.

173. *Id.* at 1748.

174. *Id.* at 1752 (emphasis in original).

*benefits, and therefore may not be required by state law.*”<sup>175</sup> In other words: a preemptive federal streamlined arbitration procedural paradigm.

Each of these pro-arbitration policy case law developments is doctrinally important. These decisions provide the framework for the Court’s view of the FAA’s pro-arbitration policy. What these recent Supreme Court cases mean collectively is the subject of the next Part of this Article.

### III. ARBITRATION’S FUTURE: TOWARDS A PREEMPTIVE PROCEDURAL PARADIGM?

The current robust federal pro-arbitration policy has evolved dramatically from Congress’s 1925 effort to eliminate the ouster doctrine from federal courts. The Supreme Court expanded the reach of this policy by aggressively building on its own precedent or, as Justice Stevens once observed, “standing on its own shoulders.”<sup>176</sup> The result: expansion of arbitrator sovereignty, enforcement of adhesion arbitration of statutory claims, and growing displacement of state contract and arbitration procedural law. This Part of the Article discusses potential implications of the Court’s recent decisions on the future of U.S. domestic arbitration law.

#### A. Arbitrator Sovereignty

When read together, *Hall Street*, *Rent-A-Center*, and *Concepcion* create a pro-arbitration policy enforcing adhesion arbitration contracts in a way that grants arbitrators almost unlimited discretion<sup>177</sup> throughout the life-

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175. *Id.* at 1753 (emphasis added). Justice Thomas “reluctantly” joined in the Court’s opinion, providing the fifth vote forming a majority. *Id.* at 1754 (Thomas, J., concurring). Justice Thomas also reasoned that the phrase “grounds for revocation” in the Section 2 savings clause only includes objections to the making of the arbitration contract as opposed to public policy or other grounds unrelated to contract formation, and that because the *Discover Bank* rule thus did not constitute a Section 2 ground for “revocation” of a contract, it was preempted. *Id.* at 1754-56.

176. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132 (2001) (Stevens, J., dissenting) (objecting to the Court’s reliance on its pro-arbitration policy decisions to support a narrow interpretation of the FAA Section 1 employment contract exclusion and concluding that “[i]n a sense, therefore, the Court is standing on its own shoulders when it points to those cases as the basis for its narrow construction of the exclusion in §1”). *See also* Schwartz, *supra* note 34, at 32 (arguing that *Southland* was largely the product of decisions trying to resolve an FAA *Erie* problem that should never have arisen in first place); *id.* at 38 (observing that *Bernhardt* based its conclusion that arbitration was “outcome determinative” on the arbitration disadvantages identified in *Wilko*, which was subsequently overruled in 1989).

177. *Hall Street* holds that Section 10(a) provides the exclusive FAA grounds for award vacatur, thus shielding arbitrator factual and legal decision-making from meaningful judicial review. *Hall St.*, 552 U.S. at 584. The Court nevertheless was willing to vacate the class arbitration legal decision in *Stolt-Nielsen* employing a somewhat elastic interpretation of FAA

cycle of an arbitral proceeding. First, adhesion arbitration contract drafters can easily avoid having arbitrability issues decided by a court rather than by an arbitrator. The *First Options* default rule, of course, requires a court to decide substantive arbitrability issues unless the parties “clearly and unmistakably” consent to an arbitrator deciding arbitrability.<sup>178</sup> The Court, however, has not only lowered the bar for proving such consent, it has effectively eliminated it. In *Rent-A-Center*, the Court found that an adhesion arbitration agreement’s recital that the parties consented to arbitrate arbitrability satisfied *First Options*.<sup>179</sup> Moreover, *Rent-A-Center* limited the ability of the objecting party to challenge the enforceability of the arbitrability delegation by the Court’s “Russian nesting doll”<sup>180</sup> expansion of the severability doctrine to include arbitration agreements within arbitration agreements—thus requiring a specific challenge to the provisions of an arbitrability delegation clause before a court may determine the enforceability of that clause.<sup>181</sup> In addition, *Hall Street* assures that under the FAA an arbitrator’s factually or legally erroneous arbitrability decision will escape meaningful post-arbitration judicial review because FAA Section 10(a) (which does not include errors of law or fact) provides the exclusive FAA vacatur grounds.<sup>182</sup>

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Section 10(a)(4), suggesting the potential for asymmetrical (if not inconsistent) adhesion arbitration applications of *Hall Street*’s limited view of judicial review under the FAA. Cf. Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 862 (2012) (commenting that the *Hall Street* decision “appears to strengthen the power of arbitration by preventing judicial review in excess of that provided by section 10 of the Act rather than protect the courts from litigants’ efforts to control the courts’ discharge of statutory duty”).

178. *First Options*, 514 U.S. at 944.

179. See *supra* notes 112-14 and accompanying text. See also Schwartz, *supra* note 13, at 264 (observing that a well-drafted delegation clause strips courts of power to decide “gateway” arbitrability issues).

180. *Rent-A-Center*, 130 S. Ct. at 2786 (Stevens, J., dissenting).

181. See *supra* notes 123-26. See also *Chen v. Dillard’s Inc.*, Case No. 12-CV-2366-CM, 2012 WL 4127958, at \* 3 (D. Kan. Sept. 19, 2012) (concluding that, as in *Rent-a-Center*, a court “must enforce this delegation provision unless plaintiff specifically challenges the validity of that provision”); *Thornton v. First Nat. Bank Credit Card*, No. CIV.A. 3:12-0492, 2012 WL 4356280, at \* 3 (S.D.W. Va. Sept. 24, 2012) (stating that it is for the arbitrator rather than the court to determine whether an arbitration agreement was unconscionable in the face of a clear and unmistakable delegation provision and the absence of a challenge specific to that provision).

182. The Court in *Hall Street* held that Section 10(a) provided the exclusive grounds for award vacatur under the FAA, perhaps leaving no room for “manifest disregard of the law” as an extra-statutory basis to vacate an award. See *Hall St.*, 552 U.S. at 584-85. The *Hall Street* Court, however, did not expressly reject “manifest disregard” as a basis to vacate an award. *Id.* at 585. Moreover, the Court in *Stolt-Nielsen* declined to decide whether “manifest disregard” constituted an independent basis for award vacatur or a gloss on the section 10(a) grounds, instead stating that assuming the standard applied it was satisfied by the arbitrators finding that a “silent” arbitration

### B. *Vindication of Statutory Rights*

The Supreme Court overcame its earlier hostility to enforcing pre-dispute agreements to arbitrate federal statutory claims in light of its conclusion, as articulated in *Mitsubishi Motors*, that “[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial, forum.”<sup>183</sup> The Court has found of no moment that the “agreement” to trade a judicial forum for an arbitral one may be an adhesion contract, concluding in *Gilmer* that “mere inequality in bargaining power”<sup>184</sup> alone is not a basis to find an arbitration agreement unenforceable; instead, the Court required a showing “in specific cases” that an arbitration agreement resulted from an exercise of “overwhelming economic power” that would be the basis for “revocation of any contract” within the meaning of FAA Section 2.<sup>185</sup> *Gilmer* also assumed that judicial review of a statutory claim arbitration award would be sufficient to assure compliance with the requirements of the statute at issue.<sup>186</sup>

But post-*Gilmer* decisions have called into question the continuing validity of the Court’s underlying assumptions for its general conclusion that arbitration can be a reasonable substitute for a judicial forum for the vindication of statutory rights.<sup>187</sup> First, notwithstanding the role of a

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agreement permitted class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3. *See also supra* notes 84-96 and accompanying text.

183. *Mitsubishi*, 473 U.S. at 628. It is uncertain whether the vindication of statutory rights defense to enforcing pre-dispute arbitration agreements applies also to vindication of state statutory rights. *Compare, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 27 (1st Cir. 2006) (holding that arbitration agreement provisions “barring the recovery of attorney’s fees and costs and barring class arbitration are invalid because they prevent the vindication of statutory rights under state and federal law”), *with Stutler v. T.K. Constructors, Inc.*, 448 F.3d 343, 345-346 (6th Cir. 2006) (holding that district court erred by applying to state law claims cases involving effect of arbitration costs on arbitrability of federal statutory claims), *Hill v. NHC HealthCare/Nashville LLC*, No. M2005-01818-COA-R3-CV, 2008 WL 1901198 at \*14-15 (April 30, 2008) (holding that federal common law regarding arbitrability of statutory claims limited to federal statutory claims), *Orman v. Citigroup, Inc.*, No. 11 CIV. 7086 DAB, 2012 WL 4039850, at \* 3-4 (S.D.N.Y. Sept. 12, 2012) (holding vindication of statutory rights doctrine not applicable to arbitrability of state statutory rights claim), *and Fromer v. Comcast Corp.*, No. 3:09CV2076 SRU, 2012 WL 3600298, at \* 7 (D. Conn. Aug. 21, 2012) (holding that vindication of statutory rights doctrine inapplicable to bar enforcement of agreement to arbitrate state statutory rights claim).

184. *Gilmer*, 500 U.S. at 33.

185. *Id.*

186. *Id.* at 32 n.4. *See also supra* note 64 and accompanying text.

187. *Compare* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 103 (2000) (“Where plaintiffs can establish that the prohibition on class actions would deprive them of any forum in which to present their federal statutory claim by making that lawsuit economically unfeasible, courts should refuse to enforce such a provision—either by voiding the arbitration clause altogether, by holding

reviewing court contemplated in *Gilmer* and *Cole*, after *Hall Street* a court may lack the authority under the FAA to vacate a statutory claim arbitration award for failing to comply with the requirements of the statute at issue.<sup>188</sup> *Hall Street* involved contractual claims rather than statutory claims;<sup>189</sup> nevertheless, the Court's conclusion that Section 10(a) provided the exclusive FAA bases for vacatur would present an obstacle in the path of an argument that a more searching review beyond the limits of Section 10(a) would be permitted for statutory claims.<sup>190</sup> Even if "manifest disregard" survived *Hall Street* as an independent basis for judicial review, an arbitrator's error of law alone would not constitute the type of egregious conduct required to satisfy this rarely-applied vacatur standard.<sup>191</sup>

Second, *Gilmer* recognized the role under Section 2 of generally applicable contract defenses (e.g., unconscionability) to challenge enforcement of adhesion arbitration agreements on a case-by-case basis.<sup>192</sup> But if the *Gilmer*-era Court expected that state unconscionability law would always be available to bar enforcement of adhesion arbitration contracts secured through the exercise of overwhelming economic power, the *Concepcion*-era Court has cast doubt on that assumption. *Concepcion* held

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the arbitration clause inapplicable as to class claims, or by permitting plaintiffs to present their claims in an arbitral class action."), and J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1737 (2006) ("Rather than rely on a patchwork of state-law unconscionability doctrine, courts should adopt a federal standard under the Federal Arbitration Act ("FAA") that would guarantee that arbitration agreements do not thwart the vindication of substantive rights."), with Carbonneau, *supra* note 17, at 261-62 & n.117 (footnote omitted) (citing *Mitsubishi Motors* comparison of arbitration and court as forum for vindicating statutory rights to illustrate that "some parts of the Court's arbitration doctrine are based upon self-evident falsehoods – distortions accepted as truth only because the Court says they are true. Although the Court may argue otherwise, in fact, arbitration does not guarantee parties the same rights they have in court."), and Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 757 (2001) (observing that "[a]rbitration critics argue that such uses of arbitration to circumvent legal requirements are precisely why commercial arbitration is problematic as a form of dispute resolution. In fact, a fully informed individual could rationally decide to waive a claim in advance. Statutes do not adapt to individual circumstances, so that even statutes that, on the whole, are beneficial may be detrimental to certain parties under certain circumstances. And some statutes may not be beneficial on the whole. If so, then waivers in theory would make the parties better off.").

188. See *supra* notes 65, 70, 88, and 91. See also Stipanowich, *supra* note 167, at 434 n.47 ("In the wake of *Hall Street*, some courts have continued to apply the principle [of manifest disregard] with or without reference to *Hall Street*. Other courts interpreted the *Hall Street* decision as eliminating the principle in cases under the FAA.").

189. *Hall St.*, 552 U.S. at 579.

190. See *supra* notes 89-90 and accompanying text.

191. See *supra* notes 86-88 and accompanying text. Cf. Davis, *supra* note 81, at 125-27 (arguing that federal courts likely will still have authority to vacate arbitration awards for violation of well accepted and deep rooted public policy even after *Hall Street* and *Concepcion*).

192. See *supra* note 62 and accompanying text.

that the FAA preempted application of California unconscionability law regarding class action waivers, concluding that although it was facially a contract rule of general applicability, the California rule had been historically applied in a way that “disfavors” arbitration.<sup>193</sup> After *Concepcion*, courts may need to measure the extent to which state unconscionability law has been used to invalidate arbitration agreements as opposed to other agreements, or determine whether applying state unconscionability law to an adhesion arbitration agreement (as in *Discover Bank*) would compromise arbitration efficiency.<sup>194</sup> If so, application of the state unconscionability law could be preempted under *Concepcion*, thus requiring the objecting party to arbitrate her statutory claim.

Finally, the Court’s decisions in *Stolt-Nielsen* and *Concepcion* have raised the specter that the Court’s pro-arbitration policy could be used by powerful economic interests to effectively immunize themselves from privately-enforced responsibility for small dollar value violations of federal or state law.<sup>195</sup> True, a narrow view of these decisions might not yield such a result. *Stolt-Nielsen* involved sophisticated business entities engaging in international commerce using an arbitration agreement stipulated to be “silent” about class arbitration.<sup>196</sup> *Concepcion* did not address a circumstance where an individual claimant could not vindicate a statutory right if required to arbitrate on an individual basis.<sup>197</sup> But if interpreted

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193. *Concepcion*, 131 S. Ct. at 1747-48. See *supra* notes 155-56 and accompanying text.

194. See, e.g., *In re Checking Acct. Overdraft Litig.*, MDL No. 2036, 685 F.3d 1269, 1279 (11th Cir. 2012) (concluding that South Carolina unconscionability law did not violate *Concepcion*’s fundamental attributes of arbitration or disfavoring arbitration standards).

195. See *Cole*, *supra* note 8, at 467 (footnote omitted) (“Considered together with the Court’s *Stolt-Nielsen* decision, where the Court held that in the absence of parties’ explicit authorization of the use of class action arbitration, the arbitrators may not order it, the [*Concepcion*] Court appears to have placed an insurmountable obstacle in the path of consumer efforts to vindicate low-value claims.”); David Horton, *Arbitration As Delegation*, 86 N.Y.U. L. REV. 437, 495 (2011) (arguing that barring class arbitration absent affirmative agreement “would magnify arbitration’s effect on substantive rights” because “mandating that all arbitration take place on an individualized basis deters plaintiffs from prosecuting low value claims”).

196. See *Stolt-Nielsen*, 130 S. Ct. 1758 at 1783 (Ginsburg, J., dissenting) (noting that by observing the *Stolt-Nielsen* parties were business entities and that the shipper could choose the form of shipment contract it preferred, “the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis”). On December 7, 2012, the Court granted a petition for a writ of certiorari in *Oxford Health Plans LLC v. Sutter*, No. 12-135, 2012 WL 3096766, at \*1, 81 U.S.L.W. 3070 (U.S. Dec. 7, 2012). *Oxford Health Plans* raises the issue of whether an arbitrator exceeds her powers under the FAA by finding that parties agreed to class arbitration under *Stolt-Nielsen* by using broad contractual language barring litigation and requiring arbitration of any dispute arising under the contract.

197. Compare, e.g., *In re Am. Express Merchants’ Litig.*, 667 F.3d 204, 212-14 (2d Cir. 2012) (“*Amex III*”), (holding that class action waiver was unenforceable and distinguishing *Concepcion* on the ground that claimant had offered undisputed expert evidence that transaction

broadly by the lower courts—or if applied broadly by the Supreme Court in future cases—*Stolt-Nielsen* and *Concepcion* could have just such an effect.<sup>198</sup>

Class adjudication often is the only rational method for asserting small dollar value claims to vindicate statutory rights. The small dollar value of these claims provides no economic incentive for a consumer or employee to litigate them on an individual basis (at least in the absence of a statutory fee-shifting provision). Further, the large discovery or expert witness costs often necessary to prove violation of statutory rights implicated in these small dollar value claims require funding and prosecuting these claims through collective action.

Under *Stolt-Nielsen* and *Concepcion*, a large employer using adhesion employment contracts or a company doing retail business through consumer adhesion contracts could avoid class litigation of statutory claims by (a) including arbitration agreements in their adhesion contracts, (b) scouring

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costs of individual arbitration would prevent vindication of statutory rights), *cert. granted*, 133 S. Ct. 594 (2012), and *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 641 (S.D.N.Y. 2012) (“[P]laintiff has made a compelling showing that requiring her to pursue a non-class proceeding in arbitration to enforce her FLSA claim would be financially impractical in view of the small amount of the underpayment that she claims, the expense of retaining an expert and the fees necessary to ensure legal representation.”); *id.* at 642 (noting that defendant’s argument that the *American Express* decision is inconsistent with Supreme Court precedent is “pure and unadulterated speculation,” and that the court was “bound to assume the validity of current Second Circuit precedent absent subsequent dispositive Supreme Court precedent to the contrary, which defendant fails to cite because there is none”), with *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212-13 (11th Cir. 2011) (“[T]o the extent that Florida law would . . . invalidate the class waiver simply because the claims are of small value, the potential claims are numerous, and many consumers might not know about or pursue their potential claims absent class procedures, such a state policy stands as an obstacle to the FAA’s objective of enforcing arbitration agreements according to their terms, and is preempted.”). See also Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 765 (2012) (observing that whether a class arbitration waiver amounts to a waiver of a plaintiff’s substantive rights and ability to vindicate statutory rights was not addressed in *Concepcion*); Marks, *supra* note 12, at 47 (noting that preemption of class action waivers limiting the availability of attorney’s fees to the point where it would affect the claimant ability to obtain legal representation, an issue not addressed in *Concepcion*, “appears to remain an open question”).

198. Several commentators have expressed concern that a broad interpretation of *Stolt-Nielsen* and *Concepcion* could chill vindication of statutory rights. See, e.g., Sternlight, *supra* note 8, at 704 (concluding that “if not legislatively limited, [*Concepcion*] will substantially harm consumers, employees, and perhaps others”); Cole, *supra* note 8, at 491 (“Following *Concepcion*, remedies for consumers with low value claims will no longer be available through the judicial system.”); Marks, *supra* note 12, at 48 (observing as an ironic potential consequence of *Concepcion* the possibility that by chilling claims to vindicate statutory rights, fewer overall disputes will be settled by arbitration, thus defeating the supposed purpose of the FAA to promote arbitration.); Schwartz, *supra* note 13, at 268 (contending that *Concepcion* “allows arbitration clauses to be used to create immunity from class actions and, therefore, from the many small-stakes consumer and employment claims that cannot feasibly be brought on an individual basis”).

the arbitration agreements to remove any hint that the drafter was agreeing to anything other than bilateral arbitration and, for good measure, (c) including a class arbitration waiver.<sup>199</sup> As a result, *Stolt-Nielsen* and *Concepcion* combined represent a significant roadblock to consumers or employees vindicating statutory rights involving small dollar amount claims. For such claims, the Court's pro-arbitration policy provides powerful economic interests with an opportunity through adhesion arbitration agreements to shield themselves from private enforcement of public law.<sup>200</sup> Ironically, the now-preempted *Discover Bank* rule found that a class action waiver in consumer adhesion agreements preventing class arbitration of small dollar value claims amounted to an exculpatory clause.<sup>201</sup> After *Stolt-Nielsen* and *Concepcion*, the adhesion arbitration agreement itself could amount to an exculpatory contract. That cannot be what Congress had in mind in 1925.

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199. See Cole, *supra* note 8, at 485 (footnotes omitted) (“A probable consequence of the decision is that every business with an arbitration clause will maintain silence on the issue of class action arbitration or, if its clause permits class action arbitration, will amend it so that it is silent on the issue. Although the Court did not decide ‘what contractual basis may support a finding that the parties agreed to authorize class-action arbitration,’ a logical interpretation of the opinion suggests that courts will not allow arbitrators to interpret silent clauses to permit class action arbitration.” (quoting *Stolt-Nielsen*, 130 S. Ct. at 1776 n.10)); Sternlight, *supra* note 8, at 718 (footnote omitted) (“In the near future, we can expect that even more companies will impose arbitral class action waivers as a means to insulate themselves from class actions because *Concepcion* has changed the calculus. Prior to *Concepcion*, some companies may have feared that inserting an arbitral class action waiver would backfire—leading them into lots of costly litigation over the viability of the clause and perhaps ultimately being held invalid by the courts. Now, however, *Concepcion* and its progeny are giving companies reason to believe that an arbitral class action waiver would be upheld, so it is likely that many more companies will choose to impose such waivers.”); cf. Drahozal & Rutledge, *supra* note 132, at 1160 (“[A]rbitrators almost unanimously filled gaps prior to *Stolt-Nielsen* by holding that class arbitration was permissible, and continue to do so in a significant proportion of cases even after *Stolt-Nielsen*.”) (footnote omitted), and Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 350 (2012) (noting that empirical evidence suggests that “many consumer arbitration clauses may not include class arbitration waivers”).

200. See, e.g., Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L. J. 326, 340 (2007) (lamenting “the lack of any sensitivity toward state laws or candid discussion of federalism in Supreme Court arbitration decisions”); Schwartz, *supra* note 13, at 268 (stating that *Concepcion* allows arbitration clauses to be used to create “immunity” from many employee and consumer claims “that cannot feasibly be brought on an individual basis”); Sternlight, *supra* note 8, at 704 (“By permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued.”).

201. See *supra* notes 160-62 and accompanying text.

C. *The Court's Anti-Federalist Pro-Arbitration Policy*

At its core, *Concepcion* reflects the Court's increasingly anti-federalist view of the FAA's pro-arbitration policy.<sup>202</sup> In *Concepcion*, the Court for the first time held that the FAA preempted the application of a state contract law rule that on its face did not target arbitration.<sup>203</sup> It nevertheless found California's *Discover Bank* rule preempted because, in the context of its view that California is more likely to hold arbitration contracts unconscionable than other contracts, the rule as applied disfavored arbitration.<sup>204</sup> It did so in the course of framing the issue as California attempting to condition the enforceability of the AT&T arbitration clause on the availability of class arbitration.<sup>205</sup> The Court concluded that

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202. See, e.g., Schwartz, *supra* note 34, at 5, 31 (criticizing *Southland* and its progeny as an “embarrassment to a Court whose majority is supposed to be leading a federalism revival” and for “treading to carelessly over substantial federalism values in the name of questionable national policies”); Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 288-89 (2007) (“[T]he Supreme Court’s FAA jurisprudence is a legal process nightmare, as by judicial fiat it has converted the relatively innocuous FAA statute into a sweeping barrier to access to the courts and a bludgeon of federal power.”); Stipanowich, *supra* note 167, at 379 (asserting that the *Concepcion* “majority’s insistence that the FAA prohibits limitations on state rules that enhance the complexity of arbitration are without precedent”); *id.* (addressing Justice Breyer’s dissent and its discussion of the majority’s “departure from bedrock principles of federalism”). See also Reuben, *supra* note 34, at 914 (commenting that “[f]rom a federalism perspective,” the *Southland* and *Gilmer* decisions are troubling when read together because “they essentially mean that states can do little to protect their citizens when franchisors, service providers, employers, and other institutional players choose to put arbitration provisions in their standard form contracts”); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1254-55 (2011) (concluding that the Supreme Court’s doctrinal test for determining when the FAA preempts state law has the effect of invalidating “practically any state law that happens to interfere with the enforceability of an arbitration agreement, unless the law is part of the common law of contracts. Each time the FAA preempts state law in this manner, the states’ role as laboratories in the great experiment of democracy diminishes. And the balance of power shifts away from local needs and interests toward a centralized government whose legislative expertise has traditionally laid elsewhere.”).

203. *Concepcion*, 131 S. Ct. at 1748 (stating that the § 2 savings clause does not “preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives”). Justice Breyer lamented the anti-federalist implications of *Concepcion* in his dissenting opinion, observing that:

By using the words “save upon such grounds as exist at law or in equity for the revocation of any contract,” Congress retained for the States an important role incident to agreements to arbitrate. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation’s laws. We have often expressed this idea in opinions that set forth presumptions. But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State’s action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California’s law, not to strike it down. We do not honor federalist principles in their breach.

*Id.* at 1762 (Breyer, J., dissenting) (citations omitted).

204. *Id.* at 1747 (majority opinion).

205. *Id.* at 1744, 1753.

“[r]equiring the availability of class-wide arbitration interferes with *fundamental attributes of arbitration* and thus creates a scheme inconsistent with the FAA.”<sup>206</sup> Because it concluded that doing so ““stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,”” the Court held that the *Discover Bank* rule was preempted.<sup>207</sup>

What was the “full purpose and objective of Congress” violated by the *Discover Bank* rule? It was to ensure enforcement of arbitration agreements “*so as to facilitate streamlined proceedings.*”<sup>208</sup> Notably, to illustrate its point the Court imagined hypothetical parties agreeing to arbitrate pursuant to the Federal Rules of Civil Procedure or a litigation-like discovery process.<sup>209</sup> The Court then asserted that these were types of procedures that “States may not superimpose on arbitration”—and concluded that a process employing such procedures “is *not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.*”<sup>210</sup>

Simply put, the Court created from whole-cloth a new, preemptive FAA “streamlined proceeding” paradigm. The FAA’s sparse language is silent about requiring “streamlined” arbitration procedures; in fact, the FAA is virtually silent about any aspect of arbitration procedure. The FAA speaks directly to the types of agreements with its scope (Sections 1 and 2)<sup>211</sup>, arbitration agreement enforcement (Sections 2 through 4)<sup>212</sup>, and arbitration award confirmation, vacatur, modification and appeal (Sections 9 through 11 and 16).<sup>213</sup> It does not purport to regulate pre-hearing or hearing processes.<sup>214</sup> Moreover, the FAA does not distinguish between real or imagined sub-species of favored and dis-favored arbitration on the basis of relative complexity or efficiency. Congress simply did not have a preemptive “streamlined procedure” paradigm in mind when it adopted the FAA in 1925.<sup>215</sup> The Court in *Concepcion* cites no authority to the

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206. *Id.* at 1748 (emphasis added). See Marks, *supra* note 12, at 45 (observing that the Court “left open the question of what these fundamental attributes [of arbitration] are”). See also *supra* note 152 and accompanying text.

207. *Concepcion*, 131 S. Ct. at 1753 (citation omitted).

208. *Id.* at 1748 (emphasis added).

209. *Id.* at 1747.

210. *Id.* at 1752-53 (emphasis added).

211. Federal Arbitration Act, 9 U.S.C. §§ 1, 2 (2006).

212. *Id.* §§ 2-4.

213. *Id.* §§ 9-11, 16.

214. The FAA does provide for court selection of arbitrators when the parties’ agreement fails to include a method for doing so and for subpoenaing witnesses to appear at the arbitration hearing. *Id.* §§ 5, 7.

215. See Marks, *supra* note 12, at 45 (raising questions about whether Congress was concerned about mandating “efficiency” or adopting a particular definition of “arbitration” when

contrary,<sup>216</sup> nor does it identify any strong preemptive federal interest in promoting only streamlined arbitration as opposed to other types of arbitration.

If read broadly,<sup>217</sup> *Concepcion* could create important anti-federalist arbitration law problems, as future courts find a malleable but preemptive streamlined arbitration paradigm available to fashion an increasingly expansive view of the FAA pro-arbitration policy. These problems are discussed below.

### 1. State Contract Law–Enforceability Defenses

The Section 2 savings clause was designed to preserve an important role for state contract law under the FAA by providing that arbitration agreements were valid, enforceable, and irrevocable “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>218</sup> The severability doctrine created a barrier to challenging the enforceability of arbitration clauses unless a challenge is directed specifically at the arbitration clause.<sup>219</sup> *Rent-A-Center* further limited the availability of state contract law defenses to arbitrability delegation clauses by using the

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it enacted the FAA in 1925); Strong, *supra* note 143, at 228 n.134 (asserting that the *Concepcion* majority’s use of the phrase “facilitate streamlined proceedings” is “problematic, since, as Justice Breyer noted, there is nothing in the FAA or in nearly a century’s worth of Supreme Court precedent to support that reading of the statute”). See also Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435, 540 (2011) (noting that a view that “arbitration under the FAA is ‘limited’ to the form that Congress ‘envisioned’ in 1925–might in fact suggest that even consensual class-wide proceedings were entirely outside the protection of the statute”) (citations omitted).

216. The Court does not cite to statutory language supporting this proposition. It does cite to FAA legislative history discussing how arbitration can be speedy and efficient and that the FAA would encourage arbitration by ensuring enforcement of arbitration agreements. *Concepcion*, 131 S. Ct. at 1749. This is a far cry from legislative history (let alone statutory language) showing that Congress intended to promote only “streamlined” arbitration and preempt state law requiring “non-streamlined” arbitration procedure.

217. Courts have used *Concepcion*’s “fundamental attributes of arbitration” standard as the basis for evaluating whether general applicable contract defenses have been applied in a way that “disfavors” arbitration and thus would be preempted by the FAA. See, e.g., *In re Checking Acct. Overdraft Litig.*, 685 F.3d 1269, 1279 (11th Cir. 2012) (concluding that South Carolina unconscionability law did not violate *Concepcion*’s fundamental attributes of arbitration or disfavoring arbitration standards).

218. 9 U.S.C. § 2 (2006). In *Concepcion*, Justice Thomas “reluctantly” joined the majority opinion in *Concepcion*, reasoning that the phrase “grounds for revocation” in Section 2 relate only to the making of the arbitration agreement and that the *Discover Bank* rule thus did not constitute a ground for “revocation” of a contract. *Concepcion*, 131 S. Ct. at 1754-56 (Thomas, J., concurring). See *supra* note 162 and accompanying text. Should a majority of the Court come to accept Justice Thomas’s interpretation of Section 2, it would further limit the role of state law in the Court’s evolving pro-arbitration policy jurisprudence.

219. See *supra* notes 100-29 and accompanying text.

severability doctrine to create a fictional arbitration agreement within an arbitration agreement.<sup>220</sup>

Unconscionability became the most likely defense based on generally applicable contract law that could survive application of the severability doctrine as a basis to challenge the enforceability of adhesion arbitration agreements. In recent years, some have contended that courts misuse unconscionability law to invalidate adhesion arbitration agreements.<sup>221</sup> Indeed, the Court in *Concepcion* cited to some of this scholarship.<sup>222</sup> But *Concepcion* went one step further, preempting the facially-neutral *Discover Bank* rule because of the California courts' perceived misapplication of the rule in a way that disfavored arbitration.<sup>223</sup> In doing so, the Court provided no guidance to help courts identify the preemptive "tipping point" for applying generally applicable contract enforcement defenses to arbitration agreements.

The mere fact that a contract defense is applied to invalidate an arbitration agreement, of course, begs the question. Whether or not a contract defense applies in a particular case always will depend on the context of the dispute. Frequent invalidation of adhesion retail installment television sales contracts because of unconscionable repayment terms under state law does not necessarily mean that the state disfavors agreements to sell televisions—only those with unconscionable sales terms. Unless the Court is prepared to retreat from its language in *Gilmer* that courts may apply Section 2 to invalidate arbitration agreements that are the product of overwhelming economic power, the FAA still leaves room for state unconscionability law to preclude enforcement of such agreements.

But after *Concepcion*, must courts now evaluate how often a state's contract law is used to invalidate adhesion arbitration contracts? If an

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220. See *supra* notes 115-29 and accompanying text.

221. See, e.g., Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (with A Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 219 n.127 (1998) (observing that although the unconscionability doctrine is categorized as part of contract law, it can, "when applied aggressively, become an (anti-contract) inalienability rule"); *id.* at 219 n.128 (endorsing the contractual approach to arbitration law over the "knowing and voluntary approach" because "the transaction costs of alienating the right to government adjudication are greater" and would "presumably result in fewer arbitration agreements than under the contractual approach"); Carboneau, *supra* note 17, at 241, 243-44 (discussing a "minority trend" in California and other states "to provide for greater rights protection" through such means as the unconscionability defense, *inter alia*, and noting that "[h]aving trained and experienced jurists act as arbitrators in the state should assuage the concerns of California judges about fairness and rights protection. The temptation to do what courts generally do must be resisted to preserve the advantages, utility, and functionality of arbitration. Any judicial intrusion compromises arbitration's benefits and essential attributes—operational efficiency and functionality.").

222. See *supra* note 156 and accompanying text.

223. *Concepcion*, 131 S. Ct. at 1753.

adhesion arbitration agreement limits discovery, evidentiary presentation or available relief, must a court evaluate whether the arbitration process that would result from severing these unconscionable provisions is still streamlined enough to constitute “arbitration” within the meaning of the FAA under *Concepcion*? Finally, if after *Concepcion* the FAA can preempt generally applicable state contract law defenses to enforcing arbitration agreements, what fills the vacuum? Must a court apply what it imagines to be the non-preempted version of the state law doctrine? Must the court create federal contract common law to fill the void in Section 2 left by preempting the state law defense? Or would there be no defense at all to enforcing an adhesion arbitration agreement if the court determines that the generally applicable state law has been applied over time in a way that violates the FAA’s pro-arbitration policy? In short, the Court’s evolving view of the FAA diminishes the role for state law contemplated by Section 2—an unfortunate anti-federalist development.<sup>224</sup>

## 2. State Contract Law—Contract Interpretation

For decades, the Court’s arbitration law jurisprudence recognized that the interpretation of arbitration agreement language was a matter of state

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224. See Sternlight, *supra* note 8, at 707 (arguing that *Concepcion* “tramples” on the traditional state role to establish rules on unconscionability); Lawrence A. Cunningham, *Rhetoric v. Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 144 (2012) (footnote omitted) (“The [*Concepcion*] Court could not accept the validity of California contract law because it did not advance its favored national policy. Justice Scalia gave a new definition of that national policy, again combining two conflicting ideas while pretending they are in harmony: ‘to ensure the enforcement of arbitration agreements according to their terms, so as to facilitate informal, streamlined proceedings.’ The opinion fights tirelessly but unsuccessfully to prove that it has not made up this new version of the national policy. It struggles strenuously but unsuccessfully to persuade that there is no conflict between its devotion to arbitration and basic principles of Anglo-American contract law.” (quoting *Concepcion*, 131 S. Ct. at 1743)). See also *supra* note 155. Some courts have reasoned that in *Concepcion*, the Supreme Court recognized that generally applicable contract defenses such as unconscionability, if applied impartially, remain valid under FAA § 2. See *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1276-77 (11th Cir. 2012) (holding that South Carolina’s unconscionability doctrine does not interfere with fundamental attributes of arbitration as identified in *Concepcion* and is among the generally applicable contract defenses that apply to arbitration agreements under the savings clause of FAA § 2); *Trompeter v. Ally Fin., Inc.*, C 12-00392 CW, 2012 WL 1980894, at \* 8 (N.D. Cal. June 1, 2012) (“*Concepcion* does not preclude this Court’s finding that the arbitration agreement in the present case is unconscionable [under California law] because the finding does not undermine the fundamental attributes of arbitration as an alternative form of dispute resolution that is neutral, speedy, economical and informal.”); *Cisneros v. Am. Gen. Fin. Services, Inc.* No. C 11-02869 CRB, 2012 WL 3025913, at \* 5 (N.D. Cal. July 24, 2012) (holding that post-*Concepcion* the “standardized, take it or leave it nature of the Account Agreement” containing a mandatory arbitration clause established “some degree of procedural unconscionability”).

contract law, “with due regard . . . given to the federal policy favoring arbitration.”<sup>225</sup> Left unclear, however, was the point at which state law must yield to federal rules of contractual interpretation as a matter of substantive federal arbitration law. The Court addressed this issue in *Stolt-Nielsen*,<sup>226</sup> but in so doing created more questions than it answered.

In *Stolt-Nielsen*, the Court observed that “[w]hile 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.’”<sup>227</sup> The Court did not catalogue these “certain rules of fundamental importance,” nor did it explain how they could be identified by lower courts. It did, however, announce one of them as dispositive in *Stolt-Nielsen*: that as a matter of substantive federal law under the FAA an arbitration agreement may not be interpreted to provide that arbitration proceed on a class-wide basis “unless there is a contractual basis for concluding that the party *agreed* to do so.”<sup>228</sup>

The Court did not further explain the basis for its conclusion that as a matter of federal law, a “silent” agreement could not be interpreted to permit class arbitration.<sup>229</sup> Apart, therefore, from attempting to anticipate where the Court will take its view of the pro-arbitration policy, courts have little guidance as to the nature or substance of these unspecified “rules of fundamental importance” that displace (or preempt) state law contract interpretation rules.<sup>230</sup> Ironically, by questioning whether arbitrators may

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225. *Volt Info. Servs., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989). See George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT’L ARB. 551, 562 n. 37 (2011) (noting that “[i]n *Stolt-Nielsen*, the Court effectively admitted that contract interpretation was subject to state law”) (citations omitted); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 772 (2012) (“A fundamental principle underlying the FAA is to respect freedom of contract . . . [and] Congress, through the FAA’s savings clause, retained a role for states to hold arbitration contracts to the standards of generally applicable state contract law, including defenses applicable to any contract, such as fraud, duress, unconscionability, or contrariness to public policy.”).

226. *Stolt-Nielsen*, 130 S. Ct. at 1773.

227. *Id.* (citations omitted).

228. *Id.* at 1775 (emphasis in original). See *supra* note 152 and accompanying text.

229. That is, beyond the Court’s observation that class arbitration is very different from bilateral arbitration. *Concepcion*, 131 S. Ct. at 1751-53.

230. See *Drahozal & Rutledge*, *supra* note 132, at 1152-53 (noting that *Stolt-Nielsen* left unanswered the scope of state arbitration law’s remaining capacity to serve as a gap filler and the related scope of FAA preemption of state contract law). See also Weston, *supra* note 225, at 791 (“The ripple effects of *Concepcion* and bans on class proceedings are not fully known.”); *id.* at 781 (“In ruling that the FAA preempts state law that would otherwise invalidate class action waivers, does *Concepcion* foreclose collective action by virtue of the arbitration contract? What is left for the states and the savings clause provision for generally applicable state-law defenses serving as a check on arbitration agreements under section 2? Does *Concepcion* apply where a

create gap-filling rules of contractual interpretation like a common law court,<sup>231</sup> *Stolt-Nielsen* and *Concepcion* combined could replace arbitrator discretion and state law contract interpretation rules with federal common law rules developed on an ad hoc basis, particularly regarding pre-hearing procedural issues.

### 3. State Law Judicial Review of Arbitration Awards

The Court in *Hall Street* held that Section 10(a) provided the exclusive grounds for vacating an award under the FAA.<sup>232</sup> But the Court went out of its way to note that it was not addressing whether the FAA precluded “more searching review under state law.”<sup>233</sup> Since *Hall Street*, courts have been divided about whether the FAA permits judicial review of arbitration awards for errors of law under state arbitration law.<sup>234</sup>

*Concepcion*, however, has increased the possibility that the Court would find state law allowing more searching judicial review preempted

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class waiver denies parties the ability to vindicate their rights?”); Bermann, *supra* note 225, at 565 (observing that “*Rent-A-Center* does not foreclose all possibility of defeating a delegation to arbitrators of authority to determine the conscionability or unconscionability of an agreement to arbitrate and the majority opinion in *Stolt-Nielsen* did not shut the door entirely on reading contracts as authorizing class arbitration even when containing no express language to that effect”); *id.* at 572 (noting that, “[o]n the one hand, the Court is pursuing a pro-arbitration philosophy at the expense not only of consumer welfare, but also of some of U.S. arbitration law’s most basic understandings. On the other hand, consumer advocates respond in kind, resisting the jurisprudence of the Supreme Court majority, if need be through argumentation and advocacy that is frankly no less strained than the majority’s jurisprudence itself.”). Absent clearer guidance, courts and arbitrators may attempt to limit the reach of *Stolt-Nielsen* to its unique facts. *See, e.g.*, *Rame, LLC v. Popovich*, No. 12 CIV. 1684, 2012 WL 2719159 at \*5-9 (S.D.N.Y. July 9, 2012) (concluding that arbitrator does not exceed power by ordering class arbitration based on interpretation of an implied agreement under state and federal law and distinguishing *Stolt-Nielsen* on the ground that the parties had not stipulated that the arbitration agreement was “silent” about class arbitration); *Yahoo, Inc. v. Iverson*, 836 F. Supp.2d 1007, 1010-1013 (N.D. Cal. 2011) (denying motion to compel individual arbitration under arbitration agreement that did not expressly address class arbitration but allowing arbitrator to decide availability of class arbitration in the absence of stipulation by parties like in *Stolt-Nielsen* that agreement was “silent” on the issue); *cf., e.g.*, *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630, 642, 644 (5th Cir. 2012) (holding that although parties did not stipulate as in *Stolt-Nielsen* that agreement was “silent” on the issue, arbitrator lacked contractual basis to find agreement for class arbitration and thus exceeded powers where agreement at most showed that parties had not precluded class arbitration).

231. *Stolt-Nielsen*, 130 S. Ct. at 1769 (rejecting decision of arbitration panel that “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”). *See supra* note 155.

232. *Hall St.*, 552 U.S. at 584. *See supra* notes 87-96 and accompanying text.

233. *Hall St.*, 552 U.S. at 590. The Court described the availability of such review as “arguable.” *Id.*

234. *See supra* note 90 and accompanying text.

under the FAA pro-arbitration policy. First, *Hall Street* described FAA Sections 9 through 11 “as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightway.”<sup>235</sup> Second, judicial review of arbitral awards for errors of law or insufficient evidence to support factual findings could prolong the arbitration process by extending the time necessary to conduct this more expansive review and, potentially, conducting further proceedings if an award is vacated because of factual or legal error. State law providing for expansive review thus could be viewed as inconsistent with streamlined arbitration proceedings and, under a broad reading of *Concepcion*, preempted for presenting an obstacle to accomplishing the “full purposes and objectives”<sup>236</sup> of the FAA’s pro-arbitration policy.<sup>237</sup>

#### 4. State Regulation of Arbitration Procedure

For years, it had been generally assumed that states could regulate arbitration procedure.<sup>238</sup> For example, in its Prefatory Note to the Revised

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235. *Hall St.*, 552 U.S. at 588. The Court cautioned that reading Sections 9-11 to permit more expansive review under the FAA would “[open] the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,’ and bring arbitration theory to grief in post-arbitration process.” *Id.* (internal citations omitted). Section 10(a) on its face, however, expressly applies only to federal district courts, not state courts. 9 U.S.C. § 10(a).

236. *Concepcion*, 131 S. Ct. at 1753.

237. See James M. Gaitis, *Clearing the Air on “Manifest Disregard” and Choice of Law in Commercial Arbitration: A Reconciliation of Wilko, Hall Street, and Stolt-Nielsen*, 22 AM. REV. INT’L ARB. 21, 33 (2011) (footnote omitted) (noting that U.S. Supreme Court precedent shows that “awards should only be vacated on § 10(a)(4) grounds when the award fails to ‘draw its essence from the contract’ or when the ‘arbitrator strays from the interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice’” (quoting *United Paperworkers Int’l Union v. Misco*, 484 U.S. 29, 30 (1987) and *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767 (2010))); *id.* (stating that the Supreme Court’s interpretation of § 10(a)(4) is consistent with the proposition that “[t]he policy concerns requiring deference to the arbitrator’s decision on the merits are *equally applicable* when reviewing the arbitrator’s interpretation of the submission agreement”) (emphasis in original, internal citations omitted); see also REV. UNIF. ARBITRATION ACT prefatory note, iii (2000) (commenting that “the Supreme Court’s unequivocal stand to date as to the preemptive effect of the FAA provides strong reason to believe that a similar result will obtain with regard to Section 10(a) grounds for vacatur. If it does, and if the Supreme Court eventually determines that the Section 10(a) standards are the sole grounds for vacatur of commercial arbitration awards, FAA preemption of conflicting state law with regard to the ‘back end’ issues of vacatur (and confirmation and modification) would be certain”). But see Reuben, *supra* note 202, at 274-76, 313 (opposing contractual expansion of judicial review as inconsistent with core arbitration process values).

238. See generally Schwartz, *supra* note 34, at 8 (“The historical record clearly shows that the FAA was intended to be a procedural statute for the federal courts, that it was not intended to

Uniform Arbitration Act, the National Conference of Commissioners on Uniform State Laws commented: “It is likely that matters not addressed in the FAA are also open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], and arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption.”<sup>239</sup> After *Concepcion*, however, this assumption is now open to question.

Curiously, the Court in *Concepcion* made a point of identifying arbitration “pursuant to the Federal Rules of Civil Procedure” or “pursuant to a discovery process rivaling that of litigation” as examples of a process that “is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.”<sup>240</sup> Presumably, the Court objected to these hypothetical state law procedural requirements as it did to class arbitration, because they would be deemed to interfere with “fundamental attributes of arbitration” and thus be inconsistent with the FAA’s “pro-arbitration policy.”<sup>241</sup>

Perhaps the Court employed these non-class arbitration procedural examples (which had nothing to do with the facts in *Concepcion*) for rhetorical flourish. Or perhaps they will serve as the backdrop for a subsequent decision preempting state regulation of bilateral arbitration procedure if it interferes with the pro-arbitration policy’s new-found “streamlined process” objective. For example, a state could decide to protect consumers required to arbitrate claims under an adhesion arbitration agreement by requiring minimum discovery rights in consumer arbitration. Similarly, a state could decide to require judicial review for errors of law with regard to consumer arbitration statutory claim awards. Under a broad reading of *Concepcion*, these state laws would be subject to a preemption challenge as creating an inefficient process that is not “arbitration” within the meaning of the FAA and thus an obstacle to carrying out the “streamlined procedure” component of the pro-arbitration policy. The preemptive streamlined arbitration paradigm suggested by *Concepcion* thus raises serious questions about the future role that state law may play in regulating arbitration procedure.

The Supreme Court’s arbitration jurisprudence has created a robust, preemptive federal pro-arbitration policy. That policy, however, is largely

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preempt state law, and that it was designed to reverse the ‘ouster doctrine’ but otherwise preserve all applicable state contract law.”) (citations omitted).

239. REV. UNIF. ARBITRATION ACT prefatory note, v.

240. *Concepcion*, 131 S. Ct. at 1752-53.

241. *Id.* at 1748.

untethered to the language of the FAA. Instead, it is essentially a creation of the Court's vision of a pro-arbitration policy and a consequence of the Court building on its own precedent fashioned largely from efforts to fill in actual or perceived FAA interstices.<sup>242</sup> The current expansive interpretation of the federal pro-arbitration policy has raised a series of important doctrinal and normative questions, including those discussed above. The issue, then, is how to address these concerns. That is the subject of the next Part of this Article.

#### IV. RESPONDING TO THE SUPREME COURT'S "PRO-ARBITRATION POLICY" JURISPRUDENCE

It appears highly unlikely that the Court as currently constituted will revisit its broad interpretation of the FAA and the federal pro-arbitration policy. First, its recent decisions suggest that the current Court majority is having no second thoughts about its arbitration decisions.<sup>243</sup> Second, even if it did, absent wholesale overruling of the last fifty years of the Court's FAA decisions, the fact remains that the federal pro-arbitration policy today is more a creature of federal common law rather than a focused interpretation of specific statutory language. Regardless, it is the responsibility of Congress, not the courts, to make federal arbitration policy.<sup>244</sup>

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242. See *supra* notes 15 and 165 and accompanying text; Schwartz, *supra* note 34, at 8, 29-30 (arguing that how *Southland* created its preemptive effect out of the Court's view of arbitration policy rather than statutory language); Reuben, *supra* note 202, at 285 (concluding that the primary purpose of the FAA was to end the ouster doctrine); Marks, *supra* note 12, at 50 ("If the Court's focus on arbitration as it existed in 1925 is the hallmark of the 'fundamental attributes of arbitration' approach, then we must engage in a historical guessing game as to what Congress envisioned with regard to these issues."); Andrew Powell & Richard A. Bales, *Ethical Problems in Class Arbitration*, 2011 J. DISP. RESOL. 309, 317 (2011) (commenting that the *Concepcion* majority "found that the Discover Bank rule has the effect of discouraging arbitration by increasing the complexity of the dispute resolution process and thereby making arbitration less attractive to the AT&Ts of the world. The problem with this argument, as the dissent points out, is that it is inconsistent with the text of the statute.").

243. See Schwartz, *supra* note 13, at 270 (arguing that in light of *Concepcion* it is necessary to turn to the political branches to correct the state of domestic arbitration law, and referencing the proposed Arbitration Fairness Act or regulation of consumer arbitration by the Consumer Financial Protection Bureau). It is possible, of course, that lower courts may embrace a narrow interpretation of the Supreme Court's recent arbitration decisions to minimize their anti-federalist and pro-adhesion arbitration effects. See, e.g., Sternlight, *supra* note 8, at 708 (discussing ways that courts could narrowly interpret *Concepcion*); Marks, *supra* note 12, at 43 (noting two views of *Concepcion*, one limited to the *Discover Bank* factual setting and the other broadly embracing the "fundamental attributes of arbitration" preemptive view).

244. See Margaret L. Moses, *Arbitration Law: Who's in Charge?* 40 SETON HALL L. REV. 147, 189 (2010) ("It is time for Congress to reassert itself as the proper, constitutionally empowered source of arbitration laws and policies, and to take steps to protect the legislation it

In recent years, a wide range of potential legislative responses have been offered to address the current state of domestic arbitration law in general, and the Court's expansive interpretation of the federal pro-arbitration policy in particular.<sup>245</sup> This Part of the Article reviews some of these suggestions. It then proposes a possible legislative response to the Court's anti-federalist application of the pro-arbitration policy to adhesion consumer and employment arbitration contracts.

#### A. *The Arbitration Fairness Act*

In recent years, the Arbitration Fairness Act (AFA)<sup>246</sup> has been introduced in Congress as a way to eliminate adhesion arbitration and preserve class action litigation for the vindication of statutory rights.<sup>247</sup> The

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has enacted.”); Reuben, *supra* note 202, at 309-10 (concluding that Congress should address through legislation the problems of mandatory arbitration created by the Supreme Court's interpretation of the FAA).

245. See, e.g., Resnik, *supra* note 15, at 165 (“Since the 1990s, Congress has considered a series of statutory proposals to respond to the Court's expansion of the Federal Arbitration Act.”); Thomas B. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1333 and App. A (2011) (describing 139 bills regarding mandatory arbitration introduced in Congress between 1995 and 2010); Theodore J. St. Antoine, *Mandatory Arbitration: Why it's Better than it Looks*, 41 U. MICH. J. L. REFORM 783, 795-96 (2008) (arguing that mandatory arbitration is a practical dispute resolution method for employees, but that due process standards must be assured in employment arbitration). There is substantial scholarly support for components of a relatively expansive pro-arbitration policy. For example, some scholars argue that pre-dispute arbitration agreements serve important public policy objectives by promoting access to justice, reducing adjudication transaction costs and delay, and promoting flexible, informal dispute resolution processes. See, e.g., Carbonneau, *supra* note 17, at 262 (“Arbitration provides for reasonable adjudication and rights protection; they are not those supplied by courts . . . The only means of providing equivalent rights is to judicialize arbitration which then robs arbitration of many of its procedural advantages.”); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89-90 (2001) (observing that if arbitration lowers dispute resolution costs, then it also lowers consumer prices “because competition forces businesses to pass their cost-savings on to consumer”), and *id.* at 99 n.62 (quoting Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 KAN. J.L. & PUB. POL'Y 578, 587-88 (2000) (commenting that “courts that decide not to enforce arbitration agreements, for whatever reason, perhaps justifiably, can impose costs on the parties. Courts can't just hold something unconscionable without consequences. Given that sophisticated parties find these arbitration agreements beneficial, it seems to me that there is evidence that they may be beneficial to unsophisticated parties as well.”)).

246. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009).

247. See Sternlight, *supra* note 8, at 726 (noting that the AFA would counteract some of the effects of *Concepcion*); Schwartz, *supra* note 13, at 240, 243 (supporting adoption of AFA and arguing that FAA was not designed to enforce arbitration agreements in one-sided relationships). *But see, e.g.,* Drahozal & Rutledge, *supra* note 132, at 1170 (arguing that the AFA would be too great an inroad into contractual freedom); Cole, *supra* note 8, at 461 (footnote omitted) (“The AFA misses the mark primarily because it overstates the case against arbitration, rendering the

AFA would amend the FAA<sup>248</sup> by providing that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.”<sup>249</sup> It would also overturn the severability doctrine as to pre-dispute arbitration agreements within its scope by requiring that a court rather than an arbitrator resolve disputes about the applicability of the AFA to a particular arbitration agreement and “the validity and enforceability of an agreement to which [the AFA] applies” whether or not the objecting party “challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.”<sup>250</sup>

The AFA would effectively eliminate adhesion arbitration by invalidating pre-dispute arbitration agreements in almost every setting in which an individual is required to arbitrate disputes with another contracting party possessing greater bargaining power as a condition of doing business with that party.<sup>251</sup> It would also eliminate from arbitrability decision-making the institutional problem of perceived conflicts of interest that can arise when an arbitrator is asked to decide issues relating to the existence or extent of her own jurisdiction.

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legislation unpalatable to corporate and business interests, as well as many consumer and employee advocates.”); Amy J. Schmitz, *Regulation Rash? Questioning the AFA’s Approach for Protecting Arbitration Fairness*, 28 No. 10 BANKING & FIN. SERVICES POL’Y REP. 16, 17 (2009) (cautioning that “the AFA is fraught with problems” and a “more measured approach for fostering arbitration fairness is warranted”).

248. Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2(1) (2011).

249. *Id.* § 402(a). AFA Section 401 includes the following relevant definitions:

(1) the term “civil rights dispute” means a dispute— (A) arising under—(i) the Constitution of the United States or the constitution of a State; or (ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting, or program funded or conducted by the Federal Government or State government, including any statute enforced by the Civil Rights Division of the Department of Justice and any statute enumerated in section 62(e) of the Internal Revenue Code of 1986 (relating to unlawful discrimination); and (B) in which at least 1 party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual; (2) the term “consumer dispute” means a dispute between an individual who seeks or acquires real or personal property, services (including services relating to securities and other investments), money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit; (3) the term “employment dispute” means a dispute between an employer and employee arising out of the relationship of employer and employee as defined in section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203); and (4) the term “predispute arbitration agreement” means any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement.

250. *Id.* at § 402(b)(1).

251. The AFA applies to adhesion pre-dispute arbitration agreements involving individuals. It does not cover adhesion arbitration agreements involving other contracting parties (e.g., small businesses) of unequal bargaining power. *See supra* note 237 and accompanying text.

But, while well-intentioned, the AFA overreaches in its effort to correct important flaws in current domestic arbitration law.<sup>252</sup> First, the AFA shares the same anti-federalist flaw as the Supreme Court's recent arbitration jurisprudence. The AFA would simply invalidate pre-dispute consumer, employment and civil rights dispute arbitration agreements, leaving no room for states to permit pre-dispute arbitration agreements governing these disputes and regulate them as appropriate.

Second, the AFA does not distinguish between adhesion arbitration and voluntary pre-dispute arbitration agreements.<sup>253</sup> It applies to "any agreement to arbitrate a dispute that had not yet arisen at the time of the making of the agreement."<sup>254</sup> It thus would sweep away pre-dispute agreements that were negotiated at arm's length, including those for which the individual received independent and meaningful consideration, and agreements that contain sufficient procedural protections to assure a fair process.<sup>255</sup>

Third, by invalidating all pre-dispute arbitration agreements, the AFA raises significant access to justice concerns by potentially foreclosing the availability of a faster, less expensive, and more informal dispute resolution

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252. See, e.g., Cole, *supra* note 8, at 461, 491-97 (reviewing objections to the AFA, including over-breadth, potential disenfranchisement of one-shot players, and the availability of due process procedural requirements that could address many concerns with adhesion arbitration contracts).

253. See Jyotin Hamid & Emily J. Mathieu, *The Arbitration Fairness Act: Performing Surgery with a Hatchet as Opposed to a Scalpel*, 74 ALB. L. REV. 769, 784-85 (2011) (observing that the AFA would invalidate all employment, consumer and civil rights pre-dispute arbitration agreements, not just adhesion arbitration agreements). Some scholars have proposed amending the FAA to prohibit adhesion arbitration agreements and require that pre-dispute arbitration agreements be based on meaningful, voluntary assent. See, e.g., Reuben, *supra* note 202, at 309-10 (proposing amendment to FAA requiring clear and unmistakable voluntary assent to arbitrate); Carboneau, *supra* note 17, at 267 (noting that much of the hesitancy to accept the Court's recent arbitration jurisprudence arises from the "adhesionary character of some arbitration agreements" and proposing that employment contracts containing arbitration clauses should be accompanied by a special notice explaining the significance of arbitration and its impact on statutory rights). On the other hand, some scholars defend adhesion arbitration agreements as benefiting adhering parties. See, e.g., Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM ARB. 251, 292 (2006) (concluding that "the general enforcement of adhesive arbitration agreements benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties").

254. Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 401(4) (2011); see *supra* note 237 and accompanying text.

255. See Drahozal & Rutledge, *supra* note 132, at 1170 (observing, *inter alia*, that the AFA represents too great an inroad into contractual freedom and blurs together pre-dispute arbitration agreements in negotiated, highly-paid executive contracts and adhesive employment contracts, and arguing further that better empirical data is necessary to support the AFA's underlying assumptions).

process than court litigation for employees and consumers.<sup>256</sup> Some studies support the proposition that arbitration conducted pursuant to a fairly constructed pre-dispute arbitration system required under an adhesion contract can result in positive outcomes for contracting parties with lesser bargaining power.<sup>257</sup> It is far from clear that contracting parties with greater bargaining power would agree to arbitrate a dispute after it has arisen if they conclude in the context of a ripe dispute that their superior access to resources could prove advantageous (if not dispositive) should an employee or consumer be required to resolve the dispute in court.

### *B. Barring Class Action Waivers*

Some scholars have proposed as an alternative to the AFA that Congress amend the FAA to prohibit the use of arbitration clauses to bar class actions in employment, consumer or other adhesion contracts containing arbitration clauses.<sup>258</sup> Such a ban on class arbitration waivers would eliminate the practice of including arbitration agreements in adhesion contracts for the purpose of avoiding class-wide litigation. It would also make it more likely that arbitration could be a reasonable substitute for a judicial forum for the vindication of statutory claims, particularly as to small dollar value claims. In the alternative, it could result in companies removing arbitration agreements from adhesion contracts if the sole or primary reason for including them had been avoiding class adjudication proceedings.

A ban on class arbitration waivers thus would address some of the more significant problems created by the Court's expansive view of the FAA's pro-arbitration policy, but not all of them. First, an amendment to the FAA banning class waivers would otherwise leave consumer and employment contract arbitration clauses subject to the Court's FAA jurisprudence. It would not affect the enforceability of adhesion arbitration agreements. Moreover, it would have no impact outside of class arbitration

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256. See, e.g., Cole, *supra* note 8, at 495-497 (reviewing access to justice objections to the AFA).

257. See, e.g., *id.* at 469-71 (summarizing studies showing that pre-dispute arbitration agreements can provide consumers with a fair and affordable dispute resolution process).

258. See, e.g., *id.* at 498-505 (proposing amendment to FAA invalidating consumer arbitration agreements to the extent that they preclude the consumer from accessing the court or arbitral system to participate in a class action within the meaning of Federal Rule of Civil Procedure 23); Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1098 (2009) (proposing amendment to FAA requiring that all class actions be litigated); Sternlight, *supra* note 8, at 726 (proposing as an alternative to the AFA that Congress amend the FAA to provide that arbitration clauses cannot be used to bar class actions).

availability on the increasingly anti-federalist tenor of the Court's pro-arbitration policy decisions, including the newly discovered "streamlined arbitration" FAA preemptive objective, the *Rent-A-Center* application of the severability doctrine to arbitrability delegation clauses, and the potential limitation on state law judicial review of statutory claim or other awards.

In short, a number of proposals have been proffered in recent years to address the at times ill-fitting intersection of employment and consumer claims with the Supreme Court's expansive, anti-federalist interpretation of the FAA's pro-arbitration policy.<sup>259</sup> Some of these proposals would simply

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259. Several scholars have proposed creative asymmetrical arbitration legislative proposals. For example, Professor Jean Sternlight has described a legislative alternative that would require binding arbitration for corporate employment disputes yet allow the employee (but not the corporation) to opt out of arbitration. Jean R. Sternlight, *In Defense of Mandatory Binding Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 84-85 (2007). Professor Sternlight stopped short of advocating for such legislation because of an overriding concern that arbitration should be truly voluntary, but distinguished between government mandating arbitration on companies and companies mandating arbitration for employees. *Id.* at 105-06. Professor Suzette Malveaux has proposed one-way binding arbitration of employment disputes, allowing the employee (but not the employer) to reject an arbitration award and obtain a trial *de novo* of her claim. Suzette M. Malveaux, *Is It the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 78 (2009). Jyotin Hamid and Emily J. Mathieu have suggested allowing judicial review of arbitral decisions at the election of the employee but not the employer. Hamid & Mathieu, *supra* note 253, at 790. See Carbonneau, *supra* note 17, at 268 (proposing that "[w]hen employment and consumer transactions involve the application of statutory rights, courts should be authorized to review the arbitrator's disposition of regulatory law matters"); Davis, *supra* note 81, at 127 (proposing that "federal courts apply plenary review for errors of law when either federal statutory rights or federal public policy is at stake"). Before *Hall Street* was decided, there was a robust debate among scholars about whether the Court or Congress should expand the scope of permissible judicial review under the FAA. Compare, e.g., Christopher Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 247 (2007) (arguing for an amendment to the FAA that would "permit a court to vacate an award for manifest disregard of the law only if (1) the arbitrators state in a written award that they are disregarding the law, or (2) the record shows that counsel for the prevailing party urged the arbitrators to disregard the law"), with Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 218 (2007) (proposing that parties should be allowed to contractually expand judicial review but "[e]xpansion of judicial review should only be permissible if the parties' proposed alterations of the standard review do not threaten the institutional integrity of the court."), Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 267 (2007) ("To the extent possible, arbitration awards should receive appellate review as searching as that applied to court cases of similar magnitude and complexity."), *id.* (further noting that "arbitration results under appellate scrutiny would be subject to a clearly erroneous review of the factual determinations of the arbitrator, arbitrator rulings on conduct of the hearing would be reviewed under an abuse of discretion standard, and the arbitrator's pure legal rulings would be subject to *de novo* review"), Reuben, *supra* note 202, at 294-95 (opposing full judicial review of arbitration awards as undermining finality, relative informality and non-law norms without which "you simply do not have the kind of commercial arbitration that Congress so strongly endorsed in the Federal Arbitration Act"), and Burch, *supra* note 245, at 1349-54 (proposing "a pragmatic regulatory approach" to mandatory arbitration allowing consumers, employees and franchisees to opt out of

invalidate pre-dispute employment and consumer arbitration agreements; others would make adhesion arbitration more attractive under the Court's FAA jurisprudence. All of these proposals present political challenges that could make them difficult to enact. But another approach merits consideration that would make arbitration under pre-dispute employment and consumer arbitration agreements available but insulate it from the problems created by the Court's pro-arbitration policy.

*C. A Federalist Alternative Proposal: Returning Regulation of Consumer and Employment Arbitration Agreements to the States*

Congress should amend the FAA to remove adhesion pre-dispute employment and consumer arbitration agreements from the scope of the statute.<sup>260</sup> Any dispute about whether an adhesion employment or consumer arbitration agreement falls within the scope of this proposed amendment would be decided as a matter of federal law<sup>261</sup> by a court, not by an arbitrator. This proposal would turn the AFA on its head and differ from it in one critical respect. Rather than invalidate all such pre-dispute

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arbitration, requiring new arbitrator disclosure standards, imposing data-collection requirements on arbitration providers, prohibiting class action waivers, remedy limitations and shorter statutes of limitations, and expanding judicial review of awards for non-drafting parties under the manifest disregard standard). See also Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509 (2009) (proposing series of post-*Hall Street* state court review of arbitration award reforms, including contract-based standards for judicial review, professional regulation of arbitrators, arbitrator disclosure standards, evident partiality (including structural arbitrator bias), public policy, and manifest disregard as meaningful bases for vacatur, serious protection of statutory rights, enhanced disclosure standards and access to arbitrator databases, and appeal of vacated awards prior to re-arbitration).

260. This proposal potentially could be expanded to include all adhesion arbitration agreements regardless of context, including agreements between businesses of unequal bargaining power. Whether this proposal should include pre-dispute consumer arbitration could be revisited once it is determined whether and how the Consumer Financial Protection Bureau chooses to regulate consumer arbitration and how the courts evaluate the intersection of these regulations with the Supreme Court's FAA jurisprudence. See 12 U.S.C. § 5518(b):

The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.

261. The amendment would define the types of agreements falling within the scope of the proposed FAA exclusion, e.g., a pre-dispute arbitration agreement within an adhesion consumer contract. Whether a particular agreement fell within the scope of the proposed amendment would be determined by a court as a question of federal law. If it fell outside the scope of FAA as amended, enforcement of the arbitration agreement then would be determined under applicable state contract and arbitration law.

arbitration agreements, it would leave their regulation to the states.<sup>262</sup> Doing so would promote federalism values and allow the states to serve as more accountable laboratories for the evolution of non-commercial arbitration involving the types of disputes that can affect all segments of society.<sup>263</sup> This proposal would promote several doctrinal and public policy objectives.<sup>264</sup>

First, it would eliminate the *Concepcion* “streamlined arbitration” preemptive paradigm from employment and consumer arbitration. States would be free to adopt arbitration procedural safeguards, such as expanded judicial review or minimum discovery rights for statutory claims.

Second, it would leave to the states whether to permit class arbitration of employment and consumer claims or to prohibit class action waivers. The limits on class arbitration imposed by *Stolt-Nielsen* and *Concepcion* would not apply to employment and consumer arbitration agreements because these agreements now would fall outside the FAA.<sup>265</sup>

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262. Cf. e.g., Yelnosky, *supra* note 197, at 770 (proposing a fully federalized FAA under which the Section 2 savings clause would apply federal common law and leave no role for state law in savings clause litigation).

263. See Schwartz, *supra* note 34, at 11 (questioning *Southland* and federal preemption of state arbitration law and advocating importance of federalist values in arbitration policy); Stone, *supra* note 17, at 995 (“The courts’ expansive interpretation of the FAA and their willingness to delegate the adjudication of statutory rights to private arbitration may be reasonable in the context of early twentieth century trade associations, but it is problematic when transposed to disputes between wholly unrelated individuals or individuals whose business dealings are on an ad hoc, one-shot basis.”); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis and A Proposal for Change*, 53 ALA. L. REV. 789, 890 (2002) (urging that the Court in its arbitration decisions “must enforce congressional intent, especially the intent that the FAA should not be applicable in state courts, an intent that would allow states to enact consumer protection laws, like in England, that exempt consumer goods contracts from arbitration and that otherwise protect weaker consumers from powerful sellers”).

264. This proposal also may have a greater likelihood of passage than other recent proposals to amend the FAA by its emphasis on federalism and allowing states to regulate the enforceability of employment and consumer adhesion contract arbitration clauses.

265. Class arbitration is not necessarily a desirable end in itself. Indeed, *Concepcion* identifies legitimate questions about the suitability of arbitration to adjudicate class-wide claims and bind absent parties. *Concepcion*, 131 S. Ct. at 1751-52. See, e.g., David S. Clancy & Mathew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History*, 63 BUS. LAW. 55, 78 (2007) (“Counsel, courts, and Congress all should be addressing the fundamental question of whether class arbitration should exist at all—should this uninvited guest stay, or should it go? As to what this means for day-to-day litigation, counsel opposing class arbitration should certainly avoid any explicit or implicit concession that class arbitration is permissible, and they should consider whether they and their clients want to argue explicitly that class arbitration is not permissible.”); Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711, 1778 (2006) (examining the role of the court in class arbitration and concluding that “[a]s a matter of constitutional import, or simply political and practical necessity, a modicum of fair process is required for arbitral class actions to hold legitimacy. The FAA should therefore specify

Third, it would largely overturn *Rent-a-Center* and eliminate the severability doctrine as a requirement of substantive federal law applicable to the states. States would then be free to allocate arbitrability decision-making functions in a manner consistent with state contract law and public policy.

Fourth, it would effectively overturn *Circuit City, Inc. v. Adams*<sup>266</sup> by excluding all adhesion employment agreement arbitration clauses from the FAA. Each state could then develop its own policy about whether and under what conditions adhesion employment contracts may include pre-dispute arbitration agreements.<sup>267</sup>

Fifth, states would be able to apply generally applicable contract law to pre-dispute consumer and employment arbitration agreements without worrying about running afoul of the FAA's "certain rules of fundamental importance" unidentified but relied on in *Stolt-Nielsen* to vacate the class arbitration determination.<sup>268</sup> States could integrate state law governing pre-dispute adhesion employment and consumer arbitration agreements with general contract and public policy law principles applicable in other contexts, such as prohibitions on exculpatory or unconscionable agreements.

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appropriate procedures, incorporating the procedural standards of class administration under Federal Rule of Civil Procedure 23, and should address the issues unique to arbitration regarding arbitrator selection, neutrality, and the need for reasoned decisions to apprise class members of the basis of the arbitral award."); Sternlight, *supra* note 187, at 125-126 (arguing that adhesion arbitration clauses should not be used to preclude class actions and concluding that "the hybrid arbitral class action should be permitted, but only so long as courts maintain sufficient involvement to protect the due process rights of absent class members"). Cf. Cole, *supra* note 8, at 503-05 (discussing how class arbitration may prove to be a workable, relatively efficient dispute resolution process); Carol J. Bruckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 263 (2006) (reviewing class arbitration procedural models and concluding that "[g]iven the doctrinal and practical shortcomings of existing approaches to class arbitration, a pure arbitral paradigm combined with a voluntary due process protocol specific to class arbitration provides a more doctrinally sound and more practical option, consistent with the FAA and with the notions of efficiency so integral to arbitration. At the same time, such an approach vests responsibility for protection of absent class members with arbitration providers, who are closest to the process and best able to provide the appropriate protections. This approach achieves the most streamlined class arbitration process possible, while assuring the binding nature of arbitral awards."). Nevertheless, in the face of mandatory arbitration provisions in consumer and employment contracts preventing class action or other court litigation, the availability of class arbitration can be essential to protecting statutory and other rights, particularly in the context of small dollar value claims. See *supra* notes 195-201 and accompanying text.

266. 532 U.S. 105 (2001). See *supra* notes 75-77 and accompanying text.

267. See Schwartz, *supra* note 34, at 14 (noting that before *Adams* at least eleven states had barred pre-dispute arbitration clauses in employment contracts).

268. *Stolt-Nielsen*, 130 S. Ct. at 1773 (citations omitted).

Sixth, it would liberate pre-dispute adhesion arbitration agreements affecting persons with lesser bargaining power from the amorphous, ever-changing federal pro-arbitration policy based largely on the Supreme Court's current view of arbitration efficacy rather than the sparse statutory language of the FAA. Commercial arbitration agreements between contracting parties reasonably well positioned (or at least evenly balanced) to protect their own substantive and process interests would remain covered by the FAA.

Finally, states could expand the scope of state court judicial review of pre-dispute adhesion employment or consumer agreement arbitration awards. For example, a state could permit its courts to review statutory claim awards for errors of law without risk that *Hall Street* and *Concepcion* would preempt such review.

This proposal is not without issues of its own. First, the AFA and the proposal to bar class action waivers directly accomplish substantive arbitration law goals at the national level, whether by invalidating pre-dispute consumer, employment, and civil rights dispute arbitration agreements altogether or by barring the use of arbitration agreements to foreclose class adjudication. This proposal does not dictate a specific substantive outcome—but it does free adhesion employment and consumer arbitration from the Court's anti-federalist, a-textual pro-arbitration policy. It allows the states to set arbitration agreement enforcement and interpretation policy consistent with state contract and civil procedure rules.

Second, a state would be free to mirror the Supreme Court's current pro-arbitration policy, flaws and all. And perhaps a state would do so. But this proposal would place regulation of adhesion arbitration at the more accountable state level where it could be coordinated with state employment, contract and consumer protection policy objectives.

Third, leaving regulation of adhesion employment and consumer contract arbitration clauses to the states could create conflict of laws problems. This, too, could be true. But the same conflict of laws problem presumably would apply to interpreting and enforcing the rest of the employment or consumer contract. Similarly, the FAA Section 2 savings clause on its face provides defenses to the enforcement of an arbitration agreement that can vary from state to state. Courts are well-equipped to deal with contractual conflict of laws issues; moreover, they regularly do so successfully with forum selection clauses and should similarly be able to do so with arbitration clauses.<sup>269</sup>

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269. Under this proposal, a federal court could face a conflict of laws issue regarding the enforceability of an adhesion employment or consumer contract arbitration clause in the event that the employee or consumer filed a federal statutory claim in district court and the employer or

## V. CONCLUSION

The Supreme Court's problematic FAA jurisprudence has taken on a life of its own. The Court's recent decisions have developed a federal pro-arbitration policy based less on the sparse language of the FAA and more on precedent crafted largely from the Court's own views about the benefits of arbitration. Today's pro-arbitration policy consists of a full-throated endorsement of bilateral arbitration and a newly-discovered preemptive streamlined arbitration federal procedural paradigm vesting arbitrators in many cases with unprecedented authority to decide the scope of their own jurisdiction without meaningful judicial oversight. The point of this Article is not that the Court's arbitration opinions are the product of some ill-motive. The point is that the Court's FAA jurisprudence, building on one pro-arbitration policy-based decision after another, has strayed so far from the language of the FAA that arbitration rules must be fundamentally re-examined. That re-examination needs to start where the current pro-arbitration policy can cause the most harm by enforcing adhesion employment and consumer arbitration agreements with little regard for state contract law or whether the compelled arbitral venue can be a reasonable substitute for a judicial forum to vindicate statutory rights.

This Article proposes a starting point for re-thinking the FAA pro-arbitration policy, protecting those most vulnerable from being abused under it by removing adhesion employment and consumer arbitration agreements from FAA regulation and the Court's pro-arbitration policy jurisprudence. This proposal could address several important problems under the Court's current arbitration jurisprudence. Other recent proposed amendments to the FAA, such as a ban on class action waivers, also address a number of these problems. But above all, Congress must revisit the FAA and amend it in a way that articulates a coherent, predictable arbitration policy that ensures the continued enforceability of freely-bargained arbitration agreements while preventing the misuse of arbitration agreements to chill private vindication of statutory and common law rights.

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company sought to compel arbitration under the agreement pursuant to state law. Under the proposal, state law rather than the FAA would govern the enforceability of the arbitration clause. *See supra* notes 24-28 and accompanying text. It is also possible that an adhesion arbitration clause could purport to incorporate by reference the law of an unrelated state that strongly favors enforcing adhesion arbitration contracts. Traditional conflict of laws principles, however, likely would prevent enforcement of the adhesion choice of law clause if enforcing the clause would undermine a fundamental policy of the state that would ordinarily supply the applicable law absent the choice of law clause. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 187, 188, 218, 219 (1971) (conflict of law rules relating to choice of law clauses in general and arbitration agreements in particular).