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REVELATION AND REACTION: THE STRUGGLE TO SHAPE AMERICAN
ARBITRATION

By
Thomas J. Stipanowich*

I. INTRODUCTION

Recent decisions by the U.S. Supreme Court implicate important conclusions about the respective domains of courts of law and arbitration tribunals regarding so-called “gateway” determinations surrounding the enforcement of arbitration agreements and the contracts of which they are a part.¹ They address the complex interplay between federal substantive law focusing on questions of arbitrability, a body of law defined and expanded

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¹ In terms of judicial activism the present period is reminiscent of the early 1960s and the groundbreaking “*Steelworker’s Trilogy*” of labor arbitration precedents. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). It builds directly upon a series of decisions from another very active period, the mid-1980s, which ushered in a long (and continuing) period of pro-arbitration jurisprudence characterized by expansive interpretations of the FAA. At that time the Supreme Court, reinterpreting congressional intent, found that the FAA created a broad national policy favoring arbitration when parties choose it. See generally Linda R. Hirschman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305 (1985) (discussing the broad reach of the FAA resulting from pro-arbitration Supreme Court jurisprudence).

by the Court under the Federal Arbitration Act (FAA) and the law of the states. They bring into play competing judicial philosophies of contractual assent and contrasting views about the balance between policies promoting the autonomy of contracting parties and judicial policing of overreaching in the context of contracts of adhesion.

The Court's decisions reflect the extreme pro-arbitration slant of recent decades while etching in sharp relief the fault lines that divide the factions of the Court and the broader American political landscape.² The Court's current jurisprudence, which may be seen as establishing and expanding a "second tier" of the "revealed" substantive law of arbitrability under the FAA first given shape and substance in the 1980s,³ is a flashpoint for special concerns associated with standardized contracts directing consumers and employees into arbitration. It will inevitably add momentum to current efforts to enact national legislation outlawing pre-dispute arbitration agreements in consumer, employment and other classes of contracts, with possible negative consequences for business-to-business arbitration.

Part II of this article sets the stage for the discussion of recent Supreme Court jurisprudence with a short history of the evolution through Court decisions of the "revelation" and expansion of federal substantive law under the Federal Arbitration Act (FAA). Parts III and IV discuss recent Supreme Court cases reflecting the Court's continuing reliance on this seemingly inexhaustible wellspring of divined federal law as a basis for promoting party autonomy in arbitration while limiting lower courts' ability

² See generally Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008) (discussing judicial manipulation of arbitration doctrine and the cause-and-effect relationships of courts, legislatures and other groups within a dynamic system).

³ Hirschman, *supra* note 1, at 1322-24, 1329-53.

to police such agreements. *Stolt-Nielsen S.A. v. AnimalFeeds International*,⁴ set against the backdrop of an international commercial contract scheme and an unusual procedural scenario, limits the ability of arbitrators—or courts—to promote public policies supporting class actions.⁵ (Some have read *Stolt-Nielsen* as a portent of the Court’s likely curtailment of state-law-based policies against enforcement of contractual waivers of the ability to participate in a class action when coupled with an agreement to arbitrate.⁶) In *Rent-A-Center, West v. Jackson*,⁷ entrenched doctrine supporting the separability of arbitration agreements from the contracts of which they are a part for the purposes of enforcement under the FAA and the evolving body of precedents addressing contractual allocation of different decisions at the “gateway” to arbitration (including issues of the breadth or scope of an arbitration agreement as well as issues relating to the existence, validity or enforceability of agreements) are in tension with the authority of courts to deny or limit the enforcement of arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract” under the rubric of unconscionability.⁸ Once again, the Court discerns Federal substantive law surrounding the FAA—this time as a basis for a novel variation of the separability principle, an aggressive application of court precedents transferring from courts to arbitrators authority to resolve

⁴ 130 S. Ct. 1758 (2010).

⁵ The class action is a distinctively U.S. phenomenon. It establishes a framework for bringing a legal cause of action on behalf of a large group of people, or for suit against a group or class of defendants. *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

⁶ *See, e.g.*, Richard Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, NOTRE DAME L. REV. (forthcoming) (Vanderbilt Pub. Law Res. Paper No. 10-34, available at <http://ssrn.com/abstract=1670722>); Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. ON DISP. RESOL. (forthcoming), available at <http://ssrn.com/abstract=1552966>.

⁷ 130 S. Ct. 2772 (2010).

⁸ *Perry v. Thomas*, 482 US 483, 489, 492 n.9 (1987).

enforceability issues, and segregating the determination a contract has been “made” in a formalistic sense from consideration of defenses to its enforceability and validity.

Part V briefly explores the dynamic political response to the extreme, non-nuanced pro-arbitration position developed in modern Court jurisprudence. After many years in which Congressional inaction has provided a vacuum giving maximum play to the Court’s expansive interpretations of the FAA, Congress and the Executive have begun to move forcefully across a broad front. However, these responses have also tended to suffer from over breadth and lack of nuance, with potentially undesirable consequences for commercial arbitration domestically and internationally.

The article concludes by calling for carefully crafted legislation or administrative regulations limiting the use of arbitration agreements in adhesion contracts or establishing due process standards for such agreements. It suggests that process choices should be informed by dispassionate consideration of the systemic costs and benefits of public and private approaches, and should avoid unnecessary transaction costs in the broad realm of business-to-business transactions, especially international transactions. The result may not be a single solution, but rather several approaches reflecting the different realities of discrete transactional systems.

II. THE WELLSPRING: FEDERAL SUBSTANTIVE LAW UNDER THE FAA AND ITS PREEMPTIVE EFFECT

The current spate of Supreme Court decisions must be understood in the context of the quarter century of case law interpreting and expanding the umbrella of the FAA and the associated penumbra of “substantive federal law.” In the mid-

1980s, the Supreme Court declared the FAA to be a source of “federal substantive law of arbitrability.”⁹ An evocation of Congress’ power under the Commerce Clause of the U.S. Constitution,¹⁰ the FAA comes into play whenever arbitration agreements arise in the context of transactions involving interstate commerce—a truly broad mandate.¹¹ By identifying the FAA as a source of federal substantive law governing issues of arbitrability, the Supreme Court established its applicability in state as well as federal courts,¹² as well as its power to preempt contrary state law under the Supremacy Clause of the U.S. Constitution.¹³ In *Southland Corp. v. Keating*,¹⁴ the Court held that FAA Section 2¹⁵ preempted a provision of the California Franchise Investment Law that California courts had interpreted to require judicial consideration (as opposed to arbitration) of claims arising under that statute. The Court explained, “In enacting § 2 of the federal Act, 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.”¹⁶ Further, “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration

⁹ In *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) the Court stated, “Section 2 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.”

¹⁰ *Perry*, 482 U.S. at 489 (“The Federal Arbitration Act... embodies Congress’ intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause”).

¹¹ See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-78 (1995).

¹² *Southland Corp. v. Keating*, 465 U.S. 1, 11-12 (1984).

¹³ U.S. Const., art. VI, cl. 2; *Perry*, 482 U.S. at 489-92.

¹⁴ *Keating*, 465 U.S. 1 (1984).

¹⁵ 9 U.S.C. § 2 (“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

¹⁶ *Keating*, 465 U.S. at 10.

agreements.”¹⁷ In the years since *Southland* the Court has repeatedly asserted strong pro-arbitration policies under the FAA to enforce arbitration of a wide spectrum of claims and controversies under federal and state statutes,¹⁸ confounding the efforts of state legislatures to prohibit or limit the enforceability of arbitration agreements in transactions involving interstate commerce.¹⁹ In contrast to the traditional, highly skeptical view of arbitration as a surrogate for trial embraced in earlier decisions,²⁰ modern Court decision rigorously adhere to the concept of arbitration as a facially acceptable substitute for a public tribunal. In the words of the Court, “By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it merely submits their resolution in an arbitral, rather than a judicial forum.”²¹

¹⁷ *Id.* at 16.

¹⁸ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616, 640 (1985), the Court ruled that claims under the Sherman Antitrust Act were arbitrable under the FAA. The Court reasoned that the arbitral forum provided distinct advantages for many parties: “[Arbitration] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Id.* at 628. Two years later the Court held that statutory claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO) are subject to mandatory arbitration. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (finding no basis for concluding that Congress intended to prevent enforcement of agreements to arbitrate RICO claims and concluding that a RICO claim can be effectively vindicated in an arbitral forum). *McMahon* also held that claims under the Securities Act of 1934 are subject to binding arbitration, rejecting the reasoning of *Wilko v. Swan*, 346 U.S. 427, 438 (1953), which held that claims arising under the Securities Act of 1933 were not subject to binding arbitration. Not surprisingly, the Court overruled *Wilko* two years later in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), supporting the arbitrability of statutory employment discrimination claims, narrowed the so-called “public policy” limitation even further.

¹⁹ *See, e.g., Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (enforcing arbitration agreement in franchise contract, holding FAA preemptive of Montana state law purporting to regulate the form of arbitration agreements); Bruhl, *supra* note 2, at 1426-32 (describing Court-directed expansion of FAA).

²⁰ *See, e.g., Wilko v. Swan*, 346 US 427, 435-38 (1953).

²¹ *Mitsubishi*, 473 U.S. at 628. More recently the Court observed that “[t]he decision to resolve [statutory claims relating to employment discrimination] by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from court in the first instance.” 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1459 (2009).

As interpreted by the Court, the FAA Section 2's "clear federal policy" required arbitration of disputes falling within the ambit of the statute, save "upon such grounds as exist at law or in equity for the revocation of any contract."²² As we will see, in recent decisions the Court has used the vehicle of federal substantive arbitration law to severely limit the purview of judicial oversight under Section 2 and related provisions of the FAA. There is an abiding tension between the Court's staunch, expansive pro-arbitration jurisprudence under the Federal Arbitration Act (FAA) and concerns about the impact of various terms in arbitration agreements featured in "contracts of adhesion"²³--typically non-negotiated standardized contracts for consumer sales or service or employment agreements.

III. STOLT-NIELSEN S.A. V. ANIMALFEEDS INTERNATIONAL: BACK TO THE WELL

A. *History of the Case*

Stolt-Nielsen S.A. v. AnimalFeeds International²⁴ involved commercial parties unquestionably outside the realm of contractual adhesion, and, even more curiously, a post-dispute, one-off submission to arbitration. AnimalFeeds shipped goods under a standard "charter party" contract that contained an arbitration clause. AnimalFeeds subsequently brought a class action law suit against Stolt-Nielsen SA and other shipping companies on the basis that they were engaged in an illegal price-fixing

²² *Perry*, 482 U.S. at 489.

²³ See Todd D. Rakoff, *Contracts of Adhesion: An Essay on Reconstruction*, 96 HARV. L. REV. 1173, 1265-66 (1983) (discussing elements of adhesion contracts), discussed *infra* note 48.

²⁴ 130 S. Ct. 1758 (2010).

conspiracy.²⁵ The suit was consolidated with similar suits brought by other charterers, including one in which the Second Circuit overturned a district court ruling that the charterers' actions were not subject to arbitration.²⁶ The parties subsequently agreed that as a consequence of these orders, they were required to arbitrate. AnimalFeeds then served Stolt-Nielsen and the other defendants with a demand for class arbitration. The parties entered into a supplemental agreement to submit the [question of class arbitration] to a panel of three arbitrators who were to address the question under the American Arbitration Association's Supplementary Rules for Class Arbitrations (which were developed in the wake of the Court's earlier decision in *Green Tree Financial Corp. v. Bazzle*²⁷). The parties stipulated that the arbitration clause was "silent" with respect to class arbitration.²⁸ After hearing arguments and evidence, including expert testimony on customs and usage in the maritime trade, the arbitration panel ruled that the language in the charter party permitted AnimalFeeds to proceed with "class arbitration." The panel found it persuasive that, post-*Bazzle*, other arbitrators had construed "a wide variety of clauses in a wide variety of

²⁵ The litigation had begun with a number of suits brought after the defendant shippers were found by a Justice Department investigation to have engaged in an illegal conspiracy to fix prices. See Sherman Kahn, *Developments in Arbitration: Arbitration at the United States Supreme Court—October Term 2009*, N.Y. DISP. RESOL. L., 12, 13 (2010) available at

<http://www.mofo.com/files/Uploads/Images/Developments-in-Arbitration-US-Supreme-Court-October-Term-2009.pdf>.

²⁶ See *Stolt-Nielsen*, 130 S. Ct. at 1765; *JLM Indus., v. Stolt-Nielsen, S.A.*, 387 F.3d 163, 183 (2004).

²⁷ 539 U.S. 444 (2003).

²⁸ Furthermore, counsel for AnimalFeeds told the arbitration panel that "[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue." *Stolt-Nielsen*, 130 S. Ct. at 1766.

settings as allowing for class arbitration." Moreover, the defendants had failed to show an "inten[t] to preclude class arbitration."²⁹

The arbitrators stayed the arbitration proceeding to allow the parties to seek judicial review. The defendants then filed a petition in district court to vacate the panel's determination under Section 10(a)(4) of the Federal Arbitration Act (FAA) (authorizing a court to vacate an award on motion "where the arbitrators exceeded their powers").³⁰

The district court vacated the award on the basis that the arbitrators' decision was made in "manifest disregard" of the law since they failed to address the question of choice of law prior to rendering their decision. AnimalFeeds appealed to the Second Circuit, which reversed, holding that although the "manifest disregard" standard had indeed survived the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,³¹ as a "judicial gloss" on the statutory grounds for vacatur provided by the Federal Arbitration Act (FAA), the arbitrators' decision was not in "manifest disregard" of federal maritime law or New York law, since in

²⁹ *Id.* at 1775.

³⁰ 9 U.S.C. § 10(a)(4).

³¹ In *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008), Justice Souter's opinion, joined by five other justices, declared that the grounds for judicial review of arbitration awards set forth in §§ 10–11 of the FAA are the exclusive sources of judicial review under that statute. In reaching this conclusion, the Court majority spoke to the much-cited dictum in a 1953 decision, *Wilko v. Swan*, 346 U.S. 427 (1953), and declined to read its reference "manifest disregard of the law" as creating an independent, judicially-declared basis for vacatur outside the precise terms of FAA §§ 10–11. The High Court did not, however, deal a death blow to "manifest disregard" under the FAA, since a lower court may read the decision as authorizing such inquiries under the specific terms of the FAA. The Court was not clear about whether there is still room for "manifest disregard" under the specific terms of the FAA, notably § 10(a)(4). The Court briefly noted, without comment, that "some courts have thought . . . 'manifest disregard' may have been shorthand for § 10(a)(3) or § 10(a)(4)"; 128 S.Ct. at 1404, and cited the Ninth Circuit's decision in *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 540 U.S. 1098 (2004). In the wake of *Hall Street*, some courts have continued to apply the principle with or without reference to *Hall Street*. Other courts interpreted the *Hall Street* decision as eliminating the principle in cases under the FAA.

neither case was there legal authority establishing a rule against class arbitration.

B. The Court's Decision: Grounding in Federal Substantive Law

The Supreme Court granted certiorari, heard arguments and rendered a decision reversing the judgment of the Second Circuit. A five-member majority comprised of Justices Alito, Kennedy, Roberts, Scalia and Thomas joined in an opinion crafted by Justice Alito. The thrust of the majority opinion is to shun the rationale of the *Bazzle* plurality—which had characterized the question of whether class arbitration is appropriate as a matter of "procedure" growing out of the dispute.³² Instead, the majority grounds its decision on Supreme Court "precedents [under the FAA] emphasizing the consensual basis of arbitration."³³ The majority thus brings into play the body of substantive law of arbitrability that has grown up around the FAA in the last quarter-century—and which preempts contrary state law.³⁴ The majority explains 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."³⁵ The contractual foundation of arbitration facilitates party choices—including "who will resolve specific disputes," and "*with whom* they choose to

³² See *Stolt-Nielsen*, 130 S. Ct. at 1770, 1772; *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-53 (2003).

³³ *Stolt-Nielsen*, 130 S. Ct. at 1776.

³⁴ See *supra* notes 9-22.

³⁵ *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt Info. Scis. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

arbitrate."³⁶ Here, where the parties' agreement was silent as to the issue of class-action arbitration—and, indeed, had stipulated that there was "no agreement" on the matter—there could be no basis upon which to authorize class arbitration. Explained the Court:

[T]he 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.³⁷

Such a result could not be inferred "solely from the fact of the parties' agreement to arbitrate" because class-action arbitration "changes the nature of arbitration" in various ways: (1) the arbitrator is charged with resolving not just a single dispute, "but instead resolves many disputes between hundreds or . . . thousands of parties"; (2) the "presumption of privacy and confidentiality" is lost; (3) the arbitrator's award "adjudicates the rights of absent parties"; and (4) the commercial stakes are particularly significant, as in class-action litigation.³⁸

Thus, the majority concludes that, *as a matter of federal law*, there can be no class-action arbitration when the parties have stipulated there is "no agreement" on the matter.³⁹ The present decision arguably fits more squarely than *Bazzle* within the general body of American precedents

³⁶ *Stolt-Nielsen*, 130 S. Ct. at 1774.

³⁷ *Id.* at 1776.

³⁸ *Id.* at 1775-76.

³⁹ *See Stolt-Nielsen*, 130 S. Ct. at 1776.

involving multi-party conflict and multiple arbitration agreements.⁴⁰ The majority of U.S. courts that considered the question have taken it upon themselves to address issues relating to the consolidated arbitration of multi-party disputes involving multiple contracts and multiple arbitration agreements, and have characterized the key issue as one of consent.⁴¹

C. *Stolt-Nielsen as Reflective of International Forum Selection Policies*

Although the Court did not address the issue, its decision in *Stolt-Nielsen* is in line with the body of precedents reflecting strong receptiveness to arbitration provisions as a species of forum selection clauses in

⁴⁰ See IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, III FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT, ch. 33 (Little, Brown & Co. ed., Aspen Law & Bus. 1999) (1994) (discussing federal case law, most of which holds that, absent express agreement, an arbitrator does not have authority to expand an action into a class action).

⁴¹ See *Gov't of U.K. of Gr. Brit. & N. Ir. v. Boeing Co.*, 998 F.2d 68, 73 (2d Cir. 1993) (quoting *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991)) (“[A] court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy. . . . If contracting parties wish to have all disputes that arise from the same factual situation arbitrated in a single proceeding, they can simply provide for consolidated arbitration in the arbitration clauses to which they are a party.”); *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1026-27 (9th Cir. 1991) (holding that arbitrator does not have authority add new parties to arbitration proceedings without the consent of all parties); *Hotel Restaurant Employees Int’l Union v. Michelson’s Food Svcs.*, 545 F.2d 1248, 1253 (9th Cir. 1976) (holding that arbitrators do not have the authority to expand an action into a class action). See generally MACNEIL, SPEIDEL & STIPANOWICH, *supra* note 40, ch. 33. The *Stolt-Nielsen* majority’s decision clearly seeks to undermine *Bazzle*—which, the majority concludes, failed to yield a majority decision on any of the questions presented. *Bazzle* was hardly a model of clarity or comfort for anyone; counsel for financial services companies as well as consumer counsel have roundly criticized the result. See Brief for Petitioner at 21-23, *AT&T Mobility LLC v. Concepcion*, No. 09-893 (U.S. Aug. 2, 2010) (noting risks of class-wide arbitration, given the potentially broad consequences of a class-wide arbitration award and limited judicial review of awards). One wonders whether Alito and company regard the post-*Bazzle* establishment of procedures to facilitate class action arbitration as a great deal of sound and fury ultimately signifying nothing.

international contracts.⁴² Richard Nagareda argues that the Court's downplaying of state policies supporting class action and its characterization of the "fundamental changes" that class-wide arbitration would bring is consistent with prevailing international practice. U.S.-style class actions are "anomalous" among global regimes; the concept of an opt-out class proceeding is distinctly at odds with civil law precepts that require affirmative consent to disposition of claimant's rights.⁴³ The *Stolt-Nielsen* holding thus avoids potential issues of other nations' public policy applicable to the recognition and enforcement of arbitration awards under the New York Convention,⁴⁴ and "effectively eases what otherwise would be the potential for tension between the obligation of other nations to recognize and enforce arbitral awards under the New York Convention and the principles that those same nations would use to recognize and enforce judgments in litigation."⁴⁵

D. Implications for Adhesion and "Class Action Waiver" Scenarios

There is, however, a very different way of looking at *Stolt-Nielsen*, and that involves its potential implications for judicial treatment of so-called "waiver of class action" clauses featured in predispute arbitration

⁴² See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). See generally, Nagareda, *supra* note 6.

⁴³ Nagareda, *supra* note 6, at 29.

⁴⁴ *Id.* at 30; see also Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, [New York Convention], available at <http://www.uncitral.org/pdf/1958NYConvention.pdf>

⁴⁵ Nagareda, *supra* note 6, at 30. For a contrary view, see S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity*, 30 MICH. J. INT'L. L. 1017, 1083-91 (2009).

agreements in many consumer and employment contracts.⁴⁶ Among the “grounds... at law or in equity” recognized by the Court is the doctrine of unconscionability.⁴⁷ The defense of unconscionability has been the centerpiece of widespread efforts to avoid arbitration in recent years, usually in the context of standardized agreements for employment or consumer goods or services that exhibit certain characteristics of contracts of adhesion.⁴⁸ Where a party is found to lack “a meaningful opportunity” to bargain, resulting in “unfairly one-sided” terms,⁴⁹ a federal or state court may employ state principles of unconscionability to deny enforcement to all

⁴⁶ See generally, Alexander J. Casey, *Arbitration Nation: Wireless Service Providers and Class Arbitration Waivers*, 6 WASHINGTON J. LAW, TECH. & ARTS 15 (2010); Yongdam Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, With Emphasis on Class Arbitration/ Arbitration Waivers*, 31 WHITTIER L. REV. 665 (2010); Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (2010); William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. OF CONFLICT RESOL. 335 (2009); Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. OF CONSUMER & COM. L. 151, 154 (2009) (discussing the recent “attack” on consumer arbitration by consumer advocates and the “widely criticized” “additional problem... that an arbitration clause may preclude the use of the class actions device”); Heather Bromfield, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 U.C. DAVIS L. REV. 315 (2009); Diana Link & Richard Bales, *Waiving Rights Goodbye: Class Action Waivers in Arbitration Agreements After Stolt-Nielsen v. AnimalFeeds International*, 11 PEPP. DISP. RESOL. L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1685297>.

⁴⁷ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) (“Generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening [FAA] § 2.”); see also *supra* text accompanying notes 15, 22; *infra* text accompanying notes 121-47.

⁴⁸ The leading commentary on adhesion contracts remains Rakoff, *supra* note 23. Professor Rakoff enumerates several identifying elements of contracts of adhesion, to wit: (1) “...a printed form that contains many terms and clearly purports to be a contract”; (2) a form drafted by one party to the transaction; (3) “[t]he drafting party participates in numerous transactions of the type represented...”; (4) the form is presented with the representation that “the drafting party will enter into the transaction only on the terms contained in the document”; (5) after dickering over whatever terms are open to bargaining, the adhering party signs the document; (6) “[t]he adhering party enters into few transactions of the type represented by the form”; (7) the principle obligation of the adhering party is to pay money. *Id.* at 1176-80.

⁴⁹ See discussion *infra* text accompanying notes 121-24.

or part of an arbitration agreement, or reform the provision.⁵⁰ Among the substantive grounds supporting unconscionability defenses, contractual waivers of the right to participate in a class action are among the most common;⁵¹ they have also produced conflicting rulings by courts.⁵² Again, much—including both the unconscionability determination and the relief granted—hinges on the applicable state law.⁵³

The Court's decision in *Stolt-Nielsen*, while not a direct assault on the breastworks of unconscionability and class action waiver doctrine, nonetheless laid the siege lines. Though Justice Alito's opinion stops short of "decid[ing] what contractual basis may support a finding that the parties agreed to authorize class-action arbitration," it may be perceived by some as a clear signal of the Court's lack of receptiveness to concerns about the impact of arbitration provisions on plaintiffs' ability to bring class actions—especially since the question may be decided not on the basis of state law

⁵⁰ See, e.g., *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219-21 (9th Cir. 2008) (applying Washington state law); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-95 (9th Cir. 2002) (applying New York state law); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 369-70, 372-73 (N.C. 2008); *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 680-90 (Cal. 2000). See also *infra* text accompanying notes 126-34.

⁵¹ See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 630-36 (2010).

⁵² David Horton, *supra* note 51, at 634. See, e.g., *Homa v. Am. Express Co.*, 558 F.3d 225, 229-32 (3d Cir. 2009) (class action waiver in credit card agreement unconscionable); *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1096-98 (9th Cir. 2009) (class action waiver made entire arbitration clause unconscionable since waiver provision was "not severable"); *Laster v. AT&T Mobility, LLC*, 584 F.3d 849, 854-56, 857-59 (9th Cir. 2009) (class action waiver made arbitration clause unconscionable; FAA did not expressly or impliedly preempt California law governing unconscionability); *Kaneff v. Del. Title Loans, Inc.* 587 F.3d 616, 624-25 (3d Cir. 2009) (arbitration clause in car loan agreement requiring debtor to arbitrate all disputes but allowing lender to repossess through court channels or self-help, containing class action waiver, provision for sharing of costs, and filing fee was not unconscionable under state law); *Cicle v. Chase Bank USA*, 583 F.3d 549, 555-56 (8th Cir. 2009) (arbitration clause in credit card agreement containing waiver of class action not unconscionable under Missouri law).

⁵³ See, e.g., *Lowden*, 512 F.3d at 1219-21 (applying Washington state law); *Circuit City Stores*, 279 F.3d at 893-95 (applying New York State law); *Tillman*, 655 S.E.2d at 369-70, 372-73; *Armendariz*, 6 P.3d at 680-90; See also, *infra* text accompanying notes 126-34.

and policy, but on that penumbra of federal law substantive law which the Court has found emanating from the FAA. While, as noted above, the Court has repeatedly taken the position that federal law is so supportive of agreements to arbitrate all kinds of civil disputes that it displaces state law that stands in the way of maximal enforcement;⁵⁴ *Stolt-Nielsen* appears to go further. Alito's opinion presages a "second tier" of substantive arbitrability law under the FAA—a body of law that not only affirmatively enforces agreements to arbitrate, but sets federal boundaries regarding the nature and scope of consent to arbitrate. Although it is too soon to tell, the Alito decision may be taken by some as a hint that the Court is prepared to remove the state law- and policy-based underpinnings for decisions directing parties to "class action arbitration" in the absence of specific contract language providing for such procedures (language which is highly unlikely to appear in any agreement⁵⁵) and perhaps even to preempt state precedents deeming contractual provisions purporting to waive class-based relief in arbitration unconscionable.⁵⁶

The latter concerns, of course, are sharply focused on the context of standardized contracts of adhesion, while the present case involved arms-length bargaining between sophisticated parties.⁵⁷ Alito alludes to this in a footnote criticizing the arbitration panel for relying on "cited arbitration awards," "none of [which] involved a contract between sophisticated business entities."⁵⁸ Justice Ginsberg took note of this qualification,

⁵⁴ See *supra* text accompanying notes 9-22.

⁵⁵ Nagareda, *supra* note 6, ("[F]aced with the choice of a class action in court and class arbitration, [corporate] defendants' oft-noted move is to opt for the devil you know...").

⁵⁶ See *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom AT&T Mobility LLC v. Concepcion* 130 S.Ct. 3322 (argued May 24, 2010) (No. 09-893) (granting cert. to at last address the issue of class action waivers).

⁵⁷ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1764-65 (2010).

⁵⁸ *Id.* at 1768 n.4.

concluding that the Court “apparently spares” contracts of adhesion from a requirement that consent to class arbitration be expressed affirmatively.⁵⁹ Ginsberg and the dissenting justices, moreover, sought to read the Court’s holding as requiring “a contractual basis for concluding that the parties agreed” to submit disputes to class arbitration, but not necessarily express assent.”⁶⁰

There is therefore room for surmise about how the Court would handle the class-action issue in an adhesion contract setting. Might a moderate judge enable a majority of the Court to reason that the “consensual dictates” of the FAA give way in any respect to the moderating realities of mass contracting, where additional concerns regarding the realities of assent come into play?⁶¹ The Court will have the opportunity to address the issue in the *AT&T v. Concepcion*⁶²— a decision which with *Stolt-Nielsen* and *Rent-A-Center* may comprise a Third Arbitration Trilogy.

Meanwhile, in light of *Stolt-Nielsen*, the Supreme Court summarily vacated and remanded for reconsideration the decision of the U.S. Court of Appeals for the Second Circuit in *American Express Co. v. Italian Colors*

⁵⁹ *Id.* at 1783 (Ginsburg, J., dissenting).

⁶⁰ *Id.*

⁶¹ See Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It’s All About Separation of Powers*, 12 J. CONSUMER & COM. L. 151, 154 (2009) (quoting a recent dissenting opinion in a Florida arbitration decision: “What we have begun to see is that virtually all consumer transactions, no matter the size or type, now contain an arbitration clause. And with every reinforcing decision, these clauses become ever more brazenly loaded to the detriment of the consumer. . . . Most consumers can’t read them, won’t read them, don’t understand them, don’t understand their implication and can’t afford counsel to help them out”); William H. Baker, *Class Action Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 335, 352 (2009) (reviewing recent cases addressing class action arbitration and noting the “special considerations” facing consumer contracts “where the consumers had no real opportunity to negotiate or change the clauses”).

⁶² See *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom AT&T Mobility LLC v. Concepcion* 130 S.Ct. 3322 (argued May 24, 2010) (No. 09-893).

Restaurant.⁶³ As in *Stolt-Nielsen*, the dispute in *American Express* involves commercial parties. A putative class of merchants who accept American Express's payment card allege that American Express has breached antitrust law in its dealings with the class. However, many of the merchants are small businesses with individual claims not exceeding \$5,000. Unlike the arbitration clause in *Stolt-Nielsen*, the clause in question in *American Express* did not specifically allocate arbitrability decisions to the arbitrator.

The Second Circuit—with then-Judge Sotomayor on the panel—ruled that the question of enforceability of class action waiver provisions in arbitration was for the court, rather than the arbitrator, and that enforcing the waiver provision would equate to granting American Express de facto immunity from federal antitrust liability by precluding the plaintiffs' only reasonable means of recovery given their disparate bargaining power.⁶⁴ Because the contract in question in *American Express* bears some of the earmarks of a contract of adhesion,⁶⁵ the Second Circuit may become the first U.S. appellate court to apply *Stolt-Nielsen* to a contract of adhesion between businesses. It is likely, however, to have more specific guidance from the Court in the form of a decision in *A.T.& T. v. Concepcion*.⁶⁶

⁶³ *Italian Colors Rest. v. Am. Express Travel Related Servs. Co.*, 554 F.3d 300, (2d Cir. 2009), *vacated and remanded sub nom American Express Co. v. Italian Colors Rest.*, No. 08-1473, 130 S. Ct. 2401 (2010).

⁶⁴ *Italian Colors Rest.*, 554 F.3d at 310-11, 319-20.

⁶⁵ See Rakoff, *supra* note 23 at 1176-78.

⁶⁶ *Laster*, 584 F.3d 849 (*cert. granted sub nom AT&T Mobility LLC v. Concepcion* (argued May 24, 2010) (No. 09-893)).

E. Stolt-Nielsen, Judicial Vacatur of Awards, and Manifest Disregard

Because of the Court's consistent penchant for enforcing arbitration agreements, increasing attention has been paid to the degree of scrutiny given by courts to arbitration awards in the course of ruling on motions to vacate. In this regard, one final element of *Stolt-Nielsen* bears comment—the rare spectacle of the nation's High Court directing vacatur of a commercial arbitration award.⁶⁷ Although, as in *Hall Street*,⁶⁸ the Court declined to give clear direction on the status of the doctrine of "manifest disregard of the law," the majority nevertheless decided that if such a standard indeed exists, it was met!⁶⁹ The arbitration panel failed to consider what body of law governed the issue of class arbitration, but instead rested its decision on general public policies supporting the concept. Such an approach ignored the FAA's preemptive "consensual foundation"—the requirement that no person can be required to arbitrate except as prescribed by agreement. The arbitrators' failure to recognize and adhere to these basic principles was an act "in excess of their powers," amounting to "manifest disregard" of fundamental FAA precepts. (Justice Ginsberg's dissent, joined by Justices Stevens and Breyer, questioned not only the level of scrutiny

⁶⁷ See *Commonwealth Coatings Corp. v. Casualty Co.*, 393 U.S. 145 (1968) (reinforcing the perceived breadth of "evident partiality" And giving rise to one of the more popular bases for motions to vacate awards and, thereby, an extensive progeny of case decisions on conflict of interest and disclosure): see also IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, III *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT*, §40.1.4 (Aspen Law & Business 1994).

⁶⁸ *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

⁶⁹ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*, 130 S. Ct. 1758, 1768 n.3 (2010).

applied by the majority but, moreover, the ripeness of the matter for judicial action).⁷⁰

Clearly, we have not seen the last of manifest disregard, which the Second Circuit believes lingers as “judicial gloss” on the FAA’s stipulated vacatur grounds.⁷¹ This is because the Supreme Court failed in *Hall Street* to clearly delineate what role, if any, “manifest disregard of the law” continues to play under the specific terms of the FAA, most notably Section 10(a)(4). The Court briefly noted that “some courts have thought... ‘manifest disregard’ may have been shorthand for Section 10(a)(3) or Section 10(a)(4)”⁷²—but stopped short of providing guidance on the appropriateness of such thinking or how either section might underpin judicial scrutiny of the legal basis of an award. Some courts interpreted *Hall Street* as eliminating the principle in cases under the FAA⁷³ while the Second Circuit and others have continued to apply the principle with or without reference to *Hall Street*.⁷⁴ Now, *Stolt-Nielsen* suggests, “manifest

⁷⁰ See *id.* at 1777 (Ginsburg, J., dissenting).

⁷¹ See *supra* note 31 and accompanying text.

⁷² *Hall Street Assoc.*, 552 U.S. at 585 (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)).

⁷³ See, e.g., *Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (acknowledging in dicta that “manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the [FAA]”); *Robert Lewis Rosen Assocs. v. Webb*, 566 F.Supp.2d 228, 233 (S.D.N.Y. 2008) (finding manifest disregard doctrine no longer good law and vacatur was limited to grounds stated in the FAA); *Supreme Oil Co. v. Abondolo*, 568 F.Supp.2d 401, 406 (S.D.N.Y. 2008) (holding manifest disregard of law is not ground for vacatur under the FAA after *Hall Street Associates*).

⁷⁴ See, e.g., *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 641 n.5 (9th Cir. 2010) (arbitrators do not exceed their powers” when they merely misinterpret or incorrectly apply the governing law; the award must be “completely irrational” or show a “manifest disregard of the law”); *UMass Mem’l Med. Ctr., Inc. v. United Food & Commercial Workers’ Union*, 527 F.3d 1, 5-6 (1st Cir. 2008) (courts still retain “inherent powers outside” the FAA to vacate arbitral awards, including situations in which the arbitrator acts in disregard of law). In a number of recent cases courts have considered challenges based on manifest disregard without reference to *Hall Street Associates*, 552 U.S. 576 (2008). See, e.g., *Radetsky v. Ferris Baker Watts, Inc.*, No. 06-CV-1284 (Sept. 3,

disregard,” whatever it is, may still exist! The grey areas are particularly intriguing with respect to Section 10(a)(4), which supports judicial vacatur of an award “where the arbitrators exceeded their powers.” Although *Hall Street* came down strongly against extra-statutory contractual bases for vacatur, might what the Second Circuit terms “judicial gloss” permit parties to give form and content to the boundaries of arbitrators’ authority and what constitutes “exceeding their powers” under Section 10(a)(4)? Might, for example, parties trigger judicial review of errors of law by describing a failure to faithfully observe and apply particular law as “in excess of the arbitrator’s powers”?⁷⁵ While it is highly doubtful that the *Stolt-Nielsen* majority actively contemplated, or relishes, the prospect, there is no doubt that hopeful attorneys will seize on the wisp of a possibility of wedging a foot in the door of vacatur. Although, as in the past, very few awards will

2008) (considering challenges to arbitration awards on grounds of manifest disregard without reference to *Hall Street*); *Grigsby & Assocs. v. M Secs. Inv., Inc.*, 2008 WL 2959730, 2-4 (S.D. Fla. July 30, 2008) (without discussing *Hall Street Associates*, confirming an arbitration award after concluding it did not manifestly disregard the law and was “not arbitrary and capricious”); *Hicks v. Cadle Co.*, 355 Fed.Appx. 186, 196-97 (D. Col. 2008) (without discussing *Hall Street Associates*, partially vacating an award on the basis of manifest disregard); *Remote Solution Co. v. FGH Liquidating Corp.*, 568 F.Supp.2d 534, 543-45 (D. Del. 2008) (without discussing *Hall Street Associates*, the court confirmed an award, finding no manifest disregard of law in award of attorney fees pursuant to a contractual provision).

⁷⁵ The Court in *Hall Street Associates* did not specifically address this possibility, which would by definition involve judicial activity under the existing terms of the FAA and not supplementary terms such as those the Court explicitly proscribed. On the other hand, such an approach seems contrary to *Hall Street Associates*’ declaration of “a national policy [under the FAA] favoring . . . just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Hall Street Assocs.*, 552 U.S. at 577, 588; see Thomas J. Stipanowich, *Expanded Review of Awards: Hall Street and Cable Connection*, in 2010 ANNUAL REPORT OF THE SECTION OF PUBLIC UTILITY, COMMUNICATIONS, AND TRANSPORTATION LAW (2010) (describing current possibilities for expanded judicial scrutiny of arbitration awards, and other alternatives).

actually be overturned on grounds of “manifest disregard,”⁷⁶ the Court’s failure to effectively put the matter to bed will continue to reduce certainty and generate additional transaction costs respecting arbitration awards.⁷⁷

IV. RENT-A-CENTER, WEST, INC. v. JACKSON: REPLACING THE GATEKEEPER

*Rent-A-Center, West, Inc. v. Jackson*⁷⁸ involves the critical nexus of three important bodies of doctrine in the law of arbitration. One involves the principle, first enunciated by the Court in 1967, that executory arbitration agreements are separable from the contracts of which they are a part for the purposes of enforcement—thereby permitting arbitrators to address defenses to the validity or enforceability of the larger contract.⁷⁹ A second stream of caselaw surrounds the enforceability of contractual agreements to give arbitrators authority to address issues associated with the scope of arbitrable issues or the existence, validity or enforceability of the arbitration agreement itself.⁸⁰ The third body of doctrine is the substantive state law of unconscionability, which has come into play in numerous federal and state court decisions as the primary judicially-declared limit on the enforceability

⁷⁶ Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 24, 25 fig.5 (summarizing data indicating only about four percent of motions to vacate based on “manifest disregard” result in vacatur).

⁷⁷ The majority also borrowed, for the first time in a commercial arbitration decision by the Court, and somewhat anachronistically, the maxim from the collective bargaining realm that “[i]t is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l*, 130 S. Ct. 1758, 1767 (2010). This principle of labor arbitration must now be regarded as a part of the law surrounding FAA Section 10(a)(4). 9 U.S.C. §10(a)(4) (2009).

⁷⁸ *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

⁷⁹ See *infra* text accompanying notes 82-99.

⁸⁰ See *infra* text accompanying notes 100-20.

of agreements to arbitrate, habitually in the realm of adhesion contracts.⁸¹ The Court's disposition of those elements in *Rent-A-Center* will undoubtedly have huge practical ramifications for those bound by arbitration agreements of all kinds.

A. *Background of the Case: Three Bodies of Doctrine*

1. *Prima Paint and Separability*

Section 2 of the FAA states that written contracts to arbitrate are: . . . valid, irrevocable, and enforceable . . . except on “such grounds as exist at law or in equity for the revocation of any contract.”⁸² This section expressly makes predispute arbitration agreements (like agreements to submit existing disputes) enforceable and puts arbitration contracts on equal footing with other types of contracts,⁸³ but also makes clear that parties can raise standard contractual defenses to challenge the validity of an arbitration agreement.⁸⁴ Consideration of such defenses is a “gateway” issue that courts are called upon to address, along with questions about the presence of appropriate written language of agreement and “scope issues” (that is, whether a controversy that falls within the scope of that

⁸¹ See *infra* text accompanying notes 121-61.

⁸² The Section states in full:

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

9 U.S.C. §2 (1947).

⁸³ See, e.g., *Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

⁸⁴ See *Doctor's Assocs., Inc. v. Casarotto*, 517 US 681, 687 (1996).

agreement).⁸⁵ The FAA implements this basic “substantive rule” of enforcement by permitting parties to apply to a federal court for a stay of the trial of arbitrable issues under Section 3 or a motion to compel arbitration under Section 4.

The precise boundaries of courts’ “gateway” role in considering contractual defenses to arbitration agreements, and the respective purviews of courts and arbitrators under the FAA, were at issue in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁸⁶ Prima Paint purchased Flood & Conklin’s (“F&C”) paint business and entered into a consulting agreement with the chairman of F&C. Soon Prima Paint stopped making payments under the agreements, charging that F&C had breached both agreements by fraudulently representing that it was solvent when it intended to file for bankruptcy. F&C served a notice of intent to arbitrate. Prima Paint subsequently filed a lawsuit in the federal court in New York seeking to rescind the consulting agreement as fraudulently induced. Prima Paint argued that since the arbitration agreement must rise or fall with the rest of the contract, its fraud defense must be addressed by a court of law.⁸⁷ The Supreme Court, however, reached a contrary conclusion and upheld the dismissal of Prima Paint’s appeal from a grant of F&C’s motion to compel arbitration. The Court ruled that the broad terms of the parties’ agreement to arbitrate, the arbitrators and not a court of law should resolve the question of fraudulent inducement. The Court’s decision—founded on the principle that the arbitration clause should be considered separately from the underlying contract for the purpose of enforcement—has become one of the cornerstones of modern arbitration law. Although this approach could result

⁸⁵ See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 414 (1967).

⁸⁶ *Prima Paint Corp.*, 388 U.S. 395, 403-404, 414.

⁸⁷ *Id.* at 398.

in the seeming paradox of arbitrators ruling that the contract that gave rise to their own jurisdiction was the fruit of fraud, and therefore invalid, the doctrine of separability (or severability) was—and continues to be—justified on the ground that the vitality of arbitration clauses will be undermined by allowing parties to waylay the process through front-end challenges to the whole contract.⁸⁸ Only where the challenge is aimed directly at the arbitration provision itself is there a place for judicial intervention at the “gateway”; otherwise, the issue of the contract’s validity is for the arbitrator in the first instance.

In addition to becoming part of arbitration doctrine under the FAA, this rationale has proven persuasive in the arena of international arbitration, where the principle of separability is broadly established.⁸⁹ It is also widely embraced under the arbitration law of various U.S. states,⁹⁰ and was expressly recognized in the Revised Uniform Arbitration Act.⁹¹

⁸⁸ The Court found this conclusion “explicit” under § 4 of the FAA, under which federal courts are directed to compel arbitration upon proof that “the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue”—a provision that reinforced the limited nature of front-end judicial “gatekeeping” and promoted the parties’ presumed desire for early resort to arbitration. . . .

[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. . . . We hold, therefore . . . that a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

Id. at 403-04.

⁸⁹ See U.N. Comm’n on Int’l Trade Law [UNCITRAL], UNCITRAL Model Law On International Commercial Arbitration, at 8, art. 16(1) (2008), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

⁹⁰ See, e.g., *Old Republic Ins. Co. v. Lanier*, 644 So. 2d 1258 (Ala. 1994); *U.S. Insulation, Inc. v. Hilro Constr. Co.*, 705 P.2d 490 (Ariz. Ct. App. 1985); *Erickson, Arbuthnot*,

The continuing vitality—and potential reach—of the separability principle under the FAA was made evident in *Buckeye Check Cashing, Inc. v. Cardegna*,⁹² a decision involving a broad-form arbitration provision in a standardized consumer-lending contract. The case was brought as a putative class action in Florida state court against Buckeye, a check-cashing service; the plaintiffs alleged that the defendant had charged usurious interest rates and that its standard deferred-payment agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face. Buckeye filed a motion to compel arbitration under the broad arbitration provision in its contract. The trial court denied the motion, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void *ab initio*. This decision was reversed by an appellate court but reinstated by the Florida Supreme Court, which concluded that “to enforce an agreement to arbitrate in a contract challenged as unlawful ““could breathe life into a contract that not only violates state law, but also is criminal in nature. ...”⁹³ The Court granted certiorari and, in a 7-1 decision (with one abstention), reversed the Florida Court. Writing for the majority, Justice Scalia reasoned that the severability principle of *Prima Paint* was now applicable in state as well as federal court actions subject to the FAA under the Court’s holding in *Southland Corp. v. Keating*,⁹⁴ which recognized FAA Section 2 as a source of federal substantive arbitration law which was ““applicable in state and federal

McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, 673 P.2d 251 (Cal. 1983); *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916 (D.C. 1992); *Brown v. KFC Nat’l Mgmt. Co.*, 921 P.2d 146 (Haw. 1996); *Quirk v. Data Terminal Sys., Inc.*, 400 N.E.2d 858 (Mass. 1980); *Weinrott v. Carp*, 298 N.E.2d 42 (N.Y. 1973); *Weiss v. Voice/Fax Corp.*, 640 N.E.2d 875 (Ohio Ct. App. 1994); *Jackson Mills, Inc. v. BT Capital Corp.*, 440 S.E.2d 877 (S.C. 1994); *South Carolina Pub. Serv. Auth. v. Great W. Coal*, 437 S.E.2d 22 (S.C. 1993); *Gerwell v. Moran*, 10 S.W.3d 28 (Tex. App. 1999); *Schneider, Inc. v. Research-Cottrell, Inc.*, 474 F. Supp 1179 (W.D. Pa. 1979) (applying Pennsylvania law); *New Process Steel Corp. v. Titan Indus. Corp.*, 555 F. Supp. 1018 (S.D. Tex. 1983) (applying Texas law); *Pinkis v. Network Cinema Corp.*, 512 P.2d 751 (Wash. Ct. App. 1973).

⁹¹ See REVISED UNIF. ARB. ACT § 6(c) & cmt.4 U.L.A. 18 (amended 2000).

⁹² *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

⁹³ *Id.* at 440.

⁹⁴ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

courts.’’⁹⁵ Because the challenge to the present agreement did not target the arbitration provisions, there was no room for judicial intervention at the “gateway” under the FAA, and the issues he challenged should therefore be initially considered by an arbitrator, not a court. It was irrelevant, concluded Scalia, that Florida public policy and contract law might refuse to sever or salvage “parts of a contract found illegal and void under Florida law;” in *Southland*, the Court ruled that state law “could [not] bar enforcement of Section 2, even in the context of state-law claims brought in state court.”⁹⁶ Moreover, *Prima Paint* failed to distinguish between defenses making contracts voidable and those rendering contracts illegal or void—all defenses were for the arbitrator in the first instance unless directed specifically at the agreement to arbitrate.⁹⁷

Although the separability doctrine has attained broad acceptance domestically and internationally in the arena of commercial contracts, *Buckeye*’s projection of the *Prima Paint* into the realm of non-negotiated mass consumer credit contracts and illegality on the face of an agreement raised concerns that the separability principle vouchsafed to arbitrators too much authority to police illegal behavior and provided companies with a mechanism for effectively avoiding the courthouse.⁹⁸ While judicial review of an arbitrator’s decision is theoretically available at the post-award stage, as a practical matter its potency is significantly diminished as a result of the timing and, even more, by the narrow bases for vacatur of award under the FAA.⁹⁹

⁹⁵ *Id.* at 12.

⁹⁶ *Buckeye Check Cashing, Inc.*, 546 U.S. at 445.

⁹⁷ *Id.*

⁹⁸ See Stephen J. Ware, *Arbitration Law’s Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107 (2007) (advocating repeal of the separability doctrine).

⁹⁹ See Cross, *supra* note 6; 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 955-958 (Kluwer Law Int’l, 2009).

2. Contractual Allocation of “Gateway” Decisions

Although the separability doctrine significantly diminished the “gateway” role of courts under the FAA, courts still serve as “gatekeepers” to make determinations relating to the arbitration agreement itself. The kinds of questions they may be called upon to address are (1) questions regarding the existence or validity of an arbitration agreement, as where a party claims to have been deceived as to the true nature or content of an arbitration agreement or raises other contractual defenses to its enforcement;¹⁰⁰ and (2) questions about whether or not a particular dispute falls within the scope of an arbitration provision.¹⁰¹ As it happens, however, both categories of questions have themselves been deemed to be arbitrable in certain circumstances under U.S. and other law.¹⁰²

In fact, agreements to delegate “gateway” functions to arbitrators are ubiquitous in business contracts. Concerns about delays and inefficiencies caused by front-end resort to court prompted drafters to give arbitrators authority to resolve not only disputes relating to the contract of which the arbitration provision is a part, but also (1) defenses aimed at the existence, validity or enforceability of the arbitration provision itself, or (2) issues respecting the scope of its application. Clauses addressing “*Kompetenz-Kompetenz*” (the authority of arbitrators to address their own competence to hear certain controversies under an arbitration agreement) are a standard

¹⁰⁰ See *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (June 21, 2010); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

¹⁰¹ See *Chevron U.S.A., Inc. v. Consolidated Edison Co.*, 872 F.2d 534, 537 (2d Cir. 1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

¹⁰² See generally BORN, *supra* note 99, 851-1001 (discussing the doctrine of “competence-competence” (“*Kompetenz-Kompetenz*”) under international law and the laws of the U.S. and other countries).

feature of international commercial arbitration rules.¹⁰³ Virtually all of the leading procedures for commercial—that is, business-to-business—arbitration in the United States include language that purports to give arbitrators plenary authority over all issues, including those surrounding the enforceability of the arbitration agreement and other arbitrability issues.¹⁰⁴

Of course, “[t]here is . . . almost inescapable circularity” to provisions that grant arbitrators authority to address questions about the existence or validity of the very arbitration agreement from which they derive their power.¹⁰⁵ As Gary Born explains, “[i]n these circumstances” any authority devolving upon an arbitration tribunal must spring from national or international law.¹⁰⁶ Internationally, such authority may be found under the European Convention, the UNCITRAL Model Law, and, impliedly, under the New York Convention.¹⁰⁷

Although the FAA contains no express provisions addressing the possibility of allocating “gateway” functions to arbitrators, Supreme Court decisions have addressed the issue. One critical precedent is *AT&T Technologies, Inc. v. Communications Workers of America*,¹⁰⁸ a case involving a dispute over interpretation of the breadth of application of an

¹⁰³ *See id.* at 869-870.

¹⁰⁴ For example, the American Arbitration Association (AAA) Commercial Arbitration Rules state, “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” AMERICAN ARBITRATION ASSOCIATION, Commercial Arbitration Rules and Mediation Procedures, R-7(a) (June 1, 2009), available at <http://www.adr.org/sp.asp?id=22440>.

¹⁰⁵ BORN, *supra* note 99, at 870.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *AT&T Techs., Inc. v. Comm’ns Workers of Am.*, 475 U.S. 643 (1986).

arbitration provision in a collective bargaining agreement under the Taft-Hartley Act,¹⁰⁹ the Court explained:

[W]hether a[n] ... agreement creates a duty for the parties to arbitrate the particular grievance ... is undeniably an issue for judicial determination. ... Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.¹¹⁰

In *First Options of Chicago v. Kaplan*,¹¹¹ a unanimous Court embraced this dictum from the labor arbitration arena as the foundation for a standard for judicial enforcement of agreements to submit what it characterized as “arbitrability” issues to arbitration under the FAA. Unlike *AT&T Technologies*, which involved who should decide a question of the breadth of a concededly valid agreement to arbitrate, *First Options* was concerned with who should decide whether the defendant investors had actually assented to an arbitration agreement with a stock trade-clearing firm. In order for the question to be directed to the arbitrator, reasoned Justice Breyer’s opinion, there would need to be a finding of the parties’ objective intent to arbitrate arbitrability.¹¹² However, because an agreement of this

¹⁰⁹ 29 U.S.C. §185(a) (2006).

¹¹⁰ *AT&T Techs.*, 475 U.S. at 649. The Court went on to conclude, however, that courts should construe arbitration agreements broadly, and “resolve doubts in favor of coverage.” *Id.* at 656 (citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)).

¹¹¹ *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

¹¹² *Id.* at 944-45.

kind would empower arbitrators to address issues that parties might reasonably expect a judge to decide,¹¹³ it was appropriate to require an enhanced burden of proof in the form of “clear and unmistakable” evidence that the parties agreed to arbitrate arbitrability.¹¹⁴

The Court proceeded to find no such evidence in the case before it. Had the decision been otherwise, however, the arbitrator’s decision would have been accorded significant deference. Justice Breyer made clear that once a judgment is made that parties have committed questions of arbitrability to the arbitrator:

¹¹³ “Giving the arbitrators that power... might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” *Id.* at 945. Breyer continues:

In this manner the law treats silence or ambiguity about the question “*who* (primarily) should decide arbitrability” differently from the way it treats silence or ambiguity about the question “*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement”—for in respect to this latter question the law reverses the presumption...

Id. at 944.

With respect to the pro-arbitration presumption that applies to a court’s determination of whether a particular dispute is arbitrable, the Court cites *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Breyer explains,

The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law’s permissive policies in respect to arbitration... one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. ... On the other hand, the former question—the “*who* (primarily) should decide arbitrability” question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers ...

First Options, 514 U.S. at 945.

¹¹⁴ *First Options*, 514 U.S. at 944 (quoting *AT&T Techs.*, 475 U.S. at 649).

[T]he court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that the parties have agreed to arbitrate... [T]he court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.¹¹⁵

First Options has been the subject of considerable commentary, much of it critical.¹¹⁶ Particular concerns have been raised about the Court's use of the vague term "arbitrability" and its appropriation of dictum from labor precedents that involved questions of scope under concededly valid arbitration agreements in support of a decision involving the question of the very existence of a valid agreement.¹¹⁷ Some courts have continued to insist that challenges to existence, validity or enforceability must be reserved for judicial determination,¹¹⁸ since, as explained by the Third Circuit, "a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction [i]f the parties never entered into it."¹¹⁹ But a growing number of courts applied the dictum of *First Options* to enforce "clear and unmistakable" provisions empowering arbitrators to address questions of the existence, validity or enforceability of arbitration

¹¹⁵ *Id.* at 943 (citing *AT&T Techs.*, 475 U.S. at 649; *Warrior*, 363 U.S. at 583, n. 7).

¹¹⁶ *See, e.g.*, Steven H. Reisberg, *The Rules Governing who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*, 20 AM. REV. OF INT'L ARB. 159 (2009); Cross, *supra* note 6, at 24-35. *See generally* BORN, *supra* note 99, at 914 n.327 (citing numerous articles).

¹¹⁷ *See e.g.*, Reisberg, *supra*, note 116, at 159-60; Cross, *supra* note 6, at 27-30.

¹¹⁸ *See, e.g.*, *China Minmetals Materials Import & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 287 (3d Cir. 2003); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001).

¹¹⁹ *China Minmetals*, 334 F.3d at 288.

agreements, not just issues of scope.¹²⁰ However desirable this outcome in the broad run of commercial contracts, it raises significant potential concerns on the part of advocates for consumers and employees who find themselves subject to boilerplate arbitration provisions prepared by a company lawyer. It requires little imagination to appreciate that an agreement consigning virtually all legal and factual issues to arbitrators, including challenges aimed at the very source of their authority, is a singularly effective way of making arbitration a procedural black box, hermetically sealed from court intrusion.

3. Unconscionability

Unconscionability is the key doctrine used by courts in addressing perceived due process concerns growing out of arbitration agreements in contracts of “adhesion.”¹²¹ The doctrine evolved as a means of permitting courts to police contracts for “gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party.”¹²²

¹²⁰ See, e.g., *Terminix Int’l Co., LP v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1331-2 (11th Cir. 2005); *Contec Corp. v. Remote Solution Co. Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005); and other cases cited at 581 F.3d at 917. See generally Cross, *supra* note 6, at 34 n.129 (citing authority), 61-67 (discussing cases).

¹²¹ See generally, Bruhl, *supra* note 2 (describing Court-directed expansion of FAA); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO. ST. J. ON DISP. RESOL. 757 (2004).

¹²² RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) states:

d. *Weakness in the bargaining process.* A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or

Proving unconscionability normally requires a showing of circumstances indicating an “adhesive” bargain (so-called “procedural unconscionability”) as well as unfair contract terms (“substantive unconscionability”).¹²³ As formulated in Article 2 of the Uniform Commercial Code and the Restatement (Second) of Contracts, unconscionability affords courts considerable discretion in tailoring appropriate remedies—from invalidating a contract to narrow blue-penciling.¹²⁴

Until fairly recently, judicial decisions grounded on unconscionability doctrine were few and far between.¹²⁵ With the expanded use of binding arbitration provisions in consumer and employment contracts, however, unconscionability doctrine came into vogue as a means of curtailing perceived abuses of corporate power aimed at denying

did not in fact assent or appear to assent to the unfair terms. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.

¹²³ See generally *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); 8 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 18:9 (4th ed. 1993 & Supp. 2010).

¹²⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result”); U.C.C. § 2-302(1) (2003) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result”).

¹²⁵ See, e.g., Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 610 (2009); Bruhl, *supra* note 2, at 1439-1442.

fundamentally fair procedures to other parties in contracts of adhesion.¹²⁶ Unconscionability has been a relatively successful mode¹²⁷ of judicially challenging the enforceability of arbitration agreements containing unilateral arbitration clauses,¹²⁸ limitations of remedies,¹²⁹ class action waivers,¹³⁰ confidential arbitration requirements,¹³¹ and fee-splitting and

¹²⁶ Stempel, *supra* note 121, at 803-807; Bruhl, *supra* note 2, at 1440 fig.1. Cross, *supra* note 6, at 10 n.28 (Challenges to the enforceability of arbitration agreements based on unconscionability defences tend to represent sixteen to eighteen percent of all arbitration cases).

¹²⁷ It has been estimated that around forty percent of unconscionability defenses to arbitration agreements have met with success in recent years. Cross, *supra* note 6, at 11 n.20.

¹²⁸ See, e.g., *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1285-86 (9th Cir. 2006) (holding unconscionable, for lack of mutuality, clause requiring employee to arbitrate claims but allowing employer to bring judicial action); *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 689-94 (Cal. 2000) (finding arbitration clause unconscionable where it required employees but not employer to arbitrate claims and limited employees' potential damages but not employer's); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 372-73 (N.C. 2008) (holding arbitration clause unconscionable because lender had managed to avoid ever arbitrating a claim against a borrower, while clause required borrowers to arbitrate claims against lender).

¹²⁹ See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (affirming, without giving reasons, lower court's holding that limitation of remedies was unconscionable); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir. 2002) (holding unconscionable "asymmetry is compounded by the fact that the agreement limits the relief available to employees").

¹³⁰ See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59-60 (1st Cir. 2007) (holding class waiver unconscionable because it would "result in oppression and unfair surprise to the disadvantaged party"); *Ting*, 319 F.3d at 1150 (holding class waiver unconscionable because one-sided); *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592, 603-04 (D.N.J. 2009) (finding arbitration provisions unconscionable because likely amounts of individual recovery were small and company was effectively immunized "from claims that would be suitable for class action resolution"); *Tillman v. Comm'l Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) (holding that class waiver, together with other provisions in arbitration agreement, rendered agreement unconscionable; the class waiver "contribute[d] to the financial inaccessibility of the arbitral forum" and "contribute[d] to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers"); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (recognizing that majority of jurisdictions uphold class action waivers but citing cases from fifteen jurisdictions holding that class action waivers in arbitration agreements were substantively unconscionable); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 951 (Or. Ct. App. 2007) (holding class waiver unconscionable because

“loser pays” schemes.¹³² While some courts have employed unconscionability to strike down entire arbitration agreements, others have taken a “surgical” approach, excising or reforming problematic provisions and sustaining the arbitration agreement.¹³³ Predictably, the courts of some states, such as California, have been considerably more energetic in developing unconscionability doctrine than others.¹³⁴

it was “unilateral in effect and . . . gives defendant a virtual license to commit, with impunity, millions of dollars’ worth of small-scale fraud”).

¹³¹ See, e.g., *Ting v. AT&T*, 319 F.3d 1126, 1151-52 (finding provision requiring that arbitration remain confidential unconscionable because it prevents “accumulat[ion] of a body of knowledge on a particular company” that could mitigate repeat player effect). Cf. *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1180-83 (Ohio Ct. App. 2004) (holding secrecy clause violates public policy, which “may be distinguished from a finding of unconscionability,” but hinges on similar concerns about repeat player effect and loss of information to the public).

¹³² See, e.g., *Ting*, 319 F.3d at 1151 (holding requirement that customers split arbitration fees with corporation unconscionable because “some complainants would . . . face prohibitive arbitration costs, effectively deterring them from vindicating their statutory rights”); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 371-72 (N.C. 2008) (holding arbitration clause requiring loser to pay costs unconscionable where plaintiffs “live paycheck to paycheck” and “simply do not have the resources to risk facing these kinds of fees”); *Vasquez-Lopez*, 152 P.3d at 951-52 (holding cost-sharing provision unconscionable because it makes cost of bringing an action prohibitive).

¹³³ Compare *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 695-99 (Cal. 2000) (declining to sever unconscionable clauses from arbitration agreement because unconscionability “permeated”), *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1293 (9th Cir. 2006) (striking down entire arbitration agreement because it had “multiple defects [that] indicate a systematic effort to impose arbitration . . . as an inferior forum”), and *Tillman*, 655 S.E.2d at 373-74 (declining to sever unconscionable provisions because “this particular arbitration clause . . . does not allow for meaningful redress of grievances”) with *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 63 (1st Cir. 2007) (severing unconscionable clause and upholding rest of arbitration agreement because both parties wanted this remedy) and *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003) (holding unconscionable provisions of arbitration agreement invalid but an unconscionable aspect “revived”).

¹³⁴ California courts have employed unconscionability to deny enforcement to arbitration agreements on numerous occasions. In the seminal decision of *Armendariz*, 6 P.3d 669, the California Supreme Court used unconscionability doctrine as the basis for considering what procedural protections would be essential requisites for the arbitration of statutory discrimination claims under an employment agreement. Such elements included an independent and impartial arbitrator, an opportunity for the employee to have adequate discovery, limits on the cost of arbitration, remedies akin to those available in court, a

Significantly, before this year the U.S. Supreme Court has never applied, or specifically addressed in a holding, the doctrine of unconscionability or similar policy grounds in the arbitration context. Aside from general hortatory dicta, it has avoided pronouncements singling out arbitration provisions in “adhesion” contracts for special treatment.

The Court has stated repeatedly that “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract,’”¹³⁵ and has enumerated unconscionability as among the “generally applicable contract defenses” that may invalidate an arbitration agreement.¹³⁶ On the other hand, the Court has never actually affirmed the denial or limited enforcement of an arbitration agreement on such grounds. Regardless of the transactional setting, the votes of a majority of justices have regularly been mustered in support of the presumption that binding arbitration is an effective surrogate for public judicial resolution of statute-based claims as well as actions at common law in the absence of clear and specific evidence to the contrary.¹³⁷

written decision allowing limited judicial review, and procedural “bilateralism.” Because not all of these requirements were met, the court struck down the entire agreement as unconscionable.

¹³⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (quoting *Mitsubishi*, 473 U.S. 614).

¹³⁶ *See, e.g., Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (Arbitration agreements “may be invalidated by ‘generally applicable contract defenses, such as fraud, duress or unconscionability.’”); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 555-56 (1995) (Stevens, J., dissenting) (“[A]n arbitration clause may be invalid without violating the FAA if . . . the provision is unconscionable”).

¹³⁷ In *Gilmer*, 500 U.S. 20, the Court upheld a motion to compel arbitration of an employee’s Age Discrimination of Employment Claims. It reasoned that there was no proof that arbitration would be any less suitable than litigation in furthering the social policies underlying the ADEA. Among other things, the Court “decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.” *Id.* at 30 (quoting

In the same vein, Court majorities have repeatedly postponed a ruling on a contested issue where the matter might be deferred to initial consideration by the arbitrator(s).¹³⁸ In such cases the practical result is to put off judicial

Mitsubishi, 473 U.S. at 634). There was, continued the Court, no indication that limitations on discovery would present a problem in the present context any more than in other statute-based actions the Court had found to be arbitrable, such as RICO and antitrust claims. Moreover, “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred... [and] it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.” *Id.* at 32 (citing *Nicholson v. CPC Int’l Inc.*, 877 F.2d 221, 241 (3rd Cir. 1989) (Becker, J., dissenting)).

Finally, the Court observed that unequal bargaining power between employers and employees was in itself “not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” The Court concluded:

Courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’” *Id.* at 33 (quoting *Mitsubishi*, 473 U.S. at 627). There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

Id.

See also *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000) (mere supposition about overly burdensome arbitration costs is not sufficient reason to invalidate an arbitration agreement).

¹³⁸ *Consider* *PacifiCare Health Sys, Inc. v. Book*, 123 S. Ct. 1531 (2003), involving an action by physicians against managed-health-care organizations (HMOs), on the basis, *inter alia*, of alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). The defendant HMOs’ motion to compel arbitration of the RICO claims was denied by the district court on the ground that the arbitration clauses in the parties’ agreements prohibited awards of “punitive damages,” thereby denying the arbitrator authority to provide meaningful relief in the form of treble damages under RICO and rendering the arbitration agreement unenforceable as to those claims. The Eleventh Circuit affirmed. The Supreme Court reversed on the basis that it was unclear whether the arbitration provisions actually prevented arbitrators from awarding treble damages under RICO, since statutory treble damages provisions may play different roles and, in particular, RICO’s treble-damages provision is remedial in nature. It was therefore not clear whether the parties intended the term “punitive” to encompass claims for treble damages under RICO. Because the Court did not know how the arbitrator would construe the limit on punitive damages, it would be premature for the Court to address them, and the proper

consideration until after arbitration hearings, at which time the relevant issues will be addressed within the relatively narrow confines of the statutory grounds for vacatur of award.¹³⁹ These and other realities raise legitimate concerns about the Court's willingness to embrace unconscionability doctrine to any meaningful degree.¹⁴⁰

Even while unconscionability doctrine has come to play the primary role in policing arbitration provisions in contracts of adhesion under the FAA, given the preemptive effect of that statute on attempts to regulate arbitration through state legislation, there has lingered the possibility that a Court majority might be mustered in favor of using preemption to dramatically narrow the role of unconscionability. A critical note of warning may be found in dicta in *Perry v. Thomas*,¹⁴¹ a decision in which

course was to compel arbitration and leave the matter initially to the arbitrator. *Cf. Mitsubishi*, 473 U.S. at 638 (“Having permitted the arbitration [of antitrust claims] to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed”).

¹³⁹ See Federal Arbitration Act, 9 U.S.C.A. § 10 (2009), which states:

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.

See *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) (holding that FAA § 10 provides the exclusive grounds for vacatur).

¹⁴⁰ See *infra* text accompanying notes 198-201.

¹⁴¹ *Perry v. Thomas*, 482 U.S. 483 (1987).

the Court held that an arbitration agreement in an employment contract was enforceable under the FAA. The Court, in an opinion by Justice Marshall, found that the federal substantive law of arbitrability preempted a section of the California Labor Code providing that wage collection actions “may be maintained ‘without regard to the existence of any private agreement to arbitrate.’”¹⁴² Although the Court declined to address the employee’s claim that the arbitration agreement was “an unconscionable, unenforceable contract of adhesion,” a matter not considered below, it took pains to address the “choice-of-law issue that arises when . . . [such] arguments are asserted.”¹⁴³ In such cases, explained the Court, FAA Section 2 offers a “touchstone for choosing between state law principles and the principles of federal common law envisioned by the [FAA].”¹⁴⁴

[Section 2 directs that a]n agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, “save upon such grounds as exist at law or in equity for the revocation of any contract. Thus, a state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. *Nor may a court rely on the uniqueness of an*

¹⁴² CAL. LAB. CODE § 229 (West 1971).

¹⁴³ *Perry*, 482 U.S. at 492 n.9.

¹⁴⁴ *Id.*

*agreement to arbitrate as a basis for a state law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.*¹⁴⁵

Although this language has not since been brought forth by the Court to quash federal or state court decisions relying on state unconscionability doctrine to strike down or reform arbitration agreements, it is clearly aimed at judicial decisions that regulate arbitration agreements *qua* arbitration agreements—that is, that focus on elements of arbitration agreements that are not present in contract provisions generally. Although it is possible to imagine a scenario in which an arbitration provision is struck down on unconscionability grounds applicable to contracts generally (as where, to use an extreme example, a party is physically forced to assent to an arbitration agreement), nearly all unconscionability defenses implicate concerns about specific substantive terms of the arbitration agreement: arbitrator selection, discovery and other administrative procedures, situs of hearings, costs and fees, remedies, and the like.¹⁴⁶ These are all, or mostly, aspects of arbitration that bear no relationship to contracts generally.¹⁴⁷ Put another way, it is highly unlikely that unconscionability doctrine would be employed by a federal or state court in any way *other* than to regulate arbitration as arbitration.

¹⁴⁵ *Id.* (citations omitted, emphasis supplied).

¹⁴⁶ See *supra* text accompanying notes 128-132.

¹⁴⁷ There may, of course, be certain kinds of substantive elements that appear in an arbitration agreement that would be unconscionable whether or not an arbitration agreement is present. One possible example would be a purported waiver of punitive damages in an employment or consumer contract. See Thomas J. Stipanowich, *Punitive Damages and the Consumerization of American Arbitration*, 92 NW. U. L. REV. 1 (1997).

Binding arbitration agreements in standardized contracts are seldom the subject of negotiation or of knowledgeable assent¹⁴⁸ (indeed, it is probably fair to assume that the great majority of *lawyers* still lack all but the barest understanding of arbitration law and practice),¹⁴⁹ and arbitration agreements can and do fall short of the reasonable expectations of employees and consumers in a variety of different ways.¹⁵⁰ In the 1990s, a series of initiatives by public and private entities sought to address the most common concerns and develop minimum standards of due process for consumer and employment arbitration,¹⁵¹ but private “community” regulation, or self-regulation, is not alone sufficient to address the problem.¹⁵² Not so long ago, alleged material conflicts of interest in a major

¹⁴⁸ See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 108 (1997) (“[I]f all the firms in the market impose the same terms, shopping is impossible. ... Because form terms are often peripheral to the core of the transaction, the cost of fully understanding most form terms reasonably appears, at the time of contracting, to outweigh the benefit. Meaningful understanding of a form term should be recognized as including the ability to make an informed judgment about its value. With an arbitration clause, this would include some awareness not only of the procedural distinctions between arbitration and litigation, but also of any systemic disparity in outcomes generated by the two procedures. . . . In sum, individual contract adherents are in no position to alter the menu of form contract terms presented by the market”).

¹⁴⁹ See Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 834 (2001).

¹⁵⁰ See *id.* at 836-37, 888; Schwartz, *supra* note 148, at 40-53.

¹⁵¹ See, e.g., TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, EMPLOYMENT DUE PROCESS PROTOCOLS (1995), available at <http://www.adr.org/sp.asp?id=28535>; NAT’L CONSUMER DISPUTES ADVISORY COMM., CONSUMER DUE PROCESS PROTOCOLS (1997), available at <http://www.adr.org/sp.asp?id=22019>; COMM’N ON HEALTH CARE DISPUTE RESOLUTION, HEALTHCARE DUE PROCESS PROTOCOLS (1998), available at <http://www.adr.org/sp.asp?id=28633>; THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MGMT. RELATIONS: FINAL REPORT (1994), available at <http://www.newunionism.net/library/workplace%20democracy/US%20Dunlop%20Commission%20-%20On%20the%20Future%20of%20Worker-Management%20Relations%20-%201995.pdf>.

¹⁵² See Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 371-72, 417-27 (2004).

provider of consumer credit arbitration services caused a state attorney general to take decisive action.¹⁵³

The Supreme Court's own decision in *Shearson/American Express, Inc. v. McMahon*¹⁵⁴ enforcing arbitration of investor claims under Section 10(b) of the Securities Exchange Act was underpinned by the expectation that the Securities and Exchange Commission (SEC) would employ "expansive power to ensure the adequacy of the arbitration procedures employed by [securities self-regulatory organizations] ... [and to] "oversee and regulate the rules."¹⁵⁵ The SEC, with the assistance of its advisory body, the Securities Industry Conference on Arbitration (SICA), has actively supervised ongoing debate and discussion among investor advocates, the Financial Industry Regulatory Association (FINRA), and other industry representatives, encouraging the continuing evolution of procedures that address public as well as private concerns.¹⁵⁶ Importantly,

¹⁵³ The Minnesota Attorney General accused the National Arbitration Forum (NAF), a Minnesota-based organization that specializes in and focuses on consumer debt actions, of violating state consumer fraud, deceptive trade practices, and false advertising laws by hiding financial connections to collection agencies and credit card companies. NAF had handled more than 214,000 collection claims in 2006, 60 percent of which were filed by law firms with ties to the collection industry. The NAF denied the allegations. In the summer of 2009 NAF ceased its consumer arbitration program as part of a settlement. Under the settlement, the NAF could continue to arbitrate certain types of claims performed under supervision of government entities or non-government organizations (e.g., Internet domain name, cargo, personal injury protection suits, etc.). *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES, July 20, 2009, at B8. In August 2009, Bank of America Corporation said that it would stop requiring that disputes with its credit card holders and banking and lending customers be settled by binding arbitration. Joshua Freed, *Bank of America drops arbitration requirement*, SEATTLE TIMES, Aug. 13, 2009, available at http://seattletimes.nwsourc.com/html/business/technology/2009657887_apusbankofameric arbitration.html?syndication=bondheads.

¹⁵⁴ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

¹⁵⁵ *Id.* at 233.

¹⁵⁶ See Constantine N. Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 FORDHAM J. CORP. & FIN. L. 49, 54-58 (2008); Constantine N. Katsoris, *Roadmap to*

the ongoing oversight and dialogue has proven critical in the development of a host of pro-consumer modifications in securities arbitration procedures.¹⁵⁷ *McMahon* reflects the Court's acknowledgment of the need for outside regulation of consumer arbitration, but the model remains one-of-a-kind; the Court has not sought to extend it to other arenas of consumer or employment arbitration.

In the broader realm of consumer and employment arbitration, especially given the extensive preemption of state legislative regulation by the FAA, effective judicial oversight is necessary to address various forms of overreaching. Fraud,¹⁵⁸ the covenant of good faith and fair dealing,¹⁵⁹ and the doctrine of reasonable expectations¹⁶⁰ have all been employed by state and federal courts in invalidating or reforming arbitration agreements.

Securities ADR, 11 FORDHAM J. CORP. & FIN. L. 413, 420-24 (2006); Stipanowich, *supra* note 149, at 900-01.

¹⁵⁷ LINDA D. FIENBERG & KENNETH L. ANDRICHIK, NASD DISPUTE RESOLUTION, THE ARBITRATION POLICY TASK FORCE REPORT—A REPORT CARD (2007) *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p036466.pdf> (reporting developments regarding forum independence, financing and administration; disclosures to investors; arbitrator selection, quality and training; discovery; mediation; simplified and standard case rules; punitive damages; and other matters).

¹⁵⁸ See *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997).

¹⁵⁹ See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

¹⁶⁰ See, e.g., *Engalla*, 938 P.2d at 922 (holding that medical group may not compel arbitration where it administers own arbitration program, fraudulently misrepresents speed of arbitrator selection process, and forces delays); *Broemmer v. Abortion Serv. of Phoenix*, 840 P.2d 1013, 1017 (Ariz. 1992) (refusing to enforce agreement in "adhesion contract" where drafter inserted potentially self-serving term requiring sole arbitrator of medical malpractice claims to be licensed medical doctor); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995) (discussing procedural limitations of arbitration in treating consumer disputes with banks and lenders); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997) (discussing due process concerns with arbitration under employment and consumer contracts).

Unconscionability, however, remains the most versatile tool available to courts.¹⁶¹

B. History of the Case

In *Rent-A-Center, West, Inc. v. Jackson*, the Court confronted the question whether courts retain any authority to address a defense of unconscionability aimed at the arbitration provision in an employment contract when the agreement itself purports to assign sole responsibility for such decisions to the arbitrator. As is often the case, the majority opinion contained a surprise: while the *First Options* line of cases on delegation of gatekeeping functions was clearly in play, the majority also found a novel way to draw in the *Prima Paint* separability doctrine.

Jackson sued his former employer, Rent-A-Center (RAC), for race discrimination and retaliation; he alleged that he had been repeatedly passed over for promotions due to his race, and was terminated in retaliation for complaining. At the time of his employment as an account manager, Jackson and RAC executed a free-standing, four-page Mutual Agreement to Arbitrate that provided for “arbitration of all claims or controversies . . . past, present, or future.”¹⁶² It also stated:

The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability,

¹⁶¹ See generally, Bruhl, *supra* note 2 (As the Supreme Court has shut off most other means of resisting arbitration, state unconscionability doctrine has become an attractive and successful tool for striking down arbitration agreements).

¹⁶² *Jackson v. Rent-A-Ctr.*, No. 03:07-CV-0050-LRH(RAM), 2007 WL 7030394, at *1 (D. Nev. June 7, 2007).

enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.¹⁶³

When RAC sought to compel arbitration pursuant to the clause, Jackson argued that the arbitration agreement was itself unenforceable on grounds of unconscionability, and should be struck down by the court. The district court, however, granted the employer's motion to compel arbitration. Citing the *First Options* line of cases, the court concluded that the agreement to arbitrate “clearly and unmistakably” gave the arbitrator exclusive authority to decide whether the arbitration agreement was enforceable.¹⁶⁴ Surprisingly, the district court also made reference to the separability doctrine, citing *Buckeye Check Cashing, Inc. v. Cardegna*¹⁶⁵ for the proposition that “where the contract agreeing to arbitrate is challenged as a whole, it is for the arbitrator to decide the validity of the agreement.”¹⁶⁶ This is, strictly speaking, a misquotation of *Buckeye* and misapplication (or at least a novel extension) of the separability principle, which calls upon courts to permit arbitrators empowered by broad-form arbitration clauses to address defenses to the contract of which the arbitration provision is a part (as opposed to defenses to the arbitration provision itself).¹⁶⁷ The arguable

¹⁶³ *Id.* Extensive, free-standing arbitration agreements appear to be increasingly common in the employment sphere. To the extent that this approach draws the attention of employees to the arbitration agreement and the procedural implications of the process, it is a positive development. Of course, most employees need advice from legal counsel to fully understand the process. (The author is sometimes asked to review and comment on employment arbitration agreements.) There is, moreover, the problem of freedom of choice—which may be more ephemeral than real.

¹⁶⁴ *Id.* at *2 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (2002)).

¹⁶⁵ *Id.* (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006)).

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* text accompanying notes 86-99.

conceptual analogy is as follows: in the instant contract the provision granting the arbitrator exclusive authority respecting disputes about the “interpretation, applicability, enforceability or formation of [the arbitration agreement]” bears the same relationship to the arbitration agreement as a whole that the typical predispute (executory) arbitration agreement bears to a contract of which it is a part. This rough analogy was not lost on the Supreme Court majority, which would embrace the same logic;¹⁶⁸ the dissent would reject the analogy.¹⁶⁹

The district court supported its decision with the conclusion that, even if the court were to have examined Jackson’s assertion of unconscionability on the merits, the argument would probably fail for lack of evidence under applicable state law. Like many states, Nevada requires an agreement to be “both procedurally and substantively unconscionable”—that is, combining (1) circumstances where a “party lacks a meaningful opportunity to agree to the terms because of unequal bargaining power or because the effect of the agreement is not readily understandable” with (2) “terms which are unfairly one-sided.”¹⁷⁰ Jackson’s assertion that the plaintiff might “have to unfairly pay burdensome arbitration costs” was, the court concluded, a mere supposition that would not be substantively unconscionable and would be insufficient to invalidate an agreement.¹⁷¹

¹⁶⁸ See *infra* text accompanying notes 187-192.

¹⁶⁹ See *Rent-A-Ctr., W., Inc v. Jackson* 130 S. Ct. 2771, 2781-88 (2010) (Stevens, J., dissenting).

¹⁷⁰ *Jackson v. Rent-A-Ctr., W., Inc.*, No. 03:07-CV-0050-LRH(RAM), 2007 WL 7030394, at *2 (D. Nev. June 7, 2007) (quoting *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553-54 (Nev. 2004)).

¹⁷¹ *Id.* at *3 (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)). The court believed this conclusion was reinforced by the fact that the arbitration agreement “expressly contained a clause allowing the apportionment of costs to be altered in the event the law require[d] a different allocation of costs to make the [a]greement enforceable.” *Id.* The district court did not address two other arguments made by Jackson regarding

In a 2-1 decision, a panel of the Ninth Circuit reversed,¹⁷² holding the FAA requires that, where a party explicitly challenges an arbitration clause on the basis of unconscionability, a court and not an arbitrator must first address the question. This is true, said the appellate court, even where the agreement's express terms delegate that determination to the arbitrator(s). Although the separability principle of *Prima Paint* and *Buckeye* gives arbitrators the authority to address challenges to the validity of the parties' contract as a whole, the court explained, "when a party specifically challenges the validity of arbitration provision within a larger contract, apart from the validity of the contract as a whole, a court decides the threshold question of the enforceability of the arbitration provisions."¹⁷³ Before compelling arbitration under FAA Section 4, a court must be "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."¹⁷⁴ With respect to provisions that purport to give arbitrators the authority to decide arbitrability questions, *First Options* requires "clear and unmistakable evidence" of agreement.¹⁷⁵

Which brings us to the nub of the appellate majority's decision—the nature of the evidence to be considered by a court in determining that an agreement to arbitrate arbitrability is "clear and unmistakable." It may be necessary, the majority reasoned, for a court to look beyond seemingly clear

substantive unconscionability—namely, that (1) the provisions of the agreement required arbitration of claims the employee was likely to bring, but not the claims that the employer was likely to bring and (2) limitations on discovery in the arbitration agreement were one-sided and unfair. See *infra* text accompanying note 182.

¹⁷² *Jackson v. Rent-A-Ctr. W., Inc.*, 581 F.3d 912, 919 (9th Cir. 2008).

¹⁷³ *Id.* at 915.

¹⁷⁴ *Id.* at 916 (quoting Federal Arbitration Act, 9 U.S.C.A. § 4 (2000)).

¹⁷⁵ *Jackson*, 581 F.3d at 915 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

and unambiguous language of agreement to ascertain whether a party's assent was *meaningful*. In the instant case,

Jackson [the employee] does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator. What he does dispute, however, is that he *meaningfully agreed* to the terms of the Agreement to Arbitrate, which he contends is procedurally and substantively unconscionable. Jackson argues that, in light of the parties' unequal bargaining power, the fact that the Agreement was presented as a non-negotiable condition of his employment, and the absence of any meaningful opportunity to modify the terms of the Agreement, he did not *meaningfully assent* to the Agreement.¹⁷⁶

First Options and other Supreme Court precedents require arbitration contracts to be enforced in accordance with "ordinary state-law principles that govern the enforcement of contracts,"¹⁷⁷ and the FAA was designed, among other things, to put arbitration agreements "upon the same footing as other contracts."¹⁷⁸ It would be inconsistent with these tenets to say "that where arbitration provisions—unlike other contractual provisions—are concerned, clear contractual language is enforceable *per se*."¹⁷⁹ Therefore, "where a party specifically challenges arbitration provisions as

¹⁷⁶ *Jackson*, 581 F.3d at 917 (emphasis added).

¹⁷⁷ *Id.* (quoting *First Options*, 514 U.S. at 944).

¹⁷⁸ *Jackson*, 581 F.3d at 917, (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)) (quoting H.R. REP. NO. 96-68, at 1-2 (1924)).

¹⁷⁹ *Jackson*, 581 F.3d at 917 (emphasis added).

unconscionable and hence invalid,” a court should have the ability to look behind the language.¹⁸⁰ The appellate panel proceeded to uphold the district court’s determination that the cost provision in the instant arbitration agreement was not unconscionable, since Jackson presented no evidence indicating that the costs of arbitration would actually be prohibitive.¹⁸¹ However, it directed further hearings on two other issues of substantive unconscionability raised by Jackson—specifically, that the arbitration agreement’s coverage and discovery terms “were one-sided and unfairly favored the [e]mployer.”¹⁸²

In dissent, Circuit Judge Hall emphasized that as arbitration agreements go, Jackson’s was relatively favorable and lacked key elements of adhesion.¹⁸³ Jackson’s allegations that the agreement was a non-negotiable condition of employment appeared to be contradicted by the agreement itself, and his substantive complaints about the agreement were “thinner than most.”¹⁸⁴ Such “bare allegations,” he argued, should not give cause for a judicial mini-trial on unconscionability, especially since the contract “clearly and unmistakably” assigns such issues to the arbitrator.

¹⁸⁰ *Id.* at 918-919. The court distinguished a number of decisions which enforced provisions for the arbitration of arbitrability in the context of “agreements between sophisticated commercial entities.” *Id.* It cited with approval *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009), a case involving an action by a class of franchisees against a corporation for fraud, misrepresentation, breach of contract and violations of various labor laws. In that case the First Circuit ruled that a party challenging a provision empowering arbitrators to rule on arbitrability issues “is entitled to have a court determine whether ‘the arbitration remedy is illusory.’” *Id.* at 13. The concern, the court explained, was not with unconscionability—essentially a fairness issue—but more narrowly with whether the arbitration regime here is structured so as to prevent a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses. *Id.*

¹⁸¹ *Jackson*, 581 F.3d at 919.

¹⁸² *Id.* at 920.

¹⁸³ *See id.* (Hall, J., dissenting).

¹⁸⁴ *See id.* (Hall, J., dissenting) (citing *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1267 (9th Cir. 2006) (en banc)).

Hall concluded that the majority's decision was an inappropriate expansion of *First Options* and other cited precedents, and, for circumstances where parties appear to have agreed to arbitrate arbitrability, proposed a more limited "gateway" role for district courts in policing unconscionability and related concerns,

perhaps permitting courts to remain attuned to "well-supported" claims of unconscionability or the potential that arbitration might be illusory, while still resolving "any doubts" as to what the parties agreed in favor of arbitration.¹⁸⁵

C. *The Court's Decision: Once More to the Fount of Federal Substantive Law*

The Supreme Court granted certiorari and heard arguments in the case; the result was, once again, a 5-4 decision reversing the judgment of the court of appeals.¹⁸⁶ Writing for the majority, Justice Scalia spurned the logic of the Ninth Circuit majority respecting the *First Options* line of cases and embraced the district court's extension of *Prima Paint* separability principles. Tapping once again the increasingly deep well of substantive arbitration law under the FAA, Scalia's opinion makes clear that where a contract "clearly and unmistakably" delegates gateway questions to

¹⁸⁵ *Jackson*, 581 F.3d at 921-922 (citing *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 13 (1st Cir. 2009)). Judge Hall pointed out that in the *Awuah* decision favorably cited by the majority, the First Circuit insisted that a litigant meet a "high burden" to show that arbitration was "truly illusory." *Id.* at 921-922 (citing *Awuah*, 554 F.3d at 13).

¹⁸⁶ See *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).

arbitrators, unconscionability challenges must be focused *on the delegation provision alone*.

Scalia begins by singling out for separate consideration two provisions in the parties' lengthy agreement to arbitrate, both of which purport "to settle by arbitration a controversy" as described by FAA Section 2: (1) the basic provision calling for arbitration of "past, present or future' disputes arising out of [the employment contract]" and (2) the provision delegating "gateway" issues to the arbitrator ("[t]he Arbitrator ... shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement.")¹⁸⁷ The controversy at issue is the alleged unconscionability of the agreement, and the provision Rent-A-Center seeks to enforce is the second, "delegation" provision. Such a provision is readily enforceable under the *First Options* line of cases.¹⁸⁸ Furthermore, explains Scalia,

[it] is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other. ... [It] is valid under § 2 "save upon such grounds as exist at law or in equity for the revocation of any contract.

While the parties' intent to arbitrate arbitrability issues must be established by "clear and unmistakable evidence," this is an "interpretive rule' based

¹⁸⁷ *Id.* at 2777 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

¹⁸⁸ See *Rent-A-Ctr. W.*, 130 S. Ct. at 2777-79.

on an assumption about parties' expectations.¹⁸⁹ It does not, Scalia insists, embrace questions of *validity* (including alleged unconscionability), which are the province of FAA Section 2. Scalia and the Court majority thereby reject the Ninth Circuit's conclusion that unconscionability is inextricably intertwined with proof of intent under *First Options* and progeny.

Scalia instead employs the doctrine of severability (separability) to determine the allocation of functions between courts and arbitrators in the presence of a provision delegating "gateway" provisions to arbitrators. To paraphrase Scalia's argument, a special provision empowering arbitrators to address issues relating to arbitrability, including the enforceability of the arbitration agreement, operates within an arbitration agreement in a manner directly analogous to the operation of a standard arbitration provision that provides for resolution of all disputes arising under or relating to the contract within which it is contained. Under *Prima Paint* and progeny, therefore, defenses to the whole agreement should normally be addressed by the arbitrators, but courts (under FAA Section 2 or the implementing sections FAA Section 3 or Section 4) should address defenses specifically aimed at the validity of the agreement to arbitrate (in this case, the delegation provision).¹⁹⁰ Scalia insists that there is no reason why "delegation" clauses cannot be severed from the remainder of arbitration agreements in the same way that arbitration provisions are severed from the remainder of the contract within which they are contained—the rule should be the same under Section 2. Henceforth, the Court majority's expansive

¹⁸⁹ *Id.* at 2777 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

¹⁹⁰ *Rent-A-Ctr W.*, 130 S. Ct. at 2778.

application of the severability doctrine will be a “matter of substantive federal arbitration law” and not state law under the FAA.¹⁹¹

Unfortunately for him, Jackson’s unconscionability challenge was to the whole arbitration agreement, and not just the delegation provision. His assertions regarding substantive unconscionability were focused on the kinds of claims subject to the arbitration agreement, arbitration costs and discovery. None bore any relation to the agreement to let arbitrators determine arbitrability,¹⁹² and were therefore irrelevant to the enforceability of the delegation clause under Section 2.

Justice Stevens’ dissent on behalf of four members of the Court took strong issue with the majority’s “breezy assertion” that arbitration agreements could be treated analogously to other kinds of contracts in applying *Prima Paint* severability doctrine. The latter, Stevens explains, is “akin to a pleading standard” that parties must follow to trigger a court’s consideration of the validity of an arbitration clause. The court’s usual function as gatekeeper of arbitrability issues is taken over by arbitrators only when the arbitration agreement “clearly and unmistakably” evinces the parties’ mutual intent to re-allocate that function. To Stevens and the dissent, like the Ninth Circuit majority, a determination of the parties’ intent must take into account whether an agreement is unconscionable, since unconscionability implicates questions of meaningful choice and assent.¹⁹³

¹⁹¹ *Id.* at 2783.

¹⁹² *Id.* at 2780.

¹⁹³ Justice Stevens quotes the RESTATEMENT (SECOND) OF CONTRACTS §208, comment d (1979):

Gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful

To Stevens, the majority's employment of severability doctrine *within* an agreement to arbitrate—described as “a new layer of severability—something akin to Russian nesting dolls”¹⁹⁴ was wholly inconsistent with prior precedent, which categorically reserved general challenges to the making of an arbitration agreement to courts. It takes the always-controversial doctrine of *Prima Paint* too far. Severability as originally defined by that decision was justified on the basis that to permit a court to invalidate an arbitration agreement on the basis of defects in the “container” contract would defeat the “national policy favoring arbitration.”¹⁹⁵ Severing the delegation clause, however, could not be said to achieve similar policy goals;¹⁹⁶ since it would do no more than determine who addresses gateway issues.¹⁹⁷

In *Rent-A-Center*, neither the majority nor the dissent offers pristine logic in favor of their respective positions. Scalia's attempt—in a footnote—to summarily dispose of the Ninth Circuit's and dissent's argument that a determination of the parties' “clear and unmistakable” intent to arbitrate arbitrability issues fails to explain why allegations of unconscionability may not be relevant to that determination. It is clear that concerns about judicial determinations of unconscionability are virtually always bound up in concerns about the practical realities of assent in mass contracting, and the relative lack of information and leverage possessed by

choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

In a footnote, Stevens acknowledged that some of employee Jackson's arguments might be directed not to the enforceability of the arbitration agreement as a whole but rather to individual contract terms, and might be properly for the arbitrator. *Rent-A-Ctr., W.*, 130 S. Ct. at 2784 n.7.

¹⁹⁴ *Rent-A-Ctr., W.*, 130 S. Ct. at 2786.

¹⁹⁵ *Id.* at 2787-88.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

adhering parties. On the other hand, neither the Ninth Circuit nor the dissenting Justices squarely address the impact of a provision specifically delegating arbitrability to arbitrators, nor clearly explain why this should not call for a more nuanced judicial consideration of unconscionability-based arguments.

D. Implications of Rent-A-Center

Within the wide purview of the FAA, the practical significance of *Rent-A-Center* is great. The “projection” of clauses delegating to arbitrators’ authority to address the validity and enforceability of the arbitration agreement, rendered relatively ironclad by the Court majority’s aggressive interpretation of past precedents, into the realm of mass contracts is especially troubling. The Court has availed itself of the vastly malleable and expandable concept of federal arbitration law to dramatically limit lower courts’ use of their most effective tools for policing overreaching in arbitration agreements, notably unconscionability. The concept of “separability” and the related notion that arbitrators may be empowered to decide their own jurisdiction, and inconsistent with general concepts of contract interpretation, but nevertheless enjoy wide application in the world of commercial arbitration because they support the independence and autonomy of those systems from courts.¹⁹⁸ Where the same concepts are employed beyond the commercial context, however, they arguably strike at the very heart of the FAA scheme itself. Testifying in favor of the FAA as a mechanism for overcoming historical judicial resistance to enforcing

¹⁹⁸ See James M. Gaitis, *Rent-A-Center, West, Inc. v. Jackson and the Ongoing Assault on Party Autonomy*, available at <http://www.karlbayer.com/blog/?p=9732> (last visited Nov. 2, 2010).

predispute arbitration agreements, Julius Henry Cohen explained the rationale for judicial control of gateway determinations under the FAA Section 4:

[T]he fundamental reason for [j]udicial resistance was that] people were not able to take care of themselves in making contracts, and stronger men would take advantage of the weaker, and the courts had to come in and protect them. ... And that is still true to a certain extent. ... [Therefore a]t the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, *is protected by the provision of the law which requires the court to examine into the merits of such a claim.*¹⁹⁹

From now on, the presence of clear “delegation” language in arbitration agreements will mean that the judicial “gatekeeper” role is limited to consideration of defenses specifically aimed at the delegation provision itself. Thus, in the presence of a delegation provision (which will, needless to say, become ubiquitous), it will be necessary for a party seeking to avoid arbitration to demonstrate that the arbitrator selection mechanism is unfair—as where the other party has unilateral control over the selection of the arbitrators (either through the appointment process or through manipulation of the underlying pool of arbitrators), or where there are

¹⁹⁹ See David Horton, *The Mandatory Core of Section 4 of the Federal Arbitration Act*, 96 VA. L. REV. IN BRIEF 1 (2010), available at <http://www.virginialawreview.org/inbrief/2010/04/02/horton.pdf>.

demonstrable conflicts of interest on the part of arbitrators or administrative bodies helping with selection.²⁰⁰ A party seeking to avoid arbitration will not be able to raise a litany of concerns about other elements of the arbitration agreement—those relating to costs, discovery, nature and location of hearings, form of award, kinds of remedies, etc.—unless they can be shown to have an impact on the validity of the delegation provision. This approach significantly further minimizes the judicial policing function and places even greater responsibilities on the shoulders of private arbitrators who may be called upon to address a variety of fairness issues. Judicial intervention in the arbitration process will be largely confined to post-award procedures under the limited grounds set forth in the FAA or analogous state arbitration statutes—grounds which, as a general principle, prohibit courts from inquiring into the merits of arbitral decision-making and accord arbitrator discretion significant deference.²⁰¹

While this arrangement will be acceptable—even highly desirable—in most forms of business-to-business arbitration, it is likely to underline the fears of consumer and employee advocates who see *Rent-A-Center* as a dramatic narrowing of the potential range of protection against the threat of procedural abuse under arbitration agreements.

Such advocates are unlikely to draw comfort from *Granite Rock Co. v. International Brotherhood of Teamsters*,²⁰² published right after *Rent-A-Center*, which restates and reinforces the formalistic approach of that decision. The Court,

²⁰⁰ See Raquel A. Rodriguez & B. Ted Howes, *Rent-A-Center, Inc. v. Jackson—Who Is The Proper ‘Gatekeeper’ of Arbitrability? Divided Supreme Court Reverses Ninth Circuit in Rent-A-Center, West, Inc. v. Jackson*, 25 MEALEY’S INT’L ARB. REP. 1 (July 2010) (litigant challenging a delegation provision “must specifically allege that the delegation provision itself is fraudulent, the subject of undue influence or duress, or unconscionable”).

²⁰¹ See *supra* note 99 & accompanying text.

²⁰² *Granite Rock Co. v. Int’l Bhd. Of Teamsters*, 130 S. Ct. 2847 (2010).

in decision authored by Justice Thomas,²⁰³ cites *First Options* and *Rent-A-Center* in the course of instructing lower courts regarding the “proper framework” for handling of arbitrability issues under federal statutes²⁰⁴:

Under that framework, a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. Where there is no provision validly committing them to an arbitrator, these issues typically concern the scope of the arbitration clause and its enforceability. In addition, these issues always include whether the clause was agreed to, and may include whether that agreement was formed.²⁰⁵

Thomas’ “framework” appears to consciously distinguish questions involving “the scope of an arbitration clause or its enforceability,” which he indicates may be referable to arbitrators by appropriate (“clear and unmistakable”) agreement, from questions about whether the clause was agreed to, or when it was formed. In this way Thomas in *Granite Rock*, like Scalia in *Rent-A-Center*, appears to be

²⁰³ In a 7-2 decision the Court overturned yet another Ninth Circuit decision involving arbitration—this in the setting of a labor/management dispute. The Court held that a dispute over a collective bargaining agreement’s ratification date was a matter for the District Court, not an arbitrator, to resolve.

²⁰⁴ Although the decision involves a collective bargaining agreement, Thomas freely mixes labor and FAA precedents.

²⁰⁵ *Granite Rock Co.*, 130 S. Ct. at 2856 (internal citations omitted).

conceptually separating questions of bare, formal assent, which are inescapably for the courts, from questions about the enforceability or validity of the arbitration agreement, which may be allocated to arbitrators (and again, are very likely to be so allocated in future standardized contracts of adhesion).

Thomas also reminds us that even the “presumption of arbitrability,” which reflects the FAA’s “commitment to ‘overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts,’”²⁰⁶ is subject to the principle of assent that is the foundation of arbitration. “Nor,” Thomas’ opinion continues, “have we held that courts may use policy considerations as a substitute for party agreement.”²⁰⁷

On one level, *Granite Rock* may be read as nothing more than affirmation of the “bedrock” principle of assent—and the court’s traditional gateway role in policing assent—that is at the heart of the FAA. Seen in the context of current Court jurisprudence, however, the announced framework and cautionary dictum on policy appear to reflect the Court’s self-described commitment to enforcing arbitration agreements according to their formal, literal terms, unfiltered by other policies except and to the extent divined by the Court in its reading of the FAA and the seemingly inexhaustible wellspring of “federal substantive law.”²⁰⁸

As the U.S. Supreme Court dramatically limits the judicial oversight of arbitration agreements in contracts of adhesion, it is appropriate to view its actions against the backdrop of legislative or judicial responses to the

²⁰⁶ *Id.* at 2859.

²⁰⁷ *Id.*

²⁰⁸ Criticizing Scalia’s rationale in *Rent-A-Center* (and the general trend of recent decisions by the Court), one thoughtful observer of arbitration concluded:

The Court’s resolution... illustrates the conservative majority’s willingness to purport to base its decisions on the precepts of party autonomy when it suits the majority’s ideological objective and to disregard those same precepts when the majority’s ideological objective so requires.

James M. Gaitis, *Rent-A-Center, West, Inc. v. Jackson and the Ongoing Assault on Party Autonomy*, <http://www.karlbayer.com/blog/?p=9732> (last visited Nov. 2, 2010).

same concerns in other parts of the world.²⁰⁹ The Court's continuing promotion of arbitration falls in line with the expansive "unfettered market" approach to the international economic order that was widely embraced in the wake of World War II.²¹⁰ In *Rent-A-Center* the U.S. Supreme Court dramatically limits the purview of judicial policing of unconscionable arbitration agreements by enforcing a delegation clause situating nearly all gate keeping functions in the hands of the arbitrator—save defenses relating directly to the delegation clause itself.

As previously stated, the proposition that arbitrators have authority to resolve issues relating to their own jurisdiction, including the enforceability of the arbitration agreement and related scope questions, is generally uncontroversial in the international arena.²¹¹ In other jurisdictions

²⁰⁹ See generally, Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World?*, 56 U. MIAMI L. REV. 831 (2002) [hereinafter "Sternlight"]; Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C.J. INT'L. & COM. REG. 357 (2003); Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341 (2007); BORN, *supra* note 99, at 817-829; SÉBASTIEN BESSON & JEAN-FRANCOIS POUURET, DROIT COMPARÉ DE L'ARBITRAGE INTERNATIONAL, (Deutsche Bibliothek, 2002), [hereinafter, POUURET & BESSON], ¶366. See also Dirk Otto and Omaia Elwan, *V(2)*, in KRONKE HERBERT & NACIMIENTO, PATRICIA (EDS.) RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 345, 360-61 (2010) [hereinafter Otto & Elwan] ("With regard to arbitration agreements, states may either prohibit the arbitration of certain consumer disputes entirely or require a specific and separate written arbitration agreement that is designed to effectively inform customers that they are about to waive recourse to state courts").

²¹⁰ John Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order*, 36 INT'L J. 379 (1982) [hereinafter Ruggie]; Dani Rodrik, *The Global Governance of Trade: As If Development Really Mattered*, United Nations Development Programme, July 2001, at 14.

²¹¹ Arbitration Act 1996, § 30 (England); UNCITRAL Model Law art. 16; French NCPC art. 1466; ICC Rules art. 6(2); LCIA Rules art. 23. For further discussion on this issue see William Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction*, ICCA CONGRESS SERIES, VOL. 13, (Kluwer Law International, 2006), pp. 55-146; Virginie Colaiuta, *The Similarity of Aims in the American and French Legal Systems With Respect to Arbitrators' Powers to Determine Their Jurisdiction*, 13 ICCA CONGRESS SERIES 154, pp. 154-166 [hereinafter Colaiuta].

globally, moreover, the concept of class actions does not exist, although their equivalent may be achieved by way of multi-party arbitrations or through a body acting as a representative for a class of people who have been affected by the same issue.²¹² However, the vast majority of non-U.S. jurisdictions have taken steps to protect their consumers and employees,²¹³ including those jurisdictions that have adopted strong pro-arbitration policies. The protection is usually achieved by either proscribing predispute arbitration agreements in consumer and employment contracts, or by placing certain conditions or limitations on such agreements.²¹⁴ In many cases, courts have applied statutory or common law standards for policing fairness in a manner akin to the approaches of many lower federal and state courts in the United States.²¹⁵

Thus, U.S. Supreme Court's arbitration jurisprudence makes the U.S. less protective of the procedural rights of consumers and employees than almost any other jurisdiction in the world. In the words of one commentator:

[d]espite the U.S. ... [Court's] statements to the contrary, one might be tempted to conclude that there is evidence of convergence in most western legal systems

²¹² Various jurisdictions differ greatly on this point, but most differ procedurally from the classic notion of class actions as found in U.S. law.

²¹³ It is this distinction in the definition of the term 'commercial' that has led to consumer and employment protections being stronger in countries outside of the U.S., as most jurisdictions outside the U.S. consider such relationships to be non-commercial, whereas, in the U.S., they are still considered commercial. *See* BORN, *supra* note 99, at 262-264). *See also*, Karen Stewart & Joseph Matthews, Comment, *Online Arbitration of Cross Border Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1136 (2002).

²¹⁴ BORN, *supra* note 99, at 817-829.

²¹⁵ *Id.* at 820.

against the enforcement of pre-dispute mandatory arbitration clauses in consumer contracts and in favor of the maintenance of consumers' access to state courts for the resolution of their disputes. To do so might involve concluding that the current situation in the U.S. ... is an anomaly flowing from a specific statutory instrument particular to American federal law.²¹⁶

Rent-A-Center and *Stolt-Nielsen* do by no means represent the end of the debate over arbitration policy and practice in the United States. The concerns underlying these decisions have lent significant momentum to efforts in Congress to outlaw predispute arbitration agreements in consumer, employment and other categories of contracts.²¹⁷ These efforts have already led to the passage of laws significantly limiting the role of arbitration in some employment and consumer settings;²¹⁸ they may eventually affect not only the whole spectrum of consumer and employment contracts but also the broad realm of business-to-business arbitration.

²¹⁶ Geneviève Saumier, *Consumer Arbitration in the Evolving Canadian Landscape*, 113 PENN ST. L. REV. 1203, 1226 (2009).

²¹⁷ *Beware the Fine Print*, NEW YORK TIMES, June 26, 2010, available at

http://www.nytimes.com/2010/06/27/opinion/27sun2.html?_r=1&ref=supreme_court.

²¹⁸ See *infra* text accompanying notes 226-235.

V. THE PENDULUM SWINGS: PENDING U.S. LEGISLATION ON BINDING ARBITRATION

A. *Mounting Efforts at Reform*

For many years the Supreme Court has pursued a course of maximal enforcement of predispute arbitration agreements across virtually the whole spectrum of civil claims and controversies, including arbitration agreements in standardized contracts of adhesion. It has done so in full recognition of the ability of Congress to enact contrary legislation, and has drawn attention to Congressional inaction in the course of giving full play the discerned penumbra of “federal substantive law” surrounding the FAA.²¹⁹

Now, Congress and the Executive Branch have taken responsive steps reflecting less sanguine views of the operation of arbitration provisions. These initiatives reflect the other side of debate, championed by some consumer and employee advocates and academics, which focuses on real or potential abuses of private justice. The complaints have mounted significantly in recent years with the publication of a Public Citizen report documenting the unfortunate experiences of individuals in consumer arbitration,²²⁰ the much-publicized plight of a young rape victim required to arbitrate her claims,²²¹ and the Minnesota Attorney General’s allegations of

²¹⁹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); Richard Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, NOTRE DAME L. REV. (forthcoming), available at <http://ssrn.com/abstract=1670722>.

²²⁰ See Public Citizen Report, available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

²²¹ See, e.g., Wade Goodwyn, *Rape Case Highlights Arbitration Debate*, June 9, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=105153315> (last visited Nov. 4, 2010).

fraud against a provider of consumer credit card arbitration services.²²² The same concerns have stimulated regular proposals in Congress to limit or regulate predispute arbitration agreements. These efforts reached a crescendo in the wake of the 2008 election.

During 2009 and the first half of 2010, Congress proposed over a dozen measures addressing the issue of mandatory binding arbitration.²²³ These included attempts to limit the enforcement of arbitration agreements in very specific categories, such as the *Rape Victims Act of 2009*,²²⁴ which would prevent employers, engaged in interstate commerce, from enforcing otherwise valid pre-dispute arbitration agreements where the employees suit

²²² Joshua Freed, *Bank of America Drops Arbitration Requirement*, SEATTLE TIMES (Aug. 13, 2009), available at http://seattletimes.nwsourc.com/html/business/technology/2009657887_apusbankofameric_aarbitration.html?syndication=bondheads. *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. TIMES (July 20, 2009), available at <http://www.nytimes.com/2009/07/20/business/20credit.html>.

²²³ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009) (invalidating pre-dispute arbitration agreements in the consumer, employment, franchise, and civil rights context); Consumer Fairness Act of 2009, H.R. 99, 111th Cong. (2009) (invalidating pre-dispute arbitration agreements in the consumer context); Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (2009) (establishing Consumer Financial Protection Bureau with ability to limit use of pre-dispute arbitration agreements); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009) (invalidating pre-dispute arbitration agreements between long-term care facilities and the elderly); Labor Relations First Contract Negotiations Act of 2009, H.R. 243, 111th Cong. (2009) (requiring arbitration of initial contract disputes); Payday Loan Reform Act of 2009, H.R. 1214, 111th Cong. (2009) (listing mandatory unfair arbitration clause as illegal element of loan contract); Predatory Mortgage Lending Practices Reduction Act, H.R. 2108, 111th Cong. (2009) (invalidating all consumer pre-dispute arbitration agreements); Rape Victims Act of 2009, S. 2915, 111th Cong. (2009) (invalidating all pre-dispute arbitration agreements where the tort alleged was rape); Service Members Access to Justice Act of 2009, H.R. 1474, 111th Cong. (2009) (invalidating pre-dispute arbitration agreements under USERRA); Taxpayer Abuse Prevention Act, S. 585, 111th Cong. (2009) (invalidating pre-dispute arbitration agreement in contract between lender and lender in anticipation of income tax return).

It is worth noting that many of the anti-arbitration provisions covered in these acts would fall under the protected categories listed in the Arbitration Fairness Act of 2009. Also, a number of the proposed restrictions on lending practices are already covered in the recently passed Consumer Protection Act. See *infra* text accompanying notes 228-235.

²²⁴ Rape Victims Act of 2009, S. 2915, 111th Cong. (2009).

alleges rape, and the *Fairness in Nursing Home Arbitration Act*,²²⁵ which would invalidate all pre-dispute arbitration agreements between long term care facilities and their residents.

Although most of the proposed legislation is still pending, some relevant bills have become law. The 2010 Department of Defense Appropriations Act (“Defense Act”),²²⁶ signed by President Obama in late 2009, included a provision that prohibits federal contractors who receive funds under the Act for contracts in excess of \$1,000,000 from requiring their employees or independent contractors to arbitrate “claims involving Title VII of the civil rights act or any tort arising out of alleged sexual assault or harassment.”²²⁷

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Consumer Protection Act”)²²⁸ has the potential to effect sweeping reforms with regard to mandatory binding pre-dispute arbitration agreements in the broad arenas of consumer finance and investment. Signed into law by President Obama on July 21, 2010, the Consumer Protection Act contains several different provisions that aim to restrict or to consider possible restrictions in the use of predispute arbitration agreements.²²⁹ Under the provisions of Section 748(n)(1-2) and Section 922, the Act provides special

²²⁵ Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009).

²²⁶ See Department of Defense Appropriations Act, H.R. 3326, 111th Cong. § 8116 (2010).

²²⁷ See John J. Roddy, *Emerging Perspectives on the Fundamental Fairness of Mandatory Arbitration Coupled with Class Action Bans*, 1789 PLI/Corp 1105, (Apr 8-9, 2010) at 1126; Zachary D. Fasman, *The New Developments in Employment Class Actions*, 833 PLI/Lit 575, (Sep. 27-28, 2010) at 705.

²²⁸ See Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) (“Consumer Protection Act”).

²²⁹ The exception is a provision relating to reinsurance agreements and the rights and duties of the ceding insurer. Under §531(b)(1) the state law of the state that is not the domicile state of the ceding insurer is preempted if it restricts or eliminates the insurer’s rights to contractual arbitration.

protections and incentives to whistleblowers.²³⁰ An employee cannot waive his right to a judicial forum regarding a dispute that arises under the whistleblower protection section of the act.²³¹ This prevents an employer covered under the section from forcing arbitration of the issue of whether a particular employee qualifies for the extensive enumerated protections listed under the section.²³² Section 1414 amends the Truth in Lending Act to provide that no mortgage lender may include a pre-dispute arbitration clause in their loan agreements.²³³

The Consumer Protection Act is largely concerned with regulation of the newly established Consumer Financial Protections Bureau (“CFPB”). Section 1057 provides general whistleblower protection to all employees of companies and individuals who fall under the auspices of the CFPB,²³⁴ and, furthermore, that “no predispute arbitration agreement shall be valid or enforceable to the extent that it requires arbitration of a dispute arising under this section.”²³⁵

B. The Arbitration Fairness Act

Of all the recent or proposed enactments, however, the most sweeping is the Arbitration Fairness Act of 2009,²³⁶ which would prevent the use and enforceability of pre-dispute arbitration agreements in all

²³⁰ *Id.*, §748(n)(1-2) & §922.

²³¹ *Id.*

²³² §748(n) adds a whistleblower protection section to the Commodities Exchange Act and § amends Title 18’s pre-existing whistleblower protection section. *Id.* § 748(n).

²³³ *Compare* Consumer Protection Act, § 1414(e) *with* Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. (2010) (noting the absence and presence of a prohibition on the enforcement of existing pre-dispute agreements).

²³⁴ Consumer Protection Act at § 1057.

²³⁵ *Id.*

²³⁶ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

consumer, employment, franchise contracts, and with respect to claims under disputes under statutes protecting civil rights.

There are currently two versions of the Arbitration Fairness Act (AFA) in Congress. The House Bill (H.R. 1020)²³⁷ is intended to amend Section 2 of the FAA to provide that:

(b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of—

- (1) an employment, consumer, or franchise dispute; or
- (2) a dispute arising under any statute intended to protect civil rights.

(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

(d) Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.²³⁸

²³⁷ *Id.*

²³⁸ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (2009).

The Senate version of the bill is very similar, but proposes to incorporate modifications to the FAA within a separate new section.²³⁹ Both bills outlaw predispute arbitration agreements respecting employment, consumer, franchise, or statutory civil rights disputes.²⁴⁰

Ever since the AFA was first introduced in 2007, it has stimulated considerable debate among lawyers and scholars.²⁴¹ Both current bills are improvements over the vague language of the now-deceased Arbitration

²³⁹ Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009) § 3(a) provides as follows:

- (a) In General. Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute.
- (b) Applicability.
 - (1) In general. An issue as to whether this chapter applies to an arbitration agreement shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.
 - (2) Collective bargaining agreements. Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

²⁴⁰ Both the House and Senate versions include exclusions for collective bargaining, although the Senate version provides that even in a collective bargaining situation an employee cannot waive any statutory or constitutional rights (an apparent effort to reverse *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1474 (2009), holding “that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law”). Another major difference in the two bills is that the Senate version creates a new, discrete section in the FAA, whereas, the House bill acts as an amendment to §2.

²⁴¹ See, Shirley M. Hufstедler and William H. Webster, *Arbitration under Siege*, NAT’L. L.J. (Sept. 20, 2010), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202472117839&slreturn=1&hbxlogin=1>.

Fairness Act of 2007, which provided for the non-enforceability of disputes under "any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power."²⁴² The failure to provide more specific definition for the classes of affected statutes (affecting "civil rights") creates a grey area of non-enforceability that may be exploited by parties seeking to avoid or to delay the commencement of arbitration, undermining conventional expectations regarding arbitration's efficiency and economy of process.

This effect is dramatically compounded by a clause providing that "the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator..."²⁴³ In the House version of the AFA this provision applies to any kind of arbitration agreement, without regard to the parties' sophistication or the way in which the parties struck an agreement to arbitrate. The practical result is to deny enforcement to provisions, now ubiquitous in domestic and international commercial arbitration procedures that promote efficiency by vouchsafing enforcement and "jurisdictional" questions to arbitrators. The impact of this provision is rendered far greater by a materially ambiguous provision that gives courts initial authority to address not only "challenges [of] the arbitration agreement specifically," but also challenges to the arbitration provision "in conjunction with other terms of the contract containing such agreement." This provision undermines the separability principle first enunciated in *Prima Paint*²⁴⁴ treating predispute arbitration agreements are separable from the contracts of which they are a part for the purposes of assessing their enforceability under the terms of the FAA. While such a

²⁴² Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. § 4 (2007).

²⁴³ *Id.* at § 4(c).

²⁴⁴ See *supra* text accompanying notes 86-91.

limitation may be appropriate in the context of certain categories of contracts, which are normally adhesive, such as employment or consumer contracts, it is wholly inconsistent with expectations in the typical business-to-business setting.²⁴⁵ Professor Emmanuel Gaillard warned that the act "pos[es] a serious threat to the promotion of efficient international dispute resolution and of the United States as a friendly place to arbitrate."²⁴⁶

A final concern raised by the AFA is its categorical prohibition of arbitration agreements in franchise agreements. While many countries have outlawed or restricted the use of predispute arbitration agreements in consumer or employment contracts, research has revealed no statutory prohibitions or regulations respecting arbitration provisions in franchise agreements anywhere else in the world with the exception of Puerto Rico.²⁴⁷ Thus, where arbitration is readily available to private parties as a mean of resolving disputes, no distinction is made with respect to arbitration agreements contained in franchise contracts.

C. *A More Considered Approach?*

A framework for more thoughtful and discrete consideration of the operation of arbitration agreements in consumer settings may have been

²⁴⁵ See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1 at 35-49.

²⁴⁶ Emmanuel Gaillard, *International Arbitration Law*, 2008 N.Y.L.J. 3 at 3.

²⁴⁷ Even in Puerto Rico, however, there is no outright prohibition on such agreements. The Puerto Rico Dealers' Contracts Act requires that a court, before enforcing an arbitration provision in a franchise contract, determine that the provision "was subscribed freely and voluntarily by both parties." P.R. LAWS ANN. tit. 10, § 278b-3 (1964). Moreover, the law creates a rebuttable presumption that any arbitration provision in a franchise contract "was included or subscribed at the request of the principal or grantor" and "is an adhesion contract to be interpreted and made effective as such." *Getting the deal through*, Franchise in 33 jurisdictions worldwide, 2009 – Puerto Rico Chapter at p. 150.

established under certain provisions of the previously mentioned Consumer Protection Act.²⁴⁸ Instead of an outright prohibition on predispute arbitration agreements, the Act may permit a process of deliberate investigation, reflection and debate about the role of arbitration in specific settings. Section 1028 of the Act gives the Consumer Financial Protection Bureau (CFPB) broad power to regulate all pre-dispute arbitration contracts in the area of consumer financial products and services.²⁴⁹ It is directed to study and prepare a report to Congress on the use of predispute arbitration agreements “in connection with the offering or providing of consumer financial products or services.”²⁵⁰ If deemed to be in the public interest, it “may prohibit or impose conditions or limitations on the use” of such agreements.²⁵¹ Section 928 provides the Securities and Exchange

²⁴⁸ See Consumer Protection Act, H.R. 4173, 111th Cong. (2010)..

²⁴⁹ Consumer Protection Act at §1028 provides:

- (a) STUDY AND REPORT.--The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.
- (b) FURTHER AUTHORITY.--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. The findings in such rule shall be consistent with the study conducted under subsection (a).
- (c) LIMITATION.--The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.

²⁵⁰ *Id.* at § 1028(a).

²⁵¹ *Id.* at § 1028(b).

Commission (“SEC”) with the same power with regards to securities products and services.²⁵²

It is hard to predict at this point what if any recommendations will result from the CFPB and SEC studies. Especially in the realm of securities arbitration, complaints about the system are balanced and perhaps outweighed by the track record of programs that have been overseen by the SEC and related entities such as the Securities Industry Conference on Arbitration.²⁵³ Moreover, the passage of the new bill may have encouraged the Financial Industry Regulatory Authority (“FINRA”) to announce a new regulatory proposal to make permanent its pilot “all-public” arbitrator program.²⁵⁴ Henceforth, investors will have the opportunity to appoint a panel of three arbitrators, none of whom have affiliations with the securities industry; the requirement of a single “industry” arbitrator—long a focus of complaints by investor advocates—will be eliminated.²⁵⁵

²⁵² *Id.* at § 928.

²⁵³ See Katsoris, *supra* note 156; Stipanowich, *supra* note 149. According to a recent letter to Congress by a business coalition assembled by the U.S. Chamber of Commerce:

Approximately 70 percent of consumer cases arbitrated last year through the Financial Industry Regulatory Authority (“FINRA”) resulted in a recovery for the investor. Studies show that investors fare at least as well in arbitration as in court (if not better), and receive their recoveries in far less time. In fact, many recent FINRA arbitrations have resulted in awards and settlements in the millions of dollars.

Letter from the Undersigned Members of the Coalition to Preserve Arbitration Opposing the Anti-Arbitration Provisions in S. 3217, the “Restoring American Financial Stability Act of 2010” (April 22, 2010), available at <http://www.uschamber.com/issues/letters/2010/letter-undersigned-members-coalition-preserve-arbitration-opposing-anti-arbitrat>.

²⁵⁴ See FINRA News Release, *FINRA Proposes to Permanently Give Investors the Option of All-Public Arbitration Panels* (Sept. 28, 2010), available at <http://www.finra.org/Newsroom/NewsReleases/2010/P122178>.

²⁵⁵ *See id.*

VI. CONCLUSION

The Supreme Court's arbitration jurisprudence under the FAA is an extended exercise in shoring up the bulwarks of private, binding dispute resolution in furtherance of the presumed intent of contracting parties. While its staunchest adherents may insist that the Court's reticence is justified as effectively promoting pro-arbitration policies under the FAA (announced and repeatedly reinforced by the Court since the mid-1980s) and in requiring lower courts to be measured and precise in the handling of defenses, many are now convinced that the Court has not done enough to address the problems of arbitration in standardized contracts of adhesion. The Court's most recent decisions, far from alleviating these concerns, have pronounced significant new limits on judicial oversight of arbitration agreements in the course of further expanding the purview of federal pro-arbitration policy.

The Court's seeming inflexibility is a significant contributor to momentum building in Congress for legislation to dramatically restrict the use of predispute arbitration agreements in consumer, employment and franchise agreements.²⁵⁶ While Congressional efforts to address widespread concerns about arbitration agreements in adhesion settings reflect to some extent predominant approaches to the protection of consumers and employees around the world, they also raise legitimate concerns. In particular, the breadth and ambiguity of the Arbitration Fairness Act, and

²⁵⁶ *See supra* Parts II-IV.

the potential impact of the statute on international transactions, is of great concern to the international business community.²⁵⁷

As recent elections have brought about a change in the political climate in Washington, an optimistic view might foresee the opportunity for thoughtful, relatively dispassionate consideration of the operation of arbitration agreements within discrete transactional and relational settings. For example, the current initiatives aimed at examining arbitration in the context of financial services contracts and agreements between securities investors and brokers²⁵⁸ offer the possibility for bringing forth and considering relevant data about the costs and benefits of arbitration for consumers. The history and evolution of regulated securities arbitration will also afford a basis for consideration of that model as an alternative to unregulated arbitration, or to outright prohibition of arbitration in such settings.²⁵⁹

Another possible “middle ground” measure would be the implementation of minimum due process guidelines for employment or consumer arbitration—a notion suggested by various due process standards developed under private or quasi-public auspices in the 1990s.²⁶⁰ A proposed Model Arbitration Act aimed at establishing due process guidelines for employment arbitration is among the alternative concepts now being discussed by concerned individuals and groups.²⁶¹

²⁵⁷ See Alan Cooper, *Congress is Mulling 'Arbitration Fairness Act': U.S. Chamber, Business Groups Are Incensed*, VA. LAWYERS WEEKLY, FEB. 26, 2010.

²⁵⁸ See *supra* note 250-252 & accompanying text.

²⁵⁹ See *supra* note 157 & accompanying text.

²⁶⁰ See *supra* notes 150-151.

²⁶¹ See Draft Model Arbitration Act (2010) (developed by Lewis Maltby and other scholars and arbitration experts, including the author; currently being circulated) (on file with author).