

# How the Arbitration-at-all-Costs Regime Ignores and Distorts Settled Law

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## INTRODUCTION

There is widespread recognition among commentators that a majority of Justices on the U.S. Supreme Court hold pre-dispute binding arbitration in exceptionally high regard and that in recent years the Court has greatly expanded the reach of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-14.<sup>1</sup> The wisdom of FAA case law is the subject of great debate, but one

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1. See, e.g., Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 854 (2002) (“[T]he Court’s current judicial philosophy is in favor of a broad application of arbitration agreements to

issue not widely discussed is how the Court's arbitration preference has led it and lower courts to ignore or rewrite a number of black letter rules that apply in other areas of law. Put another way, the drive to favor and expand the use of arbitration clauses has displaced or distorted a number of long-standing legal principles.

For example, in a variety of settings the U.S. Supreme Court has enunciated a strong presumption against federal preemption of state law. In cases decided under the FAA, however, the Supreme Court has never mentioned or acknowledged the presumption against preemption, even when its FAA decisions have preempted laws in areas traditionally governed by the States, such as the law of contracts.<sup>2</sup> Similarly, a long-standing rule of law applicable to a wide range of constitutional rights provides that waivers of such rights must be voluntary, knowing, and intelligent.<sup>3</sup> Yet in arbitration cases, courts regularly find waivers of the constitutional right to a jury trial on the basis of fine-print clauses that are buried in adhesion contracts and that consumers and employees rarely read, let alone understand. Indeed, the Supreme Court has instructed that if there is any doubt as to whether an arbitration clause waives a party's right to a jury with respect to a particular claim, courts should indulge in a presumption that construes contracts in favor of requiring arbitration if possible.<sup>4</sup> In other words, contrary to established legal principles, the Court finds a presumption in favor of the waiver of a constitutional right.

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statutory claims under federal statutes.”); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 113 (2011) (“Through its doctrine, the Court has moved the FAA from a limited role to a major source of regulation of both state and federal judges. . . . [T]he Court’s purposeful interpretation of the FAA has turned it into a new pillar.”); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J. L. & POL’Y 129, 153 (2004) (“It is an open secret that the ‘national policy favoring arbitration’ was not the creation of Congress in enacting the FAA in 1925, but is rather an ‘edifice of [the Court’s] own creation’ starting in the 1980s.”) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring)); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining In Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 386 (2007) (“One problem with the FAA has resulted largely from the common law; that is, how courts, led by the Supreme Court since the early 1980’s, have broadly interpreted, and, arguably, misinterpreted the FAA as constituting a national policy favoring arbitration, and as a body of substantive law that preempts state law and that applies in state and federal courts to a broad range of statutory, employment, and consumer claims.”).

2. In the recent case of *PLIVA v. Mensing*, writing for the Supreme Court, Justice Thomas contended the structure of the Constitution “suggests that federal law should be understood to impliedly repeal conflicting state law.” 131 S. Ct. 2567, 2580-82 (2011) (holding that federal regulations governing drug labeling requirements preempted state law tort actions). Because Justice Kennedy did not join in this part of Justice Thomas’s decision, five justices in *PLIVA* adhered to the presumption against preemption of state law. See *id.* at 2589-92 (Sotomayor, J., dissenting).

3. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

4. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (holding that a consumer contract for termite prevention services can be subject to arbitration under the FAA); see also *id.* at 283 (O’Connor, J., concurring) (“Yet, over the past decade, the Court has abandoned all pretense

This Paper discusses in detail the casting aside of these and other long-standing rules. First, we provide a brief overview of the FAA to emphasize that the modern, expansive sweep of the law is far from the modest purpose that Congress had when passing the law in the early twentieth century. We then turn in Part II to a discussion of the various legal principles that the Court's FAA jurisprudence calls into question, including federal preemption of state laws, waiver of constitutional rights, basic contract doctrines, and the delineation between substantive and procedural laws.

## I.

### THE SUPREME COURT HAS EXPANDED THE SCOPE OF THE FAA.

The Supreme Court's recent arbitration jurisprudence significantly departs from the congressional intent motivating the FAA. An abundance of scholarship establishes that the Congress that passed the FAA had fairly modest goals for the statute. For example, the principal author of the Act—who had also been the principal author of the New York Arbitration Act upon which the FAA was based and who was the lead witness in advocating for the Act—suggested that the Act was not intended to deal with statutory claims.<sup>5</sup> In addition, the Act was intended to apply only to disputes between sophisticated commercial parties of relatively equal bargaining power.<sup>6</sup> Nevertheless, in recent decades, the Supreme Court has dramatically reinterpreted and expanded the reach of the FAA. In a series of cases, the Court has found new rules and powers in the Act, often ones that preempt

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of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”).

5. *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. (1924) (statement of Julius Cohen); Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (“[Arbitration] 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.”); see also Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 112 (2006) (“According to Cohen, its leading proponent and principal drafter, the legislation was to apply to disputes involving facts and simple questions of law, not statutory or constitutional issues . . .”).

6. See Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1316-19 (2011) (discussing statements made during hearings on the law, which “show that the reformers drafted, and that Congress intended to pass, an Act that applied to arbitration agreements between merchants with relatively equal bargaining power”); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641 (1996) (“When Congress passed the FAA in 1925, it intended only to require federal courts to accept arbitration agreements that had been voluntarily entered into by two parties of relatively equal bargaining power in arms’ length transactions.”). For general background on the shift in interpretation of the FAA from a statute covering merchants of equal bargaining power to a statute with a much broader reach, see Moses, *supra* note 5; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997).

state laws or contradict earlier rulings of the Court, repeatedly bringing more types of disputes into arbitration with fewer checks and limitations.

This was not always the Court's trajectory. For example, in the 1953 case of *Wilko v. Swan*, the Supreme Court considered the intersection of the Securities Act of 1933<sup>7</sup> with the FAA<sup>8</sup> and concluded that claims under the Securities Act could not be the subject of pre-dispute binding arbitration agreements.<sup>9</sup> Similarly, in *Alexander v. Gardner-Denver Co.*, the Court concluded that claims involving the civil rights statutes for employees could not be the subject of pre-dispute binding arbitration clauses.<sup>10</sup> If an employee was required under the terms of a collective bargaining agreement to submit an employment discrimination dispute to arbitration, she maintained her statutory right to trial de novo for her discrimination claim.<sup>11</sup>

Today's FAA is a remarkably more robust and all-encompassing statute than it was in 1953. The Supreme Court has pronounced a "national policy favoring arbitration,"<sup>12</sup> and in a series of cases decided within the span of a few years, the Court held that the FAA preempts state laws restricting the arbitration of disputes<sup>13</sup> and creates a presumption of the enforceability of arbitration agreements covering a wide variety of statutory claims.<sup>14</sup> The Court also expressly overruled *Wilko*, holding that the right to

7. 15 U.S.C. §§ 77a-77aa (2012).

8. At the time the case was decided, the law was known as the United States Arbitration Act. See *Wilko v. Swan*, 346 U.S. 427, 429 (1953).

9. *Id.* at 438. The Court construed the "Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose." *Id.* (Jackson, J., concurring).

10. 415 U.S. 36 (1974).

11. *Id.* at 59-60; see also *id.* at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."). Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin. 42 U.S.C. §§ 2000e-2000e-17. The "deferral rule," which requires courts to defer to arbitration decisions on the subject matter of an employee's civil rights statutory claims, "is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues." *Alexander*, 415 U.S. at 56. The Court "deem[ed] this supposition unlikely." *Id.*

12. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

13. *Id.* at 15-16 (judicial forum anti-waiver provision in California Franchise Investment Law held preempted).

14. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . ."). With respect to the large number of statutory claims subject to the FAA, see, for example, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) (claims under the Credit Repair Organization Act may be compelled into arbitration); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing arbitration clause for Age Discrimination in Employment Act claims); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (claims under Racketeer Influenced and Corrupt Organizations Act may be the subject of pre-dispute binding arbitration clauses); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (enforcing arbitration clause to resolve claims under antitrust statutes).

select a judicial forum may be waived and an agreement to arbitrate Securities Act claims will be enforceable.<sup>15</sup>

*Gardner-Denver*, too, became a casualty of the Court's changed views toward arbitration, as *Gardner-Denver*'s holding was undone in two subsequent cases. First, the Court held that a statutory claim for age discrimination can be subject to an arbitration agreement enforceable under the FAA.<sup>16</sup> Although Congress provided a judicial forum for claims brought under the Age Discrimination and Employment Act of 1967 ("ADEA")<sup>17</sup>—just as the legislature had done in the Title VII context—the Court found nothing in the law prohibiting arbitration as an alternative.<sup>18</sup> Part of the Court's reasoning distinguished arbitration provisions contained within a collective bargaining agreement.<sup>19</sup> This distinction evaporated when, in the second case marking *Gardner-Denver*'s demise, the Court held that a provision in a collective bargaining agreement requiring union members to arbitrate ADEA claims is enforceable as a matter of law.<sup>20</sup>

In *Circuit City Stores, Inc. v. Adams*, the Supreme Court extended the FAA to provide that almost all employment contracts can be subject to arbitration.<sup>21</sup> Only "contracts of employment of transportation workers," which are expressly exempted under the FAA, are not subject to arbitration.<sup>22</sup> As with some of the Court's similar expansions of the FAA, the great weight of the evidence shows that the Congress that passed the Act never intended this expansion.<sup>23</sup>

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15. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("We now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions.").

16. *Gilmer*, 500 U.S. at 26-27.

17. 29 U.S.C. §§ 621-34 (2012).

18. *Gilmer*, 500 U.S. at 29.

19. *Id.* at 35 ("[B]ecause the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case.").

20. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

21. 532 U.S. 105, 109 (2001).

22. *Id.* at 119.

23. *Id.* at 126 (Stevens, J., dissenting) ("[N]either the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment."); *id.* at 136 (Souter, J., dissenting) (noting that with the statutory language, Congress intended to exclude all the workers its commerce power covered at the time, and simultaneously "showed its intent to legislate to the hilt over commercial contracts at a more general level"); see also *Moses*, *supra* note 5, at 146-52 (advocating that the Supreme Court "should not, as it did in *Circuit City*, interpret the Commerce Clause broadly . . . so that the one purpose of the statute—excluding employment agreements from coverage—is completely rewritten by the Court"); Kelly Burton Beam, *Administering Last Rights to Employee Rights: Arbitration Enforcement and Employment Law in the Twenty-First Century*, 40 HOUS. L. REV. 499, 528 (2003) ("The Court's selective use of historical reference [in *Circuit City*] . . . allowed the majority to remain willfully ignorant of the fact that

At the same time that the Court has expanded the reach of the FAA, it has also stripped away or substantially limited some of the protections that had earlier been in place to protect against abusive or overreaching arbitration clauses. For example, in 1996, the Supreme Court noted that state law protections against unreasonable contract terms, such as the law of unconscionability, applied to arbitration clauses.<sup>24</sup> But in 2010, the Court held that arbitrators themselves can decide unconscionability challenges to arbitration clauses in many instances.<sup>25</sup> Similarly, in 2011, the Court held that unconscionability challenges cannot be brought against terms that the Court deemed to reflect a “fundamental” attribute of arbitration.<sup>26</sup> One such attribute is that arbitration is bilateral (that is, not on a class action or collective basis), unless the parties agree otherwise. Consequently, a large number of decisions holding class-action bans in arbitration clauses unconscionable under general principles of state contract law and unenforceable in settings where they would prove to be exculpatory no longer had force.<sup>27</sup>

The effect of these decisions is that as the FAA forces more and more cases into arbitration, the protections available to individuals against abusive arbitration clauses have substantially contracted. The Supreme Court’s FAA jurisprudence has evolved in a few short years from a rule that arbitration clauses are as enforceable as other types of contracts “but not more so,”<sup>28</sup> to a “national policy favoring arbitration,”<sup>29</sup> and, even more

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the FAA was intended to relieve judicial prejudice against arbitration between merchants and was therefore not intended to cover employment contracts. Consequently, the Court’s analysis of whether its textual explanation corresponded with the legislative intent cannot be accurate because the Court was unwilling to assess the Act’s true purpose.”).

24. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

25. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). In *Rent-A-Center*, the Court held that where an arbitration clause includes a “delegation clause” (a provision providing that challenges to the validity of the arbitration clause should be decided by the arbitrator), the delegation clause shall be enforced unless the party objecting to arbitration brings an attack (such as unconscionability) against the delegation clause itself. *Id.* at 2780.

26. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748, 1753 (2011).

27. See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (overturning a district court that had refused to compel arbitration where, among other things, it had been proven that a class action ban would mean that only “an infinitesimal” number of consumers could vindicate their rights under a state consumer protection statute (quoting *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009), *rev’d*, 673 F.3d 1155 (9th Cir. 2012))); *Feeney v. Dell Inc.*, 993 N.E.2d 329, 330 (Mass. 2013) (rehearing in which the Supreme Judicial Court of Massachusetts concluded that their previous “analysis in *Feeney II* no longer comports with the Supreme Court’s interpretation of the FAA.”); *Schnuerle v. Insight Commc’ns Co.*, 376 S.W.3d 561, 573 (Ky. 2012) (“[W]e conclude that *Concepcion* is dispositive of this issue . . . [w]e accordingly conclude that the Court of Appeals properly affirmed the trial court’s dismissal of the putative class action claim.”).

28. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

29. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

recently, to a more dramatic and powerful “*emphatic* federal policy in favor of arbitral dispute resolution.”<sup>30</sup>

## II.

### THE POLICY IN FAVOR OF ARBITRATION HAS LED TO DISTORTIONS IN THE LAW.

As the Supreme Court has expanded the FAA in the course of enacting its “*emphatic*” policy favoring arbitration, it has brought the FAA into conflict with settled principles that apply in a variety of other areas of law. The seeming imperative of enforcing arbitration clauses has led the Supreme Court, and lower courts following its lead, to pen decisions that are not fairly reconcilable with a number of doctrines that apply to nearly all contracts and, in some cases, to most statutes. In short, the Supreme Court’s drive to make arbitration clauses more widely enforceable has come at a significant cost to the principled nature of American law.

#### *A. In Implementing a Policy in Favor of Arbitration, the Supreme Court Has Ignored the Presumption Against Federal Preemption of State Laws.*

A basic federalism rule in the United States, which the Supreme Court has repeatedly recognized, is that there is a presumption against federal law preempting state law. This is especially true in areas of law that are traditionally left to state police powers.<sup>31</sup> The presumption ensures that courts do not unnecessarily disturb the balance between federal and state power.<sup>32</sup> Indeed, in fields “traditionally occupied by the states,”<sup>33</sup> the Supreme Court has explicitly acknowledged “the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>34</sup>

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30. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (emphasis added). For an analysis of the evolution of Supreme Court jurisprudence on mandatory arbitration, see Jean. R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1636-42 (2005).

31. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 236 (1947) (holding that the Federal Warehouse Act manifested the intent of Congress to eliminate dual state and federal regulation of any grain warehouse that chose to obtain a federal license and therefore that the Illinois Grain Warehouse Act was preempted).

32. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

33. *Id.* (citing *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1898)).

34. *Id.* (citing *Rice*, 331 U.S. at 230); *see also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (where the text of a clause is susceptible to more than one reading, the Court recognizes “a duty to accept the reading that disfavors pre-emption”).

The Court regularly considers the presumption against preemption in a variety of contexts, among them products liability,<sup>35</sup> banking,<sup>36</sup> and others.<sup>37</sup>

Without ever providing any principled reason for doing so, however, the Supreme Court appears to have exempted the FAA from this important background rule of law. There is no particular reason to treat the FAA as a statute with unusually potent preemptive force; the Supreme Court has acknowledged that “[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”<sup>38</sup> Yet in case after case, the Supreme Court has held that the FAA preempts various rules of state law without even considering the presumption against preemption.

For example, in the seminal case of *Southland Corp. v. Keating*, the Court considered whether the FAA preempted California’s Franchise Investment Law.<sup>39</sup> Southland Corporation was the owner and franchisor of 7-Eleven convenience stores, and the standard franchise agreement included an arbitration provision.<sup>40</sup> Several 7-Eleven franchisees brought individual and class actions in state court against Southland for, among other things, violations of the California Franchise Investment Law.<sup>41</sup> At the time, claims alleging such violations were not arbitrable under state law.<sup>42</sup> In holding that the FAA preempted the California statute—thus mandating arbitration

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35. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 565 n.3, 574-75, 581 (2009) (considering the presumption against preemption and holding that federal regulation of drug labeling had not preempted available state law claims for failing to warn about risks associated with an anti-nausea drug); *Bates*, 544 U.S. 431, 444, 449-52 (2005) (considering presumption against preemption and holding that Federal Insecticide, Fungicide, and Rodenticide Act did not preempt peanut farmers’ state law claims for defective design, defective manufacture, negligent testing, breach of express warranty, and violation of Texas Deceptive Trade Practices Act relating to pesticide use).

36. See, e.g., *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 534 (2009) (holding, without needing to invoke the presumption, that the National Bank Act did not preempt a New York Attorney General action against national banks to enforce the State’s fair lending laws because states “have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years”). Long-standing Supreme Court jurisprudence establishes that state regulation of national banks is the “rule,” with the exception that federal law prevails if the state law expressly conflicts with it, “frustrate[s] the purpose for which the national banks were created, or impair[s] their efficiency to discharge the duties imposed upon them by the law of the United States.” *McClellan v. Chipman*, 164 U.S. 347, 357 (1896).

37. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42, 550-51 (2001) (considering the presumption against preemption and holding that the Federal Cigarette Labeling and Advertising Act preempts Massachusetts regulations governing outdoor and point-of-sale cigarette advertising).

38. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

39. 465 U.S. 1 (1984).

40. *Id.* at 3-4.

41. *Id.* at 4.

42. *Id.* at 5.

of the state law claims—the Supreme Court never mentioned that California’s Franchise Investment Law is presumed not to be preempted.<sup>43</sup>

A few years later, the Court again had occasion to consider the preemption by the FAA of the California Labor Code.<sup>44</sup> The relevant section of the Code provided that a wage collection action could be maintained in court without regard to any private agreement to arbitrate.<sup>45</sup> In a dispute between an employer and employee over commissions on sales of securities, the employer sought to compel arbitration pursuant to an arbitration provision in the Uniform Application for Securities Industry Registration form the employee signed.<sup>46</sup> The Supreme Court held that the statute conflicted with the FAA and violated the Supremacy Clause. Accordingly, the Labor Code section was found preempted, making the arbitration agreement enforceable.<sup>47</sup> Again, the Court made no mention of the presumption against preemption of state law.<sup>48</sup>

Additional examples of the Supreme Court’s abandonment of the anti-preemption presumption in favor of arbitration are numerous. In one case, the Court struck down an Alabama statute that invalidated written, pre-dispute arbitration agreements in the context of a consumer dispute against a termite control company.<sup>49</sup> In another case, the Court struck down a California statute that provided that disputes involving talent scouts should be initially handled by an administrative body with specialized expertise in such disputes.<sup>50</sup> Florida had a rule of law that if the principal purpose of a contract was the commission of a crime, no provision of the contract could be enforced. The Supreme Court held the statute preempted with respect to arbitration clauses,<sup>51</sup> and again made no mention of the anti-preemption presumption.

Probably the most important decision in the Supreme Court’s FAA preemption jurisprudence is *AT&T Mobility v. Concepcion*, in which the Court struck down a California rule that any contract term barring consumers from bringing or participating in a class action was unenforceable if the term would be exculpatory with respect to a consumer

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43. *See id.* The opinion mentions only that the FAA represents “a national policy favoring arbitration.” *Id.* at 10.

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

45. *Id.* at 484; CAL. LAB. CODE § 229 (West 2012).

46. *Perry*, 482 U.S. at 484-85.

47. *Id.* at 491. The Supremacy Clause establishes the U.S. Constitution and federal statutes as “the supreme law of the land,” and requires “the judges in every state shall be bound thereby.” U.S. CONST. art. VI, cl. 2.

48. The opinion does mention the “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” *Perry*, 482 U.S. at 489 (citing *Moses H. Cone. Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

49. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

50. *Preston v. Ferrer*, 552 U.S. 346 (2008).

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

protection law.<sup>52</sup> The Court struck down the rule despite the large number of similar rules in other states<sup>53</sup> and the Court's acknowledgment that California law would invalidate a term banning class actions whether it was in an arbitration clause or not—in other words, that the California provision was not limited in its application to only arbitration.<sup>54</sup> Again, as in the other arbitration cases preempting state laws, there was no discussion in *Concepcion* of the presumption against preemption.<sup>55</sup>

At bottom, courts have long favored the presumption that federal statutes preempt state laws only in the rarest and most express circumstances. But today's legal landscape suggests the canon has weakened vitality. At least in the context of a state law banning arbitration—and perhaps more broadly—the presumption against preemption has been silently overturned.

52. 131 S. Ct. 1740, 1751-53 (2011).

53. See, e.g., *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) (Washington law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (Georgia law); *Kristian v. Comcast Corp.*, 446 F.3d 25, 60 (1st Cir. 2006) (federal and Massachusetts antitrust law); *Creighton v. Blockbuster Inc.*, No. 05-482-KI, 2007 WL 1560626, at \*3 (D. Or. May 25, 2007) (Oregon law); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1290 (D. Ariz. 2007) (Arizona law); *Wong v. T-Mobile USA, Inc.*, No. 05-73922, 2006 WL 2042512, at \*5 (E.D. Mich. July 20, 2006) (Michigan law); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1105 (W.D. Mich. 2000) (Michigan law); *Leonard v. Terminix Int'l Co.*, 854 So.2d 529, 539 (Ala. 2002) (Alabama law); *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So.2d 600, 611 (Fla. Dist. Ct. App. 2007) (Florida law); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. Dist. Ct. App. 1999) (Florida law); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 274 (Ill. 2006) (Illinois law); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005) (Missouri law); *Muhammad v. Cnty. Bank of Rehoboth Beach*, 912 A.2d 88, 100-01 (N.J. 2006) (New Jersey law); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008) (New Mexico law); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) (North Carolina law); *Schwartz v. Alltel Corp.*, No. 86810, 2006 WL 2243649, at \*5 (Ohio Ct. App. June 29, 2006) (Ohio law); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161, 1183 (Ohio Ct. App. 2004) (Ohio law); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 949-50 (Or. Ct. App. 2007) (Oregon law); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. Ct. 2006) (Pennsylvania law); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006, 1008 (Wash. 2007) (Washington law); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 280 (W. Va. 2002) (West Virginia law); *Coady v. Cross Country Bank*, 729 N.W.2d 732, 748 (Wis. Ct. App. 2007) (Wisconsin law); see also *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 59-63 (1st Cir. 2007) (class action waiver unenforceable because not knowing and voluntary); *Rollins, Inc. v. Garrett*, 176 F. App'x 968, 968-69 (11th Cir. 2006) (per curiam) (illustrating that arbitrators did not exceed their authority by allowing class-wide arbitration because arbitration clause prohibiting class proceedings would have been unconscionable under Florida law).

54. The Court characterized California's rule "[r]equiring the availability of classwide arbitration" as "interfer[ing] with fundamental attributes of arbitration." *Concepcion*, 131 S. Ct. at 1748. Writing for the majority in *Concepcion*, Justice Scalia noted that "[a]lthough [the FAA's] saving clause preserves generally applicable contract defenses, nothing in [the statute] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.*

55. The decision does mention the "liberal federal policy favoring arbitration." *Id.* at 1745.

*B. In Implementing a Policy in Favor of Arbitration, the Supreme Court and Lower Courts Have Abandoned the Presumption Against Waiver of Constitutional Rights.*

It is settled law that although individuals may waive constitutional rights, a waiver is effective only when “knowing, voluntary, and intelligent.”<sup>56</sup> In other words, courts will not infer the waiver of such rights.<sup>57</sup> This standard has been applied to the Fifth Amendment protection against self-incrimination<sup>58</sup> and the Sixth Amendment right to counsel in a criminal proceeding,<sup>59</sup> among others.<sup>60</sup>

There is little doubt that, in almost all circumstances, courts would decline to enforce a contract containing a waiver of constitutional rights that fails to meet the foregoing standard. Imagine that a fine-print contract provision buried in a stack of lending documents stripped individuals of their constitutional rights to vote, to travel, to freely exercise their religion, to bear arms, or to speak out on matters of public concern. If a bank attempted to enforce such a provision, going to court to seek specific performance to bar a customer from speaking publicly, for example, the court would surely refuse on the grounds that there was no knowing, voluntary, and intelligent waiver of the right to free speech.<sup>61</sup>

That result makes the Court’s FAA jurisprudence all the more peculiar. Notwithstanding the undisputed understanding of how contracts waiving constitutional rights are normally treated, the Supreme Court’s jurisprudence under the FAA has led to a vastly differing outcome. By their very nature, arbitration clauses entail the waiver of a party’s Seventh Amendment right to a trial by jury.<sup>62</sup> As one court has put it, the “loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.”<sup>63</sup>

56. See, e.g., *Nat’l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (regarding waiver of right to jury trial).

57. See *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) (“For a waiver of constitutional rights in any context must, at the very least, be clear.”).

58. See, e.g., *Brady v. United States*, 397 U.S. 742, 748 (1970); *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing procedural safeguards designed to protect the rights of an accused under the Fifth and Fourteenth Amendments).

59. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

60. See, e.g., *Walter v. Reno*, 145 F.3d 1032, 1037 n.2 (9th Cir. 1998) (constitutional due process right to hearing in immigration proceedings); *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) (constitutional right to seek elective office).

61. Individuals regularly do waive their right to free speech, such as in non-disparagement clauses included in settlement agreements, but those waivers are only effective when and if they are sufficiently knowing, voluntary and intelligent.

62. *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (citing *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984)).

63. *Pierson*, 742 F.2d at 339. In arbitration, the arbitrator, rather than a jury, decides the merits of a claim. In *AT&T Mobility v. Concepcion*, the Supreme Court used the example of a state law requiring

Nonetheless, courts regularly enforce arbitration clauses in settings where there is no meaningful consent.<sup>64</sup> One particularly egregious illustration is *Spring Lake NC, LLC v. Holloway*, where a 92-year-old person with a fourth-grade education, memory problems, and increasing confusion, was held to have “agreed” to an arbitration clause— notwithstanding the trial court’s factual finding that the individual “could not possibly have understood what she was signing.”<sup>65</sup> The case is consistent with a great deal of law under the FAA, where the presence of an arbitration agreement somewhere in fine print is often taken as a waiver of the constitutional right to trial by jury. But the case emphasizes how the law in this area differs sharply from what would be required to constitute a waiver of other constitutional rights. Under the same set of facts, if the plaintiff in *Holloway* had allegedly waived her constitutional right to a jury trial in the criminal context,<sup>66</sup> or, the right to remain silent,<sup>67</sup> no waiver would be enforced.

It is particularly anomalous that the normal presumption against the waiver of constitutional rights is set aside in the arbitration context because outside of the arbitration setting, the normal requirement of a knowing and intelligent waiver applies to waivers of the Seventh Amendment right.<sup>68</sup> Of

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“an ultimate disposition by a jury” as a rule that “disfavors arbitration” and therefore conflicts with the FAA. 131 S. Ct. 1740, 1747 (2011).

64. See, e.g., *Morales v. Sun Constructors*, 541 F.3d 218, 222 (3d Cir. 2008) (“Morales, in essence, requests that this Court create an exception to the objective theory of contract formation where a party is ignorant of the language in which a contract is written. We decline to do so. In the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable.”) (citations omitted); *Berkeley v. Dillard’s, Inc.*, 450 F.3d 775, 776 (8th Cir. 2006) (employee who refused to sign arbitration clause assented to arbitration by continuing employment, when clause so provided); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997) (arbitration agreement binding when consumer orders product by telephone, the product can be returned within thirty days, and the product arrives with an arbitration agreement included in the papers inside the box); *In re Brown*, 311 B.R. 702, 706 (Bankr. E.D. Pa. 2004) (enforcing an arbitration clause against sick, elderly plaintiffs who “d[id] not know what an arbitration Agreement [was]” and received no explanation of papers they were asked to sign containing the arbitration clause).

65. 110 So.3d 916, 917 (Fla. Dist. Ct. App. 2013).

66. See, e.g., *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (“The suspected presence of a mental or emotional instability eliminates any presumption that a written waiver is voluntary, knowing, or intelligent.”).

67. See, e.g., *Moore v. Ballone*, 658 F.2d 218, 228-29 (4th Cir. 1981) (where defendant “unambiguously demonstrat[ed] his distorted mental condition” during questioning by police officers and remained “in continuous legal commitment to the state mental hospital,” then “[t]he evidence in the record of [his] mental condition, standing alone, should have sufficed for the state court to determine that he could not have knowingly and intelligently waived his rights”).

68. See *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937) (“[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.”); *Seaboard Lumber Co. v. U.S.*, 903 F.2d 1560, 1563 (Fed. Cir. 1990) (“Waiver requires only that the party waiving such right do so ‘voluntarily’ and ‘knowingly’ based on the facts of the case.”) (citations omitted). For more on how courts interpret the Seventh Amendment’s right to a jury trial in the civil context, see

interest to this Symposium is that the jury trial right is stated explicitly in certain employment statutes.<sup>69</sup> The majority of the Supreme Court's enormous reverence for arbitration is particularly evident in these settings. In a series of important statutes protecting workers, Congress specifically made the important policy choice to provide that key causes of action could be tried to a jury.<sup>70</sup> Notwithstanding this conscious and significant decision by the Congress, the Court has been very quick to find that those statutory rights may be waived in settings where there was no voluntary, knowing, or intelligent waiver.<sup>71</sup> It is troubling that the majority effectively is endorsing "unknowing" and "unintelligent" waivers of these rights.

Yet no court has ever articulated a serious or convincing rationale for why the Seventh Amendment right to a jury trial should be accorded reduced or no protection in the arbitration context. Instead, courts simply contend that the FAA ostensibly requires this result.<sup>72</sup> Most scholars, however, have concluded that the waiver of a constitutional right is no less important in the arbitration context.<sup>73</sup> Courts should not deviate from the long-standing rule that waiver of a right will not be inferred merely because an arbitration provision is involved.

The long-term implications of this case law could conceivably extend beyond the arbitration context. As set forth above, the Court has been

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Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000).

69. Title VII and the Americans with Disabilities Act expressly provide for the right of a trial by jury. 42 U.S.C. § 1981a(c) (2012). Parties may also seek a jury trial for claims brought under the Age Discrimination in Employment Act (ADEA) and the Fair Labor Standards Act (FLSA). See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (following the Congressional directive to interpret the ADEA "in accordance with" the FLSA, the Court found it significant that it is "well established that there was a right to a jury trial in private actions pursuant to the FLSA").

70. Section 15 of the ADEA was amended by Congress in 1978 and unambiguously states, "a person shall be entitled to a trial by jury." Pub. L. 95-256, §§ 4(a), 4(b)(1), 4(c)(1), Apr. 6, 1978, 92 Stat. 190, 191 (codified at 29 U.S.C. § 626(c)(2) (2012)); see also *Lehman v. Nakashian*, 453 U.S. 156, 168 (1981) ("Congress expressly provided for jury trials in the section of the Act applicable to private-sector employers."). And it wasn't until 1991 that Congress amended Title VII to include the right to a jury trial found within the statute today. Pub. L. No. 102-166, § 102(c) Nov. 21, 1991, 105 Stat. 1071, 1073 (1991); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 250 (1994) ("The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964" and "expressly identifies as one of the Act's purposes 'to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.'") (citations omitted).

71. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing arbitration clause for ADEA claims).

72. See *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 338-39 (7th Cir. 1984).

73. See, e.g., Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 33 (2003) ("State courts should recognize, though many have not, that those arbitration clauses that eliminate a pre-existing constitutional right to jury trial should be treated like civil jury trial waivers interpreted outside the arbitration context. Thus, to the extent that the state enforces civil jury trial waivers only if they are knowing, voluntary, and intelligent, that same standard should be applied to arbitration clauses.").

issuing decision after decision giving greater content to the FAA (whose operative section, 9 U.S.C. section 2, is only a single sentence long) that make it easier and easier for corporations to strip workers of constitutional rights through unknowing “waivers” in arbitration clauses. It does not seem far-fetched to imagine that as the Court becomes increasingly comfortable holding that constitutional rights may be waived in an unknowing and unintelligent manner through hidden fine-print contracts, that at some point the Court might also be more open to finding that corporations may strip workers of other constitutional rights (such as the right to speak out on matters of public concern, the right to petition the government, the right to privacy) as well.

*C. The Policy in Favor of Arbitration Has Distorted the Law of Contracts.*

The Supreme Court’s creeping extension of federal arbitration law has also slowly subsumed long-standing principles of contract law. Specifically, the FAA has displaced state law rules regarding contract formation.

States have traditionally governed the law of contracts, which includes, among other things, contract formation.<sup>74</sup> At first blush, one would not expect the FAA to distort or rewrite state law contract principles, as the Act does not even define the term “contract.” Except for those instances where state law targets arbitration clauses for inferior treatment, the Court has properly recognized that it is state law, and not federal law, which governs arbitration clauses.<sup>75</sup> It is unsurprising, then, that somewhat older FAA cases accord express respect to state contract law; in a 1995 case, for example, the Supreme Court stated that principles of state contract law

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74. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) (“Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law.”); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (“[T]he cases before us, which center upon appellant Northern’s claim for damages for breach of contract . . . involve a right created by state law . . .”; *id.* at 90 (Rehnquist, J., concurring) (“[T]he lawsuit . . . seeks damages for breach of contract . . . which are the stuff of traditional actions at common law . . . . There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims . . . arise entirely under state law.”); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (“Commercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable . . . .”); *Pan Am. Petroleum Corp. v. Super. Ct. of Del.*, 366 U.S. 656, 663 (1961) (“The suits [involving a contract dispute] are thus based upon claims of right arising under state, not federal, law . . . . The rights as asserted by Cities Service are traditional common-law claims.”).

75. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”) (citations omitted); see, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (“[T]he interpretation of private contracts is ordinarily a question of state law.”).

provide the primary source of protection for consumers against corporate overreaching.<sup>76</sup>

One specific area where state law governs is contract formation. The FAA says nothing about when a contract is or is not formed. Under a common contract law principle, contracts that violate criminal laws or are against public policy are illegal and void *ab initio*.<sup>77</sup> Thus, a contract entailing illegality cannot, and will not, be enforced.<sup>78</sup> Such illegal contracts are unenforceable in their entirety.

Nonetheless, the Supreme Court has superimposed on state law contract formation its invented substantive rules of federal arbitration law. In *Prima Paint Corp. v. Food & Conklin Manufacturing Co.*, the Court held that the FAA requires that arbitration clauses be treated as though they are separable from the rest of the contract.<sup>79</sup> In other words, even if a contract containing an arbitration clause is unenforceable for some reason (perhaps for fraudulent inducement), courts are to treat the arbitration clause as separate from the remainder of the contract and thus presumptively enforceable notwithstanding the broader contract's problems. Hence, under *Prima Paint*, parties are required to arbitrate their challenges to other contract provisions.<sup>80</sup>

The case of *Buckeye Check Cashing, Inc. v. Cardegna*, which relies on the *Prima Paint* rule, illustrates how the Court's expansion of the substantive federal law of arbitration displaces standard rules of contract law.<sup>81</sup> In *Buckeye*, borrowers brought a putative class action alleging that payday lenders violated state usury laws with the high finance charges associated with payday loans.<sup>82</sup> The underlying contracts contained

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76. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 [of the FAA] gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'") (emphasis omitted).

77. See, e.g., *Thomas v. Ratiner*, 462 So.2d 1157, 1159 (Fla. Dist. Ct. App. 1984) ("The right to contract is subject to the general rule that the agreement must be legal and if either its *formation* or its performance is criminal, tortious or otherwise opposed to public policy, the contract or bargain is illegal.") (citations omitted); see also *Wechsler v. Novak*, 26 So.2d 884, 887 (Fla. 1946) (en banc) ("The doctrine relating to illegal agreements is founded on a regard for the public welfare and therefore each contract must have a lawful purpose.").

78. See, e.g., *Bovard v. Am. Horse Enter., Inc.*, 201 Cal. App. 3d 832, 841 (1988) (holding that a contract for sale of a drug paraphernalia manufacturing business was unenforceable because it violated public policy against the manufacture of drug paraphernalia implicit in statute making possession, use and transfer of marijuana unlawful).

79. 388 U.S. 395, 403-04 (1967).

80. See *id.*

81. See 546 U.S. 440 (2006). It should be disclosed that one of the authors of this article, Mr. Bland, was the Counsel of Record representing John Cardegna in the *Buckeye* case.

82. *Id.* at 443.

arbitration provisions that the Florida Supreme Court refused to enforce due to the contract's illegality.<sup>83</sup>

Whereas under state contract law the existence of a valid contract is decided by a court, the U.S. Supreme Court held that the borrowers' claim of an unenforceable usurious contract—a contract for illegal activity—was to be determined by an arbitrator.<sup>84</sup> Thus, the holding in *Buckeye* conflicts with the ability of state courts to void contracts under state law on grounds that apply, in general, to any other contract provision.<sup>85</sup> This approach gives arbitration provisions a special status above state contract law.<sup>86</sup> The implications of this trend are important. For many years, state law doctrines of unconscionability, duress, and public policy have provided floors of protection for workers and individuals against over-reaching and unfair contract terms. Given the modern reality that an employer may simply say “an employee may not work here unless she signs an acknowledgement agreeing to a large number of fine print legalese terms that the employee will predictably not read,” there is a strong argument that there needs to be some protection against abuses of this great power.<sup>87</sup> As the Court's jurisprudence repeatedly chips away at the state laws that protect against over-reaching, contract law threatens to be less of a body of true law—with rules and limits—and more into a device for the powerful drafters of contracts to demand and receive whatever they want.

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83. *Cardegn v. Buckeye Check Cashing, Inc.*, 894 So.2d 860, 862 (Fla. 2005) (agreeing with the lower court that “[a] party who alleges and offers colorable evidence that a contract is illegal cannot be compelled to arbitrate the threshold issue of the *existence* of the agreement to arbitrate; only a court can make that determination”) (citation omitted).

84. The Court saw this as a direct result of the *Prima Paint* rule. *See Buckeye*, 546 U.S. at 448 (“it is true . . . that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void.”).

85. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA.]”); *see also* Charles Davant IV, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 546 (2001) (noting that “[t]o the extent that a ‘federal contract law’ exists, it is an amorphous grab bag of principles”).

86. *See* Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 147 (2012) (“[M]any of the Court's arbitration-law doctrines depart from general contract law so considerably that they achieve a different purpose—one in service of social control, not freedom of contract.”).

87. *See* MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 145 (2013) (“Of course, Congress could just outlaw mandatory arbitration clauses in consumer contracts by amending the Federal Arbitration Act to reverse the Supreme Court's over-expansive interpretations . . .”). Professor Radin notes that the prioritization of “freedom of contract” principles in case law has not resulted in “courts making a distinction between how they evaluate such a clause in a commercial contract between parties who have apparently engaged in cognizant risk allocation versus how they evaluate in a boilerplate rights deletion scheme.” *Id.* at 140.

*D. The Policy in Favor of Arbitration Has Distorted the Law Distinguishing Procedural and Substantive Laws.*

One final example of how the Supreme Court's drive to expand the use of mandatory arbitration clauses has affected black-letter principles involves the distinction between procedural and substantive laws.

The distinction between procedure and substance is significant in a number of different settings. One area where the distinction is particularly important is cases where federal courts sit in diversity jurisdiction. In that setting, of course, federal law governs procedural issues—one would certainly not expect a U.S. district judge to apply state rules of procedure. But “rules that define the elements of a cause of action, affirmative defenses, presumptions, burdens of proof, and rules that create or preclude liability are . . . obviously substantive” and are governed by state law.<sup>88</sup> So if a plaintiff in a diversity case brings claims under a state statute or using a state common law cause of action, issues such as “the allocation of burden of proof” are decided according to state law, not federal law, because those issues are “substantive in nature.”<sup>89</sup>

As with the other areas addressed in the foregoing Parts, however, the normal understanding of procedure versus substance is often abandoned when courts are working to enforce arbitration clauses. In *Parisi v. Goldman, Sachs & Co.*, where the plaintiff alleged that the defendant had violated Title VII by engaging in a pattern or practice of gender discrimination, the employer sought to have the case compelled to individual arbitration.<sup>90</sup> The pattern-or-practice theory is a method by which disparate treatment can be shown; certain types of proof in pattern-or-practice cases give rise to a presumption that shifts the burden of proof to the employer.<sup>91</sup> The district court had refused to enforce the employer's arbitration clause, which banned class actions, on the grounds that “the clause effectively operated as a waiver of a substantive right under Title VII.”<sup>92</sup> The district court so reasoned based upon the prevailing law in the Second Circuit, which held that pattern-or-practice claims could be brought only on a class action basis. The Second Circuit overturned the district

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88. *Computer Econ., Inc. v. Gartner Grp., Inc.*, 50 F. Supp. 2d 980, 990 (S.D. Cal. 1999).

89. *See Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010) (citing *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) and *Am. Title Ins. Co. v. E.W. Fin. Corp.*, 959 F.2d 345, 348 (1st Cir. 1992)); *see also James River Ins. Co. v. Kemper Cas. Ins. Co.*, 585 F.3d 382, 385 (7th Cir. 2009) (“The allocation of burden of proof (in the sense of burden of persuasion—which side loses a tie) absolutely determines the outcome in cases where the evidence is in equipoise, and by doing so advances the substantive policies of a state . . .”); *Sims v. Great Am. Life Ins. Co.*, 469 F.3d 870, 879 (10th Cir. 2006) (burden of proof rules are substantive).

90. 710 F.3d 483, 485 (2d Cir. 2013). Mr. Bland was co-counsel for Ms. Parisi.

91. *Id.* at 487-88.

92. *Id.* at 485-86 (citation omitted).

court, and enforced the arbitration clause, citing the “liberal federal policy in favor of arbitration.”<sup>93</sup>

In non-arbitration circumstances, the pattern-or-practice method of proof would undoubtedly be seen as a substantive, rather than procedural, body of law. But because applying the ordinary procedure-substance distinction would have led to the invalidation of an arbitration clause, in this case of first impression, the Second Circuit focused upon the connection between the pattern-or-practice method of proof and class actions, and held that there was no entitlement to bring such claims.<sup>94</sup> Once again, in the area of arbitration, where courts focus on the Supreme Court’s emphatic policy in favor of arbitration, the normal rule of law was set aside. A body of law that would have been considered substantive in most settings has been viewed as procedural in this context. The boundaries of this trend are not yet settled, and are currently continuing to evolve, both in the general area of employment law<sup>95</sup> and the intersection of arbitration clauses with substantive employment rights.<sup>96</sup>

#### CONCLUSION

For the legal system to operate in a principled manner, its basic rules must be applied with consistency and reason. In too many instances, however, the Supreme Court’s enthusiasm for arbitration has led it and lower courts to abandon core and otherwise trans-substantive legal principles—or, at least, to cut odd, arbitration-sized holes in them. This Paper has highlighted a few of the principles and their respective holes, and it is clear that the Court has placed arbitration upon its own pedestal. Much as critics described the American legal system of the 1890s as a system in which “The Railroad Always Wins,” it seems fair today to criticize our legal system as one where “Arbitration Always Wins.”

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93. *Id.* at 488.

94. *See id.*

95. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Dukes*, the defense relied on—and the court was persuaded by—an argument that the Rules Enabling Act, which states that the rules of civil procedure “shall not abridge, enlarge, or modify any substantive right,” 28 U.S.C. § 2072(b) (2012), prevented the use of Federal Rule 23 (governing class actions) to abridge their right to litigate statutory defenses to employment discrimination claims. *Dukes*, 131 S. Ct. at 2561.

96. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 356-57 (5th Cir. 2013), *rev’g* *D.R. Horton*, 357 N.L.R.B. No. 184, 2012 WL 36274 (2012) (overturning the decision of the NLRB that an employer violated the National Labor Relations Act (“NLRA”) by requiring its employees to sign an arbitration agreement that precluded the filing of joint, class, or collective claims because “the NLRA does not grant employees the substantive right to adjudicate claims collectively” and does not override the FAA).