An Edifice of its own Creation: The Supreme Court's recent Arbitration Cases

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Thank you to the Law Journal for inviting me here today. I also want to convey greetings from our dean, Greg Mark, who unfortunately cannot be here today. He’s out of town at a national deans’ meeting in sunny California, but he sends his greetings and congratulations on this excellent symposium.

As delighted as I was to be asked to speak to you today, I was also a little nervous. The reason is that I’m not an expert in business or commercial law. I’m a public law person; I teach and write about constitutional and administrative law—the law that deals with the government.

But I do pay a lot of attention to the Supreme Court. I’m an inveterate Court watcher, and the Court has been changing. The Court had the same nine members from 1994 to 2005: a modern record for continuity. But in the last six-plus years, it has welcomed four new members, including a new Chief Justice, John Roberts, so all of us Court watchers have been trying to figure out what kind of Court we have, and what kind of Court this is going to be.

Now, of course, we don’t know that yet. Of course, we don’t fully know what kind of a Court the Roberts Court is going to be, but there is one thing we that we can fairly confident about already: this is a business-friendly Court. Hence the subject of my presentation to this Journal’s symposium back in 2008 where I tried to talk about what kind of business-friendly Court we have—why, and in what ways, is the Roberts Court friendly to business?¹ I gave some tentative answers then, and I must say I think those answers still hold up pretty well four years later. This is a Court, notwithstanding the replacement of Justices Souter and Stevens with Sotomayor and Kagan, that looks pretty much like the one we had four years ago.

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First of all, this is a Court that favors business defendants, particularly in certain categories of cases.\(^2\) Those categories include some pretty specialized ones: for example, business defendants do extraordinarily well when the Solicitor General of the United States files a brief on the same side as the business defendant. That’s kind of a made-up category. But they’re batting ninety percent in cases like that. It’s worth mentioning.

Perhaps more interestingly, business defendants do well in cases involving pleading standards (we all know about the *Twombly* case,\(^3\) for instance). And they do well in cases seeking to reduce large punitive damage awards. They also do pretty well in cases where they’re arguing for the preemption of state law by federal law, and that’s a subject I’ll come back to later on in my talk today.

But none of these categories is as important as the one I want to talk about today, and that is the Court’s cases concerning arbitration. Now, if you asked members of the general public, “What’s going on in the Supreme Court that has to do with businesses, with corporations?”, they would either stare at you uncomprehendingly, or they would say something like “*Citizens United.*”\(^4\) That’s the case that everybody knows about and it’s obviously an extremely important case, especially for businesses that wish to enter the political arena, to spend money in support of political campaigns, or pool their money with other like businesses in such an effort. And it’s true that campaign finance is important, and it is an area in which the Court has come down heavily in favor of the interests of corporations, usually by narrow five-to-four margins.

But I think the arbitration cases are arguably even more important. And not only are they more important but they’ve flown underneath the radar. Nobody is talking about these cases. After *Citizens United*, I think the business case that most people talk about the most is probably the *Wal-Mart* class action case,\(^5\) another extremely important case, but I would say that that case, too, is not as significant as what the Court has been doing in the area of arbitration. The *Wal-Mart* case—we’ll see how it plays out in the lower courts. It appears to severely cut back on the ability of certain kinds of plaintiff classes using certain kinds of legal theories to get their classes certified.

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But as I'll describe later, the *AT&T Mobility v. Concepcion* case, which came down right around the same time as *Wal-Mart*, essentially rules out—or at least allows corporate defendants, through drafting of arbitration agreements, to rule out—an entire category of dispute resolution involving classes.

So let's talk a little bit about arbitration now. As I said at the beginning, I'm no commercial law expert. I'm sure that several of the practitioners who have joined us today have been involved in arbitrations of one kind or another, either as lawyers or perhaps even as arbitrators. For the benefit of the students here who may not be as familiar, let me just say a word or two about what arbitration is.

Arbitration is a mode of so-called alternative dispute resolution in which parties "agree"—we'll talk later about the way in which they agree or to the extent to which we can say that they agree—to be bound by the decision of a private person, an arbitrator, as opposed to a judge. Arbitration is very widespread. It is increasingly used in disputes dealing with labor-management relations under collective bargaining agreements, employment outside of the union context—employment discrimination, for example—as well as claims brought by borrowers, investors, and consumers.

Arbitration has its supporters and its critics. Supporters point to several real benefits of the arbitral forum: arbitration tends to be quicker and less costly than litigation. The setting is relatively informal and not as adversarial as the courtroom setting, and arbitrators are, or ought to be, experts. And as experts we might think that they can be counted on to reach decisions that are better or more well informed than those that might be reached by a jury or by a generalist judge.

So those are some of the benefits of arbitration, but it also has its critics, and the critics point to several disadvantages. The arbitrator is a private party who often comes from the same industry as the defendant; many arbitration agreements provide that the arbitrator is paid by the parties; the proceedings are not public; strict rules of evidence are usually not applied; discovery is usually limited, sometimes nonexistent or close to nonexistent; and the grounds for attacking an arbitral award on subsequent judicial review are usually highly restricted.

Perhaps the most trenchant critique that's often lodged against arbitration, particularly consumer arbitration as well as some employment arbitration, is that the arbitration agreement is often a part of a form contract in small print, a kind of take-it-or-leave-it form contract—

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what we used to called in law school a contract of adhesion. It’s a condition. It’s a condition of taking the job or buying the product. You take off the packaging and there’s the arbitration agreement folded up neatly in the corner of the packaging of the thing that you’ve already bought. We’ll come back later to that element of the critique of arbitration in some detail.

I’m going to focus on four cases handed down by the Supreme Court in just the last couple of terms since 2010. But first I need to lay out some background, and the most important piece of the legal background is the federal statute that forms the fulcrum of all of these cases: the Federal Arbitration Act, or the FAA. The Federal Arbitration Act’s central provision is § 2, and it says,

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

The rest of the statute requires courts to compel arbitration on the motion of either party to the agreement, and to stay litigation pending arbitration.

A couple of interesting things to note about the FAA. First, and this may be of interest only to federal jurisdiction wonks like me, it’s not clear that it was meant to apply in state courts. The Supreme Court held that it did in a 1984 case called Southland over a strong dissent by Justice O’Connor, joined by then-Justice Rehnquist. Since then, Justice Scalia has written that if he ever gets four people to agree with him, he’ll vote to overturn that holding and hold that the FAA only directs its mandates to federal courts.

The only one who consistently holds to this position nowadays is Justice Thomas. He has voted in every case involving state court proceedings to hold that the FAA does not apply, but he’s been completely alone in that. I also think he’s probably right. The text of the FAA seems to be directed exclusively to federal courts. The text

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8. Id. § 2 (emphasis added).
of the FAA makes several references to federal courts, not state courts. At the very least, it would be odd—and the Supreme Court noted the oddity all the way back in 1984 in *Southland*—for Congress to oust state courts of jurisdiction over a wide range of cases without providing any substantive federal rule of decision and without creating federal question jurisdiction. But that’s what the Supreme Court has interpreted the FAA to do.

Second point about the FAA: it was enacted a long time ago, in 1925. Why is that important? Well, as my constitutional law students are tired of hearing about at this point in the semester, the prevailing understanding of Congress’s legislative power under the Commerce Clause was much narrower in 1925 than it is today. Recall that the FAA requires courts to honor arbitration clauses arising out of transactions “involving commerce.”13 In 1925, Congress could not have had a broad understanding of what was meant by transactions involving commerce.

The best understanding, I think, of the FAA is that Congress was contemplating arbitration in reference to business-to-business transactions. The paradigm case would be one in which a national trade association wants to use its own arbitration system to settle disputes among its members without interference from federal courts. I think that the best historians of this statute have concluded that Congress’s intent in 1925 was just that, to allow industries to regulate themselves, to resolve factual disputes that come up according to the customs and usages of the industry in private arbitral settings, without interference from a *Lochner*-era federal judiciary that was hostile to this new private resolution forum called arbitration.14

So, Congress in 1925 doesn’t appear to have had in mind mandatory arbitration clauses in adhesive contracts between businesses on the one hand and consumers on the other, for example. And, indeed, in a 1953 case called *Wilko v. Swan*, the Supreme Court held that the FAA did not apply to a case in which a customer sued his brokerage firm under the federal securities laws.15 The Court said that “the Securities Act was drafted with an eye to the disadvantages under which buyers labor.”16 In other words, because buyers and sellers in the securities markets did not always have equal bargaining power, it would be inappropriate to read the FAA as forcing the buyer into an arbitral fo-

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16. Id. at 435.
rum. The Court in *Wilko* also had some critical words for the arbitration process, noting that arbitrators didn’t have to explain their rulings, or keep a complete record, or comply with rules of evidence.

Fast-forward thirty-five or so years. In 1989, the Court overruled *Wilko v. Swan*, and held that there is no public interest exception to the FAA—that the FAA mandates observance of arbitration clauses regardless of the relative bargaining power of the parties.\(^{17}\) The FAA, said the Court, reflects a general congressional policy to favor arbitration, or at least to treat arbitration agreements like any other contract. What had changed in those 35 years? I’m not quite sure. Obviously the personnel of the Court had changed, and I think the justices had dropped some of their hostility to arbitration. I also think arbitration had changed. It had become more professionalized, more judicialized. Lawyers were in charge of arbitration, much more than they were back in the ’20s or the ’50s.

That’s the background. Now let’s turn to the four recent cases, and let’s start with possibly the most bizarre holding of them all, the 2010 case of *Rent-A-Center v. Jackson*.\(^ {18} \) This case is all about a key issue in this whole arbitration context: who gets to decide? Can a judge determine the threshold legal issues in a dispute, or must they go to the arbitrator along with the rest of the case? The Supreme Court has had a whole series of who-gets-to-decide cases in the last decade or so and almost all of them have held that the arbitrator gets to decide. *Rent-a-Center* is just the latest and, in my view, the most appalling of them all.

Jackson was an employee of Rent-A-Center. He brought a discrimination claim against his employer under 42 U.S.C. § 1981. His employment contract contained a mandatory arbitration clause. Jackson claimed the arbitration agreement was unconscionable under state law. It was Nevada state law, if I’m remembering correctly, and he claimed a whole series of substantive grounds of unconscionability. They’re not really relevant to our discussion.

The question then arose: Who gets to decide whether the arbitration clause is, in fact, unconscionable and therefore unenforceable? The agreement itself in *Rent-A-Center* provided that the “Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable,”\(^ {19} \) and that’s fairly standard language for arbitration agreements. The


\(^{19}\) Id. at 2777.
problem, of course, is that this language was part of the very "agreement" that Jackson claimed was unconscionable and therefore void to begin with. Jackson was right: if we are going to have a doctrine of unconscionability at all, we can't allow parties to contract around it in an unconscionable contract. In view of this problem, the Ninth Circuit held that the issue of unconscionability was for the court, not the arbitrator, to determine.\(^{20}\)

In a 5-4 decision written by Justice Scalia—and he's going to turn out to write three out of the four decisions that I'll discuss today—the Supreme Court reversed, holding that the issue of unconscionability was for the arbitrator to decide in this factual setting.\(^{21}\) Now, as we've said, there's an obvious problem with this solution: under the Court's holding, the arbitrator is put in charge of determining the enforceability of the very agreement that gives him power to arbitrate. Perhaps such problems are unavoidable: as my students know, courts have to decide on their own jurisdiction all the time, such as when they make decisions about standing. So what's wrong with arbitrators doing the same thing?

But in the arbitration context there's an additional problem, as David Schwartz of the University of Wisconsin Law School has pointed out in his writing on the subject.\(^{22}\) We can't forget that the arbitrator gets paid to arbitrate disputes. If he voids an arbitration agreement as unconscionable, he loses an opportunity to get fees, sometimes substantial fees. Now, I don't mean to cast any aspersions on the integrity or good faith of any individual arbitrator by pointing this out. (My mother is an arbitrator.)

The point is that there's just a basic structural conflict here. It's like the wonderful old case of *Tumey v. Ohio*.\(^{23}\) The mayor of North College Hill, Ohio, also sat as the presiding judge in cases involving alcohol-related offenses allegedly committed by citizens of the town.\(^{24}\) (*Tumey* is a case from the Prohibition era.) So the mayor is also the judge. Now, that's problematic, right? I mean, maybe in a small town you can't do otherwise, but it's worse than that.

So here's how things worked in North College Hill: If a person was found guilty, a fine was assessed, and the mayor got to keep a portion of the fine! The Supreme Court said sorry, this violates Due Process.

\(^{24}\) Id. at 515–16.
Now, arbitration is a private proceeding—the Due Process clauses don’t apply—but the structural conflict is still there. Is it really appropriate for arbitrators to be determining the enforceability of arbitration clauses?

Back to Rent-A-Center v. Jackson. Don’t worry, says Justice Scalia. There’s still a way for parties to challenge arbitration clauses as unconscionable and to do so before a judge, not before the very arbitrator who they think lacks authority. The way to do it, and this is what Rent-A-Center says—and this is not a joke—the way to do it is to direct your objection to the particular sentence in the arbitration agreement that purports to assign this sort of challenge to the arbitrator himself, the so-called delegation clause, and Jackson didn’t do that. Of course he didn’t. He didn’t know he had to do that, and therefore, his challenge was improper.

As I was reading Rent-A-Center, I thought, what if there were a line in the arbitration agreement that said that the arbitrator would handle all challenges to the delegation clause? Would parties then have to object in court specifically to that clause—what would we call it, the meta-delegation clause? I’m reminded of the old children’s rhyme based on a poem of Jonathan Swift:

Big fleas have little fleas,
Upon their backs to bite ’em,
And little fleas have lesser fleas,
and so, ad infinitum.25

Let’s get real here. The arbitration agreement was drafted by Rent-A-Center’s lawyers or they copied and pasted it from somebody else’s contract that was drafted by their lawyers. It was a condition of Jackson’s employment. All Jackson did was sign a form contract so he could get a job. He might not have had a lawyer, or a very sophisticated one at any rate. He’s going to have to object to a particular line in the arbitration agreement if he wants to get in front of a judge? In practice, in many cases, arbitrators will now be in charge of determining whether the arbitration agreements that give them authority are valid or not, subject only to judicial review after the fact, which is of course quite deferential and may come too late to be of much use to the employee.

Along similar lines, let me briefly discuss a case from just last month called CompuCredit.26 A group of plaintiffs claimed that they were

defrauded by a so-called credit repair organization that claimed its card would help them rebuild their credit. The plaintiffs claimed, *inter alia*, that that was all a hoax and they were charged exorbitant fees and so forth. The small print in their credit card application contained a binding arbitration clause. They sued the credit card company under a federal law called the Credit Repair Organizations Act (CROA).\(^\text{27}\)

The CROA requires credit card companies like the defendant to issue a disclosure to the consumer that says, “You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act.”\(^\text{28}\) The Act also contains a provision that says consumers cannot waive the protections of the Act.

The plaintiffs, quite sensibly, argued that they had a “right to sue,” just as the required disclosure told them they had. In an 8-1 decision written by Justice Scalia, the Court said, “No you don’t.”\(^\text{29}\) And this is also not a joke: The Court said the CROA doesn’t give consumers a “right to sue”—it just gives them a right to certain disclosures, a right to be *told* that they have a right to sue.\(^\text{30}\) Now, that’s absurd, and I think Scalia must recognize that, because then there are several paragraphs afterwards that say basically that even if you have a right to sue, “right to sue” doesn’t necessarily mean to sue in a court; it also includes the right to arbitrate. And neither that language, “right to sue,” nor the Act’s non-waiver provision was clear enough to overcome the FAA’s mandate that arbitration agreements be enforced.\(^\text{31}\) “Right to sue,” in other words, could be understood to mean “right to arbitrate.”

That same basic issue—how much clarity is needed to overcome the FAA’s presumption in favor of arbitration—was at the heart of my next case, *Stolt-Nielsen* from 2010.\(^\text{32}\) *Stolt-Nielsen* arose out of a shipping transaction between the plaintiff, AnimalFeeds, an animal feed supplier, and the defendant, Stolt-Nielsen, a large shipping company. The plaintiff used a standard-form contract called a “charter party” that contained an arbitration agreement. No unequal bargaining power here: both parties were large commercial operations, presumably sophisticated and well-lawyered. Indeed, it was the plaintiff’s charter party that contained the arbitration agreement.

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28. *Id.* §1679(c).
30. *Id.* at 669–70.
31. *Id.* at 671–73.
AnimalFeeds and other customers wanted to bring antitrust price-fixing claims against Stolt-Nielsen. Under the contract, those claims had to be submitted to arbitration. Everyone agreed on that. The question in the case was whether the arbitration could proceed on a class-wide basis as opposed to an individual basis—whether it could be class-wide as opposed to merely bilateral arbitration.

Class arbitration may sound like an unwieldy construct, but it has become pretty well established in recent years, especially in California. I'm informed that class arbitration, in California, at any rate, sometimes occurs on a so-called “hybrid” basis, where the arbitrator deals with the merits—the common issues of law and fact—and a judge deals with certification, and opt-out, and other threshold issues designed to protect the rights of absent class members, and somehow it all works.33

Anyway, in Stolt-Nielsen, the parties agreed to submit the question of whether class arbitration was appropriate to a panel of arbitrators. The panel decided that the agreement permitted class arbitration, and ultimately the Second Circuit agreed.34

In a 5-3 decision—Justice Sotomayor did not participate—written by Justice Alito, the Supreme Court reversed, holding that class arbitration cannot be imposed on the parties if the parties did not clearly agree to it in the arbitration agreement.35 The Court first said the arbitration panel decided that class arbitration was just a good idea. It was using its notions of sound policy the way a common law court might do, but the problem, said the Court, is that arbitrators shouldn’t do that. They have to look to the language of some agreement or statute in order to find authority to proceed on a class basis.

The Court went on to say that the FAA forbids approval of class arbitration in the face of a silent agreement, because the dominant thrust of the FAA is to ensure that arbitration agreements are enforced “according to their terms.”36 The foundational principle of the FAA, Justice Alito said, is that arbitration is a matter of consent.37 Keep that idea of consent in mind as we move on. So Stolt-Nielsen, the highly sophisticated multinational corporate defendant, gets out from under a class arbitration because that mode of arbitration, says the Court, cannot be imposed on an unwilling party.

36. Id. at 1773.
37. Id.
Justice Ginsburg dissented, joined by Justices Stevens and Breyer, largely on narrow grounds, arguing that the Court should have allowed the arbitration to run its course before interfering, which strikes me as kind of strange. That would mean a lot of wasted time and money, only to overturn everything at the end. She also hinted at a question never addressed by the majority: is it possible that by denying a plaintiff the ability to proceed on a class basis, the Court could effectively prevent the plaintiff from seeking any meaningful relief?

And that question is front and center in my fourth and final case, AT&T Mobility v. Concepcion, probably the most important case in the series, and definitely, I think, the most important of these latest four. The Concepcions and other plaintiffs claimed that AT&T had violated California consumer protection law by marketing a cell phone as “free” and then charging them $30 in sales tax. The theory was that the company should either disclose that there was tax or swallow the tax as part of the promotion. They filed a class action in federal court in California and AT&T, of course, moved to compel arbitration.

The phone had come packaged with a form contract that included an arbitration clause. In case you are curious about what these contracts look like, the Harvard Law Review has published a copy of Judith Resnik’s cell phone contract. She is a professor at Yale Law School. Anyway, the Concepcions’ contract says this: “YOU AND AT&T AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING.” I like that: “Each may bring claims against the other.” That’s a poignant touch, isn’t it? So if AT&T decided to sue you or any of its fifty-four million other customers, it would not be able to join in a plaintiff class with T-Mobile, Verizon, or whatever. There’s a lot of neat stuff in here. There’s also a jury trial waiver. What does it say? If for some reason these arbitration requirements don’t apply, you and we—there “we” go again—each waive to the fullest extent allowed by law any trial by jury and a judge will decide any dispute instead. So that’s the fallback, no juries.

38. Id. at 1777 (Ginsburg, J. dissenting).
42. Id.
Also in the Concepcions’ arbitration agreement was an inseverability clause, sometimes called a “blowup” provision, that said that if the ban on class claims were held to be unenforceable, the entire arbitration agreement would be null and void. This suggests that if AT&T were forced to defend against a class, it would rather litigate a class action than face class arbitration. I question why that is. I’m not quite sure.

But anyhow, the plaintiffs argued, and the Ninth Circuit agreed, that the agreement’s ban on class arbitration was unenforceable. How come? Well, in an earlier case called Discover Bank, the California Supreme Court had held that contractual bans on class actions were unconscionable when they appeared 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. That was the Discover Bank rule.

That sort of makes sense. It’s a little bit convoluted, but the gist of the Discover Bank rule in California was that if you’ve got unequal bargaining power and lots of small claims, it’s unconscionable—it’s impermissible—to force the plaintiffs to litigate individually. They’ve got to be allowed to litigate or arbitrate as a class. There’s nothing about the Discover Bank rule that singles out arbitration, class arbitration, for special treatment as opposed to class litigation.

Now, the technical legal question in AT&T Mobility was whether the Discover Bank rule was preempted by the FAA. But in a larger sense—and this couldn’t be more important in terms of shaping the relationship between businesses and consumers—the question was whether companies can insulate themselves from class liability (which means, in cases involving very small claims, effectively insulating themselves from all liability) by inserting language in a take-it-or-leave-it contract that nobody reads.

The Supreme Court’s answer to that question was yes. In a 5-4 decision written by Justice Scalia, the Court held that the Discover Bank rule stands as an obstacle to the accomplishment of the purposes of the FAA, and is therefore preempted. This in spite of the fact that the FAA, as I mentioned earlier, requires enforcement of arbitration

44. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." \(^{45}\)

A few observations about \textit{AT&T}: First, Justice Scalia's interpretation of the FAA and its dominant purposes is extremely tendentious. He argues, essentially, that individual, bilateral arbitration is so superior to class arbitration that a preference for the former as against the latter must be understood as fundamental to Congress's purposes, even though no one had ever heard of class arbitration in 1925. And I thought Scalia was an originalist.

The main reason for the superiority of individual to class arbitration, says Scalia, is that individual arbitration is more efficient. Except, as Justice Breyer points out in his dissent, it's not: "[A] single class proceeding is surely more efficient than thousands of separate proceedings for identical claims." \(^{46}\)

The real choice in cases like this, anyway, is not between class treatment and individual treatment—it's between class treatment and nothing, because, to quote Judge Posner, "only a lunatic or a fanatic sues for $30." \(^{47}\)

Second point about \textit{AT&T}: the Court majority makes much of the idea that the FAA prohibits discrimination against arbitration: that is to say, arbitration contracts have to be on the same footing as any other kind of contract. But as I've already suggested, the \textit{Discover Bank} rule that the Court struck down in \textit{AT&T} did not discriminate against arbitration. It said that class treatment must be allowed whenever certain facts are present, whether that be class litigation or class arbitration. So there was nothing at all about the California Supreme Court's approach that discriminated against arbitration contracts in particular, but the Court said that there was. What \textit{AT&T} really does is discriminate \textit{in favor} of individual arbitration, making it a special favorite of the law. That doesn't come from the FAA; the Court just made it up. To quote an earlier dissenting opinion by Justice O'Connor, "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation." \(^{48}\)

Third point about \textit{AT&T}: it is interesting, to me, anyway, that Justice Thomas joined the majority, because he has been an outspoken critic of the whole concept of implied preemption, that is, the idea that

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47. \textit{Carnegie v. Household Int'l, Inc.}, 376 F.3d 656, 661 (7th Cir. 2004).
courts are allowed to look at the purposes of federal law and then figure out which state laws have to fall in light of that premise. So how did he get to his position in AT&T? Well, he wrote a separate and very tortured concurrence arguing that the Discover Bank rule was preempted by the text of the FAA, because the FAA’s saving clause speaks only of grounds for “revocation,” which in his view would only include defects in the making of the agreement—things like fraud and duress—as opposed to defects in the substance of the agreement.49 That argument is, in my view, fairly far-fetched, and proof of that is that it was not made in the briefs by any party to the case.

Final point about AT&T: maybe it’s time to stop treating these small-print, standard-form, take-it-or-leave-it clauses that you have to sign if you want a cell phone plan (from any provider—I mean, it’s not as though AT&T is the only one that has this) as if they were consensual agreements. Maybe they’re more like a commodity that should be regulated.50

Now, the Court isn’t going to do this, and it doesn’t seem to want to let states do it either. Maybe Congress is our only hope. Various versions of an Arbitration Fairness Act have been introduced. Don’t hold your breath.

So those are my four cases. What do they tell us about the Roberts Court and its attitude towards business? Let me suggest three larger implications here. First, they are more evidence of the Roberts Court’s willingness, indeed sometimes eagerness, to hold that state laws and court decisions have been preempted by federal law. Now, that’s interesting because sometimes people have the notion that this is a Court that’s controlled by a conservative majority and that the conservative majority is very interested in federalism, which means devolving power to a more local as opposed to national level. Not so. This is not a Court that is very interested in federalism, at least in nonglamorous cases involving statutory interpretation. Maybe it was at the heyday of the Rehnquist Court, but especially with the replacement of Rehnquist and O’Connor by Roberts and Alito, this is no longer a federalism Court. I think the trend is clear, and there’s a strange pattern to this trend, even in the heyday of the Rehnquist Court’s so-called federalism revolution. The trend is this: the Justices who were most likely to strike down federal laws as exceeding Congress’s authority (these are the conservative Justices—the “Lopez

Five”51) were also the most likely to invalidate state laws as preempted by federal statutes. (The one exception to this pattern is Justice Thomas, who is a pretty consistent federalist.)52 Why such an appetite for preemption? I’m not quite sure. I think some of it has to do with the content of the state laws that are held preempted: they tend to be plaintiff-friendly, consumer-friendly, employee-friendly state laws, which is to say unfriendly to business defendants. I also think this a Court that values uniformity, at least when it comes to the legal environment in which interstate and multinational businesses operate.

Uniformity leads me to my second larger implication. This is a Court that values and practices formalism. Formalism comes in many guises: textualism is one, originalism is often another. Formalism can also manifest itself in a fairly unreflective attachment to the ideal of contractual consent. There is no meaningful consent in a case like AT&T, or really in a case like Rent-A-Center. But, formally, these are contracts, and a contract is a contract. And it’s not just the conservatives who are attracted by this formal ideal: CompuCredit was an 8-1 decision. So why are the Justices formalists? Perhaps the Justices’ formalism is an artifact of the way they were educated, or of the fact that very few of them have real-world experience representing clients, or working in a state-court system—or participating in arbitrations, for that matter.

Third, and perhaps most important, takeaway point: this is a Court that is, in my view, profoundly skeptical about litigation, particularly as a means of social or economic regulation. Litigation is messy; it’s expensive; it’s decentralized; it’s nonuniform; it can produce unpredictable results. So for a Court that for a time featured nine former judges—now it’s eight because Kagan was never a judge—it’s amazing how unsympathetic they are to the whole idea of litigation.

Perhaps by comparison they view arbitration (by which I mean good old-fashioned bilateral arbitration) as tame, domesticated, and civilized. This skepticism about litigation helps explain the series of decisions over the last ten or twelve years, many featuring lopsided vote counts, in which the Court has allowed arbitrators to decide important threshold issues rather than judges—a series that reached its absurd climax in Rent-A-Center. The Justices, I would say, view the choice between litigation and arbitration as simply a choice of forum, and they generally prefer the arbitral forum.

What I've tried to demonstrate today is that the choice is much more than that—it is a substantive as well as a procedural choice, a choice that is increasingly imposed by businesses on consumers and employees, and increasingly ratified by a business-friendly Court.
STEVEN GREENBERGER: Hello, everyone. I just have some brief comments following David Franklin's insightful remarks.

The U.S. code has 50 titles in it. It covers everything from A to Z. Literally it starts with the AAA Farm Relief and Inflation Act and ends with the Zuni Indian Water Rights Settlement Act of 2003.

Within all of that vast statutory corpus, in the eyes of the current Supreme Court, arguably one statute, and indeed one provision of one statute, stands above all others. That super-statute is Section 2 of the Federal Arbitration Act. And it reigns supreme even over statutes enacted decades later.

When the FAA was enacted in 1925, its purpose was to reverse the anti-arbitration bias that had theretofore been exhibited by the judiciary. Judges were of the mind that arbitration was not "real" dispute resolution. Arbitration was overseen by people not as well schooled in the law; the rules of evidence and procedure did not apply, etc. In enacting the FAA, Congress effectively said that arbitration is to be taken seriously and arbitration clauses in contracts need to be enforced.

Recently, however, as David Franklin has described, the Supreme Court has written its own statute. One additional seminal case worth noting, in addition to those David mentioned, is Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. In that case, Mitsubishi, which manufactures cars, among other things, had a contract with Soler to distribute its cars in Puerto Rico. The contract contained a fairly standard arbitration clause. The clause said essentially that all disputes and controversies arising pursuant to the contract had to be arbitrated.

A dispute arose between the parties and Soler filed suit against Mitsubishi, claiming that Mitsubishi violated the Sherman Act. The arbitration clause did not say anything about arbitrating statutory claims. Nevertheless, the Supreme Court held that because the statutory claim bore some relationship to the dispute, it had to be arbitrated. Remember the principle that an arbitration clause applies even to matters it does not explicitly mention when we turn to the topic of classwide arbitration.

Following Soler, the Court decided that all federal statutory claims were subject to arbitration. In other words, even when Congress had conferred rights and provided explicitly for their judicial enforcement, arbitration was compulsory.

The key substantive areas where the principle of "arbitration supremacy" now applies, which reaches many more people than even the antitrust and securities laws, are employment law and consumer law. Today, it is standard practice for employers to include an arbitration clause in their employee handbooks. Often, the clause consists of no more than a single sentence to the effect that "any dispute that arises with respect to your employment must be arbitrated." As a result, employees lose the right to go to court to complain about violations of their federally guaranteed rights, especially violations of the anti-discrimination laws.

The same thing now is true with respect to consumer contracts as well. David [Franklin] described those cases in detail, so I won't describe them again.

But what about any sort of contractual defenses? In particular, what about unconscionability? You all learn about unconscionability in Contracts. I am here to tell you to forget what you learned. Contractual defenses such as unconscionability do not matter in this context.

The Supreme Court so held in *Carnival Cruise Lines, Inc. v. Shute.*55 Some of you may remember that case from first-year Civil Procedure. The Shutes wanted to take a cruise on Carnival Cruise Lines. They lived in Washington state and the cruise was along the Mexican Riviera. While on the cruise, Mrs. Shute slipped and fell. She filed suit in Washington state where she lived. Carnival Cruise Lines moved to dismiss the case based upon a provision in the ticket of passage that said that suit could only be brought in a court in Florida (where Carnival Cruise Lines is headquartered.)

Now from Carnival's perspective, such a clause makes sense. It understandably wants to concentrate litigation against it in its home forum. The problem, however, is that the forum selection clause was in no sense actually bargained for. It was contained in the ticket of passage, which Mrs. Shute did not even receive until after she had paid for the cruise. So the transaction is already complete. Moreover, the forum selection clause is buried in Paragraph 19 of the ticket and is written in print so fine that, at my advanced age, I cannot even read it. Thus, if ever there were a case of unconscionability, this would seem to be it. Yet, the Supreme Court says none of this matters; the forum selection clause must be enforced.

So the lesson here is that, where consumers are concerned, nothing is unconscionable.

Anything goes. Unconscionability is simply not going to be recognized as a defense. If you represent corporations, you are virtually guilty of malpractice if you do not counsel your client to insert an arbitration clause in an employment handbook or a consumer contract. And of course you supplement that with a class waiver, so that the arbitration can only be individual.

What does that mean as a practical matter? It means that wrongdoing is going to go unpunished. Let me give you two examples. The first involved my uncle. Like many Americans, he had a mortgage on his house. After regularly mailing his monthly payments for many years, out of the blue, he received a letter in the mail from his mortgage company that says, "Our costs of processing your mortgage have gone on up. It has become more expensive for us to process your payments. Therefore, we are adding a ten dollar monthly charge to your mortgage payment for the balance of the term of your mortgage." Presumably, the mortgage company sent this letter to all of its customers.

How utterly outrageous! A mortgage is a contract. It spells out its terms. Does the mortgage company have any right to suddenly demand more money? Of course not. So what happened? Unfortunately my uncle did not call me because I would have filed a class action on his behalf. This event occurred long ago when there were no arbitration clauses or class action bans in consumer contracts, and I am confident I could have obtained a substantial recovery. My uncle, however, wrote the mortgage company a letter and refused to pay the additional charge. (Too bad for me—I could have used the attorney's fees from a class action!) But presumably a lot of people did pay. But now, let's assume that a bank or mortgage company does the same thing today. What would happen? Nothing. Why? Because the mortgage would have an arbitration clause with a class action waiver. So any claim would only be brought on an individual basis in arbitration. Will any lawyer take such a claim for $10? Of course not.

Let me give you another example. This is perhaps my favorite, because the abuse is so glaring. As you know, many bank accounts have a minimum balance requirement, i.e., in order to avoid the imposition of various fees, the account holder has to maintain a certain minimum balance. Banks also commonly impose a fee for bouncing a check, not that I would know anything about that, of course.

Here's what happened. A guy writes a check for more than he has in his account. The bank will refuse to honor the check because he has insufficient funds. The bank then levies a penalty. That seems
cool. The penalty was disclosed beforehand and the guy did not have
to write a bad check.

But this is not all the bank does. The bank also claims that the guy
fell below the minimum balance when he wrote the check for more
than was in the account. But how can that be? The bank didn't honor
the check, so the money was never taken out of the account. Does the
bank need to fear that it will be sued for its conduct? Not based upon
what we have been saying. The bank's lawyers undoubtedly told it to
insert an arbitration clause with a class action waiver in the account
documents. Because no lawyer will bring a case solely on behalf of an
individual under these circumstances, there is financial disincentive
for the bank not to impose the fee.

So here is my bottom line as to what is going on with these arbitra-
tion cases. Consumer rights essentially are being done away with in
so-called negative value suits, i.e. where the value of the cost of pursu-
ing the claim exceeds the value of the prospective recovery. If you
cannot aggregate negative value suits, there is no point in bringing
them.

One footnote, though, about the Concepcion\textsuperscript{56} case, which may
raise a sliver of hope. The arbitration clause in the Concepcion case
did have some wrinkles in it that arguably justified the class action
waiver. AT&T agreed to pay double the attorneys' fees and a $7,500
bonus in the event that the consumer prevailed on a claim. Thus, it
could be argued that there might have been sufficient incentive for an
individual lawyer to go ahead and pursue a claim. And, in the absence
of such an additional incentive, it might be argued that the class action
waiver was not enforceable because otherwise the statute would go
unenforced. But the Court, although it quotes that provision, does
not really rest its holding on it, and it seems very unlikely the Court
would have decided the case differently if the provision were absent.

So from where I sit, bad news. Consumer class actions are essen-
tially dead. And with the death, instances of corporate abuse will only
increase.

\footnote{AT&T Mobility, LLC v. Conception, 131 S. Ct. 1740 (2011).}