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Is Green Tree 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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Is Green Tree 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**

ANDREA DONEFF*

TABLE OF CONTENTS

Introduction	64
I. History of the FAA and Policy Arguments	68
A. Initially, the Supreme Court Protected Individuals More than Businesses	69
B. Increasingly, the Supreme Court Enforced Business-to-Business Arbitration Agreements	71
C. Shortly After Emphasizing the Policy in Favor of Enforcing Arbitration Clauses, the Supreme Court Started Enforcing Arbitration Clauses Requires of Individuals by Businesses	74
II. Some Courts Protected Individual or Statutory Rights	77
A. Unconscionability	78
B. Vindication of Rights Theory	81
III. Limiting Policy Arguments	83
A. The Court Rejected the Policy Behind Unconscionability	88
B. Does <i>Concepcion</i> Only Apply to State Law Defenses, or Should it be Read to Apply to Public Policy Defenses Such as Vindication of Federal Statutory Rights?	91
C. Post- <i>Concepcion</i> Cases Debate the Effect on Statutory Rights and Public Policy	95
IV. Will Public Policy Arguments Continue to be Viable to Invalidate or Refuse to Enforce Arbitration Clauses?	99
A. Is the Supreme Court Federalizing Arbitration?	101
1. The Court is Clearly Not Allowing States Rights under a Theory of Federalism	101
2. Could the Court Instead Be Encouraging the Creation of a Federal Common Law of Arbitration?	104

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64	<i>OHIO NORTHERN UNIVERSITY LAW REVIEW</i>	[Vol. 39]
	B. Instead, the Court Appears Simply to be Forcing Parties to Arbitrate if the Contract Says They Must	106
	C. What Should be Done to Overcome the Hurdles?	108
	Conclusion	112

INTRODUCTION

There can be little doubt that the Supreme Court of the United States' 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.¹ 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.² 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.³ Litigation between businesses was increasing, and arbitration offered a faster, cheaper, and more expert method for resolving those disputes.⁴ When more individuals started to bring lawsuits against businesses, businesses started drafting

1. See *Compucredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011); *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010).

2. Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 OR. L. REV. 729, 751 (2012).

3. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-307 (2012)).

4. Jean R. Sternlight, *Panacea Or Corporate Tool?: Debunking The Supreme Court's Preference For Binding Arbitration*, 74 WASH. U. L.Q. 637, 645 (1996) [hereinafter Sternlight, *Panacea*].

contracts that required arbitration of anticipated disputes.⁵ Historically, the courts were more protective of individuals than of businesses engaged in arms-length business transactions.⁶ Over time, though, it became clear that courts believed that the FAA required enforcing arbitration agreements involving either individuals or businesses or both.⁷

Unfortunately, it became clear pretty quickly that arbitration did not always provide the same benefits to one party as it did to the other.⁸ Litigation has built-in protections to try to level the playing field.⁹ Arbitration, as a creature of contract, does not.¹⁰ 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.¹¹

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.¹² The party suing often has less information than the party being sued, so discovery can be key to a successful lawsuit.¹³ The quicker timetable to an arbitration award, which has great advantages, provides the party with less information, less time to investigate, and less time to gather information and witnesses.¹⁴ 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.¹⁵

Perhaps most importantly, arbitration has an impact on the greater whole, not just on the parties to the specific arbitration. It does not create

5. Jean R. Sternlight, *Rethinking The Constitutionality Of The Supreme Court's Preference For Binding Arbitration: A Fresh Assessment Of Jury Trial, Separation Of Powers, And Due Process Concerns*, 72 TUL. L. REV. 1, 5 (1997).

6. Sternlight, *Panacea*, *supra* note 4, at 653.

7. *Id.* at 660.

8. *Id.* at 696.

9. *Id.* at 638-39.

10. *See id.* at 637-40.

11. *See* Sternlight, *Panacea*, *supra* note 4, at 637-40.

12. *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).

13. *See* Sternlight, *Panacea*, *supra* note 4, at 659.

14. *See id.*

15. *See generally* Nancy A. Welsh, *What Is "(Im)Partial Enough" In A World Of Embedded Neutrals?*, 52 ARIZ. L. REV. 395 (2010). In fairness to arbitrators everywhere, I do not believe that arbitrators intentionally skew results. The arbitrators I know are all scrupulously ethical. The concern, however, is that 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 *id.*

legal precedent, is often confidential, and is nearly impossible to appeal.¹⁶ 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 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.¹⁷ And now, given the Supreme Court's holdings that essentially do away with all class actions in arbitration, this last problem becomes more apparent.¹⁸ 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.¹⁹ 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.²⁰

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.²¹ The Supreme Court invalidated California's policy against enforcing class action waivers in arbitration clauses under certain circumstances.²² 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.²³ These decisions, along with others from the past several terms, lead one to wonder whether the policy of not enforcing clauses where a party cannot vindicate statutory rights, as provided by *Green Tree Financial Corp.-Alabama v.*

16. See Sternlight, *Panacea*, *supra* note 4, at 637-40.

17. *Id.* at 680.

18. *Concepcion*, 131 S. Ct. at 1751-53; *Stolt-Nielsen*, 130 S. Ct. at 1776.

19. See Sternlight, *Panacea*, *supra* note 4, at 680.

20. *Id.* 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, 1192 (2011).

21. *Concepcion*, 131 S. Ct. at 1750; *Stolt-Nielsen*, 130 S. Ct. at 1767-68; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

22. *Concepcion*, 131 S. Ct. at 1750.

23. *Stolt-Nielsen*, 130 S. Ct. at 1763.

Randolph,²⁴ is still good law. In *Green Tree*, 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 the plaintiff with no forum in which to vindicate his rights.²⁵ A reading of the Supreme Court's arbitration decisions in the 2010 and 2011 terms, especially from *AT&T Mobility LLC v. Concepcion*²⁶ forward, leads one to wonder whether the Court has reversed *Green Tree* 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?²⁷ 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 likewise refuse? 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 that seems to be 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 it will examine refusals to enforce arbitration decisions that bear on the issue of enforcement of the clause itself.²⁸

24. 531 U.S. 79, 92 (2000).

25. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. at 92. 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., *In re Am. Express Merchs. Litig. (Amex I)*, 554 F.3d 300, 315 (2d Cir. 2009).

26. 131 S. Ct. 1740 (2011).

27. See *infra* Part II.B; see also *Concepcion*, 131 S. Ct. at 1747-48; *Mitsubishi Motors*, 473 U.S. at 625.

28. See, e.g., *E. Assoc. Coal 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 Jonathan A. Cohen, *Grievance Resolution and the System Board of Adjustment*, ALI-ABA Course of Study, *Airline and Railroad Labor and Employment Law: A Comprehensive Analysis 337* (June 9-11, 2011), available at http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/CS051_

I. HISTORY OF THE FAA AND POLICY ARGUMENTS

Arbitration has existed in various forms for centuries.²⁹ 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 businesses trying to find a quicker, more efficient way to resolve business-to-business disputes in our increasingly industrialized society.³⁰ It was reenacted and then codified as Title IX of the United States Code in 1947.³¹ 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.”³²

Initially, though, the Supreme Court was reluctant to enforce all arbitration agreements.³³ 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.³⁴ The Court noted that the Sherman Antitrust Act was enacted “to prevent not the mere injury to an individual which 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”³⁵ The Court was concerned that the arbitration agreement would allow a party to “unreasonably suppress normal competition.”³⁶ 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 for the greater good.³⁷

chapter_18_thumb.pdf. *But see Stolt-Nielsen*, 130 S. Ct. at 1758 (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).

29. DOUGLAS H. YARN & GREGORY TODD JONES, *ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA* § 9:4 (3d ed. 2006); Sternlight, *Panacea*, *supra* note 4, at 644.

30. John C. Norling, *The Scope of the Federal Arbitration Act’s Preemption Power: An Examination of Import of Saturn Distribution Corp. v. Williams*, 7 OHIO ST. J. ON DISP. RESOL. 139, 141 (1991).

31. Federal Arbitration Act, ch. 392, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1-307 (2006)).

32. *Gilmer*, 500 U.S. at 24; *Mitsubishi Motors*, 473 U.S. at 624.

33. *See Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43 (1930).

34. *Id.* at 43-44.

35. *Id.* at 42 (quoting *Wilder Mfg. Co. v. Corn Products Co.*, 236 U.S. 165, 174 (1915)).

36. *Id.* at 43.

37. *See infra* Part I.

A. 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.³⁸ 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.³⁹ The Court made a clear distinction in *Wilco v. Swan*,⁴⁰ where it refused to enforce a pre-dispute mandatory arbitration clause against a securities broker for claims under the Securities Act.⁴¹ The Court 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.⁴²

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.⁴³ 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.⁴⁴ It was also concerned that judicial enforcement would almost require de novo review of the substantive claims.⁴⁵

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

38. See *Wilco v. Swan*, 346 U.S. 427, 438 (1953); see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

39. See *Alexander*, 415 U.S. at 52-60; *Wilco*, 346 U.S. at 438.

40. 346 U.S. 427 (1953).

41. *Id.* at 438.

42. See Securities and Exchange Commission Authorization Act of 1987, Pub. L. No. 100-181, 101 Stat. 1249 (1987) (codified in scattered sections of 15 U.S.C.); *Wilco*, 346 U.S. 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/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 267-68 (1987) (Blackmun, J., dissenting) (predicting an increase in litigation about the enforceability of arbitration awards based on arguments of manifest disregard of the law and partiality).

43. *Alexander*, 415 U.S. at 57-60.

44. *Id.* at 59.

45. *Id.* at 59-60.

arbitration.⁴⁶ 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.⁴⁷ This decision was effectively overruled years later, after the Court had expanded the reach of the Commerce Clause.⁴⁸

As recently as the 1970s, 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 Equal Employment Opportunity Commission discrimination charge.⁴⁹ In *Alexander v. Gardner-Denver Co.*,⁵⁰ the Court separated contractual labor disputes from statutorily protected rights.⁵¹ 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 forums.⁵² The Court allowed an individual to pursue arbitration through the collective bargaining agreement and then litigation under Title VII, reasoning that “the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each.”⁵³

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 1980s.⁵⁴ In *Barrentine v. Arkansas-Best Freight System, Inc.*,⁵⁵ 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 (“FLSA”).⁵⁶ 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

46. *See id.* at 59.

47. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 200-01 (1956).

48. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995); *see also Bernhardt*, 350 U.S. at 292 (Thomas, J., dissenting).

49. *Alexander*, 415 U.S. at 47-51.

50. 415 U.S. 36 (1974).

51. *Id.* at 50.

52. *Id.*

53. *Id.* at 50-51.

54. *Barrentine v. Ark.-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981).

55. 450 U.S. 728 (1981).

56. *Id.* at 745.

underlying the FLSA, thus depriving an employee of protected statutory rights.⁵⁷

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

Despite the Supreme Court's initial concerns about arbitration, since the 1960s and increasingly faster since the 1980s, 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.⁵⁸ The "purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'"⁵⁹

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.⁶⁰ The Court emphasized the "statutory policy" of the FAA favoring "the rapid and unobstructed enforcement of arbitration agreements," and insisted that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" over litigation.⁶¹ The Court later 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,"⁶² 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.⁶³ It enforced arbitration agreements that required businesses to arbitrate in other

57. *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* Part I.C.

58. See *Stolt-Nielsen*, 130 S. Ct. at 1776; *Mitsubishi Motors*, 473 U.S. at 638; *Barrentine*, 450 U.S. at 745.

59. *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989), *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995)).

60. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 422-23 (1967).

61. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-24 (1983).

62. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that the California Franchise Investment Law violated the Supremacy Clause by requiring judicial consideration of claims brought under the statute and precluding enforcement of arbitration agreements for such claims); see, e.g., *Prima Paint Corp.*, 388 U.S. at 396-07 (federal court applying state law in diversity case involving interstate commerce must still apply FAA), *expanded by First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938 (1995).

63. *Prima Paint Corp.*, 388 U.S. at 401; see also *Concepcion*, 131 S. Ct. at 1753 (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* Part II); *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

countries using other laws.⁶⁴ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁶⁵ the Supreme Court made it clear that even claims protected by federal statutes could be forced into arbitration⁶⁶ 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.⁶⁷

The holding in *Mitsubishi Motors* was a marked departure from earlier decisions refusing to mandate arbitration of statutory claims.⁶⁸ 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 arbitration.⁶⁹ 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.⁷⁰ “[A]t bottom,” the Court went on, the policy favoring arbitration agreements simply is a “policy guaranteeing the enforcement of private contractual agreements”⁷¹

While the Court in *Mitsubishi Motors* talked about the “regime” of the antitrust laws instead of using the term “policy,” its arguments indicate that it is a public policy discussion.⁷² The Supreme Court acknowledged the importance of the private cause of action in protecting the public interest in democratic capitalism.⁷³ But the Court still held that antitrust actions can be arbitrated, even in other countries that do not have antitrust laws.⁷⁴ To

64. *Mitsubishi Motors*, 473 U.S. at 638 (Mitsubishi involved a contract between a car manufacturer and a car dealer, but the requirement of arbitrating statutory rights overseas).

65. 473 U.S. 614.

66. *Id.* at 638.

67. *Id.* at 628.

68. See, e.g., *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 292 (1984); *Barrentine*, 450 U.S. at 745; *Alexander*, 415 U.S. at 59-60.

69. *Mitsubishi Motors*, 473 U.S. at 627-28 (citing *Wilko*, 346 U.S. at 434-35; *Southland*, 465 U.S. at 16 n.11; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 224-25 (1985)).

70. See *infra* Part III; see, e.g., *Green Tree*, 531 U.S. at 80 (Congress must express intent “to preclude a waiver of judicial remedies for the statutory rights at issue.”); see also *CompuCredit*, 132 S. Ct. at 667 (“[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.’”).

71. *Mitsubishi Motors*, 473 U.S. at 625.

72. *Id.* at 634.

73. *Id.* (citing *Topco Assoc.*, 405 U.S. at 610; *N. Pac. R.R. Co.*, 356 U.S. at 4).

74. *Id.* at 636-37.

protect the public's interest, the Court assured the public that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"),⁷⁵ which created the treaty agreeing to enforce 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.'"⁷⁶ 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.⁷⁷

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.⁷⁸ *Mitsubishi Motors* 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.⁷⁹

Despite its oft-repeated statement that the policy behind the FAA is to enforce the parties' agreement according to its terms,⁸⁰ the Supreme Court 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.⁸¹ 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.'"⁸²

Justice Stevens dissented, arguing that there is no public policy that prevents supplementing the statute with a contractual agreement allowing more review.⁸³ In fact, he asserted, the grounds allowed in sections 10 and

75. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 4739 [hereinafter Convention], available at <http://dispute.martindale.com/dispute/references/include/pdfs/Convention%20on%20the%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20Awards.pdf>.

76. *Mitsubishi Motors*, 473 U.S. at 638 (quoting Convention, *supra* note 75, Art. V(2)(b), 21 U.S.T. at 2520).

77. *Id.* at 628; *see also id.* at 665 (Stevens, J., dissenting).

78. *See generally Mitsubishi Motors*, 473 U.S. 614.

79. *Id.* at 627.

80. *See, e.g., Kaplan*, 514 U.S. at 947; *Mastrobuono v. Shearson Lehman Hutton Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 479 (1989).

81. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585-87 (2008).

82. *Id.* at 588 (quoting *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

83. *Id.* at 593 (Stevens, J., dissenting).

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.⁸⁴ This view has not been adopted in subsequent decisions.

C. 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.⁸⁵ In 1983, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,⁸⁶ 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."⁸⁷

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*.⁸⁸ 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 containing an arbitration clause to arbitrate statutory claims in *Southland Corp. v. Keating*.⁸⁹ 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.⁹⁰ After that decision, the Supreme Court started limiting state rights to exempt disputes from arbitration. For example, in *Perry v. Thomas*,⁹¹ following its earlier decision in *Southland*,⁹² 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.⁹³ In dicta, the Court announced

84. *Id.* at 595.

85. See *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

86. 460 U.S. 1 (1983).

87. *Id.* at 24.

88. *Barrentine*, 450 U.S. at 745.

89. *Southland*, 465 U.S. at 17.

90. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

91. 482 U.S. 483 (1987).

92. *Southland*, 465 U.S. at 16 (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).

93. *Perry*, 482 U.S. at 490-91.

that the strong federal policy preempted state laws that “undercut the enforceability of arbitration agreements.”⁹⁴ 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.”⁹⁵

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.⁹⁶ 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 Corp.*,⁹⁷ 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”⁹⁸ The Court pointed out that it currently strongly endorsed the federal law favoring arbitration.⁹⁹ 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.”¹⁰⁰

Following the rule it set out in *Mitsubishi Motors*, the Court in *Gilmer* looked at the Age Discrimination in Employment Act (“ADEA”) and found no express statement that Congress intended to preclude non-judicial enforcement of rights under the Act.¹⁰¹ It distinguished rather than overruled 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.¹⁰²

The Court acknowledged in *Gilmer* that the ADEA was designed to protect important social policies in addition to individual rights.¹⁰³ The

94. *Id.* at 489 (quoting *Southland*, 465 U.S. at 16). 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 generally Yelnosky, *supra* note 2.

95. *Perry*, 482 U.S. at 493 (Stevens, J., dissenting).

96. See *Gilmer*, 500 U.S. at 30-35.

97. 500 U.S. 20 (1991).

98. *Id.* at 30 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1991)).

99. *Id.*

100. *Id.* at 34 n.5 (quoting *Mitsubishi Motors*, 473 U.S. at 626-27). Paradoxically, when confronted with an arbitration panel that determined that it should hold a class action arbitration in *Stolt Nielsen*, the Court quickly dispensed of the possibility that an arbitration panel was competent to apply “public policy” as a court would. *Stolt-Nielsen*, 130 S.Ct. at 1767.

101. *Gilmer*, 500 U.S. at 33 (following *Mitsubishi*, 473 U.S. at 627).

102. *Id.* at 33-34. For a discussion of the Supreme Court’s decisions in the collective bargaining arena, see Sternlight, *Panacea*, *supra* note 4, at 653-54.

103. *Gilmer*, 500 U.S. at 27-28.

Court, however, saw no inconsistency between those policies and agreements to arbitrate the statutory claims:

[i]t 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.¹⁰⁴

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.¹⁰⁵ 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 ceases its wrongs.¹⁰⁶ 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 *Grimshaw v. Ford Motor Co.* (“*Ford Pinto*”)¹⁰⁷ case show 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, in the future.¹⁰⁸

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*,¹⁰⁹ the Supreme Court enforced an arbitration clause between a consumer alleging failure to treat for termites properly and the pest control company.¹¹⁰ In that opinion, the Supreme Court applied a “commerce in fact” test to determine whether the company’s actions affected interstate commerce.¹¹¹ Because the parties did not really argue that interstate commerce was not affected,

104. *Id.*

105. *See id.* at 27-33.

106. *See supra* notes 17-19 and accompanying text.

107. 119 Cal. App. 3d 757 (1981).

108. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d at 818-21. *See* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991), for a discussion of the case and its lasting, if arguably not completely accurate, message.

109. 513 U.S. 265 (1995).

110. *Id.* at 268-70.

111. *Id.* at 277-81.

and because the Commerce Clause was interpreted to its fullest extent, the Court held that the clause was enforceable.¹¹²

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.¹¹³ Instead, it held, it looked to whether the actions constituted “commerce in fact.”¹¹⁴ 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.”¹¹⁵ It reasoned that *Southland* and *Perry* diminished the force of that argument when they held that the Act displaces state law.¹¹⁶ 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.¹¹⁷

II. SOME COURTS PROTECTED INDIVIDUAL OR STATUTORY RIGHTS

Over time, it became clear that arbitration is a good choice for many 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.¹¹⁸ In order to restore some of these protections, lower courts have refused to enforce arbitration clauses that over time generally can be divided into two basic categories: unconscionability and inability to vindicate statutory rights.¹¹⁹ The

112. *Id.* at 273-74, 281-82 (citing *Perry*, 482 U.S. at 490 for the proposition that the “involving interstate commerce” clause in the FAA should be interpreted to the full extent of the Commerce Clause).

113. *Id.* at 277-81.

114. *Allied-Bruce Terminix*, 513 U.S. at 281.

115. *Id.* at 280 (quoting *Metro Ind. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 386 (2d Cir. 1960) (Lumbard, C.J., concurring)).

116. *Id.* (citing *Southland*, 465 U.S. at 10-16; *Perry*, 482 U.S. at 489-92).

117. *Id.* at 283-97. In *Allied-Bruce Terminix*, 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. *See 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. *See id.*

118. *See supra* Part I.

119. *See Amex I*, 554 F.3d at 312 (choosing to apply a vindication analysis instead of an unconscionability standard); *Armendariz v. Found. Health Psychcare*, 6 P.3d 669, 674 (Ca. 2000) (providing a good explanation of unconscionability); *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130 (Ca. 2011)

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.¹²⁰ 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*,¹²¹ 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.¹²² The Court emphasized the "longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements," which set out the rights and duties of the parties.¹²³ If arbitrators get to decide what is arbitrable, the Court worried, they could impose obligations not allowed by the contract.¹²⁴ This concern evaporated years later, when the Court held that parties can agree in their contract that the arbitrator can also decide arbitrability questions.¹²⁵ 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.

A. Unconscionability

While the Supreme Court was broadening the reach of arbitration, some courts recognized that such breadth allowed individual rights to get swallowed or at least ignored.¹²⁶ These courts rendered decisions designed

(invalidating an arbitration agreement under both vindication and unconscionability standards), *vacated and remanded*, 132 S.Ct. 496 (2011) for reconsideration after *Concepcion*.

120. *Concepcion*, 131 S.Ct. at 1753-56 (Thomas, J., concurring).

121. 475 U.S. 643 (1986).

122. *Id.* at 651.

123. *Id.*

124. *Id.*

125. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-46 (2006).

126. See *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 522-26 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1451-54 (10th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 262-65 (7th Cir. 1997).

to provide some protections from the increasingly broad sweep of arbitration.¹²⁷

One of the grounds courts used to justify providing protection to individuals is that the arbitration agreement itself was unconscionable under state law.¹²⁸ 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.”¹²⁹ The unconscionability doctrine has been applied by courts on the theory that section 2 of the FAA, better known as the Savings Clause, allows it. Section 2 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.*¹³⁰

The Supreme Court has held that the Savings Clause of section 2 allows courts to use state law¹³¹ or equitable grounds¹³² 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.¹³³

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.¹³⁴ Unconscionability in the terms of the contract

127. See *Brisentine*, 117 F.3d at 522-26; *Harrison*, 112 F.3d at 1451-54; *Pryner*, 109 F.3d at 262-65.

128. See *Armendariz v. Found. Health Psychcare*, 6 P.3d 669, 674 (Cal. 2000).

129. *Hume v. United States*, 21 Ct. Cl. 328, 330 (1886) (citing JOHN BOUVIER, A LAW DICTIONARY (6th ed. 1856), available at http://www.constitution.org/bouv/bouvier_u.htm).

130. 9 U.S.C. § 2 (2006) (emphasis added).

131. *Doctor's Assoc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). The FAA does not specify that only state law contract grounds can be used, but courts have generally interpreted it that way. See, e.g., *Rent-A-Ctr. v. Jackson*, 130 S.Ct. 2772, 2783 (2010); *Discover Bank v. Super. Ct. of L.A.*, 113 P.3d 1100, 1110-112 (Cal. 2005). For the argument that this provision really means for courts to use federal law grounds, see generally Yelnosky, *supra* note 2, at 734-44.

132. See *Rent-A-Ctr.*, 130 S. Ct. at 2776 (citing *Doctor's Assoc.*, 517 U.S. at 686).

133. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1440-43 (2008).

134. *Prima Paint*, 388 U.S. at 403-04. See also *Mitsubishi Motors*, 473 U.S. at 627 (quoting 9 U.S.C. § 2) (“Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”).

historically has been another accepted ground.¹³⁵ Justice Thomas would reject unconscionability and allow only grounds that involve the making of the contract.¹³⁶ 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.¹³⁷ 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.¹³⁸

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.¹³⁹
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.¹⁴⁰
3. Courts also look at substantive unconscionability, relating to the substantive contract terms and whether they are unreasonably favorable to the drafting party.¹⁴¹ Courts then weigh the procedural and substantive considerations on a sliding scale, so that more

135. See *Discover Bank*, 113 P.3d at 1106-110.

136. *Concepcion*, 131 S. Ct. at 1753-56 (Thomas, J., concurring).

137. Bruhl, *supra* note 133, at 1449-455.

138. *Id.* The Supreme Court did not worry about this problem in *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. *Concepcion*, 131 S. Ct. at 1747.

139. See, e.g., *Soltani v. W. & S. Life Ins. Co.*, 258 F.3d 1038, 1042 (9th Cir. 2001).

140. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 246 P.3d 961, 974 (Idaho 2010) (citing *Lovey v. Regence Blueshield of Idaho*, 72 P.3d 877, 882 (Idaho 2003)), *reh'g denied*, No. 36245-2009, 2010 Ida. LEXIS 234 (Dec. 23, 2010); *Armendariz v. Found. Health Psychcare Svcs., Inc.*, 6 P.3d 669, 689 (Cal. 2000); 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:10 (4th ed. 2010).

141. *Id.*

substantive unconscionability allows for less procedural unconscionability for the court to invalidate the clause.¹⁴²

The most well-known application of the unconscionability argument to invalidate a class action waiver in an arbitration clause is California's *Discover Bank v. Superior Court of Los Angeles*.¹⁴³ From that case, the *Discover Bank* rule evolved:

When 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.¹⁴⁴

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.¹⁴⁵

B. Vindication of Rights Theory

Instead of using unconscionability arguments to invalidate mandatory 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, which provides protections against discrimination, or the antitrust laws.¹⁴⁶ Courts recognize that unconscionability does not apply well in all

142. *Id.* § 18:14.

143. *Discover Bank*, 113 P.3d at 1110, *abrogated by Concepcion*, 131 S. Ct. at 1753.

144. *Id.* at 1110 (quoting CAL. CIV. CODE § 1668 (West 2011)).

145. *See, e.g.*, *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007) ("The FAA favors arbitration, not exculpation."); *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 271-72 (Ill. 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.'"). For California cases following *Discover Bank*, see *Cohen v. DirecTV, Inc.*, 48 Cal. Rptr. 3d 813, 819 (2d Dist. 2006); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 739-40 (1st Dist. 2005); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229, 237-38 (2d Dist. 2005); *America Online, Inc. v. Superior Ct.*, 90 Cal. App. 4th 1, 17-18 (2001).

146. 42 U.S.C. § 2000e (2011).

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.¹⁴⁷ Often this argument comes into play when an arbitration clause prohibits class actions.¹⁴⁸ 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.’”¹⁴⁹

“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.”¹⁵⁰

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.”¹⁵¹ Courts rely on language from *Gilmer*, which admits that not all statutory claims are appropriate for arbitration.¹⁵² But *Gilmer* states that a party should be held to an arbitration agreement unless “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”¹⁵³ 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.’”¹⁵⁴ In addition, courts must be cognizant of the limited application of a statutory rights theory because *Gilmer* rejected the argument that arbitration cannot address important social policies.¹⁵⁵ Just as courts focus on specific disputes, so do arbitrators. “[S]o long as the litigant

147. *See In re Am. Express Merchs. Litig. (Amex II)*, 634 F.3d 187, 197 (2d Cir. 2011).

148. *See id.* at 196-97.

149. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497 (1969)).

150. *Id.* at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

151. *Mitsubishi Motors*, 473 U.S. at 637.

152. *Gilmer*, 500 U.S. at 26.

153. *Id.* (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

154. *Id.* (quoting *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24).

155. *Id.* at 27-28.

may vindicate [his or her] statutory cause of action in arbitration,” the Court held, “the statute serves both its remedial and its deterrent function.”¹⁵⁶

“[The] ‘vindication of statutory rights’ arguments reflect ‘the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights,’”¹⁵⁷ and “loses its claim as a valid alternative to traditional litigation” when it does not.¹⁵⁸ 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,¹⁵⁹ prevents recovery of statutorily mandated attorneys’ fees so that finding legal representation for a single claim would be nearly impossible,¹⁶⁰ or prohibits the use of class mechanisms.¹⁶¹ In addition, applying *Green Tree*, courts have refused to enforce arbitration agreements where the cost of individual arbitration would make vindicating statutory rights prohibitively expensive or otherwise take away their statutory rights (sometimes based on the contractual prohibition of class actions).¹⁶²

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.¹⁶³ In recent years, though, the Supreme Court has begun rejecting many of these public policy arguments and enforcing arbitration agreements.¹⁶⁴ The Court’s reasoning appears to be two-fold: that Congress should have

156. *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637).

157. *Kristian v. Comcast Corp.*, 446 F.3d 25, 37 (1st Cir. 2006) (quoting *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d, 1, 14 (1st Cir. 1999)).

158. *Id.*

159. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 403 (2003); *see also Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (affirming refusal to compel arbitration where contract required arbitration of all claims).

160. *Kristian*, 446 F.3d at 53. Note that the First Circuit severed the class action prohibition rather than refusing to enforce the arbitration clause. *Id.* at 53. 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. *Stolt-Nielsen*, 130 S. Ct. at 1779. For example, a court could not sever the class action waiver and force the parties to arbitrate in a class action. *See id.*; *see also Kristian*, 446 F.3d at 53.

161. *See Discover Bank*, 113 P.3d at 1110.

162. *Green Tree*, 531 U.S. at 90-92; *Amex I*, 554 F.3d at 315-16, 320 (prohibition of class action made arbitration prohibitively expensive); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-95 (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); *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001) (requiring plaintiff to waive right to recover fees under Title VII made arbitration agreement unenforceable).

163. *See infra* notes 168-203 and accompanying text.

164. *See infra* notes 168-203 and accompanying text.

included exemptions from arbitration in its statutes, and that state legislatures' attempts to make the same exclusions are pre-empted by the FAA.¹⁶⁵ 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.¹⁶⁶

In *Buckeye Check Cashing, Inc. v. Cardegna*,¹⁶⁷ 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 Corp. v. Flood & Conklin Manufacturing Co.*¹⁶⁸ that an arbitrator must determine the validity of a contract containing an arbitration clause.¹⁶⁹ 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.¹⁷⁰ Instead, the Court held, only the federal substantive rules should apply.¹⁷¹

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. The Court, in *14 Penn Plaza LLC v. Pyett*,¹⁷² made a clear distinction between that case and *Gardner-Denver* based on language in the modern collective bargaining agreement that specified the inclusion of individual statutory claims in the arbitration agreement.¹⁷³ Mostly, though, the Supreme Court relied on its increasingly adamant 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.”¹⁷⁴ It rejected the notion that arbitrators are less able than judges to resolve complex issues of law and fact.¹⁷⁵

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

165. See *infra* notes 204-229 and accompanying text; see *infra* Part IV.

166. See *Mitsubishi Motors*, 473 U.S. at 632-37.

167. 546 U.S. 440 (2006).

168. 388 U.S. 395, 402-04 (1967).

169. See *Buckeye Check Cashing*, 546 U.S. at 445-46.

170. *Id.* at 446.

171. *Id.* at 447.

172. 556 U.S. 247 (2009).

173. *Id.* at 263-64. See generally *Alexander*, 415 U.S. 36.

174. *14 Penn Plaza LLC v. Pyett*, 556 U.S. at 266 (quoting *Circuit City Stores*, 532 U.S. at 123).

175. *Id.* at 268-69.

the union in an arbitration.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ 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.'" ¹⁷⁹ The Court reminded us that, as far back as *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.'" ¹⁸⁰

This decision was at the forefront of a continuing line of arbitration cases that found 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.¹⁸¹

This rejection of the use of policy arguments to limit the application of arbitration clauses became even clearer in *Stolt-Nielsen, S.A. v. Animalfeeds International Corp.*,¹⁸² and again in *Concepcion*.¹⁸³ 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.¹⁸⁴ In *Stolt-Nielsen*, the parties agreed to submit to an arbitrator the issue of whether plaintiffs should be allowed to bring a class action arbitration where the arbitration clause was silent.¹⁸⁵ The parties agreed that the contract's

176. *Id.* at 270.

177. *Id.* at 269-71.

178. *Id.* at 270 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

179. *14 Penn Plaza*, 556 U.S. at 270 (quoting *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008)).

180. *Id.* (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 627).

181. *See Concepcion*, 131 S. Ct. at 1746-47. 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 St. Assocs.*, 552 U.S. at 592.

182. 130 S. Ct. 1758 (2010).

183. *Concepcion*, 131 S. Ct. 1740.

184. *Id.* at 1755; *Stolt-Nielsen*, 130 S. Ct. at 1767.

185. *Stolt-Nielsen*, 130 S. Ct. at 1766.

silence regarding class actions in arbitration meant there was no agreement on that issue.¹⁸⁶ The arbitration panel concluded that plaintiffs could bring the arbitration as a class action, reasoning that the evidence showed no reason to *preclude* class action arbitration and that other arbitration panels construed other clauses (similar, though not “exactly comparable”) to allow for class action arbitrations.¹⁸⁷ 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.”¹⁸⁸ The Supreme Court reversed the arbitrators’ decision, agreeing almost completely with the defendants.¹⁸⁹ 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.¹⁹⁰

The interesting part of that decision for purposes of this article is the Court’s insistence that the arbitration panel exceeded its powers under section 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.”¹⁹¹ The Court suggested that the panel should have looked for legal support for its holding from the FAA, maritime law, 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 “common-law court to develop what it viewed as the best rule to be applied to the situation.”¹⁹²

The Court also ignored the policy of ensuring punishment for statutory violations for the greater good.¹⁹³ 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.’”¹⁹⁴ 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

186. *Id.*

187. *Id.*

188. *Id.* (quoting Petition for a Writ of Certiorari at 17, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL797583 at *17).

189. *Id.* at 1770.

190. *Stolt-Nielsen*, 130 S. Ct. 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).

191. *Id.* at 1767-68.

192. *Id.* at 1768-69 (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).

193. *Id.* at 1768-70.

194. *Id.* at 1774 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)).

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.¹⁹⁵ The Court reasoned that a “foundational FAA principle [is] 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.¹⁹⁶

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* that it was not bothered by all those conflicting policy arguments.¹⁹⁷ 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 do not agree to them.¹⁹⁸ The Court 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.¹⁹⁹

The Supreme Court made it clear, though, that it is not abandoning state law interpretations of arbitration agreements in favor of a new federal

195. *Stolt-Nielsen*, 130 S. Ct. at 1773 (citing *Volt Info. Sci.*, 489 U.S. at 479).

196. *Id.* at 1773, 1776.

197. *Id.* at 1773-76.

198. *Id.* at 1776.

199. *Id.*

common law of arbitration.²⁰⁰ In *Stolt-Nielsen*, the Court reiterated that, “the interpretation of an arbitration agreement is generally a matter of state law”²⁰¹ The FAA imposes certain rules, such as that arbitration “is a matter of consent, not coercion.”²⁰² Apparently for this Court, it is acceptable 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.²⁰³ The effect of such a decision is like saying it is acceptable for companies to sell dangerously shoddy products and put a clause in each purchase agreement saying “if there is a problem with our product you agree you will not sue us unless we say you can.”

A. *The Court Rejected the Policy Behind Unconscionability*

As much as the outcome of *Concepcion* was expected, its reasoning was disquieting. Justice Scalia accepted the premise that companies should be allowed to coerce²⁰⁴ customers when he said, “the times in which consumer contracts were anything other than adhesive are long past.”²⁰⁵ In a footnote, the Court suggested that states can protect consumers by requiring that the class action waivers be highlighted in the contracts.²⁰⁶ Since it is admittedly a contract of adhesion, what protection does highlighting offer? It simply informs the customer that he has 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, which had been followed by California courts in numerous decisions since 2005.²⁰⁷ 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.²⁰⁸ The California court’s theory was that such clauses were unconscionable

200. *Stolt-Nielsen*, 130 S. Ct. at 1773, 1775.

201. *Id.* at 1773 (quoting *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009)).

202. *Id.* (citing *Volt Info. Sci.*, 489 U.S. at 479).

203. *See generally Stolt-Nielsen*, 130 S. Ct. 1758.

204. The Court does not define “coerce,” so perhaps later cases will have to clarify how far companies may coerce individuals and less powerful companies into giving up their rights.

205. *Concepcion*, 131 S. Ct. at 1750.

206. *Id.* at 1750 n.6.

207. *Id.* at 1750; *Discover Bank*, 113 P.3d at 1103, followed by *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 140 (2d Cir. 2010), vacated, *Affiliated Computer Services, Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011). For California cases following the *Discover Bank* rule, see *supra* note 145.

208. *Discover Bank*, 113 P.3d at 1110, 1117.

because they did not provide a mechanism for vindicating rights of small dollar value, thus allowing wrongdoers to get away with their actions.²⁰⁹

While the Supreme Court of the United States 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.²¹⁰ 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."²¹¹ The Court reasoned that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."²¹² 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."²¹³ Thus, class arbitration, when required by the court rather than consented to by the parties, is inconsistent with the FAA.²¹⁴ 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.²¹⁵ The Court found that such a decision was pre-empted by the FAA.²¹⁶

It is unclear from *Concepcion* whether unconscionability, as 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.²¹⁷ Justice Thomas concurred, arguing that the Savings Clause means that only defenses such as fraud and duress will be allowed to invalidate arbitration clauses—that is, defects in the formation of the contract.²¹⁸ 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.'"²¹⁹ Thus, under Justice

209. *Id.* at 1107-08.

210. *Concepcion*, 131 S. Ct. at 1748 (citing *Geier*, 529 U.S. at 872; *Crosby*, 530 U.S. at 372-73).

211. *Id.*

212. *Id.*

213. *Id.* at 1749; See *Stolt-Nielsen*, 130 S. Ct. 1758.

214. *Concepcion*, 131 S. Ct. at 1750-51.

215. *Id.* at 1748, 1753.

216. *Id.* at 1747-48.

217. *Id.* at 1747.

218. *Id.* at 1753 (Thomas, J., concurring).

219. *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring).

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.²²⁰

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* ("Marmet").²²¹ In that case, the Supreme Court essentially reprimanded the West Virginia Supreme Court of Appeals for "misreading and disregarding the precedents of the Court interpreting the FAA [and not following] controlling federal law implementing that basic principle."²²² 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.²²³ The state court called the Supreme Court decisions "tendentious"²²⁴ and "created from whole cloth."²²⁵

The state court in *Marmet* also found the clause unconscionable, at least in part because requiring arbitration of such claims violates public policy.²²⁶ 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.²²⁷ 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.²²⁸ But it did not suggest that it believed the court would succeed.²²⁹

220. *Id.*

221. 132 S. Ct. 1201 (2012) (per curiam).

222. *Id.* at 1202.

223. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 292 (W. Va. 2011), vacated, 132 S. Ct. 1201 (2012). In *Brown ex rel. Brown v. Genesis Healthcare Corp.*, the West Virginia Supreme Court reviewed and entered judgment on three consolidated cases, which were later vacated by the Court in *Marmet* and remanded back to the West Virginia Supreme Court.

224. *Id.* at 278.

225. *Id.* at 279.

226. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. at 1203.

227. *Id.* at 1203-04.

228. *Id.* at 1203.

229. *Id.*

B. 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* ("Amex I"),²³⁰ 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 ("Amex").²³¹ The case involved "small" merchants (less than ten million dollars in expected annual charge volume) who were forced to accept Amex charge cards at a high percentage rate per transaction in order to be allowed to accept Amex's more prestigious and more lucrative credit card.²³² 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.²³³

Amex appealed that initial decision.²³⁴ The Supreme Court remanded it to the Second Circuit for reconsideration in light of its decision in *Stolt-Nielsen*.²³⁵ The Supreme Court did not provide any guidance to the Second Circuit on how to apply the *Stolt-Nielsen* decision.²³⁶ In *In re American Express Merchants' Litigation* ("Amex II"),²³⁷ 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.²³⁸

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

230. 554 F.3d 300 (2d Cir. 2009).

231. *Amex I*, 554 F.3d at 305, 315-16, 320.

232. *Id.* at 305 n.4.

233. *Id.* at 305, 316, 320.

234. *Am. Express Co. v. Italian Colors Rest.*, 130 S.Ct. 2401 (2010) (Mem.).

235. *Id.*

236. *Id.*

237. 634 F.3d 187 (2d Cir. 2011).

238. *Amex II*, 634 F.3d at 189, 193.

effectively strip plaintiffs of their ability to prosecute alleged antitrust violations.²³⁹

The Second Circuit relied on a vindication of federal statutory rights theory rather than an unconscionability theory.²⁴⁰ In other words, it looked to federal statutes to determine whether plaintiffs could show that the “practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity.”²⁴¹ 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 *Green Tree*.²⁴² In *Green Tree*, 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.”²⁴³ 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.²⁴⁴ In *Green Tree*, the Court concluded 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.²⁴⁵

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.²⁴⁶ The Second Circuit specifically found that, under *Green Tree*, 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 experts and where attorneys would be willing to take the claims.²⁴⁷ Because the court could not force the parties into a class action arbitration after *Stolt-Nielsen*, the court held that the arbitration clause was unenforceable and that plaintiffs could pursue their claims in litigation.²⁴⁸ The Second Circuit’s

239. *Id.* at 193-94.

240. *Id.* at 193-96.

241. *Id.* at 196.

242. *Id.* at 197, 199; *see Green Tree*, 531 U.S. at 90.

243. *Green Tree*, 531 U.S. at 90.

244. *Id.* at 91-92.

245. *Id.* at 92.

246. *Amex II*, 634 F.3d at 198-99.

247. *Id.* at 194, 197-99.

248. *Id.* at 199-200.

decision was seen as a victory against companies using arbitration to avoid the law.²⁴⁹

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 *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.²⁵⁰

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."²⁵¹

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.²⁵² 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."²⁵³

249. Samuel E. Buffaloe, *Sweet Vindication: The Second Circuit Strikes a Blow to Companies that Use Class-Action Waivers in Arbitration Agreements to Avoid the Law*, 2010 J. DISP. RESOL. 175, 187 (2010).

250. *Amex II*, 634 F.3d at 199-200; see also *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 137 (2010) (citing *Discover Bank*, 113 P.3d at 1108).

251. *Discover Bank*, 113 P.3d at 1109.

252. See *id.* at 1109; see also *Amex II*, 634 F.3d at 198-200.

253. *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006). See, for example, p. 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.

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.²⁵⁴

The Second Circuit held that, while it may no longer be able to force class action 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.²⁵⁵ 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.²⁵⁶ Of course, in *Concepcion*, the Supreme Court, for all practical purposes, removed this argument.²⁵⁷ 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.²⁵⁸

The Second Circuit reconsidered its refusal to compel arbitration yet again after the Supreme Court's decision in *Concepcion*.²⁵⁹ It specifically rejected the argument that *Concepcion* required the court to enforce the arbitration clause with its class action waiver.²⁶⁰ The Second Circuit distinguished the unconscionability argument under state contract law in *Concepcion* from the "vindication of statutory rights analysis, which is part

Id. at 60-61 (quoting *Ting v. AT&T*, 182 F. Supp. 2d 902, 918 (N.D. Cal. 2002)); *see also* *Jenkins v. First Am. Cash Advance of Georgia, LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004).

254. *Amex II*, 634 F.3d at 199. In fact, the Supreme Court held in *Hall Street Associates* that the strong policy favoring arbitration could not be used to enforce contract language that expanded judicial review following an arbitration. 552 U.S. at 588-90.

255. *Amex II*, 634 F.3d at 199.

256. *Id.* (citing *Fensterstock*, 611 F.3d at 140).

257. *See generally* *Concepcion*, 131 S. Ct. 1740.

258. *See generally* *id.*

259. *In re Am. Express Merchs. Litig. (Amex III)*, 667 F.3d 204, 206 (2d Cir. 2012).

260. *Id.*

of the federal substantive law of arbitrability,”²⁶¹ finding that neither case required that “all class-action waivers be deemed per se enforceable.”²⁶²

C. Post-Concepcion Cases Debate the Effect on Statutory Rights and Public Policy

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 *Green Tree* theory. In New York, two courts in the Southern District followed the Second Circuit’s decision in *Amex I* and *Amex II*, 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*²⁶³ 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 \$2,000.²⁶⁴ 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.²⁶⁵ In *Sutherland*, the court held, the cost precludes her from bringing her claims, so the agreement could not be enforced.²⁶⁶ In addition, the court in *Sutherland* distinguished cases based on state law from cases based on “federal courts’ interpretation of the FAA itself,” reiterating the Supreme Court’s dicta in *Mitsubishi Motors* and its holding in *Green Tree* that a court may consider refusing to enforce an arbitration clause where rights cannot be vindicated.²⁶⁷

The second case decided after *Amex II* in which the court declined to apply *Concepcion* is *Chen-Oster v. Goldman, Sachs & Co.*²⁶⁸ In that case, the plaintiffs without argument were unable to vindicate their rights. 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.²⁶⁹ In other words, plaintiffs could

261. *Id.* at 212-13 (quoting *Amex I*, 554 F.3d at 320).

262. *Amex III*, 667 F.3d at 214.

263. 847 F. Supp. 2d 528 (S.D.N.Y. 2012).

264. *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d at 532-59; *see generally Amex II*, 634 F.3d 187.

265. *Sutherland*, 847 F. Supp. 2d at 535-37.

266. *Id.* at 533-34.

267. *Id.* at 539-41 (citing *Mitsubishi Motors*, 473 U.S. at 628, 632; *Green Tree*, 531 U.S. at 90).

268. 785 F. Supp. 2d 394 (2011).

269. *Id.* at 408-10.

only bring their action as a class action, but they could not bring a class action case in district court because the contract required arbitration, and could not bring a class action in arbitration because the arbitration agreement prohibited it.²⁷⁰ Because New York law requires all pattern and practice cases to be tried as class actions, plaintiffs had no forum for their claim.²⁷¹

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*.²⁷² Therefore, either the court must hold: 1a) that the FAA pre-empts the state law requiring pattern and practice cases to be brought as class actions *and* b) that the plaintiffs must then bring their actions as individual or perhaps consolidated actions in arbitration *or* 2) that the arbitration clause is unenforceable because plaintiffs cannot vindicate their rights under federal law and therefore may take their claims to court. It cannot both enforce the law and the arbitration clause.

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.²⁷³ It did, however, acknowledge that a higher court might come out differently.²⁷⁴ 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* ("Amex III")²⁷⁵ case, this time to determine whether *Concepcion* should change the outcome.²⁷⁶ Once again, the court determined that the class action waiver in the arbitration clause was unenforceable based on a vindication of rights theory.²⁷⁷ And because, following *Stolt-Nielsen*, a court cannot force a party to arbitrate in a class action, the court held the arbitration clause

270. *Id.*

271. *Id.*

272. Compare *id.* at 405-10, with *Concepcion*, 131 S. Ct. at 1746-47.

273. *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 CIV. 6950, 2011 WL 2671813, at *5 n.4 (S.D.N.Y. July 7, 2011) (the Magistrate Judge recommended denying Goldman Sachs' Motion to Strike the class action certification request in light of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* 131 S. Ct. 2541 (2011)).

274. *Id.* at *4. The District Court denied a motion to strike the plaintiffs' request for class certification in the case, distinguishing *Wal-Mart Stores, Inc. v. Dukes* on the grounds that plaintiffs in *Chen Oster* all worked at one office and that they did show specific employment practices that tied the claims together, unlike the plaintiffs in *Dukes*. *Id.* at *3.

275. 667 F.3d 204 (2d Cir. 2012).

276. *Amex III*, 667 F.3d at 206.

277. *Id.* at 213-14, 219.

unenforceable and remanded it to the district court to deny Amex's motion to compel arbitration.²⁷⁸

In the *Amex III* decision, the Second Circuit also attempted to distinguish *CompuCredit Corp. v. Greenwood*,²⁷⁹ discussed above, 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 *Amex III* did not restrict arbitration; it was the ability to vindicate the rights protected by the statute that necessitated a restriction of arbitration.²⁸⁰ This discussion, confined to a footnote, provides little comfort. It acknowledges that the decision in *CompuCredit* is based on a close reading of the statute and a finding that the statute does not expressly prohibit enforcement of arbitration clauses.²⁸¹ 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 *CompuCredit*.²⁸² It ignores the fact that the Court could have made the same argument in *CompuCredit* that the Second Circuit applied in *Amex III*, but chose not to.²⁸³

Other courts deciding cases after *Concepcion* believe that the line is not so clear. In *Kaltwasser v. AT&T Mobility, LLC*,²⁸⁴ the United States District Court for the Northern District of California appears to have accepted defeat—holding that, after *Concepcion*, it is pretty clear that courts must enforce arbitration clauses, including class action waivers, even if parties will not have an appropriate forum for vindicating their rights.²⁸⁵ While the court in *Kaltwasser* did not specifically hold that *Green Tree* 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

278. *Id.* at 213, 219; *see also Stolt-Nielsen*, 130 S. Ct. at 1775 (“a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”).

279. 132 S. Ct. 665.

280. *Amex III*, 667 F.3d at 213 n.5.

281. *Id.* (citing *CompuCredit*, 132 S. Ct. 665).

282. *Id.* (citing *CompuCredit*, 132 S. Ct. 665).

283. *See id.* (citing *CompuCredit*, 132 S. Ct. 665).

284. 812 F. Supp. 2d 1042 (N.D. Cal. 2011).

285. *Id.* at 1048-51, *reconsideration denied*, No. C 07-00411 JW, 2011 WL 5417085 (N.D. Cal. Nov. 8, 2011).

possibility that “small-dollar claims . . . might . . . slip through the system” because of the cost of proving a claim.²⁸⁶

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 *Green Tree* it should have done so, especially in light of the dissent that points out the concern.²⁸⁷

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.²⁸⁸ The law in question is the California Labor Code, which states that employees can waive a right intended for their own purpose, but not a right intended for a public purpose.²⁸⁹ 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.²⁹⁰ Interestingly, this decision came out just days before the Supreme Court vacated a similar decision and remanded it for further consideration in light of *Concepcion*.²⁹¹

The Ninth Circuit decided that it must enforce an arbitration agreement where the recovery permissible was so small that there was no incentive to bring the action, reasoning that *incentive* was different from *means*.²⁹² In other words, while it might be possible to invalidate an arbitration requirement that makes it impossible to bring the case, *Concepcion* made it clear that a court could not invalidate a clause that simply made it unattractive to bring the case.²⁹³ The Court specifically stated that it did not find *Concepcion* to be inconsistent with *Green Tree* because the parties in *Concepcion*, as in this case, could be made whole in arbitration.²⁹⁴

286. *Id.* at 1048 (quoting *Concepcion*, 131 S. Ct. at 1753).

287. *Id.* (citing *Concepcion*, 131 S. Ct. at 1753, 1760-61).

288. *See Ralphs Grocery Co. v. Brown*, 197 Cal.App.4th 489, 496-97 (2012), *cert denied*, 132 S. Ct. 1910 (2012) (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).

289. *Id.* at *2-3; CAL. LAB. CODE § 2804 (West 2012).

290. *Ralphs Grocery Co.*, 2012 WL 151754, at *8.

291. *See Moreno*, 247 P.3d at 133-34 (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), *vacated*, 132 S. Ct. 496 (2011), *remanded*.

292. *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012).

293. *Id.*

294. *Id.* at 1158. *See also Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1214-15 (11th Cir. 2011) (A court cannot apply state law policy considerations because they are pre-empted by the FAA); *Homa v. American Express*, No. 11-3600, 2012 WL 3594231 (3d Cir. August 22, 2012), *petition for*

IV. 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 do not?

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 *Green Tree*.²⁹⁵ 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.²⁹⁶ In dicta, however, 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.²⁹⁷ If the party can show that the costs are prohibitive, then a court could invalidate an arbitration clause because plaintiff is unable to vindicate her statutorily protected rights in arbitration.²⁹⁸ Otherwise, the party seeking to invalidate the arbitration agreement would have to show that "Congress intended to preclude arbitration of the statutory claims at issue."²⁹⁹

In many recent cases the Court seems to be pushing the line as to how to invalidate or refuse to enforce arbitration clauses closer to the bright line of showing that in the statute Congress intended to preclude arbitration for the specific claims; *Green Tree* remains one possibility for an additional ground to decide these cases.³⁰⁰ If a party cannot vindicate her statutory rights, then the important social policies protected by those statutes cannot be furthered.

cert. filed December 20, 2012 (distinguishing *Amex II* because Homa's claims arose under state law, not federal, and holding that the public policy protecting the right to vindicate state statutory rights was no longer an acceptable grounds for invalidating an arbitration agreement: "Though some persons might regard our result as unfair, 9 U.S.C. § 2 requires that we reach it.").

295. *Green Tree*, 531 U.S. 79.

296. *Id.* at 90-92.

297. *Id.*

298. *Id.* at 90.

299. *Id.* at 92.

300. See *supra* Parts II.B, III; see also *Green Tree*, 531 U.S. 79.

Arguably, the *Amex III* decision simply follows *Green Tree* closely.³⁰¹ 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*.³⁰²

In concurring in the Second Circuit’s denial of rehearing *en banc*, Judge Pooler said:

Amex III strives to give full effect to the Supreme Court’s teachings that where a contractual agreement functions “as a prospective waiver of a party’s right to pursue statutory remedies,” then the contractual agreement may not be enforced. *Amex III* is carefully cabined to hold that this waiver, on this record, is unenforceable. It creates no broad new rights.³⁰³

This statement squarely sets up the issue—is *Green Tree* still good law as the Second Circuit believes it is? The Supreme Court has just granted certiorari on the issue, stated as “Whether the Federal Arbitration Act permits courts, invoking the ‘federal substantive law of arbitrability,’ to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim.”³⁰⁴

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.³⁰⁵ That decision is consistent with the dicta in *Green Tree*.³⁰⁶ After *Concepcion*, in which the Supreme Court went out of its way to clarify that the Ninth Circuit’s determination that the arbitration clause the *Concepcions* signed was unconscionable was not a particularized finding but 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

301. Compare *Green Tree*, 531 U.S. 79, with *Amex III*, 667 F.3d at 209 (both cases finding that arbitration waivers are not automatically enforceable, and must be viewed in light of the specific allegations of the parties).

302. *Amex II*, 634 F.3d at 199; see also *Green Tree*, 531 U.S. at 90-92.

303. *In re American Express Merchant’s Litigation*, 681 F.3d 139, 140 (2d Cir. 2012), cert. granted, 133 S.Ct. 594 (Mem) (citing *Mitsubishi Motors*, 473 U.S. at 637 n.19; see also *Green Tree*, 531 U.S. at 90).

304. *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 594 (2012).

305. *Amex II*, 634 F. 3d at 199.

306. See *Green Tree*, 531 U.S. at 90-92.

individual will not be able to vindicate his or her rights and the company will be able to get away with wrongdoing that the state does not want it to get away with.³⁰⁷ 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.³⁰⁸ In *Amex I*, the Second Circuit held that individual arbitrations would be so expensive that an individual merchant could not protect itself against wrongdoers and thus should be allowed to take its case to court, where statutory class action procedures apply.³⁰⁹ 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.³¹⁰

A. 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.³¹¹ 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.³¹² 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.³¹³

1. 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.³¹⁴ 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,

307. See *Concepcion*, 131 S. Ct. at 1746.

308. See, e.g., *Amex III*, 667 F.3d at 218; *Chen-Oster*, 2011 WL 2671813; *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 863 (Cal Ct. App. 2011).

309. *Amex I*, 554 F.3d at 315-16, 320.

310. See *Amex III*, 634 F.3d at 197; *Discover Bank*, 113 P.3d at 1106-07.

311. Yelnosky, *supra* note 2, at 729.

312. *Id.*

313. *Id.* at 759.

314. U.S. CONST. amend. X (setting out the allocation of powers and rights between the states and the federal government); see also *Younger v. Harris*, 401 U.S. 37, 44 (1971).

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.³¹⁵

Federalism would require the Supreme Court to allow state courts to make decisions based on state law and policy, except where the state laws conflict with federal law.³¹⁶ Given that Congress specified that contract law applied to determine the enforceability of arbitration agreements, and that contract law generally is defined by states, logically state law would apply under the Savings Clause.³¹⁷

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 *Southland*, 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.³¹⁸ He argued that the Court's interpretation of the FAA in *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.³¹⁹ Justice Stevens said he could find no evidence that Congress intended such a double standard.³²⁰

While Justice Scalia dissented in *Allied-Bruce Terminix*, suggesting that the Court should overturn *Southland*, his most recent opinions—those he has 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 *Southland* forward, has usurped.³²¹ 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

315. *Younger*, 401 U.S. at 44.

316. *Shady Grove Orthopedic Assoc's, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1439 (2010).

317. 9 U.S.C. § 2.

318. *Southland*, 465 U.S. at 21 (Stevens, J., concurring and dissenting).

319. *Id.*

320. *Id.*; See Margaret L. Moses, *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); see also Yelnosky, *supra* note 2, at 732-36 (a good overview discussion of criticism of the Court's decisions making arbitration an almost purely federal issue).

321. See *Allied-Bruce Terminix*, 513 U.S. at 285 (Scalia, J., dissenting); see also Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 328-29 (2008).

two, but he did not.³²² 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 *Discover Bank* rule to stand, but he did not.³²³ 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.³²⁴

One could argue that this Court sees a difference between the state arguments and the federal arguments based on the Supremacy Clause—that claims such as those raised in *Amex III* 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 Orthopedic Associates v. Allstate Insurance Co.*,³²⁵ where the federal directive is on point and valid, so it applies regardless?³²⁶ *Southland* can be interpreted to say that the answer is yes.³²⁷ 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.³²⁸

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.³²⁹ 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.³³⁰ This is the exception that the Supreme Court disallowed a state court to make with regard to state policy in *Concepcion*.³³¹

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.³³² Thus, arguably,

322. *Allied-Bruce Terminix*, 513 U.S. at 285 (Scalia, J., dissenting).

323. *See id.*

324. *See id.*

325. 130 S.Ct. 1431 (2010).

326. *Id.* at 1432-42.

327. *See Southland*, 465 U.S. at 17-21 (Stevens, J., concurring and dissenting); Yelnosky, *supra* note 2, at 731-32 (discussing *Southland*, 465 U.S. 1).

328. *See id.*; Yelnosky, *supra* note 2, at 731-32 (discussing *Southland*, 465 U.S. 1).

329. *CompuCredit Corp.*, 132 S. Ct. at 672-73 (holding that the exemption was not sufficiently specific to exempt claims from arbitration).

330. *See Sutherland v. Ernst & Young LLP*, 847 F.Supp. 2d 528, 539-40 (S.D.N.Y. 2012).

331. *Concepcion*, 131 S. Ct. at 1747.

332. *Id.* at 1748 (citing *Geier*, 529 U.S. at 872).

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*.³³³

One author prior to *Concepcion* described the possibility of the Supreme 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.³³⁴

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 *Brown v. Board of Education*.³³⁵ 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.³³⁶ 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.

2. *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 *federal* common law for enforcing contracts, keeping in

333. *Southland*, 465 U.S. at 17-22 (Stevens, J., concurring and dissenting).

334. Bruhl, *supra* note 133, at 1454-55.

335. *Id.* at 1454-55; 347 U.S. 483, 490-91, 495 (1954) (holding segregation is unconstitutional).

336. Bruhl, *supra* note 133, at 1454-55.

mind that the FAA was passed when *Swift v. Tyson*³³⁷ was still good law.³³⁸ Under *Swift*'s holding, federal courts routinely rejected state law decisions in favor of newly “divined” federal law.³³⁹ 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.³⁴⁰ Yelnosky points out that creating a federal common law of arbitration would ensure no conflicting state law decisions on virtually identical agreements.³⁴¹ 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.³⁴² He also points out that there already exists a significant body of federal common law.³⁴³

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 do not. Essentially that is the argument in *Amex III*—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* do not.³⁴⁴ 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.³⁴⁵ It simply further limited that application to very narrow grounds—fraud, duress, and, possibly but unlikely, unconscionability.³⁴⁶

337. 41 U.S. 1, 18 (1842) (allowing federal courts to create federal common law in diversity cases, often even despite state court decisions or common law that would require a different outcome), *overruled* by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 89 (1938).

338. See Yelnosky, *supra* note 2, at 745-51.

339. 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.

340. Yelnosky, *supra* note 2, at 746-47, 751.

341. *Id.* at 757-58.

342. *Id.*

343. *Id.* at 770.

344. *Amex III*, 667 F.3d 204.

345. *Concepcion*, 131 S. Ct. at 1747.

346. *Id.*; see also *id.* at 1753 (Thomas, J., concurring).

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 Railroad Co. v. Tompkins*.³⁴⁷ Federal courts can no longer substitute their own version of common law for state common law if there is applicable law.³⁴⁸ 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.³⁴⁹ 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.³⁵⁰ 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.³⁵¹

B. 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 does not want to do (e.g. participate in a class action 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

347. 304 U.S. 64, 78 (1938) (holding that federal courts must apply state law, not make up their own federal law).

348. *Id.*

349. *See Concepcion*, 131 S. Ct. at 1746 (citing CAL. CIV. CODE §§ 1668, 1670.5(a) (West 1985)).

350. *Id.* at 1747.

351. *See Tompkins*, 304 U.S. at 78 (implying that given the principles of *Erie*, as long as the state law does not violate a federal law, then state law should be respected).

specifically, but the answer is clear—of course, even where it means that federal substantive rights are ignored or effectively nullified.³⁵²

Most recently, the Supreme Court has shown its intent to narrow exceptions to arbitration agreements even further, despite federal statutory language. In *Greenwood v. CompuCredit Corp.*,³⁵³ 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 intended to exempt claims under the Act from arbitration.³⁵⁴ The Ninth Circuit went through a lengthy discussion to show that "sue" in the Act means court, not arbitration.³⁵⁵ In its analysis, the Ninth Circuit relied on the Supreme Court's decision in *Mitsubishi Motors*, 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."³⁵⁶ 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."³⁵⁷

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.³⁵⁸ The Court cited other cases enforcing arbitration clauses where the statute maintains a right to sue.³⁵⁹ 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 Credit Reporting Organization Act, 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.³⁶⁰ 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.³⁶¹

352. See discussion of vindication of rights theory, *supra* Part II.2.

353. 615 F.3d 1204 (9th Cir. 2010).

354. *Id.* at 1209 (citing 15 U.S.C. § 1679(c) (2006)).

355. *Id.* at 1209-10.

356. *Id.* at 1207 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

357. *Id.*

358. *CompuCredit*, 132 S. Ct. at 671.

359. *Id.* at 670-71 (citing *Gilmer*, 500 U.S. 20; *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987)).

360. *Id.* at 669-70.

361. *Id.* at 670-71.

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 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 their intent.³⁶² But, as the Court in *CompuCredit* looked back to *Mitsubishi Motors*, it will continue to rely on *Mitsubishi Motors*' 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 arrangements."³⁶³

C. 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.³⁶⁴ The Securities and Exchange Commission has taken the advice from *CompuCredit Corp.* to heart and has promulgated proposed rules that any action to be taken as a collective action should be brought in court, not in an arbitration.³⁶⁵ 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.³⁶⁶

362. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1976).

363. *Mitsubishi Motors*, 473 U.S. at 625.

364. *See, e.g.*, Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend the Code of Arbitration Procedure for Industry Disputes To Preclude Collective Action Claims From Being Arbitrated, 77 Fed. Reg. 1773 (Jan. 11, 2012) [hereinafter *Self-Regulatory Organizations*].

365. *Id.* (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). *See generally CompuCredit*, 132 S. Ct. 665.

366. *Self-Regulatory Organizations*, *supra* note 364, at 1774.

Congress understands the challenge laid down by the Supreme Court and has started to talk about it, but talking 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 one million dollars between the United States government and a federal contractor where that contractor required arbitration of its employment disputes.³⁶⁷ This amendment was a direct result of a Halliburton employee allegedly raped by co-workers who was forced to arbitrate some of her employment claims in Iraq.³⁶⁸

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.³⁶⁹ It has not passed either House,³⁷⁰ nor is it expected to pass this year,³⁷¹ just as it did not pass in prior years.³⁷² Numerous bills have been introduced to exempt specific groups from arbitration, but few have passed.³⁷³ Car dealer franchisees were first to succeed in gaining some protections.³⁷⁴ Car buyers, consumers generally, employees, nursing home residents, and growers have not been so successful.³⁷⁵

367. Department of Defense Appropriations Act 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3409 (2009) (referred to as “Franken Amendment”) (Congress expressly denies funding under specific circumstances if arbitration clauses are enforced).

368. *Jones v. Halliburton Co.*, 583 F.3d 228, 242 (5th Cir. 2009) (enforcing the arbitration clause for some but not all of her claims).

369. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 2 (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2 (2011).

370. Both bills were referred to committee, and the Senate held hearings in October 2011. No activity has been reported since. *Bill Summary & Status 112th Congress (2011-2012) S.987*, THE LIBRARY OF CONGRESS THOMAS, <http://thomas.loc.gov> (last visited Nov. 4, 2012); *Bill Summary & Status 112th Congress (2011-2012) H.R.1873*, THE LIBRARY OF CONGRESS THOMAS, <http://thomas.loc.gov> (last visited Nov. 4, 2012).

371. Cooper, Laura J., *Employment Arbitration 2011: A Realist's View*, 87 IND. L.J. 317, 318 (2012).

372. See, e.g., Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Civil Rights Act of 2008, H. R. 5129, 110th Cong. (2008); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); Preservation of Civil Rights Protection Act, H.R. 2969, 109th Cong. (2005); Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, H.R. 3809, 108th Cong. (2004); Preservation of Civil Rights Protections Act of 2001, S. 2435, 107th Cong. (2002); Preservation of Civil Rights Protections Act of 2001, H.R. 2282, 107th Cong. (2001); H.R. 815, 107th Cong. (2001).

373. See Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap “Sophisticated Parties” Too*, 2 J. DISP. RESOL. 235, 258 (2010) (providing a discussion of bills introduced but not passed by Congress).

374. Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, H.R. 1296, 107th Cong. (2001).

375. Doneff, *supra* note 373, at 258.

Congress recognized the need for some protections when it passed the Dodd-Frank Act in 2011.³⁷⁶ Mostly the Act deals with business requirements, but it also addresses whistleblowers.³⁷⁷ Its whistleblower provisions state that “[n]o predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this section.”³⁷⁸ It also asks the Bureau of Consumer Financial Protection to investigate and determine the effects of arbitration clauses in consumer and other cases.³⁷⁹

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 rights? 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 have hurt.³⁸⁰ 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 one thousand arbitration claims against AT&T to stop its proposed merger with T-Mobile.³⁸¹ Apparently the lawyers believe AT&T will be less eager to enforce the individual arbitration requirement when faced with an overwhelming number of

376. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, 124 Stat. 1376 (2010).

377. *Id.* § 922, 124 Stat. at 1841.

378. *Id.* § 922(c)(2), 124 Stat. at 1848 (codified at 18 U.S.C. § 1514A(e)(2) (2011)).

379. *Id.* § 1028, 124 Stat. at 2003-04 (requiring the Bureau of Consumer Financial Protection to do this study).

380. See generally discussion of the FAA Savings Clause and prevention of unconscionability and the Vindication of Rights theory, *supra* Part II.A-B.

381. See, e.g., Terry Baynes, *Law Firm Strikes Back at AT&T Over Merger*, THOMAS REUTERS (July 27, 2011), <http://www.reuters.com/article/2011/07/27/us-att-merger-arbitration-idUSTRE76Q7F320110727>.

individual cases, none of which creates precedent for the other.³⁸²

Interestingly, AT&T filed claims in several district courts, seeking to enjoin the enforcement of the arbitration proceedings.³⁸³ 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.³⁸⁴ Since each claim seeks to stop the merger or put conditions on it, and since that 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.³⁸⁵ But the contract also prohibits them from bringing claims in court.³⁸⁶ 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.³⁸⁷ And because the individuals cannot vindicate their rights, society as a whole will suffer.³⁸⁸

In New York, a group of over 700 pilots joined together in a collective arbitration against JetBlue.³⁸⁹ The Supreme Court left the issue of whether the pilots could bring a collective action to the arbitrators, holding that it was not prevented by *Stolt-Nielsen*.³⁹⁰ In addition, there has been a move toward “mass actions,” where many plaintiffs join their claims together in arbitration.³⁹¹ While not the same as a class action, the idea is the same as the case described above, but hopefully the courts will allow these actions

382. *See id.*

383. *See infra* note 384 (claims filed by AT&T).

384. *AT&T Mobility LLC v. Princi*, No. 11-11448-RWZ, 2011 WL 6012945 (D. Mass. Dec. 2, 2011); *AT&T Mobility LLC v. Fisher*, No. DKC 11-2245, 2011 WL 5169349, at *3 (D. Mass. Oct. 28, 2011); *AT&T Mobility LLC v. Bernardi*, Nos. C 11-03992 CRB, C 11-04412 CRB, 2011 WL 5079549, at *13 (N. D. Cal. Oct. 26, 2011); *AT&T Mobility LLC v. Smith*, No. 11-cv-5157, 2011 WL 5924460, at *8 (E.D. Pa. Oct. 7, 2011); *AT&T Mobility LLC v. Gonnello*, No. 11 Civ. 5636(PKC), 2011 WL 4716617, at *4 (S.D.N.Y. Oct. 7, 2011); *AT&T Mobility LLC v. Bushman*, 11-80922-CIV, 2011 WL 5924666, at *2 (S.D. Fla. Sept. 23, 2011).

385. *See Fisher*, No. DKC 11-2245, 2011 WL 5169349, at *2.

386. *Id.*

387. *See generally Concepcion*, 131 S. Ct. 1740.

388. 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.

389. *JetBlue Airways Corp. v. Stephenson*, 931 N.Y.S.2d 284 (S.Ct. App. Div. 2011).

390. *Id.* at 288-89.

391. A group called Consumers Count has established a website, CONSUMERS COUNT, <http://consumerscount.org> (last visited Jan. 15, 2013), where it promises to bring a consumer action when enough plaintiffs join to warrant the action.

until Congress is able to remedy the effects of the Court decisions or, more likely, until a new Court reverses the decisions.

CONCLUSION

After the Supreme Court's decisions in the 2010 through 2012 terms, consumers, employees, small businesses, and any person or entity not in a position of power 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*.³⁹² The question remains how long it will take and how hard it will be to reverse the effects.

392. *Swift*, 41 U.S. at 18-19, *overruled by Tompkins*, 304 U.S. at 89. See Edward A. Purcell, Jr., *The Story of Erie: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, in *CIVIL PROCEDURE STORIES* 21, 32-35 (Kevin M. Clermont ed., 2d. ed. 2008) (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). Unfortunately, almost 100 years elapsed between *Swift* and *Erie*.