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ARBITRATION—FROM SACRED COW TO GOLDEN CALF: THREE PHASES IN THE HISTORY OF THE FEDERAL ARBITRATION ACT

Katherine V.W. Stone*

I. INTRODUCTION

Today, many legal scholars, policymakers, social activists, and public commentators are paying attention to the Federal Arbitration Act (FAA, or the Act).¹ What was once an obscure federal procedural statute that applied only to a narrow range of cases in federal courts has now come to assume great importance for the civil justice system as a whole. This change happened gradually, below the radar screen of most legal observers. Yet for the past twenty-five years, without much fanfare, arbitration law has been an unusually dynamic field. The Supreme Court issues decisions in the field nearly every year, each one yielding startling new developments. Over this time period, arbitration has gone from being the darling of the courts and the purported antidote to the legal system's ills—i.e., a sacred cow—to being an oft-rigged system, honored not for its actual virtues but because it has achieved an exalted status, even as it has proven it to be a false god.

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The transformation of the FAA began in the 1980s. It was not the result of any new or altered legislation; it was the result of a change in judicial interpretation of the FAA. As it is now interpreted, the FAA requires millions of consumers, workers, homeowners, credit card holders, hospital patients, and other ordinary people to forego use of the courts to vindicate important rights. For example, between 1992 and 2018, the percent of employees subject to forced arbitration has increased from just 2% to 56%.² One development that has garnered particular attention is the tendency of corporations to include class action waivers in arbitration agreements, thereby preventing consumers and employees from aggregating small claims and litigating on a collective basis. Thus today, the vast majority of credit card companies, banks, cell phone providers, internet service providers, hospitals, consumer goods manufacturers, and financial institutions require their customers to forego their rights to go to court or bring class actions.³

Only recently have legal scholars, social commentators, and the general public become aware of these trends. It is important to ask, how did a change in the civil justice system of this magnitude transpire without much notice, controversy, or commentary? Moreover, given that the vast majority of Supreme Court decisions for the past thirty-five years have been made by a unanimous—or nearly unanimous—Court,⁴ we need to ask, why have the liberal justices not challenged the pro-arbitration trends that have closed off meaningful access to the courts for so many people? A view of the life history of the FAA provides context and helps answer these questions. It also illuminates prospects for reversing the current trends.

The FAA has been transformed in three phases. In its first two phases, the Act was widely perceived as a relatively

² See Tim Ryan, *House Passes Bill Banning Mandatory Arbitration Clauses*, COURTHOUSE NEWS SERV. (Sept. 20, 2019), <https://www.courthousenews.com/house-passes-bill-banning-mandatory-arbitration-clauses/> (“A 2018 study by the Economic Policy Institute found more than 56% of workers, about 60 million people, have mandatory arbitration clauses in their contracts. The study found the clauses were more common among low-wage workers.”).

³ See Katherine V.W. Stone & Alexander Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, ECON. POL’Y INST. 4, 10 (Dec. 7, 2015), <https://files.epi.org/2015/arbitration-epidemic.pdf>.

⁴ The Appendix to this article, *infra*, presents a chart that lists all the Supreme Court decisions interpreting the FAA between 1983 and 2020. It includes a description of the issue involved, the outcome, and the position of each of the Justices.

uncontroversial and limited-purpose statute.⁵ The FAA was enacted in order to make arbitration agreements specifically enforceable, which they were not under common law.⁶ In Phase One, lasting from 1925 until the mid-1980s, supporters of the FAA as well as the business community saw arbitration as an essential aspect of business self-regulation.⁷ In Phase Two, lasting from the early 1980s until about 2000, both conservative and liberal judges, as well as lawyers, legal scholars, and commentators, saw arbitration as an antidote to many of the perceived shortcomings of the judicial system.⁸ To these observers of all political stripes, arbitration was a method of dispute resolution that avoided the expense, lengthy timelines, and excessive technicality of the courts. Informality, flexibility, and efficiency were its touted virtues.⁹ However, in the current phase that began in the early 2000s, many legal commentators and members of the public interest community have come to see the dangers and pitfalls of the previous approaches even as the Court continues to expand arbitration's role in the modern legal system.¹⁰

Below, I describe each of these phases then assess what this history can tell us about the correct interpretation of the FAA and the appropriate role of arbitration in the civil justice system going forward.

II. PHASE ONE: ARBITRATION AS BETTER JUSTICE

The FAA was originally enacted in 1925 at the behest of the commercial bar of New York, whose most prominent members waged a lengthy campaign to convince the courts, legal profession, and legislatures that it was important for the interests of the commercial community that agreements to arbitrate be specifically enforceable.¹¹ The New York City Bar Association's Commerce Committee accomplished their goal with the enactment of the New York Arbitration Act in 1920, and shortly thereafter, the Federal Arbitration Act of 1925.¹²

⁵ See discussion *infra* Sections II, III. On the early history of the FAA, see generally Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999).

⁶ Stone, *supra* note 5, at 936.

⁷ *Id.*

⁸ See discussion *infra* Section III.

⁹ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

¹⁰ See generally Stone & Colvin, *supra* note 3.

¹¹ Stone, *supra* note 5, at 986.

¹² *Id.* at 982; see generally *id.* at 969–94 (recounting history of—and philosophy behind—enactment of FAA).

The commercial lawyers who advocated for the FAA represented trade associations, which had proliferated in the American business community in the early twentieth century.¹³ While trade associations had been a feature of American life since the colonial era, in the late nineteenth and early twentieth centuries, new trade associations were formed at unprecedented rates.¹⁴ Bankers, hardware dealers, lumbermen, textile manufacturers, canners, tobacco manufacturers, and the like came together to form local, regional, and national associations.¹⁵ The National Industrial Conference Board issued a report on trade associations in 1925 that found there were between 800 and 1,000 national trade organizations in the United States, most of which had been formed since the 1890s.¹⁶ When local and state trade associations were added, the Department of Commerce estimated there were some 2,000 state and 7,700 local associations.¹⁷ The trade associations themselves combined to form state associations and state chambers of commerce, and in 1914, they joined together to form the United States Chamber of Commerce.¹⁸

Trade associations set industry standards for production and developed form contracts that standardized terms of dealings between members of a trade.¹⁹ Such standardized practices were seen as beneficial because they helped to minimize commercial disputes and achieve certainty and order in the anarchic world of competitive trade.²⁰ For the same reasons, trade associations established their own internal arbitration systems to resolve disputes between association members.²¹

Early-twentieth-century trade associations urged—and some even required—their members to use their standard form contracts containing a standard arbitration clause for their business

¹³ *Id.* at 977.

¹⁴ *Id.*; see also NATIONAL INDUSTRIAL CONFERENCE BOARD, TRADE ASSOCIATIONS: THEIR ECONOMIC SIGNIFICANCE AND LEGAL STATUS 11–13 (1925).

¹⁵ Stone, *supra* note 5, at 977.

¹⁶ *Id.*; see also NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 14, at 319–26.

¹⁷ Stone, *supra* note 5, at 977.

¹⁸ *Id.*; see ROBERT H. WIEBE, BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT 18–25 (1962).

¹⁹ Stone, *supra* note 5, at 977; see NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 14, at 276.

²⁰ Stone, *supra* note 5, at 977; see NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 14, at 275–76.

²¹ Stone, *supra* note 5, at 977; see NATIONAL INDUSTRIAL CONFERENCE BOARD, *supra* note 14, at 276–77; see also FRANKLIN D. JONES, TRADE ASSOCIATION ACTIVITIES AND THE LAW 194 n.2 (1922) (listing some of the national trade associations that had adopted arbitration systems as of 1922).

transactions.²² In these standard clauses, parties agreed to use an industry-specific arbitration system to adjudicate all disputes.²³ The typical trade-association arbitration was an informal proceeding headed by a respected member of the trade group. This member would resolve disputes on the basis of the norms, customary practices, and unstated understandings of the community.²⁴

Despite these developments that encouraged or even mandated the use of industry-specific arbitration, the common law courts in the early twentieth century refused to grant specific performance to enforce arbitration agreements because they maintained that arbitrators were the agents of the parties and that arbitration agreements were therefore revocable by either party until the final arbitration award was rendered.²⁵ Thus, if one party to an arbitration agreement refused to arbitrate a dispute or decided to walk away during an arbitration proceeding, the other party had no effective method of enforcing the agreement to arbitrate.²⁶

The business community and the trade associations campaigned vigorously to overturn the common law doctrine and make arbitration agreements specifically enforceable for two primary reasons.²⁷ First, they wanted to ensure they could reliably use arbitration to resolve their disputes quickly.²⁸ And secondly, they wanted business disputes to be decided by insiders to their trade rather than by courts.²⁹ They wanted respected elders in their specific commercial communities to resolve disputes according to the norms of the trade, rather than by external law.³⁰ Industry-specific arbitration was part of their aspiration for business self-regulation rather than government intervention in their internal

²² Stone, *supra* note 5, at 978; see Harlan F. Stone, *The Scope and Limitation of Commercial Arbitration*, PROC. ACAD. POL. SCI. CITY N.Y. 195, 195–96 (1923).

²³ Stone, *supra* note 5, at 978; see Soia Menschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961); Philip G. Phillips, *Commercial Arbitration Under the N.R.A.*, 1 CHI. L. REV. 424, 426–27 (1933).

²⁴ See Stone, *supra* note 5, at 972 nn.234–35 and accompanying text.

²⁵ Stone, *supra* note 5, at 973.

²⁶ For a detailed history of the common law’s treatment of arbitration, see Stone, *supra* note 5, at 973–87.

²⁷ Stone, *supra* note 5, at 976.

²⁸ *Id.*; see Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) (“This statute is not an isolated change of an outworn rule of law. It is a single step in a movement of growing momentum. The movement finds its origin in the unfortunate congestion of the courts and in the delay, expense and technicality of litigation.”).

²⁹ Stone, *supra* note 5, at 976.

³⁰ See *id.*

affairs.³¹ To this end, they wanted judicial support for arbitration so they could move disputes out of the courts, while retaining the power of courts to force recalcitrant parties to arbitrate disputes and provide judicial enforcement for arbitral awards.³²

In 1925, the business community achieved its goal in the enactment of the FAA.³³ As enacted, the FAA provides that when a dispute involves a contract that has a written arbitration clause, a court must, upon motion, stay litigation so that the dispute can go to arbitration.³⁴ And after an arbitration proceeding is complete, the FAA gives courts extremely limited power to review an arbitral award on the merits, no matter how erroneous the court believes the award to be.³⁵ Thus, under the statute, an award can only be set aside if: (1) it was procured by fraud, (2) the arbitrator was biased, (3) the arbitrator refused to hear relevant evidence, or (4) the arbitrator exceeded his or her power as set out in the parties' arbitration agreement.³⁶ Each of these grounds has been interpreted exceptionally narrowly.³⁷ There is no provision for overturning an award based on an arbitrator's errors of fact, contract interpretation, or law.³⁸

The FAA was a product of lobbying by the trade-association movement of the early twentieth century, their lawyers, and the commerce committee of the New York City Bar Association.³⁹ In Washington, they obtained powerful support from Herbert Hoover, who was Secretary of Commerce in 1922.⁴⁰ Secretary Hoover, who was known as the St. Paul of the Trade Association Movement, had a comprehensive philosophy about the relative roles of government and industry in the economy in achieving efficiency.⁴¹ He advocated for government-business cooperation, opposed government intervention in business affairs, and believed that

³¹ *Id.* at 977.

³² *Id.* at 985.

³³ *Id.* at 992.

³⁴ 9 U.S.C. § 3. In order to come under the FAA, an agreement must involve commerce and include a written arbitration clause. *See id.* § 2.

³⁵ *See id.* § 10.

³⁶ *See id.*

³⁷ *See Broker Unable to Clear the "High Hurdle" Necessary to Justify Vacatur of an Arbitral Award Under Section 10 of the Federal Arbitration Act*, FREIBERGER HABER, LLP: BLOG (July 10, 2017), <https://fhnylaw.com/broker-unable-clear-high-hurdle-necessary-justify-vacatur-arbitral-award-section-10-federal-arbitration-act/>.

³⁸ *See, e.g., Kalyanaram v. New York Inst. of Tech.*, 79 A.D.3d 418, 419–20 (1st Dept. 2010) (“Challenges to the sufficiency or adequacy of the evidence to support an award are not grounds for vacating the award.”).

³⁹ Stone, *supra* note 5, at 985.

⁴⁰ *Id.* at 988–91.

⁴¹ *Id.*

autonomous trade associations, rather than government, should have regulatory power.⁴² As a crusader for business self-regulation, Secretary Hoover was a fervent believer in expanding the role of arbitration.⁴³ He used the Commerce Department to promote commercial arbitration, playing a key role in drafting and enacting the FAA.⁴⁴ Later, he served as the first president of the American Arbitration Association (AAA).⁴⁵

Secretary Hoover and the commercial lawyers advocating for the FAA were driven by an animating belief: They saw arbitration as an essential feature of self-regulation, the business communities' counter to the big-government policies promoted by Progressive Era social reformers.⁴⁶ Arbitration, they insisted, was a method of dispute resolution that served the role of preserving business communities while instantiating a community's own norms.⁴⁷ In the New York Bar Association's campaign leading up to the enactment of the New York Arbitration Law and the Federal Arbitration Act, and in the legislative floor debates on both bills, as well as in the commentary and judicial decisions in their immediate wake, the image of trade associations as self-regulating communities with their own norms, values, and culture was constantly invoked.⁴⁸ This conception was reiterated by the drafters of the FAA, Julius Henry Cohen and Kenneth Dayton, in a law review article they published immediately after the statute was enacted, where they stated:

Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the

⁴² EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 40 (Adrienne E. Eaton & Jeffrey H. Keefe eds., Industrial Relations Research Association 1999).

⁴³ Stone, *supra* note 5, at 988–91.

⁴⁴ See Ellis Hawley, *Three Facets of Hooverian Associationalism: Lumber, Aviation, and Movies, 1921–1930*, REGULATION IN PERSPECTIVE 95, 99 (Thomas K. McGraw ed., 1981).

⁴⁵ *See id.*

⁴⁶ WIEBE, *supra* note 18, at 222–23.

⁴⁷ Hawley, *supra* note 44, at 99.

⁴⁸ Stone, *supra* note 5, at 976–79.

questions of law which are complementary to the questions of fact which we have just mentioned.⁴⁹

In subsequent decades, the ideal of arbitration as a mechanism for resolving disputes within discrete self-governing communities was expanded beyond trade associations and was adopted by the securities industry to justify arbitration for broker–dealer disputes, and by the labor–management community to justify resolving disputes that arose under collective bargaining agreements.⁵⁰ As with trade associations, parties in both the securities and labor–management settings felt that having one of their own resolve their disputes was preferable to judicial resolution.⁵¹ They felt their own members, unlike civil judges, understood the complex factors, implicit norms, and unstated assumptions that were relevant to resolving their internal disputes.⁵²

The associational vision of arbitration animated the interpretation of the FAA from 1925 until the early 1980s.⁵³ Proponents saw arbitral justice as not necessarily more convenient or expeditious as judicial justice. Rather, they saw it as better justice.⁵⁴ They believed arbitrators were better than judges in resolving their disputes—better because they understood the unspoken considerations, factors, nuances, and implications for their own communities.⁵⁵ Courts that upheld the use of arbitration in that period routinely articulated this justification for doing so.⁵⁶ In those

⁴⁹ Cohen & Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926).

⁵⁰ See Stone, *supra* note 5, at 1006, 1009.

⁵¹ *Id.* at 978.

⁵² *Id.* at 994–1013 (demonstrating that the ideal of self-regulation animated the embrace of arbitration by the securities industry and the labor–management community in the twentieth century).

⁵³ *Id.* at 943, 986.

⁵⁴ *Id.* at 1034.

⁵⁵ *Id.* at 978–79.

⁵⁶ See, e.g., *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 150 (1968) (White, J., concurring) (characterizing the effectiveness of arbitrators as partially due to their role as “men of affairs, not apart from but of the marketplace”); *Hardware Dealers’ Mut. Fire Ins. Co. of Wis. v. Glidden Co.*, 284 U.S. 151, 159 (1931) (noting insurance disputes are often arbitrated because arbitration provides “expert knowledge and prompt inspection of the damaged property . . . to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding”); *accord Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983); see also *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–82 (1960) (discussing the special role of arbitration within the labor–management community); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (same).

years, proponents of arbitration also occasionally articulated, as an additional virtue of arbitration, the fact that it was quicker and less expensive than conventional litigation.⁵⁷ But this instrumental rationale for arbitration was not the primary consideration proffered by courts or commentators in their interpretations of the FAA.⁵⁸ Rather, the initial oft-repeated rationale was that arbitration would produce better justice by having insiders to a discrete community resolve disputes between community members.⁵⁹

During this period, not all members of the Supreme Court were unequivocally supportive of arbitration. Rather, there was a persistent strain of skepticism in the Court's opinions during Phase One. Some justices raised due process concerns, warning of dangers to individuals when their disputes were decided by private individuals in private fora without the benefit of judicial review or the due process protections afforded by a court.⁶⁰ For example, in the 1953 case of *Wilko v. Swan*, the Supreme Court ruled that an individual customer was not required to arbitrate his claim of fraud against his brokerage firm because, as Justice Reed explained in the majority opinion, the self-regulatory role of an arbitrator was not appropriate for customer–broker disputes involving the Securities Acts.⁶¹ Justice Reed wrote:

Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved. This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. [In arbitration,] [t]hey must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care," or "material fact[]" cannot be examined. Power to vacate an award is limited. While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to

⁵⁷ See Stone, *supra* note 5, at 957.

⁵⁸ *Id.* at 957, 995.

⁵⁹ *Id.*

⁶⁰ See, e.g., *Wilko v. Swan*, 346 U.S. 427, 439 (1953) (Frankfurter, J., dissenting). *Wilko* was subsequently overruled by *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477 (1989), but remains a useful illustration of the differences of opinions Supreme Court justices had of arbitration at the time.

⁶¹ *Wilko v. Swan*, 346 U.S. 427, 434–36.

decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.⁶²

Justice Reed's skepticism of arbitration for individual customer claims echoed concerns dating from long before the FAA was enacted, concerns that underlay the common law courts' refusal to use specific performance to force parties to arbitrate.⁶³ It was articulated in 1845 by Justice Story, who explained his refusal to use the court's equitable powers to compel parties to submit their dispute to arbitration on the grounds that there was no way the court could ensure a result in arbitration would be fair or an arbitration procedure would comport with elementary due process.⁶⁴ As Justice Story explained:

One of the established principles of courts of equity is, not to entertain a bill for the specific performance of any agreement, where it is doubtful whether it may not thereby become the instrument of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected Now we all know, that arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well[-]enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases; and hence it has often been said, that the judgment of arbitrators is but *rusticum judicium*. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that

⁶² *Id.* at 435–37.

⁶³ *See* Stone, *supra* note 5, at 973.

⁶⁴ *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845).

the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?⁶⁵

The same due process concerns identified by Story were voiced periodically in Supreme Court opinions throughout Phase One and Phase Two, usually in dissenting opinions, even as the courts approved an ever-widening scope for arbitration through their interpretations of the FAA.⁶⁶

III. PHASE TWO: ARBITRATION AS MORE EFFICIENT JUSTICE

The domain of the FAA was vastly expanded in the 1980s, a period in which many observers inside and outside the legal profession, both progressives and conservatives, expressed sharp criticisms of the civil justice system.⁶⁷ Judges complained judicial dockets were overly congested so that their dockets were overwhelmed and cases took too long to adjudicate.⁶⁸ Social activists complained that the courts were too expensive, time-consuming, and technical to enable ordinary people to enforce their rights.⁶⁹ Businesses complained they were being drowned in frivolous lawsuits.⁷⁰ Commentators warned of a “litigation explosion”—that an avalanche of frivolous lawsuits was crippling American businesses and clogging the courts.⁷¹ Basically, Americans did not support the courts.⁷²

⁶⁵ *Id.* (emphasis added).

⁶⁶ Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1966–67 (1995).

⁶⁷ See Stone & Colvin, *supra* note 3, at 1955–56.

⁶⁸ See Warren E. Burger, *Isn't There a Better Way?*, Ann. Rep. on the State of the Judiciary (Jan. 24, 1982), reprinted in LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 13–15 (2d ed. 1977).

⁶⁹ See Stone, *supra* note 5, at 956–58; see also *id.* at 957 nn.149–51 (citing references).

⁷⁰ See *id.* at 957 n.149.

⁷¹ *Id.* at 958.

⁷² There were some exceptions. Some scholars challenged the notion that there was too much litigation. See generally Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL (1991). And some warned moving individual disputes to privatized tribunals for the adjudication of social rights was perilous. See generally Laura Nader, *The Recurrent Dialectic Between Legality and Its Alternatives: The Limitations of Binary Thinking*, 132 U. PA. L. REV. 621

Also, in the late 1970s and 1980s, there was a proliferation of proposals for alternative forms of dispute resolution.⁷³ Legal reformers advocated an enlarged role for arbitration, mediation, and conciliation.⁷⁴ Some also proposed new mechanisms for resolving disputes, such as ombudsmen, med–arb, mini-trials, private judging, and other forms of alternative dispute resolution (ADR).⁷⁵ Harvard Law School Professor Frank Sanders proposed civil cases be brought in a “multi-door courthouse,” in which parties would be directed toward one of a variety of non-judicial mechanisms for resolving disputes, depending upon the nature of the dispute.⁷⁶

In 1976, Chief Justice Burger convened a conference on “The Causes of Popular Dissatisfaction with the Administration of Justice,” known as the “Pound Conference,” named for a speech by the same name delivered by Roscoe Pound in 1906 to the twenty-ninth annual meeting of the American Bar Association (ABA).⁷⁷ The Pound Conference is generally considered the birth of the modern ADR movement.⁷⁸ In his opening address, the Chief Justice urged federal courts to utilize third-party neutrals drawn from the legal profession to resolve small-dollar-value cases.⁷⁹ Subsequently, many federal and state courts complied, changing their rules to require mandatory court-connected mediation,

(1984) (reviewing JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* (1983)). But those voices were in the minority. See Stone, *supra* note 5, at 956–58.

⁷³ Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 205, 233 (2022).

⁷⁴ Scott Brown, Christine Cervenak & David Fairman, *Alternative Dispute Resolution Practitioners Guide*, CONFLICT MGMT. GRP. 1, 4–6, https://pdf.usaid.gov/pdf_docs/PNACB895.pdf (last visited Sept. 17, 2022).

⁷⁵ *Id.* at App. A, 3–5.

⁷⁶ The concept of a multi-door courthouse was first proposed by Harvard Professor Frank E.A. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), and was reprinted in Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976). For a discussion of the impact of the concept, see generally Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577 (1988).

⁷⁷ Lara Trauma & Brian Farkas, *The History and Legacy of the Pound Conferences*, 18 CARDOZO J. CONFLICT RESOL. 677, 679 (2017).

⁷⁸ *Id.*

⁷⁹ *Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 83–96 (1976) (referring to the Honorable Warren E. Burger’s keynote address regarding the Agenda for 2000 A.D. and a need for systematic anticipation).

arbitration, and settlement conferences prior to setting a case for trial.⁸⁰

Contemporaneous with the burgeoning ADR movement, the Supreme Court issued three judicial decisions in the mid-1980s that greatly expanded the use of arbitration in the civil justice system. They expanded the scope of the FAA in two respects: They expanded its scope geographically outward from federal courts to state courts, and expanded it vertically to apply not only to contractual disputes but also to disputes involving statutory rights.⁸¹ Thus, the 1980s Supreme Court expanded the scope of the FAA far beyond its initial community-reinforcing and business-related purposes that its drafters had envisioned.⁸² Indeed, it is no exaggeration to say the Supreme Court's arbitration decisions in the 1980s rewrote the FAA and brought about a hidden revolution in the civil justice system.

Before describing these seminal cases of the 1980s, it is important to point out that the Supreme Court decisions that transformed the FAA in that decade were not exclusively the handiwork of the conservative justices.⁸³ Instead, liberal and conservative justices both supported the expansion of the Act, although in different ways.⁸⁴ In general, the liberal wing of the court favored expanding the FAA to the states by holding that it preempted any state laws that stood in the way of arbitration.⁸⁵ The conservative wing, on the other hand, favored expanding the scope of the FAA to disputes over federal statutory rights so that federal rights were subject to mandatory arbitration clauses.⁸⁶

⁸⁰ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 438 (1982) (court-ordered arbitration); Margaret Schmidt, *Exploring the Contradictions Inherent in Court-Ordered "Voluntary" Mediation*, 68 DISP. RESOL. J. 103, 103 (2013) (court-ordered mediation).

⁸¹ See generally *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁸² See generally *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁸³ See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

⁸⁴ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

⁸⁵ See generally *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁸⁶ See generally *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

The developments were as follows. First, in 1983, the Supreme Court declared that courts should apply a presumption in favor of arbitration when deciding cases involving the FAA. In an opinion by Justice Brennan, the Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* announced the principle that, when deciding whether a particular dispute comes within an arbitration clause, courts should resolve all doubts in favor of arbitration.⁸⁷ He said such a presumption furthered the “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”⁸⁸ He contended this policy was embodied in “Congress’[s] clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”⁸⁹

This declaration of a federal policy in favor of arbitration has served as a fixture of arbitration law and provided a rationale for the extraordinary expansion of the FAA that followed. *Moses H. Cone* was a 6–3 decision, signed by all the liberal justices and to which the conservative justices—Justices Rehnquist, Burger, and O’Connor—dissented.⁹⁰

The second pivotal development of that decade concerned the scope of FAA preemption. Prior to the mid-1980s, it was assumed the FAA only applied to cases that were in federal courts on federal question jurisdiction.⁹¹ But in 1984, in *Southland Corp. v. Keating*, the Court’s majority rejected this view, and held the FAA must also be applied by state courts, so long as the dispute involved interstate commerce and there was a written agreement to arbitrate.⁹² The majority also held the state court must apply federal law and the FAA preempted any state law that conflicted with it.⁹³ The *Southland* decision was decided 7–2, with Chief Justice Burger writing the majority opinion.⁹⁴ The conservative members of the Court—Justices Rehnquist and O’Connor—again dissented.⁹⁵

After *Southland*, the FAA was found to preempt any and all efforts by a state to enact legislation to protect weaker parties from

⁸⁷ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

⁸⁸ *Id.* at 24.

⁸⁹ *Id.* at 22.

⁹⁰ *See infra* Appendix.

⁹¹ *See Southland Corp. v. Keating*, 465 U.S. 1, 21–23 (1984) (O’Connor, J., dissenting).

⁹² *Id.* at 14–15.

⁹³ *Id.* at 18.

⁹⁴ *See generally id.*

⁹⁵ *See id.* at 21 (O’Connor, J., dissenting).

onerous or unfair arbitration agreements.⁹⁶ Three years later, the holding in *Southland* was reinforced and expanded in *Perry v. Thomas*, a 7–2 opinion authored by the liberal Justice Marshall,⁹⁷ to which Justices Stevens and O’Connor dissented.⁹⁸

The third pivotal development of the 1980s concerned the types of disputes that were subject to the FAA. Whereas previously the FAA had been found to apply only to contractual disputes, in 1985 the Court extended the reach of the FAA to also compel arbitration of statutory disputes.⁹⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* involved a business dispute in which an auto dealer accused the automobile manufacturer and its joint-venture partner of violating the federal antitrust law.¹⁰⁰ The Court ruled, in a 5–3 decision, that the antitrust issue had to go to arbitration instead of to court.¹⁰¹ Justice Blackmun, writing for the majority, justified closing the courthouse door to the dealer’s Sherman Act claim on the ground that, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.”¹⁰² In so doing, Blackmun also announced an important principle of arbitration law: He stated that arbitration can be ordered only if the litigant “may vindicate its statutory cause of action in the arbitral forum.”¹⁰³

The Court’s liberal members—Justices Stevens, Brennan, and Marshall—dissented on the grounds that the informality of arbitration procedures combined with the lack of meaningful judicial review of arbitral awards made arbitration an inappropriate forum for the adjudication of statutory rights.¹⁰⁴ Their position echoed concerns that had been voiced earlier by Justices Story and Reed about the due process deficiencies inherent in the arbitration process.¹⁰⁵

The *Moses H. Cone*, *Southland*, and *Mitsubishi* cases opened the floodgates for arbitration to be used in statutory disputes and for arbitration cases to be brought in state courts. Two years after *Mitsubishi*, in a decision written by Justice O’Connor, the Supreme

⁹⁶ See, e.g., *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding a Montana law requiring arbitration clauses to appear in capital letters on the first page of a contract to be preempted by the FAA).

⁹⁷ *Perry v. Thomas*, 482 U.S. 483 (1987).

⁹⁸ See *id.* at 493 (Stevens, J., dissenting); *id.* at 494 (O’Connor, J., dissenting).

⁹⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

¹⁰⁰ See *id.* at 616–24.

¹⁰¹ *Id.* at 640.

¹⁰² *Id.* at 628.

¹⁰³ *Id.* at 637.

¹⁰⁴ *Id.* at 640 (Stevens, J., dissenting).

¹⁰⁵ See discussion *supra* Section II.

Court extended the holding in *Mitsubishi* to a dispute alleging violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act statute and the Securities and Exchange Act of 1934.¹⁰⁶ The justices in *Shearson/American Express v. McMahon* were unanimous on the issue that the RICO claim was subject to the FAA.¹⁰⁷

Nonetheless, in *Shearson/American Express*, there was a partial dissent.¹⁰⁸ Three justices—Blackmun, Brennan, and Marshall—disagreed with the majority’s holding regarding arbitration of claims arising under the 1934 Securities and Exchange Act.¹⁰⁹ Those Justices contended that because the Securities and Exchange Act contained language indicating Congress did not intend to permit claims arising under the statute to be subject to arbitration, Securities Act claims are not arbitrable.¹¹⁰ Additionally, they expressed the fear that arbitrators might not give sufficient heed to the congressional policy of investor protection embodied in the securities statutes.¹¹¹ The dissenters relied on the earlier Supreme Court case, *Wilko v. Swan*, in which the Court held that claims brought under the 1933 Securities Act could not be submitted to arbitration. In *Wilko*, the Court reasoned that Congress did not intend for arbitrators to enforce the investor protections embodied in the statute, and moreover, arbitration was not an appropriate venue for the adjudication of claims under that statute.¹¹² The majority in *Shearson/American Express* rebuffed the dissenters’ arguments, contending that the *Wilko* decision embodied an outdated suspicion of arbitration that Congress had rejected when it enacted the FAA.¹¹³

Thus, by 1987, all nine justices agreed federal statutory rights could be amenable to arbitration. The only issues left open were to determine which federal statutes evidenced a congressional intent to preclude arbitration of the statute’s provisions, and in which cases arbitration would be inadequate to protect the plaintiffs’ substantive rights.

In 1991, the Court again expanded the range of statutes whose provisions were subject to arbitration. In *Gilmer v.*

¹⁰⁶ *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 242 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens partially dissented as well, in a separate opinion. *See id.* at 268 (Stevens, J., concurring in part and dissenting in part).

¹⁰⁹ *Id.* at 243 (Blackmun, J., concurring in part and dissenting in part).

¹¹⁰ *Id.* at 250–51 (Blackmun, J., concurring in part and dissenting in part).

¹¹¹ *Id.* at 256–57 (Blackmun, J., concurring in part and dissenting in part).

¹¹² *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

¹¹³ *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 228–29 (1987).

Interstate/Johnson Lane Corp., the Court held that an employee who alleged his termination was in violation of the federal Age Discrimination in Employment Act (ADEA) had to take his case to arbitration.¹¹⁴ The 7–2 majority opinion in *Gilmer* was written by Justice White and signed by Justices Rehnquist, O’Connor, Scalia, Kennedy, and Souter.¹¹⁵ Justices Stevens and Marshall dissented, arguing Congress did not intend age discrimination claims to be subject to mandatory arbitration.¹¹⁶

After *Gilmer*, most claims arising under federal statutes were found to be subject to arbitration.¹¹⁷ Indeed, in *Gilmer*’s aftermath, thousands of employers inserted arbitration clauses into their employment manuals and hundreds of cases in the lower federal courts compelled arbitration of claims brought under the federal civil rights laws, employment laws, and consumer protection laws.¹¹⁸

In the decades from 1980 to about 2000, which I term Phase Two of the FAA, the self-regulation rationale for promoting arbitration was rarely expressed. Indeed, once the scope of arbitration under the FAA was expanded beyond contractual disputes to include arbitration of statutory claims, it was not plausible to characterize workers and consumers as part of a joint self-regulatory community with their employers or with the large corporations from whom consumers made purchases. So, instead of contending arbitration provided better justice than a judicial forum, courts after 1980 emphasized the instrumental virtues of arbitration—that arbitration is preferable to litigation because it is more efficient.

Most of the seminal decisions in the mid-1980s and 1990s invoked the dicta in *Moses H. Cone* to the effect that, under the FAA, arbitration clauses should be interpreted liberally because arbitration is faster, cheaper, and more efficient than litigation in courts.¹¹⁹ For example, this contention was the centerpiece of the

¹¹⁴ *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S. 20, 35 (1991).

¹¹⁵ *Id.* at 22.

¹¹⁶ *Id.* at 36 (Stevens, J., dissenting).

¹¹⁷ See generally Katherine V.W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. UNIV. L. REV. 1017, 1033–34 (1996) (citing post-*Gilmer* cases applying FAA to employment disputes).

¹¹⁸ Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/#:~:text=If%20an%20employment%20right%20protected,procedure%20designated%20in%20the%20agreement.>

¹¹⁹ The asserted instrumental benefits of arbitration can also be found in some earlier decisions, including *Prima Paint v. Conklin & Flood*, the case

Supreme Court's decision in *Rodriguez de Quijas* in 1989, in which the Court explicitly overruled *Wilko* because, it claimed, *Wilko* was difficult to reconcile with the policy of the Arbitration Act, "which strongly favors the enforcement of agreements to arbitrate as a means of securing 'prompt, economical[,] and adequate solution of controversies.'"¹²⁰ The same rationale was expressed in the *Mitsubishi* opinion, where the majority opined that "[b]y agreeing to arbitrate a statutory claim, a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."¹²¹

In the late 1980s and throughout the 1990s, lower courts routinely asserted the instrumental value of arbitration to justify giving an expansive approach to the FAA.¹²² For example, in *Olde Discount Corp. v. Tupman*, the Third Circuit justified its decision to deny a party an administrative hearing on an issue that was subject to arbitration because:

Olde Discount's right to arbitration cannot be satisfied if an alternate administrative forum is determining at the same time whether a claim to the identical remedy is available. The concern underlying a federal right to enforcement of arbitration agreements is a party's entitlement to a proceeding and a forum that are, at least ideally,

that established the separability doctrine for applying arbitration clauses in cases where the underlying contract is alleged to be unenforceable. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 423–24 (1967). In that case, Justices Black, Douglas, and Stewart dissented, even as they agreed there are "special values of arbitration: (1) the expertise of an arbitrator to decide factual questions in regard to the day-to-day performance of contractual obligations, and (2) the speed with which arbitration, as contrasted to litigation, could resolve disputes over performance of contracts and thus mitigate the damages and allow the parties to continue performance under the contracts." *Id.* at 415. However, to them, these virtues were not dispositive of the issue of whether arbitration should be required in that case. *Id.* at 415–16.

¹²⁰ *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 479–80 (1989).

¹²¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

¹²² *See, e.g., Olde Discount Corp. v. Tupman*, 1 F.3d 202, 213 (3d Cir. 1993); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273–74 (4th Cir. 1997); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.*, 88 F.3d 129, 133 (2d Cir. 1996); *Real Color Displays, Inc. v. Universal Applied Technologies Corp.*, 165 F.3d 19, 19 (4th Cir. 1998); *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 191 (4th Cir. 1991).

speedy, efficient, and simpler than litigation in the courts or before agencies.¹²³

Similarly, in *Rainwater v. National Home Insurance Co.*, the Fourth Circuit proclaimed “we approach the issues on appeal here guided by a congressional policy that favors and encourages arbitration precisely because it is thought to be a speedy, inexpensive[,] and efficient way to resolve (as opposed to prolong) disputes without consuming court time.”¹²⁴

Throughout Phase Two, all the Supreme Court justices shared the view that arbitration was preferable to courts because arbitration offered a speedy, inexpensive, and efficient mechanism for resolving disputes.¹²⁵ Where they differed was in their view of the way in which the Court should expand arbitration’s domain. The liberal justices favored expanding the *Southland* preemption to prevent states from enacting legislation that would impede the enforcement of arbitration agreements.¹²⁶ The conservative justices disagreed with this approach, and repeatedly dissented on the basis of states’ rights. Thus, until the mid-1990s, Justices O’Connor, Scalia, and Thomas dissented in all the cases that extended the FAA’s preemptive effect because, they contended, to do so interfered with states’ rights.¹²⁷ But over time, most of the conservative justices begrudgingly accepted the broad preemption force that *Southland* and its progeny were accorded under the FAA.¹²⁸ But not all of them: As recently as 2017, Justice Thomas

¹²³ *Olde Disc. Corp. v. Tupman*, 1 F.3d 202, 213 (3d Cir. 1993).

¹²⁴ *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 192 (4th Cir. 1991).

¹²⁵ *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 657 (1985).

¹²⁶ *See discussion supra* Section III (discussing *Southland* and *Perry v. Thomas* decisions); *see also Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 268, 273–77 (1995) (adopting expansive definition of phrase “involving commerce” in order to give FAA unusually broad preemptive scope, with Justice Breyer writing for majority); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (finding Montana law that limited validity of arbitration clauses preempted by federal law, with Justice Ginsburg writing for majority).

¹²⁷ *See, e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273–74 (1995). Justices Thomas and Scalia dissented and Justice O’Connor, in a concurring opinion, reiterated her view that the decision in *Southland* was incorrectly decided. *See id.* at 282–84 (O’Connor, J., concurring); *id.* at 284 (Scalia, J. dissenting); *id.* at 285 (Thomas, J., dissenting).

¹²⁸ *Id.* at 273–74.

continued to insist the FAA does not apply to state court proceedings.¹²⁹

On the other hand, since 1985, the conservative justices have advocated expanding the FAA into the realm of statutory rights.¹³⁰ Before *Mitsubishi*, the Court assumed the FAA was designed to enforce arbitration agreements in contractual disputes, but not statutory ones.¹³¹ As discussed, this position was based on *Wilko v. Swan*, where the Court refused to require arbitration in a dispute that arose under the 1933 Securities Act.¹³² But *Wilko* was expressly overturned in 1989.¹³³ Then, after the *Gilmer* decision in 1991, the floodgates opened for using the FAA to compel arbitration of all types of statutory rights, even in cases in which a solitary individual was pitted against a major corporation.¹³⁴ In those cases, the conservative justices supported applying the FAA to statutory rights and the liberal justices dissented.¹³⁵

Although courts in Phase Two greatly expanded the scope of arbitration, the Supreme Court decisions in that era also erected some guardrails to protect individuals from having to have their cases heard in arbitration proceedings that were unfair and to ensure that individuals had an accessible and fair venue for adjudicating their rights, particularly when a dispute pitted an individual against a powerful corporation and when federal statutory rights were at stake. Thus, for example, as discussed above, the dicta in the *Mitsubishi* opinion served as an important limitation¹³⁶ because the Court there declared that, although it was permissible to compel arbitration of statutory rights, it was not permissible if the arbitration would entail the litigant's loss of substantive rights.¹³⁷ This was termed the "effective vindication doctrine."¹³⁸

The Supreme Court erected another guardrail in 1995, in *First Options of Chicago v. Kaplan*, where it held a court should not

¹²⁹ See, e.g., *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1429–30 (2017) (Thomas, J., dissenting); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting).

¹³⁰ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

¹³¹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967).

¹³² *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

¹³³ *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 479–80 (1989).

¹³⁴ *Stone*, *supra* note 5, at 953.

¹³⁵ *Id.*

¹³⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616 (1985).

¹³⁷ See *id.*

¹³⁸ Mark Lemley & Christopher Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U.L. REV. 1, 8 (2015).

require a party to arbitrate the issue of arbitrability unless there was “clear and unmistakable evidence” the parties had agreed to do so.¹³⁹ In a unanimous decision authored by Justice Breyer, the Court thus carved out an exception to the presumption of arbitrability, and instead held that in determining whether an arbitration agreement should be interpreted to include an agreement to submit issues of arbitrability itself to the arbitrator, it should apply the “clear and unmistakable” standard.¹⁴⁰ Arbitration should only be ordered for issues that both parties had clearly and unmistakably agreed to arbitrate.¹⁴¹ This was necessary, Breyer wrote, because the question of who should decide issues of arbitrability is “arcane,” and thus weaker parties might not focus on it when they consent to a contract.¹⁴² Thus they should not be forced to arbitrate in situations in which they were unlikely to have consented.¹⁴³ As Breyer explained:

[W]hen the parties have a contract that provides for arbitration of some issues . . . the parties likely gave at least some thought to the scope of arbitration. And, given the law’s permissive policies in respect to arbitration . . . one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter On the other hand, the former question—the “who (primarily) should decide arbitrability” question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the “who shall decide arbitrability” point as giving the arbitrators that power¹⁴⁴

In practice, the result of *First Options* was that parties to an arbitration agreement could have the validity of the arbitration clause itself decided by a court, where they could argue there had

¹³⁹ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 944–45.

¹⁴² *Id.* at 945.

¹⁴³ *Id.*

¹⁴⁴ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (internal citations omitted) (emphasis in original).

been no consent, that the agreement was unconscionable, or that the agreement was invalid under other contract defenses.

After *First Options*, the lower federal courts used the “clear and unmistakable” standard to protect parties from having to arbitrate cases in which they had scant knowledge they were subject to an arbitration clause and had no reason to believe they had agreed to arbitrate the threshold question of arbitrability.¹⁴⁵ This redounded to the benefit of the weaker parties in transactions—those who did not draft the arbitration clause and were often unfamiliar with its import.¹⁴⁶ And some lower federal courts embellished the *First Options* principle to hold a case was not subject to mandatory arbitration when the claim that the dispute is arbitrable is “wholly groundless.”¹⁴⁷

One case, *Douglas v. Regions Bank*, decided by the Fifth Circuit in 2014, demonstrates why the “clear and unmistakable” standard adopted by *First Options* and the “wholly groundless” exception to arbitration were guardrails protecting consumers.¹⁴⁸ That case involved an individual, Shirley Douglas, who opened a checking account with her local bank in August 2002. The court found as follows:

In August 2002, Shirley Douglas opened a checking account with Union Planters Bank and signed a signature card binding her to arbitration. The arbitration provision included a clause (the “delegation provision”) delegating the question of a dispute’s arbitrability to an arbitrator. Douglas’s account was closed less than a year later. Union Planters Bank (“Union Planters”) merged with Regions Bank (“Regions”) in June 2005.

In 2007, Douglas was injured in an automobile accident caused by the negligence of the driver of another vehicle. She retained a lawyer, settled the

¹⁴⁵ See, e.g., *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); *Turi v. Main Street Adoption Services, LLP*, 633 F.3d 496 (6th Cir. 2011); *Douglas v. Regions Bank*, 757 F.3d 460 (5th Cir. 2014).

¹⁴⁶ See David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 386–94 (2018) (characterizing *First Options* as decision protective of weaker parties to arbitration agreements).

¹⁴⁷ *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006); *Turi v. Main Street Adoption Services, LLP*, 633 F.3d 496, 511 (6th Cir. 2011); *Douglas v. Regions Bank*, 757 F.3d 460, 463–64 (5th Cir. 2014). *But see* *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017) (declining to adopt the “wholly groundless” approach); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286 (10th Cir. 2017) (same).

¹⁴⁸ *Douglas v. Regions Bank*, 757 F.3d 460, 461 (5th Cir. 2014).

claim for \$500,000, and hired a separate attorney, Vann Leonard, to get the settlement approved in bankruptcy court, where she had filed under Chapter 13. Leonard allegedly embezzled Douglas's portion of the settlement. Douglas sued Regions and Trustmark National Bank ("Trustmark"), where Leonard had maintained accounts, for negligence and conversion on the ground that they had notice of the embezzlement and negligently failed to report that activity, make reasonable inquiries, or prevent further diversions.

Regions moved to compel arbitration based on the delegation provision in the arbitration agreement Douglas had entered into [five years earlier] with Union Planters, Regions' predecessor-in-interest."¹⁴⁹

The Fifth Circuit refused to compel arbitration because "the claim that this dispute is within the scope of the arbitration provision is groundless."¹⁵⁰ As the Fifth Circuit further explained:

The mere existence of a delegation provision in the checking account's arbitration agreement, however, cannot possibly bind Douglas to arbitrate gateway questions of arbitrability in *all* future disputes with the other party, no matter their origin. Suppose the driver who injured Douglas was an employee of Regions who was conducting bank business. Douglas would not have to arbitrate the underlying tort, which is unrelated to her checking account and its accompanying contract, just because she happens to have a contract with Regions on a completely different matter. It follows that she does not have to send such a claim for "gateway arbitration" merely because there is a delegation provision in the completely unrelated contract.

If it were otherwise, then every case involving an arbitration agreement with a delegation provision must, with no exceptions, be submitted for such gateway arbitration; no matter how untenable the argument that there is some connection between the dispute and the agreement, an arbitrator must decide first.¹⁵¹

¹⁴⁹ *Id.* at 461.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 462–63.

During Phase Two, some lower courts adopted other doctrines to prevent unfairly depriving individuals of their rights through the overbroad use of arbitration.¹⁵² For example, some courts utilized the common law doctrine of unconscionability to prevent arbitration under grossly unfair procedures, and some others imposed a standard of “knowing and voluntary” to ascertain consent before enforcing arbitration agreements.¹⁵³ These doctrines served to ensure arbitration between parties with great disparities of bargaining power was the product of actual consent and that the arbitration procedures conformed with fundamental fairness.¹⁵⁴ Some lower courts also expanded judicial review of arbitration beyond the four narrow grounds specified in the statute by refusing

¹⁵² See, e.g., *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

¹⁵³ See *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 827 (1981) (refusing to compel arbitration of a fee dispute because the arbitration procedure called for in the agreement was so unfair that it did not meet the “‘minimal levels of integrity’ which are requisite to a contractual arrangement for the nonjudicial resolution of disputes”); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1530 (1997) (finding arbitration agreement in the employment contract to be “so one-sided as to be unconscionable [because] Defendants can use the court system for certain claims, but the plaintiff must use arbitration for all his, with very limited damages. The plaintiff gives up significant rights, and defendant is protected from liability for all fraud, willful injury or violation of law.”); see also *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938–39 (4th Cir. 1999) (refusing to enforce an arbitration agreement in which, amongst other defects, the arbitration rules specified the employer would provide all the names of the arbitrators on the list from which the parties were required to make their selection, but also permitted the employer to place its own family members, partners, and managers on the list).

¹⁵⁴ See *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992) (holding a 21-year-old woman was not required to arbitrate her medical malpractice complaint because the arbitration agreement was contained in a clinic intake form and the arbitration term was not explained, so there was no knowing consent and the term itself was beyond her reasonable expectations); *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994) (reversing district court order for arbitration of a sexual harassment complaint because the employees did not give their knowing and voluntary consent to the arbitration provision).

to enforce arbitral awards that displayed “manifest disregard of the law”¹⁵⁵ or that were “completely irrational.”¹⁵⁶

These guardrails were integral aspects of arbitration law during Phase Two, and were widely understood as necessary to protect unwitting individuals from forcibly having their statutory rights adjudicated by unfair arbitration systems to which they did not consent and from which they had no right of appeal.¹⁵⁷ For example, in *Stirlen v. Supercuts*, the California Court of Appeal held a one-sided arbitration agreement that required employees to submit claims to arbitration but did not impose such a requirement on the employer to be unconscionable.¹⁵⁸ As *Stirlen* explained:

While it may often be advantageous for employees to submit employment disputes to arbitration, it may also be disadvantageous. For example, arbitral discovery is ordinarily much more limited than judicial discovery, which may seriously compromise an employee's ability to prove discrimination or unfair treatment Procedural protections available in arbitration are inferior in other ways to those employees may obtain in a judicial forum. As the Ninth Circuit noted in *Prudential Ins. Co. of America v. Lai* [42 F.3d 1299 (9th Cir.[1994]), in

¹⁵⁵ See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (reviewing the history of the “manifest disregard” standard in arbitration); see also *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (finding arbitrators manifestly disregarded the law, vacating arbitral award, and allowing suit in district court to go forward); *accord*, *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1134 (3d Cir. 1972); *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1464 (11th Cir. 1997).

¹⁵⁶ See, e.g., *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1134 (3d Cir. 1972) (advising “although the complete irrationality of an award is a basis for setting it aside, the irrationality principle must be applied with a view to the narrow scope of review in arbitration cases”).

¹⁵⁷ Not all courts adopted all these guardrails. For example, courts in several circuits expressly rejected the Ninth Circuit’s “knowing and voluntary” standard for consent to an arbitration agreement. See, e.g., *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183 (3d Cir. 1998); *Haskins v. Prudential Ins. Co.*, 230 F.3d 231, 239 (6th Cir. 2000); see also *Hart v. Canadian Imperial Bank of Commerce*, 43 F. Supp. 2d 395, 400 (S.D.N.Y. 1999) (rejecting the “heightened standard” announced in *Lai*); *Battle v. Prudential Ins. Co. of America*, 973 F. Supp. 861, 866 (D. Minn. 1997) (“This Court is . . . not persuaded that the court's analysis in *Lai* is sound and supported by law and declines to following its reasoning as well.”).

¹⁵⁸ See generally *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1st Dist. Ct. App. 1997).

California “the privacy rights of victims of sexual harassment are protected by statutes limiting discovery and admissibility of plaintiff’s sexual history in a judicial proceeding” No such statutory protection is provided an employee compelled to arbitrate a claim of sexual harassment against an employer under an agreement of the sort presented here

. . . .

Further, except in extraordinary circumstances, parties who submit a dispute to private arbitration also give up their right to review of an adverse decision Thus, . . . employees must accept adverse rulings on their employment claims *even if an error of fact or law appears on the face of the arbitrator’s ruling and causes substantial injustice*.¹⁵⁹

However, by 2000, the guardrails began to erode.

IV. PHASE 3: ARBITRATION AS JUSTICE, QUESTION MARK?

Since 2000, the judge-created guardrails fell away, transforming the FAA into a tool to keep ordinary Americans from enforcing their rights and shifting the justification for pushing cases out of the courts and into arbitration. The first sign of that shift appeared in 2000 in *Green Tree Financial Corp. v. Randolph*, in which a mobile home purchaser alleged a lender charged her excessive finance fees to finance her purchase, in violation of the federal Truth in Lending Act.¹⁶⁰ The loan agreement required her to take her claim to arbitration.¹⁶¹ The plaintiff attempted to avoid arbitration because, she asserted, she lacked the financial resources to pay the steep fees that arbitration would likely entail.¹⁶² The Court’s majority opinion, written by Chief Justice Rehnquist, rejected her claim because, he contended, she had failed to introduce evidence to substantiate her claim that the arbitration fees would be too expensive for her to bear.¹⁶³ Chief Justice Rehnquist further proclaimed that although a party should not be forced to arbitrate when doing so means the loss of a substantive right,¹⁶⁴ the plaintiff bears the burden of establishing the costs of arbitration would

¹⁵⁹ *Id.* at 1537–38 (internal citations omitted) (emphasis in original).

¹⁶⁰ *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 82–84 (2000).

¹⁶¹ *Id.* at 83.

¹⁶² *Id.* at 83–84.

¹⁶³ *Id.* at 90–91.

¹⁶⁴ *Id.* at 91–92.

prohibitively expensive.¹⁶⁵ Because the arbitration clause was silent as to the cost, Chief Justice Rehnquist ruled the plaintiff had not met that burden.¹⁶⁶

Although Chief Justice Rehnquist ruled against the plaintiff in *Green Tree*, he acknowledged the “effective vindication doctrine” from *Mitsubishi* by stating, in dicta, that “[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”¹⁶⁷ However, there was no showing this was true in the case at hand.¹⁶⁸

The *Green Tree* decision drew a strong dissent from the Court’s liberal wing.¹⁶⁹ It was the first time since 1989 that an FAA decision was made by a divided Court.¹⁷⁰ The dissenting opinion, authored by Justice Ginsburg and joined by Justices Stevens, Souter, and Breyer, contended the plaintiff should not be forced to arbitrate without knowing in advance who would pay for the arbitral forum or what the upfront costs would be.¹⁷¹ Because the arbitration clause was drafted by Green Tree and because Green Tree was a large financial institution and a repeat player in arbitration, the dissent maintained Green Tree was in a position to know what the costs would entail.¹⁷² Thus, the dissenters argued the plaintiff should not bear the burden of establishing the forum is inaccessible and should not be required to submit to arbitration without knowing the cost in advance.¹⁷³

Another case that signaled the shift to a new phase was *Circuit City Stores v. Adams*, decided in 2001.¹⁷⁴ In *Circuit City*, a retail worker brought a race and sex discrimination claim against his employer and contended the employer’s inclusion of an arbitration clause in initial employment paperwork was not enforceable under state law.¹⁷⁵ He further argued the FAA did not preempt state law because section 1 of the FAA has an exclusion for “contracts of employment of seamen, railroad employees, or any other class of

¹⁶⁵ *Id.* at 92.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 90.

¹⁶⁸ *See generally id.*

¹⁶⁹ *See id.* at 92 (Ginsburg, J., concurring in part and dissenting in part).

¹⁷⁰ As noted in the Appendix, and for the purposes of this analysis, a divided Court is one in which there is more than a 7–2 split. *See infra* Appendix.

¹⁷¹ *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 93, 96 (2000) (Ginsburg, J., concurring in part and dissenting in part).

¹⁷² *Id.* at 96.

¹⁷³ *Id.* at 97.

¹⁷⁴ *See generally* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

¹⁷⁵ *Id.* at 109–11.

workers engaged in foreign or interstate commerce.”¹⁷⁶ He argued that this provision was put into the statute when it was debated in 1925 in response to objections from the President of the International Seamen’s Union of America, who feared that arbitration could be used to deprive workers of access to the courts.¹⁷⁷ Hence, he claimed, it should be interpreted to apply to all classes of workers. The Supreme Court rejected his argument and ruled the case must go to arbitration.¹⁷⁸ In his majority opinion, Justice Kennedy insisted legislative history was not relevant to interpreting the statute.¹⁷⁹ Instead, he resorted to a canon of construction, writing that “[t]he wording of [section] 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that ‘[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’”¹⁸⁰ Justice Kennedy continued that “[u]nder this rule of construction the residual clause should be read to give effect to the terms ‘seamen’ and ‘railroad employees,’ and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it,” and that “the interpretation of the clause pressed by respondent fails to produce these results.”¹⁸¹ Therefore, “[s]ection 1 exempts from the FAA only contracts of employment of transportation workers.”¹⁸² The *Circuit City* decision was 5–4, to which all the conservative justices signed on and all the liberal justices dissented.¹⁸³ *Circuit City* and *Green Tree* were the turning point when the liberals on the Court began to see the serious consequences of how arbitration jurisprudence evolved.

In Phase 3, which began in 2000, the Court’s rationale for its expansive FAA decisions shifted again. Arbitration decisions are no longer justified on the grounds that arbitration offers more satisfactory justice to the parties, is less costly, or more efficient. In fact, by the early 2000s, many commentators contended that while arbitration was sometimes faster and cheaper than litigation, sometimes it is not.¹⁸⁴ Some pointed out that parties in arbitration

¹⁷⁶ *Id.* at 112–14.

¹⁷⁷ *Id.* at 119–20.

¹⁷⁸ *Id.* at 113–16.

¹⁷⁹ *Id.* at 119–20.

¹⁸⁰ *Id.* at 114–15 (emphasis in original) (citations omitted).

¹⁸¹ *Id.* at 115.

¹⁸² *Id.* at 119.

¹⁸³ *Id.* at 124.

¹⁸⁴ See, e.g., Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, ADR NEWS 6 (Aug./Oct. 2009) (collecting studies); Alexander J.S. Colvin, *An Empirical Study of Employment*

are often required to split the administrative fees and costs of the arbitrator's time, which can add up to thousands of dollars.¹⁸⁵ In contrast, in court, apart from minimal filing fees, administrative expenses and judges' time are not charged to the parties.¹⁸⁶ The high cost of arbitration is particularly evident in cases such as *Green Tree*, where an individual challenged a corporate practice in which the plaintiff had relatively small stakes, but where arbitral fees could be substantial.¹⁸⁷ In addition, several scholarly studies found that that in cases where individual workers or consumers were pitted against large corporations, individuals were less likely to win their case in arbitration than in court.¹⁸⁸ Moreover, they found that when individuals won, the damages awarded were significantly less than they would have received in court.¹⁸⁹

After 2000, the Court's justification for its arbitration decisions shifted away from the instrumental benefits of speed and efficiency, and instead, the Court primarily relies on two other rationales to support its pro-arbitration decisions: *stare decisis* and the Court's view of what is best for the business community.¹⁹⁰ These factors are sometimes embellished with a strained reading of the statutory language,¹⁹¹ or a formalistic construction of party consent.¹⁹² In Phase Three, there has been little attempt to provide a reasoned or convincing rationale for depriving individuals of the

Arbitration: Case Outcomes and Processes 8 J. EMPIRICAL L. STUD. 1 (2011) [hereinafter Colvin, *An Empirical Study*].

¹⁸⁵ See, e.g., Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761 (2002); Mark Budnitz, *The High Cost of Arbitration*, 67 *L. & CONTEMP. PROBS.* 133 (2004); see also *Recognizing the Hidden Costs of Arbitration*, JORDAN RAMIS PC (June 18, 2014), <https://jordanramis.com/resources/articles/recognizing-the-hidden-costs-of-arbitration/view/>.

¹⁸⁶ See, e.g., Knapp, *supra* note 185, at 781; Budnitz, *supra* note 185, at 161; see also *Recognizing the Hidden Costs of Arbitration*, *supra* note 185.

¹⁸⁷ *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000).

¹⁸⁸ See generally Colvin, *An Empirical Study*, *supra* note 184.

¹⁸⁹ See Stone & Colvin, *supra* note 3, at 18–21, 20 Table 1 (summarizing studies).

¹⁹⁰ See discussion *infra* Sections IV.A, B; see also Knapp, *supra* note 185, at 778 n.62 (on the role of *stare decisis* in the evolution of arbitration law).

¹⁹¹ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (reading the FAA's § 1 exclusion for "contracts of employment" out of the statute despite overwhelming evidence of congressional intent to keep it in).

¹⁹² See, e.g., *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1427–28 (2017) (imputing "consent" to elderly and infirm residents of a nursing home to compel their surviving kin to arbitrate their wrongful death claims).

ability to have their claims adjudicated in a court of law.¹⁹³ The thinness of the rationale for the FAA decisions and their overt pro-business bias in Phase 3 has sometimes, but not always, moved justices in the Court's liberal wing to dissent.¹⁹⁴ Thus, as the chart in the Appendix demonstrates, there have been many more contested opinions in this phase than previously.¹⁹⁵

The transformation of the FAA from Phase Two to Phase Three was primarily the work of Justice Scalia, who was the heavyweight in reshaping arbitration law in the past two decades.¹⁹⁶ Justice Scalia's majority opinions in *Buckeye Check Cashing, Inc. v. Cardegna*,¹⁹⁷ *Arthur Andersen LLP v. Carlisle*,¹⁹⁸ *Rent-A-Center, West, Inc. v. Jackson*,¹⁹⁹ *AT&T Mobility LLC v. Concepcion*,²⁰⁰ *CompuCredit Corp. v. Greenwood*,²⁰¹ and *American Express Co. v. Italian Colors*²⁰² expanded the law of arbitration into new and dangerous territory. All but one of Justice Scalia's arbitration decisions grew out of cases in which consumers, workers, or small businessmen challenged arbitration agreements drafted by large corporations, claiming the arbitration terms were unfair.²⁰³ In each case, Justice Scalia rejected the plaintiffs' challenge.²⁰⁴ In doing so, he altered the law in four aspects. First, Scalia's post-2000 opinions have made it nearly impossible to challenge an arbitration clause on the ground that it is contained in an unenforceable or void arbitration agreement.²⁰⁵ Second, he made arbitration clauses combined with a class action waiver enforceable, despite state laws that would render

¹⁹³ See discussion *infra* Section IV.C.

¹⁹⁴ See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, at 124 (2001) (Stevens, J., dissenting); *id.* at 133 (Souter, J., dissenting).

¹⁹⁵ See *infra* Appendix.

¹⁹⁶ See generally Katherine V.W. Stone, *The Bold Ambition of Justice Scalia's Arbitration Jurisprudence: Keep Workers and Consumers Out of Court*, 21 EMP. RTS. & EMP. POL'Y J. 189 (2017).

¹⁹⁷ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

¹⁹⁸ *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

¹⁹⁹ *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

²⁰⁰ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

²⁰¹ *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012).

²⁰² *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

²⁰³ The only exception is *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). The case involved a dispute between two businesses, and the issue before the Supreme Court concerned two procedural questions: the appealability of a refusal of a stay order by the lower court, and whether a non-signatory to an arbitration agreement can request a stay under § 3 of the FAA. See generally *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

²⁰⁴ See cases cited *supra* notes 197–202.

²⁰⁵ See Stone, *supra* note 196, at 194–201.

class action waivers unconscionable.²⁰⁶ Third, he called into question a fundamental principle of arbitration law—that arbitration should not be required, when doing so would prevent litigants from effectively vindicating their statutory rights.²⁰⁷ Finally, Justice Scalia gave the FAA preeminence, in that case law now allows it to supersede all other federal laws it conflicts with.²⁰⁸ The net effect of these decisions was to make arbitration the exclusive forum for most claims brought against corporations and financial institutions by workers and consumers.²⁰⁹ As a result, efforts by consumers and workers to assert their hard-won rights have been relegated to the privatized, invisible, and unaccountable forum of arbitration.²¹⁰

Justice Scalia was not the only member of the Court who pushed the arbitration envelope. Many other Supreme Court decisions since 2000 have significantly curtailed the rights of consumers, workers, and small businesses. For example, Chief Justice Rehnquist's opinion in *Green Tree*,²¹¹ Justice Kennedy's opinion in *Circuit City*,²¹² Justice Alito's opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*,²¹³ and Justice Gorsuch's opinion in *Epic Systems Corporation v. Lewis*.²¹⁴ All similarly curtailed ordinary citizens' access to the civil justice system. However, Justice Scalia's opinions set the stage for the recent transformation of the law of arbitration.

A. STARE DECISIS REASONING

Justice Scalia's first major opinion involving the FAA was in *Buckeye Check Cashing, Incorporated v. Cardegna* in 2006, in which he gave an expansive reading to the separability doctrine.²¹⁵ The separability doctrine of arbitration law derived from the *Prima Paint* decision, stating arbitration should be ordered in contract disputes, even if the underlying contract is alleged to be unenforceable under state law.²¹⁶ In *Buckeye*, plaintiffs utilized a payday lender service to cash checks and later filed suit challenging the transactions and contract on the grounds that the lender had

²⁰⁶ *Id.* at 201–06.

²⁰⁷ *Id.* at 206–09.

²⁰⁸ *Id.* at 209–13.

²⁰⁹ *Id.* at 213–19.

²¹⁰ *Id.*

²¹¹ *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 82–92 (2000).

²¹² *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109–24 (2001).

²¹³ *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 665–87 (2010).

²¹⁴ *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619–32 (2018).

²¹⁵ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

²¹⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

charged loans that were usurious, and hence illegal, under established state law.²¹⁷ The defendant lender moved for arbitration based on an arbitration provision in the contract.²¹⁸ The Florida Supreme Court held the case was not subject to arbitration because the contract itself was illegal.²¹⁹ The Florida Supreme Court reasoned enforcing an agreement to arbitrate contained in a contract that is itself unlawful “could breathe life into a contract that not only violates state law, but also is criminal in nature.”²²⁰ In its opinion, the Florida Supreme Court refused to compel arbitration, insisting that “*Prima Paint* has never been extended to require arbitrators to adjudicate a party’s contention, supported by substantial evidence, that a contract *never existed at all*.”²²¹ This same position had been asserted by several other courts and eminent legal scholars.²²² In one case, the Eleventh Circuit refused to enforce an arbitration agreement where the plaintiff had produced evidence to make a colorable showing her signature on an arbitration agreement was forged.²²³ In another case, where an arbitration agreement was signed by a person who had neither actual nor apparent authority to do so, Seventh Circuit Judge Easterbrook refused to apply separability.²²⁴ As Judge Easterbrook explained, “arbitration depends on a valid contract[, and therefore] an argument that the contract does not exist can’t logically be resolved by the arbitrator.”²²⁵

²¹⁷ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006).

²¹⁸ *Id.* at 442–43.

²¹⁹ *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862 (Fla. 2005).

²²⁰ *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 862 (Fla. 2005) (quoting *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000)).

²²¹ *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 864 (Fla. 2005) (quoting *Chastain v. Robinson–Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992)).

²²² *See, e.g.*, *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2000).

²²³ *Chastain v. Robinson–Humphrey Co., Inc.*, 957 F.2d 851, 855 (11th Cir. 1992) (holding arbitration not required because party made convincing showing of never signing arbitration agreement and that her signature was forged).

²²⁴ *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 589–91 (7th Cir. 2001) (holding claim no contract was ever formed is different from other objections to contract formation and should not be sent to arbitration pursuant to separability doctrine).

²²⁵ *Id.* at 591.

The U.S. Supreme Court reversed the Florida Supreme Court's decision.²²⁶ Justice Scalia, writing for the Court, based his reasoning entirely on *stare decisis*.²²⁷ He contended the result inexorably followed from two earlier decisions: *Prima Paint*, which had adopted the principle that arbitration clauses are separable from the contracts in which they are embedded, and *Southland*, which held the FAA is binding in state courts.²²⁸ Justice Scalia also rejected without explanation the position, espoused by the state's supreme court in that case, that the separability principle should only be applied to contracts that are voidable but not to contracts that are void.²²⁹

In *Buckeye*, Justice Scalia did not even address this argument.²³⁰ Rather, Justice Scalia gave a broad—and debatable—reading of the statutory language without providing reason and ultimately rejected the argument many courts, eminent scholars, and the state supreme court in that case had advanced.²³¹

Justice Scalia's willingness to paint precedent with a broad brush to uphold arbitration in one context after another has been repeated by other justices in recent years.²³² For example, in *Epic Systems v. Lewis*, Justice Gorsuch concluded the FAA overrode the protections for collective action embodied in another federal statute (the National Labor Relations Act) without providing any principled reasoning at all.²³³ The majority opinion was based entirely on *stare decisis*.²³⁴

Justice Kagan adopted a similarly wooden invocation of *stare decisis* in *Kindred Nursing Center v. Clark* in 2017.²³⁵ The *Clark* case involved two patients who died in a nursing home under conditions that were allegedly the result of substandard care.²³⁶ Each surviving kin had signed an agreement for care with the nursing home under a power of attorney given to them by their infirm relative.²³⁷ Both nursing home agreements provided all claims regarding the residents' stay at the facility would be resolved

²²⁶ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006).

²²⁷ *Id.*

²²⁸ *Id.* at 444–46.

²²⁹ *Id.* at 448.

²³⁰ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006).

²³¹ *Id.*

²³² *See, e.g., Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017).

²³³ *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

²³⁴ *See generally id.*

²³⁵ *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017).

²³⁶ *Id.* at 1425.

²³⁷ *Id.*

through arbitration.²³⁸ The Kentucky Supreme Court found both powers of attorney to be invalid because the right to a jury trial is a fundamental right under the Kentucky constitution.²³⁹ Accordingly, the court held any power of attorney that would deprive a person of this right needed to be expressly provided.²⁴⁰ Because there was no clear statement of waiver of the fundamental constitutional right to a jury trial, the court held the powers of attorney containing the arbitration clauses, signed under power of attorney, were invalid and refused to order arbitration.²⁴¹ The Kentucky Supreme Court further explained its clear-statement rule applied to all waivers of state constitutional rights, so it was not arbitration-specific and thus, not preempted by the FAA.²⁴²

The U.S. Supreme Court, in a 7–1 decision, reversed.²⁴³ Justice Kagan, writing for the majority, found the Kentucky clear-statement rule for fundamental constitutional rights disfavored arbitration, thus violating the FAA.²⁴⁴ Even though the state supreme court had explained why the rule was not arbitration-specific, Justice Kagan held the state rule “is too tailor-made to arbitration agreements . . . to survive the FAA’s edict against singling out these contracts for disfavored treatment.”²⁴⁵ Thus, the Court held the state rule represented “the kind of ‘hostility to arbitration’ that led Congress to enact the FAA” in the first place.²⁴⁶ The Court gave no other rationale for the decision, but rather explained “we once again ‘reach a conclusion that . . . falls well within the confines of (and goes no further than) present well-established law.’”²⁴⁷ Despite this pronouncement, Justice Kagan’s decision that the ruling flowed naturally from the Court’s earlier preemption decisions, the result—that a neutral principle embodied in a state’s constitution was preempted by the FAA—stretched the scope of FAA preemption far beyond its earlier reach. Justice Thomas, the only dissenter, contended the FAA does not apply in state courts.²⁴⁸

²³⁸ *Id.*

²³⁹ *Id.* at 1426.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 1427.

²⁴³ *Id.* at 1423.

²⁴⁴ *Id.* at 1426–27.

²⁴⁵ *Id.* at 1427.

²⁴⁶ *Id.* at 1428. *But see* Stone, *supra* note 5, at 969–92 (explaining this is a commonplace but debatable reading of the FAA’s legislative history).

²⁴⁷ *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421, 1429 (2017).

²⁴⁸ *Id.* at 1429–30.

B. PRO-BUSINESS RATIONALES

The other rationale behind the current FAA decisions is that individual arbitration is good for business, and thus should be favored.²⁴⁹ It is articulated prominently in class action waiver and class arbitration cases.²⁵⁰ The rationale originated in Justice Alito's majority opinion in *Stolt-Nielsen*, where he ruled when an arbitration agreement is silent as to whether it permitted arbitration to proceed on a class or collective basis, a court should presume the parties did not intend to permit collective actions.²⁵¹ His reasoning was that a collective arbitration would be too great a power for arbitrators to presume when there is silence on the issue of class action arbitration, and too risky for the parties.²⁵²

Justice Scalia elaborated on Justice Alito's reasoning in *AT&T Mobility LLC v. Concepcion* in 2011, and gave it an explicit pro-business spin.²⁵³ In that case, an AT&T consumer brought a class action alleging the company had engaged in fraudulent practices by charging sales taxes—approximately \$30.22 per phone—to customers to whom AT&T had promised free cell phones in exchange for a two-year service contract.²⁵⁴ AT&T's customer agreement included an arbitration clause that also banned class actions and class-wide arbitration.²⁵⁵ The plaintiffs wanted to bring their case as a class action, so they argued the class action waiver was unconscionable.²⁵⁶

The Ninth Circuit applied California's three-pronged test, which determines that a class action waiver in a consumer contract is unenforceable if: (1) the agreement is a contract of adhesion—i.e., a form contract presented by a powerful party to a weaker party on a take-it-or-leave-it basis; (2) the dispute is likely to involve small amounts of damages; and (3) “the party with superior bargaining power carried out a scheme to deliberately cheat large numbers of

²⁴⁹ *The Benefits of Arbitration for Business-to-Business Disputes*, PASHMAN STEIN WALDER HAYDEN P.C.: NEWS & INSIGHTS (Aug 28, 2018), <https://www.pashmanstein.com/publication-the-benefits-of-arbitration-for-businesstobusiness-disputes>.

²⁵⁰ See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

²⁵¹ *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684 (2010).

²⁵² *Id.* at 684–87.

²⁵³ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

²⁵⁴ *Id.* at 337.

²⁵⁵ *Id.* at 336.

²⁵⁶ *Id.* at 340–42.

consumers out of individually small sums of money.”²⁵⁷ The Ninth Circuit found all three prongs of the test satisfied, and therefore denied AT&T’s motion to compel arbitration on an individual basis.²⁵⁸ In *Concepcion*, the Supreme Court reversed.²⁵⁹ Justice Scalia, writing for the majority, held the California rule was preempted because it interfered with arbitration.²⁶⁰ He also disparaged the use of class arbitration, even though that issue had neither been posed to the Court nor briefed by the parties.²⁶¹ Scalia enumerated three reasons for finding class arbitration to be an unsatisfactory procedure.²⁶² First, class arbitration undermines the informality, efficiency, and speed that are the *raison d’être* for arbitration in the first place.²⁶³ Second, an arbitrator must devise a method to afford absent class members notice, an opportunity to be heard, and a right to opt out.²⁶⁴ Third, it imposes great risks on defendants, who could receive a devastating judgment and lose their right to interlocutory appeals or judicial review.²⁶⁵ “We find it hard to believe that defendants would bet the company with no effective means of review”²⁶⁶ For this reason, he ruled not only were the parties prevented from bringing a class action due to the composite arbitration class action waiver in their contract, they also could not proceed in arbitration on a collective basis.²⁶⁷ Finally, he suggested any attempt by the state court to permit such a procedure would violate the FAA.²⁶⁸ The four liberal Justices Breyer, Ginsburg, Sotomayor, and Kagan dissented.²⁶⁹

Recently, the Court extended the pro-business reasoning of *Stolt-Nielsen* and *Concepcion* in *Lamps Plus v. Varela*.²⁷⁰ In that case, an employee attempted to bring a class action against his employer on behalf of employees whose tax information had been compromised by the employer’s allegedly lax data security practices. The lower court denied the class action, pursuant to an arbitration clause in the hiring documents, but it ordered arbitration on a class-wide basis because the arbitration clause was ambiguous

²⁵⁷ *Id.* at 340.

²⁵⁸ *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009), *rev’d sub nom.* *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

²⁵⁹ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

²⁶⁰ *Id.* at 344.

²⁶¹ *Id.* at 348–51; *see* Stone, *supra* note 196, at 204–05.

²⁶² *AT&T Mobility v. Concepcion*, 563 U.S. 333, 348–50 (2011).

²⁶³ *Id.* at 348.

²⁶⁴ *Id.* at 349.

²⁶⁵ *Id.* at 350.

²⁶⁶ *Id.* at 351.

²⁶⁷ *Id.* at 350–52.

²⁶⁸ *Id.* at 352.

²⁶⁹ *Id.* at 357.

²⁷⁰ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

as to the availability of class arbitration.²⁷¹ The Supreme Court, in a 5–4 decision authored by Chief Justice Roberts, reversed.²⁷² In the opinion, the Chief Justice extended *Stolt-Nielsen* to hold the FAA “bars an order requiring class arbitration when an agreement is . . . ‘ambiguous’ about the availability of such arbitration.”²⁷³ The Ninth Circuit had reasoned that because the arbitration agreement at issue was ambiguous as to whether class arbitration was required, the agreement should have been construed against its drafter, the defendant-petitioner.²⁷⁴ Chief Justice Roberts rejected that reasoning on grounds that *Stolt-Nielsen* precluded such a result.²⁷⁵ Since class arbitration is “markedly different” from individualized arbitration and undermines “the most important benefits” of individualized arbitration, courts can only authorize class arbitration when an agreement clearly expresses it.²⁷⁶

Justice Ginsburg’s dissent, joined by Justices Breyer and Sotomayor, directly named and decried the Court’s explicit pro-business trend:

In relatively recent years, [the Court] has routinely deployed the [FAA] to deny to employees and consumers “effective relief against powerful economic entities.”

. . . .

[M]andatory individual arbitration continues to thwart “effective access to justice” for those encountering diverse violations of their legal rights When companies can “muffl[e] grievance[s] in the cloakroom of arbitration,” the result is inevitable: curtailed enforcement of laws “designed to advance the well-being of [the] vulnerable.”²⁷⁷

Issues involving arbitration and the scope of the FAA continue to frequently arise, and current trends threaten to remove some of the remaining protections for consumers and workers, but in the past few years, in contrast to the cases in Phase Two, many recent cases have generated heated dissents from the Court’s liberal wing.²⁷⁸ Indeed, the sparse reasoning in Phase Three has led some of the Court’s justices to challenge the Court’s lock-step automatic rubber

²⁷¹ *Id.* at 1413.

²⁷² *Id.* at 1419.

²⁷³ *Id.* at 1412.

²⁷⁴ *Id.* at 1411.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 1415.

²⁷⁷ *Id.* at 1420, 1422 (Ginsburg, J., dissenting) (internal citations omitted).

²⁷⁸ See *infra* Appendix (cases in Phase 3).

stamping of arbitration.²⁷⁹ It is also possible the conservative justices' willingness to couch their justifications for extending the scope of the FAA in explicitly pro-business terms has emboldened the liberal justices to make these policy arguments in their dissents.

C. THE GUARDRAILS COME DOWN

In Phase Three, the guardrails have come down.²⁸⁰ Most prominently, the *Mitsubishi* effective vindication doctrine—that arbitration should only be required when it does not entail a loss of substantive rights—has been weakened and possibly eliminated. The unraveling began in *Green Tree*, discussed above.²⁸¹ While the *Green Tree* majority retained the *Mitsubishi* guardrail, it weakened its application.²⁸² Thirteen years later, in *American Express Co. v. Italian Colors Restaurant*, Justice Scalia, writing for the majority, cast further doubt on the status of the *Mitsubishi* principle.²⁸³

In *Italian Colors*, a group of merchants brought a class action against American Express (AmEx), claiming they had been overcharged in violation of the federal antitrust law.²⁸⁴ The merchants' contract with AmEx contained a clause that prohibited the merchant from bringing any dispute to a forum other than arbitration, and it required that all disputes be arbitrated on an individual basis.²⁸⁵ It also prohibited the merchants from sharing resources to produce a common expert report.²⁸⁶ When AmEx moved to compel arbitration on an individual basis, the merchants objected because, they contended, to arbitrate the antitrust claim on an individual basis would cost an individual several hundred thousands of dollars, whereas the average recovery would be only \$5,000.²⁸⁷ Hence, without the ability to bring a class or collective action, they would lose their substantive rights under the antitrust laws.²⁸⁸ The plaintiffs prevailed in the Second Circuit, but the decision was reversed by the Supreme Court.²⁸⁹

²⁷⁹ *See id.* (cases in Phase 3).

²⁸⁰ *See id.* (cases in Phase 3).

²⁸¹ *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000).

²⁸² *See generally id.*

²⁸³ *American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

²⁸⁴ *Id.* at 231.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 231–32.

²⁸⁸ *Id.*

²⁸⁹ *In re American Express Merchants' Litigation*, 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom. American Exp. Co. v. Italian Colors Restaurant*, 559 U.S. 1103 (2010), *remanded sub nom. In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011), *aff'd on*

The Supreme Court upheld the class action waiver despite unrefuted evidence that the cost of bringing an antitrust case not as a class action was so high as to render it unfeasible.²⁹⁰ In his majority opinion, Justice Scalia explained, “[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”²⁹¹ Moreover, Scalia went out of his way to cast doubt on the effective vindication principle’s viability.²⁹² He called it mere “dicta,” and interpreted it with mutilating narrowness, stating it would cover “a provision in an arbitration agreement forbidding the assertion of certain statutory rights.”²⁹³ Additionally, he noted it “would *perhaps* cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”²⁹⁴ Beyond those circumstances, “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”²⁹⁵

Justice Kagan dissented and was joined by Justices Ginsburg and Breyer.²⁹⁶ The dissent paid particular attention to Justice Scalia’s dismissive treatment of the effective vindication principle.²⁹⁷ Justice Kagan explained the principle was essential to prevent stronger parties from using these and other kinds of means to eviscerate statutory protections.²⁹⁸ As she wrote:

[The FAA] reflects a federal policy favoring actual arbitration—that is, arbitration as a streamlined “method of resolving disputes,” not as a foolproof way of killing off valid claims The effective[]vindication rule furthers the statute’s goals by ensuring that arbitration remains a real, not faux, method of dispute resolution Without it, companies have every incentive to draft their

reh’g, 667 F.3d 204 (2d Cir. 2012), *cert. granted sub nom.* American Exp. Co. v. Italian Colors Restaurant, 568 U.S. 1006 (2012).

²⁹⁰ American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228, 236 (2013).

²⁹¹ *Id.* (emphasis in original).

²⁹² *Id.*

²⁹³ *Id.* at 236.

²⁹⁴ *Id.* (emphasis added).

²⁹⁵ *Id.* (emphasis in original).

²⁹⁶ *Id.* at 240. *Italian Colors* was decided by a 4–3 majority, with Justice Thomas concurring in the result and Justice Sotomayor recusing herself. *See id.* at 229.

²⁹⁷ *Id.* at 240.

²⁹⁸ *Id.*

agreements to extract backdoor waivers of statutory rights²⁹⁹

Subsequently, the Court in *Epic Systems* appears to have abandoned the *Mitsubishi* principle altogether.³⁰⁰ In that case, an employee who had been given an arbitration agreement when he was hired, subsequently sought to bring a class action lawsuit claiming he, and others similarly situated, had been misclassified as professional employees and hence denied their rights to overtime pay under the federal Fair Labor Standards Act.³⁰¹ The employer moved to compel individual arbitration based on an arbitration clause in the employment agreement.³⁰² The employee contended that to require individual arbitration would abrogate his federally protected right, enshrined in the National Labor Relations Act (NLRA), to take collective action with his co-workers for their “mutual aid and protection.”³⁰³ The Ninth Circuit agreed.³⁰⁴

In the Supreme Court, the narrow issue was whether the FAA supersedes the rights of employees under the NLRA, and the majority ruled the FAA did.³⁰⁵ As Justice Gorsuch wrote:

In many cases over many years, the Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes Throughout, we have made clear that even a statute’s express provision for collective legal actions does not necessarily mean that it precludes ‘individual attempts at conciliation’ through arbitration.³⁰⁶

A powerful dissent written by Justice Ginsburg—and joined by Justices Breyer, Sotomayor, and Kagan—argued that, unlike the earlier cases that Justice Gorsuch cited, here, Congress’s essential purpose in enacting the NLRA was to safeguard workers’ right to take collective action such as collective bargaining or collective litigation.³⁰⁷ Hence, to rule the statute is overridden by the FAA, and that employees can be forced to forego class action litigation in

²⁹⁹ *Id.* at 243–44 (internal citations omitted).

³⁰⁰ *See generally* *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979–80 (9th Cir. 2016).

³⁰⁴ *Id.* at 783–84.

³⁰⁵ *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619–32 (2018).

³⁰⁶ *Id.* at 1627.

³⁰⁷ *Id.* at 1633 (Ginsburg, J., dissenting).

the presence of an arbitration clause, was a direct abrogation of their statutory rights.³⁰⁸

In the past twenty years, other Phase Two guardrails have collapsed as well. In 2019, in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, a unanimous Court rejected the judicially created exception to the FAA, known as the “wholly groundless” exception to delegation of arbitrability, claiming that it was inconsistent with the FAA’s text.³⁰⁹ In doing so, the Court rejected the Fifth Circuit’s reasoning in *Douglas v. Regions Bank*, discussed above.³¹⁰ The wholly groundless exception allowed courts, even when confronted with an agreement that included a valid delegation clause, to decide questions of arbitrability themselves, rather than force the parties to present that argument to the arbitrator, if the court was convinced the defendant’s argument for compelling arbitration was wholly groundless. Justice Kavanaugh, writing for the majority, concluded the wholly groundless exception was “inconsistent with the text of the Act and our precedent.”³¹¹

Moreover, most other guardrails erected by the lower courts to protect individual from unfair or hidden arbitration agreements have also been struck down. As discussed above, some lower courts had adopted an additional standard of review—“manifest disregard of the law”—to supplement the four narrow grounds listed in the statute for courts to refuse enforce arbitral awards. The manifest disregard standard had its origins in the *Wilko* decision, where both the Supreme Court majority and dissent (Justice Frankfurter), agreed an arbitral award can be overturned if an arbitrator’s decision displays a manifest disregard of the controlling and relevant law.³¹² Indeed, Justice Frankfurter bluntly asserted “[a]rbitrators may not disregard the law On this we are all agreed.”³¹³

Lower courts on numerous occasions have relied on the dicta in *Wilko* to overturn arbitral awards when there was blatant

³⁰⁸ *Id.*

³⁰⁹ See generally *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

³¹⁰ See discussion *supra* Section III.

³¹¹ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

³¹² *Wilko v. Swan*, 346 U.S. 427, 440 (1953). Some courts have also expanded the statutory grounds with a “completely irrational” standard for overturning an arbitration award. See, e.g., *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1134 (3d Cir. 1972) (advising “although the complete irrationality of an award is a basis for setting it aside, the irrationality principle must be applied with a view to the narrow scope of review in arbitration cases”).

³¹³ *Wilko v. Swan*, 346 U.S. 427, 440 (1953) (Frankfurter, J., dissenting).

disregard of the law.³¹⁴ The courts used it as a guardrail to protect individuals compelled to enforce their statutory rights in front of arbitrators, many of whom were not lawyers and were not trained in the relevant law.³¹⁵ But in 2008, the Supreme Court ended that form of judicial protection in *Hall Street v. Mattel*, where Justice Souter held, in a 6–3 decision, that the exclusive grounds for vacating an arbitral award were those listed in the statute.³¹⁶ Notably, the issue in *Hall Street* was not whether the manifest disregard standard was an additional valid ground for judicial review under the FAA. Rather, the case involved the question of whether the parties to an arbitration agreement could include in their agreement a provision giving a court the power to vacate the award if the arbitrator’s findings of fact or conclusions of law were erroneous.³¹⁷ The Court held they could not do so and that they were prohibited from including any review provisions other than the four narrow statutory grounds, even if the parties wanted such a provision in their agreement.³¹⁸ In passing, the majority seemed to eliminate the additional, judge-made manifest disregard standard.³¹⁹

³¹⁴ See, e.g., *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 201–02, 204 (2d Cir. 1998) (relying on *Wilko*’s “manifest disregard” standard to find arbitrators manifestly disregarded the law); *accord*, *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461–62 (11th Cir. 1997); see also Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, B.C. L. REV. 137, 157–71 (2011) (surveying how circuit courts and state courts came to adopt the “manifest disregard” standard and providing leading cases).

³¹⁵ F. Paul Bland, Myriam Gilles & Tanuja Gupta, *From the Frontlines of the Modern Movement to End Forced Arbitration and Restore Jury Rights: An Essay in Three Parts*, 95 CHI.-KENT. L. REV. 585, 588–96 (2021).

³¹⁶ *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

³¹⁷ See generally *id.*

³¹⁸ *Id.* at 584–85.

³¹⁹ Some courts have interpreted *Hall Street* to mean “manifest disregard” is not an independent ground for review, but rather comes within § 10(a)(4)—vacating an award where the arbitrators “exceeded their powers.” Using this reasoning, the Second, Fourth and Ninth Circuits have taken the position that the “manifest disregard” standard survives. For example, the Second Circuit has recently affirmed the continued viability of the manifest disregard doctrine in *Weiss v. Sallie Mae, Incorporated*, 939 F.3d 105, 109 (2d Cir. 2019), where it stated:

In addition, this Court has “held that the court may set aside an arbitration award if it was rendered in manifest disregard of the law.” *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451 (2d Cir. 2011) (internal quotation marks omitted). This inquiry encompasses situations “where the arbitrator’s award is in manifest disregard of the terms of the [parties’ relevant] agreement.” *Id.* at 452 (quoting *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us*,

Another important guardrail against egregious unfairness lower courts used to police arbitration was the unconscionability doctrine. Section 2 of the FAA contains an exception for arbitral award enforcement for “grounds that exist in law or in equity for the revocation of any contract.”³²⁰ This provision, also known as the “savings clause,” has been interpreted to give state courts the ability to refuse enforcement of an arbitration agreement that is unenforceable under general principles of state law.³²¹ Many state courts used the unconscionability doctrine to render exceedingly unfair arbitration agreements unenforceable.³²² The Supreme Court’s 2010 decision in *Rent-A-Center*, written by Justice Scalia,

Inc., 126 F.3d 15, 23 (2d Cir. 1997)). Here, the district court characterized the “manifest disregard” standard as “a fifth reason why an arbitration award may be vacated.” App. 162. In light of recent Supreme Court precedent, it is somewhat unclear whether the “manifest disregard” paradigm constitutes an independent framework for judicial review, as the district court thought, or a “judicial gloss” on the FAA’s enumerated grounds in section 10(a). *See Schwartz*, 665 F.3d at 451–52 (citing, *inter alia*, *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 585, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008)). But because this Court has “concluded that manifest disregard remains a valid ground for vacating arbitration awards” whether applied as judicial gloss or as an independent basis, see *id.* at 452 (internal quotation marks omitted), we need not resolve this epistemological debate.

The Fifth, Eighth, and Eleventh Circuits, on the other hand, treat *Hall Street* as eliminating the manifest disregard of the law as a ground for overturning an arbitral decision. *See, e.g.*, *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009). In either event, *Hall Street* has significantly narrowed the ability of courts to overturn an arbitral award for blatant mistakes of law, fact, or contract interpretation.

³²⁰ 9 U.S.C. § 2.

³²¹ *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (interpreting savings clause in § 2 of the FAA to mean “state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally”) (emphasis in original).

³²² *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs, Inc.*, 6 P.3d 669 (Cal. 2000); *Burnett v. Pagliacci Pizza, Inc.*, 47 P.3d 486 (Wash. 2020); *Peavy v. Skilled Healthcare Grp., Inc.*, 470 P.3d 218 (N.M. 2020); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007); *Leonard v. Terminix Int’l Co., L.P.*, 854 So. 2d 529 (Ala. 2002); *East Ford, Inc. v. Taylor*, 826 So. 2d 709 (Miss. 2002); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992).

eliminated most unconscionability challenges to arbitration.³²³ That decision also garnered a powerful dissent from the Court's liberal wing, consisting of Justices Stevens, Ginsburg, Breyer, and Sotomayor.³²⁴

The Appendix, *infra*, includes the line-up of the justices in the Supreme Court decisions involving the FAA since 1983—i.e., throughout Phases Two and Three in my periodization. The shaded rows indicate controversial decisions—i.e., Court division of 6–3 or wider. Notably in those cases, the majority predominantly consisted of conservative justices, while the dissent generally consisted of liberal justices. Further, while most decisions prior to 2008 were unanimous or near-unanimous, a divided Court was characteristic of many decisions between 2008 and 2011. Since 2011, of thirteen decisions, all but four were unanimous or nearly unanimous, and those deemed controversial involved arbitration and class actions.

V. CONCLUSION

There have been three distinct phases in the Court's understanding of the FAA, so that over time, the rationale for the Court's pro-arbitration rulings' has shifted significantly. What remains in Phase Three is a statutory reading by the Supreme Court's conservative majority that is thinly justified, bereft of principled elaboration, and overtly pro-business. It is, therefore, not surprising that many of the decisions are controversial, not only for their specific holdings but also for their lack of convincing rationale. Moreover, the class action cases have led the liberal wing of the Court to contend that the law of arbitration has strayed too far in the direction of stripping individuals of their statutory rights.

At present, numerous groups are advocating that the FAA be amended to exempt consumer and employment cases from its ambit. Every year for the past several years, a bill called the Arbitration Fairness Act that would have this effect has been introduced in Congress.³²⁵ Although it has not been enacted, it has garnered increased support.³²⁶ In addition, on July 10, 2017, the Consumer Financial Protection Bureau issued a regulation to prevent arbitration in agreements between consumers and financial

³²³ See generally *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

³²⁴ See *id.* at 76 (Stevens, J., dissenting).

³²⁵ See, e.g., S. 1133, 114th Cong. (2015); H.R. 1374, 115th Cong. (2017).

³²⁶ See Robert Gilmore & Hannah Kraus, *FAIR Act: U.S. House Passes Bill Eliminating Mandatory Arbitration Agreements*, JD SUPRA (Mar. 23, 2022), <https://www.jdsupra.com/legalnews/fair-act-u-s-house-passes-bill-5292972/>.

entities.³²⁷ Four months later, in November 2017, Congress voted to overturn the regulation in a 50–50 vote.³²⁸

It is clear the use of arbitration to undermine employee and consumer rights and undermine the civil justice system is an issue that is not going away. However, given the density of the precedent, it would take either a new Supreme Court majority committed to overturning several key FAA decisions, or congressional action to amend the statute, to reverse the recent trends. The stakes are high. The Court's current interpretations of the FAA are far removed from the initial intent of the statute and threaten to undo a century of achievements in consumer and worker rights. They also threaten to lock ordinary citizens out of court, thereby undermining our civil justice system.

³²⁷ *CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court*, CONSUMER FIN. PROT. BUREAU BULL. (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/>.

³²⁸ Ian McKendry, *Senate Votes to Repeal CFPB Arbitration Rule in Win for Financial Institutions*, AM. BANKER (Oct. 24, 2017, 10:21 PM EDT), <https://www.americanbanker.com/news/senate-repeals-cfpb-arbitration-rule-in-win-for-financial-institutions>.

APPENDIX

Supreme Court Decisions Involving FAA, 1983–2020

NOTES ON THE CHART

- Supreme Court justices are denoted as follows:
 - Conservative justices are named in **Bold** type.
 - Liberal justices are named in *Italics* type.
 - Centrist justices are named in Standard type.
- The shaded rows are those in which the Court was divided by more than a 7–2 split.
- Cases decided *per curiam* are denoted as “PC.”

<u>Case Name</u>	<u>Issue</u>	<u>Vote of the Court</u>	<u>Opinion Author—Majority</u>	<u>Majority</u>	<u>Opinion Author—Concurrence(s)</u>	<u>Opinion Author—Dissent(s)</u>	<u>Minority</u>
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	Abstention/courts v. arbitration	6–3	<i>Brennan</i>	<i>Brennan</i> , <i>White</i> , <i>Marshall</i> , <i>Blackmun</i> , Powell , <i>Stevens</i>	N/A	Rehnquist	Rehnquist , Burger , O'Connor
Southland Corp. v. Keating, 465 U.S. 1 (1984)	Preemption	6–2–1	Burger	Burger , <i>Brennan</i> , <i>White</i> , <i>Marshall</i> , <i>Blackmun</i> , Powell	<i>Stevens</i>	O'Connor	O'Connor , Rehnquist , <i>Stevens</i> (Partial)
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)	Abstention/arbitration of pendent claims	9–0	<i>Marshall</i>	Unanimous	<i>White</i>	N/A	N/A
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985)	Arbitration of statutory claims (antitrust)	5–3	<i>Blackmun</i>	<i>Blackmun</i> , Burger , <i>White</i> , Rehnquist	N/A	<i>Stevens</i>	<i>Stevens</i> , <i>Brennan</i> , <i>Marshall</i> (Partial)

<u>Case Name</u>	<u>Issue</u>	<u>Vote of the Court</u>	<u>Opinion Author—Majority</u>	<u>Majority</u>	<u>Opinion Author—Concurrence(s)</u>	<u>Opinion Author—Dissent(s)</u>	<u>Minority</u>
				O'Connor (Powell took no part)			
Perry v. Thomas, 482 U.S. 483 (1987)	Preemption	7–2	<i>Marshall</i>	<i>Marshall,</i> Rehnquist, <i>Brennan,</i> White, <i>Blackmun,</i> Powell, Scalia	N/A	<i>Stevens,</i> O'Connor	<i>Stevens,</i> O'Connor
Shearson/Am. Express v. McMahon, 482 U.S. 220 (1987)	Arbitration of statutory claims (RICO & Securities Act of 1934)	9–0	O'Connor	Unanimous	<i>Blackmun,</i> <i>Stevens</i> (Partial C/D)	N/A	N/A
Volt Info. Scis. v. Bd. of Trustees., 489 U.S. 468 (1989)	Preemption	6–2	Rehnquist	Rehnquist, White, <i>Blackmun,</i> <i>Stevens,</i> Scalia, Kennedy (O'Connor took no part)	N/A	<i>Brennan</i>	<i>Brennan,</i> <i>Marshall</i>
Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)	Arbitration of statutory claims (Securities Act of 1933)	5–4	Kennedy	Kennedy, Rehnquist, White, O'Connor, Scalia	N/A	<i>Stevens</i>	<i>Stevens,</i> <i>Brennan,</i> <i>Marshall,</i> <i>Blackmun</i>

<u>Case Name</u>	<u>Issue</u>	<u>Vote of the Court</u>	<u>Opinion Author—Majority</u>	<u>Majority</u>	<u>Opinion Author—Concurrence(s)</u>	<u>Opinion Author—Dissent(s)</u>	<u>Minority</u>
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	Arbitration of statutory claims (Age Discrimination in Employment Act)	7–2	White	White, Rehnquist , <i>Blackmun</i> , O'Connor , Scalia , Kennedy , <i>Souter</i>	N/A	<i>Stevens</i>	<i>Stevens</i> , <i>Marshall</i>
Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995)	Preemption	7–2	<i>Breyer</i>	<i>Breyer</i> , Rehnquist , <i>Stevens</i> , O'Connor , Kennedy , <i>Souter</i> , <i>Ginsburg</i>	O'Connor	Scalia , Thomas	Scalia , Thomas
Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 (1995)	Preemption; remedies	8–1	<i>Stevens</i>	<i>Stevens</i> , Rehnquist , O'Connor , Scalia , Kennedy , <i>Souter</i> , <i>Ginsburg</i> , <i>Breyer</i>	N/A	Thomas	Thomas
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)	Delegation of arbitrability	9–0	<i>Breyer</i>	Unanimous	N/A	N/A	N/A

<u>Case Name</u>	<u>Issue</u>	<u>Vote of the Court</u>	<u>Opinion Author—Majority</u>	<u>Majority</u>	<u>Opinion Author—Concurrence(s)</u>	<u>Opinion Author—Dissent(s)</u>	<u>Minority</u>
Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995)	Venue/jurisdiction	7–1	Kennedy	Kennedy, Rehnquist, O’Connor, Scalia, Souter, Thomas, Ginsburg (<i>Breyer</i> took no part)	N/A	<i>Stevens</i>	<i>Stevens</i>
Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996)	Preemption	8–1	<i>Ginsburg</i>	<i>Ginsburg, Rehnquist, Stevens, O’Connor, Scalia, Kennedy, Souter, Breyer</i>	N/A	Thomas	Thomas
Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996)	Abstention	9–0	O’Connor	Unanimous	Scalia, Thomas	N/A	N/A
Cortez Byrd Chips v. Bill Harbert Constr. Co., 529 U.S. 193 (2000)	Venue	9–0	<i>Souter</i>	Unanimous	N/A	N/A	N/A
Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79 (2000)	Effective vindication/ costs of arbitration	5–4	Rehnquist	Rehnquist, O’Connor, Scalia, Kennedy, Thomas	N/A	<i>Ginsburg</i>	<i>Ginsburg, Stevens, Souter, Breyer</i>

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Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)	FAA employment exemption	5–4	Kennedy	Kennedy, Rehnquist, O’Connor, Scalia, Thomas	N/A	<i>Souter, Stevens</i>	<i>Souter, Stevens, Ginsburg, Breyer</i>
Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002)	Authority of arbitrator to determine procedure	8–0	<i>Breyer</i>	Unanimous (O’Connor took no part)	Thomas	N/A	N/A
PacifiCare Health Sys. v. Book, 538 U.S. 401 (2003)	Ripeness	8–0	Scalia	Unanimous (Thomas took no part)	N/A	N/A	N/A
Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003)	Commerce Clause authority	PC	N/A	N/A	N/A	N/A	N/A
Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)	Class arbitration	5–4	<i>Breyer</i>	<i>Breyer, Stevens, Scalia, Souter, Ginsburg</i>	<i>Stevens (Partial)</i>	Rehnquist, Thomas, Stevens (Partial)	Rehnquist, Thomas, O’Connor, Kennedy
Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006)	Separability	7–1	Scalia	Scalia, Roberts, Stevens, Kennedy, Souter, Ginsburg, Breyer (Alito took no part)	N/A	Thomas	Thomas
Preston v. Ferrer, 552 U.S. 346 (2008)	Preemption	8–1	<i>Ginsburg</i>	<i>Ginsburg, Roberts,</i>	N/A	Thomas	Thomas

<u>Case Name</u>	<u>Issue</u>	<u>Vote of the Court</u>	<u>Opinion Author—Majority</u>	<u>Majority</u>	<u>Opinion Author—Concurrence(s)</u>	<u>Opinion Author—Dissent(s)</u>	<u>Minority</u>
				<i>Stevens,</i> Scalia, Kennedy, <i>Souter,</i> <i>Breyer,</i> Alito			
Hall Street Assocs., LLC v. Mattel, Inc., 552 U.S. 576 (2008)	Judicial review	6–3	<i>Souter</i>	<i>Souter,</i> Roberts, Scalia, Thomas, <i>Ginsburg,</i> Alito	N/A	<i>Stevens,</i> <i>Breyer</i>	<i>Stevens,</i> <i>Breyer,</i> Kennedy
Vaden v. Discover Bank, 556 U.S. 49 (2009)	Jurisdiction	5–4	<i>Ginsburg</i>	<i>Ginsburg,</i> Scalia, Kennedy, <i>Souter,</i> Thomas	Roberts	Roberts (partial D/C)	Roberts, <i>Stevens,</i> <i>Breyer,</i> Alito
Arthur Andersen LLP v. Carlisle, 556 U.S. 624 (2009)	Non-signatory enforcement	6–3	Scalia	Scalia, Kennedy, Thomas, <i>Ginsburg,</i> <i>Breyer,</i> Alito	N/A	<i>Souter</i>	<i>Souter,</i> Roberts, <i>Stevens</i>
Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)	Class arbitration	5–3	Alito	Alito, Roberts, Scalia, Kennedy, Thomas	N/A	<i>Ginsburg</i>	<i>Ginsburg,</i> <i>Stevens,</i> <i>Breyer</i>

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Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010)	Delegation; arbitrability; unconscionability	5–4	Scalia	Scalia, Roberts, Kennedy, Thomas, Alito	N/A	<i>Stevens</i>	<i>Stevens, Ginsburg, Breyer, Sotomayor</i>
AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)	Class action; arbitration; preemption; unconscionability	5–4	Scalia	Scalia, Roberts, Kennedy, Thomas, Alito	Thomas	<i>Breyer</i>	<i>Breyer, Ginsburg, Sotomayor, Kagan</i>
KPMG LLP v. Cocchi, 565 U.S. 18 (2011)	Arbitration of pendent claims	PC	N/A	N/A	N/A	N/A	N/A
CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012)	FAA overriding other federal statutes	8–1	Scalia	Scalia, Roberts, Kennedy, Thomas, Alito, Sotomayor, Kagan	N/A	<i>Ginsburg</i>	<i>Ginsburg</i>
Marmet Health Care Center, Inc. v. Brown, 565 U.S. 530 (2012)	Preemption	PC	N/A	N/A	N/A	N/A	N/A
Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17 (2012)	Separability	PC	N/A	N/A	N/A	N/A	N/A
Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013)	Judicial review/class arbitration	9–0	<i>Kagan</i>	Unanimous	Alito	N/A	N/A

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Am. Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013)	Class action/arbitration; effective vindication of rights	5–3	Scalia	Scalia, Roberts, Kennedy, Thomas, Alito (<i>Sotomayor</i> took no part)	Thomas	<i>Kagan</i>	<i>Kagan, Ginsburg, Breyer</i>
DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015)	Preemption; choice of law	6–3	<i>Breyer</i>	<i>Breyer, Roberts, Scalia, Kennedy, Alito, Kagan</i>	N/A	Thomas, Ginsburg	Thomas, Ginsburg, Sotomayor
Kindred Nursing Ctrs. Ltd. P’ship v. Clark, 137 S. Ct. 1421 (2017)	Preemption	7–1	<i>Kagan</i>	<i>Kagan, Roberts, Kennedy, Ginsburg, Breyer, Alito, Sotomayor</i> (Gorsuch took no part)	N/A	Thomas	Thomas
Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)	Class action/arbitration; FAA overriding other federal statutes	5–4	Gorsuch	Gorsuch, Roberts, Kennedy, Thomas, Alito	Thomas	<i>Ginsburg</i>	<i>Ginsburg, Breyer, Sotomayor, Kagan</i>

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Henry Schein, Inc. v. Archer and White Sales, Inc., 139 S. Ct. 524 (2019)	Delegation; arbitrability (wholly groundless exception)	9–0	Kavanaugh	Unanimous	N/A	N/A	N/A
New Prime, Inc. v. Oliveira, 139 S. Ct. 532 (2019)	FAA employment exemption	8–0	Gorsuch	Unanimous (Kavanaugh took no part)	<i>Ginsburg</i>	N/A	N/A
Lamps Plus v. Varela, 139 S. Ct. 1407 (2019)	Class arbitration	5–4	Roberts	Roberts, Thomas, Alito, Gorsuch, Kavanaugh	Thomas	<i>Ginsburg, Breyer, Sotomayor, Kagan</i>	<i>Ginsburg, Breyer, Sotomayor, Kagan</i>
GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020) ³²⁹	Non-signatory enforcement	9–0	Thomas	Unanimous	<i>Sotomayor</i>	N/A	N/A

³²⁹ This case involves the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, not the FAA. It is included here because it considers what parts of domestic arbitration case law can be applied to international arbitration agreements.