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IS GREENTREE v. RANDOLPH STILL GOOD LAW? HOW THE SUPREME COURT’S EMPHASIS ON CONTRACT LANGUAGE IN ARBITRATION CLAUSES WILL IMPACT THE USE OF PUBLIC POLICY TO ALLOW PARTIES TO VINDICATE THEIR RIGHTS

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There can be little doubt that the Supreme Court’s recent arbitration decisions take away state’s rights, pre-empting more and more state statutes and policies that are not aimed at arbitration but that affect it. One argument is that the Supreme Court is “federalizing” arbitration—instead of allowing states to provide law on arbitration, federal courts are creating a body of law that pre-empts the state law.¹ The purpose of this article is to argue that the effect of the recent Supreme Court decisions is not intended to remain limited to pre-empting state law. The Court’s extreme emphasis on the policy of enforcing arbitration agreements and limiting interpretation to the terms of the agreement and the applicable statute appears to be leading this Court to pre-empting, or at least dramatically diminishing, federal rights in addition to state rights. These recent decisions indicate that the Court intends to limit courts to finding arbitration agreements unenforceable only if they are unenforceable from their inception (due to fraud or duress) or if Congress specifically provides that arbitration agreements are unenforceable under applicable circumstances. Under these decisions, public policy is relevant only if it protects the enforcement of the agreement.

Arbitration seemed like a simple concept when the Federal Arbitration Act (FAA) was passed less than 100 years ago.² Litigation between businesses was increasing, and arbitration offered a faster, cheaper, and more expert method for resolving those disputes.³ When more individuals started to bring lawsuits against businesses, businesses started drafting

² 9 U.S.C. § 1 et seq.
³ Jean R. Sternlight, Panacea Or Corporate Tool?: Debunking The Supreme Court's Preference For Binding Arbitration, 74 WASH. U. L.Q. 637, 645 (Fall 1996).
contracts that required arbitration of anticipated disputes. Historically, the courts were more protective of individuals than of businesses engaged in arms-length business transactions. Over time, though, it became clear that courts believed that the FAA required enforcing arbitration agreements involving either individuals or businesses or both.

Unfortunately, it became clear pretty quickly that arbitration did not always provide the same benefits to one party as it did to the other. Litigation has built-in protections to try to level the playing field. Arbitration, as a creature of contract, does not. Arbitration providers have drafted rules designed to provide some balance, but too much regulation impinges on the beauty of arbitration—flexible process and efficient decisions.

In addition, arbitration’s efficiencies often impact the party that can least afford the impact. Discovery may be significantly less broad in arbitration than in litigation. The party suing often has less information than the party being sued, so discovery can be key to a successful lawsuit. The quicker timetable to an arbitration award, which has great advantages, provides the party with less information less time to investigate and gather information and witnesses. A more controversial argument is that arbitrators often answer for their ongoing business to the party being sued—the large corporation that places an arbitration clause in all its contracts becomes a repeat customer that ends up keeping the arbitrator in business—and therefore become biased in favor of the corporation.

Perhaps most importantly, arbitration has an impact on the greater whole, not just on the parties to the specific arbitration. It does not create legal precedent, is often confidential, and is nearly impossible to appeal. The party suing a wrongdoer does not alert the public to the wrongdoing in arbitration in the way that occurs in the court system. And the person seeking to vindicate rights gives up the protections provided by the court.

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5 Sternlight, supra, n. 3 at 653.

6 Id. at 660.

7 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (Holding that the limited discovery available in arbitration does not make an arbitration agreement unenforceable, even as a means for vindicating statutory rights).

8 In fairness to arbitrators everywhere, I do not believe that arbitrators intentionally skew results. The arbitrators I know are all scrupulously ethical. But when you see the same corporate representative over and over, and know him or her to be generally credible, the repeat player almost inevitably starts with an advantage. For a more in-depth look at potential biases, both in arbitrators and in repeat players choosing arbitrators, see Nancy A. Welsh, What Is (Im)Partial Enough In A World Of Embedded Neutrals? 52 Ariz. L. Rev. 395 (Summer 2010).
system—oversight of the decision maker by both higher level courts and the public. Since the arbitrator does not have the same power as a court to force a wrongdoer to cease its wrongful actions against all potential victims, and because the arbitrator’s decision does not create rules or guidance which other potential wrongdoers can or must follow, arbitration’s limited effect leaves wrongdoers free to continue the wrongs, recognizing that few individuals will sue and that individual damages often are minimal compared to the gains from the wrongdoing. And now, given the Supreme Court’s holdings that essentially do away with all class actions in arbitration, this last problem becomes more apparent. The effect of these decisions is to diminish (many would say extinguish) the ability of individuals and less powerful companies to protect themselves against the misdeeds of powerful companies. The long term implications of these decisions may take years to manifest, but some of the implications must be considered and hopefully addressed before the obvious negative effects become even broader.

One example of a concern raised by these decisions is that the various policy reasons courts use for invalidating or refusing to enforce arbitration agreements (in whole or at least the class or collective action waiver in the agreement) will simply stop being allowed. The Supreme Court invalidated California’s policy against enforcing class action waivers in arbitration clauses under certain circumstances. It berated an arbitration panel for applying a similar policy and deciding that a silent arbitration clause could be construed to allow a class action in arbitration. These decisions, along with others from the past several terms, leads one to wonder whether the policy of not enforcing clauses where a party cannot vindicate statutory rights, as provided by GreenTree v. Randolph, is still good law. In GreenTree, the Supreme Court held that a plaintiff could not be forced to arbitrate if he could show that the arbitration process was prohibitively expensive, leaving plaintiff with no forum in which to vindicate his rights. A reading of the Supreme Court’s arbitration decisions in the 2010 and 2011 terms,

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10 For the opposite view—that this change is simply allowing arbitration equal footing with litigation and not with other types of contracts—see Hiro N. Aragaki, “Equal Opportunity for Arbitration,” 58 UCLA L. Rev. 1189 (June 2011).
12 Stolt-Nielsen, 130 S.Ct. at 1763 (2010).
13 Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000). (In that case the plaintiff was not able to make the showing, but many arbitration clauses have been invalidated since on that basis). See, e.g., Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchs.' Litig.), 554 F.3d 300 (2d Cir. 2009).
especially from *AT & T v. Concepcion*\(^1\) forward, leads one to wonder whether the Court has reversed *GreenTree* or intends to do so in the near future. Does the Supreme Court’s emphasis on the right to contract outweigh a party’s ability to vindicate his rights? Is the Court creating a two-tier system of justice where federal courts can refuse to enforce arbitration clauses if individuals will not be able to vindicate rights but state courts cannot? Or is it narrowing exceptions so much that a court cannot invalidate an arbitration agreement unless the contract was formed improperly (under duress or fraud) or a federal statute specifically exempts the claims from mandatory arbitration?

Part I of this article will start with a brief history of the rise in popularity of arbitration in this country and the courts’ move from distrust to too much trust. Part II will discuss the efforts by a few courts to stem the tide washing cases indiscriminately to arbitration, emphasizing the various public policy reasons courts have used for invalidating or refusing to enforce arbitration agreements. Part III will review the relevant Supreme Court decisions surrounding arbitration and related issues that will or may have an effect on these long-standing practices, emphasizing the last several years. Part IV will argue that the Supreme Court’s recent decisions illustrate an intent to eliminate all bars to enforcing arbitration clauses except for formation issues or specific federal statutory prohibitions. This article will not examine in any detail the Court’s approach to refusals to enforce substantive arbitration awards based on public policy but will include refusals to enforce arbitration decisions that bear on the issue of enforcement of the clause itself.\(^1\)

**I. HISTORY OF THE FAA AND POLICY ARGUMENTS**

Arbitration has existed in various forms for centuries.\(^2\) As an alternative to formal litigation in the United States, though, it is a relative newcomer. The Federal Arbitration Act was passed in 1925, supported by

\(^1\) *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011).

\(^2\) See, e.g. Eastern Assoc. Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000). For a discussion of the Court’s narrowed judicial review on public policy grounds in the collective bargaining context, see “Grievance Resolution and the System Board of Adjustment, American Law Institute SS051 ALI-ABA 337 (June 9-11, 2011). But see Stolt-Nielsen, supra note 9, where the Supreme Court reversed the arbitrators’ decision based on a finding that the arbitrators could not base a finding of intent to allow class arbitration on public policy.

businesses trying to find a quicker and more efficient way to resolve business-to-business disputes in our increasingly industrialized society.\textsuperscript{17} It was reenacted and then codified as Title 9 of the United States Code in 1947. The Supreme Court has been very clear that the purpose of the Act is to overcome the longstanding judicial hostility to arbitration and to “place arbitration agreements on the same footing as other contracts.”\textsuperscript{18}

Initially, though, the Supreme Court was reluctant to enforce all arbitration agreements. For example, shortly after the passage of the FAA, the Supreme Court refused to enforce a contract between motion picture distributors that required them to contract for movies using only a standard form providing for compulsory arbitration.\textsuperscript{19} The Court noted that the Sherman Antitrust Act was enacted “to prevent not the mere injury to an individual that would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented. . ..”\textsuperscript{20} The Court was concerned that the arbitration agreement would allow a party to “unreasonably suppress normal competition.”\textsuperscript{21} As will be discussed later, lower courts tried to carry through the theme of protecting the public and not just individuals from harm in deciding whether to enforce arbitration clauses, but the Supreme Court increasingly has rejected its own concern with the greater good.

1. Initially, The Supreme Court Protected Individuals More Than Businesses

For a number of years after the FAA’s passage, the Supreme Court was careful to make a distinction between consumer/individual arbitration and business-to-business arbitration. At least for the first few decades, the Supreme Court protected individuals and small companies from being required to arbitrate their disputes by businesses, especially in pre-dispute mandatory arbitration clauses, and especially where statutory rights were involved. The Court made a clear distinction in \textit{Wilco. v. Swan},\textsuperscript{22} where it refused to enforce a pre-dispute mandatory arbitration clause against a securities broker for claims under the Securities Act. The Court


\textsuperscript{19} Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930)

\textsuperscript{20} Id. at 44-45, quoting Wilder Mfg. Co. v. Corn Products Co., 236 U.S. 165, 174 (1915).

\textsuperscript{21} Id. at 30.

\textsuperscript{22} 346 U.S. 427 (1953)
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acknowledged that a similar clause would be enforceable in a commercial contract, but held that Congress’s intent in the Securities Act was best served by not enforcing the agreement against an individual.  

The Supreme Court initially refused to require individuals to arbitrate statutory claims covered by a collective bargaining agreement because, it held, those statutes are designed to provide substantive guarantees to individual workers, which are different from the rights contractually arising out of the collective bargaining agreement. The Supreme Court was concerned that arbitration of such claims would be “procedurally complex, expensive, and time-consuming,” the opposite of the purpose for arbitration. It was also concerned that judicial enforcement would almost require de novo review of the substantive claims. 

In addition to the Court’s concerns about judicial economy and the effect of arbitration on the greater good, the Court was also concerned about the effect of arbitration on the ability of individuals to protect themselves in arbitration. In the first thirty years after the FAA went into effect, the Court refused to enforce an arbitration clause in an individual employment agreement, finding that the agreement did not involve interstate commerce. This decision was effectively overruled years later, after the Court had expanded the reach of the Commerce Clause.

As recently as the 1970’s, the Supreme Court looked at the policy behind Title VII as compared to the federal policy favoring arbitration of labor disputes and found that, because the policy against discrimination was of “the highest priority,” an individual who arbitrated a labor dispute and lost could also bring a lawsuit after pursuing an EEOC discrimination charge. In Alexander v. Gardner-Denver Co., the Court separated contractual labor disputes from statutorily protected rights. It held that the rights were of a “distinctly separate nature,” so the fact that they arose from the same set of facts did not vitiate the right to have the claims heard in both

23 Id. at 438. The Court refused to extend this finding to the Securities Exchange Act in 1987, despite Justice Blackmun’s strong dissent pointing out that the issues under both Acts are the same and that the California legislature did, in fact, express a policy of prohibiting waiver of the right to litigation to protect the rights under the Act. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), Blackmun, J., dissenting at 243-268 and predicting an increase in litigation about the enforceability of arbitration awards based on arguments of manifest disregard of the law and partiality.


25 Id. at 58-59.

26 Id.


30 Id.
The Court allowed an individual to pursue arbitration through the collective bargaining agreement and then litigation under Title VII, reasoning that “[T]he relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each.”

The Supreme Court reinforced its view that collective bargaining agreements did not consign individuals to arbitration for all claims, especially statutory ones, through the early 1980’s. In *Barrentine v. Arkansas-Best Freight System, Inc.*, the Supreme Court held that an individual who had arbitrated his claim under a collective bargaining agreement could also bring a claim in court under the Fair Labor Standards Act. The Court reasoned that an arbitrator’s job is to “effectuate the collective intent of the parties” to the collective bargaining agreement, so he might issue a ruling that is “inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.”

2. Increasingly, the Supreme Court Enforced Business-to-Business Arbitration Agreements

Despite the Supreme Court’s initial concerns about arbitration, since the 1960’s and increasingly faster since the 1980’s, the Supreme Court has taken a more and more hands off approach to business-to-business arbitration, with the goal of enforcing arbitration agreements to effectuate the parties’ intent, so long as the agreement does not conflict with the FAA. “[T]he FAA’s central purpose is to ensure that ‘private agreements to arbitrate are enforced according to their terms.’”

The Court’s broadening of its enforcement of arbitration agreements by businesses took several paths. It started with an insistence that there is a federal policy in favor of arbitration, stemming from the passage of the FAA. The Court emphasized the “statutory policy” of the FAA favoring “the rapid and unobstructed enforcement of arbitration agreements” and

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31 Id. at 50.
32 Id.
34 Barrentine, 450 U.S. at 745.
35 Id. at 744. This line of cases was dramatically narrowed by Gilmer and even further by 14 Penn Pyett Plaza LLC v. Pyett, 556 U.S. 247 (2009), discussed in more detail infra at Section III.
insisted that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration over litigation.”\cite{footnote39} The Court also emphasized that Congress, through the FAA, “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,”\cite{footnote40} and invalidated state laws aimed at carving out exceptions to the FAA or protecting parties to arbitration agreements more than parties to other contracts, so long as the contract “relates to” interstate commerce.\cite{footnote41} It enforced arbitration agreements that required businesses to arbitrate in other countries using other laws.\cite{footnote42} In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*\cite{footnote43} the Supreme Court made it clear that even claims protected by federal statutes could be forced into arbitration because, it said,

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.\cite{footnote44}

The holding in *Mitsubishi* was a marked departure from earlier decisions refusing to mandate arbitration of statutory claims.\cite{footnote45} The Court did point out in dicta, though, that not all controversies implicating statutory rights should be arbitrated, and said that Congress should indicate in its statutes if claims arising under the statute should not be subject to

\begin{enumerate}
\item \cite{footnote39} Id. at 24.
\item \cite{footnote41} Id. at 401, fn. 7; See also, Perry v. Thomas, 482 U.S. 483, 492 (1987); AT &T v. Concepcion, (2011) (case law that ostensibly applies to all contracts, but mostly affects arbitration, is not enforceable to invalidate a class action waiver in an arbitration agreement)(discussed in detail, infra).
\item \cite{footnote42} Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)(Mitsubishi involved a contract between a car manufacturer and a car dealer, but the requirement of arbitrating statutory rights overseas.
\item \cite{footnote43} Id.
\item \cite{footnote44} Id. at 627.
arbitration. Interestingly, as discussed earlier, the Supreme Court rejected the same option for state legislatures to decide on their own exemptions. And, as will be discussed further, the Court reads this limitation narrowly even for federal legislation. “At bottom,” the Court went on, the policy favoring arbitration agreements simply is a “policy guaranteeing the enforcement of private contractual agreements.”

While the Court in Mitsubishi talked about the “regime” of the antitrust laws instead of using the term policy, its arguments indicate that it is a public policy discussion. The Supreme Court acknowledged the importance of the private cause of action in protecting the public interest in democratic capitalism. But the Court still held that antitrust actions can be arbitrated, even in other countries that don’t have antitrust laws. To protect the public’s interest, the Court assured the public that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (the Convention), the treaty agreeing on enforcing foreign arbitral decisions, allows a country to refuse to enforce a foreign arbitral award “where the ‘recognition or enforcement of the award would be contrary to the public policy of that country.’” This holding fits well within the Court’s earlier statement that Congress may limit the enforcement of arbitration agreements if it indicates a limitation in the text or the legislative history.

It must be recognized, though, that this decision does not grant courts leeway to refuse to enforce the arbitration agreement; instead, it allows courts leeway not to enforce the arbitration award. Mitsubishi leaves courts leeway only to refuse to enforce arbitration agreements that are the result of fraud or “overwhelming economic power” (arguably a “duress” argument and not a financial resources argument) that would allow a court to revoke any contract.

Despite its oft-repeated statement that the policy behind the FAA is to enforce the parties’ agreement according to its terms, the Supreme Court

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46 Mitsubishi, 472 U.S. at 627.
47 Infra, § III; see, eg., Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79 (Congress must express intent “to preclude a waiver of judicial remedies for the statutory rights at issue.”); see also, CompuCredit Corp v. Greenwood, 132 S.Ct 665, 667 (2012) (“[T]he FAA...requires that courts enforce arbitration agreements according to their terms ....unless the FAA's mandate has been ‘overridden by a contrary congressional command.’”).
48 Mitsubishi, 472 U.S. at 625.
49 Id. at. 634.
50 Id. at 637.
52 Id. at 638, quoting Convention Art. V(2)(b), 21 U.S.T. at 2520,
53 Id. at 627.
54 Id.
55 See, e.g. Volt Information Sciences 487 U.S. 468, 479; Mastrobuono, 514 U.S. 52,
refused to allow parties to rely on that policy to contractually agree to broaden court review of arbitration awards beyond the grounds set out in the FAA. The Court rejected the argument that contractually providing for judicial review of arbitration decisions for legal error is consistent with the goals and policies of the FAA, worrying that “[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.’”

Justice Stevens dissented, arguing that there is no public policy that prevents supplementing the statute with a contractual agreement allowing more review. In fact, he asserted, the grounds allowed in §§ 10 and 11 of the FAA are designed to ensure that some protections must always be available to contracting parties, not to limit the grounds for review. This view has not been adopted in subsequent decisions.

3. Shortly After Emphasizing The Policy In Favor Of Enforcing Arbitration Clauses, the Supreme Court Started Enforcing Arbitration Clauses Required of Individuals by Businesses

The Supreme Court’s concern for those who signed arbitration agreements lessened significantly as arbitration became a more accepted practice, especially where the parties had some say in the negotiations. In 1983, in *Moses H. Cone Hospital v. Mercury Construction Corp.*, the Supreme Court announced the policy it has been sharpening since—“Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”

This policy was announced just a few years after refusing to enforce an arbitration clause in a collective bargaining agreement against an individual in *Barrentine*. It led to the Supreme Court essentially abandoning *Barrentine* and upholding a decision to force an individual employee who was not part of a collective bargaining unit but who had signed a contract

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58 Id. at 593 (Stevens, J., dissenting).
59 Id. at 595.
60 460 U.S. 1 (1983)
61 Id. at 24.
containing an arbitration clause, to arbitrate statutory claims in Southland v. Keating Corporation. In Moses H. Cone, the Supreme Court held that Courts must bend to the strong federal policy in favor of arbitration and that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. After that decision, the Supreme Court started limiting state rights to exempt disputes from arbitration. For example, in Perry v. Thomas, following its earlier decision in Southland v. Keating, the Court refused to enforce the California Labor Code, which provided that certain wage claims, including claims for commissions, could be pursued in court without regard to private arbitration agreements. In dicta, the Court announced that the strong federal policy preempted state laws that “undercut the enforceability of arbitration agreements.” Justice Stevens dissented vigorously, asserting that “[i]t is only in the last few years that the Court has effectively rewritten the [FAA] to give it a pre-emptive scope that Congress certainly did not intend.”

By the early 1990s, the Supreme Court had reiterated its emphasis on arbitration as a creature of contract and on Congress’s preference for arbitration over litigation enough to start enforcing mandatory arbitration clauses signed by individuals. In a surprising reversal of its prior refusal to require arbitration of statutorily protected individual rights, the Supreme Court decided Gilmer v. Interstate/Johnson Lane, rejecting attacks on arbitration generally that “res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.” The Court pointed out that it currently strongly endorsed the federal law favoring arbitration. The Court emphasized that “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”

64 Id. at 24-25.
65 465 U.S. 1 (1984)(holding that the California Franchise Investment Law was preempted by the FAA and therefore could not provide a basis for refusal to enforce an arbitration agreement).
67 Id. at 489. For a discussion of how this dicta led the Court to apply state law regarding contracts rather than creating a federal common law for arbitration, as perhaps Congress intended, see Michael J. Yelnosky, Fully Federalizing the Federal Arbitration Act, SSRN http://ssrn.com/abstract=1907849, Oregon Law Review, forthcoming.
68 Id. at 493.
71 Id.
72 Id. at 34, quoting Mitsubishi, 473 U.S. 614, 626-27. Paradoxically, when confronted
Following the rule it set out in *Mitsubishi*, the Court in *Gilmer* looked at the Age Discrimination in Employment Act and found no express statement that Congress intended to preclude non-judicial enforcement of rights under the Act.\(^{73}\) It distinguished rather than overruling its earlier precedents, on the basis that *Gardner-Denver* was about individuals wanting to arbitrate statutory claims when their arbitration agreement required them to arbitrate only contractual claims.\(^{74}\)

The Court acknowledged in *Gilmer* that the ADEA was designed to protect important social policies in addition to individual rights.\(^{75}\) The Court, however, saw no inconsistency between those policies and agreements to arbitrate the statutory claims:

> It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes.\(^{76}\)

The Court did not explain how a process that is private, creates no precedent, and has little chance for review provides the same protections of “broader social purposes” as does our public court system. In theory, of course, a wrongdoer punished by an arbitrator for its actions against one individual should and will cease such wrongdoing, but that is not the same as a court order mandating it. The confidential arbitrator’s decision does not have the public outcry behind it to ensure that a wrongdoer cease its wrongs. Also, the arbitrator cannot enjoin the wrongdoer from committing the same wrong against every consumer and simply paying the consequences to the few who seek damages in arbitration. The lessons taught from the Ford Pinto case show us that sometimes a public trial and a huge punitive damage award are necessary to make a company do the “right” thing, in that case and, hopefully, for the future.\(^{77}\)

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\(^{73}\) Id., following Mitsubishi, 473 U.S. 614, 627.

\(^{74}\) Id. For a discussion of the Supreme Court’s decisions in the collective bargaining arena, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 653-54 (1996).

\(^{75}\) Gilmer, 500 U.S. at 27-28.

\(^{76}\) Id.

After extending arbitration to employment contracts, the most controversial issue left was to extend it to consumer contracts, which the Supreme Court did in 1995. In *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995), the Supreme Court enforced an arbitration clause between a consumer alleging failure to treat for termites properly and the pest control company. In that opinion, the Supreme Court applied a “commerce in fact” test to determine whether the company’s actions affected interstate commerce. Because the parties did not really argue that interstate commerce was not affected, and because the Commerce Clause was interpreted to its fullest extent, the Court held that the clause was enforceable.\(^78\)

In deciding that the FAA should be interpreted to the full extent of the Commerce Clause, the Supreme Court found that it need not determine whether the arbitration agreement “contemplated” actions in interstate commerce. Instead, it held, it looked to whether the actions constituted “commerce in fact.”\(^79\) The Court rejected the argument underlying the “contemplation of the parties” test, which had been based on the need to “‘be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states.’”\(^80\) It reasoned that *Keating* and *Perry* diminished the force of that argument when they held that the Act displaces state law.\(^81\) Interestingly in light of recent decisions, Justices O’Connor, Scalia, and Thomas argued unsuccessfully that *Southland* should be overturned and the FAA held not to apply in state courts.\(^82\)

### II. SOME COURTS PROTECTED INDIVIDUAL OR STATUTORY RIGHTS

Over time, it became clear that arbitration is a good choice for many

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Rutgers L. Rev. 1013 (Summer, 1991), for a discussion of the case and its lasting, if arguably not completely accurate, message.

\(^78\) 513 U.S. 265, 274, 281 (1995) citing Perry v. Thomas, 482 U.S. 483 (1987) for the proposition that the “involving interstate commerce” clause in the FAA should be interpreted to the full extent of the Commerce Clause.

\(^79\) Id.

\(^80\) Id. at 280, quoting Metro Ind. Painting Corp. v. Terminal Constr. Co., 287 F.2d 382, 386 (2d Cir. 1960)(concurring opinion).

\(^81\) Id.

\(^82\) Id. at 283-297. (In *Dobson*, Scalia announced that he will not continue to dissent, since *Southland* is the law, but that he stands ready to reverse it when joined by a majority. Id. at 285). Arguably, the Court today contains a majority of Justices who historically favored leaving state issues to the states, but instead of reversing *Southland*, the Court has gone to the opposite extreme and used it to strip state courts and legislatures of pretty much all authority over arbitration agreements.
disputes, but not for all. Individuals or small companies forced into arbitration by a mandatory pre-dispute arbitration clause effectively waived their right to judicial review, to have a jury hear their dispute, to have a court create binding precedent to protect potential future victims, and often to the public opinion that can effect positive change. In order to restore some of these protections, lower courts have refused to enforce arbitration clauses that over time generally divided into two basic categories: unconscionability and inability to vindicate statutory rights. The Supreme Court over time has moved toward a very limited application of both doctrines, with the suggestion by Justice Thomas that unconscionability not be considered in deciding whether to enforce arbitration clauses. ³³ This section will discuss the progression of cases finding arbitration clauses unconscionable and the cases finding clauses unenforceable due to a party’s inability to vindicate statutory rights.

Despite the change from cautious to seemingly unrestrained enforcement of arbitration agreements, even the Supreme Court historically found some limits to courts interpreting arbitration agreements broadly. Over time, though, the Court allowed corporations to find a way around the limits. For example, in AT&T Technologies, Inc. v. Communications Workers of America, ³⁴ the Supreme Court held that a court erred in finding that the arbitrator and not the court should decide whether the claims presented were arbitrable. ³⁵ The Court emphasized the “longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements,” ³⁶ which set out the rights and duties of the parties. If arbitrators get to decide what is arbitrable, the Court worried, they could impose obligations not allowed by the contract. ³⁷ This concern evaporated years later, when the Court held that parties can agree in their contract that the arbitrator can also decide arbitrability questions. ³⁸ While such a provision in a collective bargaining agreement arguably would be negotiated, one must wonder whether “industrial harmony” is promoted when an employee is forced to sign an employment contract with an arbitration clause that says even the issue of arbitrability is arbitrable.

1. Unconscionability

While the Supreme Court was broadening the reach of arbitration, some

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³³ ATT v. Concepcion, (Thomas, J., concurring)
³⁵ Id. at 651.
³⁶ Id.
³⁷ Id.
courts recognized that such breadth allowed individual rights to get swallowed or at least ignored. These courts rendered decisions designed to provide some protections from the increasingly broad sweep of arbitration.

One of the grounds courts used to justify providing protection to individuals is that the arbitration agreement itself was unconscionable under state law. The historical theory behind unconscionability is that a person should not be required to live up to an agreement that “‘no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other.”89 The unconscionability doctrine has been applied by courts on the theory that Section 2, better known as the Savings Clause, allows it. Section 2 of the FAA states:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (Emphasis added)90

The Supreme Court has held that the “Savings Clause” of section 2 allows courts to use state law91 or equitable grounds92 to refuse to enforce arbitration clauses. The argument became increasingly popular as the Supreme Court eliminated other means for invalidating arbitration clauses, even though it is not easy to convince a court of its merits.93

Generally, the grounds that the Court accepts as valid for revoking arbitration agreements have to do with the making of the contract. Fraud and duress are generally accepted grounds for revoking any contract and therefore are arguably available to any party seeking to revoke or avoid an arbitration agreement.94 Unconscionability in the terms of the contract


historically has been another accepted ground. Justice Thomas would reject unconscionability and allow only grounds that involve the making of the contract. As will be discussed further, recent decisions make it clear that the unconscionability argument has little life to it under current Supreme Court jurisprudence.

Arguably, an advantage of making an unconscionability argument is that it is more difficult to review, since it relies on both the intricate facts of the particular case and on an in-depth understanding of state law. In addition, historically courts were reluctant to overturn a decision applying the correct legal standard and purportedly applying it evenhandedly, since it was really simply the lower court’s application of the law to a certain set of facts.

Courts have disagreed on whether certain provisions or effects were unconscionable, with the more protective courts finding a broader range of arbitration clauses unconscionable. An unconscionability discussion generally looks at several issues:

1. Whether the contract is one of adhesion—the drafter has more bargaining power than the signee and the contract was offered on a take-it-or-leave-it basis.

2. If it is a contract of adhesion, courts look to procedural unconscionability—lack of voluntariness and lack of knowledge of the rights being given up.

3. Courts also look at substantive unconscionability, relating to the substantive contract terms and whether they are unreasonably favorable to the drafting party. Courts then weigh the procedural and substantive considerations on a sliding scale, so that more substantive unconscionability allows for less procedural unconscionability for the court to invalidate the

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97 Id. at 1450-52.
98 Id. The Supreme Court did not worry about this problem in AT & T v. Concepcion, where it acknowledged the argument that the Ninth Circuit’s unconscionability determination was neutral on its face but then boldly went on to presume that the lower court decision had a greater effect on arbitration clauses than on contract clauses and was therefore pre-empted. Id. at 1747.
99 See e.g. Soltani v. Western & Southern Life Ins. Co., 258 F.3d 1038 (9th Cir. 2001).
The most well known application of the unconscionability argument to invalidate a class action waiver in an arbitration clause is California’s *Discover Bank* case. From that case, the *Discover Bank Rule* evolved:

“[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.”

*Discover Bank* v. Super. Ct. of L.A, 113 P.3d 1110 (quoting Cal. Civ. Code Ann. § 1668). This decision was followed by a number of courts that reiterated the idea that, while arbitration was favored, it could not be used to exculpate businesses from wrongdoing.

2. Vindication of Rights Theory

Instead of using unconscionability arguments to invalidate mandatory

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102 Id. at § 18:14.
104 Overturned by AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011).
105 See, e.g. Scott v. Cingular Wireless, 160 Wash.2d 843 (2007)(“The FAA favors arbitration, not exculpation.” Id. at 858); Kinkel v. Cingular Wireless, LLC, 223 Ill.2d 1, 36 (2006) providing a good overview of cases on both sides of the argument and concluding that the distinction appears to be that “a class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner. If the agreement is so burdened, the ‘right to seek classwide redress is more than a mere procedural device.’” Id. at 41 (citations omitted). (for California cases following Discover Bank, see Cohen v. DirecTV, Inc., 142 Cal. App. 4th 1442, 1451–1453, 48 Cal. Rptr. 3d 813, 819–821 (2006); Klussman v. Cross Country Bank, 134 Cal. App. 4th 1283, 1297, 36 Cal.Rptr.3d 728, 738–739 (2005); Aral v. EarthLink, Inc., 134 Cal. App. 4th 544, 556–557, 36 Cal. Rptr. 3d 229, 237–239 (2005), America Online, Inc. v. Superior Ct., 90 Cal. App. 4th 1, 17–18, 108 Cal. Rptr. 2d 699, 711–713 (2001).
arbitration clauses, some courts invalidate them on a “vindication of rights” theory, usually where a federal statute applies, such as the Civil Rights Act of 1964’s protections against discrimination or the antitrust laws.\textsuperscript{106} Courts recognize that unconscionability does not apply well in all cases where enforcing an arbitration clause would be contrary to public policy, especially where it has an effect not as much on the individual as on a larger group or the public as a whole.\textsuperscript{107} Often this argument comes into play when an arbitration clause prohibits class actions. The argument in favor of class actions is “the vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’”\textsuperscript{108}

'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.'\textsuperscript{109}

In order to rely on this argument, courts must keep in mind the Supreme Court’s warning that, “so long as the prospective litigant effectively may vindicate [her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”\textsuperscript{110} Courts rely on language from \textit{Gilmer v. Interstate/Johnson Lane},\textsuperscript{111} that admits that not all statutory claims are appropriate for arbitration. But \textit{Gilmer} states that a party should be held to an arbitration agreement unless “Congress itself evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”\textsuperscript{112} To avoid arbitration on this theory, the Court held, a party must show Congressional intent from the text of the statute, its legislative history, or “an ‘inherent conflict’ between arbitration and [the statute’s] underlying purposes,” always with a “‘healthy regard for the federal policy favoring arbitration.’”\textsuperscript{113} In addition, courts must be

\textsuperscript{106} 42 U.S.C. § 2000e.
\textsuperscript{107} 634 F.3d 187 (2d Cir. 2011), after remand, 130 S.Ct. 2401 (mem.) (2010).
\textsuperscript{109} Id., quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997).
\textsuperscript{112} Id. at 26.
\textsuperscript{113} Id., quoting Moses H. Cone Hospital v. Mercury Construction Corp., 113 460 U.S. 1,
cognizant of the limited application of a statutory rights theory because *Gilmer* rejected the argument that arbitration cannot address important social policies. Just as courts focus on specific disputes, so do arbitrators. So long as the litigant may vindicate her statutory cause of action in arbitration, the Court held, the statute serves both its remedial and its deterrent function.\(^{114}\)

“[The] “vindication of statutory rights” arguments reflect “the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights,”\(^{115}\) and “loses its claim as a valid alternative to traditional litigation”\(^{116}\) when it doesn’t. Some examples of scenarios that arguably should not be heard in arbitration because a party could not vindicate statutory rights include where the agreement bars recovery of statutorily guaranteed damages,\(^{117}\) prevents recovery of statutorily mandated attorneys fees so that finding legal representation for a single claim would be nearly impossible,\(^{118}\) or prohibits the use of class mechanisms.\(^{119}\) In addition, applying *GreenTree v. Randolph*,\(^{120}\) courts have refused to enforce arbitration agreements where the cost of individual arbitration would make vindicating statutory rights prohibitively expensive or otherwise taken away their statutory rights (sometimes based on the contractual prohibition of class actions).\(^{121}\)

\(^{24}\) (1983).

\(^{114}\) *Gilmer*, 546 U.S. at 27.

\(^{115}\) *Kristian v. Comcast Corp.*, 446 F.3d 25, 37 (1st Cir. 2006), quoting *Rosenberg*, 170 F.3d at 14.

\(^{116}\) Id. at 37.

\(^{117}\) *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003); see also *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998) (affirming refusal to compel arbitration where contract required arbitration of all claims but

\(^{118}\) *Kristian*, 446 F.3d at 53 (But note that the First Circuit severed the class action prohibition rather than refusing to enforce the arbitration clause. Severing is no longer an option in many instances after *Stolt-Nielsen*, which held that a party cannot be forced to conduct a class action in arbitration if the contract does not allow it. For example, a court could not sever the class action waiver and force the parties to arbitrate in a class action).


\(^{121}\) In *American Express Merchants' Litigation*, 554 F.3d 300, 315-316, 320 (2d Cir. 2009) (prohibition of class action made arbitration prohibitively expensive); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 894 (9th Cir.2002) (dispute resolution agreement that required an aggrieved employee who brought a claim against her employer to split the arbitrator's fee with the employer rendered the entire arbitration agreement unenforceable);
III.
LIMITING POLICY ARGUMENTS

Courts have long looked at the public policy behind statutes and case law precedent in trying to determine the validity of arbitration clauses. In recent years, though, the Supreme Court has begun rejecting many of these public policy arguments and enforcing arbitration agreements. Its reasoning appears to be two-fold: that Congress should have included exemptions from arbitration in its statutes and that state legislatures’ attempts to make the same exclusions are pre-empted by the FAA. The Court has rejected most policy arguments in favor of the one it keeps coming back to—the policy of enforcing contracts according to their terms.\(^\text{122}\)

In *Buckeye Check Cashing, Inc. v. Cardegna*,\(^\text{123}\) for example, the Supreme Court held that Florida public policy and contract law regarding whether a contract is void or voidable is irrelevant in light of federal case law from *Prima Paint\(^\text{124}\)* that an arbitrator must determine the validity of a contract containing an arbitration clause.\(^\text{125}\) The Supreme Court specifically rejected the argument that the state legislature’s judgment as to whether a contract should be interpreted by the court or the arbitrator was relevant to a contract enforceable under the FAA.\(^\text{126}\) Instead, the Court held, only the federal substantive rules should apply.

In the collective bargaining context, the Supreme Court has moved from enforcing arbitration agreements between unions and employers for collective issues but not individual issues to enforcing arbitration clauses even if the agreements include individual issues.\(^\text{127}\) The Court in *14 Penn Plaza LLC v. Pyett\(^\text{128}\)* made a clear distinction between the current case and *Alexander v. Gardner-Denver\(^\text{129}\)* based on language in the modern collective bargaining agreement that specified the inclusion of individual statutory claims in the arbitration agreement in the more modern cases.\(^\text{130}\) Mostly, though, the Supreme Court relied on its increasingly adamant


\(^{125}\) Id. at 446.

\(^{126}\) Id.


\(^{128}\) Id.


\(^{130}\) 14 Penn Plaza, 556 U.S. at 368.
holdings that arbitration is appropriate for vindicating statutory rights and does not contravene “the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law.”\textsuperscript{131} It rejected the notion that arbitrators are less able than judges to resolve complex issues of law and fact.\textsuperscript{132}

Perhaps most significant for these purposes, though, the Court said that it could not limit arbitration based on a “judicial policy concern” such as the mere fact that the individual’s rights might not be sufficiently protected by the union in an arbitration.\textsuperscript{133} The Court accepted the idea that a union through its collective bargaining agreement retains control over the individual’s claim even though the union’s interests may not be consistent with the individual and a union might choose to present the employee’s grievance less vigorously or choose different litigation strategies than an employee would.\textsuperscript{134} To rectify the potential problem, the Court held, Congress could add to the ADEA the qualification that individuals have the right to go to court for ADEA claims.\textsuperscript{135} It reiterated a statement from a 2008 case, that, “[a]bsent a constitutional barrier, ‘it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress.’”\textsuperscript{136} The Court reminded us that, as far back as \textit{Mitsubishi Motors}, it had noted that “Congress is fully equipped ‘to identify any category of claims as to which agreements to arbitrate will be held unenforceable.’”\textsuperscript{137}

This decision was at the forefront of a continuing line of arbitration cases that find that policy must come from a clear legislative statement and marked the Court’s concerted effort to enforce the FAA as it was written, with increasingly less room for interpretation, flexibility, and “doing the right thing.” Instead, the Court continued to emphasize that the arbitration agreement must be enforced according to its terms unless Congress provides specifically for a right to go to court rather than arbitration.\textsuperscript{138}

\textsuperscript{131} Id. at 1469, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001).
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 1472.
\textsuperscript{135} Id.
\textsuperscript{137} Id., quoting Mitsubishi Motors Corp. v. Soler, at 627.
\textsuperscript{138} AT&T Mobility LLC, 131 S.Ct. at 1746. (2011). Unless, of course, the agreement’s terms try to expand the rights Congress provided in the FAA—for example, by providing for review of arbitration awards on grounds other than those provided by the FAA. See Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 592 (2008).
This rejection of the use of policy arguments to limit the application of arbitration clauses became even clearer in *Stolt-Nielsen*¹³⁹ and again in *AT & T v. Concepcion*.¹⁴⁰ Those cases rejected the idea that public policy behind state law could be used either to interpret the parties’ intent or to find an arbitration clause unconscionable.¹⁴¹ In *Stolt-Nielsen*, the parties agreed to submit to an arbitrator the issue of whether plaintiffs should be allowed to bring a class arbitration where the arbitration clause was silent.¹⁴² The parties agreed that the contract’s silence regarding class actions in arbitration meant there was no agreement on that issue.¹⁴³ The arbitration panel concluded that plaintiffs could bring the arbitration as a class action, reasoning that the evidence showed no reason to preclude class arbitration and that other arbitration panels construed other clauses (similar, though not “exactly comparable”) to allow for class arbitrations. Besides, the arbitration panel reasoned, if they construed it as defendants wished, there would be “no basis for a class action absent express agreement among all parties and the putative class members.”¹⁴⁴ The Supreme Court reversed the arbitrators’ decision, agreeing almost completely with the defendants.¹⁴⁵ It held that silence in a contract cannot be construed as allowing a class action, though it left slightly open the possibility that an agreement that did not expressly allow class actions could be construed to show intent to allow them.¹⁴⁶

The interesting part of that decision for purposes of this article is the Court’s insistence that the arbitration panel exceeded its powers under §10 (a)(4) of the FAA because, instead of doing the task it was supposed to—interpreting and enforcing a contract—it “simply [imposed] its own view of sound policy regarding class arbitration.”¹⁴⁷ The Court suggested that the panel should have looked for legal support for its holding—from the FAA, maritime law, or New York law, or at least explored the issue of the parties’ intent, insisting that the panel did not have the authority to act as a

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¹⁴¹ *Stolt-Nielsen*, 130 S.Ct. at 1767; *AT&T Mobility LLC*, 131 S.Ct. at 1746.
¹⁴³ Id.
¹⁴⁴ Id., apparently quoting from the arbitrators’ decision.
¹⁴⁵ Id. at 1768.
¹⁴⁶ Id. at 1776 (the Court did not present an example of how a contract that does not specifically allow for class actions could be construed to agree to them).
¹⁴⁷ Id. at 1767-68.
“common-law court to develop what it viewed as the best rule to be applied to the situation.”

The Court also ignored the policy of ensuring punishment for statutory violations for the greater good. The Court quoted from a 1960 decision finding that “an arbitrator ‘has no general charter to administer justice for a community which transcends the parties’ but rather is ‘part of a system of self-government created by and confined to the parties.’”149 This quote provides insight into the Court’s future intentions, especially in the context of a case where a company, if it did the wrong it is accused of, will get away with it against numerous customers. An obvious corollary to this statement would be that, because arbitration works only on an individual basis, where the issue to be heard involves more than the claims between individuals or individual companies, or implicates or affects the rights of others, arbitration is not an appropriate forum. And since you cannot know all of the issues that are likely to arise when you agree to arbitrate at the beginning of the relationship, the Court could easily find within the FAA a policy that claims that present a collective or class-wide issue after the clause is signed will not be subject to arbitration. That holding would be consistent with the vindication of rights argument. But that is not what the Supreme Court held. Instead, ignoring arguments of unconscionability or adhesion, and ignoring the federal antitrust laws that defendants now will be able to choose to violate at will knowing that there will be few, if any, consequences, the Supreme Court simply held that a contract is a contract and must be enforced according to its terms.150 The Court reasoned that a foundational FAA principle that arbitration is a matter of consent—as to what you agree to arbitrate, with whom you agree to arbitrate, the rules you agree to follow, etc., and because a silent agreement, without more, cannot be construed to show consent, the contract cannot be interpreted to agree to anything other than an individual arbitration.151

Based on its emphasis on the policy of enforcing arbitration agreements regardless of whether the parties signing them intended to sign away their statutory rights, the Supreme Court made it clear in Stolt-Nielsen

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148 Id. at 1768, pointing out that the parties had made their intent express in the stipulations to the panel—the contract did not evidence an intent to allow class arbitration.
150 Id. at 1773, quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).
151 Id. at 1774.
that it was not bothered by all those conflicting policy arguments. The policies that courts must apply are the enforceability of arbitration agreements under the FAA and not forcing defendants to engage in class actions when they didn’t agree to them.\(^\text{152}\) It did not find, as it could have, that, because the plaintiffs did not consent to waive their federally guaranteed right to a class action, the silent contract should not be construed against them. It could have held that, since federal law provides a right to a class action in appropriate cases, failure to waive the right to a class action should be construed as agreeing to one. Instead, the Supreme Court allowed the FAA to pre-empt the federal rule in favor of its stated policy of enforcing arbitration agreements absent specific limitations.

The Supreme Court made it clear, though, that it is not abandoning state law interpretations of arbitration agreements in favor of a new federal common law of arbitration. In *Stolt-Nielsen*, the Court reiterated that, “the interpretation of an arbitration agreement is generally a matter of state law.”\(^\text{153}\) The FAA imposes certain rules, such as that arbitration “is a matter of consent, not coercion.” Apparently for this Court, it is okay to coerce individuals or less powerful companies into signing away rights and interests, knowingly or unknowingly, but not to force the drafter of the agreement or the more powerful party to defend against multiple claims at once unless it indicated it was willing to do so. The effect of such a decision is like saying it’s okay for companies to sell dangerously shoddy products and put a clause in each purchase agreement saying “if there’s a problem with our product you agree you won’t sue us unless we say you can.”

1. The Court Rejected the Policy Behind Unconscionability

As much as the outcome of *AT&T Mobility LLC v. Concepcion*\(^\text{154}\) was expected, its reasoning was disquieting. Justice Scalia accepted the premise that companies should be allowed to coerce customers when he said, “the times in which consumer contracts were anything other than adhesive are long past.”\(^\text{155}\) In a footnote, the Court suggested that states can protect consumers by requiring that the class action waivers be highlighted in the contracts.\(^\text{156}\) Since it is admittedly a contract of adhesion, what

\(^\text{152}\) Id at 1776.


\(^\text{154}\) 131 S.Ct. 1740 (2011),

\(^\text{155}\) Does that include bully, take advantage of, harm, laugh in the face of, and step on, over, or around?

\(^\text{156}\) AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011)

\(^\text{157}\) Id. at fn. 6.
protection does highlighting offer? It simply informs the customer that he’s just given up rights he would never agree to give up if he had any choice in the matter. In other words, unless he were coerced.

In Concepcion, the Supreme Court overturned the Discover Bank rule, followed by California courts in numerous decisions since 2005. In Discover Bank, the California Supreme Court held that California public policy prohibited the enforcement of class action waivers, including waivers in arbitration agreements, in certain circumstances. The California court’s theory was that such clauses were unconscionable because they did not provide a mechanism for vindicating rights of small dollar value, thus allowing wrongdoers to get away with their actions.

While the United States Supreme Court agreed that generally applicable contract defenses still apply to enforcement of arbitration clauses, it held that state-law rules that stand as obstacles to the FAA’s objectives cannot stand. The Court invalidated the Discover Bank rule because it conflicts with the purpose of the FAA—“to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” The Court reasoned that “[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” Instead, the Court emphasized, as it did in Stolt-Nielsen, arbitration is about the contract—allowing parties to create an efficient, streamlined procedure “tailored to the type of dispute.” Thus, class arbitration, when required by the court rather than consented to by the parties, is inconsistent with the FAA. The Supreme Court found that the decision made by the lower court in Concepcion was not a particularized finding as to whether this individual contract was enforceable, but instead was a general policy finding that class-wide arbitration was the best route for small claims by multiple parties. The Court found that such a decision was pre-empted by the

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159 Id., 113 P.3d at 1110, 1117.
160 Id. at 1107.
161 131 S.Ct. at 1748.
162 Id.
163 Id.
164 Id.
165 Id. at 1751.
It is unclear from *Concepcion* whether unconscionability as a grounds for invalidating agreements remains viable on any grounds. The Court likened the unconscionability arguments to the “great variety of ‘devices and formulas’ declaring arbitration against public policy” that prompted the passage of the FAA.\(^{167}\) Justice Thomas concurred, arguing that the Savings Clause means that only defenses such as fraud and duress will be allowed to invalidate arbitration clauses—defects in the formation of the contract.\(^{168}\) He argued that “courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to ‘any contract.’”\(^{169}\) Thus, under Justice Thomas’s view, state law essentially is irrelevant to deciding the validity or enforceability of arbitration agreements except as necessary to determine whether the contract was entered into legally.

The Supreme Court’s rejection of the use of public policy, at least state public policy, to invalidate arbitration agreements, was made even clearer in *Marmet Health Care Center, Inc. v. Brown*.\(^{170}\) In that case, the Supreme Court essentially reprimanded the West Virginia Supreme Court of Appeals for “misreading and disregarding the precedents of this Court interpreting the FAA [and not following] controlling federal law implementing that basic principle.”\(^{171}\) In *Marmet*, the West Virginia Supreme Court held that a state could invalidate arbitration clauses that applied to personal injury or wrongful death claims against nursing homes, reasoning that the claims were only collaterally derived from the contract with the nursing home and therefore could be invalidated based on state public policy against pre-dispute agreements to arbitrate such claims.\(^{172}\) The state court called the Supreme Court decisions “tendentious”\(^{173}\) and “created from whole cloth.”\(^{174}\)

The state court in *Marmet* also found the clause unconscionable, at least in part because requiring arbitration of such claims violates public

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\(^{166}\) Id. at 1746.

\(^{167}\) Id. at 1747.

\(^{168}\) Id. at 1753.

\(^{169}\) Id.

\(^{170}\) 565 U.S. _ (per curiam Feb. 21, 2012).

\(^{171}\) Id. at *1.


\(^{173}\) 565 U.S. _, at *1, quoting state court decision, p. 51a.

\(^{174}\) 565 U.S. _, at *1, quoting state court decision, p. 51a.
policy. The Supreme Court wasted no time in quibbling about the holding. It simply stated that a court could not base an unconscionability decision on whether the clause violated a public policy specific to arbitration. The Court did remand to the state court for a determination of whether the court could come up with a reason for refusing to enforce the clause that was not specific to arbitration, as was the application of the policy at issue. But it did not suggest that it believed the court would succeed.

2. Does Concepcion only apply to state law defenses, or should it be read to apply to public policy defenses such as vindication of federal statutory rights?

In In re American Express Merchants' Litigation, decided prior to Concepcion, the Second Circuit refused to enforce an arbitration clause that prohibited class actions to an antitrust class action brought by merchants against American Express. The case involved “small” merchants (less than $10 million in expected annual charge volume) who were forced to accept American Express charge cards at a high percentage rate per transaction in order to be allowed to accept American Express’s more prestigious and more lucrative credit card. Despite individual agreements between the merchants and Amex that waived the right to a class action and agreed to arbitration, the Second Circuit relied on the “vindication of rights” theory to invalidate the arbitration clause and allow the plaintiffs to pursue their potential class action in court.

American Express appealed that initial decision. The Supreme Court remanded it to the Second circuit for reconsideration in light of its decision in Stolt-Nielsen. The Supreme Court did not provide any guidance to the Second Circuit on how to apply the Stolt-Nielsen decision. In Amex II, as the Second Circuit’s decision after the remand is called, the Second Circuit disagreed with Amex’s argument that Stolt-Nielsen prevented a court from invalidating an arbitration agreement based on the absence of class procedures.

175 Id.
176 565 U.S. _, at*1.
177 Id.
178 634 F.3d 187 (2d Cir. 2011), after remand, 130 S.Ct. 2401 (mem.) (2010).
179 In re American Express Merchants' Litigation, 554 F.3d 300, 315-316, 320 (2d Cir. 2009).
180 Id. at 305.
181 Id. at 315-316, 320.
183 Id. at 193.
*Stolt–Nielsen* states that parties cannot be forced to engage in a class arbitration absent a contractual agreement to do so. It does not follow, as Amex urges, that a contractual clause barring class arbitration is *per se* enforceable. Indeed, our prior holding focused not on whether the plaintiffs' contract provides for class arbitration, but on whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations.\(^{184}\)

The Second Circuit relied on a federal “statutory rights” theory rather than an unconscionability theory. In other words, it looked to federal statutes to determine whether plaintiffs could show that the “practical effect of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity.”\(^{185}\) When plaintiffs proved that having to bring individual claims in arbitration would prevent them from vindicating their statutory rights primarily due to the expense of hiring a necessary expert, the Second Circuit rested its holding that the class action waiver in the mandatory arbitration clause, could not be enforced squarely on the Supreme Court’s holding in *GreenTree Financial Corp-Alabama v. Randolph*.\(^{186}\) In *GreenTree*, the Supreme Court held that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”\(^{187}\) The Court made it clear that the party seeking to avoid arbitration bears the burden of showing the likelihood of incurring costs that make arbitration prohibitively expensive.\(^{188}\) In *GreenTree*, the Court held that the plaintiff did not meet that burden and that silence as to the costs could lead only to speculation as to the risk that arbitration would be prohibitively expensive, which was insufficient.\(^{189}\)

In *Amex II*, the Court reiterated that plaintiffs presented significant evidence that the costs of hiring an expert and bringing individual claims to arbitration would prohibit merchants from pursuing their claims.\(^{190}\) The Second Circuit specifically found that, under *GreenTree*, plaintiffs had met their burden and could not expect to vindicate their statutory rights unless allowed to bring a class action, where they could share the costs of the

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\(^{184}\) Id. at 193-194.

\(^{185}\) Id. at 196.

\(^{186}\) Id. at 199, citing Randolph, 531 U.S. 79 (2000).

\(^{187}\) Randolph, 531 U.S. at 91.

\(^{188}\) Id. at 92.

\(^{189}\) Id.

\(^{190}\) In re Am. Express Merchants' Litig., 634 F.3d 187, 199 (2d Cir. 2011).
experts and where attorneys would be willing to take the claims. Because the court could not force the parties into a class arbitration after Stolt-Nielsen, the court held that the arbitration clause was unenforceable and that plaintiffs could pursue their claims in litigation. The Second Circuit’s decision was seen as a victory against companies using arbitration to avoid the law.

Arguably, though, the victory will be short-lived. The court’s reasoning in Amex II makes the same policy argument raised in Discover Bank, which was overturned by AT&T v. Concepcion: “A provider’s insistence on an arbitration provision that gives it the opportunity to overcharge its customers by small amounts while denying the customers any effective way to recover ‘violates fundamental notions of fairness’ and . . . violates public policy by granting [the company] a ‘get out of jail free’ card while compromising important consumer rights.” In fact, the California Supreme Court in Discover Bank found that “class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights.”

The arguable difference appears to be that the rights in Discover Bank were state law rights, while the rights in Amex II were created by federal law. But several courts have used the unconscionability theory under state law to justify the vindication of statutory rights theory under federal law, noting that, “[a]s a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis. In fact, many . . . unconscionability arguments are merely reiterations of . . . vindication of statutory rights arguments.”

191 Id. at 187.
193 113 P.3d at 1108.
195 See, e.g. Kristian v. Comcast, 446 F.3d at 61, explaining that the federal antitrust laws are comparable to the California unconscionability law that, when applied, invalidated class action waivers in arbitration agreements if “the potential reward would be insufficient to motivate private counsel to assume the risks of prosecuting the case just for an individual on a contingency basis. While retaining counsel on an hourly basis is possible, in view of the small amounts involved, it would not make economic sense for an individual to retain an attorney to handle one of these cases on an hourly basis and it is hard to see how any lawyer could advise a client to do so. The net result is that cases such as the ones listed above will not be prosecuted even if meritorious. Thus, the prohibition on class action litigation functions as an effective deterrent to litigating many types of claims involving rates, services or billing practices and, ultimately, would serve to shield [the defendant] from liability even in cases where it has violated the law.” Kristian v. Comcast Corp., 446 F.3d 25, 60-61 (1st Cir. 2006), quoting Ting v. AT & T, 182 F.Supp.2d 902, 918 (N.D. Cal.
It does not appear to be a distinction that makes a difference to the current Supreme Court.

In *Amex II*, the Second Circuit, writing after remand following the *Stolt-Nielsen* decision but before *Concepcion*, argued forcefully that public policy can still be used to void contract language, even in arbitration clauses:

Amex argues that *Stolt–Nielsen* expressly rejects the use of public policy as a basis for finding contractual language void. We disagree. While *Stolt–Nielsen* plainly rejects using public policy as a means for divining the parties' intent, nothing in *Stolt–Nielsen* bars a court from using public policy to find contractual language void.  

The Second Circuit held that, while it may no longer be able to force class arbitration, it can refuse to enforce an arbitration clause as a whole, thus sending a case that cannot properly be brought in arbitration (due to prohibitive costs in that case) to court. The Second Circuit analogized its decision after remand to its decision in a recent case applying state law to find an arbitration agreement unconscionable pursuant to the *Discover Bank* rule.  

Of course, in *Concepcion*, the Supreme Court for all practical purposes removed this argument. In overturning the *Discover Bank* rule, the Supreme Court took away a major public policy argument used to void or at least to refuse to enforce arbitration clauses.

The Second Circuit reconsidered its refusal to compel arbitration yet again after the Supreme Court’s decision in *Concepcion*. It specifically rejected the argument that *Concepcion* required the court to enforce the arbitration clause with its class action waiver. The Second Circuit distinguished the unconscionability argument under state contract law from

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196 *In re Am. Express Merchants' Litig.*, 634 F.3d 187, 199 (2d Cir. 2011). In fact, the Supreme Court held in *Hall Street Assoc., LLC. v. Mattel, Inc.*, 552 U.S. 576 (2008) that the strong policy favoring arbitration could not be used to enforce contract language that expanded judicial review following an arbitration.


199 Id. at *7.

After Concepcion, several courts again addressed the issue of whether arbitration clauses could be invalidated based on a vindication of statutory rights theory, especially under the Greentree v. Randolph theory. In New York, two courts in the Southern District followed Amex, refusing to enforce arbitration clauses where the court found the parties could not vindicate their statutory rights without a class action. Sutherland v. Ernst & Young, LLP\(^{202}\) essentially followed all of the reasoning in Amex II, finding that plaintiff could not vindicate her rights under the FLSA and New York wage and hour laws for recovery of unpaid overtime wages, where plaintiff’s actual loss was less than $2,000. The court ignored Concepcion based on a distinction between cases where plaintiffs might choose not to pursue their rights individually in arbitration and those where they would be precluded from doing so. In Sutherland, the court held, the cost precludes her from bringing her claims, so the agreement could not be enforced.\(^{203}\) In addition, the court in Sutherland distinguished cases based on state law from cases based on “federal courts’ interpretation of the FAA itself,”\(^ {204}\) reiterating the Supreme Court’s dicta in Mitsubishi Motors and its holding in GreenTree v. Randolph that a court may consider refusing to enforce an arbitration clause where rights cannot be vindicated.

The case where plaintiff without argument will be unable to vindicate his rights in arbitration is Chen-Oster v. Goldman, Sachs & Co.\(^{205}\) In that case, the District Court refused to enforce an arbitration clause prohibiting class and collective actions in a putative class action asserting a pattern and practice of discrimination under Title VII because New York law prohibits individual pattern and practice cases. In other words, plaintiff can only bring her action as a class action, but she cannot bring a class action case in district court because the contract requires arbitration, and cannot bring a class action in arbitration because the arbitration

\(^{200}\) Id. at *8, quoting Amex I, 554 F3d at 320.
\(^{201}\) Id.
\(^{203}\) Id. at *5-6.
agreement prohibits it. Because New York law requires all pattern and practice cases to be tried as class actions, plaintiff has no forum for her claim.

In addition, there does not appear to be an argument that the New York law is aimed at or applied mostly to arbitration clauses, as the Supreme Court was concerned with in Concepcion. So either the court has to hold that 1a) the FAA pre-empts the state law requiring pattern and practice cases to be brought as class actions and b) that the class action waiver in the arbitration agreement is unenforceable because it leaves plaintiff without a way to vindicate her rights or 2) that the arbitration clause is unenforceable because plaintiff cannot vindicate her rights under federal law.

The District Court refused to reconsider its decision post-Concepcion, holding that federal rights are distinguishable from state rights and that the FAA cannot be read to preclude an individual from vindicating those federal statutory rights.\(^{206}\) It did, however, acknowledge that a higher court might come out differently.\(^{207}\) It might take some time for this case to work its way to the Supreme Court.

After Chen-Oster and Sutherland, the Second Circuit again heard arguments in the In Re American Express Merchants’Litigation case, this time to determine whether Concepcion should change the outcome.\(^{208}\) Once again, the court determined that the class action waiver in the arbitration clause was unenforceable based on a vindication of rights theory. And because, following Stolt Nielsen, a court cannot force a party to arbitrate in a class action, the Court held the arbitration clause unenforceable and remanded it to the district court to deny Amex’s motion to compel arbitration.\(^{209}\)

In the latest Amex decision, the Second Circuit also attempted to distinguish Greenwood v. CompuCredit, discussed infra, and cases cited in it on the grounds that the other cases involved statutes that restrict the use of arbitration while the statute at question in the Amex case did not restrict arbitration; it was the ability to vindicate the rights protected by the statute


\(^{207}\) Id. at *4.


\(^{209}\) Id. at *14.
that necessitated a restriction of arbitration.\textsuperscript{210} This discussion, confined to a footnote, provides little comfort. It acknowledges that the decision in Greenwood is based on a close reading of the statute and a finding that the statute does not expressly prohibit enforcement of arbitration clauses. But it returns to the three ways courts may invalidate arbitration clauses (explicit statement, legislative history, and the history and purpose of the statute) and finds that its own reasoning is based on the third possible factor in the analysis—not the first, as it says was the case in Greenwood. It ignores the fact that the Court could have made the same argument in Greenwood that the Second Circuit applied in Amex, but chose not to.

But other courts deciding cases after Concepcion believe that the line is not so clear. In, Kaltwasser v. AT&T Mobility, LLC\textsuperscript{211} a district court in the Northern District of California appears to have accepted complete defeat—holding that, after Concepcion, it is pretty clear that courts must enforce arbitration clauses, including class action waivers, even if it means that parties will not end up with an appropriate forum for vindicating rights. While the court in Kaltwasser did not specifically hold that GreenTree v. Randolph had been overturned, it stated: “[T]he notion that arbitration must never prevent a plaintiff from vindicating a claim is inconsistent with Concepcion. In striking down the Discover Bank rule, the Supreme Court recognized the possibility that ‘small-dollar claims . . . might . . . slip through the system’ because of the cost of proving a claim.”\textsuperscript{212} Kaltwasser acknowledges that there might be a distinction between vindicating state rights and vindicating federal rights, but argues that, if the Court wanted to allow a carve-out for cases that apply GreenTree, it should have done so, especially in light of the dissent that points out the concern.\textsuperscript{213}

On the other hand, a state appellate court in California chose to ignore Concepcion and refused to enforce an arbitration agreement where it undermined the vindication of a state statutory right, even if the agreement was not unconscionable.\textsuperscript{214} The law in question is the California Labor Code, which states that employees can waive a right intended for their own

\textsuperscript{210} Id. at *14, fn. 5.
\textsuperscript{211} 2011 WL 4381748 *5, N.D. CA (Sept. 20, 2011), Followed by Hendricks v. AT&T Mobility, LLC 2011 WL 5104421 (Oct. 26, 2011)
\textsuperscript{212} Id.
\textsuperscript{213} Id., citing Concepcion, 131 S.Ct. at 1760 and 1761.
\textsuperscript{214} See also, Ralphs Grocery Co. v. Brown, 2012 WL 151754 (U.S. 2012), petition for cert., (state court of appeals refused to enforce an arbitration agreement that waived the right to bring a representative case under the California Private Attorney General Act of 2004 (PAGA), because the purpose of the Act is to allow not just individual recovery, but relief to others similarly situated who were harmed by an unfair labor practice).
purpose, but not a right intended for a public purpose.\textsuperscript{215} Because the statute allowed representative actions, and the arbitration agreement waived the right to bring a representative action, the California court held, the waiver could not be enforced. Interestingly, this decision came out just days before the Supreme Court vacated a similar decision and remanded it for further consideration in light of \textit{Concepcion}.\textsuperscript{216}

IV.

\textbf{WILL PUBLIC POLICY ARGUMENTS CONTINUE TO BE VIABLE TO INVALIDATE OR REFUSE TO ENFORCE ARBITRATION CLAUSES?}

After these decisions that make it very clear that the Supreme Court will interpret arbitration clauses, state laws, and the FAA to enforce arbitration agreements, the issue remains what arguments will the Supreme Court allow for invalidating or refusing to enforce arbitration clauses, in whole or in part? Are the cases that apply federal policy safe? If so, does that make any sense? Has the Supreme Court created a situation where parties who sue under federal statutes might have some protections while parties who sue on state law grounds don’t?

Perhaps the most persuasive argument that public policy grounds still apply to invalidating arbitration agreements is that the Supreme Court has not yet reversed or revisited its decision in \textit{Green Tree Financial Corp.-Alabama v. Randolph}.\textsuperscript{217} In that decision, the Court enforced the parties’ arbitration clause, finding that the party had not demonstrated that it could not vindicate its statutory rights in arbitration.\textsuperscript{218} But in dicta, the Court said that a party might be able to invalidate an arbitration clause if it could show the likelihood of incurring costs that would make arbitration prohibitively expensive.\textsuperscript{219} If so, the party could not vindicate her statutorily protected rights, and the statutes in question were designed to further important social policies.\textsuperscript{220} Otherwise, the party seeking to

\begin{itemize}
  \item \textsuperscript{215} \textit{CAL. LAB. CODE} § 2804 (2002).
  \item \textsuperscript{216} Sonic-Calabasas A, Inc. v. Moreno, 51 Cal. 4th 659 (2011), vacated and remanded in light of \textit{Concepcion}. (holding before remand that employer could not require employee to waive right to administrative hearing in wage and hour case because of the strong public policy of ensuring that employers paid appropriate wages to employees).
  \item \textsuperscript{217} 531 U.S. 79 (2002).
  \item \textsuperscript{218} Id. at 92.
  \item \textsuperscript{219} Id. at 90-92.
  \item \textsuperscript{220} Id.
\end{itemize}
invalidate the arbitration agreement would have to show that “Congress intended to preclude arbitration of the statutory claims at issue.”

While in many recent cases the Court seems to be pushing the line for how to invalidate or refuse to enforce arbitration clauses closer to the bright line of showing in the statute that Congress intended to preclude arbitration for the specific claims, Green Tree remains as one possibility for an additional ground. If a party cannot vindicate her statutory rights, then the important social policies protected by those statutes cannot be furthered.

Arguably, the Amex II decision simply follows Green Tree closely. In fact, the Second Circuit makes it clear that it is making only a particularized decision based solely on the facts of the case before it, just as the Supreme Court suggested in Green Tree.

Under the guidance at the time of the decision in Amex II, the Second Circuit’s reasoning makes sense. The court applied the general federal principle that people must be able to vindicate their rights. That decision is consistent with the dicta in Green Tree. After Concepcion, though, where the Supreme Court went out of its way to determine that the Ninth Circuit’s determination that the arbitration clause the Concepcions signed was unconscionable was not a particularized finding and instead was a blanket refusal to enforce class action waivers in arbitration agreements, whether the Second Circuit’s holding remains viable is questionable.

How is the Discover Bank rule different from the decision the Second Circuit made in Amex II? From a practical perspective, it is not. The California state rule requires a particularized showing of the three elements of unconscionability discussed earlier, the upshot of which is that the individual will not be able to vindicate his or her rights and that the company will be able to get away with wrongdoings that the state does not want it to get away with. The vindication of statutory rights approach finds an arbitration clause unenforceable if enforcing it would mean the rights could not be protected by the applicable statute. In Amex, the Second Circuit held, individual arbitrations would be so expensive that an individual merchant could not protect itself against wrongdoers and should be allowed to take its case to court, where statutory class action procedures

221 Id. at 92
222 In Re American Express Merchants’ Litigation, 634 F.3d 187, 199 (2d Cir. 2011).
apply. The policies behind both approaches are the same—to make sure parties can protect their rights. And that powerful companies cannot hide behind contract clauses to insulate themselves from liability for their wrongdoings.

1. Is the Supreme Court Federalizing Arbitration?

Perhaps instead of indicating an intent to deny all policy arguments in cases seeking to invalidate arbitration clauses, the recent Supreme Court cases indicate merely an intent to federalize rights under the FAA. Federalizing in this context means that the Court seeks to ensure the enforcement of federal rules and laws and to pre-empt state law or policy. If this theory is accurate, it indicates the Supreme Court’s willingness to interpret the Savings Clause in a way very different from its historical analysis.

a. The Court is Clearly Not Allowing States Rights Under a Theory of Federalism

Federalism in the United States defines the relationships and the allocation of power and authority between the federal government and state and local governments pursuant to the Tenth Amendment of the United States Constitution. Federalism requires

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.

Federalism would require the Supreme Court to allow state courts to make decisions based on state law and policy except where the laws conflict with federal law. Given that Congress specified that contract law applied to determine the enforceability of arbitration agreements, and that contract

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224 In re American Express Merchants’ Litigation, 554 F.3d 300, 315-316, 320 (2d Cir. 2009).
226 See Constitution of the United States of America, Amendment 10, setting out the allocation of powers and rights between the states and the federal government.
law generally is defined by states, logically state law would apply under the Savings Clause.\footnote{229}{9 U.S.C. §}

Arguably, if a federal court can invalidate an arbitration clause based on the federal policy that the clause prohibits individuals from vindicating statutory rights, then a state court should be able to do the same. In his dissent in \textit{Southland v. Keating}, Justice Stevens argued that the Court should not refuse to hold agreements contrary to public policy simply because the source of the substantive law underlying the agreement comes from the state rather than the federal government.\footnote{230}{Id.} He argued that the Court’s interpretation of the FAA in \textit{Southland} allowed Congress to create a federal right and guarantee judicial enforcement of it despite a written agreement, but that now state legislatures were prevented from doing the same with respect to a state-created right.\footnote{231}{Id. See Margaret L. Moses, \textit{Statutory Misconstruction; How the Supreme Court Created a Federal Arbitration Act Never Enacted by Congress}, 34 Fla. St. U. L. Rev. 99, 157-58 (2006). For a good overview discussion of criticism of the Court’s decisions making arbitration an almost purely federal issue, see Michael Yelnosky, Michael J. Yelnosky, Fully Federalizing the Federal Arbitration Act, SSRN http://ssrn.com/abstract=1907849, Oregon Law Review, forthcoming. pp. 1-3.} Justice Stevens said he could find no evidence that Congress intended such a double standard.\footnote{232}{Id. See Edward Brunet, \textit{The Minimal Role of Federalism and State Law in Arbitration}, 8 NEV. L.J. 326, 328 (2008).}

While Justice Scalia dissented in \textit{Allied-Bruce Terminix}, suggesting that the Court should overturn \textit{Southland},\footnote{233}{Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265 at 285 (1995)(Scalia dissenting).} his most recent opinions—those he’s either written or joined—clearly indicate that he and the other Justices now accept the Court’s abandonment of state’s rights in the arbitration context and instead insist that only Congress can return the power to the states that the Supreme Court, from \textit{Southland} forward, has usurped.\footnote{234}{See Southland v. Keating, 465 U.S. at 21 (Stevens, J., concurring and dissenting), Id.} Why he has interpreted the FAA to delve so far into states’ rights is not yet clear. He could have argued that, at the least, states could invalidate arbitration agreements to the full extent of the Savings Clause in section 2. But he didn’t. He could have argued simply that it is not for the Supreme Court to question a state’s reasons for invalidating contracts and allowed the \textit{Discover Bank} rule to stand. But he didn’t. Instead, he, along with a majority of the Justices, has pushed the FAA to its fullest extent—rejecting almost any arguments for invalidating an arbitration agreement in light of the strong policy in favor of enforcing such agreements.
One could argue that this Court sees a difference between the state arguments and the federal based on the Supremacy Clause— that claims such as those raised in *Amex II* are based on the federal antitrust law and the claims in *Concepcion* are based in state law, so the Supremacy Clause mandates that only people suing under a federal law can vindicate their rights. Are we talking about a pure Erie/Hannah analysis, as applied by Justice Scalia in *Shady Grove*, where the federal directive is on point and valid, so it applies, regardless? *Southland v. Keating* can be interpreted to say that the answer is yes. Arguably, Congress can create a federal right and guarantee judicial enforcement of it, despite the FAA’s mandate otherwise, but state legislatures cannot do the same thing for state-created rights.

There are two reasons that rule does not apply here. First, we are not talking about federal law that specifically exempts certain kinds of cases from arbitration. The Court has held that a specific exemption in a federal statute is enforceable. Instead, we are discussing cases where a court decides that federal policy, applied generally but perhaps with much more frequency and pointedness to arbitration, exempts cases from arbitration. This is the exception that the Supreme Court disallowed a state court to make in *Concepcion*.

Second, Congress specified in the FAA that contract law applies to limit the enforceability of an arbitration clause. And the Supreme Court has held that the contract law the courts must look to is state law. Thus, arguably, it is not a question of whether state law regarding enforcing contracts, which under California law includes the policy of vindicating rights, may apply; it does. Is it more important that federal rights get vindicated than state ones? Or is it simply that the FAA is more important according to this Court than both federal and state policies? That appears to be Justice Stevens’ concern in his concurrence and dissent in *Southland*.

One author prior to *Concepcion* described the possibility of the Supreme

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237 Greenwood v. CompuCredit, 132 S.Ct. 665 (Jan. 12, 2012), holding that the exemption was not sufficiently specific to exempt claims from arbitration.
Court delving so deeply into states rights issues and rejecting a state unconscionability holding as a discriminatory manipulation of state law as really... pulling out the big guns, in terms of federal-state judicial relations. Issuing such a ruling would arguably reveal something about the Court's values, namely, that it thinks state discrimination against arbitration merits the same extraordinary response, in terms of judicial federalism, as discrimination in the Jim Crow South. While some commentators have noted parallels between state court resistance to civil rights in the 1950s and 1960s and the current hostility to arbitration, it would be quite remarkable if the Court itself were to validate their similarity in this way.\footnote{241}

Essentially the author argues that the Supreme Court sees courts trying to get around mandatory arbitration like courts trying to continue allowing segregation after the Supreme Court decided \textit{Brown v. Board of Education}.\footnote{242} The author suggests that the Supreme Court is performing its job to remind the lower courts that discriminating against arbitration is wrong and against federal law.\footnote{243} Arguably, federal courts applying federal law are making the same end-around attempt—trying to find any way around the Supreme Court’s pronouncement that arbitration clauses must be enforced according to their terms.

b. Could the Court Instead Be Encouraging the Creation of a Federal Common Law of Arbitration?

There is also an argument that what Congress really meant in Section 2 of the FAA was that courts should not follow state contract law but instead should create a \textit{federal} common law for enforcing contracts,\footnote{244} keeping in mind that the FAA was passed when \textit{Swift v. Tyson}\footnote{245} was still good law. Under \textit{Swift v. Tyson}’s holding, federal courts routinely rejected

Is GreenTree v. Randolph Still Good Law?

state law decisions in favor of newly “divined” federal law. Professor Michael Yelnosky asserts that the Court should move toward creating a federal common law of arbitration, which would necessitate pre-empting state law on the same point. Yelnosky points out that creating a federal common law of arbitration would ensure no conflicting state law decisions on virtually identical agreements. The advantage would be predictability, a common set of rules to follow, and not being advantaged or disadvantaged simply based on the place you signed your agreement. He also points out that there already exists a significant body of federal common law.

This approach would create a two-tier system of justice—if you state a federal claim, you may have some policy-based protections from coercive arbitration clauses, but if your claim only arises under state law, you cannot. Essentially that is the argument in Amex II—that the federal substantive law creates a policy favoring the vindication of federal statutory rights over the FAA’s policy of enforcing arbitration clauses, even though the state law followed in Concepcion cannot. It would be simple to say that the federal common law only allows federal statutory law to preempt application of the FAA. But such a finding would ignore the Savings Clause and overturn decades of Supreme Court precedent, from Perry forward, that followed state law on the Savings Clause issue of whether a contract is unenforceable.

The Supreme Court has not indicated that is the direction in which it is headed. In fact, in Concepcion, the Supreme Court reiterated its earlier holdings that state law regarding the enforceability of contracts applies in determining whether to enforce an arbitration agreement. It simply further limited that application to very narrow grounds—fraud, duress, and, possibly but unlikely, unconscionability.

Is there a distinction that makes a difference because the federal cases apply statutes and the state cases sometimes apply common law? Not really. The Supreme Court did away with that distinction in Erie.

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246 See, e.g. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) and cases discussed therein; note Justice Holmes’ dissent, p. 532.


248 Id. at p. 13 (August 2011 draft)

249 Id.

250 Id. at 27.

251 AT &T v. Concepcion, 133 S.Ct. at 1747. See also J. Thomas, concurring, at 1753, n.

252 Erie Railroad Co. v. Tompkins, 302 U.S. 671 (1937) (holding that federal courts
courts can no longer substitute their own version of common law for state common law if there is applicable law. If they cannot substitute, then it is a small step to find that they cannot rely on the distinction to get around a Supreme Court decision finding their reasoning invalid. In any event, in Concepcion, the California court relied on a state statute regarding enforcement of contracts, not just case law.\textsuperscript{253} The Court made it clear in Concepcion that it is not whether the court purports to make an individualized finding, but whether the court is using that individualized finding to go against the stronger public policy favoring arbitration.\textsuperscript{254} If the overriding policy is enforcing agreements to arbitrate, then it should make no difference if the right to be vindicated is created by state or federal law.

2. Instead, the Court Appears Simply to Be Forcing Parties to Arbitrate if the Contract Says They Must

The Supreme Court instead appears to be steering a path toward enforcing all arbitration agreements, including class action waivers (with silence being equivalent to a waiver) unless Congress specifies in its legislation that parties have a right to go to court rather than arbitration or unless the contract was unenforceable in its formation. I would argue that the Court has used these arguments to justify the end they are working toward—forcing those who sign arbitration clauses to live with them regardless of the consequences, both to the individual and to society. Coercion is a defense only if it might make a corporation do something it doesn’t want to do (e.g. participate in a class arbitration). And unconscionability in drafting contracts is perfectly acceptable if it is in a consumer (and arguably also then in an employment) contract. Whether it is acceptable in business-to-business contracts entered into under the same adhesive circumstances as consumer contracts has not been determined specifically, but the answer is clear—of course, even where it means that federal substantive rights are ignored or effectively nullified.

Most recently, the Supreme Court has shown its intent to narrow exceptions to arbitration agreements even further, and despite federal statutory language. In \textit{Greenwood v. CompuCredit Corp.},\textsuperscript{255} the Ninth Circuit upheld a lower court decision that the federal Credit Reporting Organization Act’s non-waiver of a right to “sue” means that Congress

\textsuperscript{253} Cal. Civ. Code Ann. § 1668 (West 1985) and § 1670.5(a)
\textsuperscript{254} AT&T Mobility LLC, 131 S. Ct. at 1747.
\textsuperscript{255} 615 F.3d 1204 (9th Cir. 2010), cert granted, 131 S.Ct. 2874 (2011)
intended to exempt claims under the Act from arbitration. The Ninth Circuit went through a lengthy discussion to show that “sue” in the Act means court, not arbitration. In its analysis, the Ninth Circuit relied on the Supreme Court’s decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* where it held that, in “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” In *Mitsubishi Motors*, the Court set up the guideline that, “[i]f Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history.”

Instead of accepting the Ninth Circuit’s analysis, the Supreme Court relied on *Mitsubishi Motors* for the opposite proposition—that the word “right to sue” does not guarantee a right to a hearing in court. The Court cited other cases enforcing arbitration clauses where the statute maintains a right to sue. The Supreme Court’s decision narrowly avoided a specific holding that the words “right to sue” in a contract do not void an arbitration clause, relying instead on a narrow reading of the CROA, finding that it really only provides for non-waiver of the right to receive statements and that the statute is silent regarding arbitration as a forum in which to sue. This holding provides guidance to all legislators that a statute must unequivocally state that an arbitration clause is unenforceable and allow a non-waivable right to sue in court in order to give parties a way around arbitration.

This decision has serious implications for the vindication of statutory rights theory. If even Congress cannot render an arbitration clause unenforceable without being explicit, how can a court find that an arbitration clause *effectively* renders statutory rights unenforceable and refuse to enforce an arbitration clause? In other words, if only Congress can invalidate an arbitration agreement and then only by explicit language

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256 Id. at 1209, citing the CROA, 15 U.S.C. § 1679c.
259 Id.
261 Id.
262 See discussion, Id. at *4.
in the statute, can courts read into statutes a right to a trial in court that Congress did not explicitly put in them? Of course, this argument flies in the face of the policy of reading statutes broadly to effectuate its intent. But, as the Court in Greenwood looked back to Mitsubishi, it will continue to rely on Mitsubishi’s admonishment that, “[a]t bottom,” the only policy argument that matters in deciding whether to enforce arbitration clauses is the “policy guaranteeing the enforcement of private contractual agreements.”

3. What Should Be Done to Overcome the Hurdles?

The easy decision going forward is that, for all new statutes, Congress must decide and state explicitly whether arbitration clauses are enforceable when the rights created under that statute are at issue. Individuals will be faced with the problem of trying to bring cases that can only feasibly be brought as class actions as individual claims. And Congress will have to consider what to do about statutorily protected rights where it did not address the enforceability of arbitration agreements at the time of drafting the statute.

Reactions to recent cases indicate that many disagree with the Court’s all-but-blanket enforcement of arbitration agreements. The Securities and Exchange Commission has taken the advice from CompuCredit v. Greenwood to heart and has promulgated proposed rules that any action to be taken as a collective action should be brought in court, not in arbitration. It also provides that the existence of a certified or putative class action nullifies any pre-dispute arbitration agreement, leaving the parties free to go to court unless the collective action is not certified or is decertified.

Congress understands the challenge laid down by the Supreme Court and has started to talk about it, but is a far cry from meeting it. In the Franken Amendment to the 2010 Defense Appropriation bill, Congress specified it would not provide funds for a contract in excess of $1 million between the United States government and a federal contractor where that

264 Mitsubishi, 472 U.S. at 625.
265 77 Fed. Reg. 7, Jan. 11, 2012, Release No. 34-66109, Jan 5, 2012. This action follows an earlier amendment to the regulations stating that class actions cannot be brought in arbitration and responding to a district court decision finding that a collective action is not prohibited by the class action prohibition.
266 Id.
contractor required arbitration of its employment disputes.\textsuperscript{267} This amendment was a direct result of a Halliburton employee allegedly raped by co-workers who was forced to arbitrate confidentially some of her employment claims in Iraq.\textsuperscript{268}

And Congressman Hank Johnson from Georgia has reintroduced the Arbitration Fairness Act in the House of Representatives, with Senator Franken from Minnesota introducing it in the Senate, which would prohibit enforcement of mandatory pre-dispute arbitration clauses against consumers, employees, and franchisees.\textsuperscript{269} It has not passed either House,\textsuperscript{270} nor is it expected to pass this year,\textsuperscript{271} just as it did not pass in prior years.\textsuperscript{272} Numerous bills have been introduced to exempt specific groups from arbitration, but few have passed. Car dealer franchisees were first to succeed in gaining some protections.\textsuperscript{273} Car buyers, consumers generally, employees, nursing home residents, and growers have not been so successful.\textsuperscript{274}

Congress recognized the need for some protections when it passed the Dodd-Frank Act in 2011. Mostly the Act deals with business requirements, but it also addresses whistleblowers. Its whistleblower provisions state that “no predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this section.”\textsuperscript{275} It also asks the Bureau of Consumer Financial Protection to investigate and

\textsuperscript{268} Jones v. Halliburton, 583 F.3d 228, 242 (5th Cir. 2009)(enforcing the arbitration clause for some but not all of her claims)
\textsuperscript{270} Both bills were referred to committee; the Senate held hearings in October 2011. No activity has been reported since. THE LIBRARY OF CONGRESS: THOMAS, http://thomas.loc.gov/cgi-bin/Thomas (last visited March 11, 2012).
\textsuperscript{274} For a discussion of bills introduced but not passed, see Doneff, “Arbitration Clauses in Contracts of Adhesion Trap ‘Sophisticated Parties’ Too, 2 J. Dis. Res. 235 (Vol. 2010).
\textsuperscript{275} Pub. L. No. 111-203, sec. 922 (2)(e)(2).
determine the effects of arbitration clauses in consumer and other cases.  

But Congress has not gone back to Title VII, the ADEA, the ADA, the Credit Reporting Act, and the many other laws it has written over the past generation and exempted disputes under those laws from arbitration. A major difficulty is getting Congress to agree on broad generalities. Should all mandatory pre-dispute arbitration provisions in consumer contracts be unenforceable or just ones that meet the requirements set out in Discover Bank or Amex II? Should all employees be protected from having to arbitrate discrimination claims? If so, why just discrimination claims and not disputes over enforcing covenants not to compete or other contractual claims? Should the distinction be between statutory rights and contractual? On what basis? In other words, generalizing the issue raises too many questions. Congress is correct to provide general rules—it is illegal to discriminate and those who do must compensate those they’ve hurt. Courts should take these general rules and determine how to enforce them through the court system or when it is okay to allow them to be taken out of the court system. The Supreme Court has taken that power from courts and returned it to Congress, which is ill-equipped for the task.

Different responses to these recent decisions can already be seen, which likely will lead to a final Supreme Court pronouncement. In New York, a law firm has filed approximately a thousand arbitration claims against AT & T to stop its proposed merger with T-Mobile. Apparently the lawyers believe AT& T will be less eager to enforce the individual arbitration requirement when faced with an overwhelming number of individual cases, none of which creates precedent for the other.

Interestingly, AT&T filed claims in several District Courts, seeking to enjoin the enforcement of the arbitration proceedings. To date, all of the district courts have refused to compel arbitration, finding that the claims, which are couched as individual claims, really are brought as collective claims and therefore are prohibited by the arbitration agreement. Since each claim seeks to stop the merger or put conditions on it, and since that

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276 H.R. 4173 (111th) sec. 1028 (Dodd Frank Act) requires that the Bureau of Consumer Financial Protection do this study.


claim inevitably will affect more than the single individual bringing the
claim, it is inevitable that the merger decision will affect the rights and
interests of the plaintiffs, who now have no way to protest or protect
themselves against the decision. They must arbitrate their claims, but they
cannot arbitrate them collectively because the contract prohibits it. But the
contract also prohibits them from bringing claims in court. Based on
Concepcion and a close reading of the contract provisions, these claims
provide excellent examples of how the recent Supreme Court decisions void
or at least ignore the policy of ensuring that rights can be protected. And
because the individuals cannot vindicate their rights, society as a whole will
suffer.\textsuperscript{279}

CONCLUSION

After the Supreme Court’s decisions in the 2010 and 2011 terms,
consumers, employees, small businesses, and any person or entity not in a
power position can anticipate being required to sign an arbitration
agreement that mandates individual arbitration of any claim against the
powerful company. Congress has done little to stop this deprivation of
rights. The Arbitration Fairness Act, while a good step, has little chance of
passing. Fortunately, this trend toward corporatism will cycle around, just
as it did after the public helped the courts finally find their voice and
overrule Swift v. Tyson.\textsuperscript{280} The question remains how long it will take and
how hard it will be to reverse the effects.

\textsuperscript{279} One could argue that the parties must rely on the Department of Justice to protect
society from such wrongs, but when the Department does not pursue actions, the public is
left without the protections specifically built into the statutes by Congress.

\textsuperscript{280} 41 U.S. 1 (1842). Justice Holmes’ opinion that law is based on social need and
convenience rather than being pre-existing or transcendental gained support among legal
scholars and political progressives who urged courts to proclaim that the courts should not
reject state law and create their own federal common law with a pro-corporate bias.
Edward A. Purcell, Jr., The Story of Erie; How Litigants, Lawyers, Judges, Politics, and
Social Change Reshape the Law, in Civil Procedure Stories, 21-78 (2d ed. Kevin M.
Clermont, ed., Thomson West 2008). Unfortunately, almost 100 years elapsed between
Swift and Erie.