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## TRUMPING THE NINTH CIRCUIT: HOW THE 45TH PRESIDENT'S SUPREME COURT APPOINTMENTS WILL STRENGTHEN THE ALREADY STRONG FEDERAL POLICY FAVORING ARBITRATION

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TRUMPING THE NINTH CIRCUIT: HOW THE 45<sup>TH</sup> PRESIDENT’S SUPREME COURT APPOINTMENTS WILL STRENGTHEN THE ALREADY STRONG FEDERAL POLICY FAVORING ARBITRATION

By  
Eric Schleich\*

I. INTRODUCTION

The Supreme Court was left essentially divided along political lines after the tragic passing of the late Justice Antonin Scalia on February 13, 2016.<sup>1</sup> A Hillary Clinton victory in the 2016 presidential election could have swung the Court to a liberal majority, assuming that her nominee(s) would have been approved by a Republican-controlled Senate.<sup>2</sup> Now, with a Donald Trump presidential victory and Republican control of the Senate, America will see at least one, and possibly multiple,<sup>3</sup> conservative justices appointed to the Supreme Court over the next four to eight years, establishing a right-leaning Court.<sup>4</sup> Should these justices stay consistent with their conservative colleagues and predecessors, and follow the Court’s recent arbitration precedent, they are likely to continue the Court’s current interpretation of the Federal Arbitration Act (“FAA”) establishing a “[strong] federal policy favoring arbitration.”<sup>5</sup>

This article will examine the impact of the 2016 presidential election on arbitration jurisprudence. Specifically, this article will examine how the Supreme Court will address concerns regarding the validity and enforceability of adhesive arbitration clauses and class action waivers in consumer and employment arbitration. This article will also discuss the Supreme Court precedent interpreting the FAA, the current status of the law, and the Supreme Court’s most important cases protecting contracts of adhesion and class action waivers from adverse state laws. Finally, this article will explore how President Trump can

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<sup>1</sup> Matthew Tonis, *U.S. Supreme Court becomes a court divided after death of Justice Antonin Scalia*, CRONKITE NEWS (Feb. 15, 2016), <https://cronkitenews.azpbs.org/2016/02/15/u-s-supreme-court-becomes-a-court-divided-after-death-of-justice-antonin-scalia/>.

<sup>2</sup> Rebecca Shabad, *How could the next president reshape the Supreme Court?*, CBS NEWS (Jan. 5, 2016), <http://www.cbsnews.com/news/the-next-president-could-reshape-the-supreme-court/>.

<sup>3</sup> *Id.* (stating that there could be as many as four Supreme Court vacancies in the coming years).

<sup>4</sup> Jeffrey Rosen, *How President Trump Could Reshape the Supreme Court – and the Country*, POLITICO MAGAZINE (Nov. 13, 2016), <http://www.politico.com/magazine/story/2016/11/donald-trump-wins-supreme-court-214449>.

<sup>5</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); see THOMAS E. CARBONNEAU, *ARBITRATION LAW AND PRACTICE* 584 (7th ed. 2015) (“[T]he court perceives the issue in political terms.”).

build a conservative, arbitration-friendly Supreme Court, and how this will affect the future of consumer and employment arbitration law.

## II. THE STRONG FEDERAL POLICY FAVORING ARBITRATION

### A. *Supreme Court Jurisprudence Interpreting the FAA*

The Supreme Court, in more than forty-five arbitration cases over the last forty to fifty years, has been nearly unwavering in its support for arbitration.<sup>6</sup> In this support, the Court has added significantly to the content and function of the FAA, transforming what was originally a mere federal procedural statute into a substantive federal arbitration law binding on federal and state courts.<sup>7</sup> This process is popularly referred to as federalization, or federalism.<sup>8</sup> At the heart of this development is the Federalism Trilogy, a series of three cases in successive terms in the 1980's in which the Court clarified the policy underlying its arbitration doctrine.<sup>9</sup> An overview of the Trilogy will highlight the fact that it was the Supreme Court, and not Congress, that crafted the federal policy on arbitration as it exists today, and provide the groundwork upon which the Court has based its more provocative holdings in recent years.

Through *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>10</sup> *Southland Corp. v. Keating*<sup>11</sup> and *Dean Witter Reynolds, Inc. v. Byrd*,<sup>12</sup> the Court identified in the FAA a strong federal policy favoring arbitration, and a congressional command to the courts to enforce it.<sup>13</sup> The Court employed three overreaching concepts to expand the

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<sup>6</sup> CARBONNEAU, *supra* note 5, at vi (citing *Stolt-Neilsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008), *Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468 (1989), and *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) as the Court's primary deviations from its general support of arbitration and arbitrability).

<sup>7</sup> Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 735 (2012) (describing the federalization of the FAA, focusing on the savings clause); *compare* *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200-01, 205 (1956) (holding that the FAA could not dislodge the application of state law in federal court per *Erie*, because it was a federal procedural enactment, and only applies to arbitration agreements concerning transactions involving commerce) *with* *Moses H. Cone*, 460 U.S. at 24-25 ("The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

<sup>8</sup> Yelnosky, *supra* note 7, at 735.

<sup>9</sup> CARBONNEAU, *supra* note 5, at 166.

<sup>10</sup> *Moses H. Cone*, 460 U.S. 1.

<sup>11</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>12</sup> *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

<sup>13</sup> 31 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 905.03 (3d ed. 1999).

reach of the FAA: 1) the plenary power of Congress under the Commerce Clause; 2) the preemption of state law by federal law under the Supremacy Clause; and 3) the constitutional power of Congress to direct the conduct of federal courts.<sup>14</sup>

In *Moses H. Cone*, the Court found that the effect of section 2 of the FAA is to “create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act,”<sup>15</sup> which governs the issue of arbitrability in either state or federal court.<sup>16</sup> This marks an important milestone in arbitration jurisprudence, as the Court announced that the FAA creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet the statute does not create any independent federal-question jurisdiction.<sup>17</sup> The Court then built on this and its holding in *Prima Paint v. Flood Conklin*<sup>18</sup> when it ruled in *Southland* that Congress not only mandated the enforcement of arbitration agreements that fall within the coverage of the FAA, but that this mandate is not “subject to any additional limitations under state law.”<sup>19</sup> The ultimate effect of *Southland* is that state statutory law precluding the arbitration of a state law claim is preempted by § 2 of the FAA.<sup>20</sup>

*Byrd* is the final case of the Trilogy, and the one with the most limited continuing precedential value due to the Court later overruling an earlier position establishing the underlying premise of the case.<sup>21</sup> Here, the Court ruled that where some claims presented within a case are subject to arbitration and others are not, the FAA nonetheless commands that the agreement to arbitrate be given effect.<sup>22</sup> The concerns created by the separation of claims cannot overcome the express statutory mandate for arbitration.<sup>23</sup>

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<sup>14</sup> MOORE ET AL, *supra* note 13, ¶ 905.03.

<sup>15</sup> *Moses H. Cone*, 460 U.S. at 24.

<sup>16</sup> *Id.* at 24-25.

<sup>17</sup> *Id.*; Linda R. Hirshman, *The Second Arbitration Trilogy, the Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1341 (1985).

<sup>18</sup> *Prima Paint Corp. v. Flood Conklin*, 388 U.S. 395, 403, 406-07 (1967) (holding that, on the issue of whether a claim of fraud in the inducement of a contract was to be resolved by the federal court as a diversity action, or by the arbitrators pursuant to the parties’ “Consulting Agreement,” the matter should go to arbitration).

<sup>19</sup> MOORE ET AL, *supra* note 13, ¶ 905.03; *Southland*, 465 U.S. at 11; *see* Yelnosky, *supra* note 7, at 740 (“The Court announced in *Prima Paint* that its ‘severability’ doctrine . . . is a creature of federal law that governs notwithstanding state law to the contrary.”).

<sup>20</sup> MOORE ET AL, *supra* note 13, ¶ 905.03.

<sup>21</sup> *Id.* (“[A]n underlying premise in the *Byrd* case was that the federal securities claim were not subject to arbitration . . . however, that premise was later . . . overruled.”); *see also* *Byrd*, 470 U.S. 213.

<sup>22</sup> MOORE ET AL, *supra* note 13, ¶ 905.03; *Byrd*, 470 U.S. at 218.

<sup>23</sup> MOORE ET AL, *supra* note 13, ¶ 905.03; *Byrd*, 470 U.S. at 218.

The Court rewrote the express content of the FAA through these cases, “articulating a federal policy extending to issues well beyond its literal terms.”<sup>24</sup> The Court established the FAA and the enforceability of arbitration agreements as a rule of national application, extended to state courts and legislatures.<sup>25</sup> All statutes and litigation that implicate arbitration must now conform to the provisions and underlying policy of the FAA, or otherwise be defeated by the strong federal policy favoring arbitration.<sup>26</sup>

### *B. The Current Status of the Law*

The Court has been committed to upholding the strong federal policy favoring arbitration.<sup>27</sup> As stated earlier, the Court has been nearly unwavering in its support for arbitration.<sup>28</sup> Orlando Distinguished Professor of Law and Penn State Law Professor Thomas E. Carbonneau described the current state of arbitration jurisprudence in the United States as a “golden era.”<sup>29</sup> With the strong federal policy established, the Court has expanded the jurisdiction of arbitration and the FAA to areas such as the purchase of securities, employment disputes, statutory rights, and federal civil liberties.<sup>30</sup> This campaign to expand the jurisdiction of arbitration “was waged to create a disciplined, uniform, and unambiguous regulation of arbitration” with the ultimate goal being a workable system of civil adjudication and justice in U.S. society.<sup>31</sup>

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<sup>24</sup> Hirshman, *supra* note 17, at 1353.

<sup>25</sup> CARBONNEAU, *supra* note 5, at vii; MOORE ET AL, *supra* note 13, ¶ 905.03.

<sup>26</sup> MOORE ET AL, *supra* note 13, ¶ 905.03.

<sup>27</sup> CARBONNEAU, *supra* note 5, at vii.

<sup>28</sup> *Id.* at vi.

<sup>29</sup> *Id.* at vii-viii (“The court sustains every aspect of the operation of the arbitral process in both the domestic and transborder sphere. Doctrine is adapted to achieve the objectives of policy; everything is sacrificed to bring about an accessible form of adjudicatory justice.”)

<sup>30</sup> CARBONNEAU, *supra* note 5, at v; *see* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481-83 (1989) (ruling that pre-dispute agreements to arbitrate claims under the Securities Act of 1993 are enforceable because the provisions of the Act which grant venue to the federal courts may be waived); *see* Circuit City Stores v. Adams, 532 U.S. 105, 109 (2001) (holding that the employment contract exclusion applies only to employment contracts of workers directly involved in interstate transport of goods and services); *see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628-39 (1985) (holding that an anti-trust dispute arising from an international commercial transaction was arbitrable); *see* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009) (holding that collective bargaining agreements that require union members to arbitrate ADEA claims are enforceable).

<sup>31</sup> CARBONNEAU, *supra* note 5, at vii.

This progression has not been without criticism, however; the Court's federalization of the FAA has been "much maligned."<sup>32</sup> Judges, lawmakers, and commentators have expressed concerns about the expansion of the FAA into areas Congress may have never intended, pre-emption of state laws, and the unfair nature of certain agreements.<sup>33</sup> Some of the most significant diversions from the Supreme Court's arbitration policy have come from Democratic lawmakers, California state courts and the Ninth Circuit.<sup>34</sup>

### III. EXPANDING THE STRONG FEDERAL POLICY FAVORING ARBITRATION

The most controversial rulings in arbitration law today center upon the validity and enforceability of adhesive arbitration agreements, many of which contain class action waivers.<sup>35</sup> Many view these agreements as inherently unfair, allowing more powerful parties (usually wealthy businesses) to dominate weaker parties (consumers and employees), essentially denying them the right to sue as a class.<sup>36</sup> The rejection of this form of agreement is most prominent in the California legislature, as well as California state and federal courts, which have viewed such agreements as unconscionable and unfair.<sup>37</sup> The

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<sup>32</sup> Yelnosky, *supra* note 7, at 730.

<sup>33</sup> Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C.L. REV. 931, 936 (1999) ("[T]he Supreme Court's expansive doctrines, when applied to consumer transactions, contravene the [FAA's] intent and undermine many important due process and substantive rights."); *see, e.g., Southland*, 465 U.S. at 22-23 (O'Connor, S.D., dissenting) ("The Court's decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA."); *see also* Arbitration Fairness Act, S. 537, 115th Cong. (2017) (Introduced by Senator Al Franken on March 7, 2017, this Act aims to prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute).

<sup>34</sup> CARBONNEAU, *supra* note 5, at 584 ("California state courts . . . have displayed considerable resistance to embracing . . . the 'emphatic federal policy favoring arbitration.'"); *see* S. 537; William C. Martucci, *California courts breathe renewed life into unconscionability arguments against the enforcement of employment arbitration agreements*, LEXOLOGY (Nov. 7, 2013), <http://www.lexology.com/library/detail.aspx?g=d6fa6c1a-d935-44a9-8c5e-83bc95f80654>.

<sup>35</sup> *Accord* CARBONNEAU, *supra* note 5, at v.

<sup>36</sup> David Lazarus, *Bill aims to restore consumers' right to sue*, LOS ANGELES TIMES (Oct. 18, 2011), <http://articles.latimes.com/2011/oct/18/business/la-fi-lazarus-20111018>; *see generally* Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 152-53 (2012) (stating that there are many reasons a business would want to include arbitration clauses in adhesion contracts, one of which is to avoid class action litigation).

<sup>37</sup> CARBONNEAU, *supra* note 5, at v.

California and Ninth Circuit courts “have displayed considerable resistance to embracing arbitration and the ‘emphatic federal policy supporting arbitration.’”<sup>38</sup>

The Court’s decisions in class arbitration cases laid important groundwork for its later cases involving contracts of adhesion.<sup>39</sup> The Court first addressed class arbitration under the FAA in *Green Tree Fin. Corp. v. Bazzle*,<sup>40</sup> and *Stolt-Neilsen S.A. v. AnimalFeeds International Corp.*,<sup>41</sup> arising in South Carolina and the Second Circuit, respectively.<sup>42</sup> In *Bazzle*, an arbitration clause in loan contracts between Green Tree, homeowners, and purchasers of mobile homes provided for arbitration of all contract-related disputes, but made no mention of class-wide arbitration.<sup>43</sup> The South Carolina State Supreme Court held that the contracts permitted class arbitration since the clauses were silent on that matter.<sup>44</sup> The U.S. Supreme Court reversed, holding that this was a question for the arbitrator to decide.<sup>45</sup> The significance of this case is that no Justice suggested that the FAA prohibited class arbitration, and class arbitration proceedings actually became more common following *Bazzle*.<sup>46</sup>

The Court next addressed class arbitration in *Stolt-Neilsen S.A. v. AnimalFeeds Int’l Corp.*, where it considered “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is inconsistent with the [FAA].”<sup>47</sup> Here, claimants sought to bring class-wide arbitration against the owners of parcel tanker ships under agreements that did not expressly address class arbitration.<sup>48</sup> The parties entered into an agreement allowing a three-arbitrator panel to settle the issue, which ruled that class arbitration was permissible.<sup>49</sup> The U.S. Supreme Court reversed, holding that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis

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<sup>38</sup> *Id.* at 584.

<sup>39</sup> See Aronovsky, *supra* note 36, at 152.

<sup>40</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

<sup>41</sup> *Stolt-Neilsen*, 559 U.S. 662.

<sup>42</sup> *Bazzle*, 539 U.S. 444, *Stolt-Neilsen*, 559 U.S. 662.

<sup>43</sup> *Bazzle*, 539 U.S. at 448.

<sup>44</sup> *Green Tree Fin. Corp. v. Bazzle*, 351 S.C. 244, 265 (2002).

<sup>45</sup> *Bazzle*, 539 U.S. at 451, 454.

<sup>46</sup> Aronovsky, *supra* note 36, at 154 (citing Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1139 (observing that class arbitration became widespread after *Bazzle*)).

<sup>47</sup> *Stolt-Neilsen*, 559 U.S. at 666.

<sup>48</sup> *Id.* at 667-68.

<sup>49</sup> *Id.* at 668-69.

for concluding that the party agreed to do so.”<sup>50</sup> An important part of Justice Alito’s opinion was that “the differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.”<sup>51</sup> This was a deviation from the Court’s holding in *Bazzle*, and distinguished class arbitration from bilateral arbitration.<sup>52</sup> This differentiation of class arbitration and bilateral arbitration “laid the groundwork for . . . *Concepcion*.”<sup>53</sup>

While there are a number of cases that reveal the California courts’ views on this subject, a landmark case in this area and one that best illustrates the conflict is *AT&T Mobility v. Concepcion*.<sup>54</sup> In an opinion delivered by Justice Scalia, the Court reviewed California’s *Discover Bank* rule,<sup>55</sup> and directly addressed the issue of adhesive arbitration contracts and class arbitration waivers.<sup>56</sup> When the *Concepcions* purchased AT&T service, they received what they thought were free cellphones.<sup>57</sup> However, after they were charged sales tax based on the phones’ retail value, the *Concepcions* filed a complaint in the United States District Court for the Southern District of California, which was later consolidated with a putative class action.<sup>58</sup> AT&T moved to compel arbitration under the terms of its contract with the *Concepcions*.<sup>59</sup> The *Concepcions* contended that the arbitration agreement was “unconscionable and unlawfully exculpatory under California law because it disallowed class-wide procedures.”<sup>60</sup> Relying on the California Supreme Court’s decision in *Discover Bank v. Superior Court*,<sup>61</sup> the district court found that the arbitration

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<sup>50</sup> *Id.* at 684.

<sup>51</sup> *Stolt-Neilsen*, 559 U.S. at 687.

<sup>52</sup> Aronovsky, *supra* note 36, at 156.

<sup>53</sup> *Id.*

<sup>54</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>55</sup> *Id.* at 341; *see generally* *Discover Bank v. Superior Court*, 36 Cal. 4<sup>th</sup> 148 (2005) (the *Discover Bank* rule is a rule which classifies class arbitration waivers in adhesive consumer arbitration agreements as unconscionable and therefore unenforceable under California law).

<sup>56</sup> *Concepcion*, 563 U.S. at 336.

<sup>57</sup> *Id.* at 337.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 337-38.

<sup>61</sup> *Discover Bank*, 36 Cal. 4<sup>th</sup> at 149 (finding a class action waiver to be an exculpatory clause, in violation of Cal. Civ. Code § 1668, and unenforceable under California Law).



agreement was unconscionable, and therefore unenforceable.<sup>62</sup> The Ninth Circuit affirmed, agreeing that the *Discover Bank* rule was not preempted by the FAA.<sup>63</sup>

The Court, in a 5-4 opinion, reversed the Ninth Circuit, holding that the FAA preempted the *Discover Bank* rule.<sup>64</sup> In doing so, the Court held “for the first time . . . that the FAA preempted the application of a state contract law rule that on its face did not target arbitration.”<sup>65</sup> The Court reasoned that while the FAA section 2 savings clause allows arbitration agreements to be invalidated by generally applicable state contract law defenses, those state laws may not disfavor arbitration or stand as an obstacle to the accomplishment of the FAA’s objectives.<sup>66</sup> With this holding, the Court not only ruled that the practice of including class arbitration waivers is a lawful exercise of bargaining power, but also that adhesive contracts are a lawful means of bargaining.<sup>67</sup>

The Court most notably utilized *Concepcion* in *American Express Co. v. Italian Colors Restaurant*,<sup>68</sup> where it again upheld an adhesive arbitration agreement with a class arbitration waiver.<sup>69</sup> In this Second Circuit case, merchants who accepted American Express cards for customer purchases filed a class action lawsuit against the credit card company, claiming violations of the Sherman Antitrust Act.<sup>70</sup> The merchants filed suit despite the language of the contractual agreement, which required them to resolve disputes by arbitration and waived class actions.<sup>71</sup>

The Second Circuit reversed the District Court’s decision to dismiss the lawsuit, holding that, because the merchants would lose money arbitrating their claims individually, the class action waiver was prohibitive and unenforceable.<sup>72</sup> The Supreme Court then reversed the Second Circuit, holding that the FAA does not permit courts to invalidate an

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<sup>62</sup> *Concepcion*, 563 U.S. at 338.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 352.

<sup>65</sup> Aronovsky, *supra* note 36, at 166.

<sup>66</sup> *Concepcion*, 563 U.S. at 341-342 (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA . . . nothing in [§ 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”).

<sup>67</sup> *Id.* at 344-46, 348.

<sup>68</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013).

<sup>69</sup> *Id.* at 2312.

<sup>70</sup> *Italian Colors*, 133 S.Ct. at 2308; 15 U.S.C. § 1 (2012).

<sup>71</sup> *Italian Colors*, 133 S.Ct. at 2308.

<sup>72</sup> *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs. Litig.)*, 667 F.3d 204, 218-20 (2d Cir. 2012).

arbitration contract on the grounds the Second Circuit relied on.<sup>73</sup> Justice Scalia, writing for the majority, stated that “*AT&T Mobility* all but resolves this case.”<sup>74</sup> Requiring a federal court to determine the possible costs and recoveries of a claim before a plaintiff can be held to his arbitration contract would “undoubtedly destroy the prospect of a speedy resolution that arbitration . . . was meant to secure.”<sup>75</sup>

These four cases, together, established the legality and enforceability of adhesive arbitration clauses containing class arbitration waivers in employment and consumer contracts. This expansive interpretation of the FAA’s preemptive authority over state contract law and arbitration procedure rules minimized the roles of lawmakers and judges in arbitration, and strengthened the federal policy favoring arbitration.<sup>76</sup>

#### IV. THE POLITICS OF ARBITRATION

It is essential to understand the political divide on this issue in order to understand how the 2016 election will impact the future of arbitration jurisprudence. This can be accomplished by simply looking at the voting breakdown and analyzing the content of the dissenting opinions in these important Supreme Court adhesive arbitration decisions. In *Stolt-Nielsen*, Justice Alito delivered the opinion, joined by Roberts, Scalia, Kennedy and Thomas.<sup>77</sup> Justice Ginsburg filed a dissenting opinion, joined by Stevens and Breyer, with Sotomayor taking no part in the case.<sup>78</sup> In her dissent, Ginsburg disagreed with the majority, writing that the Court erred in addressing an issue not ripe for judicial review, substituted its judgment for that of the decision-makers chosen by the parties, and ignored the strict limitations that the FAA places on judicial review of arbitral awards.<sup>79</sup> She criticized the Court for “not persuasively justify[ing] judicial intervention so early in the game or convincingly reconcil[ing] its adjudication with the firm final-judgment rule prevailing in the federal court system.”<sup>80</sup> More importantly, in dicta at the end of her

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<sup>73</sup> *Italian Colors*, 133 S.Ct. at 2312.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Aronovsky, *supra* note 36, at 133-134.

<sup>77</sup> *Stolt-Nielsen*, 559 U.S. 662.

<sup>78</sup> *Id.*

<sup>79</sup> *Stolt-Nielsen*, 559 U.S. at 688 (Ginsburg, J., dissenting).

<sup>80</sup> *Stolt-Nielsen*, 559 U.S. at 692 (Ginsburg, J., dissenting) (“No decision of this Court, until today, has ever approved immediate judicial review of an arbitrator’s decision as preliminary as the “partial award” made in this case.”).

opinion she wrote of the importance of class arbitration in allowing claimants to effectively vindicate their rights.<sup>81</sup>

In *Concepcion*, Justice Scalia delivered the opinion, in which Roberts, Kennedy, Thomas and Alito joined.<sup>82</sup> Justice Breyer filed a dissenting opinion, in which Ginsburg, Sotomayor and Kagan joined.<sup>83</sup> Breyer's dissent defended *Discover Bank*, noting that the rule did not create a blanket policy against waivers, but rather applies a more general principle.<sup>84</sup> He argued that the *Discover Bank* rule, as well as class arbitration, is consistent with the FAA.<sup>85</sup> He stated that "class arbitration is consistent with the use of arbitration . . . [and] is a form of arbitration that is well known in California and followed elsewhere."<sup>86</sup>

In *American Express Co. v. Italian Colors*, Justice Scalia again delivered the majority opinion, in which Roberts, Kennedy, Thomas and Alito joined.<sup>87</sup> Kagan penned the dissent, in which Ginsburg and Breyer joined, with Sotomayor taking no part in the case.<sup>88</sup> Kagan called the majority's decision a "betrayal of our precedents, and of federal statutes,"<sup>89</sup> and argued that the Court ignored past decisions in not applying the effective vindication doctrine<sup>90</sup> to this case and erroneously applied *Concepcion*.<sup>91</sup> She argued that the ruling allows monopolists to use their power to deprive consumers of all legal recourse, thereby insulating themselves from antitrust liability.<sup>92</sup> This outcome led Kagan to deliver a scathing analysis of the majority's stance on arbitration, in which she stated that "[i]n the

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<sup>81</sup> *Id.* at 699.

<sup>82</sup> *Concepcion*, 563 U.S. 333.

<sup>83</sup> *Id.* at 357 (Breyer, J., dissenting).

<sup>84</sup> *Id.* at 358-59 (Breyer, J., dissenting) ("The *Discover Bank* rule does not create a 'blanket policy in California against class action waivers in the consumer context.' . . . Instead, it represents the 'application of a more general [unconscionability] principle.' . . . Courts applying California law have enforced class-action waivers where they satisfy general unconscionability standards.").

<sup>85</sup> *Id.* at 359 (Breyer, J., dissenting) (stating that "the *Discover Bank* rule is consistent with the federal Act's language," as well as the basic purpose behind the act).

<sup>86</sup> *Id.* at 361-62.

<sup>87</sup> *Italian Colors*, 133 S.Ct. 2304.

<sup>88</sup> *Id.* at 2313.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (The effective vindication doctrine is a mechanism that prevents arbitration clauses from "choking off a plaintiff's ability to enforce congressionally created rights" by barring the application of such a clause when it "operates to confer immunity from potentially meritorious federal claims.").

<sup>91</sup> *Id.* at 2313, 2317, 2319-20 (Kagan, J., dissenting).

<sup>92</sup> *Italian Colors*, 133 S.Ct. at 2313-14 (Kagan, J., dissenting).

hands of today's majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability."<sup>93</sup>

What can be extrapolated from the voting breakdown and content of the dissenting opinions is that the Court is divided along ideological lines when it comes to adhesive arbitration agreements and class action waivers.<sup>94</sup> And as happens so often, this ideological split coincides with politics.<sup>95</sup> With the majority in *Stolt-Neilsen*, *Concepcion* and *Italian Colors* consisting of the four conservative justices (Scalia, Thomas, Alito, and Roberts) and moderate Justice Kennedy,<sup>96</sup> and the dissent consisting of the four liberal justices (Ginsburg, Breyer, Kagan, and Sotomayor), it appears that arbitration has become a truly political issue.<sup>97</sup> This dynamic makes the Office of the President very important to the future of the law of arbitration.

## V. THE NEW COURT

Donald Trump has promised to “[a]ppoint justices to the United States Supreme Court who will uphold our laws and our Constitution,” and has stated that “The replacement for Justice Scalia will be a person of similar views and principles who will uphold and defend the Constitution of the United States.”<sup>98</sup> This is the Trump administration’s broad criteria for Supreme Court nominees, taken directly from President Trump’s campaign website. On January 31, 2017, within his first two weeks in office, President Trump nominated 10<sup>th</sup> Circuit Judge Neil Gorsuch to the Supreme Court.<sup>99</sup> Judge Gorsuch was confirmed by the Senate on April 7, 2017, to become the 113<sup>th</sup> justice of the

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<sup>93</sup> *Id.* at 2320 (Kagan, J., dissenting).

<sup>94</sup> *See generally* CARBONNEAU, *supra* note 5, at 584.

<sup>95</sup> *Id.*

<sup>96</sup> *The Justices of the Supreme Court: Justice Anthony Kennedy*, SUPREME COURT REVIEW, <http://supremecourtreview.com/default/justice/index/id/34> (last visited Jan. 25, 2017) (“Justice Kennedy is the court’s most moderate vote and, therefore, its swing vote.”).

<sup>97</sup> *See generally* CARBONNEAU, *supra* note 5, at 584 (writing that the Court, as well as legislators and commentators, divide politically and ideologically on this issue).

<sup>98</sup> *Donald J. Trump’s Vision*, TRUMP, PENCE: MAKE AMERICA GREAT AGAIN!, <https://www.donaldjtrump.com/policies/constitution-and-second-amendment/>.

<sup>99</sup> Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, NEW YORK TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html>.

Supreme Court.<sup>100</sup> Gorsuch is an originalist in the mold of the late Justice Scalia<sup>101</sup> with an undeniably impressive resume, which includes clerking for both Justice Byron R. White and Justice Kennedy.<sup>102</sup> Gorsuch is the youngest nominee to the Supreme Court in 25 years at only 49 years old, and could serve on the court for decades.<sup>103</sup>

In his opinions on cases involving arbitration, Gorsuch has exhibited an adherence to the Supreme Court's interpretation of the FAA. In *Howard v. Ferrellgas Partners, L.P.*,<sup>104</sup> Gorsuch wrote that "Congress has chosen to preempt state laws that aim to channel disputes into litigation rather than arbitration,"<sup>105</sup> and cited *Concepcion* in the opening paragraph when emphasizing that it is a "fundamental principle' [of the FAA] that 'arbitration is a matter of contract.'"<sup>106</sup> While much is yet to be determined, Gorsuch's record and ideological approach make it more likely than not that he will rule in a manner consistent with the Court's conservatives on employment and consumer arbitration issues.

## VI. HOW TRUMP APPOINTEES WILL SHAPE THE FUTURE OF ARBITRATION

As stated above, the main impact of the 2016 Election on consumer and employment arbitration is the prospect of a right-leaning court. The late Justice Scalia penned the majority opinions on the two most important cases in this area in the last decade, *Concepcion* and *Italian Colors*.<sup>107</sup> Having his seat filled by a like-minded thinker like Gorsuch will likely lead to very different results than if the seat were filled by a more left

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<sup>100</sup> Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, NEW YORK TIMES (Apr. 7, 2017), [https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html?\\_r=0](https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html?_r=0).

<sup>101</sup> Jeremy Kidd, Riddhi Sohan Dasgupta, Ryan Walters & James Phillips, *Searching for Justice Scalia: Measuring the "Scalia-ness" of the Next Potential Member of the U.S. Supreme Court*, SSRN (Dec. 1, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2874794](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874794) (determining "just how Scalia-like" President Trump's potential nominees are by looking at how often a judge promotes originalism, cites to Justice Scalia's non-judicial writings, and writes separately).

<sup>102</sup> Davis & Landler, *supra* note 99.

<sup>103</sup> *Id.*

<sup>104</sup> *Howard v. Ferrellgas Partners, L.P.*, 748 F.3d 975 (10th Cir. 2014).

<sup>105</sup> *Id.* at 977.

<sup>106</sup> *Id.*

<sup>107</sup> *Concepcion*, 563 U.S. 333; *Italian Colors*, 133 S.Ct. 2304.

leaning judge.<sup>108</sup> While Merrick Garland<sup>109</sup> or a Hillary Clinton appointee may have been more likely to join an opinion that would reverse some of the aforementioned cases, it is unlikely that any conservative Trump appointee will break from the political and ideological lines on this issue.<sup>110</sup> Rather, Justice Gorsuch and any future Trump appointees will likely uphold prior precedent set by the Roberts Court, and continue to strengthen the already strong federal policy favoring arbitration.<sup>111</sup>

A great way to see how this impacts future consumer and employment arbitration jurisprudence would be to look at how a current circuit split will likely be decided. Luckily, the Court recently granted certiorari and will address a circuit split between the Second, Fifth, Seventh, Eighth, and Ninth Circuits involving employment arbitration.<sup>112</sup> The issue in this circuit split involves the larger debate over adhesive arbitration and class action waivers, but with a slight complexity that the Court has not yet addressed: whether mandatory employee arbitration agreements with class action waivers are enforceable under the FAA, notwithstanding the provisions of the National Labor Relations Act (hereinafter NLRA).<sup>113</sup> This case will require the court to further analyze this issue under the savings clause<sup>114</sup> of the FAA.<sup>115</sup>

The National Labor Relations Board (hereinafter Board) has repeatedly concluded in recent decisions that §§ 7 and 8(a)(1) of the NLRA, and §§ 2 and 3 of the Norris-La Guardia Act,<sup>116</sup> foreclose enforcement of arbitration agreements that waive an employee's

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<sup>108</sup> See CARBONNEAU, *supra* note 5, at 584 (stating that the law in this area could be “completely destabilized” if there were a change in the Court’s composition).

<sup>109</sup> Michael D. Shear, Julie Hirschfeld Davis & Hardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, NEW YORK TIMES (Mar. 16, 2016), <https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html>.

<sup>110</sup> See CARBONNEAU, *supra* note 5, at 584 (stating that “the court perceives the issue in political terms,” and that the law in this area could be “completely destabilized” if there were a change in the Court’s composition); see also Davis Morris, *Hillary Clinton, The Supreme Court and a Progressive Future*, HUFFINGTON POST (July 29, 2016), [http://www.huffingtonpost.com/david-morris/hillary-clinton-the-supre\\_b\\_11258126.html](http://www.huffingtonpost.com/david-morris/hillary-clinton-the-supre_b_11258126.html) (identifying arbitration as one area of the law where a Hillary Clinton victory could secure a “progressive future”).

<sup>111</sup> See CARBONNEAU, *supra* note 5, at 584.

<sup>112</sup> John Lewis, *Adding Fuel to the Employment Arbitration Agreement Fire*, LAW360 (Sept. 13 2016), <https://www.law360.com/articles/838569/adding-fuel-to-the-employment-arbitration-agreement-fire>.

<sup>113</sup> National Labor Relations Act, 29 U.S.C. § 151-169 (1935).

<sup>114</sup> 9 U.S.C. § 2 (2012).

<sup>115</sup> Lewis, *supra* note 112.

<sup>116</sup> 29 U.S.C. § 185 (2012).

right to pursue legal claims in any judicial or arbitral forum on a class action basis.<sup>117</sup> The Fifth and Eighth Circuits have reversed the Board's rulings, holding that the class waivers are enforceable.<sup>118</sup> Those courts found that class actions waivers are compatible with the NLRA, and that the savings clause is not a basis for invalidating class waivers in this context because requiring the availability of class actions is inconsistent with the FAA.<sup>119</sup>

The Seventh and Ninth Circuits have sided with the Board, holding that such agreements are not enforceable because they violate the NLRA, and are thus invalid under the savings clause.<sup>120</sup> Those courts did not find the conflict between the NLRA and the FAA regarding class waivers that the Fifth and Seventh Circuits found under *Concepcion*.<sup>121</sup> Rather, the Seventh and Ninth Circuits resolved the issue under the savings clause, holding that an illegal arbitration agreement under the NLRA meets the criteria to be unenforceable under the savings clause.<sup>122</sup>

The Supreme Court has granted certiorari for *Lewis*,<sup>123</sup> consolidated with *Morris*,<sup>124</sup> and *Murphy Oil USA*.<sup>125</sup> In this case, the court will address the circuit split, deciding whether employment arbitration agreements with class waivers violate the NLRA, whether the NLRA and FAA are consistent, and then whether those agreements are unenforceable under the savings clause.<sup>126</sup> One can certainly assume based on prior precedent that this will be another arbitration case with a majority and dissent divided along political lines.<sup>127</sup>

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<sup>117</sup> *Accord Patterson v. Raymours Furniture Co., Inc.*, No. 15-2820-cv, 2016 U.S. App. LEXIS 16240, at \*4-5 (2d Cir. 2016); *see, e.g., D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (2012); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (2014).

<sup>118</sup> *Accord Patterson*, 2016 U.S. App. LEXIS at \*5; *see D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 348 (5th Cir. 2013); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1015 (5th Cir. 2015); *Cellular Sales of Missouri, LLC v. N.L.R.B.*, 824 F.3d 772, 778 (8th Cir. 2016).

<sup>119</sup> *See generally D.R. Horton, Inc.*, 737 F.3d at 360.

<sup>120</sup> *Accord Patterson*, 2016 U.S. App. LEXIS at \*5; *see Morris v. Ernest & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016); *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016).

<sup>121</sup> *See Morris*, 834 F.3d at 982; *Lewis*, 823 F.3d at 1157-60.

<sup>122</sup> *Lewis*, *supra* note 112 (“They both found that the savings clause of the FAA resolved the issue by stating that agreements to arbitrate ‘shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”). The “criteria” to which the sentence in the associated text refers is the illegality of the contract.

<sup>123</sup> *Lewis*, 823 F.3d 1147.

<sup>124</sup> *Morris*, 834 F.3d 975.

<sup>125</sup> *Murphy Oil USA*, 808 F.3d at 1015.

<sup>126</sup> *See Lewis*, 823 F.3d at 1161; *see Morris*, 834 F.3d at 979; *see Murphy Oil USA*, 808 F.3d at 1015, 1021-22.

<sup>127</sup> *See Concepcion*, 563 U.S. 333 (5-4 decision); *see Italian Colors*, 133 S.Ct. 2304 (5-4 decision).

When considering the two possible outcomes in light of the 2016 election, the impact of Trump's victory is clear – a conservative majority created by Trump's appointment of Neil Gorsuch will likely reverse the Ninth Circuit, protecting the enforcement of class action waivers and strengthening the already strong federal policy favoring arbitration.<sup>128</sup> If Hillary Clinton had won, Garland or another liberal justice would have been more likely than the current court to affirm the Ninth Circuit, subsequently creating an avenue for courts to utilize the savings clause of the FAA to invalidate class waivers that violate the NLRA, and possibly other statutes.<sup>129</sup>

## VII. CONCLUSION

The 2016 presidential election will certainly impact the country and world in countless ways. One of the many powers granted to the president is the power to nominate Justices of the Supreme Court.<sup>130</sup> The Supreme Court was one of the more important issues to voters in 2016, possibly being the driving force behind some votes.<sup>129</sup> This is understandable considering that the Court is often presented with the country's most pressing and polarizing issues, and the composition of the court can greatly effect the outcomes of cases involving such issues.<sup>131</sup> While arbitration may not be one of the more talked-about issues today, it is increasingly political, and the Court will hear arbitration-related cases. A Republican victory will bring with it conservative justices to fill any vacancies. What this means for arbitration is two fold: a probable rejection of the liberal view on adhesive arbitration agreements and class action waivers, and strengthening of the already strong federal policy favoring arbitration.

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<sup>128</sup> *Concepcion*, 563 U.S. at 344, 352 (stating that rules requiring the availability of class-wide arbitration interfere with fundamental attributes of arbitration and are thus pre-empted by the FAA); see *D.R. Horton, Inc.*, 737 F.3d at 359 (using *Concepcion* to conclude that “[t]he savings clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.”); CARBONNEAU, *supra* note 5, at 584.

<sup>129</sup> *Concepcion*, 563 U.S. at 361, 364 (Breyer, J., dissenting) (rejecting the Court's assertion that class arbitration is inconsistent with the use of arbitration and stating that “California is free to define unconscionability as it sees fit.”); see *Morris*, 834 F.3d at 987 (“[W]e join the Seventh Circuit in treating the interaction between the NLRA and the FAA in a very ordinary way: when an arbitration contract professes to waive a substantive federal right, the savings clause of the FAA prevents the enforcement of that waiver.”); see CARBONNEAU, *supra* note 5, at 584.

<sup>129</sup> See Ari Berman, *The Supreme Court is the Most Important Issue in the 2016 Election*, THE NATION (Feb. 16, 2016), <https://www.thenation.com/article/the-supreme-court-is-the-most-important-issue-in-the-2016-election/>; Christian Hakim, *Democrat or Republican: The 2016 Election and the Supreme Court*, JURIS MAGAZINE (Nov. 2, 2015), <http://jurismagazine.com/democrat-or-republican-the-2016-election-and-the-supreme-court/>.

<sup>130</sup> U.S. CONST. art. II, § 2.

<sup>131</sup> Compare *Scott v. Sandford*, 60 U.S. 393 (1857) (excluding all African-Americans, free or slaves, from having any Constitutional rights) with *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding segregation to be a violation of the Fourteenth Amendment).