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by Thomas E. Carbonneau

"*Obdurate Opposition*: As children eventually learn as they progress toward adulthood, permitting intense anger to invade the human spirit in the face of disagreement only brings momentary personal relief. A fit of temper harbors feelings of guilt, but no resolution. It mistakes monologue for dialogue and substitutes irrationality for self-control. It quickly becomes a self-inflicted exile and could lead the group to which the individual belongs to disown its member. The chaotic burst of emotions is a false attempt to reconcile the contradistinctive human need for asserting individuality and engaging in effective social communion."

A. In New Hampshire: *Finn* v. *Ballentine*

In *Finn v. Ballentine*,[1] the parties disagreed about the monetary consequences of the termination of one of the company's founders and then CEO. The facts involved two separate arbitrations that addressed the aftermath of the corporate 'push out'. As a

[1]Finn v. Ballentine Partners, 169 N.H. 128 (N.H. 2016). (The factual account that follows in the text is distilled from various parts of the record in the court's opinion. It has been substantially reorganized and rewritten).

founder of the company, Finn owned nearly 40% of the company shares. There were four shareholders in addition to the two founding members of Ballentine Finn & Company. Ballentine and the four shareholders claimed that Finn's termination was for cause and exercised their right under the Shareholder Agreement to purchase Finn's shares "at the price assigned to 'for cause' terminations . . . ." BFI (Ballentine Finn & Company, Inc.) gave Finn a promissory note for her shares in an amount that represented a sum less than their current fair market value. Before the first arbitral tribunal, Finn contested the legitimacy of her firing and the amount BFI offered for her shares. The arbitrators determined that Finn's removal was unlawful and increased the amount of the purchase price of the shares by nearly 25% (from the company's offer of $4,635,684 to $5,721,756). The arbitrators further determined that, for reasons of liquidity, the company could make periodic payments over a number of months to satisfy the damages ordered in the award.

In order (at least, in part) to pay Finn, BFI engaged in a corporate re-organization. It established BPLLC, transferring to it all of its assets and some of its liabilities. BFI was the sole member of BPLLC. Thereafter, BFI renamed itself Ballentine & Co. It sold a 40% membership interest in BPLLC to Perspecta Investments, LLC. Perspecta paid $7,000,000 for its participation in BPLLC and also made a capital contribution of $280,000 to BPLLC. The cost of the membership reflected a very substantial increase in the market value of the

company shares. Accordingly, Finn filed a motion to compel arbitration to recover a portion of the enhanced price of the shares. Finn claimed that Ballentine & Co. was unjustly enriched by the sale and that she was entitled to recover for her loss because of a 'claw back' provision in the Shareholder Agreement.

The second arbitral tribunal concluded that Finn was entitled to relief on the basis of unjust enrichment and breach of contract. The arbitrators, however, dismissed the breach of contract claim because they concluded that that claim had already been considered and resolved by the first arbitral tribunal. Nonetheless, the arbitrators ruled that Finn was entitled to equitable relief because the company's wrongful conduct prevented her recovery under the contract. The panel awarded Finn $600,000 in equitable relief. The court vacated that award under the state arbitration law on the grounds of 'plain mistake.' The court concluded that *res judicata* prohibited the awarding of damages, which had already been granted by the first arbitral tribunal. The damages were duplicative; double recovery was unlawful. Finn challenged the court ruling on the basis that—because the transaction implicated interstate commerce—the FAA and its less exacting review standard governed.

On appeal, the New Hampshire Supreme Court rendered a doctrinally significant opinion that addressed the issue of the federal preemption of state arbitration law. In doing so, the court articulated a new interpretation of the ruling in *Hall Street*

Associates, LLC v. Mattel, Inc.[2] The new interpretation was calculated to counter and prevent the nullification of state law. The court's advocacy for the application of the 'plain mistake' vacatur ground in the state arbitration law was well-crafted, analytically sophisticated, and—to a degree—persuasive. It introduced the concept of the 'partial avoidance' of federal preemption and made the case for the development of a larger regulatory role for state law in American arbitration. It effectively exploited the convolution of SCOTUS' reasoning and

[2] Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008). *See* Thomas E. Carbonneau, *The Rise in Judicial Hostility to Arbitration: Revisiting Hall Street Associates,* 14 CARDOZO J. CONFLICT RESOL. 593 (2013); J. Keaton Grubbs, Justin R. Blount, & Kyle C. Post, *Arbitration Agreements, Expanded Judicial Review, And Preemption—Hall Street Associates and NAFTA Traders, Inc.—A National Debate With International Implications,* 24 SOUTH. L. J. 2 (2014); Richard C. Reuban, *Personal Autonomy and Vacatur After Hall Street,* 113 PENN ST. L. REV. 1103 (2009); Kenneth R. Davis, *The End of an Error: Replacing "Manifest Disregard" with a New Framework for Reviewing Arbitral Awards,* 60 CLEV. ST. L. REV. 87 (2012); Brian T. Burns, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street,* 78 FORDHAM L. REV. 1813 (2010); Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception,* 14 FORDHAM J. CORP. & FIN. L. 597 (2009); Matthew J. Brown, *"Final" Awards Reconceptualized: A Proposal to Resolve the Hall Street Circuit Split,* 13 PEPP. DISP. RESOL. L. J. 325 (2013); Patrick Sweeney, *Exceeding Their Powers: A Critique of Stolt-Nielsen and Manifest Disregard, and a Proposal for Substantive Arbitral Award Review,* 71 WASH. & LEE L. REV 1571 (2014).

indecision in *Hall Street.* The Court could only amass a majority through a series of trade-offs and compromises—at the price of not achieving even a modicum of doctrinal clarity. The features of *Hall Street* allowed the state court to ignore the thrust of the Court's rulings in the federal preemption cases and to contradict and challenge the supremacy of the FAA in matters of arbitration.

The 'plain mistake' ground for the vacatur of arbitral awards under New Hampshire's arbitration statute permits courts, albeit in limited circumstances, to assess the merits of the arbitrator's determinations.[3] Like 'manifest disregard of the law',[4] it is a means by

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[3] *Finn*, 169 N.H. at 142-145.

[4] On 'manifest disregard', see Michael H. LeRoy, *Are Arbitrators Above the Law? The 'Manifest Disregard of the Law Standard*, 52 B.C. L. REV. 137 (2011); Stephen L. Hayford, *Reining in the Manifest Disregard of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117 (1998); Liz Kramer, *Circuit Split Persists Regarding Whether Arbitrator's "Manifest Disregard" Of Law Can Vacate Arbitration Award (June 25, 2015)*, available at: http://www.arbitrationnation.com/circuit-split-persists-regarding-whether-arbitrators…/; Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L. J. ONLINE 1 (2009), *available at:* http://yalelawjournal.org/forum/the-mess-of-manifest-disregard; Jason R. Brost, *Court Rejects Claim That Arbitrator's Ruling Was in Manifest Disregard of the Law (May 24, 2017), available at:* http://reinsurancefocus.com/archives/12094?utm_source=Mondag&utm_medium=syndication&utm_campaign=V/; Thomas V. Burch, *Manifest Disregard and the Imperfect Procedural Justice of Arbitration*, 59 KAN. L. REV. 47 (2010); Griffin Toronjo Pivateau, *Reconsidering Arbitration: Evaluating*

which courts can gauge the validity of the arbitrators' application of law to the facts of the litigation and the 'accuracy' of their interpretation of the governing law. The merits review of arbitral awards poses a significant challenge to arbitral autonomy[5]—a core feature of most contemporary arbitration laws and of the FAA, especially as reinterpreted by the U.S. Supreme Court. Merits review could be a 'death blow' to the arbitral process.

There can be little doubt that the 'plain mistake' ground allows courts to look over the shoulder of arbitrators as they apply the law to the facts of the case. It subjects the recourse to arbitration to a more protracted and deeper contact with the judicial process, thereby depriving parties of the benefit of their bargain for arbitration. It reduces the functionality and effectiveness of arbitration and makes it a lesser adjudicatory alternative. It transforms the correction of legal error into a singularly important objective of judicial supervision.

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the Future of the Manifest Disregard Doctrine, 21 SOUTH. L. J. 41 (2011); William H. Hoofnagle III & Byran W. Horn, *Vacating Arbitration Awards for Manifest Disregard of the Law (May 2013), available at*: http://ascelibrary.org/doi/full/10.1061/

(ASCA) LA. 1943-4170.0000110/: Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-Arbitration,* 77 CHI. L. REV. 1013 (2010); Stephen Wills Murphy, *Judicial Review of Arbitration Awards Under State Law,* 96 VA. L. REV. 887 (2010); Karen A. Lorang, *Mitigating Arbitration's Externalities: A Call for Tailored Judicial Review*, 59 UCLA L. REV. 218 (2011).

[5] *See* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 27-30, 90 (4th ed. 2017).

Awards are reduced to the status of being just another adjudicatory determination—no longer the product of a categorical and powerful legal policy that elevates arbitration to a constitutional necessity. More aggressive judicial supervision enhances the risk of reversal for awards because arbitrators are unlikely to apply the law in the customary lawyerly way. The brief for merits review also does not take into account the ever-present judicial disagreement about the meaning and application of law in particular cases. It would seem that arbitrators as adjudicators, who additionally are not bound by *stare decisis*, should be given at least the same degree of professional freedom as judges. After all, they perform a very similar function.

The New Hampshire High Court's justification for its support of the state statutory ground was drawn not only from *Hall Street*, but from *Volt Information Sciences, Inc. v. Bd. Trust. Stanford Univ.*[6] as well—the two cases being anomalies in the Court's decisional law on arbitration. In *Volt*, the Court stated that "the FAA . . . does [not] . . . reflect a congressional intent to occupy the entire field of arbitration."[7] This assertion was uncharacteristic of the Court's prior and future holdings on arbitration. The statement was used by the *Volt* Court to justify an atypical and bizarre holding on the federalization issue that undermined the objective of establishing a uniform national law on arbitration. The New Hampshire court took advantage of these

[6] Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468 (1989).

[7] *Id.* at 477.

doctrinal irregularities and used them to justify the application of the state law provision on vacatur.

In *Hall Street*, the Court aligned its opinion with the observation in *Volt* about the limited role of federal law in the field of arbitration by constricting the range and role of contract freedom in American arbitration law and limiting the parties' options for review to the stipulated statutory grounds.[8] The *Hall Street* Court also made the equally unusual comment that there are frameworks other than the FAA for securing the judicial review of arbitral awards—in particular, a more aggressive form of review than the limited review available under FAA §10.

Specifically, it asserted that state laws could provide that more rigorous review. ("We do not agree . . . that the FAA is the exclusive method by which to review . . . [arbitral] award[s]. . . ."[9]); ("If the FAA were, in all circumstances, the exclusive grounds for review of arbitration awards subject to the FAA, these possible *alternative paradigms of judicial review* that the Court described would have been completely foreclosed."[10] [Emphasis added]). These declarations in atypical arbitration cases (*Hall Street* and *Volt*) were made by a clearly divided court. That disagreement became the aperture through which the New Hampshire court reintroduced state authority into the legal framework for the regulation of arbitration.

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[8] *Hall St.*, 552 U.S. at 590.

[9] *Finn*, 169 N.H. at 138.

[10] *Id.* at 139.

Acknowledging that the FAA contains less invasive grounds for supervising arbitral awards than the state basis of 'plain mistake', the New Hampshire court ruled that:

> [W]e conclude that §§9-11 of the FAA apply only to arbitration review proceedings commenced in federal courts . . . when the contract to arbitrate affects [interstate] commerce. . . . Section 2 of the . . . [FAA] applies in state courts to prevent anti-arbitration laws from invalidating otherwise lawful arbitration agreements. . . . However, it does not follow that the FAA applies to state courts in its entirety. In fact, the Supreme Court has suggested that some of the statute's provisions apply only in federal courts. . . . [T]he Court noted that . . . '§§3 and 4 . . . by their terms appear to apply only to proceedings in federal court'. . . . This comment clearly contemplates that the Court considers the application to the states of each section individually, rather than the application of the Act as a whole. . . .[11]
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> [. . .]
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> [T]he Supreme Court . . . has described the primary purpose of the FAA as 'foreclos[ing] state legislative

[11] *Finn*, 169 N.H. at 138.

> attempts to undercut the enforceability of arbitration agreements.'[12]
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> [. . .]
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> [T]he Court emphasized that '[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.'[13]

The New Hampshire court may have accurately represented the surface meaning of the SCOTUS pronouncements in eccentric decisions, but it ignores, perhaps deliberately, the key feature of the Court's doctrine that would invalidate the state court's view of the role of state laws in the regulation of arbitration. It avoids considering the Court's primary motivation for preempting state law in arbitration. In its analysis, the state court never refers to the "emphatic federal policy favoring arbitration"[14]—the Court uses this policy (which it itself discovered in the FAA and proclaimed to be the linchpin concept of American arbitration law) to fill the holes in, and answer the difficult questions about, the federal law on arbitration and to set the direction for the development of American arbitration law. In point of fact, the Court's

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[12] *Finn,* 169 N.H. at 140.

[13] *Id.*

[14] *See* Thomas E. Carbonneau, *Freedom and Governance in U.S. Arbitration Law,* 2 GLOBAL BUS. L. REV. 59, 64 (and notes) (2011).

recognition of the narrow scope of the provisions in the FAA (§§3 and 4) testifies to the *ad hoc*,[15] circumstantial, and—at times—imperfect conceptual content of the Court's doctrine on arbitration, but those attributes do not alter or negate the fundamental principles of federal arbitration law dictated by the Court's 'emphatic federal policy.'

To buttress the credibility of its analysis in the quoted statements, the state court reasons, albeit syllogistically, that even SCOTUS (in *Volt* and *Hall Street*) recognized the restrictive character of the FAA's jurisdictional and substantive scope.

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[15] The California courts are particularly fond of emphasizing the language of FAA §§ 3 and 4 as a means of restricting the jurisdictional reach of the federal statute. *See, e.g.*, Engalla v. Permanante Medical Group, Inc., 938 P.2d 903 (Cal. 1997); Cable Connection, Inc., v. DirecTV, Inc., 190 P. 3d 586 (Cal. 2008). The Court gave rise to this trend in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) when it stated that the FAA was "something of an anomaly. . . . It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction. . . ." The Court then referred specifically to FAA §§ 3 and 4. It acknowledged that the enforcement of the Act was "left in large part to the state courts. . . ." *See* James Zimmerman, Note, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Pre-empted*, 51 VAND. L. REV. 759, 764 (1998); Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 10 (1996); *cited in* Paul Turner, *Preemption: The United States Arbitration Act, the Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts,* 26 PEPP. L. REV. 519, 520 n.2 (1999).

According to the state court, the statute is applicable only in cases governed by federal law. It does not, however, substantiate that statement analytically or with references to actual cases. Moreover, the court asserts that the fundamental objective of the FAA is to foster the enforcement of arbitration agreements by shielding them from inhospitable state statutes ("Section 2 of the [federal] act applies in state courts to prevent anti-arbitration laws from invalidating otherwise lawful arbitration agreements."). In the state court's assessment, award enforcement (as opposed to the enforcement of arbitration agreements) is not part of the FAA's fundamental objectives. The statement is calculated to act as the foundation for the remaining, even more unconventional, analysis. Be that as it may, it is inconceivable that enforcement of the result of an arbitration is of lesser importance to the fulfillment of the 'emphatic policy' than the institution of the proceeding through the parties' agreement.

The New Hampshire High Court focuses upon SCOTUS' least hospitable rulings on arbitration and, from their unique content, fabricates a wishful framework for salvaging the role of state law in the regulation of arbitration. The distinction between arbitral agreements and awards that SCOTUS implies in *Hall Street* is a means to an end—a fragment of legal reasoning that upholds and eventually justifies a doctrinal conclusion, *i.e.*, extinguishing the effects of contract freedom at the enforcement stage of the arbitral process. For the state court, then, substantive judicial review becomes, somehow, part of the

'emphatic federal policy' and, therefore, a fully lawful means by which to regulate the arbitration process. The New Hampshire court reinterprets the forced distinction between arbitral agreements and awards (articulated in *Hall Street*) to create room for its restrictive state law on arbitration. The actual federal arbitration law strongly disfavors merits review because it allows courts to second-guess arbitrators.

Such a practice robs arbitration of its operational autonomy for the sake of promoting would-be legally correct substantive results. It is evident that both the front and back-end of the arbitral process are equally vital to the operation of arbitration. In fact, without enforcement, the entire alternative adjudicatory process would collapse and become useless and ineffective. Pyrrhic victories may have some symbolic value, but—by definition—they are obtained at an excessive price. Finality and fairness are the trademarks of useful and resorted-to adjudication.

When the state court declares—disingenuously citing other SCOTUS rulings[16] that, in reality, are unqualifiedly favorable to arbitration—that the "overarching purpose"[17] of the federal statute on arbitration "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings,"[18] it tendentiously ignores how crucial enforcement is to any system of adjudication. SCOTUS does not ignore the

[16] *Finn*, 169 N.H. at 140-142.

[17] *Id.* at 140.

[18] *Id.*

fundamental importance of enforcement to arbitration—not in *Volt*, not in *Hall Street.* Despite a few foibles, SCOTUS' determinations are, in the main, intended to achieve a uniform and, therefore, workable and effective law of arbitration.[19] While a few weaker cases[20] emerged from an embattled Court, the policy favoring arbitration was never in doubt or question. For its part, the state court arbitrarily manipulates and dilutes the FAA in order to attribute a controlling function to state law in matters of the enforcement of arbitral awards.

The Court creates an unsanctioned and previously unknown concept of 'qualified preemption': limited and unlimited preemption of state law by the FAA.[21] The contrivance allows the court to declare, at least in theory, that the FAA has only a conditional impact on the vacatur and confirmation of awards.[22] According to the state court,

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[19] The Court's opinion in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), is particularly instructive in this regard. There, the Court qualified the absolute contract freedom doctrine in *Volt* to ensure that the exercise of contract freedom resulted in arbitrability. *See also* BG Group v. Argentina, 572 U.S. 25 (2014).

[20] Wilko v. Swan, 346 U.S. 427 (1953); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956); Alexander v. Gardner-Denver, 415 U.S. 36 (1974); Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968); Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468 (1989); Hall St. Assocs., v. Mattel, Inc., 552 U.S. 576 (2008); Stolt-Nielsen S.A. v. AnimalFeeds Int'l, 559 U.S. 662 (2010).

[21] *Finn*, 169 N.H. at 142-143.

[22] *Id.* at 143.

if preemption is based upon a conflict of regulatory objectives between state and federal statutes, state laws cannot simply be automatically displaced or voided; they can still regulate award enforcement as long as the statutory conflict is not a 'fundamental' clash between regulatory schemes.[23] Some restrictive state laws on arbitration, in the court's view, are no more than venial impediments to the FAA's control over arbitration.[24] As with the *Discover Bank* Rule[25]—a provision that the Court invalidated in *AT&T Mobility v. Concepcion*,[26]—federal law preempts restrictive state laws that apply disproportionately to arbitration contracts when they function as "a thinly veiled refusal to enforce arbitration agreements."[27]

Another serious failing of state laws is their promotion of class litigation through statutory provisions or decisional rulings that prohibit, directly or indirectly, waivers of the right to engage in class proceedings.[28] As SCOTUS observed in *Concepcion*, these outlawed waivers can have the beneficial effect of preventing arbitrating parties from converting a bilateral arbitration into a class proceeding.[29] State laws should permit class action waivers to obviate the

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[23] *Finn*, 169 N.H. at 142.

[24] *Id.*

[25] Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (Cal. 2000).

[26] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[27] *Finn*, 169 N.H. at 140.

[28] *Id.* at 141.

[29] *Concepcion*, 563 U.S. 333 (2011).

possibility that the party intent to engage in bilateral arbitration is ignored.[30] State laws cannot generally prohibit arbitration contracts, expressly or impliedly, and apply limitations disproportionately to them and place their legitimacy in doubt. According to the state court, outright or evident hostility to arbitration under state law cannot be tolerated, but a measured or moderate antagonism toward the arbitral process represents a normal exercise of the state's political and regulatory authority.[31] Drawing again selectively from *Volt* and anchoring its statement in the strained distinction between arbitration agreements and awards, the court declares: " . . . state rules that slow or change [arbitral] procedures without the potential consequences of invalidating an arbitration agreement are not preempted."[32]

The state court further misreads or reinterprets the *Volt* opinion by describing the procedural rule of California state law[33] that blocked the recourse to

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[30] *Concepcion*, 563 U.S. 333 (2011).

[31] *Finn*, 169 N.H. at 142.

[32] *Finn*, 169 N.H. at 140.

[33] CAL. CIV. PROC. CODE § 1281.2(C) (West 1982), *cited in Volt*, 489 U.S. at 471 n.3. The Statute provided that a court confronted with two on-going and conflicting proceedings, both involving the same matter and the same parties, one being an arbitration, could resolve the conflict in one of four ways: (1) not enforce the arbitration agreement; (2) combine issues for joinder; (3) compel arbitration; or (4) stay the arbitration. It was evident that the court used a state law of procedure to subordinate the arbitration to a judicial proceeding—a consequence that is evidently in conflict with federal preemption.

arbitration in *Volt* as a mere annoyance, devoid of truly consequential effect.[34] Although it acknowledged that the FAA would provide a contrary result, the court claimed that the application of the California procedural rule only engendered a stay of the arbitration and not a nullification of the arbitration agreement.[35] The distinction is transparently calculated to reach a foregone conclusion; moreover, it distorts actual reality. It ignores the incontrovertible fact that the postponement of the arbitration, in the end, will inevitably lead to its abandonment—if only for economic reasons, thereby rendering the arbitration agreement ineffective. Such a result does frustrate the fundamental goals of the FAA.

Again, characterizing the FAA's chief objective as the enforcement of arbitration agreements and the elimination of "the judiciary's long-standing refusal to enforce the agreements to arbitrate,"[36] the state court adds that Congress did not see "expeditious review as a primary goal of the FAA."[37] The hair-splitting is deliberately meant to justify a single conclusion and is self-evidently specious. The court then reiterates that obstructing arbitration through state law rules is permissible as long as it is done in moderation: "The fact that a state law affecting arbitration is less deferential to an arbitrator's decision than the FAA

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[34] *Finn,* 169 N.H. at 141.

[35] *Id*.

[36] *Finn,* 169 N.H. at 141.

[37] *Id*.

does not create an obstacle so insurmountable as to preempt state law."[38]

Much of the New Hampshire Supreme Court's advocacy, as noted earlier,[39] is based on its reading of, and reliance upon, the majority opinion in *Volt*. *Volt* was an astonishing addition to the Court's decisional law on arbitration; while the *Volt* Court touted contract freedom as a central pillar of American arbitration law, it cast substantial doubt on the Court's willingness to pursue federalization and federal preemption in the area of arbitration.[40] Displaying an unusually passive and disinterested attitude toward the regulation of arbitration, the *Volt* Court appeared willing to share power over arbitration with state courts and legislatures as long as the contracting parties commanded it in their agreement.[41] The hegemony of federal arbitration law, it seemed, was not the primary objective of the federal enactment.

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[38] *Finn*, 169 N.H. at 141.

[39] *See supra* text accompanying note 2.

[40] *See, e.g*., Arthur S. Feldman, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University: Confusing Federalism with Federal Policy Under the FAA*, 69 TEX. L. REV. 691 (1991). After the Federalism Trilogy, the decision in Volt to follow the state procedural regulation and void the reference to arbitration was unexpected. In the wake of Volt, many commercial litigators concluded that the law had returned to a rule of non-preemption of state law and that the Court's endorsement of arbitration was at an end. Justice Thomas' dissent in Mastrobuono was completely accurate: Volt and Mastrobuono could not co-exist. Eventually, Volt would fade into the background and the mandate of arbitrability would become dominant.

[41] Volt Info. Scis. V. Bd. of Trs., 489 U.S. 468 (1989).

A line of SCOTUS rulings following *Volt*, beginning with *Mastrobuono*[42] and ending most recently with *DirecTV v. Imburgia*,[43] re-established the vitality of federalization and federal preemption in the American law of arbitration and significantly moderated the Court's absolute version of contract freedom. Now, parties could choose the governing law as long as it sustained the reference to arbitration.[44] Ignoring that qualification and the other cases, the state court concluded that: "*Volt* demonstrates that not all obstacles to arbitration are repugnant to the FAA."[45]

According to the state court, unlike the California procedural rule at issue in *Volt*, the state law rule banning class waivers (the *Discover Bank* Rule) promoted multi-party litigation that constituted "an extreme alteration of arbitration procedure, risks, and efficiency."[46] The application of that rule in the circumstances of *Concepcion* could have had "such a profound effect" that parties would be discouraged from engaging in arbitration,[47] thereby frustrating the FAA's primary objective, *i.e.,* the enforcement of arbitral agreements: "[T]he FAA does not preempt all state-law impediments to arbitration; it preempts

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[42] Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995).

[43] DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

[44] *Finn,* 169 N.H. at 141.

[45] *Finn,* 169 N.H. at 141.

[46] *Id*.

[47] *Id*.

state-law impediments to arbitration agreements."[48] This analysis of the federal preemption doctrine was tailored to validate the New Hampshire provision permitting courts to review awards for 'plain mistake.' The court ignores the undeniable fact that the lack of award enforcement is the most substantial means of impeding the recourse to arbitration agreements.

As noted earlier,[49] the state court's re-interpretation of SCOTUS' cases ignores the Court's core doctrinal motivation.[50] Over the years and cases, the Court felt impelled to produce a comprehensive and unitary body of legal provisions for the regulation of arbitration. As noted several times elsewhere,[51] the Court was not interested in arbitration for its intellectual and analytical worth. For the Court, arbitration was an instrument of policy—a means of creating a process that provided effective civil litigation.[52] The Court used its authority to create a shield by which to protect arbitration from adversarial litigation; subjecting arbitration cases to the standard litigation practices would have destroyed its systemic value entirely.[53] The unbending clarity of its arbitration doctrine created a discipline that allows the process to function undisturbed. The Court was

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[48] *Finn,* 169 N.H. at 141.

[49] *See supra* text accompanying note 2.

[50] *Id*.

[51] *See, e.g.,* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 55-56 (4th ed. 2017).

[52] *Id.* at 55.

[53] *Id.* at 61-62.

rightly convinced that the finesse of legal exceptions and distinctions could only hinder the development of arbitration.[54]

The New Hampshire Supreme Court wove its distinctions out of whole cloth. The twists and turns of the analysis did not mask the conclusory character of its reasoning. At least in terms of arbitration, it re-ignited the great federalism debate about the standing of states' rights in the federal system. The state court attempted to challenge federal hegemony on arbitration. Arbitration, however, had become indispensable to the constitutional integrity of American citizenship. In the American law of arbitration, there was only one concept of federal preemption, and its purpose was always to express, then to achieve, the ends of the 'emphatic federal policy favoring arbitration.' There were no partial (and, therefore, no admissible) trespasses on federal authority. A trespass was always a trespass. Effective laws were clear and unambiguous. They generally had an unambiguous focus on a single objective.

The FAA, as written in 1925 or as rewritten by the Court since, has never had, and does not now have, contradistinctive regimes for regulating arbitration agreements and arbitral awards. As mentioned earlier,[55] adjudicatory outcomes are meaningless when unenforceable. Through its decisional rulings, SCOTUS elaborated a functional regulation of arbitration that emphasized equally the

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[54] *See, e.g.,* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 71 (4th ed. 2017).

[55] *See supra* text accompanying note 11-13.

front and back-ends of the process—its two critically important stages. Whether astute or aberrant, the policy was equally unforgiving of all acts of non-compliance and all attempts to deviate. There is no state right to regulate arbitration differently from the federal framework. If it applies, state law must conform to core federal requirements. Arbitration is a federal matter. The federal authority in arbitration is solid, firm, and unwavering.

The New Hampshire High Court took pains to find a means of defending the state right to regulate arbitration. It did so by distorting the content and purpose of the SCOTUS decisions on arbitration. It engaged in a strained analysis that did not account for the essential thrust of the SCOTUS rulings. It constructed an 'edifice' that housed only its misguided and unlawful resistance to federalization. Its analysis attempted to displace a *fait accompli*. The 'plain mistake' rule cautions arbitrators not to make mistakes in applying the law. They must emulate judges in their application of the law. Even though the parties bargained for arbitration, a court could rescind arbitrator rulings if it determined that they were wrong on the law and contained unacceptable legal errors. The primary impetus for the opinion in *Finn v. Ballentine* was SCOTUS' unusual opinion and reasoning in *Hall Street*, along with its equally befuddling counterpart in *Volt*.

In many respects, the New Hampshire Supreme Court's analysis in *Finn v. Ballentine* simply complied with the *Hall Street* Court's directive that lower courts should assess the standing of manifest

disregard or like bases for the judicial supervision of arbitral awards.[56] 'Plain mistake' could represent such a reassessment. The state court attempted to characterize review for 'plain mistake' as an exceptional action meant to maintain the integrity of arbitral awards. The ground is clearly intended to allow courts to examine and evaluate an arbitrator's application of law: "Rather, although judicial review is deferential, it is the court's task to determine whether the arbitrators were plainly mistaken in their application of law to the specific facts and circumstances of the dispute they were called upon to decide."[57]

The statutory ground in the state law allowed courts to require that arbitrators reach a would-be legally correct result or, at least, a result that was not plagued by an allegedly manifest or evident legal error. This circumstance, however, was not what the parties intended when they bargained for arbitration. Moreover, inviting judges to assess the arbitrators' law application was a risky activity that could easily lead to untoward results and supervisory chaos. The court's focus on federal preemption and state law was so intense that it failed to see the forest through the proverbial trees. What was left of arbitration's appeal to parties after the 'plain mistake' restriction was applied? It demonstrated the wisdom of the SCOTUS' intolerance of exceptions to its determinations on arbitration. A judicially supervised arbitral process, subordinated to the 'rule of law,' was unlikely to be

[56] Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008).

[57] *Finn*, 169 N.H. at 146.

an effective alternative to court litigation. Echoing and paraphrasing the historical distinction between the submission and arbitral clause,[58] the lack of arbitral autonomy would dissuade business interests from engaging in arbitration.

B. In Texas: *NAFTA Trader v. Quinn*

In its opinion, the New Hampshire Supreme Court referred to a Texas case that provided support for the views and analysis expressed in *Finn v. Ballentine*. Both state courts adopted similar positions on federal preemption of state law. In *NAFTA*

[58] In the 19th century and through the early part of the 20th century, national legislation in a number of countries, *e.g.*, France and Brazil, made the submission (the arbitration agreement for existing disputes) the lawful contract for agreeing to arbitration. Courts believed that submitting future disputes to arbitration (through the arbitral clause) was a dangerous proposition because neither party knew what kind of disputes (if any) would arise. This was the position argued by the concurring opinion in *Wilko v. Swan*, 346 U.S. 427, 438-39 (1953). It was ostensibly a paternalistic approach to the protection of legal rights. In reality, it was a fig leaf by which to conceal a persistent and uncompromising judicial hostility to arbitration. The modern law of arbitration reversed the status of the two agreements for arbitration. These laws privilege the independence and autonomy of arbitration to maintain its effectiveness as an adjudicatory mechanism. If the submission were the exclusive pathway to arbitration, few parties already in opposition would have sufficient motivation to agree to forgo court proceedings. The point in the text is in a similar vein: if arbitration were not final and binding, it would have little, if any, appeal to disputing parties.

Traders, Inc. v. Quinn,[59] the Texas Supreme Court rendered a decision that gauged the impact of *Hall Street* upon the federal preemption doctrine, the Texas Arbitration Act (TAA), and the function of contract freedom in Texas arbitration law. In *Hall Street*, SCOTUS held that the parties' authority to define their recourse to arbitration ended with the rendition of the award.[60] Texas law, however, permitted contracting parties to enter into special 'opt-in' agreements as part of their bargain for arbitration under which the parties agreed that courts could vacate awards if the arbitrator committed 'reversible error' in deciding the case. The parties' agreement thereby reached into the award enforcement phase of the arbitral process—an area that *Hall Street* determined only courts could enter.

Otherwise stated, the parties could agree to expanded judicial supervision in which the courts were authorized (or required by party command) to review the arbitrator's dispositions on the merits. Because the Texas statute did not provide for vacatur on the basis of reversible error, it could only be instituted through party agreement.[61] In effect, according to the Texas court, the contracting parties could agree to place the same limitation (review on the merits) on the arbitrator's decisional power that applied to a judge's ruling and thereby protect themselves from the risk of erroneous legal

[59] Nafta Traders, Inc. v. Quinn, 339 S.W. 3d 84 (Tex. 2011).
[60] *Hall St.,* 552 U.S. at 586.
[61] *Nafta,* 339 S.W. 3d at 93.

conclusions.[62] Such provisions had been outlawed in *Hall Street*.[63]

'Reversible error' usually involved matters relating to the application of the governing law; it, however—albeit more infrequently, could refer to errors of fact as well. Generally, it was contrasted to 'harmless' error. If it is discovered, reversible error would have a significant impact on the result of litigation. Like the choice-of-law or venue, its application could be outcome-determinative. The error committed by the adjudicator needed to be indisputable, profound, and grave, *i.e.*, so substantial that the final determination was, as a result, unjust and should be rendered unenforceable. The error, in effect, extinguished the validity and enforceability of the result.[64]

Clear and unmistakable bias by the decision-maker or reliance on falsified (or otherwise corrupted) evidence were examples of possible reversible errors in judicial litigation. There needed to be unmistakable indicia that the adjudication could not satisfy minimal juridical standards. In the setting of arbitration, reversible error could mean that the arbitrator clearly and profoundly misunderstood crucial factual elements or the content or parts of the governing law such that the determinations in the award were both incongruous and—in fact—incapable of being

[62] *Nafta,* 339 S.W. 3d at 93.
[63] *Id.*
[64] *Id.*

comprehended by reasonable people given the issues, interests, and facts.[65]

According to the Texas High Court, the Texas Arbitration Act included the possibility of regulating awards for reversible error by invoking the ground of excess of arbitral authority. Therefore, a finding that the arbitrators ruled either on a matter beyond their mandate or made a significant legal or factual error in their ruling would justify vacatur.[66] The Texas Supreme Court further concluded that arbitrator reversible error or excess of authority overwhelmed the policy favoring arbitration because, when the parties so provided, reversible error contradicted a specific provision in the parties' contract (that the determinations in the award be free of reversible error), deprived the parties of the benefit of their bargain, and prevented them from realizing their reasonable expectations under the agreement.[67]

In effect, the Texas court allied itself to Justice Stevens' dissent in *Hall Street*[68] when it declared that contract freedom—the legal right of contracting parties to formulate their own protocol for (entry into, participation in, and exit from) arbitration—was at the heart of its opposition to *Hall Street's* restriction of party prerogatives and to the imposition of that holding on states and state courts through the federal preemption doctrine:

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[65] *Nafta,* 339 S.W. 3d at 93.

[66] *Id.*

[67] *Nafta,* 339 S.W. 3d at 93.

[68] *Id.*

> As a fundamental matter, Texas law recognizes and protects a broad freedom of contract. We have repeatedly said that/ 'if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice'. /We find nothing in the TAA [Texas Arbitration Act] at odds with this policy.[69]
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> * * *
>
> If we were to identify an essential virtue of arbitration, it would be that it is a creature of [party] agreement.[70]

The court segregated its loyalty to doctrine on a governing law basis. When the court applied the FAA (because of party choice-of-law or the transaction involved interstate commerce), *Hall Street* was binding precedent and controlling. In this setting, 'opt-in' agreements could not be enforced and the court was relegated to the application of the content of FAA §10 and the so-called common law grounds.[71] When the TAA governs the litigation, the court arrogated to itself the discretion to "reach [its] own

[69] Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008).

[70] *Nafta*, 339 S.W. 3d at 95-96.

[71] *Id*. at 94.

judgment"[72] about the meaning and applicability of the *Hall Street* ruling and its consequences for the rules of arbitration law articulated in the Texas statute and its underlying case law.[73]

The state court's analysis was in clear and complete opposition to SCOTUS' doctrine on federal preemption as established by the case law decided after *Volt*—in effect, as stated earlier, a line of cases intended to rectify the impact of *Volt* on the elaboration of a uniform national law of arbitration.[74] The state court's reasoning and conclusion clearly allowed a state law (through party agreement) to limit the autonomous operation of the arbitral process. The FAA established the cardinal principles of American arbitration law that had to be applied consistently throughout the legal system. The prohibition against the merits review of awards and the decisional sovereignty of the arbitrator were instrumental provisions in those principles. Since *Volt*, SCOTUS had shown steadfast intolerance for limiting arbitration through the imposition of state law constraints.[75]

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[72] *Nafta,* 339 S.W. 3d at 91-92.

[73] *Id.* at 92.

[74] *See supra* text accompanying note 40. The relevant case law consists of: Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995); Doctor's Associates, Inc., v. Casarotto, 517 U.S. 681 (1996); Buckeye Check Cashing, Inc., v. Cardegna, 546 U.S. 440 (2006); Preston v. Ferrer, 552 U.S. 346 (2008); DirecTV v. Imburgia, 136 S.Ct. 463 (2015).

[75] *See, e.g.,* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

Review for reversible error integrated the substantive judicial review of awards into the regulation of arbitration. Because courts were familiar with this standard, they were more likely to apply it than manifest disregard and to use it to do a thorough review of the arbitrator's conclusions on the law.[76] It thereby would pose a greater challenge to arbitrability and the autonomy of the arbitrator in deciding the dispute. It represented a gross judicial trespass on the independence, autonomy, and functionality of arbitration. Moreover, it conflicted with the letter and spirit of the SCOTUS case law on arbitration. Once reversible error was incorporated into the judicial supervision of arbitral awards, what remained of the deferential discipline that simple error and even gross error in the application of law or the understanding of the facts by the arbitrator would not justify vacatur? If there was one approach in state law and another in federal law—and they are dichotomous—the federal law had to prevail under the preemption doctrine.[77]The Texas court, however, articulated a very different solution to the conflict. According to the court, when the parties agreed to limit the arbitrator's decisional discretion, limited judicial

[76] "Clear error refers to a trial court's judgment or action that appears unquestionably erroneous to the reviewing appellate court." *Available at:* http://definitions.uslegal.com/c/clearerror/. *See* Pierce v. Underwood, 487 U.S. 552, 558 (1988); Teva Pharma. USA, Inc., v. Sandoz, Inc., 574 U.S. ___ (2015) (No. 13-854), *available at:* http://supreme.justia.com/cases/federal/us/
574/13-854/.

[77] *Nafta,* 339 S.W. 3d at 91.

supervision under FAA §10 was superseded by that party provision. When review for reversible error was added to the mix by party agreement, the applicable law was irretrievably altered. In the court's words, legal or factual errors by the arbitrator "directly contradict[ed] the parties' express agreement."[78] Judicial failure to follow party prescriptions would then "deprive [the parties] of the benefit of their reasonable expectations."[79] The party expectation "to limit an arbitrator's power to err"[80] gave the arbitrator "no more power than a judge"[81] and thereby allowed contracting parties to manage their risk of exposure to arbitrator mistakes on the law or facts.

The comparison of arbitrators and judges was a backhanded way of saying that judges and their rulings were, as a general rule, subject to appeal. If judges suffered this restriction of their power and decisional discretion, arbitrators (presumably inferior to the public servants) should be willing to tolerate a similar limitation. Moreover, constraining arbitrator discretion to decide loses any discriminatory character when it was demanded by the parties in their agreement. Contract freedom and party provision legitimized the containment and the legal limitation of arbitration. The core problem, implausibly ignored and dismissed by the Texas court, was that its reasoning and result were in flagrant breach of the well-settled federal law on arbitration. The statute

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[78] *Nafta,* 339 S.W. 3d at 90.

[79] *Id.*

[80] *Id.*

[81] *Id.*

thereby fulfilled the parties' desire to obtain legally correct results by recognizing reversible error as a basis for vacating awards and expressed it as an excess of arbitrator authority.[82]

Under Texas law, contract freedom was the first principle of the legal regulation of arbitration. Freedom of contract transformed the party agreement into the supreme law of arbitration. Both the law and the courts were on the sidelines and only entered the fray to enforce party intent or, when the latter was absent, they provided a default regulatory framework:

> [W]e agree that delay and resulting expenses are concerns that arbitration is intended, at least, to alleviate. But equally grievous is a post-arbitration process that refuses to correct errors as the parties intended, and of equal concern

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[82] In reaching this conclusion, the Court ignored the distinctive contributions of each process to the adjudication of disputes. Legally-correct determinations were the special province of the courts. Unless the parties customized the process to their individual liking, arbitration provided a different adjudicatory service and product. It also refused to acknowledge that, no matter how significant to the public interest and the public good it may be, litigation was also a service-providing industry. Its 'customers' have a wide range of problems and needs. Arbitral adjudication was not and should not be a blurred mirror image of judicial litigation. Citizens with full legal capacity have the right to make choices about their own lives through contract. Finally, as for many opponents of 'federalized arbitration', the court's analysis at bottom represented a power struggle about which institution had the authority to decide.

> is a civil justice system that allows parties an alternative to litigation only if they are willing to risk an unreviewable decision.[83]

Further, the Texas court argued that an irreconcilable conflict existed between state and federal law in the context of arbitration and federal preemption "when state law . . . refuse[d] to enforce an arbitration agreement that the FAA would enforce[,]"[84] unless (at least, under Texas law) the parties have agreed to a form of merits review of their arbitral awards. The court relied heavily upon the opinion in *Volt* to find 'safe harbor' for its ideas that deviated from the doctrine established by the 'emphatic federal policy favoring arbitration.' It sought to establish and buttress states' rights, non-national-uniformity proposition that state laws of arbitration could lawfully establish a more restrictive regulation of arbitration than the federal law. Echoing its New Hampshire counterpart, the Texas court stated that: "The lesson of *Volt* is that the FAA does not preempt all state-law impediments to arbitration; it preempts state-law impediments to arbitration agreements."[85] By dividing the FAA into two separate parts (like the New Hampshire court), the Texas court found the safe haven it sought for the application of a less hospitable state law of arbitration. In its view, the selective preemption that arose from an exclusive

[83] *Nafta,* 339 S.W. 3d at 91.
[84] *Id.* at 93.
[85] *Id.* at 95.

focus upon arbitration agreements gave state laws of arbitration a much wider regulatory scope.[86] That conclusion was both true and illegal.

The Texas court gave the opinion in *Volt* an untoward significance in the elaboration of American arbitration law, presenting it as critically significant to the preservation of state authority in the regulation of arbitration. While courts and commentators generally perceived the case as wrongly decided,[87] the Texas High Court saw *Volt* (again, like its counterpart in New Hampshire) as the source of a limited preemption doctrine that tolerated well the coexistence of state and federal laws on arbitration.[88] Accordingly, partial state law limits on arbitrability were permissible. As the New Hampshire court would state in *Finn v. Ballentine*, the California procedural provision in *Volt* was not preempted because it merely 'stayed' (rather than dismissed) the agreed-upon arbitration proceeding. Moreover, the parties had selected California law as the governing law.[89] "The parties' agreement was enforced, not thwarted, by application of the California law they had chosen."[90]

After all, an unusually inhospitable and unsupportive U.S. Supreme Court proclaimed in *Volt* that the FAA was not the only framework for

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[86] *Nafta*, 339 S.W. 3d at 98.

[87] *See* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 52-55, 141, 163-65, 195, 386 (4th ed. 2017).

[88] *Nafta*, 339 S.W. 3d at 99-100.

[89] *Id*. at 99.

[90] *Id*. at 100.

regulating arbitration.[91] It coexisted with several different legal regimes that provided a variety of requirements and outcomes—a theme at the heart of the later decision in *Hall Street*.[92] The parties in their contract could select the governing regime and customize their recourse to arbitration. They could also agree to a governing law for the transaction and the arbitration. The courts' task was to enforce the parties' contract as written.[93] There was no policy imperative associated to arbitration but contract freedom and the principle of *pacta sunt servanda*: "The Supreme Court concluded that the FAA's purposes and objectives are not defeated by conducting arbitration under state-law procedures different from those provided by the federal statute."[94]

The state court then emphasized a feature of the FAA that restricted its range of application. FAA §§3 and 4 were specifically directed to federal courts alone, leading to the undeniable conclusion that "§§3 and 4 of the FAA apply only in federal court."[95] The New Hampshire court reached the same conclusion.[96] The Texas court added that "Section 10 of the FAA, the basis of the decision in *Hall Street*, is itself

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[91] *See* Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 473 (1989).

[92] *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 589 (2008).

[93] *See* THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 161 (4th ed. 2017).

[94] *Nafta,* 339 S.W. 3d at 99.

[95] *Id.* at 99-100 n.71.

[96] Finn v. Ballentine Partners, 169 N.H. 128, 138 (N.H. 2016).

addressed only to 'the United States court in and for the district wherein the award was made.'"[97] Further, the U.S. Supreme Court had itself acknowledged the anomalous circumstance that, although the FAA established a federal right to arbitrate, it did not create federal question jurisdiction.[98] These various textual features of the statute made its extension to state courts and legislatures a lesser imperative. Still ignoring the presence and overwhelming force of the 'emphatic federal policy favoring arbitration,' the Texas High Court reached, what is at this point, the foregone conclusion that:

> The lesson of *Volt* is that the FAA does not preempt all state-law impediments to arbitration; it preempts state-law impediments to arbitration agreements. . . . The only reasonable reading of . . . *Hall Street* . . . is that the FAA does not preempt state law that allows parties to agree to a greater review of arbitration awards. . . . The TAA . . . permits parties to agree to expanded review, or to a corresponding limit on the arbitrator's authority, as in this case, but it does not impose such review on every arbitration agreement. . . . The matter is left to the agreement of the parties. But

[97] *Nafta,* 339 S.W. 3d at 99-100.

[98] *See* Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25. *See supra* text accompanying note 11-13.

> absent clear agreement, the default under the TAA, and the only course permitted by the FAA, is restricted judicial review.[99]

This 'lesson' is only possible if the Federalism Trilogy[100] and the extensive case law decided in the aftermath of *Volt* are ignored.[101] The Texas court engaged in a deliberately selective perusal of the relevant decisional law to prove its point that limited state law intrusions upon the regulation of arbitration were tolerable under federal law. The strategy was virtually identical to the approach of the New Hampshire Supreme Court.[102] The analysis was a case study in calculated legal advocacy; it followed the letter of the SCOTUS doctrine on arbitration only to corrupt its soul. In many respects, the reasoning represented a return to *Wilko v. Swan*[103] (a difficult choice between would-be competing policies), *Gardner-Denver*[104] (some statutory rights are exempt from arbitrability), and *Commonwealth Coatings*[105] (some legal regulations must apply to the arbitral

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[99] *Nafta*, 339 S.W. 3d at 100-101.

[100] Dean Witter Reynolds, Inc., v. Byrd, 470 U.S. 213 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1 (1983).

[101] *See also* note 74 *supra*; THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 76 (4th ed. 2017).

[102] *Finn*, 169 N.H. at 134, 138.

[103] Wilko v. Swan, 346 U.S. 427 (1953).

[104] Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

[105] Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968).

process to safeguard its use and integrity), and it echoed the 9th Circuit's persistent opposition to the federal law of arbitration[106] because it depreciated the professional work of the courts and the social mission of the law.

The Chief Justice of the Texas Supreme Court filed a concurring opinion[107] in which he took a critical view of arbitration from another, less analytically-oriented, and more policy-driven perspective. The assessment makes the case for the importance of the law in all societies and argues that the privatization of legal litigation through arbitration may be a costly, unsuitable solution to the systemic problems it seeks to correct.[108] Both sides of the Texas court see arbitration as an inadequate and approximative remedy to the problems of civil adjudication, while the U.S. Supreme Court assesses it as the exclusive and indispensable means of correcting the dysfunctionality of civil litigation in the American legal system and in the process of trans-border litigation.[109]

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[106] *See, e.g.*, Circuit City Stores, Inc., v. Adams, 279 F.3d 889 (9th Cir. 2002).

[107] *Nafta*, 339 S.W. 3d at 102-04.

[108] *See id.* at 102-03.

[109] The civil or public servant's answer to problems is nearly always adequate funding. It is an overly facile approach that recommends a solution that is as bad as the problem it addresses. As the 'war on poverty' demonstrated, throwing money at a problem achieves virtually nothing. To the extent it generates gratitude, it may garner votes. It seems to enrich primarily the administrators. The Chief Justice, however, is more persuasive in his advocacy for changes in trial procedures. Nonetheless, for

According to the concurring opinion in *NAFTA Traders*:

> Increasingly, our civil disputes are submitted to the private sector rather than a judge or jury. The trend is neither intrinsically good nor bad, but there are consequences. When a case is tried in open court, rules of evidence . . . dictate what facts a jury may properly consider. The proceeding is recorded, and dispositive rulings are subject to principles of error preservation. . . . An arbitration is different. . . . I write only to observe that our system is failing if parties are compelled to arbitrate because they believe our courts do not adequately serve their needs. If litigation is leaving because lawsuits are too expensive, the bench and the bar must rethink the crippling burdens oppressive discovery imposes. If courts have yet to embrace modern case-management practices, the legislature should ensure that the justice system has resources to improve technology and to hire qualified personnel—two sure ways to improve efficiency. . . . [W]e must, in the future, address those aspects of our justice system that compel litigants to

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reasons of lawyer training and established practices, the SCOTUS recourse to arbitrability is more convincing.

> circumvent the courts and opt for private adjudication.[110]

In a more recent case (*Hoskins v. Hoskins*),[111] the Texas Supreme Court held that the enumerated grounds for vacatur in the TAA are exclusive at least from the perspective of the statutory text itself. If the parties do not provide for a particular type of review, the statutory grounds and limited review apply.[112] With a contractual 'assist' from the parties, the explicit statutory standard controls. Therefore, common law grounds, like manifest disregard of the law, are not available for vacating awards under state law.[113] The parties in *Hoskins* had agreed that the governing arbitration law would be the TAA. The court cited one of its prior cases to establish that "'[b]ecause Texas Law favors arbitration, judicial review of an arbitration award is extraordinarily narrow.'"[114] Later, the court concluded that "the TAA leaves no room for courts to expand on . . . [the enumerated] grounds"[115] and these enumerated statutory grounds "do not include an arbitrator's manifest disregard of the law."[116] The court compared the circumstances of this case with its precedent in *NAFTA Traders* and found the circumstances to

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[110] *Nafta*, 339 S.W. 3d at 102-04.
[111] Hoskins v. Hoskins, 497 S.W. 3d 490 (Tex. 2016).
[112] *Id*. at 495.
[113] *Nafta*, 339 S.W. 3d at 102, 103, 104.
[114] *Hoskins*, 497 S.W. 3d at 494.
[115] *Id*. at 494-95, 495-96.
[116] *Hoskins*, 497 S.W. 3d at 495, 496.

warrant a separate and distinct legal analysis and conclusion:

> The arbitration agreement in [*Hoskins*] contained no restriction (either directly or indirectly) on the arbitrator's authority to issue a decision unsupported by the law. Unlike the reversible-error challenge to the award in *NAFTA Traders*, Leonard's manifest-disregard complaints cannot be characterized as assertions that the arbitrator exceeded his powers.[117]
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> [. . .]
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> Thus, our holding in *NAFTA Traders* does not support Leonard's broad contention that parties may obtain vacatur of an arbitration award on a common-law ground that is not enumerated in the TAA. To the contrary, we recognize in *NAFTA Traders* that "the default under the TAA . . . is restricted judicial review. . . ."[118]
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> [. . .]
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> [*U*]*nless* a statutory vacatur ground is offered, the Court *shall* confirm the award. . . . [W]e may not rewrite or

[117] *Hoskins*, 497 S.W. 3d at 494.

[118] *Id.* at 495.

> supplement a statute to overcome its perceived deficiencies. The parties signed an agreement to arbitrate under the TAA, and that agreement contained no limitations on the arbitrator's authority beyond those enumerated in the statute. . . .[119] [Emphasis in the original].

The concurring opinion provided the following assessment of the significance of the *Hoskins* ruling:

> Our holding that the TAA's vacatur grounds are exclusive establishes that manifest disregard and, for all practical purposes, all other common-law vacatur doctrines are no longer viable with regard to arbitrations governed by the TAA./ [W]e avoid the sort of quagmire that surrounds . . . the . . . FAA./ [Because of the restrictive review under the enumerated grounds]. [N]o glosses on . . . [the] statutory bases, no smuggling common-law in through the back door—and no judicial intermeddling with the Legislature's carefully circumscribed bases for judicial review of an arbitration award. Exclusive means exclusive.[120]

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[119] *Hoskins,* 497 S.W. 3d at 495-496.

[120] *Hoskins,* 497 S.W. 3d at 498, 500.

C. In California

(i) *Cable Connection v. DirecTV*

Like the New Hampshire Supreme Court, the Texas High Court in *NAFTA Traders* drew inspiration for its analysis and doctrine from California decisional law—a jurisdiction open to an extensive utilization of ADR yet leading the judicial opposition to SCOTUS' 'progressive' rulings on arbitration.[121] California law, therefore, displays opposing tendencies in its embrace of the legal policy on alternatives to judicial litigation: open to novel approaches to dispute resolution, on the one hand, and, on the other hand, an ardent advocate for the importance of the traditional work of the judiciary and its mission to maintain the social order.[122] Both state and federal courts in California have helped to create, guide, and nurture the resistance to the SCOTUS'

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[121] *See, e.g.* Jones v. Citigroup, Inc., 38 Cal. Rptr. 3d 461 (Ct. App. 2006); Szetelav. Discover Bank, 118 Cal. Rptr. 2d 862 (Ct. App. 2002); Badie v. Bank of America, 79 Cal. Rptr. 2d 273 (Ct. App. 1998); Discover Bank v. Superior Court, 30 Cal. Rptr. 3d 76 (Cal. 2005); Southland v. Superior Court, 31 Cal. 3d 584 (Cal. 1982). For characteristic Ninth Circuit decisions, see Comedy Club, Inc. v. Improv West Associates, 553 F.3d 1277 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 145 (2009); Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002); Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999); Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).

[122] *See, e.g.*, Armendariz v. Fdn. Health Psychare Servs., Inc., 99 Cal. Rptr. 2d 745 (Cal. 2000).

elaboration of a vital role for arbitration in civil litigation.[123]

The California High Court has been steadfast in its opposition to the hegemony of the FAA, the application of the federal preemption doctrine to matters of arbitration, and the permissive character of the federal judicial policy on statutory arbitrability. It believes that state law—in particular, legislation to repair the inequities in society and the contract defenses to the enforcement of adhesive contracts[124]—should govern the issues that arise from arbitration agreements and the arbitral process in cases within the territorial boundaries of the state.[125] The advocacy for state law is especially unyielding when there is no firm basis or categorical reason to justify the jurisdiction of federal law. At the very least, state law should not be completely eclipsed in litigation involving contract relationships between citizens of the state or that implicate state interests or commercial enterprises. By the fact of its election, the state government possesses the sovereign authority to make law within and for the state—a right of self-determination (or freedom) that can be mitigated by federal law (the Bill of Rights and the Supremacy Clause) only in the face of the manifest violations of

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[123] *See* note 121 *supra*.

[124] *See, e.g.,* Smith v. Pacificare Behavior Health of Cal., Inc., 113 Cal. Rptr. 2d 190 (Ct. App. 2001); Broughton v. Cigna Healthplans of Cal., 90 Cal. Rptr. 2d 334 (Cal. 1999).

[125] *See, e.g.*, Engalla v. Permanente Med. Grp., Inc., 15 Cal. Rptr. 4th 951, 938 P.2d 903 (Cal. 1997).

the Constitution.[126] For preemption to take place, a state law must clash with the federal government's core constitutionally-established law-making authority. To warrant dislodging or invalidating state law, the conflict must be both heretical and brazen; it must attack the very principle of national political cohesion.

In *Cable Connection, Inc. v. DIRECTV, Inc.*,[127] for example, the California Supreme Court set the opposition to *Hall Street* into motion. It described the case's range of application as limited to cases involving federal law.[128] It emphasized the Court's own statement of the holding's restrictions; in particular, the case did not ban the use of non-FAA frameworks for the judicial supervision of awards that permitted parties to agree to the enhanced review of arbitral awards.[129] When the court refused to follow *Hall Street* in the interpretation of the state arbitration statute, it stated:

> The judicial system reaps little benefit from forcing parties to choose between the risk of an erroneous arbitration award and the burden of litigating their dispute

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[126] The position restates the original *Erie* doctrine and ignores the impact of the subsequent political and economic development of the country, as well as the evolution of the doctrine itself. *See* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 47, 76, 184 (4th ed. 2017).

[127] Cable Connection, Inc., v. DIRECTV, Inc., 190 P.3d 586 (Cal 2008).

[128] *Cable Connection,* 190 P.3d at 593.

[129] *Id*. at 599.

> entirely in court . . . . There are also significant benefits to the development of the common law where arbitration awards are made subject to merits review by the parties' agreement . . . . These advantages, obtained with the consent of the parties, are substantial.[130]

(ii) *McGill v. Citibank*

The California Supreme Court's discussion of this and related legal issues in *McGill v. Citibank*,[131] was characteristically thorough. The analysis was methodical and well-organized. The court, however, demonstrated a sense of distinction so subtle that, once made, some of its distinctions became barely visible or comprehensible. They disappeared into the ether or overwhelmed the intellect. Moreover, at several points in the opinion, the court's ideological and political agenda peered through the cloud cover of doctrinal considerations. Throughout the discussion of the law, either impliedly or expressly, the High Court distinguished between the public and private domain and, concomitantly, between the rules that arose from regulatory law and those that emerged from private contracts.[132] The discussion strongly suggested that governmental interests and activities were the paramount concerns of the legal system and that they could dislodge, even overrule, privately-formulated

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[130] *Cable Connection,* 190 P.3d at 601.

[131] McGill v. Citibank, 393 P.3d 85 (Cal. 2017).

[132] *McGill,* 393 P.3d at 89.

rules.[133] In the court's view, enacted legislation was a manifestation of the sovereign political will of the state government and could not be diminished or altered by the exercise of private contractual authority. Establishing the rule of law and defining public policy were within the exclusive jurisdiction of the elected and appointed government.[134]

The state court saw its primary task in *McGill* as establishing a legal basis for the application of state law and preventing the encroachment of federal law and jurisdiction. Within the territory of the state, its citizens had a right to be governed by state law, and state law should be the source of governing legal rules and controlling political values.[135] The idea of contract freedom and the obligation of enforcing arbitration contracts could be, and was, replaced by an allegiance to locally legislated law and the local mores of judicial adjudication. The constitutional supremacy of federal law could and needed to yield, at times and on some issues, to state territorial sovereignty, especially in litigation involving the application of state law to the interests of state residents.

To a not insignificant degree, the *McGill* opinion and related determinations reignited the discussion of states' rights that attended the formulation of the Articles of Confederation and later

[133] *McGill,* 393 P.3d at 93-94.
[134] *Id*. at 92.
[135] *Id.* at 93-94.

the U.S. Constitution.[136] The states' rights issue is akin to the ideological turmoil that today accompanies the debate about sanctuary cities, illegal immigration, the commander-in-chief powers, the Paris agreement on the environment, and the seemingly unending efforts to delegitimize current political institutions and the founding values of the Republic. Without seeking to address any of these controversies directly, it is nonetheless clear that the strident clash of positions threatens to unravel federalism, full faith and credit, and integrity of national political fabric.

Federalism generally fosters a strong central government and is the purveyor of unity within the country. Current circumstances have shaken the very foundation of well-settled political principles and practices. The hostility and defiance are so intense that they even raise the specter of secession. The national government is likely strong enough to quell any acts of true insurrection—so one hopes. The policy on arbitration is part of the pursuit of national goals and interests. It arose from federal efforts to restore the right to redress grievances to the American citizenship.[137] Such an objective could not be attained without the galvanizing force of federal preemption. A cogent and uniform national law on arbitration was instrumental to arbitral autonomy and the effectiveness of the arbitral process.[138] Effective

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[136] *See* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 76 (4th ed. 2017).

[137] *Id.*

[138] *See* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959).

arbitral adjudication could not have been realized by a weak federal policy. Without federalism and federal preemption, U.S. citizenship would have been altered and depreciated. While unitary national policies have a negative impact on local rights, the addition of federalized arbitration law to U.S. citizenship was vital to its constitutional integrity. Effective civil adjudication is an intrinsic and vital part of democratic governance.

The *McGill* ruling advocates for a form of state sovereignty and independence that undermines the federalization of American arbitration law and the arbitral process' operational effectiveness. *McGill* represents a larger decisional law that opposes the intrusion of the 'emphatic federal policy favoring arbitration' upon California state sovereignty and self-governance.[139] The Ninth Circuit also has been part of the resisting group. Its opinions indicate that the court deeply resents the privatization of adjudication and the substitution of arbitral methods for traditional judicial procedures.[140]

Despite its long-standing opposition, the Ninth Circuit appears to have reassessed—at least to some extent—its position on the federalization issue. In *Kilgore v. KeyBank, N.A.*,[141] in contrast to the reasoning in *McGill*, the Ninth Circuit held that the FAA preempted the *Broughton-Cruz* rule, which prohibited the arbitration of claims for injunctive relief under the California Unfair Competition Law

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[139] *McGill*, 393 P.3d at 95.

[140] *See supra* text accompanying note 15.

[141] Kilgore v. KeyBank, 718 F.3d 1052 (9th Cir. 2013).

(UCL).[142] While avoiding a direct confrontation with *Kilgore*, the *McGill* court reached a contrary result by focusing on another aspect of the litigation. It drew a distinction between 'public' and 'private' injunctive relief and aligned that distinction with an alleged provision in the arbitration contract that extended the waiver of 'public injunctive relief' to any type of adjudicatory proceeding.[143] Despite its conjectural character, this reasoning allowed the state court to attribute an inviolable public policy character to the relevant consumer protection legislation and thereby excluded it from the reach of arbitral jurisdiction. The latter outcome directly contradicted the result mandated by federal preemption.

In light of *Kilgore* and the current federal arbitration practice,[144] had the Ninth Circuit decided *McGill*, in all likelihood, it would have commanded that the question of arbitrability be submitted to the arbitrator to determine the parties' intent on this

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[142] California Code, Business and Professions Code – BPC §17200, *available at:* http://codes.findlaw.com/ca/business-and-professionscode/bpc-sect-17200.html; Kent J. Schmidt (Dorsey & Whitney LLP), *What is California's Unfair Competition Law?—the Michael Scott explanation, available at:* http://www.lexogy.com/library/detail.aspx? g=26df0acf-ef9d-4ffa-8bcb-d59c0686837/; Carlton A. Varner & Thomas D. Nevins, *California Antitrust & Unfair Competition Law* (3d ed. 2003); Jeremy B. Rosen, *California: Unfair Competition Law*, *in* The Federalist Soc. State Ct. Doc. Watch Summer 2009, a*vailable at:*http://www.horvitzlevy.com/horvitz/assets/dynapsis/attachment357.pdf.

[143] *McGill*, 393 P.3d at 90-91.

[144] *See supra* text accompanying note 141-43.

question, as reflected in the contract for arbitration. This outcome is the characteristic result in the federal decisional law on arbitration, as confirmed by the ruling in *Oxford Health Plans LLC v. Sutter*.[145] In contrast, the California Supreme Court in *McGill* avoided assessing *Kilgore* and the arbitrability question; rather, it cast the problem in terms of limitations on contract freedom and the creation of private rights. It determined that contracting parties could not lawfully agree to waive their right to seek public injunctive relief in all adjudicatory frameworks because of the substantial public interest in the regulatory law. The California statutes in question in *McGill* were the following: the Consumers Legal Remedies Act (CLRA); the unfair competition law (UCL); and the false advertising law. Arbitrators could not adjudicate or interfere with the political rights that arose from the state's exercise of governmental authority on behalf of its citizens.[146]

The *McGill* court also believed that SCOTUS exaggerated the significance of the FAA in its case law. Implied by this perspective was the additional view that the hyperbole that surrounded the FAA and the 'emphatic policy' was more of a sales pitch than serious analytical thinking.[147] It may have been wishful thinking, but the state court was convinced that the reality of arbitration did not match the Court's description. Moreover, it was the state court's conviction that the public purpose underlying the laws

[145] Oxford Health Plans, LLC v. Sutter, 569 U.S. 564 (2013).
[146] *McGill,* 393 P.3d at 91-93.
[147] *McGill,* 393 P.3d at 93-94.

enacted by the state legislation could not be diminished, frustrated, or contradicted by private contractual references to arbitration.[148] Additionally, the court seemed to distrust the arbitrators' ability to apply the law, and to question the corporate parties' motivation for their recourse to arbitration.[149] Arbitration had become a means of avoiding judicial rulings and legal remedies. In the court's view, the law should function to correct the inequality between parties and the abuse of position by large commercial enterprises.[150]

In addressing the issues in *McGill*, the state court never acknowledged SCOTUS' objective of having arbitration provide citizens with a functional and effective process of civil litigation. Also, it failed to recognize that SCOTUS' purpose in fostering preemption was to create a single American arbitration law. Fifty-one arbitration statutes would create a horde of qualifications, exceptions, and variations that would rob the arbitral process of its autonomy and practical utility. Both the reasoning and result in *McGill* are foregone conclusions calculated to conceal, but also to achieve, the aim of reintegrating state sovereignty and law into the regulation of arbitration.

In *McGill*, Sharon McGill was a Citibank credit card customer. On the basis of that status,[151] she purchased insurance from Citibank, known as a

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[148] *McGill,* 393 P.3d at 94, 95.

[149] *Id*. at 93-94.

[150] *Id*. at 93.

[151] *McGill,* 393 P.3d at 87-88.

"credit protection plan," which was intended to provide customers with insurance protection from catastrophic events that prevented them from earning an income or a sufficient one (*e.g.*, unemployment, hospitalization, divorce, or long-term disability). McGill paid a monthly premium to Citibank for the plan, the amount of which was based upon her credit card balance: the higher the debt, the greater the risk, and the more costly the premium.

In 2001 and 2005, Citibank issued a notice of change to the terms and conditions of credit card accounts. In 2001, the company added a number of arbitral clauses to cover various aspects of the commercial relationship. These clauses allowed either party to file a demand for the arbitration of "any claim . . . [or] dispute," attributed to the arbitrator the authority to interpret the arbitration agreement, broadly defined the types of claims that were arbitrable, and prohibited any type of class or representative action.

Both the 2001 and 2005 notice contained 'opt-out' provisions. These agreements had become a commonplace feature in adhesive arbitration agreements because the California courts often concluded that these agreements rectified the bargaining imbalance between the parties. They permitted the customer to reject the proffered arbitral clause and to use the credit card for the remainder of the contract term. *McGill* did not exercise her 'opt-out' privilege in either circumstance.

A curious feature of the litigation record noted and emphasized by the state court was the accord

reached by the parties during court proceedings. They allegedly agreed that the various arbitration agreements prohibited customers "from pursuing claims for public injunctive relief, not just in arbitration, but *in any forum* [including a court of law]."[152] [Emphasis in the original]. This statement would prove decisive to the outcome of the case.

Having lost her job in 2008, McGill began to incur higher amounts of debt on her card. In 2011, she filed a class action against Citibank because of the way it marketed the customer protection plan and how it processed McGill's individual claim. She contended that Citibank engaged in deceptive advertising and violated the Consumers Legal Remedies Act (CLRA), the California Unfair Competition Law (UCL), and the California False Advertising Law. The trial court ordered McGill to arbitrate her claims except those in which she sought public injunctive relief. The appellate court reversed that decision, concluding that McGill should arbitrate all of her claims against Citibank. It asserted that the SCOTUS ruling in *AT&T Mobility v. Concepcion*[153] preempted the so-called *Broughton-Cruz* rule that had prohibited the arbitration of claims for public injunctive relief.[154]

On appeal, the California High Court dismissed McGill's first claim by refusing to address it on the basis that it was unnecessary to the litigation and unsupported by the facts. She had asserted that, contrary to the appellate court's determination, the

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[152] *McGill,* 393 P.3d at 87.

[153] *Concepcion,* 563 U.S. 333 (2011).

[154] *McGill,* 393 P.3d at 88.

FAA did not preempt the *Broughton-Cruz* rule of inarbitrability.[155] The state court may have wanted to avoid addressing the *Broughton-Cruz* rule issue, not because it fell outside the factual perimeter of the case, but rather because it did not want to affirm an arbitrability ruling with which it took exception (perhaps strong exception): that injunctive relief under California statutory was arbitrable. The *Broughton-Cruz* controversy could be avoided or ignored because McGill's second question resolved the entire litigation on its own and in a manner that conformed to the state court's view of what a 'correct result' should be.

In the second branch of her appeal, McGill argued that the arbitration agreements in the standard form bank service contract were unenforceable because they coerced her into surrendering completely "her right to seek public injunctive relief . . . ."[156] Although the record was devoid of direct substantiation, Citibank, according to the court, agreed with McGill's representation about the arbitral clauses. The only textual representation made in the opinion about the would-be party agreement was the statement that " . . . as Citibank states, the parties elected . . . to exclude public injunctive relief from arbitration . . . ."[157] Rather than a mutual agreement to have the customer's right to public injunctive relief waived in all adjudicatory settings, the parties appeared to engage in an effort to avoid most of the *Broughton-Cruz* inarbitrability rule and thereafter to

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[155] *McGill,* 393 P.3d at 88.

[156] *Id.*

[157] *McGill,* 393 P.3d at *90.*

have recourse to arbitration on all issues. Contrary to the court's interpretation, the would-be party agreement did not support the claim that the customer should be deprived completely of any right to seek public injunctive relief. It is unclear how the court arrived at its conclusion or what the parties might have intended.

The court's interpretation of the *McGill* case's second question was a means by which it could address the uneasy relationship between public regulation and private rights in arbitration doctrine. In effect, the court gave itself the opportunity to tackle the federal preemption of the *Broughton-Cruz* inarbitrability rule by ricochet, masking its conclusions on that issue as part of its resolution of the other issue of litigation. The state court first noted that all three consumer protection statutes that provided the foundation for McGill's claim invalidated consumer waivers of the statutory protection because such waivers were "contrary to public policy and [were] unenforceable and void."[158] Moreover, at least one of the statutes—the false advertising law—gave standing to both government officials and aggrieved customers to seek relief under its framework. This factor reinforced the public policy character of the enactment.[159]

The court then appropriated and expounded upon a distinction made in *Broughton-Cruz* between 'private injunctive relief' and 'public injunctive relief.' The former resolved private disputes, and the

[158] *McGill*, 393 P.3d at 89.

[159] *Id*. at 89-90.

latter mostly benefitted the public as a whole and only "incidentally" ("if at all") individual private citizens: " . . . public injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has 'the primary purpose and effect' of prohibiting unlawful acts that threaten future injury to the general public. . . ."[160] With this observation, the court ascended to the pulpit of public policy, so it could rescue the hapless and unfortunate customer from the abusive and self-interested behavior of the private bank.

If the adhesive arbitration agreement completely excluded the parties' right to pursue public injunctive relief, the court would be justified in declaring the arbitral clause invalid and unenforceable under state law. The waiver of public injunctive relief through an arbitral clause "would seriously compromise the public purpose the statutes were intended to serve."[161] Under the California Code, ". . . a law established for a public reason [could] not be contravened by a private agreement."[162] The latter statement is a familiar principle in civil law legal systems. In contrast to their common law counterparts, civilian legal systems give both the law and traditional litigation the highest station in the legal process.[163] Moreover, as stated earlier, the public

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[160] *McGill,* 393 P.3d at 90.

[161] *McGill,* 393 P.3d at *94.*

[162] *Id*. at 93.

[163] *See The Common Law and Civil Law Traditions, available at*: http://www.law.berkeley.edu/library/robbins/CommonLaw

injunctive relief available under the CLRA, UCL, and the 'false advertising' law were "primarily 'for the benefit of the general public'. . . ."[164]

The California Supreme Court then advanced several criticisms of the federal policy and doctrine on arbitration, even though it was only addressing McGill's second argument which related to contract language. The state court argued that the federal doctrine on arbitration was based upon an "overbroad view of the FAA."[165] In interpreting the FAA, the state court advised federal courts to place greater emphasis on the 'savings clause' in FAA §2, providing that arbitration contracts were subject to ordinary contract defenses like unconscionability.[166] The 'savings clause' opened the door to state contract law and the unconscionability defense prohibiting arbitration agreements from forcing a contracting party to waive a public law right.

Moreover, in virtually complete contradiction with the SCOTUS case law, the state court asserted that the congressional purpose underlying the FAA

CivilLawTraditions.html; *Civil law systems and Mixed Systems with a Civil Law Tradition, available at*: http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-civil.php; Pyall Syam, *What is the Difference Between Common Law and Civil Law?, available at*: http://onlinlaw.wusl/edu/blog/common-law-vs-civil-law/; *Civil law (legal system), available at*: http://www.newworldencyclopedia.org/entry/Civil_law_(legal_system)/.

[164] *McGill,* 393 P.3d at 94.

[165] *McGill,* 393 P.3d at 94.

[166] *Id*.

was to "'make arbitration agreements . . . as enforceable as other contracts, but . . . [not] more so.'"[167] Legal rights that proceed from statutory enactments reflect the expression of public political authority. The court then made the highly suspect, likely inaccurate, contention that the FAA did not command the enforcement of arbitration agreements if those agreements contradicted or extinguished statutory rights.[168] The application of an arbitration agreement could not deprive a contracting party of its statutory rights. When the government acted, it acted on behalf of all of its citizens.[169] The California vision of the law, courts, and arbitration differed radically from the federal analogue propounded by SCOTUS.

(iii) *Sanchez v. Valencia*

In *Sanchez v. Valencia Holding Co.*,[170] the California Supreme Court demonstrated an uncharacteristically accommodative attitude toward an arbitral clause in a consumer transaction. As in other similar cases, the critical question of legal doctrine centered upon the integration of the SCOTUS decision in *AT&T Mobility v. Concepcion*[171] into (and its impact upon) the California state regulation of consumer transactions involving

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[167] *McGill,* 393 P.3d at 94.

[168] *Id*.

[169] *Id.* at 94. 95.

[170] Sanchez v. Valencia Holdings Co., 353 P.3d 741 (Cal. 2015).

[171] *Concepcion,* 563 U.S. 333 (2011).

arbitration. The trial court denied the motion to compel arbitration, ruling that the class waiver and the remainder of the arbitration agreement were unenforceable. The court of appeals did not rule on the validity of the class action waiver, but concluded that both a provision for internal arbitral appeal and the arbitration agreement "as a whole" were "unconscionably one-sided" and, therefore, unenforceable.[172]

At the outset of the opinion, the California Supreme Court expressed guarded approval of the decision in *Concepcion* by emphasizing its limited impact upon the state regulation of arbitration:

> While circumscribing the ability of states to regulate the fairness of arbitration agreements, *Concepcion* reaffirmed that the FAA does not preempt "'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" . . . Under the FAA, these defenses may provide grounds for invalidating an arbitration agreement if they are enforced evenhandedly and do not "interfere [] with fundamental attributes of arbitration."[173]

Therefore, the state regulation of arbitration was subject to federal preemption only if state rules overtly disfavored arbitration (arbitral autonomy, or

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[172] *Sanchez,* 353 P.3d at 745.

[173] *Sanchez,* 353 P.3d at 745, 746.

arbitrability) by imposing special requirements on arbitration contracts or placing restrictions that interfered with the primary attributes of arbitration.

The circumstances of *Sanchez* involved the purchase of a luxury car by a consumer (Gil Sanchez) from a California dealership (Valencia Holding Company of Valencia).[174] The purchase price was nearly $54,000. The sales contract contained a relatively elaborate *sui generis* provision for arbitration, indicating that the dealership crafted the provision over time to reflect prior sales experience and avoid previous problems. The purchaser alleged that, at the time of sale, he had been inundated with documents which he was instructed to sign. The salesperson did not explain what the documents were but simply indicated where Sanchez needed to sign. Sanchez signed the documents without reading them. There was no opportunity whatsoever to negotiate.

In particular, none of the dealership personnel alerted Sanchez to the presence of an arbitral clause or explained what the reference to arbitration meant or entailed in terms of consequences.[175] The arbitral clause contained a class action waiver, required that the arbitrators—who would be selected according to the applicable arbitral rules—be "attorneys or retired judges" who would rule pursuant to law. The arbitral proceeding would be conducted in the federal district in which the purchaser resided. There could be two distinct but related arbitrations. The first arbitration was the standard proceeding, which applied to the

[174] *Sanchez*, 353 P.3d at 745.

[175] *Id.*

adjudication of disputes that arose from the contractual relationship. Given the parties' disparity of position, the dealership (if requested) was obligated to advance the buyer's share of the costs of the arbitration with a maximum of $2500. The arbitrator could return the advance to either party at the time of the award. If authorized by the governing law, the arbitrator could also apply a 'loser pays' formula to the allocation of costs.[176]

The second arbitration was an appellate proceeding that could be invoked only in two sets of circumstances by the affected party: (1) if the winning party in the standard proceeding did not receive monetary relief, or (2) if the losing party in that proceeding was ordered to pay damages in excess of $100,000 or the award contained injunctive relief. Moreover, an award of punitive damages could be re-tried by a three-member arbitral tribunal. The requesting party would be responsible for the fees and costs of arbitration subject to possible later reapportionment by the arbitral tribunals. The parties further stipulated that arbitrations held under the agreement would be "governed by the Federal Arbitration Act."[177]

The arbitral procedure described in the adhesive arbitral clause contained protections for both parties (but to different degrees and for different reasons). The parties' position in the contract relationship identified which provisions had been written to benefit them in particular. The first ground

[176] *Sanchez,* 353 P.3d at 746.

[177] *Sanchez,* 353 P.3d at 747.

for arbitral appeal could only be used by the buyer, and the second ground was likely to be used only by the seller. The advance of costs partly assisted the buyer who was forced to arbitrate, and the possibility of an eventual reimbursement of the advance in the award protected or favored the seller's interests. Three factors indicated that the drafting party was determined to avoid the legal process and legal procedures because they believed they were antagonistic to its business interests: (1) the reference to punitive damages and injunctive relief, (2) the requirement that arbitrators be experienced legal professionals, and (3) the class action waiver.

The provisions, however, also expressed a distrust of arbitrators by requiring legal accuracy and correctness in their rulings. This requirement limited the arbitrators' decisional discretion. These attributes of the arbitral clause indicated that the choice of arbitration was unilateral and one-sided—intended to protect primarily the seller's interests. The consumer's interests were present but much less apparent. To the extent that the arbitral provisions provided access to expert, efficient, economical, and enforceable adjudication, they benefited both parties.[178]

Regardless of its real or theoretical benefits, the adhesive agreement for arbitration had little in common with a bilateral bargain. The parties' 'right to arbitrate,' therefore, was unaffected by the party recourse to other remedies. In the face of the exercise

[178] *Sanchez,* 353 P.3d at 746-47.

of other contractual remedies, the 'agreed-upon' obligation to arbitrate disputes became merely an option (a discretionary right) and was not a binding legal duty. The arbitral clause was not a 'tiered' agreement, but rather a statement of options, depending upon how the parties (individually or collectively) evaluated the circumstances. Additionally, the arbitral clause would survive the lapsing, termination, or completion of the contract and the transaction, so any prospective or unresolved disputes would be submitted to arbitration. The obligation to arbitrate, in effect, transcended the contract and even the transaction. In the event that part of the arbitral clause was invalidated, the remainder of the clause could be enforced. If, however, the class action waiver was nullified, the entire arbitral clause would be nullified. The class waiver was absolutely material and indispensable to the bargain. In effect, the parties 'agreed' that any class litigation would be heard exclusively by a court.[179]

The remainder of the arbitral clause described other forms of alternative non-judicial relief that 'coexisted' with the parties' 'agreement' to have recourse to arbitration. The parties could still have recourse to 'self-help' remedies, which again appeared to favor the drafting party more than the consumer. For example, repossession was authorized; it was a procedure of benefit exclusively to the car dealership. It hardly enabled the car buyer. Another

[179] *Sanchez*, 353 P.3d at 746.

exemption from the obligation to arbitrate was the right to have recourse to small claims court proceedings, unless such a course of conduct would lead to the transfer of the dispute to another court. The sales contract was a one-page, double-sided document with small margins. It was thick with provisions. The bottom of the front page contained signatures, and a box with a black outline highlighted the arbitral clause on the bottom of the back page.[180]

The court of appeals concluded that the arbitration agreement, especially the arbitral appeal provision, was "unconscionably one-sided."[181] As a whole, the arbitral agreement placed "an unduly oppressive burden on the buyer."[182] The court identified four aspects of the arbitration agreement that "made the agreement unfairly one-sided in favor of"[183] the car dealership: (1) the possibility of appeal to a three-member tribunal when the arbitrators awarded more than $100,000; (2) the same possibility of appeal when the award included injunctive relief; (3) the requirement that the appealing party pay the costs of arbitration in advance; and (4) the exclusion of repossession from the arbitral procedure while submitting demands for injunctive relief. Each of these features favored primarily, even exclusively, the dealership's position and interests.[184]

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[180] *Sanchez*, 353 P.3d at 747.

[181] *Id.* at 745.

[182] *Id.* at 748.

[183] *Id.*

[184] *Sanchez*, 353 P.3d at 748.

The court began its analysis with a thorough discussion of the California law of unconscionability. It cited a group of significant state cases on unconscionability.[185] The court adopted a well-reasoned approach to defining the term 'unconscionability.' It emphasized that the meaning of the term was largely dependent upon circumstances. "An evaluation of unconscionability is highly dependent on context."[186] A definition was determined by a "sliding scale"[187] that resulted from changes in the facts of the case and the interests of the parties. The controlling doctrine was well-settled; unconscionability consisted of two components—one procedural and the other substantive. How these

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[185] Sonic-Calabasas A, Inc. v. Moreno, 57 Cal. 4th 1109 (2013) (Sonic II); Armendariz v. Fd. Health Psychare Serv., Inc., 24 Cal. 4th 83 (2000); Stirlen v. Supercuts, Inc., 51 Cal. 4th 1519 (1997); Little v. Auto Stiegler, Inc., 29 Cal. 4th 223 (2012); Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Develop., 55 Cal. 4th 223 (2012); Perdue v. Crocker Nat'l Bank, 38 Cal. 3d 913 (1985); Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807 (1981); Washington Mutual Bank v. Superior Court, 24 Cal. 4th 906 (2001); City of Santa Barbara v. Superior Court, 41 Cal. 4th 747 (2007); Mareno v. Sanchez, 106 Cal. App. 4th 1415 (2003); Smith, Valentine & Smith, Inc. v. Superior Court, 17 Cal. 3d 491 (1976); Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005); Madden v. Kaiser Fd. Hosp., 17 Cal. 3d 699 (1976); Gentry v. Superior Court, 42 Cal. 4th 443 (2007); Saika v. Gold, 49 Cal. App. 4th 1074 (1996); Gutierre v. Autowest, Inc. 114 Cal. App. 4th 77 (2003); Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (2002); Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951 (1997).

[186] *Sanchez*, 353 P.3d at 749.

[187] *Id.* at 748.

components interrelated varied in different situations. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability [was] required . . . ."[188] Adhesion and unilateralism (take-it-or-leave-it or all-or-nothing 'bargains') epitomized procedural unfairness in contract, and oppressive terms unacceptable to any reasonable person best described substantive unconscionability. Unconscionability could arise from a single contract provision or from the contract as a whole. It signified a coercive bargain that was a 'bad deal' for the weaker party—that, in fact, negated most of its interests and enhanced substantially those of the party who benefited from the bargain.[189]

The court asserted that a multitude of phrases hover around the idea of unconscionability, but they all fail to alight upon a true definition. The court mentioned a litany of "nonexclusive formulations" in its perusal of the case law: terms that are overly harsh, unduly oppressive, unreasonably favorable, unfairly one-sided, or shock the conscience.[190] The law had been unable to identify a fully dispositive single expression or conclusive factor. The court sorted through the redundant and inconclusive phraseology by focusing upon an analytical framework ("[n]ot all one-sided contract provisions are unconscionable . . .")[191] and commercial utility, which it described as

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[188] *Sanchez,* 353 P.3d at 748.

[189] *Id*. at 749.

[190] *Id*. at 748.

[191] *Sanchez,* 353 P.3d at 749.

"the mores and business practices of the time and place":[192]

> Commerce depends on the enforceability, in most instances, of a duly executed written contract. A party cannot avoid a contractual obligation merely by complaining that the deal, in retrospect, was an unfair or bad bargain.[193]
>
> ***
>
> a contract can provide a 'margin of safety' that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable.[194]

The objective was to reach beyond "a simple old-fashioned bad bargain."[195] "*Concepcion* clarifies the limits the FAA places on state unconscionability rules as they pertain to arbitration agreements."[196] In arbitration cases, state unconscionability rules were subject to further limitations. They could not regulate arbitration contracts differently from other contracts

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[192] *Sanchez,* 353 P.3d at 749.

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Sanchez,* 353 P.3d at 750.

or discriminate against them in the application of law: "even when facially nondiscriminatory, [such rules] must not disfavor arbitration *as applied* by imposing procedural requirements that 'interfere [] with fundamental attributes of arbitration' . . . ."[197] Further, these rules must be "enforced evenhandedly."[198]

The court examined a number of considerations that might render the arbitration agreement so one-sided that it became unconscionable. In each case, the court concluded that the potential unfairness was inadequate to invalidate the arbitration agreement. Procedural unconscionability by itself was insufficient to render an arbitration agreement unenforceable. It only required that the court examine vigorously the terms of the contract for oppression of the weaker, imposed-upon party's interests.[199] The court determined that the one-sided features of the arbitral clause in the sales contract—in particular, the poison pill aspect of the class waiver provision and the self-help remedies—were justified by their necessity in the business context and by the SCOTUS decision in *AT&T Mobility v. Concepcion.*[200]

The court also addressed the recently-enacted state legislative requirement that arbitration be affordable to the weaker, imposed-upon party. It concluded that the standard demanded a serious evidentiary showing (which the plaintiff had not done). The purchase of a luxury car was hardly the

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[197] *Sanchez,* 353 P.3d at 750.

[198] *Id.*

[199] *Id.* at 751.

[200] *Concepcion,* 563 U.S. 333 (2011).

setting in which to accomplish the legislative goal of protecting the consumer who was relatively impecunious. The contract provision against injunctive relief was also justified because the granting of such a remedy could have a substantial, long-term negative effect on a business.[201]

The court avoided addressing the status of the *Broughton-Cruz* rule, but nonetheless concluded that the rules of unconscionability must be enforced even-handedly and could not disfavor arbitration in particular or interfere with its fundamental attributes.[202] In this consumer arbitration case the California court rendered an opinion that was respectful of federal law, federal preemption, and the federal policy on arbitration. When compared to the court's other rulings, it was an uncharacteristic opinion.

(iv) *More Movement in the Other Direction*

Two recent decisions, one rendered by the California Supreme Court and the other by the Ninth Circuit, suggest a possible shift in California law toward a more complete and less acrimonious acceptance of federalization and the federal doctrine on arbitration. In *Sandquist v. Lebo Auto*,[203] the California Supreme Court rendered an opinion in which it applied the principles and rules articulated by SCOTUS in *First Options of Chicago, Inc. v. Kaplan*,

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[201] *Sanchez,* 353 P.3d at 753.

[202] *Id.* at 753, 755, 756.

[203] Sandquist v. Lebo Auto., 376 P.3d 506 (Cal. 2016).

and then in a group of cases consisting of *Howsam v. Dean Witter Reynolds, Inc.*, *Green Tree Fin. Corp. v. Bazzle*, *Oxford Health Plan, LLC v. Sutter*, and *BG Group v. Argentina*—cases that address the authority of courts and arbitrators to decide threshold jurisdictional issues in the arbitral process—in a straightforward and even cordial manner.[204] The court did not elaborate any undermining distinctions to block the application of the federal law on arbitration. The state court's discussion was in 'lock-step' with SCOTUS doctrine—especially the most recent holdings. The court asserted that the arbitrators had decided the disputes that the parties submitted to them—in particular, whether their arbitration agreement permitted or prohibited class action.

Only the parties could eliminate the arbitrator's threshold jurisdictional authority through their agreement. Unless the parties agreed to a *Kaplan* jurisdictional delegation clause, the court's role was to decide whether the parties had entered into a valid agreement to arbitrate. The state court also embraced the *Stolt-Nielsen–Concepcion* assessment of class action in arbitration—*i.e.*, the recourse to class arbitration negated arbitration's informality, flexibility, economy, and expedition. Given the complex character of class proceedings, class arbitration also made procedural objections more

[204] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); *see* BG Group v. Argentina, 572 U.S. 25 (2014); Oxford Health Plan, LLC v. Sutter, 133 S. Ct. 2064 (2013); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2002); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

likely and enhanced the risk of loss for the defendants because of the lack of judicial review. The clash in remedial character made class arbitration an inapposite substitute for bilateral arbitration. Linking arbitration and collective lawsuits, therefore, was oxymoronic.

The Ninth Circuit acknowledged in greater detail the unexpected and significant alterations in California arbitration law. In *Tompkins v. 23 and Me, Inc.*,[205] the court engaged in a lengthy comparison of the federal and California law of arbitration with particular emphasis upon the decisions of the California Supreme Court. The Ninth Circuit first referred to the SCOTUS decisional law on arbitration, reaching the following conclusions:

> 1. The FAA, in particular Section Two, embodies a congressional declaration of a liberal federal policy favoring arbitration. As a result, the FAA's primary objective is to secure the enforcement of arbitration agreements as they are written by the contracting parties. A rigorous enforcement policy will give effect to the party intent to have access to expeditious, efficient, effective, and economical proceedings.
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> 2. Judicial precedent clearly establishes that the FAA's national

[205] Tompkins v. 23andMe, Inc., 840 F.3d 1016 (9th Cir. 2016).

> policy favoring arbitration also applies to the states and, in particular, to state courts.
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> 3. The FAA prohibits any state law encroachment on the federal regulation of arbitration—either in the form of legislation directly or indirectly antagonistic to arbitration or through common law principles [*i.e.*, decisional law, court rulings] that interfere with the enforcement of arbitration agreements according to their terms.
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> 4. The 'savings clause' is the only exception in the FAA to the validity of arbitration agreements.
>
> 5. The application of the contract defenses in the 'savings clause' cannot disfavor arbitration clauses in particular or have a disproportionate impact upon arbitration agreements.[206]

The Ninth Circuit's assertions accurately restate the federal law on arbitration. Unconscionability is obviously a matter of state contract law, but it establishes a potentially considerable limitation on arbitrability which the court represents as being difficult to establish under

[206] Tompkins v. 23andMe, Inc., 840 F.3d 1016 (9th Cir. 2016).

state law. The court then outlines the essential principles of arbitration that it believes have been articulated by the California Supreme Court:

> 1. In adhesive arbitration, the law of unconscionability is the principal 'savings clause' restriction on arbitrability. Under California law, unconscionability is established by fulfilling two requirements: first, a procedural component that evaluates the parties' unequal bargaining power from the perspective of oppression or surprise; second, a substantive component that assesses whether the unilateral 'bargain' yields overly harsh one-sided results. Both components must be present, but need not influence the transaction to the same degree. A bit more of one can counterbalance a lack in the other.
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> 2. Under California contract law, 'substantive' unconscionability does not protect parties against a "simple old-fashioned bad bargain" that they negotiated and to which they consented. It provides relief from terms that are unreasonably favorable to the more powerful party. Moreover, the 'context' of the transaction is critical to determinations of unconscionability.

3. The contract defense of unconscionability applies indistinguishably to arbitration and non-arbitration contracts.

4. The contracting parties to an arbitration agreement may validly agree that the prevailing party shall be awarded attorney's fees regardless of whether the dispute sounds in tort or contract.

5. California Civil Code §1717 seems to validate 'prevailing party clauses' because it requires courts to consider all such clauses as bilateral provisions. This rule also applies to adhesive contracts.

6. In mandatory arbitration—meaning either unilaterally-imposed employment or consumer contracts in which the parties are uneven, the costs borne by the weaker party cannot exceed the court costs for such an action.

7. The *Armendariz* rule for procedural fairness in arbitration proceedings is restricted to cases involving employment disputes.

8. In consumer transactions, fee-shifting clauses are not unconscionable unless the challenging party establishes

that appellate fees and costs, in fact, are unaffordable by the party and create a substantial deterrent effect to pursuing the action.

9. The filing fees for arbitration (usually involving deposits for arbitrator administrator fees) are unenforceable if they are prohibitively high and thereby block all forms of redress, including arbitration.

10. The California High Court has re-evaluated the assumptions underlying its ruling in *Armendariz* to the effect that arbitration was an inferior form of adjudication. The court has asserted that, under both California and federal law, arbitral adjudication and judicial litigation are co-equal processes; substituting one for the other does not generate a disadvantage for either party. Any characterization by a state court or under state law that arbitration is a unique form of dispute resolution and, therefore, is unconscionable because it insufficiently protects legal rights is untenable.

11. The state court has also established that a one-sided contract is not necessarily or presumptively

> unconscionable. Such a contract can give the stronger party a 'margin of safety' or 'extra protection' mandated by that party's business activity. A one-sided contract is, therefore, not *ipso facto* unconscionable; in fact, the presumption goes toward the validity of such agreements.
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> 12. The state court has also acknowledged the separability doctrine and its beneficial impact on arbitral autonomy. A party opposing arbitration on the basis of contract validity must attack the arbitral clause directly. Moreover, the question of the validity of the arbitral clause shall be decided by the arbitrator.[207]

There are evident problems of definition created by the generality of the propositions (especially the first two, *i.e.,* how do unreasonably unfavorable terms differ from 'an old-fashion bad bargain' and how is the proportionality between the two components of unconscionability to be measured). The foregoing assessment of the Californian judicial posture on arbitration differs substantially from the previous statement of the state law. It argues that the relevant California case law is a mirror image of its federal counterpart. The state law

[207] Tompkins v. 23andMe, Inc., 840 F.3d 1016 (9th Cir. 2016).

seems not only to embrace, but also to reinforce, the federalization of U.S. arbitration law as well as the attendant preemption doctrine.

There are at least two factors that dampen the positive appraisal of the Ninth Circuit's discussion of the law. The federal court has only a territorial connection to the state law and has no real institutional standing to establish its content. It would have been more persuasive to read about the acceptance of the federal law principles in a California Supreme Court opinion. Be that as it may, the Ninth Circuit has persistently resisted the federal case law on arbitration and challenged its preemptive hegemony. The assessment, presuming it is highly likely to be accurate, may at least indicate the prospect of a fundamental change in California Ninth Circuit law.

The second factor of concern is, if there is change, is it merely episodic or a permanent shift of direction? *Sandquist* was unusual because of its conformity to federal law principles on arbitration. On the one hand, it may lack convincing precedential value. On the other hand, it could signal a moderation of the California judiciary's antagonism toward federalized arbitration. Subduing the antagonism would greatly solidify the foundation of federal arbitration law and contribute substantially to arbitral autonomy. Nevertheless, the Third Circuit's recent decision on class waivers favoring the NLRB's position establishes that there are other points of serious federal dissent from the consecrated principles of the federal stance on arbitration. SCOTUS has

granted *certiorari* to a group of federal court cases that have addressed the NLRB position on class waivers.

(v) Florida: *Basulto v. Hialeah*

The Supreme Court of Florida made a contribution to the growing state supreme court case law on arbitration. The court focused less on federalism and federal preemption. Instead, they concentrated on adhesive contracts for arbitration and formation and fairness issues. In *Basulto v. Hialeah Auto,*[208] the court applied the controlling Florida precedent on the issue of unconscionability related to a motion to compel arbitration.[209] An unconscionable arbitration agreement cannot support a motion to compel. The case involved Cuban immigrants who purchased a car from a dealership in Miami. Because the buyers neither spoke nor understood English, they were not aware of the terms of the sales contract and the arbitral clause it contained. In light of these circumstances, the Florida High Court concluded that the arbitration agreement was unenforceable—either an arbitration agreement did not physically exist, or it was both procedurally and substantively unconscionable.[210]

The court was preoccupied with the would-be injustice of the circumstances. It never focused on the

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[208] Basulto v. Hialeah Auto., 141 So. 3d 1145 (Fla. 2014).

[209] *See* Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999).

[210] *Basulto,* 141 So. 3d at 1152.

legal questions generated by the facts. It did not consider the question of whether (and on what basis) arbitration was unsuitable for these consumers. At the very least, they knew they were buying a car. How much knowledge was enough? It also never raised the question of whether the issue of arbitrability should be decided by a court or submitted to an arbitrator appointed pursuant to the arbitral clause. As in *Buckeye Check Cashing,*[211] the result was unequivocally clear to the court; the law mandated only one possible legal outcome. It freed the consumers of any responsibility because it believed that the agreement and transaction were void *ab initio*.[212] The court's decisiveness at least implied that the court believed that the consumers and their interests could only be safeguarded by the law and courts. The FAA would have preempted that belief and legal conclusion.

What Florida law provides or how the courts apply it in these circumstances may violate the supremacy of the FAA—even though a state court is applying state law in a state case to a state transaction. There is no safe haven from the reach of the federal law of arbitration—except possibly the parties' agreement when it seeks to contradict itself on the issue of arbitration and arbitrability. Be that as it may, the Florida court never referred to the supremacy of federal arbitration law, the 'emphatic federal policy favoring arbitration,' or the valuable role and impact

[211] Buckeye Check Cashing, Inc. V. Cardegna, 546 U.S. 440 (2006).

[212] *Basulto,* 141 So. 3d at 1156.

of arbitration on consumer arbitration. The court only saw a denial of fairness to resident aliens (perhaps also either nationals or tourists) who did not speak English. It concluded that the failure of English-language communications meant that the parties had not entered into a contract or agreed to arbitration. "Because the buyers have not agreed to the arbitration terms within the Clause, they cannot be compelled to arbitrate their claims for monetary relief."[213]

This outcome may have been possible under Florida law, but the result was extremely unlikely to be reached under the FAA by the U.S. Supreme Court. The solution under *Kaplan*,[214] *Bazzle*,[215] and *Sutter*[216] would have been to submit the arbitrability question to the arbitrator or to follow whatever prescription, if any, was contained in the parties' agreement. The opportunity the consumers had to read the document or to retain a translator or to engage in the transaction with bilingual friends may have been enough to resolve any judicial question about the enforceability of the contract, leaving the matter of its binding character or the meaning of its contents to the arbitrator. The rule of federal law is that the courts should not intrude upon the sovereignty of the process

[213] *Basulto*, 141 So. 3d at 1157.

[214] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

[215] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2002).

[216] Oxford Health Plan, LLC v. Sutter, 133 S. Ct. 2064 (2013).

or of the arbitrator.[217] The parties' bargain is for arbitration, not judicial reasoning or results—unless the trial of arbitration is imbued with flagrant abuse or fundamental corruption. The Florida court's decision strays far afield from those unambiguous and unyielding principles of federal arbitration law.[218]

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[217] *See* THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 90 (4th ed. 2017).

[218] *See also* Raymond James Fin. Serv. Inc. v. Phillips, 38 Fla. L. Weekly S 325 (Fla. 2013) (a Florida statute of limitations applies to an arbitral proceeding because the latter is a "civil action or proceeding" under the Fla. Stat. §95.11.) (Under the court's analysis and its consultation of the "ordinary dictionary definition" of the undefined statutory term 'proceeding', proceeding refers to a "tribunal" which then becomes "a court or other adjudicatory body" which finally can be described as an arbitral proceeding or arbitration. Therefore, the statutory phrase "civil action or proceeding" referred to adjudicatory bodies, a group that jesuitically interpreted included arbitral tribunals. By its own terms, the statute of limitations applied to arbitral proceedings.) (Instead of engaging in this mechanical, superficial, artificial discussion, the court should have discovered the true character of arbitration for purposes of applying state law. The 'emphatic federal policy favoring arbitration' establishes the attributes of arbitration for purposes of federal preemption and the application of state law. The state statute of limitations, unless specifically chosen by the parties, placed restraints on the recourse to arbitration and the validity of the arbitration agreement. It thereby encumbered the parties' right to arbitrate under FAA §2 and did so on the basis of a forced and implausible statutory construction.). *See also Nappa Const. Mgmt., LLC v. Flynn,* 2017 R.I. LEXIS 13, in which the court used the *Stolt-Nielsen* redefinition and expansion of the excess of authority ground in FAA §10 to permit judicial disagreement with and reversal of the arbitrator's ruling on the

(vi) SCOTUS:

DIRECTV v. Imburgia

Thereafter, in *DIRECTV v. Imburgia*,[219] SCOTUS underscored its commitment to the doctrine it articulated in *AT&T Mobility v. Concepcion*[220] on consumer arbitration and class action waivers. In doing so, it affirmed the strength of the federal preemption doctrine in American arbitration law and the absolute authority of the FAA and the emphatic federal policy. In the state litigation, the California Court of Appeal devised a strained distinction in an attempt to circumvent federal preemption through the application of contract freedom. The state court wanted to salvage the role of state law in the regulation of arbitration beyond supplying the rules for contract formation and validity. It also wanted to limit the impact of *AT&T Mobility v. Concepcion* on the matters pertaining to consumer protection and the vindication of consumer interests.[221]

The state court action was brought by two DIRECTV customers (Amy Imburgia and Kathy Greiner) who alleged that the company's imposition

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merits. *See also Noble v. Samsung Electronics America, Inc.*, 2017 B L 66251 (3d Cir. 03/03/2017 (unpub.) (consumer bought a Samsung Galaxy Gear S Smartwatch and was given a warranty booklet; because the arbitration agreement was 'buried' in the warranty booklet, it was unenforceable).

[219] DIRECTV, Inc., v. Impgia, 136 S. Ct. 463 (2015).

[220] *Concepcion*, 563 U.S. 333 (2011).

[221] *DIRECTV*, 136 S. Ct. 463 (2015).

of early termination fees violated California law. DIRECTV made a motion to remove the matter to arbitration pursuant to a clause in the service contract; the state court denied the motion. DIRECTV filed an appeal.[222] The contract contained a standard provision for arbitration: "any Claim either of us asserts will be resolved only by binding arbitration . . . ." It also contained a class arbitration waiver: "[n]either you nor we shall be entitled to join or consolidate claims in arbitration."[223] The effect of both provisions was to eliminate any possibility of class litigation between the contracting parties. The contract then stated that, if the "law of your [customer's] state" nullified class waivers, it voided entirely the arbitral clause.[224] In other words, if arbitration did not prevent class litigation, DIRECTV saw no benefit to arbitration and would have recourse to the courts. The California court somehow reached the conclusion that the phrase "law of your state" meant California law prior to the decision in *Concepcion*.[225] Thereby, the contracting parties had deliberately agreed to have their contract governed by a historically-dated legal rule that expressly ignored developments in federal law that voided the legitimacy of the earlier law.

The provisions of California law that the court of appeal wanted to retain at all costs were twofold: the *Discover Bank* Rule and provisions in the California Consumers Legal Remedies Act (§§ 1751,

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[222] *DIRECTV*, 136 S. Ct. at 463.
[223] *DIRECTV*, 136 S. Ct. at 466.
[224] *Id*.
[225] *Id*.

1781[a]). Both of these frameworks included legal rules that voided class action waivers and protected the consumers' right to engage in 'representative' litigation.[226] Of course, *Concepcion* had only recently declared that class waivers in consumer contracts of adhesion were lawful and enforceable agreements pursuant to the FAA. The state court emphasized freedom of contract and choice-of-law to 'manufacture' a make-weight argument that the reference to the "law of your state" meant the California law prior to the *Concepcion* validation of class waivers. In effect, if the parties agreed, they could select as the law applicable an historical version of the law of a state (or of a country or of another entity).

This position, supplemented by a few rules of construction and the view that would-be ambiguity is counted against the contract drafter (DIRECTV), lead to the contrived conclusion that the parties, as they were entitled to do, could choose to be governed by a dated state law.[227] The reasoning was tortured, transparent, and tendentious. The objective was to unseat the hegemony of federal law in the field of arbitration and to allow California to establish and apply its own standards in arbitration cases.

The California Supreme Court did not grant discretionary review to the ruling, and even the Ninth Circuit could not endorse the court of appeal's reasoning and conclusion. The case hardly posed an obstacle to SCOTUS and its arbitration doctrine. The

[226] *DIRECTV,* 136 S. Ct. at 466.

[227] *Id.* at 469.

Court acknowledged that contract freedom was a vital principle of arbitration (to which the FAA gave "considerable latitude") and that the interpretation of state law belonged to state courts. The state law, however, could not contradict and had to be "consistent with Federal Arbitration."[228] Moreover, federal law was supreme and binding on state courts: "consequently, the judges of every State must follow it."[229] In particular, "The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act."[230]

The Court surmised that the state court would not have engaged in a similar analysis in regard to any other contract. Such a ruling imposed special validity requirements on arbitration contracts exclusively: "[W]e conclude that California courts would not interpret contracts other than arbitration contracts the same way . . . . [T]he court's interpretation of this arbitration contract is unique, restricted to that field."[231] This unique interpretation exhibits a particular animus toward the FAA, which eviscerates the role of state law in the regulation of arbitration. The state court decision was an intrusion and a trespass on federal authority. Moreover, the construction applied only to arbitration in a vain attempt to undo its impact. "The view that state law retains independent force even after it has been authoritatively invalidated by this Court" cannot be

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[228] *DIRECTV*, 136 S. Ct. at 468.

[229] *Id.*

[230] *Id.*

[231] *Id.* at 469.

accepted in general, and therefore, should not be accepted in the context of arbitration.[232]

The California ruling's interpretation of "law of your state" treats arbitration contracts differently from other contracts. They are not placed "on equal footing with all other contracts."[233] The federal policy emphatically favoring arbitration is not given its due and is, in fact, ignored. "The Court of Appeal's interpretation is pre-empted by the Federal Arbitration Act."[234]

4. *Conclusion*

Arbitration in California has been vigorously opposed by a judicial determination to protect the integrity of law, the public interest, and legal civilization itself. Courts exist to implement the legislative will and protect legal rights. Government supervision and control inhere in public matters. Even the Ninth Circuit, a federal court, believed that the U.S. Supreme Court decisional law on arbitration was excessive—violative of essential roles and boundaries. Federalization and preemption deprive states of regulatory authority within their own territory on matters that are significant to their citizens. States become victims of federalism. California courts have argued that arbitration should be confined to so-called invisible subject areas like

[232] *DIRECTV,* 136 S. Ct. at 470.
[233] *Id.* at 471.
[234] *Id*.

commercial contracts and the disruption of mercantile relationships. It should not intrude upon the governmental prerogative to regulate and guide society.

This approach and position are not only contrarian and unlawful, but they also misrepresent the capabilities and social value of arbitration. The California law on arbitration looks backwards; it harkens to a by-gone era of American society in which courts played a dominant role and occupied an unquestioned position of authority in society. During that time, courts and the law had preemptive authority. In effect, as noted earlier, the antagonism between California and federal law on arbitration was fueled by a regenerated battle for states' rights in the American political system.

Most of the California positions and much of its policy on arbitration are not simply odd and antiquated, but dangerous as well. They deny the evident moral and professional failures of adversarial justice and, concomitantly, of judicial adjudication. They impede the attenuation or resolution of a substantial social problem. They state a preference for a bureaucratic approach to issues that deprecates self-reliance and individual freedom, that deprives society of the benefit of the energy, thinking, and creativity of many of its members.

Despite their sophisticated rhetorical and analytical packaging, California judicial rulings on arbitration have been (for the most part) the modern-day expression of judicial hostility to arbitration. The SCOTUS has deemed this position unlawful under the

FAA. Faced with a crisis in law and adjudication, it is time for courts in California to heed J. William Fulbright's battle cry of the 1960s; they should abandon "old myths" and adjust willingly and well to "new realities." Society has evolved beyond its traditional role and function. The 'old-time religion' is simply too much for society to bear in the domain of civil litigation. If states can simply defy federal law at will and have courts rule in opposition to federal policy, the integrity of national government and federalism will be shattered.