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APPROACHING “DANGEROUS” TERRITORY: THE IMPLICATIONS OF *DIRECTV v. IMBURGIA* AND THE CURRENT SCOPE OF U.S. ARBITRATION LAW

By
Stephanie Lapple*

I. INTRODUCTION

The U.S. Law of Arbitration and the scope of the Federal Arbitration Act (“FAA”)¹ remain worthy focuses of review before the Supreme Court in recent terms.² As exemplified in October 2015, the Court continues to grant certiorari to a variety of arbitration issues so that the substantive body of arbitration law can be more carefully developed and clearly defined.³

In general, domestic arbitration law has widely developed since the inception of the FAA in 1925, primarily as a response to judicial hostility and resentment of arbitration agreements. The history of arbitration precedent reflects that, for the most part, the Court has constructed not only a reliable alternative to dispute resolution, but an increasingly resilient and substantive body of arbitration law that emphatically enforces agreements to arbitrate, except where agreements are deemed unlawful on the increasingly narrower grounds under the savings clause of FAA Section 2.⁴

This article analyzes the most recent decision by the Supreme Court reviewing arbitration, *DIRECTV v. Imburgia*,⁵ which is consistent with our current arbitration regime; the decision highlights the emphatic federal policy of enforcing agreements to arbitrate. The nature of the decision, in that it consistently reflects this ever-strengthening pro-arbitration policy, serves as an appropriate platform to review the current body of arbitration law and resulting implications to come. First, this article considers the history of the federalization of arbitration law with an additional emphasis on California decisions. Then, this article provides an overview of *Imburgia* and implies that its disposition was foreseeable in light of the Court’s historically adamant federalization of the FAA.

While *Imburgia* could be easily categorized as another anti-arbitration California decision that was predictably overturned, Justice Ginsburg’s dissent is noteworthy

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¹ 9 U.S.C. §§ 1-16 (2012).

² See *DIRECTV, Inc., v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen v. AnimalFeeds, Int’l*, 559 U.S. 662 (2010); *14 Penn Plaza v. Pyett*, 566 U.S. 247 (2009).

³ See *Imburgia*, 136 S. Ct. 463 (2015).

⁴ See 9 U.S.C. § 2; see also *Concepcion*, 563 U.S. at 333; *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

⁵ *Imburgia*, 136 S. Ct. 463 (2015).

because she asserts that federalizing the law of arbitration has finally gone too far.⁶ Justice Ginsburg defines the *Imburgia* decision as “dangerous,” and contends that, right now, federalizing arbitration law may be more important to the Court than assuring state courts are left without interference to interpret their own contracts based on the laws of the state.⁷ In more dramatic terms, Justice Ginsburg accuses the Supreme Court of prioritizing what appears as its obsession over arbitration law to the point of dismantling the autonomy of the states and stripping them of a principle upon which our country was founded.⁸

Taking Justice Ginsburg’s dissent into mind, this article reflects on the rather negative implications stemming from the Court’s creation of the substantive body of arbitration law and how its current scope should be defined. Broader yet pertinent areas to this discussion include a review of the original intent and purpose underlying the FAA in light of its expanded jurisprudence, the impact of the Roberts Court, and the specific effects of adhesive agreements on weaker parties, such as through “claim suppressing” and “boot strapping” arbitration. In addition, this article offers modern critiques of *Concepcion*⁹ to further present the increasingly dangerous scope of arbitration.

Ultimately, the discussion of these various components, which have contributed in unique ways to the development of arbitration law, largely highlights that there is no exact reason why arbitration law has resorted to an utmost liberal policy. Perhaps these components suggest that it may be time for Congress to intervene in what might now be an overly federalized policy. Until that time comes, *Imburgia* will represent the current scope of arbitration law, which is defined by its emphatic federal policy favoring arbitration.¹⁰ Regardless of whether one considers its implications to be dangerous or not, arbitration’s far-reaching impact will continue to render its scope a noteworthy component of United States’ jurisprudence.

II. THE FEDERALIZATION OF U.S. ARBITRATION LAW

A. The Origins of U.S. Arbitration Law and the Enactment of the FAA

U.S. arbitration law has undergone rapid federalization since the inception of the FAA. The first uses of arbitration in the U.S., however, were laughable. Despite the current increasing trend in the magnitude and frequency of arbitration in the United

⁶ See *Imburgia*, 136 S. Ct. at 473, 476-78 (Ginsburg, J., dissenting).

⁷ See *id.* at 473, 477-78.

⁸ See *id.* at 477-78.

⁹ *Concepcion*, 563 U.S. 333 (2011).

¹⁰ See *Imburgia*, 136 S. Ct. 463 (2015).

States, arbitration law prior to 1925 was largely met with judicial hostility.¹¹ Before Congress enacted the FAA, courts reluctantly enforced arbitration agreements and perceived them “as a way to force potential litigants to surrender their rights to a jury and public forum for the resolution of their legal disputes.”¹² Judges emphasized their duty to protect weaker parties from forced arbitration proceedings and further justified their reluctance through common law techniques.¹³ For example, the “ouster doctrine,”¹⁴ rooted in common law, was a platform upon which judges would refuse to enforce arbitration agreements because the agreement tended to “oust” the courts of the judges’ jurisdiction.¹⁵ In contrast to the modern emphatic policy favoring arbitration, judges created “loopholes” by allowing losing parties to pursue remedies in court and revoke the arbitration agreement before any final award was entered.¹⁶ This led to the firmly rooted common law practice of not enforcing arbitration agreements and defined arbitration law as far from credible.¹⁷

In time, businesses began to shape their need for a more serious platform underlying the enforcement of arbitration agreements and consequently pressured legislatures to overrule this common law practice.¹⁸ As a response to judicial hostility,¹⁹ Congress mirrored the New York Arbitration Act of 1920, which was a statutory scheme for the recognition and enforcement of arbitration agreements, to create the Federal Arbitration Act in 1925.²⁰ The FAA bolstered the enforcement of arbitration agreements

¹¹ Lyra Haas, Note, *The Endless Battleground: California’s Continued Opposition to the Supreme Court’s Federal Arbitration Act Jurisprudence*, 94 B.U. L. REV. 1419, 1420 (2014) (citing *Concepcion*, 563 U.S. at 337); see also Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1146 (2015); Michael G. McGuinness & Adam J. Karr, *California’s “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 63-64 (2005).

¹² Bonaccorso, *supra* note 11, at 1149.

¹³ Haas, *supra* note 11, at 1422.

¹⁴ *Id.* (citing 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, 886 (2012)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ McGuinness & Karr, *supra* note 11, at 63 (explaining the function of arbitration within the business community); see also Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 460 (1996).

¹⁹ Haas, *supra* note 11, at 1423 (citing Stephen E. Friedman, *Protecting Consumers from Arbitration Provisions in Cyberspace, the Federal Arbitration Act and E-Sign Notwithstanding*, 57 CATH. U. L. REV. 377, 381 (2008)); see also Bonaccorso, *supra* note 11, at 1149 (“Congress sought to eliminate this hostility through the FAA and make courts neutral to arbitration provisions . . .”).

²⁰ See Haas, *supra* note 11, at 1423 (citing the law of New York in 1920 to show its similarity to FAA Section 2); see also Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803, 804.

through incorporating Section 2, which provides that “any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²¹ Although the immediate impact of the FAA was minimal and functioned for procedural purposes in federal courts,²² the Supreme Court has since built a well-founded decisional law promoting the enforcement of arbitration agreements under Section 2 of the FAA.²³

B. The Federalization of the FAA

Prima Paint Corp. v. Conklin Manufacturing Co. traces the Supreme Court’s interpretation of the underlying legislative purpose of the FAA.²⁴ In *Prima Paint*, the Court addressed the jurisdictional issue, stemming originally from a question of contract validity, of whether courts or arbitrators had the authority to decide the impact of a fraudulent inducement claim on the parties’ pre-existing agreement to arbitrate.²⁵ Broadly underscoring Congress’ primary objectives underlying the FAA, the Court illustrated that *Prima Paint* was not a question of “whether Congress may fashion federal substantive rules to govern questions arising simply in diversity cases, . . . [but] whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has the power to legislate.”²⁶ *Prima Paint* provided an important framework for arbitration law by projecting that Congress “could create federal law where it had legislative authority to act,” and, through the FAA, “provide[d] [a] substantive directive[] to the federal courts.”²⁷ In this particular diversity

²¹ 9 U.S.C. § 2 (2012).

²² Bonaccorso, *supra* note 11, at 1151; *see also* Haas, *supra* note 11, at 1423 (citing IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION – NATIONALIZATION – INTERNATIONALIZATION 42-47 (1992)).

²³ *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013); AT&T Mobility v. Concepcion, 563 U.S. 333 (2011); Rent-A-Center West, Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen v. AnimalFeeds, Int’l, 559 U.S. 662 (2010); 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995); Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989); Volt Info. Scis v. Bd. of Trs., 489 U.S. 468 (1989); Perry v. Thomas, 482 U.S. 483 (1987); Shearson/American Express v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone v. Mercury Construction Corp., 460 U.S. 1 (1983); *Prima Paint Corp. v. Conklin Manufacturing Co.*, 388 U.S. 395 (1967).

²⁴ *Prima Paint Corp.*, 388 U.S. at 395; THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 260 (5th ed. 2014).

²⁵ *Prima Paint Corp.*, 388 U.S. at 402-05.

²⁶ *Id.* at 405.

²⁷ *Prima Paint Corp.*, 388 U.S. at 405.

action, the federal court was required to apply the FAA in line with Congress' intent, which the Court concluded was to "foster the enforcement of arbitration agreements."²⁸

The Court's emphasis on Congress' broad intent, however foundational for the substantive body of arbitration law, was restricted to cases involving interstate commerce arising in federal court.²⁹ *Prima Paints'* full implications and evolution over time are reflected through a series of cases in the 1980s known as the federalism trilogy.³⁰ *Moses H. Cone v. Mercury Construction Corp.*³¹ involved a contract dispute between a hospital and building contractor, where the Court considered the district court's decision to stay a federal case pending the resolution of a parallel state action based on the *Colorado River* abstention doctrine.³² Importantly, the Court indirectly addressed the scope of the FAA insofar as a state court's role in enforcing arbitration agreements.³³ In holding that Section 2's mandate was applicable to enforcing the agreement, the Court emphasized that "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration"³⁴ The Court also explained that the FAA provides basic rights to arbitration and suggested that all courts have a duty to enforce promises to arbitrate.³⁵

Subsequently, the Court more affirmatively defined the scope of the FAA, clarifying that this duty extends equally to state courts in *Southland Corp. v. Keating*.³⁶ The Court in *Southland Corp.* granted certiorari to address whether the California Supreme Court correctly held that allegations of statutory directive claims under the California Franchise Investment Law could not be adjudicated in arbitration.³⁷ Focusing on Section 2, the Court expressly held that the FAA had a preemptive effect on state courts and state substantive law.³⁸ In other words, both state and federal courts maintained a duty to apply the federal policy underlying arbitration law and the FAA.³⁹ The Court articulated a preference for enforcing arbitration agreements by emphasizing Congress' intent to create a "national policy favoring arbitration" that left states

²⁸ *Id.* See also *Byrd*, 470 U.S. at 213; *Southland Corp.*, 465 U.S. at 1; *Moses H. Cone.*, 460 U.S. at 1.

²⁹ *Prima Paint Corp.*, 388 U.S. at 405.

³⁰ CARBONNEAU, *supra* note 24, at 268; see *Byrd*, 470 U.S. 213; *Southland Corp.*, 465 U.S. 1; *Moses H. Cone*, 460 U.S. 1.

³¹ *Moses H. Cone.*, 460 U.S. 1.

³² *Id.* at 13 (analyzing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)).

³³ See *id.* at 13-14.

³⁴ *Id.* at 7.

³⁵ *Id.* at 25-26; CARBONNEAU, *supra* note 24, at 270.

³⁶ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

³⁷ *Id.* at 4.

³⁸ *Southland Corp.*, 465 U.S. at 14-16.

³⁹ CARBONNEAU, *supra* note 24, at 278.

powerless to require the judicial forum for arbitral disputes.⁴⁰ The Court, noting that the California Supreme Court's interpretation of the statute clashed with the FAA,⁴¹ consequently promoted a national federal policy to thwart continued attitudes of hostility.⁴² Absent this national federal policy, the Court reasoned that hostility could be manifested through state law and forum shopping if the FAA only governed federal courts.⁴³

The final case of the federalism trilogy, *Dean Witter Reynolds, Inc. v. Byrd*,⁴⁴ involved an arbitration agreement between a securities brokerage firm and customer who filed a complaint in district court alleging violations of the Securities Exchange Act of 1934 (Exchange Act) and other state law claims related to securities regulation.⁴⁵ Denying the lower courts application of the "intertwining doctrine," which barred the arbitration of state law claims that were factually inseparable from the various other federal securities claims, the Supreme Court held that the state law claims were, in fact, arbitrable.⁴⁶ The Court, once again relying on Congress's intent, articulated that judicial enforcement was to be ensured over the "suggestion that the . . . goal . . . was to provoke the expeditious resolution of claims" by resorting to the judicial forum.⁴⁷ It follows that the federalism trilogy undoubtedly outlined the emphatic federal policy of the FAA and "effectively federalized the U.S. law of domestic arbitration."⁴⁸

The FAA has since maintained an expansive authority over matters arising out of international disputes and statutory law. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court determined claims arising under the Sherman Act between an American auto dealer and foreign auto manufacturer were arbitrable,⁴⁹ and thereby integrated an international case into U.S. domestic arbitration law. Importantly, the Court expressed that the parties did not forgo their substantive rights afforded by the statute under which the claims were brought while bound by the agreement to arbitrate.⁵⁰ Acknowledging the lack of any exception in either the FAA or the Sherman Act, the

⁴⁰ *Southland Corp.*, 465 U.S. at 10.

⁴¹ *Id.* at 16.

⁴² *See id.* at 15.

⁴³ *Id.* at 15-16.

⁴⁴ *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

⁴⁵ *Id.* at 214-15.

⁴⁶ *Id.* at 216-17; *see generally* CARBONNEAU, *supra* note 24, at 280.

⁴⁷ *Byrd*, 470 U.S. at 219.

⁴⁸ CARBONNEAU, *supra* note 24, at 281.

⁴⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

⁵⁰ *Id.* at 628.

Court did not warrant any additional exception despite the establishment of antitrust laws and importance of the private damages remedy in the Sherman Act.⁵¹

The reasoning of *Mitsubishi* was further reflected in *Shearson/American Express v. McMahon*, which examined the arbitrability of claims under the Exchange Act and Racketeer Influenced and Corrupt Organizations Act.⁵² In its decision, the Court attempted to clarify when federal statutory claim acts may be inarbitrable.⁵³ In doing so, the Court placed the burden on the party opposing arbitration to prove that Congress did intend to limit particular claims to the judicial forum.⁵⁴ Since this holding, no federal statute to date has met this test to establish that a congressional intent exists to direct parties to a judicial forum over arbitration.⁵⁵ Also, it is important to note that the *McMahon* Court acknowledged the difficulty of reconciling its decision with *Wilko v. Swan*, which previously held the Securities Act of 1933 was non-arbitrable and generally reflected the common law attitude of judicial hostility.⁵⁶ The Court subsequently overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express*⁵⁷ and signified the supremacy of modern arbitration law when it held that Securities Act claims are arbitrable.⁵⁸ Together, these landmark cases reflect the expansive shift toward a more authoritative FAA. The decisions likewise demonstrate how the Court has rarely tolerated any grounds for deferring claims, subject originally to arbitration, to judicial forums.

A history of the federalization of the FAA would be unfounded without recognizing *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, which has been deemed a setback in modern arbitration jurisprudence.⁵⁹ In *Volt*, the contract at issue called for both arbitration and the application of local law in provisions describing dispute resolution and choice-of-law.⁶⁰ The California courts denied *Volt*'s motion to compel arbitration and ordered a stay of the arbitral proceeding following California state law.⁶¹ Under California law, courts had the discretion to stay arbitration pending the outcome of litigation arising out of the same transaction or series

⁵¹ *Id.* at 634-635.

⁵² *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).

⁵³ *Id.* at 242.

⁵⁴ *Id.* at 227.

⁵⁵ Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 KAN. L. REV. 795, 843 (2012).

⁵⁶ *McMahon*, 482 U.S. at 231-32 (analyzing *Wilko v. Swan*, 346 U.S. 427 (1953)).

⁵⁷ *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989).

⁵⁸ *Id.* at 484-85.

⁵⁹ *Volt Info. Scis v. Bd. of Trs.*, 489 U.S. at 468.

⁶⁰ *Id.* at 470.

⁶¹ *Id.* at 471-73.

of transactions involving parties not bound by the arbitration agreement.⁶² *Volt* shook the strong foundation of arbitration policy by upholding the parties' clear contractual intent to have state law undermine the agreement to arbitrate.⁶³ In other words, the Court emphasized principles of contractual freedom when it upheld that the *Volt* parties chose to be bound by the procedural laws of California in the choice-of-law provision.⁶⁴ Although the *Volt* contract was silent as to whether the parties made an express choice of law governing arbitration,⁶⁵ the majority's decision laid out a dangerous groundwork in its new doctrinal development by creating a basis for courts to employ anti-arbitration interpretations in the future based on freedom of contract.

Nevertheless, the federalization of arbitration law has been strongly reaffirmed since *Volt*.⁶⁶ In a 1995 case, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, the Court stood firmly behind federalization by thwarting judicial hostility.⁶⁷ The dispute involved an arbitration clause between an Alabama homeowner and a Terminix franchisee.⁶⁸ In sum, an Alabama homeowner, who originally kept the agreement in dispute, sold his home to another resident and transferred the agreement with the sale.⁶⁹ The new homeowner eventually filed suit against Terminix.⁷⁰ The Supreme Court of Alabama upheld the lower court's refusal to stay the court action pending arbitration through its reasoning that any interstate commerce grounds for the original transaction became too tenuous over time.⁷¹ The Supreme Court of the United States reversed and held unequivocally that the FAA preempts state law when there is diversity jurisdiction, in addition to whenever a basis for federal law exists in state courts, and even when state law would govern the merits of the case.⁷² The same principles in *Dobson* were later affirmed by *Doctor's Associates, Inc. v. Casarotto* and *Buckeye Check Cashing, Inc. v. Cardegna*.⁷³

⁶² *Id.* at 471 n.3.

⁶³ *Id.* at 479.

⁶⁴ *Volt*, 489 U.S. at 479.

⁶⁵ *Id.* at 476-77.

⁶⁶ See generally CARBONNEAU, *supra* note 24, at 288-93.

⁶⁷ See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

⁶⁸ *Id.* at 268.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Allied-Bruce Terminix*, 513 U.S. at 268.

⁷² *Id.* at 270-77.

⁷³ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996); see generally CARBONNEAU, *supra* note 24, at 289 (explaining that *Doctor's Associates* "added nothing new to the Court's doctrine on arbitration, but confirmed the strength of the federalization development").

The Court has most famously and forcefully curbed resistance to arbitration law in *AT&T Mobility LLC v. Concepcion*, when it declared that the FAA preempted California's *Discover Bank* rule using the doctrine of unconscionability to invalidate arbitration agreements that contained class action waivers.⁷⁴ Likewise, in three recent per curiam opinions, the Court "affirmed the now self-evident proposition" that the federal law triumphed over state law in the specific situations when two of four claims in a dispute regarding accounting practices were not subjected to arbitration,⁷⁵ when public policy rendered an exception to the arbitrability of personal injury and death claims,⁷⁶ and non-compete clauses could not be enforced under Oklahoma state law.⁷⁷ Today, there is little doubt that the Court intended to build a strong substantive body of arbitration law after dispensing with many boundaries which would have prevented the federalization of the FAA as illustrated in these summarized cases.

III. CALIFORNIA'S RESISTANCE TO ARBITRATION

Despite the fact that the Supreme Court has blatantly reaffirmed its well-founded decisional law of arbitration, California courts have persistently rendered anti-arbitration decisions at odds with the emphatic federal policy favoring arbitration.⁷⁸ This summary of arbitration decisions arising out of California sheds light on the disposition set forth in the *Imburgia* case before it reached the Supreme Court.

Numerous California decisions have ambiguously portrayed the FAA to create exceptions and render arbitration agreements unenforceable.⁷⁹ For example, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court rejected the Ninth Circuit's interpretation of the phrase "involving commerce" under Section 1 and conclusion that the FAA did not extend to arbitration agreements in employment contracts.⁸⁰ The Court relied on its liberal policy of enforcing arbitration agreements and the *ejusdem generis* statutory maxim to embrace a narrow exemption to transportation workers in employment

⁷⁴ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (invalidating *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)); *see generally* CARBONNEAU, *supra* note 24, at 291.

⁷⁵ *See KPMG LLP v. Cocchi*, 566 U.S. 18 (2011) (per curiam).

⁷⁶ *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).

⁷⁷ *See Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500 (2013) (per curiam).

⁷⁸ *See, e.g.*, *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996 (9th Cir. 2010); *Shoyer v. New Cingular Wireless Servs.*, 498 F.3d 976 (9th Cir. 2007); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Lopez v. Kmart Corp.*, No. 15-cv-01089-JSC, 2015 U.S. Dist. LEXIS 58328, at *1-20 (N.D. Cal. May 4, 2015); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129 (Cal. 2014); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005); *Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000).

⁷⁹ Haas, *supra* note 11, at 1428-29.

⁸⁰ *Adams*, 532 U.S. at 119.

arbitration agreements.⁸¹ Similarly, the Court overturned a Ninth Circuit decision relying erroneously on the doctrine of manifest disregard to challenge arbitration agreements under Section 10 of the FAA in *Hall Street Associates, L.L.C., v. Mattel, Inc.*⁸²

California courts often address preemption when interpreting arbitration agreements, as evidenced in *Imburgia*.⁸³ Specifically, the courts have deferred to state law interpretations of unconscionability under the savings clause of Section 2 to avoid enforcing agreements.⁸⁴ Through this process of “covert construction,” California courts have readily concluded that state law preempts federal law governing arbitration agreements.⁸⁵

The United States Supreme Court in *Perry v. Thomas* cautioned that state laws might be relied upon only if “they arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.”⁸⁶ In addition, the Court expressed with regard to the savings clause in *Doctor’s Associates* that only “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements”⁸⁷ This precedent did not provide the ground for California courts to rely on state law to interpret arbitration agreements disfavoring the policy underlying the FAA.

Nonetheless, California courts have relied on a broad interpretation of this precedent to render arbitration agreements unenforceable. For example, in *Armendariz v. Foundation Health Psychcare Services*, the California Supreme Court focused on unconscionability and expressed the concept of “mutuality” to hold that arbitration agreements must meet minimum requirements underlying due process to be enforceable.⁸⁸ Three years later, the Ninth Circuit applied California law in *Ingle v. Circuit City Stores* to hold that there was a rebuttable presumption of substantive unconscionability in any contract to arbitrate between an employer and employee.⁸⁹ In

⁸¹ *Id.*

⁸² See generally *Hall Street Assocs.*, 552 U.S. at 567.

⁸³ See, e.g., *Imburgia*, 136 S. Ct. at 473-475.

⁸⁴ See Haas, *supra* note 11, at 1432-33.

⁸⁵ See generally Daniel B. Mitchell, Note, *Unconscionable Construction: How the Ninth Circuit Evades the FAA by Severing Arbitration Agreements as Unconscionable*, 2012 J. DISP. RESOL. 303 (2012) (describing how the Ninth Circuit in *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996 (9th Cir. 2010), used the process of covert construction to affirm the application of California state law to an arbitration agreement).

⁸⁶ *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

⁸⁷ *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996).

⁸⁸ *Armendariz v. Found. Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000) (the minimum requirements for an valid arbitration agreement included (1) no limitation of available remedies; (2) adequate discovery; (3) a written arbitration decision setting forth, however briefly, the essential findings and conclusions on which the decision is based; and (4) all the expenses unique to arbitration are to be borne by the employer).

⁸⁹ *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003).

Ingle, the Ninth Circuit created its own rule of unconscionability by requiring mutuality of obligation in arbitration agreements.⁹⁰ The Ninth Circuit concluded that the mere fact that an arbitration agreement existed between an employer and employee could render the contract one-sided enough to shock the conscious of the court.⁹¹ In creating this rebuttable presumption, the Ninth Circuit placed the burden of proof on the party seeking enforcement to show that the contract was not unconscionable.⁹² *Ingle* is problematic for arbitration law because it converted policy concerns for employees into an outlet to a judicial forum, and this ultimately reflected judicial hostility to enforcing arbitration agreements.⁹³ Under the current law, the FAA strictly preempts this “brand” of unconscionability and was designed to overcome judicial hostility to arbitration.⁹⁴

Similarly in *Discover Bank v. Superior Court*, the California Supreme Court relied on unconscionability to create a specific test for determining the enforceability of class arbitration waivers.⁹⁵ The California Supreme Court considered *Southland Corp.* and reasoned that the United States Supreme Court “did not answer directly the question whether a class action waiver may be unenforceable as contrary to public policy or unconscionable.”⁹⁶ Thus, the California Supreme Court developed a specific test declaring class action waivers were unconscionable and, therefore, unenforceable in situations involving (1) consumer contracts of adhesion, (2) where the disputes predictably involved small damage claims, and (3) where it was alleged that the party with greater “bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”⁹⁷

Discover Bank was applied in *Shoyer v. New Cingular Wireless Services, Inc.* in which the Ninth Circuit reasoned that the savings clause under Section 2 authorized states to apply general contract defenses against arbitration agreements and held that the *Discover Bank* test applied to all class action waivers regardless of whether the agreement contained an arbitration provision.⁹⁸ Likewise, *Discover Bank* was relied upon to invalidate a franchise-franchisee arbitration clause at issue in *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, which held generally that state policies concerning fair business practices and unconscionability provided California a “materially greater issue” in deciding the case.⁹⁹

⁹⁰ *Id.*

⁹¹ *Id.* at 1172.

⁹² *Id.* at 1174.

⁹³ McGuinness & Karr, *supra* note 11, at 80.

⁹⁴ *Id.*

⁹⁵ *Discover Bank v. Superior Court*, 113 P.3d 1100, 1107-10 (Cal. 2005).

⁹⁶ *Discover Bank*, 113 P.3d at 1106.

⁹⁷ *Id.* at 1108-10.

⁹⁸ *Shoyer v. New Cingular Wireless Servs.*, 498 F.3d 976, 981 (9th Cir. 2007).

⁹⁹ *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1003-04 (9th Cir. 2010).

A final example along this line of preemption cases is *Preston v. Ferrer*.¹⁰⁰ In *Preston*, a California attorney tried to compel arbitration pursuant to a contract involving a law that vested original jurisdiction for cases arising under the California Talent Agencies Act (CTAA) in the Labor Commissioner.¹⁰¹ The California Court of Appeal held that the Labor Commissioner had exclusive original jurisdiction and that the FAA did not preempt California state law because it did not discriminate against arbitration clauses, but rather relocated original jurisdiction for all disputes arising under the CTAA.¹⁰² The United States Supreme Court disagreed and held that the FAA preempted the California law. This included any state laws seeking to establish primary jurisdiction in a forum that would limit the applicability and enforcement of arbitration agreements.¹⁰³

Concepcion is worth highlighting again for its direct impact on the *Discover Bank* rule arising out of California and for its force in overturning many California “preemption decisions.”¹⁰⁴ After the California Supreme Court ruled that the class action waiver in AT&T’s contract was unconscionable under the *Discover Bank* test, the Supreme Court decided that California’s law acted as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰⁵ According to the Court, this interpretation was necessary to preserve the power of the FAA.¹⁰⁶ The Court also clarified that the savings clause of Section 2 “should not be construed to include a State’s preference for procedures that are incompatible with arbitration.”¹⁰⁷ In theory, *Concepcion* limited California courts’ efforts to preserve access to the judicial forum through whatever “devices and formulas” the courts would express as contradictory to the FAA.¹⁰⁸

In recent times, California has made veiled efforts to evade the emphatic federal policy favoring arbitration set forth in *Concepcion*,¹⁰⁹ and this response suggests that a lingering bias toward arbitration remains in place.¹¹⁰ For example, in *Iskanian v. CLS Transportation Los Angeles, LLC*, which was pending while *Concepcion* was decided,

¹⁰⁰ *Preston v. Ferrer*, 552 U.S. 346 (2008).

¹⁰¹ *Id.* at 350.

¹⁰² *Ferrer v. Preston*, 51 Cal. Rptr. 3d 628, 631, 634 (Cal. Ct. App. 2006), *rev’d*, 552 U.S. 346 (2008).

¹⁰³ *Preston*, 552 U.S. at 359.

¹⁰⁴ *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011) (invalidating *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

¹⁰⁵ *Concepcion*, 563 U.S. at 352.

¹⁰⁶ *Id.* at 341-44.

¹⁰⁷ *Id.* at 343.

¹⁰⁸ *Id.*

¹⁰⁹ *See generally* Bonaccorso, *supra* note 11, at 1159.

¹¹⁰ *See* Haas, *supra* note 11, at 1439.

the California Supreme Court found yet another loophole.¹¹¹ The California court held that the employee's arbitration agreement did not require the employee, as a condition of employment, to give up the right to bring a PAGA action under the Private Attorneys General Act of 2004 in any form, which otherwise would be contrary to state policy and thereby unenforceable.¹¹² Finally, *Lopez v. Kmart Corp.* is another modern decision in which California avoided arbitration.¹¹³ In *Lopez*, the Northern District of California did not enforce an arbitration agreement on the grounds of disaffirmance, despite recognizing the agreement as valid.¹¹⁴

In conclusion, California courts have persistently refused to endorse the emphatic federal policy of arbitration law, even in recent times. The Supreme Court's most current arbitration precedent is reflective of this clash once again. The following section will discuss how the California Court of Appeal drew attention for its anti-arbitration disposition in *Imburgia*, which centers on what has been an important factor the Court has utilized throughout the federalization of the FAA: the FAA's preemption effect on state law.

IV. DIRECTV V. IMBURGIA

A. California Court of Appeal

DIRECTV customer, Amy Imburgia, filed a complaint against DIRECTV alleging unjust enrichment, declaratory relief, false advertising, violations of the Consumer Legal Remedies Act (CLRA), unfair competition law (UCL), and California Civil Code Section 1671.¹¹⁵ These claims asserted that the television service had improperly charged its customers early termination fees.¹¹⁶ Because Kathy Greiner filed a similar claim a day later, both plaintiffs jointly filed.¹¹⁷ Subsequently, the lawsuit

¹¹¹ See *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 144 (Cal. 2014); see also Haas, *supra* note 11, at 1441.

¹¹² *Iskanian*, 327 P.3d at 143-49; Haas, *supra* note 11, at 1440-41 (the *Iskanian* court emphasized that the FAA did not preclude the California state legislature from obligating employees to prosecute Labor Code violations in a specific manner; therefore, the FAA did not preempt a state law prohibiting a waiver of such actions in an employment contract). The Ninth Circuit has since validated *Iskanian*. See generally Lauren Picciallo, Comment, *Qui Tam Claims – A Way to Pierce the Federal Policy on Arbitration? A Comment on Sakkab v. Luxoticca Retail North America, Inc.*, 8 Y.B. ON ARB. & MEDIATION 130 (2016).

¹¹³ *Lopez v. Kmart Corp.*, No. 15-cv-01089-JSC, 2015 U.S. Dist. LEXIS 58328, at *1-20 (N.D. Cal. May 4, 2015).

¹¹⁴ *Id.* at *20.

¹¹⁵ *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 192 (Cal. Ct. App. 2014).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 192-93.

proceeded at the same time as a multidistrict litigation proceeding containing similar claims in federal court.¹¹⁸ DIRECTV moved to stay the action pending the outcome of the multidistrict litigation, but the Superior Court denied DIRECTV's motion and granted the plaintiffs' motion for class certification for some claims but not others.¹¹⁹ The decision was rendered on April 20, 2011.¹²⁰

The Supreme Court decided *Concepcion* on April 27, 2011, overruling *Discover Bank* and holding that, for the most part, class action waivers in consumer contracts are unconscionable and unenforceable.¹²¹ Consequently, DIRECTV moved to stay or dismiss the action, decertify the plaintiffs' class, and compel arbitration.¹²² The Superior Court denied the motion and DIRECTV appealed.¹²³

1. Relevant Provisions

DIRECTV's customer agreement for the acceptance of its programming equipment contained an arbitration provision (Section 9) which specified that "any legal or equitable claim relating to this Agreement, any addendum, or your Service" will first be addressed through an informal process,¹²⁴ and then:

[I]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be concluded under the rules of JAMS that are in effect at the time the arbitration is initiated . . . and under the Rules set forth in this Agreement.¹²⁵

There was a "Special Rules" heading governing Section 9:

Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claims as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, *the law of your state* would find this agreement to

¹¹⁸ *Id.* at 193.

¹¹⁹ *Id.*

¹²⁰ *Imburgia*, 170 Cal. Rptr. 3d at 193.

¹²¹ *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011).

¹²² *Imburgia*, 170 Cal. Rptr. 3d at 193.

¹²³ *Id.*

¹²⁴ *Imburgia*, 170 Cal. Rptr. 3d at 193.

¹²⁵ Brief for Petitioner at 5, *DIRECTV v. Imburgia*, 136 S. Ct. 463 (2015) (No. 14-462).

dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.¹²⁶

Section 10 of the agreement contained a choice-of-law provision, “Applicable Law:”

The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal law, and the laws of the state and local area where the Service is provided to you. This agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 *shall be governed by the Federal Arbitration Act.*¹²⁷

2. Discussion and Holding

The California Court of Appeal reviewed the Superior Court’s decision to deny DIRECTV’s motion to compel arbitration de novo and applied California contract law to determine whether the arbitration agreement was legally enforceable.¹²⁸ The court affirmed the Superior Court’s denial as to the motion to compel arbitration.¹²⁹

In affirming the Superior Court’s decision, the California Court of Appeal focused on the interpretation of the phrase, “the law of your state” to determine the enforceability of the agreement.¹³⁰ The court agreed with plaintiffs’ argument that the arbitration agreement was unenforceable because the agreement was subject to the CLRA—or the “law of [their] state”—which, at the time the agreement was created, followed *Discover Bank* and California state law that addressed the right to bring a class action.¹³¹

In support of this conclusion, the appellate court initially emphasized the broad policy of enforcing arbitration agreements according to their terms as set forth by *Volt*.¹³² Applying freedom of contract principles, the court distinguished between the ability of the parties to “opt out” of the FAA default rules under *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, an option which placed the choice-of-law provision in the

¹²⁶ *Imburgia*, 170 Cal. Rptr. 3d at 193 (emphasis added).

¹²⁷ *Imburgia*, 170 Cal. Rptr. 3d at 193 (emphasis added).

¹²⁸ *Id.* at 193-94.

¹²⁹ *Id.* at 198.

¹³⁰ *Id.* at 194-98.

¹³¹ *Id.* at 194-96.

¹³² *Imburgia*, 170 Cal. Rptr. 3d at 194 (“[If] ‘parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA[.]’” (quoting *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)). The Court of Appeal emphasized that this is true “even if application of the state rules would yield a different result from application of the FAA.” *Id.*

arbitration agreement on equal footing with any other contracts insofar as its enforceability.¹³³ In addition, the court cited the *Discover Bank* appellate court decision as an example of how California had previously held that parties may choose what law governs the enforceability of a class action waiver.¹³⁴

When interpreting the phrase, “if . . . the law of your state would find this agreement to dispense with class action arbitration procedures unenforceable,” the court contemplated if it was initially included in the agreement by the parties to mean, “the law of your state *without considering the preemptive effect*, if any, of the FAA” or “the law of your state *to the extent that it is not preempted* by the FAA,” and chose the former.¹³⁵ In sum, the court affirmed that the reference to “the law of your state” provision provided an exception to the arbitration agreement’s general adoption of the FAA in Section 10.¹³⁶

Further, the court rejected DIRECTV’s argument that there was no inconsistency among the provisions that sought to apply both state and federal law, meaning the FAA broadly governed the agreement through its preemptive effect.¹³⁷ The court reasoned that applying state law versus federal law in this case would lead to substantially different outcomes of enforcement versus non-enforcement of the class action waiver.¹³⁸ Also, the court applied common law principles to determine that ambiguous contract language should be construed against the drafter.¹³⁹ Thus, DIRECTV, as the drafter, could not “claim the benefit of the doubt.”¹⁴⁰ Subtly, the court addressed the overruling of *Discover Bank* by *Concepcion* and iterated that the plaintiffs who filed their lawsuit in 2007 were unlikely to anticipate that the Supreme Court would preempt *Discover Bank*, and, therefore, should be protected as the party who did not draft the agreement.¹⁴¹

¹³³ *Id.* at 194; *see generally* Ario v. Underwriting Members of Syndicate 53 at Llyods, 618 F.3d 227 (3d Cir. 2010) (holding generally that parties cannot “opt out” of the FAA in its entirety).

¹³⁴ *Imburgia*, 170 Cal. Rptr. 3d at 194 (“We have previously held that the parties to a contract may choose the law under which the enforceability of a class action waiver is to be determined.” (citing *Discover Bank v. Superior Court*, 36 Cal. Rptr. 456 (Cal. Ct. App. 2005)).

¹³⁵ *Imburgia*, 170 Cal. Rptr. 3d at 195 (emphasis added).

¹³⁶ *Id.* at 195 (explaining that plaintiffs’ argument is grounded in well-established state contract principles that say a particular provision in a contract is paramount to a general provision when both provisions are inconsistent).

¹³⁷ *Id.* at 195-96.

¹³⁸ *Id.* at 196.

¹³⁹ *Id.* (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995)).

¹⁴⁰ *Imburgia*, 170 Cal. Rptr. 3d at 196.

¹⁴¹ *Id.*

Importantly, the California Court of Appeal noted that the Ninth Circuit’s analysis in *Murphy v. DIRECTV, Inc.* was unpersuasive.¹⁴² The court reasoned that *Murphy* provided no basis for concluding that the parties intended to use the phrase “the law of your state” to mean “federal law plus (nonfederal) state law,” and described that in actuality, a reasonable reader would naturally interpret the provision to refer exclusively to state law.¹⁴³ Next, the court explained that *Murphy* also provided no basis to conclude that “contract interpretation is irrelevant because the parties are powerless to opt out of the FAA by contract,” and reiterated that choice-of-law would be enforceable where the law of a state governs enforceability of an agreement.¹⁴⁴ This interpretation, in the court’s eyes, ultimately made the dispositive issue in the case whether the parties did, in fact, choose to abide by state law, or in other words, if the parties actually decided to submit to arbitration in the first place.¹⁴⁵

V. THE SUPREME COURT’S DECISION

A. The Majority Opinion

The Supreme Court granted certiorari to decide whether it was consistent with the FAA for the California Court of Appeal to affirmatively answer the question of whether “the law of your state” included invalid state law.¹⁴⁶ In doing so, the Court looked to see if this decision placed arbitration contracts “on equal footing with all other contracts” as emphasized in *Buckeye Check Cashing*.¹⁴⁷ Also, the Court looked to the grounds upon which the California court offered to satisfy the savings clause and revoke the contract.¹⁴⁸

The Court began by recognizing that, in principle, parties by way freedom of contract can expressly render their arbitration agreements to the force of any type of law, such as the “law of Tibet” or as set forth in *Imburgia*, the law of California that included the *Discover Bank* rule regardless if it was invalidated in *Concepcion*.¹⁴⁹ The Court reasoned that because the California Court of Appeal relied on state contract law principles to interpret the phrase “law of your state” as pertaining to invalid California

¹⁴² *Id.* at 197-98; *see generally* *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218 (9th Cir. 2013) (enforcing an arbitration agreement under *Concepcion* which held that the FAA preempts California law rendering arbitration provisions unenforceable in consumer contracts that waive class action proceedings).

¹⁴³ *Imburgia*, 170 Cal. Rptr. 3d at 197.

¹⁴⁴ *Imburgia*, 170 Cal. Rptr. 3d at 197-98.

¹⁴⁵ *Id.* at 198.

¹⁴⁶ *DIRECTV, Inc., v. Imburgia*, 136 S. Ct. 463, 468 (2015).

¹⁴⁷ *Id.*; *see* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

¹⁴⁸ *Imburgia*, 136 S. Ct. at 468.

¹⁴⁹ *Id.*

law, or California law under the former *Discover Bank* rule, the Court needed to determine if that use of California state contract law was consistent with the FAA.¹⁵⁰

The Court found that the appellate court’s interpretation of the terms “law of your state” was unique to the arbitration agreement and, therefore, did not place arbitration agreements “on equal footing with other contracts.”¹⁵¹ Because the Court of Appeals’ approach to interpreting the provision within the arbitration agreement did not adhere to the federal policy favoring arbitration, the FAA pre-empted the California court’s interpretation and rendered the arbitration agreement enforceable.¹⁵²

The Court employed six reasons to support its holding. First, the Court reasoned that, contrary to the California Court of Appeal’s reasoning, the relevant contract language of the “law of your state” was not ambiguous.¹⁵³ The phrase “law of your state” would ordinarily take the meaning *valid* state law, and not *invalid* state law, unless there was an express indication to the contrary or the existence of supporting case law, which there was not in this case.¹⁵⁴ Second, the Court found that California case law provides clarification when there is doubt about how to interpret contract language.¹⁵⁵ Specifically, the law says that general contract principles in California incorporate the legislature’s power to change the law retroactively and preserve that judicial construction of statutes are ordinarily applied retroactively.¹⁵⁶ Thus, the Court concluded that these general contract principles would have defined how to more correctly interpret the “law of your state” phrase for the appellate court.¹⁵⁷

Third, the Court found there was no indication from argument or precedent that California courts would ordinarily interpret the phrase “law of your state” to incorporate *invalid* California law in a different contract context outside of arbitration.¹⁵⁸ This signaled to the Court that this was a tactic used by the appellate court so that it could specifically invalidate the arbitration agreement.¹⁵⁹ In other words, the appellate court’s interpretation was not reflective of a general procedure all California courts use to invalidate other contracts.¹⁶⁰ Fourth, the Court based this conclusion on the fact that the California Court of Appeal framed its question by focusing only on arbitration: whether

¹⁵⁰ *Id.* at 468-69.

¹⁵¹ *Id.* at 471.

¹⁵² *Imburgia*, 136 S. Ct. at 471.

¹⁵³ *Id.* at 469.

¹⁵⁴ *Id.* (emphasis added).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Imburgia*, 136 S. Ct. at 469.

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *Id.* at 468-469.

¹⁶⁰ *Id.* at 470.

“the law of your state” means “the law of your state to the extent that is it not preempted by the FAA,” or “the law of your state without considering the preemptive effect, if any, of the FAA.”¹⁶¹ The Court concluded that this phrasing indicated that the appellate court’s holding was directed at the arbitration contract only and was not reflective of contracts generally.¹⁶²

Fifth, the Court reasoned that it was not likely that California courts would support the view that state law retains independent force, even after it has been authoritatively invalidated by the Supreme Court, and apply this view to general contracts.¹⁶³ In other words, the appellate court would be unlikely to hold that invalid state law holds force as a matter of general contract principles, despite that it was so quick to conclude that invalid state law superseded *Concepcion*.¹⁶⁴ Lastly, the Court focused on the appellate court’s reasoning that the “law of your state” constituted a *specific* exception to the agreement’s general acknowledgment of the FAA, but the Court explained that including the terms “specific exception” did not provide the express support that the phrase “law of your state” encompassed invalid state law.¹⁶⁵ Moreover, the Court was not convinced that applying the canon construing contract language against the drafter, DIRECTV, was a sufficient reason to assume the result the appellate court reached.¹⁶⁶ For all these reasons, the California Court of Appeal did not answer the question of how to interpret the phrase “law of your state” in light of general contract principles.¹⁶⁷ Because the appellate court did not satisfy the savings clause of Section 2, the arbitration agreement was enforceable under the FAA.¹⁶⁸

B. The Dissenting Opinion

Justice Ginsburg argued in her dissent that the majority stepped beyond the acceptable reaches of arbitration policy and consequently set forth a holding that unfairly deprives consumers of reasonable protection.¹⁶⁹ Focusing on the procedural history of the case, Justice Ginsburg first maintained that the 2007 version of DIRECTV’s agreement, which was at issue in *Imburgia*, blatantly allowed for the “law of [California]” to govern the enforceability of the agreement’s class action prohibition.¹⁷⁰

¹⁶¹ *Id.*

¹⁶² *Imburgia*, 136 S. Ct. at 470.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ *Imburgia*, 136 S. Ct. at 471.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 477 (Ginsburg, J., dissenting).

¹⁷⁰ *Id.* at 473.

This is because at the time the lawsuit commenced, the *Discover Bank* rule governed California law, which rendered class action waivers per se unenforceable.¹⁷¹ Justice Ginsburg emphasized that it was not until three years into the litigation and after *Concepcion* was decided that DIRECTV moved to compel bilateral arbitration.¹⁷² Ultimately, the California Court of Appeal decided that the phrase “law of your state” meant “the law of your state without considering any preemptive effect of the FAA” because DIRECTV drafted the service agreement in a way to guarantee customers the right to unilaterally modify the agreement at any time.¹⁷³

The dissent’s reasoning portrayed that the parties could rightfully choose to be bound by a particular law of California even if that law was rendered invalid after *Concepcion*.¹⁷⁴ This argument can be captured in the rhetorical question “Why are parties allowed to be governed by the law of Tibet but not laws of the state purported to remain valid at the time they are interpreted?”¹⁷⁵ In addition, the majority was criticized for its broad reliance on *Concepcion*, which the dissent explained “held only that a State cannot *compel* a party to engage in class arbitration when the controlling agreement unconditionally prohibits class procedures.”¹⁷⁶ This meant that even after *Concepcion*, the parties would still be able to bind themselves under the California CLRA law as not pre-empted by the FAA, especially considering freedom of contract as emphasized in *Volt*.¹⁷⁷

Importantly, Justice Ginsburg pointed out that the Supreme Court’s decision is a “dangerous first” because the Court has not once reversed a state court decision on the grounds that the state court misapplied the state contract law when interpreting an arbitration agreement.¹⁷⁸ Justice Ginsburg further frowned upon the majority’s unwillingness to embrace the application of a general canon used for contractual interpretation of construing ambiguous language against the drafter.¹⁷⁹ This would have been a practical matter for the plaintiffs in 2007 who were unlikely to have predicted the Supreme Court holding in *Concepcion* in 2011.¹⁸⁰ Additionally, the dissent purported that this decision runs beyond the scope of *Concepcion* and *Italian Colors* to the extent that it “deprive[s] consumers of effective relief against powerful economic realities that write

¹⁷¹ *Imburgia*, 136 S. Ct. at 472-75 (Ginsburg, J., dissenting).

¹⁷² *Id.* at 474-75.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* at 473-74.

¹⁷⁶ *Imburgia*, 136 S. Ct. at 473 (Ginsburg, J., dissenting).

¹⁷⁷ *Id.* at 474.

¹⁷⁸ *Id.* at 473.

¹⁷⁹ *Id.* at 475.

¹⁸⁰ *Id.* at 473.

no-class-action arbitration clauses into their form contracts.”¹⁸¹ Thus, the consumers here lacked the benefit of the doubt even when there were legitimate reasons to protect their rights.¹⁸²

Lastly, Justice Ginsburg reminisced that the Court’s current understanding of FAA preemption no longer aligns with the main purposes with which Congress passed the FAA, particularly for specific business parties and to curb judges’ reluctance to enforce arbitration agreements.¹⁸³ The dissent proposed that Congress in 1925 would have never anticipated that in the future, the Court would apply the FAA with such a preemptive force as to render consumers to adhesive contracts almost entirely powerless.¹⁸⁴ Ultimately, the dissent’s portrayal of the FAA indicates that the federalization of the FAA has gone too far in its modern development.¹⁸⁵

VI. CURRENT IMPLICATIONS FOR ARBITRATION

A. Justice Ginsburg’s Dissent Warrants Additional Review of the History of Arbitration

1. Pinpointing the Original Purpose of the FAA

Justice Ginsburg’s dissent serves as a platform to re-analyze the history of domestic arbitration law in light of the Act’s original purpose, as compared to how it was previously portrayed for its growing federalized and pro-arbitration policy. In the days before the Supreme Court recognized arbitration and its corresponding rights, American businesses sought arbitration to resolve disputes privately and as an alternative to public litigation.¹⁸⁶ American courts neglected to enforce arbitration agreements and followed the English “ouster doctrine,” as mentioned previously. The Supreme Court endorsed the “ouster doctrine” in 1874 when it held “parties cannot by contract oust the ordinary courts of their jurisdiction.”¹⁸⁷ Precedents like this made American courts feel obliged to

¹⁸¹ *Imburgia*, 136 S. Ct. at 476 (Ginsburg, J., dissenting). See also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *AT&T Mobility v. Concepcion*, 563 U.S. 333, 336 (2011).

¹⁸² *Imburgia*, 136 S. Ct. at 476 (Ginsburg, J., dissenting).

¹⁸³ *Id.* at 478.

¹⁸⁴ *Id.* at 477-78.

¹⁸⁵ *Id.* at 478.

¹⁸⁶ James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & Bus. 745, 748 (2009).

¹⁸⁷ *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

follow the English rule founded upon the jealousy of judges who felt threatened by arbitration in their own jurisdictions.¹⁸⁸

Consequently, the business community urged Congress to enact the FAA because of the advantages it could provide over traditional litigation.¹⁸⁹ Overall, arbitration was less expensive than litigation and was an expeditious method to resolve inter-merchant disputes, particularly in the business context that dealt with perishable goods.¹⁹⁰ In turn, removing inter-merchant disputes from court dockets freed courts and reduced court congestion.¹⁹¹

There are further historical reasons to believe that the origins of enforcing arbitration agreements were pro-consumer, unlike what we see with adhesive arbitration agreements today. First, the high costs of litigation between merchants were likely passed on to consumers in the form of higher prices, so this made arbitration more appealing to consumers.¹⁹² Second, the speed of arbitration likely reduced merchant costs and prices because the FAA served to conserve perishable food products and save capital in foodstuffs that would otherwise be wasted when dispositions from arbitration agreements were not enforced.¹⁹³ Third, the arbitral forum saved tax dollars for consumers who ultimately paid less to maintain state courthouses flooded with intra-merchant litigation.¹⁹⁴

It follows that, because of these reasons, a wide range of merchant associations endorsed the FAA, including, “fruit jobbers; wholesale grocers; raisin growers; poultry, dairy, and egg producers; peach and fig growers; canners; music publishers; and coffee, sugar, and lumber producers.”¹⁹⁵ Merchants likewise supported the FAA because they reasoned that an arbitrator familiar with their industry would best serve their interests.¹⁹⁶ After many lobbying efforts, the FAA was enacted and construed to protect several of these ideals.¹⁹⁷

The original congressional intent underlying the FAA seems foreign when compared to the Supreme Court’s modern expansion of the FAA. The text of the FAA suggests that Congress only intended for arbitration to apply to a narrow set of legal claims including inter-merchant contract disputes sounding in breach and maritime

¹⁸⁸ Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 301 (2015).

¹⁸⁹ *Id.* at 302.

¹⁹⁰ *Id.* at 303.

¹⁹¹ *Id.*

¹⁹² *Id.* at 304.

¹⁹³ Leslie, *supra* note 188, at 304.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 305.

¹⁹⁶ *Id.* at 306.

¹⁹⁷ *Id.*

claims.¹⁹⁸ In light of the current body of arbitration law, little evidence supports that arbitration was intended for statutory problems, like antitrust, or complex legal issues stemming from statutory claims.¹⁹⁹ Moreover, the aforementioned reasons underlying merchant disputes support that arbitration was especially more likely to cover “routine commercial matters of contract interpretation, breach and remedy” rather than consumer contracts of adhesion.²⁰⁰

Nonetheless, several examples portray how the Supreme Court has extended the FAA despite the absence of support provided in the text or the legislative history. For example, in *Moses H. Cone*, the Supreme Court emphasized that the FAA reflects, “a congressional declaration of a liberal policy favoring arbitration agreements,”²⁰¹ but considering the reasons upon which merchants lobbied for enactment of the FAA, the Court’s position is puzzling and evidenced by little support.²⁰²

Also, the Supreme Court has supported the enforcement of adhesive arbitration agreements at all costs despite any indication from the original drafting that the FAA was meant to expand the way it did.²⁰³ Congress’s intent likely did not match the Supreme Court’s interpretation, though, because of the obvious differences that currently divide consumer and merchant contracts. For example, parties to business contracts “have a similar incentive to structure a neutral arbitration process.”²⁰⁴ This is because “each party bears a similar risk of being the plaintiff or defendant.”²⁰⁵ On the contrary, in a consumer contract, it is more likely that a powerful business entity would maintain a strong incentive to impose an anti-plaintiff arbitration process on a consumer.²⁰⁶

It follows that Congress affirmatively could not have envisioned the implications that are reflective of adhesive, consumer arbitration agreements. Modern consumer contracts are not formed from negotiations between parties with equal bargaining power, and this often renders the consumer powerless in the contract formation process and likewise in arbitration proceedings.²⁰⁷ Right now, consumers bound by these agreements lack so much power that they are unaware that their contracts include mandatory arbitration proceedings, or that by signing the arbitration agreement, they expressly waive their right to engage in class action arbitration against the business entity.²⁰⁸ Ultimately,

¹⁹⁸ Leslie, *supra* note 188, at 307.

¹⁹⁹ *Id.* at 308.

²⁰⁰ *Id.* at 308-09.

²⁰¹ *Moses H. Cone v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

²⁰² Leslie, *supra* note 188, at 301-07.

²⁰³ *Id.* at 308-09.

²⁰⁴ *Id.* at 310.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Leslie, *supra* note 188, at 310.

²⁰⁸ Leslie, *supra* note 188, at 310.

when considering the original purpose of the FAA and the ever-broadening scope of arbitration's impact, it is unlikely that Congress envisioned such a "liberal policy" when it drafted the FAA.

2. Further Review of the Supreme Court's Arbitration Precedent

In addition to focusing on the original congressional intent of the FAA, further review of the Supreme Court's decisions suggests that the Supreme Court has become somewhat lost in its own jurisprudence. As Justice O'Connor famously put it in *Allied-Bruce Terminix*, "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."²⁰⁹ This proposition has merit while further reconsidering the history of the Court construing the FAA to achieve a much liberalized policy.

It should first be remembered that even after the FAA was passed, judges still displayed hostility and resistance to arbitration. This is most evidenced in *Wilko v. Swan*, which held that claims stemming from the Securities Act of 1933 were not subject to arbitration.²¹⁰ This decision was puzzling, and likely the result of lingering hostility, because the arbitration clause at issue was relatively clear, there was knowing and voluntary consent of the parties, and standard practices of the industry and expectations of the parties were evident.²¹¹ Similarly in *Bernhardt v. Polygraphic Co. of America*, the Court held that the arbitration act was procedural rather than substantive and subject to the Erie doctrine, which had the effect of rendering Vermont law applicable to the case.²¹²

Following in the 1960s and 1970s, the Court began to warm up to arbitration despite its earlier doubts. In 1967, the Court decided *Prima Paint*, and, as discussed previously, appeared to display a more favorable attitude toward arbitration by deciding that the issue of fraudulent inducement as to entering a contract containing an arbitration clause was reserved for the arbitrator.²¹³ Likewise, the Court began to show greater affection for arbitration in the context of labor arbitration with the Steelworkers Trilogy, where the Court emphasized that arbitration was a critical component of the collective bargaining process in both *United Steelworkers v. American Manufacturing Co.* and *United Steelworkers v. Enterprise Wheel & Car Corp.*²¹⁴ However, in *Alexander v. Gardner-Denver Co.*, the Court in the mid-1970s evidenced concern for establishing that arbitration clauses had a broad scope when it held that a Title VII claim of a union

²⁰⁹ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

²¹⁰ *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

²¹¹ *Id.*

²¹² *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 208 (1956).

²¹³ *See generally* *Prima Paint Corp. v. Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967).

²¹⁴ Stempel, *supra* note 55, at 823-34; *see also* *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 594-96 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 564-66 (1960).

employee was not subject to the arbitration clause in the collective bargaining agreement to which he was subject.²¹⁵

The 1980s cases promoting arbitration comprised the turn toward the modern era of arbitration. The Court used pro-arbitration rhetoric in *Moses H. Cone* when it moved quickly to compel arbitration and reject the application of *Colorado River* abstention.²¹⁶ The Court relied on the notion that the FAA “creates . . . a substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act.”²¹⁷ While the FAA appeared to apply in state courts as well as federal courts, this issue was not resolved until *Southland Corp.*²¹⁸ In *Moses H. Cone*, Chief Justice Burger and Justices Rehnquist and O’Connor displayed their reservations about the Court’s zealous pro-arbitration ruling, fearing that the majority decided too quickly on an order that permitted appeal.²¹⁹

Nonetheless, the Court subsequently held in *Southland Corp.* that the FAA serves as substantive law based on the “strong indications that Congress had in mind something more than making arbitration agreements enforceable only in federal courts” as well as the congressional intent to create a body of substantive law applicable in state courts as to ultimately prevent state legislatures from “undercut[ting] the enforceability of arbitration agreements.”²²⁰ The dissent, however, cautioned that Congress had only intended the FAA to apply to federal court proceedings and strongly argued that the *Southland Corp.* majority may have embraced the personal preference for expanding arbitration rather than carefully considering precedent, such as *Bernhardt*, which viewed the FAA as merely procedural.²²¹ The Court in *Southland Corp.* dodged *Bernhardt* completely, and the application of the FAA appeared not only inconsistent with federalism and states’ rights, but also with what Congress evidenced as its intent.²²² Thus, *Southland Corp.* is powerful because it “appears to mark the beginning of an ideological shift in that Republican and conservative Justices, who might otherwise have opposed broad arbitration clause enforcement on federalism and states’ rights grounds, became arbitration advocates”²²³ In close cases today, there are no Republican-appointed Justices who oppose arbitration.²²⁴

²¹⁵ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 38-42, 59-60 (1974).

²¹⁶ *Moses H. Cone v. Mercury Construction Corp.*, 460 U.S. 1, 13-23 (1983) (analyzing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)).

²¹⁷ *Id.* at 24.

²¹⁸ Stempel, *supra* note 55, at 830; *see Southland Corp. v. Keating*, 465 U.S. 1, 10-14 (1984).

²¹⁹ *Moses H. Cone*, 460 U.S. at 30 (Rehnquist, J., dissenting).

²²⁰ *Southland Corp.*, 465 U.S. at 12, 16.

²²¹ *See id.* at 25-29 (O’Connor, J., dissenting); *see also Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 202-03 (1956).

²²² Stempel, *supra* note 55, at 834-35.

²²³ Stempel, *supra* note 55, at 831.

²²⁴ *Id.* at 832.

Following *Southland Corp.*, the Court continued to show its developing pro-arbitration attitude in *Byrd*, in which the Court compelled the arbitration of state law claims and rejected that the claims were subject to litigation because they were intertwined with other securities claims.²²⁵ The Court took a larger step in *Mitsubishi* when it reiterated the strong federal policy favoring arbitration and required the arbitration of antitrust claims.²²⁶ Yet, the Court seemingly failed to find any basis in the statutory text, legislative intent or purpose, or public policy to support its holding.²²⁷ The majority explained, “[w]e find no warrant in the Arbitration Act for implying every contract within its ken a presumption against arbitration of statutory claims.”²²⁸ Two terms later, Justice O’Connor, who dissented in *Southland Corp.*, led the majority opinion in *McMahon*, which was another important pro-arbitration opinion in regards to the arbitrability of statutory claims.²²⁹ This further evidenced the Court’s “emerging enthusiasm” for arbitration.²³⁰ In turn, *Perry* was decided in the same year as *McMahon* and rested on the criticisms of *Southland Corp.* that the Court’s enthusiasm for arbitration has sidestepped the protection of the states and the actual intent and goals of Congress.²³¹

Since the turn of the century, the Supreme Court has continued to display a zealous attitude toward enforcing arbitration agreements, but with some caveats. For example, *Buckeye Check Cashing* and *Preston* are currently viewed as strong precedents upholding the emphatic federal policy favoring arbitration which demands utmost deference to arbitrators and the FAA’s preemption effect over state law.²³² Although *Hall Street Associates* does not clearly indicate the Court’s preference for arbitration, the decision arguably can be considered pro-arbitration by the Court’s refusal to expand the grounds of judicial review under Section 10 of the FAA.²³³

There is no doubt, however, that *Stolt-Nielsen* represents a disruption in the Court’s consistent renderings of decisions promoting the emphatic federal policy of the FAA.²³⁴ In *Stolt-Nielsen*, an animal-feed supplier sought to compel class action proceedings under a broadly worded arbitration clause that undisputedly bound the

²²⁵ *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223-24 (1985).

²²⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-28 (1985).

²²⁷ *See id.* at 625.

²²⁸ *Id.*

²²⁹ *Shearson/American Express v. McMahon*, 482 U.S. 220, 225 (1987).

²³⁰ *Stempel*, *supra* note 55, at 844.

²³¹ *Id.* at 846; *see also Perry v. Thomas*, 482 U.S. 483, 493-94 (1987) (Stevens, J., dissenting); *id.* at 494-95 (O’Connor, J., dissenting).

²³² *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); *Preston v. Ferrer*, 552 U.S. 346, 349-51 (2008); *Stempel*, *supra* note 55, at 861.

²³³ *Stempel*, *supra* note 55, at 862; *see also Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

²³⁴ *Stolt-Nielsen v. AnimalFeeds, Int’l*, 559 U.S. 662 (2010); *see generally* David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 *IND. L.J.* 239 (2012); *Stempel*, *supra* note 55, at 862-65.

animal-feed supplier and its opponent-shipper to arbitration proceedings.²³⁵ The arbitrators decided that the clause allowed for class action arbitration and stayed the proceedings pending the court's review.²³⁶ The Supreme Court surprisingly reversed the decision and accused the arbitrators of exceeding their powers by imposing their own policy on the matter, instead of treating the matter as one of contract.²³⁷

Stolt-Nielsen should be discussed for some of its underlying ironies. For example, the parties in *Stolt-Nielsen* are reflective of the types of business parties the FAA was originally intended to serve as two "substantial commercial entities of sufficient bargaining power to look after their own interests."²³⁸ Moreover, it is ironic that the Court was suddenly concerned with whether or not there was sufficient consent to arbitrate when the Court had not considered the issue seriously in any of the decisions following *Southland Corp.*²³⁹ Thus, it appears that the Court was suddenly concerned with this issue when defendants, who were resisting arbitration, had slightly more commercial power and would be disempowered by the class action relief requested.²⁴⁰

Justice Ginsburg's dissent in *Stolt-Nielsen* foreshadows her dissent in *Imburgia* because she suggested that the Court went too far in that it prematurely interfered in *Stolt-Nielsen*.²⁴¹ The dissent criticized the *Stolt-Nielsen* arbitration panel for deciding based on policy, but indicated that the issue ultimately was "not ripe for judicial review."²⁴² It followed that the Court should have deferred to the strict limitations the FAA places on judicial review of arbitral awards.²⁴³ As Justice Ginsburg accurately pointed out, "[t]he question properly before the Court [was] not whether the arbitrators' ruling was erroneous but whether the arbitrators 'exceeded their powers.' The arbitrators decided a threshold issue, explicitly committed to them, about a procedural mode"²⁴⁴ Thus, Justice Ginsburg not only pointed out the Court's inconsistency with its previous arbitration decisions, but further alluded to the Court's fearless stake in shaping arbitration jurisprudence.

Nevertheless, the Court reinstated its pro-arbitration platform when it decided *Rent-A-Center v. Jackson* less than two months after *Stolt-Nielsen*.²⁴⁵ Relying on *Prima*

²³⁵ *Stolt-Nielsen*, 559 U.S. at 666-67.

²³⁶ *Id.* at 667.

²³⁷ *Id.* at 687.

²³⁸ Schwartz, *supra* note 234, at 259-60.

²³⁹ Stempel, *supra* note 55, at 863.

²⁴⁰ *Id.*

²⁴¹ *Stolt-Nielsen*, 559 U.S. at 688 (Ginsburg, J., dissenting).

²⁴² *Id.*

²⁴³ *Stolt-Nielsen*, 559 U.S. at 690 (Ginsburg, J., dissenting).

²⁴⁴ *Id.* at 696.

²⁴⁵ See *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010).

Paint and *Buckeye*, the Court deferred a question about unconscionability to the arbitrator and precluded any judicial assessment of the broadly worded agreement despite the savings clause of Section 2.²⁴⁶ There is no doubt that in recent times, *Concepcion* should be coined the Court's truest masterpiece in arbitration jurisprudence for its resilient position to enforce arbitration agreements at the expense of class action lawsuits. However, the implications of the Court's achievement in reaching an undeniably pro-arbitration jurisprudence can unfortunately now be viewed as less than satisfying for the specific reasons outlined below.

B. *Understanding the Modern Scope of Domestic Arbitration Law*

1. *Defining Arbitration under the Roberts Court*

The Roberts Court has been accused of displaying a “tainted love”²⁴⁷ toward the enforcement of arbitration agreements and, to an extreme extent, “represent[s] a new low point in the Court’s FAA jurisprudence” in terms of defining arbitration’s scope.²⁴⁸ In sum, various Roberts Court decisions can be construed as generally reflective of negative implications. Three specific areas outline these implications for adhesive agreements in particular, which include (1) claim suppressing arbitration, (2) boot strapping arbitration, and (3) the critiques of the majority’s holding in *Concepcion*.

a. *Claim Suppressing Arbitration*

Claim suppressing arbitration is a term that can accurately describe modern adhesive arbitration. It underlines the motivation of employers who seek to include pre-dispute arbitration within agreements in order to control and suppress future claims of their employees.²⁴⁹ For example, employers are motivated to keep “high-cost/high-stakes” claims out of court because these claims are presented in complex disputes where the liability payoff for the plaintiff is potentially high, and this justifies the plaintiff’s cost and risk in pursuing the claim.²⁵⁰ In contrast, employers seek to litigate “low-cost/high-stakes” claims with the hope that litigation will drive up the plaintiff’s costs to the extent that pursuing the judgment is no longer justified.²⁵¹ Perhaps the most obvious example of

²⁴⁶ *Id.* at 71-72.

²⁴⁷ *See generally* Schwartz, *supra* note 234.

²⁴⁸ *Id.* at 259.

²⁴⁹ Schwartz, *supra* note 234, at 240.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 240.

class suppressing arbitration stems from the Court's decision in *Concepcion*.²⁵² Nothing appears to be more class-suppressing than banning class action waivers for individuals who would never realistically litigate their claims alone; the liability would far exceed the costs of litigating.²⁵³

Claim suppressing arbitration has been an implication of the Court's deference to the strong emphatic federal policy favoring the enforcement of arbitration agreements. This proposition is first supported by the fact that strong evidence suggests that the FAA was not designed to rigorously enforce arbitration agreements in one-sided, adhesive contracts.²⁵⁴ The Court has repeatedly held that adhesive contracts are enforceable under the FAA, despite the fact that the original intent of the FAA purports to serve business parties of equal bargaining power with similar risks in the dispute.²⁵⁵ In addition, the Court eliminated the chance to observe any public policy type exceptions to the FAA when it overruled *Wilko*.²⁵⁶ Having this exception would have made it easy for the Court to address the issue of claim suppression throughout the history of federalizing the FAA.²⁵⁷

This implication also adversely affects due process rights when agreements are rigorously enforced under the current policy of arbitration.²⁵⁸ First, due process is arguably affected when the "neutral arbitrator," most likely hired by the employer, has a financial stake in the outcome of the decision.²⁵⁹ Simply put, an arbitrator is more likely to enforce an arbitration agreement because he will be paid more for seeing the dispute to its end than for rendering the arbitration agreement unenforceable.²⁶⁰ Second, it is arguably unfair to allow the wealthier and more powerful party (the employer) to completely control how the dispute will be resolved. Therefore, the expansive scope of the FAA has not merely created an alternative dispute resolution process, but rather a deceptive tactic widely incorporated into modern business practice.

b. Boot Strapping Arbitration

Similar to claim suppressing arbitration is the notion of boot strapping arbitration, which underlines further negative implications that derive from the current body of law.

²⁵² See *AT&T Mobility v. Concepcion*, 563 U.S. 333, 336 (2011).

²⁵³ Schwartz, *supra* note 234, at 242.

²⁵⁴ *Id.* at 252.

²⁵⁵ See *Concepcion*, 563 U.S. 333; *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

²⁵⁶ *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484-85 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

²⁵⁷ Schwartz, *supra* note 234, at 252.

²⁵⁸ Schwartz, *supra* note 234, at 245.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 246.

Boot strapping arbitration refers to situations where parties of superior bargaining power insert unconscionable terms into arbitration agreements with the hope that a judge would be more likely to enforce them because of current policy underlying the emphatic enforcement of arbitration agreements.²⁶¹ Boot strapping arbitration is recognized largely in the form of adhesive agreements and demonstrates inherent unfairness that exists to undercut consumers and employees.²⁶² Similar to claim suppressing arbitration, boot strapping arbitration was arguably promoted after the Court decided *Concepcion* considering that class action waivers are now written as boilerplate language in many contracts.²⁶³

The current arbitration regime has allowed employers to get away with adding several other types of unconscionable provisions into adhesive contracts in addition to class action waivers. Six examples include: (1) unconscionably short statute of limitations periods, (2) limits on damages, (3) anti-injunctive clauses, (4) fee shifting provisions, (5) forum-selection clauses, and (6) non-coordination clauses.²⁶⁴ In sum, businesses have used arbitration clauses to trick parties into agreeing to unreasonably short statute of limitations periods and also to unknowingly waive their rights to punitive damages and injunctive relief.²⁶⁵ Businesses have also attempted to contract around pro-plaintiff fee shifting provisions and have included forum-selection clauses in their arbitration agreements to pre-designate a court in the case of litigation.²⁶⁶ Lastly, businesses have employed confidentiality requirements to prevent plaintiffs from sharing information or costs among other plaintiffs seeking injuries through non-coordination clauses.²⁶⁷ These tactics are arguably a result of the Court's tainted deference to enforcing arbitration agreements, which in many ways sits blindly to some of the most basic consumer and employee rights.

c. Critiques of *Concepcion*

Concepcion has been widely criticized as a further source of negative implications that have unfairly fallen upon consumers and employees subject to adhesive agreements.²⁶⁸ *Concepcion*, as previously mentioned, invalidated California's *Discover Bank* rule when it held that class action waivers were neither unconscionable nor an

²⁶¹ See Leslie, *supra* note 188, at 266.

²⁶² See *id.* at 267.

²⁶³ *Id.* at 276.

²⁶⁴ See generally *id.* at 282-92.

²⁶⁵ See Leslie, *supra* note 234, at 282-87.

²⁶⁶ See *id.* at 287-90.

²⁶⁷ See *id.* at 290-91.

²⁶⁸ See generally George A. Bermann, *Arbitration in the Roberts Supreme Court*, 27 AM. U. INT'L L. REV. 893, 904-09 (2012).

acceptable grounds to invalidate an entire arbitration agreement.²⁶⁹ Professor George Bermann argued that the *Concepcion* holding is fundamentally flawed and inconsistent with the Court's established decisions underlying U.S. arbitration.²⁷⁰ First, he curiously explained that if *Stolt-Nielsen* served its intended purpose, then the *Concepcion* decision was unnecessary given that *Stolt-Nielsen* evidenced that only express language in the agreement would subject parties to class arbitration.²⁷¹ Importantly, Bermann emphasized that *Concepcion* invades parties' basic fairness in arbitration agreements.²⁷² Referring to Justice Scalia's suggestion in the majority that the states cannot dictate whether parties subject themselves to full scale discovery or jury trials against their wishes, he made a valid observation:

[T]he fact that the FAA does not allow states to impose pretrial discovery and jury trials in arbitration does not mean that states cannot override party agreements that would jeopardize arbitration's basic fairness.²⁷³

Concepcion blocked California and other state courts from guaranteeing this basic fairness to parties of arbitration agreements.²⁷⁴ Bermann suggested that the California *Discover Bank* rule merely promised to enforce class-wide arbitration if the parties had agreed to it.²⁷⁵ In other words, Bermann presented an alternative reading of *Concepcion* and suggested that perhaps the Court moved too quickly in *Concepcion* to write off *Discover Bank*, which could be alternatively viewed as valid state law.²⁷⁶ Consequently, this understanding of *Concepcion* sheds a negative light on the Supreme Court's interpretation and holding.

Further questions and observations highlight that perhaps the Supreme Court, in rendering *Concepcion*, was more excited about expanding the federal policy rather than cautiously considering parties' rights to arbitration agreements. For example, why did the Supreme Court declare class action waivers per se unenforceable in *Concepcion* instead of allowing courts to analyze class action waivers under the particular facts on a case-by-case basis?²⁷⁷ Professor Jeffrey Stempel has asked, "[w]here does the majority get its . . . idea—that individual, rather than class, arbitration is a 'fundamental attribute'

²⁶⁹ *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011).

²⁷⁰ *See generally* Bermann, *supra* note 268, at 906.

²⁷¹ *Id.*

²⁷² *Id.* at 907.

²⁷³ Bermann, *supra* note 268, at 907.

²⁷⁴ *Id.* at 908.

²⁷⁵ *Id.* at 907.

²⁷⁶ *Id.* at 907-08.

²⁷⁷ *Id.* at 908.

of arbitration?”²⁷⁸ Consistent with claim suppressing arbitration, it follows that no rational person would fight for the \$30.22 which the individual plaintiffs in *Concepcion* would have likely received.²⁷⁹ Lastly, *Concepcion*, in some ways, is a “blueprint for bootstrapping” because the holding risks “the ability of courts to hold other unconscionable contract terms unenforceable” by “holding that judges cannot use the unconscionability doctrine to invalidate a term embedded in an arbitration agreement.”²⁸⁰

In sum, *Concepcion* is undoubtedly the high pedestal upon which the Roberts Court reemphasized the emphatic federal policy underlying arbitration. However, alternative interpretations of its holding support the concept that the disposition has set a stage upon which powerful parties are further able to implement arbitration agreements fully to their advantage.²⁸¹ These implications likewise will follow from *Imburgia*, in which the Court disregarded the use of what the California court regarded as applicable state law to interpret the contract.²⁸² Arguably, *Imburgia* goes beyond *Concepcion* because it not only limited the consumers rights to the arbitration agreement, but also infringed upon the general protection that states are left alone to interpret contracts under their own state law.²⁸³ Altogether, *Concepcion* and *Imburgia* further legitimize deceitful business practices such as claim suppressing and boot strapping arbitration, and this is because of the adamant federal policy upon which the Roberts Court not only relies, but more expansively promotes.

VII. CONCLUSION

Many aspects of this article have indicated that U.S. arbitration law is currently defined by an expanded scope, which underscores several negative implications. The emphatic federal policy underlying arbitration has been further promoted by the Roberts Court through the new disposition in *Imburgia*. By holding that consumers to the DIRECTV contract were subject to the preemption effect of the FAA, the Court effectively precluded the states from applying another method purported to protect consumers from the negative consequences of adhesive contracts.²⁸⁴ This disposition prompted Justice Ginsburg to deem the decision “dangerous.”²⁸⁵ After reviewing the Court’s history of ignoring what reasonably appears to be the original congressional intent of the FAA, further precedent that seemingly appears to stand on questionable

²⁷⁸ Stempel, *supra* note 55, at 871-72.

²⁷⁹ *Id.* at 868.

²⁸⁰ Leslie, *supra* note 188, at 292.

²⁸¹ DIRECTV, Inc., v. Imburgia, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).

²⁸² See *Imburgia*, 136 S. Ct. at 468-71 (majority opinion).

²⁸³ See *id.* at 476 (Ginsburg, J., dissenting).

²⁸⁴ See *id.* at 471.

²⁸⁵ *Id.* at 471-78.

grounds, and the modern use of adhesive contracts, there are reasons to conclude that Justice Ginsburg correctly described the current state of domestic arbitration.

Another conclusion, although frustrating, is that it is difficult to pinpoint the exact reason why the Supreme Court has insisted on creating the emphatic federal policy underlying the enforcement of arbitration agreements. While this article has explored many areas including the history of federalization—from Congress' narrowed intent to pass the FAA for merchant disputes to the Court's response to California's continued resistance to the FAA or perhaps the Court's mere infatuation with arbitration by itself—the answer still remains unclear in light of *Imburgia*. Nonetheless, the many implications discussed in this article affirmatively support the conclusion that *Imburgia* provides the necessary platform upon which one can re-examine and define the current scope of arbitration.

All things considered, so long as precedent such as *Imburgia* will define the current scope of arbitration jurisprudence, alternative legislation might be the only option to prevent the aforementioned dangerous implications of arbitration. Until that day comes, *Imburgia* stands tall as the legitimate defender of Court's emphatic federal policy, and regardless of potentially negative implications, its far-reaching consequences and definitive scope will continue to affect many under its expansive regime.