

THE THREE PHASES OF THE SUPREME COURT'S ARBITRATION JURISPRUDENCE: EMPOWERING THE ALREADY-EMPOWERED

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Arbitration agreements coupled with class-action waivers and other onerous provisions have become common in employment, consumer, and other transactions. The Supreme Court's decisions enforcing such agreements have encouraged their use. Scholars have largely critiqued the Court's decisions.

This article finds that the Court's arbitration jurisprudence has not been so monolithic. Rather it has evolved through three phases. In Phase I, the Court overruled older case law and held that pre-dispute agreements to arbitrate statutory claims were enforceable pursuant to the Federal Arbitration Act ("FAA"). The Court's rationale was that as long as the claimant could effectively vindicate the claims in the arbitral forum, the arbitration agreement did not amount to a waiver of the statutory rights at issue. This rationale led many to envision arbitration, with procedures effectively policed by the courts, developing into an informal, cost-effective forum that would be more accessible than the courts, particularly for low-dollar-value claims. Phase II substantially undermined the effective vindication doctrine, but state contract law doctrines used to police overreaching adhesive contracts continued to support the vision of arbitration as an accessible forum. In Phase III, however, the Court has held that the FAA mandates enforcement of class-action waivers, premising its holding on an FAA policy of enforcing arbitration agreements according to their terms. This article demonstrates how the latest phase of the Court's arbitration jurisprudence is obliterating state contract-law doctrines that policed overreaching by dominant parties, elevating the interests of the parties imposing the terms, and enshrining the imposing party's interests in the FAA and the Supremacy Clause of the Constitution.

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INTRODUCTION

“*Arbitration Everywhere, Stacking the Deck of Justice*” screamed the headline of the opening article of a three-part series in the *New York Times* in October 2015.¹ The article decried the insertion of arbitration clauses coupled with class and collective-action waivers and other onerous terms in the boilerplate of consumer and employment contracts.² We do not need the *New York Times* to tell us about the pervasiveness of such provisions. It is close to impossible to obtain a credit card, cell phone service, or consumer financing without one.³ Nursing homes also have largely adopted the practice of mandating that residents and their caregivers agree to arbitrate any claims that might arise and to do so on an individual basis only.⁴ Employers are increasingly mandating that their employees waive their rights to sue and agree to arbitrate their claims on an individual basis only.⁵

¹ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [<https://perma.cc/5GV T-A2J2>].

² *Id.*

³ See, e.g., CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at § 2 (2015).

⁴ See Michael Corkery & Jessica Silver-Greenberg, *Pivotal Nursing Home Suit Raises a Simple Question: Who Signed the Contract?*, N.Y. TIMES (Feb. 21, 2016), <http://www.nytimes.com/2016/02/22/business/dealbook/pivotal-nursing-home-suit-raises-a-simple-question-who-signed-the-contract.html> [<https://perma.cc/WM38-TXC5>].

⁵ See Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 n.9 (2015) (reporting on a recent survey of corporate general counsel which found that the

Academic scholars have largely criticized the move toward allowing employers, merchants, and others with superior bargaining power to relegate the weaker party of the transaction to arbitration on an individual basis only.⁶ A limited number of legislative and administrative actions have banned mandatory arbitration provisions in certain contexts. For example, the Military Lending Act of 2006 prohibits pre-dispute arbitration mandates in consumer credit agreements with active military or their dependents but excludes residential mortgages and auto loans.⁷ The Dodd-Frank Wall Street Reform and Consumer Protection Act prohibits pre-dispute agreements to arbitrate under the statute's securities and commodities whistleblower-protection provisions.⁸ The 2010 Department of Defense Appropriations Act bans defense contractors with Department of Defense ("DoD") business of \$1 million or more from mandating arbitration of sexual-harassment claims under Title VII of the Civil Rights Act of 1964 or in tort.⁹ On July 31, 2014, President Obama issued an Executive Order extending that ban to all federal contractors with contracts of \$1 million or more and to all Title VII claims as well as sexual-harassment tort claims.¹⁰ Perhaps the most far-reaching development is the Consumer Finance Protection Bureau's ("CFPB") proposed regulation that would ban mandatory arbitration provisions in consumer financial contracts from precluding class-action lawsuits.¹¹

The trend toward individual arbitration of consumer, employment, and similar disputes has been encouraged by the Supreme Court's jurisprudence, which over the last four decades has overwhelmingly favored the party seeking to arbitrate. In only two of the numerous cases concerning enforcement of arbitration agreements during this period has the Court favored the party resisting arbitration.¹² The Court appears to consistently compel weaker parties to arbi-

use of arbitration mandates with class-action prohibitions increased from 16.1 percent in 2012 to 42.7 percent in 2014).

⁶ See, e.g., Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 76 (2014); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2862-63 (2015); Sternlight, *supra* note 4, at 1325-27; Imre Stephen Szalai, *More Than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 51 (2014).

⁷ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670(a), 120 Stat. 2083, 2266 (codified as 10 U.S.C. § 987 (2006)).

⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1848 (2010) (codified as amended at 18 U.S.C. § 1514A(e)(1)(2) (2010)).

⁹ Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454-55 (2009).

¹⁰ Exec. Order No. 13673, § 6, 79 Fed. Reg. 45309 (July 31, 2014).

¹¹ Bureau of Consumer Financial Protection, Arbitration Agreements, 81 Fed. Reg. 32830-01 (proposed May 24, 2016) (to be codified at 12 C.F.R. § 1040).

¹² Equal Emp't Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 295 (2002) (holding that EEOC may sue employer for individual relief for victims of discrimination despite arbitration provision in victims' employment contracts); Volt Info. Scis., Inc. v. Bd. of

trate under whatever terms the stronger party imposed on them. Indeed, Professors Sullivan and Glynn have satirized the Court's arbitration jurisprudence with a supposed serendipitously discovered draft Supreme Court opinion implying an arbitration agreement into every contract that does not expressly disclaim arbitration.¹³

But the law of adhesive arbitration agreements did not have to develop this way. Although at first glance the Supreme Court's arbitration jurisprudence appears to be monolithic, closer scrutiny reveals that it has evolved and may be divided into three phases. In the first phase, the Court rejected older decisions, which had refused to enforce pre-dispute agreements to arbitrate statutory claims. The Court reasoned that an agreement to arbitrate merely substitutes an arbitral for a judicial forum, and as long as the arbitral forum allows for the effective vindication of statutory rights, pre-dispute agreements to arbitrate do not amount to impermissible waivers of statutory rights. Although many scholars criticized the privatization of the adjudication of statutory claims, others, including this author, seized on the requirement that the claimant be able to effectively vindicate the claim in the arbitral forum as a vehicle for close judicial regulation of the arbitration process. Such judicial policing would allow arbitration to develop into a faster and more accessible option for claimants, albeit one lacking the possibility of outlier jury awards.¹⁴ In the second phase, the Court placed a heavy burden on the party resisting arbitration to prove that the arbitral forum precluded the vindication of statutory claims. Although that burden undermined the vision of judicial policing to ensure that arbitration would be a fair, accessible forum, the possibility of some judicial policing under the effective vindication doctrine remained and was buttressed by state contract law which contains tools for protecting the weaker party to a transaction from overreaching by the stronger party.¹⁵ The third, and most recent, phase emphasizes a federal policy that arbitration agreements be enforced "according to their terms."¹⁶ This federal policy has completely neutered the effective vindication doctrine and is on its way to obliterating state contract law through federal preemption. Phase III has shattered the vision of arbitration as a viable, accessible forum for weaker claimants.¹⁷

This article traces and evaluates the three phases of the Supreme Court's arbitration jurisprudence. Part I chronicles the three phases of the Court's arbi-

Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989) (holding that the Federal Arbitration Act does not preempt California law that allows state trial court judges to stay arbitration while related claims against entities not party to arbitration agreements proceed in court).

¹³ Charles A. Sullivan & Timothy P. Glynn, *Satire, The FAA Triumphant: A Modest Opinion*, 19 EMP. RTS. & EMP. POL'Y J. 103 (2015).

¹⁴ See discussion *infra* Part I.A.

¹⁵ See discussion *infra* Part I.B.

¹⁶ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

¹⁷ See discussion *infra* Part I.C.

tration jurisprudence, tracing its evolution from reliance on the view that arbitration will be compelled as long as the aggrieved party may effectively vindicate statutory claims in the arbitral forum to the current approach, which relies on a federal policy favoring enforcement of the arbitration agreement in accordance with its terms. Part II examines consequences of the Court's third phase. It finds that the new emphasis on a policy favoring enforcement of arbitration agreements in accordance with their terms coupled with the federal policy favoring arbitration by resolving ambiguities in favor of arbitration threatens to obliterate basic doctrines of state contract law designed to protect the weaker party in grossly one-sided transactions. Part III reflects on the apparent demise of such state contract-law doctrines. It concludes that the Court's arbitration jurisprudence has focused only on the concerns of the business imposing the arbitration agreement in complete disregard of the presence of a second, weaker party to the transaction.

I. THE THREE PHASES

Section 2 of the Federal Arbitration Act ("FAA") provides that written provisions in contracts evidencing transactions involving commerce to arbitrate claims arising out of such transactions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁸ However, in *Wilko v. Swan*, the Supreme Court held that a pre-dispute agreement to arbitrate claims under the Securities Act of 1933 was unenforceable.¹⁹ The Court relied on Section 14 of the Securities Act which declared void "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this [subchapter] . . ."²⁰ The Court reasoned:

Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. 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. They 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. . . . As the protective provisions of the Securities Act require the exercise of judicial direction to fairly

¹⁸ 9 U.S.C. § 2 (2012).

¹⁹ *Wilko v. Swan*, 346 U.S. 427, 434–35 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

²⁰ Securities Act of 1933, Pub. L. 112-106, § 14, 48 Stat. 84 (1933) (codified as amended at 15 U.S.C. § 77n).

assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review.²¹

Beginning in the 1970s, however, the Court moved away from this view that statutory provisions expressly prohibiting waiver of rights protected by the statute preclude pre-dispute agreements to arbitrate such claims. This Part chronicles the evolution of the Court's jurisprudence from a view that an agreement to arbitrate changes the forum but does not affect substantive statutory rights as long as those rights may be effectively vindicated in the arbitral forum to its current view that the FAA embodies a strong federal policy that such agreements be enforced in accordance with their terms.

A. Phase I: Substitution of Forum and Effective Vindication

The Supreme Court's movement away from *Wilko* began in international commercial contracts, such as in *Scherk v. Alberto-Culver Co.* Decided in 1974, the Court in *Scherk*, by a vote of five to four, enforced an arbitration provision in a contract between a United States corporation and a German citizen concerning the sale of European business entities, and it required Alberto-Culver to arbitrate its claims under the Securities and Exchange Act of 1934.²² The Court assumed that under *Wilko*, such claims in a purely domestic context might not be arbitrable²³ but found *Wilko* inapplicable to the international transaction before it. The Court reasoned:

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.²⁴

Eleven years later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court confronted a federal statutory claim pertaining to another international transaction that included an arbitration provision.²⁵ Soler, a Chrysler and Mitsubishi dealer in Puerto Rico, sought to litigate its Sherman Act anti-trust claim against Mitsubishi, a Japanese auto manufacturer, despite a provision in its distributor agreement requiring arbitration in Japan under the rules of the Japan Commercial Arbitration Association.²⁶ The Court followed *Scherk* and held the Sherman Act claim arbitrable.²⁷ It rejected the view that requiring

²¹ *Wilko*, 346 U.S. at 435–37 (citations omitted).

²² *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 506, 519–20 (1974).

²³ *Id.* at 515.

²⁴ *Id.* at 519 (citations omitted) (quotations omitted).

²⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616 (1985).

²⁶ *Id.* at 616–17.

²⁷ *See id.* at 630–37.

arbitration, at least in the international context, would undermine the public policies underlying the Sherman Act:

There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American anti-trust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.²⁸

It did not take the Court long to expand to purely domestic transactions; the concept that pre-dispute agreements to arbitrate will be enforced with respect to statutory claims as long as the party may effectively vindicate those rights in the arbitral forum. The stage was set for such expansion a few months prior to *Mitsubishi* in *Dean Witter Reynolds, Inc. v. Byrd*.²⁹ The Court in *Byrd*, as did the lower courts before it, assumed that claims under the Securities Exchange Act of 1934 were governed by *Wilko* and, thus, not arbitrable.³⁰ The Court nevertheless held that state-law claims pending to the Securities and Exchange Act lawsuit were arbitrable, and the FAA compelled the lower court to order them arbitrated.³¹ In a concurring opinion, Justice White emphasized that arbitrability of claims under the 1934 act was an open question.³²

Two years later, the Court held that pre-dispute agreements to arbitrate were enforceable as applied to claims under the Securities Exchange Act of 1934, as well as to claims under Racketeer Influenced and Corrupt Organizations Act (“RICO”).³³ Relying on *Mitsubishi*, the Court held that the FAA mandates enforcement of agreements to arbitrate statutory claims unless the party opposing arbitration can establish that Congress intended to preclude waiver of the judicial forum.³⁴ Relying further on *Mitsubishi*, the Court held that there was no reason to believe that the claimants could not effectively vindicate their statutory claims in the arbitral forum; thus, the arbitration agreement did not amount to a waiver of statutory rights but simply provided for “their resolution in an arbitral, rather than a judicial, forum.”³⁵ The same rationale led the Court a year later to overrule *Wilko*³⁶ and two years thereafter to

²⁸ *Id.* at 636–37 (citation omitted).

²⁹ *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

³⁰ *Id.* at 215 n.1.

³¹ *Id.* at 217.

³² *Id.* at 224–25 (White, J., concurring).

³³ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

³⁴ *Id.* at 226–27.

³⁵ *Id.* at 229–30.

³⁶ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

extend its holding to employment statutes in *Gilmer v. Interstate/Johnson Lane Corp.*³⁷

The Court's rationale that an agreement to arbitrate did not waive substantive statutory rights but merely substituted the arbitral forum for the judicial forum for adjudication of those rights as long as the aggrieved party could effectively vindicate those rights in arbitration led lower courts to police arbitration procedures to ensure effective vindication. The D.C. Circuit's decision in *Cole v. Burns International Security Services* contains one of the most extensive and scholarly discussions of the minimum characteristics of an arbitration system necessary to provide an employee with a forum in which to vindicate effectively a statutory claim.³⁸ The decision received considerable attention, not only for its thoroughness but also because its author, Chief Judge Harry Edwards, is a leading scholar in alternative dispute resolution and the law governing the workplace. The court in *Cole* held that the arbitration system must provide neutral arbitrators, "more than minimal discovery," "a written award," and "all of the types of relief that would otherwise be available in court," and the system must "not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum."³⁹

The Court's Phase I jurisprudence enforcing pre-dispute agreements to arbitrate statutory claims came under intense scholarly criticism.⁴⁰ A number of scholars and commentators, however, suggested, particularly in the employment arena, that mandatory arbitration could provide an accessible, fair process for workers to resolve claims that might not otherwise be litigated. In one of the earliest analyses, Professor Susan A. FitzGibbon, taking note of the developments in *Cole* and observing that the remedy of reinstatement becomes less workable the more time that passes between termination and reinstatement, argued that with procedures properly policed by courts and arbitration professionals, arbitration could provide an accessible and speedy forum in which the remedy of reinstatement could be viable.⁴¹ Professor Roberto L. Corrada argued that properly policed by courts and market forces, including an active plaintiffs' bar, employer-mandated arbitration could provide a forum for lower income

³⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

³⁸ *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

³⁹ *Id.* at 1482 (emphasis in original).

⁴⁰ See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

⁴¹ Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMP. RTS. & EMP. POL'Y J. 221, 249 (1997).

employees, for whom the courts were not accessible, and urged civil rights lawyers to work actively to shape the arbitration process.⁴²

Professor Robert N. Covington envisioned employment arbitration evolving into a U.S. system of labor courts.⁴³ Individual employee rights advocate, Lewis L. Maltby, urged that arbitration could provide an affordable and accessible forum to rank-and-file employees for whom the prospect of litigation is more of a mirage than a reality.⁴⁴ I suggested that a key advantage to employers of mandating arbitration was eliminating their exposure to outlier jury awards and that such advantage would be balanced by the advantage to employees of an accessible forum in which dismissals and summary judgments were rare, provided that the arbitral process was adequately policed.⁴⁵ More recently, Professor Theodore J. St. Antoine reiterated the potential of mandatory employment arbitration as a more accessible forum for low-income workers and others with low-dollar-value claims over litigation⁴⁶ and suggested that some employers, prior to Phase III discussed below, were moving away from imposing arbitration mandates for that reason.⁴⁷

The Court's approach in Phase I that premised the enforceability of pre-dispute agreements to arbitrate statutory claims on the agreement's merely changing the forum without waiving substantive rights provided the basis for decisions such as *Cole*, setting forth general prerequisites for the arbitral forum being deemed one in which statutory rights may be effectively vindicated. Decisions such as *Cole* prompted many to envision mandatory arbitration, at least in the employment setting, evolving into an accessible, speedy forum with significant advantages for employees as well as employers. Unfortunately, that vision was significantly undermined as the Court's jurisprudence evolved into Phase II.

⁴² Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1068–70 (1996).

⁴³ Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345, 351 (1998).

⁴⁴ Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 63 (1998).

⁴⁵ Martin H. Malin, *Privatizing Justice But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 607–09 (2001).

⁴⁶ Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. MICH. J. L. REFORM 783, 810 (2008).

⁴⁷ Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A. J. LAB. & EMPL. L. 411, 421 (2010); see also Charles D. Coleman, *Is Mandatory Employment Arbitration Living up to Its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. LAB. & EMP. L. 227, 238 (2010) (Raytheon Company senior counsel reporting that the company discontinued its mandatory employment arbitration program because of the absence of appeals and rarity of dismissals and summary judgments).

B. Phase II: The Party Opposing Arbitration Must Prove Inability to Vindicate

Phase II is marked by *Green Tree Financial Corp. v. Randolph*, where the Court placed a significant gloss on Phase I.⁴⁸ For pre-dispute agreements to arbitrate to be enforceable, the claimant must still be able to effectively vindicate statutory rights in the arbitral forum.⁴⁹ There is a presumption, however, that the forum allows for such vindication, and the party resisting arbitration has a heavy burden to demonstrate otherwise.⁵⁰

In *Randolph*, the plaintiff financed her purchase of a mobile home through Green Tree Financial Corp. (“Green Tree”), whose financing agreement required arbitration for all disputes related to the agreement.⁵¹ Randolph sued Green Tree alleging violations of the Truth in Lending Act and the Equal Credit Opportunity Act.⁵² Green Tree moved to compel arbitration, and the district court agreed.⁵³ However, the Eleventh Circuit reversed, observing that the arbitration agreement failed to specify which party would be responsible for the arbitrator’s fees and related costs of the proceeding.⁵⁴ The court held the agreement unenforceable because it subjected the plaintiff to an unreasonable risk of steep arbitration costs that would undermine her ability effectively to vindicate her statutory rights.⁵⁵

By a five to four vote, the Supreme Court reversed.⁵⁶ The majority wrote:

It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. As the Court of Appeals recognized, “we lack . . . information about how claimants fare under Green Tree’s arbitration clause.” The record reveals only the arbitration agreement’s silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The “risk” that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.⁵⁷

The Court premised its analysis on the strong federal policy favoring arbitration. It analogized to the presumption that claims under a particular statute are arbitrable unless the party resisting arbitration shows that Congress intend-

⁴⁸ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000).

⁴⁹ *Id.* at 90.

⁵⁰ *Id.* at 91–92.

⁵¹ *See id.* at 82–83.

⁵² *Id.* at 83.

⁵³ *Id.*

⁵⁴ *Id.* at 84.

⁵⁵ *Id.*

⁵⁶ *Id.* at 81.

⁵⁷ *Id.* at 90–91 (citation omitted) (footnote omitted).

ed that claim under the statute not be arbitrated.⁵⁸ The Court placed a similar burden on a party resisting arbitration on the ground that excessive costs will impede her ability to vindicate her claims in the arbitral forum.⁵⁹ The Court majority wrote:

[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. *Randolph* did not meet that burden.⁶⁰

The decision in *Randolph* requiring case-by-case adjudication of the effects of the costs of the arbitral forum on a plaintiff's ability to vindicate statutory rights is in marked contrast to *Cole*'s bright-line rule that the employer (or in *Randolph*, the creditor) must pay all arbitral fees above an amount equal to a federal court filing fee.⁶¹ The decision in *Cole* told employers, and by implication, banks, merchants, and others who would impose arbitration in adhesive contracts, to provide that claimants pay only a nominal amount of forum costs if they want their arbitration agreements enforced.⁶² *Cole*'s rule, thus, was largely self-enforcing as employers and others had to provide in their arbitration plans for claimants to pay only nominal fees. In contrast, *Randolph* effectively mandated pre-arbitration litigation over fee allocation. The prospect of costly and uncertain litigation likely deters many claimants from challenging a plan's allocation of arbitral fees even where the prospect of incurring large fees deters them from bringing their claims to arbitration.⁶³

Randolph assumed that the decision of whether a plaintiff proved that a provision of an arbitration agreement impeded the plaintiff's ability to vindicate statutory rights in the arbitral forum would be made by the court. Subsequently during Phase II, in *PacifiCare Health Systems v. Book*, the Court began signal-

⁵⁸ *Id.* at 91–92.

⁵⁹ *Id.* at 92.

⁶⁰ *Id.* at 91–92 (citations omitted).

⁶¹ See *supra* note 39 and accompanying text.

⁶² See *supra* note 39 and accompanying text (discussing that the system must “not require employees to pay either unreasonable costs or any arbitrator’s fees or expenses as a condition of access”) (quoting *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997)); see also *Cole*, 105 F.3d at 1484–85 (“[F]ees would be prohibitively expensive for an employee like Cole, especially after being fired from his job, and it is unacceptable to require Cole to pay arbitrators’ fees, because such fees are unlike anything that he would have to pay to pursue his statutory claims in court.” Thus, the court held “that Cole could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator’s fees and expenses.”).

⁶³ See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS., 75, 100–01 (2004) (making a similar point with respect to case-by-case adjudication of validity of class-action prohibitions in consumer arbitration agreements).

ing lower courts to refer to arbitrators' questions concerning the adequacy of an arbitral forum to vindicate statutory rights.⁶⁴

In *PacifiCare*, a group of physicians sued several managed-care organizations alleging that the managed-care organizations violated, *inter alia*, RICO.⁶⁵ The managed-care organizations moved to compel arbitration.⁶⁶ Their contracts with the physicians required arbitration but also provided "punitive damages shall not be awarded," or "[t]he arbitrators . . . shall have no authority to award any punitive or exemplary damages," or "[t]he arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages."⁶⁷ The lower courts refused to enforce the arbitration agreements because they precluded the plaintiffs from being awarded treble damages, as provided for in RICO.⁶⁸

The Supreme Court reversed.⁶⁹ The Court observed that it had on several occasions commented that statutory treble damages in general, and RICO's treble-damage provision in particular, serve remedial as well as punitive functions.⁷⁰ The Court characterized the contracts' limitations on the arbitrator's remedial authority as "ambiguous," and reasoned, "[W]e should not, on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved."⁷¹ The Court held that the lower courts should have compelled arbitration.⁷²

To resolve the issue of arbitral remedial authority, the arbitrator would, by necessity, have to decide whether RICO treble damages are punitive or compensatory. Significantly, the Court did not hold that RICO treble damages are not punitive in nature. It merely observed that in prior decisions, it had characterized various statutory treble-damage provisions as serving remedial as well as punitive functions.⁷³ Thus, the Court left it to the arbitrator in *PacifiCare* to interpret RICO in the context of the arbitration agreements' limitations on arbitral remedial authority. Furthermore, if the arbitrator determined that the agreement precluded an award of treble damages, the arbitrator would have to decide whether such a prospective waiver of treble damages is allowed under RICO.

⁶⁴ *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003).

⁶⁵ *Id.* at 402.

⁶⁶ *Id.* at 403.

⁶⁷ *Id.* at 405.

⁶⁸ *Id.* at 403.

⁶⁹ *Id.* at 407.

⁷⁰ *Id.* at 405–06.

⁷¹ *Id.* at 406–07.

⁷² *Id.* at 407.

⁷³ *Id.* at 405–06.

The combined effect of *Randolph* and *PacifiCare* was not lost on then-Circuit Judge John Roberts who wrote:

We take from these recent cases two basic propositions: *first*, that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and *second*, that this burden cannot be carried by “mere speculation” about how an arbitrator “might” interpret or apply the agreement.⁷⁴

Thus, in Phase II, the Court continued to adhere to its rationale that pre-dispute agreements to arbitrate merely substitute the arbitral forum for the judicial as long as the forum allows for the effective vindication of statutory rights but made it very difficult for courts to police the forum. Nevertheless, the potential for judicial supervision of the forum remained, albeit in a much smaller subset of cases.⁷⁵

Moreover, Phase II left state contract law relatively unscathed. Because the FAA expressly leaves arbitration agreements subject to “such grounds as exist at law or in equity for the revocation of any contract,”⁷⁶ in Phase II, it was accepted that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements,”⁷⁷ in contrast to “state laws applicable *only* to arbitration provisions,” which are preempted by the FAA.⁷⁸

A wealth of state law has developed policing the one-sidedness of adhesive contracts. State contract doctrine calls for interpreting ambiguous language against the drafter and finding hidden provisions not to be part of the contract.⁷⁹ By far the most far-reaching contract-law-policing doctrine is unconscionability.⁸⁰

⁷⁴ *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005).

⁷⁵ *See, e.g., McMullen v. Meijer, Inc.*, 355 F.3d 485, 487 (6th Cir. 2004) (finding an employer's control over the pool of potential arbitrators rendered the arbitral forum incapable of providing for effective vindication of plaintiff's statutory rights); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000) (suggesting similar concerns in dicta). *But see Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 947–48 (8th Cir. 2001) (refusing to invalidate a suspect arbitrator selection provision on the ground that plaintiff did not meet the burden of showing an inability to effectively vindicate statutory rights in an arbitral forum); *see also Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001) (refusing to enforce an agreement to arbitrate because of a lack of consideration, but suggesting that an attack on arbitrator selection procedure would not meet the burden under *Randolph*).

⁷⁶ 9 U.S.C. § 2 (2012).

⁷⁷ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

⁷⁸ *Id.*

⁷⁹ *See generally* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (3d ed. 2004).

⁸⁰ For example, the doctrine is codified in the Uniform Commercial Code's provisions governing contracts for the sale of goods, *see* U.C.C. § 2-302 (UNIF. LAW. COMM'N & AM. LAW INST., amended 2003), and is recognized in the American Law Institute's Restatement of the Law of Contracts, *see* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 2016).

In *Armandariz v. Foundation Health Psychcare Services, Inc.*,⁸¹ the California Supreme Court incorporated the *Cole* requirements into state law.⁸² The court further found that an arbitration agreement that limited remedies and required only the weaker party to arbitrate while leaving the imposing party free to go to court was substantively unconscionable.⁸³ Other courts found substantively unconscionable—and therefore unenforceable—arbitration agreement provisions that have limited the time period during which the claim could be filed,⁸⁴ limited the remedies available to the claimant,⁸⁵ and imposed excessive arbitration costs on the claimant.⁸⁶ Although state unconscionability law had its drawbacks,⁸⁷ the use of state contract law coupled with what remained of the effective vindication doctrine allowed the vision of strictly policed arbitral processes providing claimants access to justice to remain viable. Phase III, however, calls judicial supervision into serious question and shatters the vision.

C. Phase III: The Federal Policy Favoring Enforcement of Arbitration Agreements in Accordance with Their Terms

Phase III is marked by the Court's decisions in *AT&T Mobility LLC v. Concepcion*⁸⁸ and *American Express Corp. v. Italian Colors Restaurant*.⁸⁹ The Court's new rationale for compelling arbitration of statutory claims is that "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted."⁹⁰ The new rationale came front and center in *Concepcion*, where it was essential to the Court's holding that the FAA preempted the California law of unconscionability.

The *Concepcions* purchased cell phone service from AT&T, which was advertised as including free phones, but AT&T charged them sales tax based on the phones' retail values.⁹¹ They brought a class action for false advertising and fraud.⁹² Because their contract mandated arbitration on an individual basis and

⁸¹ *Armandariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

⁸² *Id.* at 681–89.

⁸³ *Id.* at 691–94.

⁸⁴ *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (applying Virgin Islands' law).

⁸⁵ *Id.*; *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 767 (Wash. 2004) (en banc); see also *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 309 (Mo. Ct. App. 2005) (limitations on remedies coupled with class-action waiver unconscionable).

⁸⁶ *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 607–08 (Wash. Ct. App. 2002).

⁸⁷ See Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 380–85 (2007).

⁸⁸ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁸⁹ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁹⁰ *Id.* at 2309 (emphasis omitted) (quotations omitted) (citations omitted) (brackets omitted).

⁹¹ *Concepcion*, 563 U.S. at 337.

⁹² *Id.*

precluded class actions, AT&T moved to compel arbitration, but the lower courts denied the motion finding that the limitations on class actions was unconscionable under California law.⁹³ Under California law, class-action waivers in consumer contracts—where potential claims are likely to be too small to litigate individually—are unconscionable regardless of whether they are included in arbitration agreements or are free standing.⁹⁴ Section 2 of the FAA allows for the refusal to enforce arbitration agreements on such grounds that exist at law or in equity for denying enforcement to any contract.⁹⁵ Although California held class-action waivers unconscionable independently of whether they were found in arbitration agreements,⁹⁶ the Court held that the FAA preempted California law when the class-action waiver is in an arbitration agreement.⁹⁷

The Court founded the preemption on its declaration that “[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”⁹⁸ The Court went on to criticize class actions in arbitration as inconsistent with the speed, informality, and simplicity of arbitration as envisioned by the FAA.⁹⁹

In *Italian Colors*, Italian Colors and other merchants who accepted American Express cards brought a class action alleging American Express used its monopoly power to compel merchants to pay excessive fees for transactions with the cards.¹⁰⁰ Their agreements with American Express mandated arbitration and prohibited class actions.¹⁰¹ When American Express moved to compel arbitration, the plaintiffs responded with an economist’s affidavit, which maintained that the cost of expert analysis necessary to prove the antitrust claims would range in six or seven figures while the maximum recovery for an individual plaintiff after trebling the damages would be \$38,549.¹⁰² The Second Circuit held the class-action waiver unenforceable, finding that the plaintiffs

⁹³ *Id.* at 337–38.

⁹⁴ See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. at 346–48.

⁹⁵ 9 U.S.C. § 2 (2012).

⁹⁶ See *Concepcion*, 563 U.S. at 338 (quoting the Ninth Circuit in *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857–58 (9th Cir. 2009), to the effect that the *Discover Bank* rule was “simply a refinement of the unconscionability analysis applicable to contracts generally in California[] . . . [and] placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration.”) (emphasis omitted) (quotations omitted) (citation omitted).

⁹⁷ *Concepcion*, 563 U.S. at 344 (discussing preemption of California law).

⁹⁸ *Id.* at 344.

⁹⁹ *Id.* at 348–51.

¹⁰⁰ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

¹⁰¹ *Id.*

¹⁰² *Id.*

would incur prohibitive costs if compelled to arbitrate individually.¹⁰³ The Supreme Court vacated and remanded for reconsideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹⁰⁴ which had held that an arbitrator lacked authority to order arbitration on a class-wide basis unless such authority was conferred on the arbitrator by the parties' agreement.¹⁰⁵ On remand, the Second Circuit reaffirmed its decision.¹⁰⁶ After the Supreme Court ruled in *Concepcion* that the FAA preempted California state law, which had held that class-action waivers in consumer contracts were unconscionable, the Second Circuit *sua sponte* reconsidered and reaffirmed its decision.¹⁰⁷

The Supreme Court reversed.¹⁰⁸ The Court majority, which included Chief Justice Roberts, characterized the effective vindication line of analysis from Phases I and II as dicta.¹⁰⁹ It upheld the arbitration mandate with its class-action waiver, reasoning that "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."¹¹⁰ But the Court went further. It suggested that it might uphold a provision which precluded a party from presenting economic testimony, even in an antitrust case.¹¹¹ The driving rationale behind the Court's decision was that "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted."¹¹²

For many years, the Court told us that the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."¹¹³ The newly found purpose of enforcing arbitration agreements in accordance with their terms places them on a different footing from other contracts by making them immune to being struck or reformed under generally applicable contract doc-

¹⁰³ *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)*, 554 F.3d 300, 315–16 (2d Cir. 2009), *vacated and remanded*, 130 S. Ct. 2401 (2010).

¹⁰⁴ *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (mem.).

¹⁰⁵ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010).

¹⁰⁶ *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)*, 634 F.3d 187 (2d Cir. 2011).

¹⁰⁷ *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants' Litig.)*, 667 F.3d 204 (2d Cir. 2012), *rev'd*, 133 S. Ct. 2304 (2013).

¹⁰⁸ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

¹⁰⁹ *Id.* at 2310.

¹¹⁰ *Id.* at 2311 (emphasis in original).

¹¹¹ *Id.* at 2311 n.3.

¹¹² *Id.* at 2309 (emphasis omitted) (quotations omitted) (citations omitted) (brackets omitted).

¹¹³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20, 220 n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)).

trine. Without this freshly found purpose of the FAA, the Court would have had no basis for holding the generally applicable state contract law of unconscionability preempted by the FAA.¹¹⁴

In *Italian Colors*, the Court used this freshly found purpose of the FAA to obliterate the well-established principle that arbitration merely changes the forum in which statutory rights may be vindicated. Indeed, the Court no longer spoke of arbitration as a forum in which rights may be vindicated but now spoke of it as a forum in which an aggrieved party may pursue statutory remedies.¹¹⁵ It does not matter that the arbitration system is set up in such a way as to make the pursuit a fool's errand.

The Phase III rationale for compelling arbitration, which no longer asks whether arbitration merely changes the forum in which statutory claims will be resolved but now vigorously enforces arbitration agreements in accordance with their terms, raises numerous issues going forward. The next section explores the most significant ones.

II. GOING FORWARD IN PHASE III

A. *Determining the Terms of the Arbitration Agreement*

Giving effect to a federal policy of rigorously enforcing arbitration agreements according to their terms begs the question of how to determine the terms. Suddenly, the Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹¹⁶ may loom large. The hospital's construction contract with Mercury provided for arbitration of disputes.¹¹⁷ Mercury demanded payment of certain claims from the hospital, which filed an action in state court for a declaratory judgment that it was not required to arbitrate.¹¹⁸ Mercury responded by filing a diversity action in federal court seeking to compel arbitration under the FAA.¹¹⁹ At issue was whether the federal court should stay its proceeding pending the outcome of the state court action.¹²⁰ In holding that the federal court need not stay its proceeding,¹²¹ the Supreme Court catalogued the factors that militated against the stay, including that

¹¹⁴ As Professor Aragaki has observed, in *Concepcion*, the Court extended its jurisprudence calling for rigorous enforcement of the parties' contract over whether and what substantive claims should be arbitrated, for the first time, to mandate rigorous enforcement of the parties' contractual choice of what procedures will apply in arbitration. Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1956 (2014). That extension substantially undermines judicial efforts to police procedures in arbitration, such as called for in cases like *Cole*.

¹¹⁵ *Italian Colors*, 133 S. Ct. at 2310–11.

¹¹⁶ *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

¹¹⁷ *Id.* at 4–5.

¹¹⁸ *Id.* at 7.

¹¹⁹ *Id.*

¹²⁰ *See id.* at 13.

¹²¹ *See id.* at 19.

[t]he basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital. Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. . . .

. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.¹²²

Phase I of the Court's arbitration jurisprudence featured a heavy presumption that statutory claims are arbitrable but left courts considerable leeway to police arbitration procedures. Phase II greatly limited that policing, thus increasing the weight on the scale in favor of compelling arbitration and deregulating the process. Phase III, by potentially obliterating the effective vindication doctrine and greatly restricting state unconscionability law, furthers that deregulation and again increases the weight on the compelling arbitration side of the scale. *Moses H. Cone* did not concern whether the claims were arbitrable, but the Court's language in finding that the federal court need not stay its hand pending the outcome of the state case, coupled with Phase III's increased weight on compelling arbitration, provides a one-two punch that can be read to support ignoring basic state law principles of contract interpretation to compel arbitration even in the most doubtful circumstances. A comparison of pre- and post-Phase III cases suggests this may already be happening.

Two decisions from the Tenth Circuit reflect this concern. In *Dumais v. American Golf Corp.*, a pre-Phase III decision, the arbitration provision was part of an employee handbook.¹²³ At one place in the handbook, the employer reserved the right to change anything at will except for the arbitration provision and a provision that employment was at-will.¹²⁴ At another place, the employer reserved the right to change anything except the at-will employment provision.¹²⁵ The handbook, thus, was ambiguous as to whether the employer had reserved the right to change the arbitration provision at-will. The court cited the state common-law doctrine of interpreting contracts against the drafter.¹²⁶ It observed that the doctrine pointed in different directions for resolving the ambiguity in the handbook:

In the unusual posture of this case, the issue becomes whether we construe the ambiguity against the drafter generally or within the confines of the particular litigation before us. If construed generally against American Golf, the ambiguity would prohibit American Golf from modifying the arbitration agreement. If we construe the ambiguity against American Golf within the specific confines of

¹²² *Id.* at 24–25.

¹²³ *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1217 (10th Cir. 2002).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1219.

this dispute, the ambiguity would permit modification of the arbitration agreement because such a construction would enable Appellee to avoid arbitration.¹²⁷

The court opted for the latter interpretation.¹²⁸ It found that because the employer reserved the right to change the arbitration provision at-will, the arbitration provision was illusory and hence unenforceable.¹²⁹ The court held that arbitration should not be compelled.¹³⁰

In *Sanchez v. Nitro-Lift Technologies, LLC*,¹³¹ decided during Phase III, the court compelled arbitration of the plaintiffs' FLSA overtime claims under a clause providing that "[a]ny dispute, difference or unresolved question between Nitro-Lift and the Employee . . . shall be settled by arbitration . . ."¹³² The provision was in an agreement not to compete which also referenced sections 4, 4(k), and 18 of the agreement—sections that did not exist.¹³³ The court found the arbitration clause ambiguous but did not resolve the ambiguity in accordance with ordinary principles of contract law (which presumably would include interpreting against the drafter). Instead it said that, in accordance with the broad presumption of arbitrability, all ambiguities, as a matter of federal law, are to be resolved in favor of arbitration:

In our view, when the broad arbitration clause is considered together with the entire language of the narrow contract, two reasonable constructions emerge—either the parties agreed to arbitrate all disputes arising between them, or they agreed to arbitrate all disputes concerning only those issues covered in the agreement. We need not decide this difficult question, for we have stated that “to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved *in favor* of arbitrability.”¹³⁴

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1220.

¹³¹ *Sanchez v. Nitro-Lift Techs., LLC*, 762 F.3d 1139 (10th Cir. 2014).

¹³² *Id.* at 1142 (emphasis omitted).

¹³³ *Id.* at 1142–43.

¹³⁴ *Id.* at 1147. *But see Herzfeld v. 1416 Chancellor, Inc.*, No. 14-4966, 2015 WL 4480829, at *1–2 (E.D. Pa. July 22, 2015), *aff'd*, No. 15-2835, 2016 WL 6574075 (3d Cir. Nov. 7, 2016), where an exotic dancer worked at a club since 2006 and sued claiming what the club styled as a lease arrangement whereby she leased space in the club to perform was really an employment relationship and she was entitled to minimum wage and overtime. She signed a lease agreement in 2013 that included an arbitration clause. *Id.* at *1. The defendant could not produce any prior signed agreement but showed its standard packet in use at the time included a lease agreement with an arbitration clause and that it had lost most of its documents in a 2009 flood. *Id.* at *3. The court applied the Pennsylvania lost document doctrine, which required proof by clear and convincing evidence and found that the defendant didn't meet its burden of proof. *Id.* The court also interpreted the 2013 agreement to not encompass claims prior to date of its signing. *Id.* at *4. The club appealed arguing that the district court erred in applying the lost document doctrine and in refusing to apply the 2013 agreement retroactively. In an unpublished opinion, the Third Circuit declined to address these issues. 2016 WL 6574075 at *3 n.14. The court held that the arbitration clause, which applied to disputes arising out of the lease agreement, did not encompass claims under the Fair Labor Standards Act and related state statutes and affirmed the district court on this basis. *Id.* at *2.

In its most recent decision in Phase III, *DirectTV, Inc. v. Imburgia*, the Supreme Court expanded *Concepcion*'s preemption of state contract law of unconscionability to preempt state law of contract interpretation.¹³⁵ The plaintiffs sued for various consumer protection violations.¹³⁶ The arbitration agreement provided, “[i]f . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [the arbitration section] is unenforceable.”¹³⁷ California law held class-action waivers unconscionable, but the Supreme Court held that law preempted in *Concepcion*.¹³⁸ The California Court of Appeal interpreted “law of your state” to include state law that is federally preempted and held that the matter was not arbitrable.¹³⁹ The court relied on contract doctrines that the specific governs over the general and that ambiguities are to be construed against the drafter.¹⁴⁰

The Supreme Court reversed, holding California contract law was preempted by the FAA.¹⁴¹ It rejected the state court’s view that the language at issue, in particular, the phrase “law of your state,” was ambiguous¹⁴² and concluded that the doctrine of interpreting against the drafter did not apply.¹⁴³ The Supreme Court found the California Court of Appeal’s decision in conflict with decisions of the California Supreme Court.¹⁴⁴ It read the state court’s reasoning as indicating that the court would not interpret “law of your state” to include invalid state law in any context other than arbitration¹⁴⁵ and pointed to the state court’s language, which it said focused only on arbitration.¹⁴⁶ The Court opined that the state court’s view “that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts.”¹⁴⁷ It criticized the state court for invoking no other principle that would suggest that California courts would interpret “law of your state” the same way in contexts other than arbitration.¹⁴⁸ The Supreme Court concluded that the California court’s decision did not treat arbitration agreements equally with other contracts but rather was driven by there being a contract to arbitrate at issue.¹⁴⁹

¹³⁵ *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

¹³⁶ *Id.* at 471 (Ginsburg, J., dissenting) (outlining the alleged violations of California consumer-protective legislation).

¹³⁷ *Id.* at 469 (majority opinion) (quotation omitted).

¹³⁸ *Id.* at 467.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 471.

¹⁴² *Id.* at 469.

¹⁴³ *Id.* at 470.

¹⁴⁴ *Id.* at 469.

¹⁴⁵ *Id.* at 469–70.

¹⁴⁶ *Id.* at 470.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 471.

Rather than take the state court's interpretation of state contract law at face value, the Supreme Court set itself up as a type of super-state supreme court to find the state court's application of state contract law preempted by the FAA. The decision is in marked contrast to *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, a case arising solidly during the Phase I period.¹⁵⁰ In *Volt*, the parties' construction contract adopted provisions from a form contract developed by the American Institute of Architects, including a provision specifying that the contract would be governed by the law of the place where the project was located.¹⁵¹ The contract also contained an arbitration clause.¹⁵² Volt claimed the university owed it for extra work and demanded arbitration.¹⁵³ The University filed suit in state court for fraud and breach of contract against Volt and indemnification against two other contractors involved in the project with whom the University did not have arbitration agreements.¹⁵⁴ In accordance with state law, the state courts stayed the arbitration between the University and Volt pending the outcome of the litigation against the other contractors.¹⁵⁵ The Supreme Court deferred to the state court's interpretation of the choice-of-law clause as including the California rules of arbitration, despite the language in *Moses H. Cone*.¹⁵⁶ The Court opined, "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."¹⁵⁷ Reiterating that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts," the Court held that the FAA did not preempt California law.¹⁵⁸

The contrast between the pre- and post-Phase III decisions of the Tenth Circuit and the Supreme Court and their implications for the survival of state contract law are stark. Prior to Phase III, the Tenth Circuit employed the traditional contract doctrine of interpreting ambiguous contract language against the drafter, especially when dealing with adhesive contracts. In Phase III, the Tenth Circuit displaced traditional contract interpretation tools with a presumption resolving ambiguities in favor of arbitration. Prior to Phase III, the Supreme Court took the state courts' interpretations of their own contract law at face value, but in *DirectTV* the Court set itself up as a super-state supreme court, preempting the state's traditional contract doctrine by reinterpreting state law to

¹⁵⁰ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

¹⁵¹ *See id.* at 479–80 (Brennan, J., dissenting).

¹⁵² *Id.* at 470 (majority opinion).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 470–71.

¹⁵⁵ *Id.* at 471.

¹⁵⁶ *Id.* at 476.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 478–79.

conclude that the state had singled out arbitration contracts for discriminatorily unfavorable treatment.

Professor Imre S. Szalai has suggested that *DirectTV* presumes that any state law-contract interpretation against arbitration is based on a discriminatory anti-arbitration bias unless the party defending the state court interpretation can show that the court interpreted the same phrase in the same way in a non-arbitration contract setting.¹⁵⁹ Professor Szalai has argued that *DirectTV* will lead to any state court interpretation of a contract against arbitration being preempted by the FAA.¹⁶⁰

In *Narayan v. Ritz-Carlton Development Co.*, condominium purchasers sued the condominium developer and related entities.¹⁶¹ The purchase agreement contained a waiver of jury trial and provided that venue for any cause of action would lie in the Second Circuit Court in the State of Hawaii.¹⁶² In the purchase agreement, the buyers acknowledged, approved, and accepted the condominium declaration, which on pages thirty-four and thirty-five of the thirty-six total pages mandated arbitration in Honolulu of all claims arising out of the declaration.¹⁶³ The Hawaii Supreme Court found the arbitration provision ambiguous in light of its conflict with the venue provision in the purchase agreement, construed the ambiguity against the drafter, and held that the claims were not arbitrable.¹⁶⁴ The Supreme Court vacated the decision and remanded for reconsideration in light of *DirectTV*.¹⁶⁵

Phase III, thus, is pushing aside state law of contract interpretation and sending a clear message to state courts that they should interpret contracts to mandate arbitration or face FAA preemption. But an even larger threat to traditional state contract law looms in the implications of Phase III for the doctrine of unconscionability. The next section explores what, if anything, is left of unconscionability law.

B. What is Left of Unconscionability Law?

The rationale in *Concepcion* for preempting the California law that class-action waivers were unconscionable, i.e., the FAA's strong policy favoring enforcing arbitration agreements in accordance with their terms, could potentially eradicate the application of unconscionability law to any aspect of an arbitration agreement. A finding of unconscionability necessarily precludes enforce-

¹⁵⁹ Imre S. Szalai, *DIRECTV, Inc. v. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 OHIO ST. J. ON DISP. RESOL. (forthcoming 2016) (manuscript at 22–23) (on file with author).

¹⁶⁰ *Id.* (manuscript at 31).

¹⁶¹ *Narayan v. Ritz-Carlton Dev. Co.*, 350 P.3d 995, 998 (Haw. 2015), *vacated and remanded by Ritz-Carlton Dev. Co. v. Narayan*, 136 S. Ct. 800 (2016).

¹⁶² *Id.* at 1000.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1003. The court also found the agreement unconscionable. *Id.* at 1003–06.

¹⁶⁵ *Ritz-Carlton Dev. Co. v. Narayan*, 136 S. Ct. 800 (2016) (mem.).

ment of the contract in accordance with its terms, as the court may deny or limit enforcement of a contract or any part of a contract that it finds to be unconscionable.¹⁶⁶ But unconscionability is a ground that exists in law or equity for revocation of any contract and thus appears to be preserved by Section 2 of the FAA.¹⁶⁷ As the Ninth Circuit noted in a slightly different context, a broad reading of the policy favoring enforcement of arbitration agreements in accordance with their terms “would require strict enforcement of all terms contained in an arbitration agreement, including terms that are unenforceable under generally applicable state law. Such a broad construction of the FAA’s purposes is untenable, of course, because it would render § 2’s saving clause wholly ‘ineffectual.’”¹⁶⁸

Two decisions issued shortly after *Italian Colors* illustrate the divide over what, if anything, remains of state unconscionability law. In *Reed Elsevier, Inc. v. Crockett*,¹⁶⁹ the arbitration provision in an adhesion contract between Crockett and LexisNexis mandated arbitration in the city where LexisNexis is located.¹⁷⁰ Crockett had a billing dispute with LexisNexis, but arbitrating individually under the agreement was economically unfeasible so he filed a demand for classwide arbitration on behalf of himself and all other similarly situated LexisNexis customers.¹⁷¹ The agreement was silent as to the availability of classwide arbitration.¹⁷²

The court rejected Crockett’s argument that if the agreement was interpreted to preclude classwide arbitration, it would be unconscionable.¹⁷³ The court detailed how one-sided the agreement was but concluded it was bound by *Italian Colors* to enforce it.¹⁷⁴ It stated that

[t]he clause is indeed as one-sided as Crockett says: the clause favors LexisNexis at every turn, and as a practical matter makes it economically unfeasible for Crockett or any other customer to assert the individual claims that Crockett seeks to assert here. The clause provides that any arbitration of any dispute concerning LexisNexis’s charges must occur in Dayton, Ohio, where LexisNexis is headquartered. The customer must pay his own legal fees, even if the arbitrator concludes that LexisNexis’s charges were improper. And unlike many corporations that require arbitration of disputes with their customers, LexisNexis makes its customer split the tab for the arbitrator’s fee. The idea that the arbitration agreement in this case reflects the intent of anyone but LexisNexis is the purest

¹⁶⁶ U.C.C. § 2-302 (AM. LAW. INST. & UNIF. LAW COMM’N 2015); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

¹⁶⁷ 9 U.S.C. § 2 (2012); *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 . . .”).

¹⁶⁸ *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434 (9th Cir. 2015).

¹⁶⁹ *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

¹⁷⁰ *Id.* at 600.

¹⁷¹ *Id.* at 596.

¹⁷² *Id.* at 599.

¹⁷³ *Id.* at 600.

¹⁷⁴ *Id.*

legal fiction. But all of these things—the one-sided nature of the arbitration clause, and its adhesive nature—were also present in *American Express Co. v. Italian Colors Restaurant*. And there the Supreme Court held that, all of those concerns notwithstanding, the absence of a class-action right does not render an arbitration agreement unenforceable. . . . Under *Italian Colors*, therefore, the agreement here is not unconscionable.¹⁷⁵

In contrast, in *Chavarria v. Ralphs Grocery Co.*, the Ninth Circuit Court of Appeals held an arbitration agreement unconscionable under California law and that the state law was not preempted by the FAA.¹⁷⁶ The agreement at issue prohibited the use of the American Arbitration Association (“AAA”) or Judicial Arbitration and Mediation Service as an arbitration administrator.¹⁷⁷ It provided that if the parties could not agree on an arbitrator, each party would nominate three, and the parties would alternate striking names until one remained, with the party who did not initiate arbitration making the first strike.¹⁷⁸ The agreement effectively guaranteed that Ralphs Grocery would determine who would be the arbitrator. It prohibited the arbitrator from awarding the employee attorney fees unless a Supreme Court decision expressly required such an award and required the arbitrator to determine at the outset how the arbitrator’s fee would be apportioned between the parties.¹⁷⁹ It also allowed Ralphs Grocery to amend the agreement unilaterally without notice to the employee and stated that continued employment would signify assent to the new terms.¹⁸⁰ Distinguishing *Italian Colors*, the court stated that “[i]n this case, administrative and filing costs, even disregarding the cost to prove the merits, effectively foreclose pursuit of the claim. Ralphs has constructed an arbitration system that imposes non-recoverable costs on employees just to get in the door.”¹⁸¹ It also rejected Ralphs argument that the FAA preempted California law, reasoning:

If state law could not require some level of fairness in an arbitration agreement, there would be nothing to stop an employer from imposing an arbitration clause that, for example, made its own president the arbitrator of all claims brought by its employees. Federal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power. California law regarding unconscionable contracts, as applied in this case, is not unfavorable towards arbitration, but instead reflects a generally applicable policy against abuses of bargaining power. The FAA does not preempt its invalidation of Ralphs’ arbitration policy.¹⁸²

¹⁷⁵ *Id.* (citation omitted).

¹⁷⁶ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 919 (9th Cir. 2013).

¹⁷⁷ *Id.* at 920.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 920–21.

¹⁸⁰ *Id.* at 921.

¹⁸¹ *Id.* at 927.

¹⁸² *Id.* A provision effectively enabling the employer’s president to preside as arbitrator is found in the collective bargaining agreement between the National Football League (“NFL”) and the NFL Players Association. *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 820 F.3d 527, 537 (2d Cir. 2016). Article 46 of that contract allows

The California Supreme Court has held that the FAA preempts state unconscionability law only where it interferes with fundamental attributes of arbitration.¹⁸³ Courts in California and elsewhere continue to hold arbitration provisions unconscionable in extreme cases. For example, in *Carlson v. Home Team Pest Defense, Inc.*, the California Court of Appeal held the arbitration provision in an employment contract unconscionable.¹⁸⁴ The plaintiff had asked to see the arbitration agreement but was told it was not available; despite this, she still had to “blindly sign” it or the job offer would be withdrawn, which would result in plaintiff losing her unemployment benefits.¹⁸⁵ The court held the agreement substantively unconscionable because it 1) reserved the employer’s right to go to court to enforce restrictive covenants and intellectual property rights; 2) required the employee to file a request for dispute resolution before demanding arbitration but did not say what dispute resolution procedure was involved; 3) precluded demanding arbitration on any matter not included in the request for dispute resolution; 4) precluded the employee—but not the employer—from being represented by counsel; 5) required the arbitration request to be filed within ninety days after filing the request for dispute resolution; and 6) required that arbitration fees and expenses be split between the parties.¹⁸⁶

the NFL commissioner to discipline a player for conduct detrimental to the integrity of the game and provides the player with the right to appeal to the commissioner who appoints a hearing officer to hear the appeal. *Id.* The contract expressly allows the commissioner to appoint himself as hearing officer. *Id.* That is exactly what NFL Commissioner Roger Goodell did following the NFL’s investigation of the deflation of the New England Patriots’ footballs in the 2015 American Football Conference championship game. *Id.* at 534. Commissioner Goodell imposed a four-game suspension on Patriots’ quarterback Tom Brady, appointed himself as hearing officer to hear Brady’s appeal, and upheld the discipline that he had imposed. *Id.* at 534–35. The Court of Appeals for the Second Circuit rejected Brady’s argument that Goodell’s decision be vacated for arbitrator evident partiality. *Id.* at 548. The Court opined:

[A]rbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen. . . . [T]he parties contracted . . . to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes “conduct detrimental,” and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner’s authority, they could have fashioned a different agreement.

Id. (citations omitted). The *Brady* decision arose under a collective bargaining agreement between two affluent sophisticated parties of relatively equal bargaining power. It should not be applied to contracts of adhesion, but it does illustrate the extremes to which the driving rationale of Phase III—enforcing arbitration agreements according to their terms—could lead.

¹⁸³ *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 750 (Cal. 2015); *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 188 (Cal. 2013).

¹⁸⁴ *Carlson v. Home Team Pest Def., Inc.*, 191 Cal. Rptr. 3d 29 (Cal. Ct. App. 2015).

¹⁸⁵ *Id.* at 35–36.

¹⁸⁶ *See id.* at 41–42.

Unconscionability has been found where plaintiffs were seeking to assert that they were employees of the defendants even though their contracts claimed they were something else. For example, the Illinois Appellate Court held an arbitration provision unconscionable in contracts between purportedly independent truck drivers and a trucking company.¹⁸⁷ The plaintiffs were truck drivers who spoke Russian but not much English and whose contracts with defendant stated that they were independent contractors.¹⁸⁸ The contract provided for a per-mile fee with numerous deductions, which, if the drivers were employees, would have been illegal.¹⁸⁹ If the drivers wanted to contest a deduction, the agreement required filing of an arbitration demand within ten days after the date of the deduction.¹⁹⁰ A separate arbitration demand was required for each deduction.¹⁹¹ The agreement provided that arbitration would take place in Illinois, even though plaintiffs did not live in Illinois and often their routes did not take them through Illinois.¹⁹² It also provided that each party would select an arbitrator, and “if the two arbitrators disagree, those arbitrators would select a third, whose fees and expenses would be shared[.]”¹⁹³ The court held the provisions unconscionable.¹⁹⁴

In *Herzfeld v. 1416 Chancellor, Inc.*, the Pennsylvania court found an arbitration provision unconscionable in the plaintiff exotic dancer’s lease of dance space from the company she claimed was really her employer.¹⁹⁵ The court found that a new lease agreement with an arbitration provision, which superseded her prior lease with the company, was procedurally unconscionable because it was given to the exotic dancer on a take-it-or-leave-it basis.¹⁹⁶ The court reasoned that it was given to her after she paid her dance floor fees for the night, and, thus, if she took the time to read it, she would be sacrificing dance floor-earning time for which she had already paid.¹⁹⁷ The court found it substantively unconscionable for various reasons. First, it waived the plaintiff’s FLSA right to recover attorney fees if she prevailed; second, the court interpreted its silence concerning availability of class and collective actions to mean that they were not available; and third, plaintiff thus entered into an unknowing

¹⁸⁷ *Potiyevskiy v. TM Transp., Inc.*, No. 1-13-1864, 2013 WL 6199949, at *10 (Ill. App. Nov. 25, 2013).

¹⁸⁸ *Id.* at *1–2.

¹⁸⁹ *Id.* at *1.

¹⁹⁰ *Id.* at *2.

¹⁹¹ *Id.* at *3.

¹⁹² *Id.* at *8.

¹⁹³ *Id.* at *2.

¹⁹⁴ *Id.* at *10.

¹⁹⁵ *Herzfeld v. 1416 Chancellor, Inc.*, No. 14-4966, 2015 WL 4480829, at *1 (E.D. Pa. July 22, 2015), *aff’d on other grounds*, No. 15-2835, 2016 WL 6574075 (3d Cir. Nov. 7, 2016).

¹⁹⁶ *Id.* at *1, *9.

¹⁹⁷ *Id.* at *9.

waiver of that right (distinguishing *Concepcion* where the waiver was expressed).¹⁹⁸

But a broad application of the policy favoring enforcement of arbitration agreements in accordance with their terms could render decisions like these preempted. The Court in *Concepcion* seemed to lay the groundwork for such holdings. It generally linked the enforcement of the terms of the arbitration agreement to the type of arbitration the Court maintained that the FAA envisions:

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.¹⁹⁹

At least one court has read *Green Tree Financial Corp. v. Randolph* as an unconscionability case and has held that the FAA has federalized the law of unconscionability.²⁰⁰ And in a different exotic-dancer case, another court found that the collective-action waiver, the fee-shifting provision, and the provision shortening the statute of limitations were not substantively unconscionable because they “have a general tendency to reduce the formalities, the delays, the expenses, and the vexation associated with ordinary litigation. That is, they further the very goals that make arbitration a favored procedure . . .”²⁰¹ Such a rationale could easily be used to find state law holding such features substantively unconscionable to be preempted under *Concepcion*.

Furthermore, the Court’s decisions in Phase III may have a depressing effect on judicial willingness to find arbitration provisions unconscionable. For example, in *Hopkinton Drug, Inc. v. CaremarkPCS, LLC*, Hopkinton, an independent pharmaceutical compounder, sued CaremarkPCS following termination of its long-standing relationship as a Caremark provider.²⁰² The parties’ 2011 agreement provided, *inter alia*, “The arbitrator must follow the rule of Law, and may only award remedies provided for in the Provider Agreement.”²⁰³ In 2014, pursuant to authority reserved to CaremarkPCS in the 2011 agreement, CaremarkPCS unilaterally imposed new terms including a class-

¹⁹⁸ *Id.* at *10–11.

¹⁹⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011).

²⁰⁰ *In re Sprint Premium Data Plan Mktg. & Sales Practices Litig.*, No. 11-2855(SDW)(MCA), 2014 WL 202117, at *1–2 (D. N.J. Jan. 15, 2014); *see also* *Valle v. ATM Nat’l, LLC*, No. 14-cv-7993(KBF), 2015 WL 413449, at *6–7 (S.D.N.Y. Jan. 30, 2015) (finding loser pays winner’s costs and attorney fees provision unconscionable not because claimants’ claims for wrongfully charged ATM fees were worth only \$300 or \$400 and would be deterred by loser pays provision but because claimants’ very low income rendered the loser pays provision unconscionable under *Randolph*).

²⁰¹ *D’Antuono v. Serv. Rd. Corp.*, 789 F. Supp. 2d 308, 330 (D. Conn. 2011).

²⁰² *Hopkinton Drug, Inc. v. CaremarkPCS, LLC*, 77 F. Supp. 3d 237, 240 (D. Mass. 2015).

²⁰³ *Id.* at 241.

action waiver and a provision precluding the arbitrator from awarding indirect, consequential, or special damages, lost profits or savings, punitive damages or damages for injury to reputation or loss of customers or business.²⁰⁴ But the court held that the provision was not unconscionable.²⁰⁵ The court essentially left it to the arbitrator to decide the scope of the damage limitation. In its reasoning, the court cited the federal policy favoring enforcement of arbitration agreements in accordance with their terms.²⁰⁶

Recall the dicta in *Italian Colors* that the policy favoring enforcing arbitration agreements in accordance with their terms might lead the Court to uphold a provision in the agreement barring the presentation of economic evidence even in an antitrust case.²⁰⁷ Such a provision would grossly disadvantage a claimant who would bear the burden of proof and would be unable to meet that burden without economic evidence. The evidence bar seems qualitatively comparable to provisions that courts have held unconscionable, but the Court's dicta strongly suggests that, to the extent that state law may find such one-sided provisions unconscionable, it will be preempted by the FAA policy favoring enforcement of arbitration agreements in accordance with their terms.²⁰⁸

When a court finds a contractual provision unconscionable, under the Restatement and the Uniform Commercial Code ("UCC"), it "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."²⁰⁹ Accordingly, depending on the circumstances, courts have severed unconscionable terms in arbitration agreements, compelling parties to arbitrate without the severed terms.²¹⁰ In the most extreme cases where severing the unconscionable provisions would require the court to in effect rewrite the arbitration clause, courts have refused to enforce the arbitration agreement in its entirety.²¹¹

The one-two punch of enforcing arbitration agreements in accordance with their terms and resolving all ambiguities in favor of arbitration may knock out

²⁰⁴ *Id.* at 241–42.

²⁰⁵ *Id.* at 247.

²⁰⁶ *See, e.g., id.* at 242.

²⁰⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 n.3 (2013).

²⁰⁸ *See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS* § 4.28, at 310 (Supp. 2015-2) (suggesting state court holdings in which discovery limitations in arbitration agreements are unconscionable are preempted in light of *Concepcion* and *Italian Colors*).

²⁰⁹ U.C.C. § 2-302 (AM. LAW. INST. & UNIF. LAW COMM'N 2015); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) (2016 update).

²¹⁰ *See, e.g., Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (Roberts, J.); *Scovill v. WSYX/ABC, Sinclair Broad. Grp., Inc.*, 425 F.3d 1012, 1016–17 (6th Cir. 2005); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 674–75 (6th Cir. 2003); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 221–23 (3d Cir. 2003); *Valle v. ATM Nat'l, LLC*, No. 14-cv-7993(KBF), 2015 WL 413449, at *7 (S.D.N.Y. Jan. 30, 2015).

²¹¹ *See, e.g., Jackson v. Payday Fin., LLC*, 764 F.3d 765, 781 (7th Cir. 2014); *Carlson v. Home Team Pest Def., Inc.*, 191 Cal. Rptr. 3d 29, 44–45 (Cal. Ct. App. 2015); *Potiyevskiy v. TM Transp., Inc.*, No. 1-13-1864, 2013 WL 6199949, at *10 (Ill. App. Nov. 25, 2013).

the flexibility that the UCC and Restatement afford judges facing unconscionable arbitration provisions. In *Zaborowski v. MHM Government Services, Inc.*,²¹² the arbitration provision shortened the limitations period to six months, provided for the employer to select three arbitrators from which employee would select one, required a filing fee of \$2,600 and provided that if the employer prevailed the employee would be responsible for employer's costs and attorney fees.²¹³ The court held these provisions unconscionable and that the unconscionability was so pervasive that the unconscionable terms could not be severed without rewriting the contract.²¹⁴ Consequently, it refused to compel arbitration.²¹⁵ The Supreme Court granted certiorari to decide whether the FAA preempts California law and compels severing the unconscionable clauses while otherwise enforcing the agreement to arbitrate.²¹⁶ However, the case was removed from the Court's argument calendar and apparently has been settled.²¹⁷

The Court's Phase III arbitration jurisprudence provides three routes to compelling courts to reform unconscionable arbitration provisions rather than denying enforcement entirely. First, most contracts contain savings clauses providing that if a court finds a provision of the contract to be unenforceable, then the provision shall be severed, and the remainder will be enforced. In such cases, it will be easy to find that the federal policy that arbitration agreements be enforced in accordance with their terms preempts the state law that would ignore the savings clause. Second, even if the contract is silent as to severance of unenforceable provisions and state contract law would find the provision not severable, the federal policy requiring that ambiguities be resolved in favor of arbitration can again preempt state law, thus mandating the implication of an intent that the unenforceable provisions be severed, requiring enforcement of the arbitration provision. Third, if the one-two punch of the enforcement of arbitration agreements in accordance with their terms and the resolution of ambiguities in favor of arbitration does not compel severance, the court can always become a super-state supreme court as it did in *DirecTV*. In doing so, the Court can conclude that the state court rule on severance is peculiar to arbitration agreements and would not to be applied generally and is preempted by the FAA.

²¹² *Zaborowski v. MHN Gov't Servs. Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013), *aff'd*, 601 Fed. Appx. 461 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 27 (2015).

²¹³ *Id.* at 1153–54.

²¹⁴ *Id.* at 1156–57.

²¹⁵ *Id.* at 1157.

²¹⁶ *MHN Gov't Servs., Inc. v. Zaborowski*, 136 S. Ct. 1539 (2015) (mem.).

²¹⁷ See Ronald Mann, *February Argument Calendar Loses Arbitration Case to Settlement*, SCOTUSBLOG (Jan. 7, 2016, 6:06 PM), <http://www.scotusblog.com/2016/01/february-argument-calendar-loses-arbitration-case-to-settlement/> [<https://perma.cc/S2EC-RTAF>].

C. *Unavailability of the Designated Arbitral Forum*

What happens when the designated arbitration-service provider is unavailable? This issue is potentially very important because of the effect it can have on efforts at self-regulation by private arbitration service providers.²¹⁸ For example, the AAA will refuse to administer arbitration agreements that substantially depart from its rules or the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship.²¹⁹

The situation pits two of the driving forces in Phase III against each other. The policy that arbitration agreements be enforced according to their terms would seem to counsel against enforcing an arbitration agreement that designates a particular service provider that later becomes unavailable. But a court could find the agreement ambiguous concerning the parties' intent if the designated service provider becomes unavailable, and the policy of resolving ambiguities in favor of arbitration would counsel in favor of compelling arbitration. The latter policy appears to be reinforced by section 5 of the FAA, which provides for the court to appoint an arbitrator when 1) the agreement fails to designate a method for making the appointment, 2) a party fails to avail itself of the agreement's method, or 3) there is a lapse in the naming of an arbitrator.²²⁰ The most significant Phase III cases have arisen from consumer contracts naming the National Arbitration Forum ("NAF") as arbitrator or providing for arbitration to be conducted by the Cheyenne River Sioux Nation.

NAF was an arbitration services provider frequently named in consumer contracts. It became unavailable in 2009 after being sued by the Minnesota Attorney General, following her investigation, which showed that NAF represented to corporations that it would appoint anti-consumer arbitrators and would refuse to refer further cases to arbitrators who ruled in favor of consumers.²²¹ NAF resolved the lawsuit by agreeing to cease conducting consumer arbitrations.²²² In *Khan v. Dell, Inc.*, Khan's agreement accompanying the computer he purchased from Dell provided "ANY CLAIM, DISPUTE, OR CONTROVERSY . . . SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE

²¹⁸ See Malin, *supra* note 87, at 396, 399–400 (discussing need for providers of arbitration services to police the procedural fairness of employer-imposed arbitration mandates because of inadequacy of judicial policing).

²¹⁹ See, e.g., *Brady v. Williams Capital Grp., L.P.*, 928 N.E.2d 383, 385 (N.Y. 2010) (refusing to defer to AAA's insistence that employer pay the entire arbitrator fee where the arbitration agreement was imposed by the employer as a condition of employment); see also NAT'L ACAD. OF ARBITRATORS, *Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration*, http://naarb.org/Guidelines_for_standards.asp [<https://perma.cc/K2AR-7CPJ>] (last visited July 17, 2016) (providing guidelines for members of the National Academy of Arbitrators to follow in deciding whether to accept and conduct employment arbitrations).

²²⁰ 9 U.S.C. § 5 (2012).

²²¹ See *Khan v. Dell Inc.*, 669 F.3d 350, 358–59 (3d Cir. 2012) (Sloviter, J., dissenting).

²²² See *id.* (Sloviter, J., dissenting).

NATIONAL ARBITRATION FORUM . . .”²²³ A divided Third Circuit Court of Appeals compelled arbitration with the court to appoint a substitute arbitrator under section 5 of the FAA.²²⁴ The majority held that whether section 5 applied turned on whether naming NAF as arbitrator was an integral part of the agreement.²²⁵ Although dissenting Judge Sloviter believed the contract’s language clearly and unambiguously mandated arbitration before NAF and no one else,²²⁶ the majority reasoned that the provision was ambiguous because the word “exclusively” could be read as modifying only “binding arbitration” rather than “administered by NAF” or “binding arbitration administered by NAF.”²²⁷ The majority reasoned, “[b]ecause of the ambiguity, it is not clear whether the designation of NAF is ancillary or is as important a consideration as the agreement to arbitrate itself. Therefore, we must resolve this ambiguity *in favor* of arbitration.”²²⁸ The majority’s reasoning echoed the reasoning of the Tenth Circuit in *Sanchez v. Nitro-Lift*.²²⁹ Both opinions did not attempt to resolve ambiguous contract language with common contract principles, such as interpreting against the drafter. Instead, they simply found, or the dissent in *Khan* might say manufactured, ambiguity and compelled arbitration.²³⁰

The Seventh Circuit went a step further, again by a divided vote, in *Green v. U.S. Cash Advance Illinois, LLC*.²³¹ Green’s payday loan agreement, entered into three years after NAF agreed to stop handling consumer arbitrations,²³² mandated arbitration by one arbitrator “by and under the Code of Procedure of the National Arbitration Forum.”²³³ The majority read section 5 as precluding application of the integral part of the agreement doctrine.²³⁴ It reasoned that section 5

tells us that arbitration clauses remain enforceable if for “any” reason there is a “lapse in the naming of an arbitrator”. When a court declares that one or another part of an arbitration clause is “integral” and that the clause is therefore unenforceable as a matter of federal common law, it is effectively disagreeing with

²²³ *Id.* at 351 (majority opinion) (capitals in original).

²²⁴ *Id.* at 356–57.

²²⁵ *Id.* at 356.

²²⁶ *Id.* at 357 (Sloviter, J., dissenting).

²²⁷ *Id.* at 358.

²²⁸ *Id.* at 356 (majority opinion) (citation omitted) (emphasis in original). *But see* *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 811–15 (N.M. 2011) (holding that designation of NAF as arbitrator was an integral part of the arbitration agreement and its unavailability precluded compelling arbitration).

²²⁹ *See supra* notes 131–34 and accompanying text.

²³⁰ *Khan*, 669 F.3d at 358 (Sloviter, J., dissenting).

²³¹ *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787 (7th Cir. 2013).

²³² *See id.* at 789.

²³³ *Id.* at 794 (Hamilton, J., dissenting).

²³⁴ *Id.* at 791 (majority opinion).

Congress, which provided that a judge can appoint an arbitrator when for “any” reason something has gone wrong.²³⁵

The Cheyenne River Sioux Nation cases all involved very high-interest consumer loan agreements. In *Inetianbor v. Cashcall, Inc.*, the agreement provided for arbitration “conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules . . .”²³⁶ The Cheyenne River Sioux Tribal Nation had no consumer dispute arbitration rules and did not conduct arbitrations.²³⁷ The court held that the designated arbitral forum was an integral part of the arbitration agreement and, because the forum was unavailable, the agreement was unenforceable.²³⁸

In *Jackson v. Payday Financial, LLC*,²³⁹ the Seventh Circuit distinguished its prior decision in *Green*. The plaintiffs took out loans over the internet from the defendant, an LLC controlled by an individual who was a member of the Cheyenne River Sioux Tribe and resided on the Tribe’s reservation in South Dakota.²⁴⁰ The loans carried annual interest rates of 139 percent.²⁴¹ The plaintiffs brought suit under Illinois usury and consumer fraud laws.²⁴² The loan agreements provided that claims “will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.”²⁴³ The loan agreements further provided that arbitration would be conducted by either “(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council.”²⁴⁴ The loan agreements also provided “that the Loan Entities [would] pay the filing fee and any fees charged by the arbitrator; the loan consumer [would] not have to travel to the reservation for arbitration; and the loan consumer [could] participate in arbitration by phone or videoconference.”²⁴⁵ The court distinguished *Green* from the case before it on several grounds. No tribal elders were qualified to serve as arbitrators. The tribe had no arbitration rules or procedures.²⁴⁶ In another case, the tribe had appointed a tribal elder whose daughter worked for the defendant, and the appointment was a subjective judgment with no rules governing appointment of the arbitrator.²⁴⁷

²³⁵ *Id.*

²³⁶ *Inetianbor v. Cashcall, Inc.*, 768 F.3d 1346, 1348 (11th Cir. 2014).

²³⁷ *Id.* at 1348–49, 1354.

²³⁸ *Id.* at 1350–54.

²³⁹ *Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014).

²⁴⁰ *Id.* at 768–69.

²⁴¹ *Id.* at 769.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 778.

²⁴⁷ *Id.* at 770–71.

The court said:

In *Green*, we noted that, if the particular arbitration clause before us had been shorn of all detail as to the number of arbitrators, the identity of the arbitrators or the rules that the arbitrators were to employ, the mere existence of the arbitration clause would have made it clear that the parties still would have preferred to submit their dispute to arbitration.

Although such mutuality of intent might have been apparent in the contractual relationship in *Green*, it is not at all apparent in the situation before us today. The contract at issue here contains a very atypical and carefully crafted arbitration clause designed to lull the loan consumer into believing that, although any dispute would be subject to an arbitration proceeding in a distant forum, that proceeding nevertheless would be under the aegis of a public body and conducted under procedural rules approved by that body. The parties *might* have chosen arbitration even if they could not have had the arbitrator whom they had specified or even if the rules to which they had stipulated were not available. But even if these circumstances had been tolerable, a far more basic infirmity would have remained: One party, namely the loan consumer, would have been left without a basic protection and essential part of his bargain—the auspices of a public entity of tribal governance.²⁴⁸

The Cheyenne Sioux loan sharks, however, appeared to have gotten the message from the Seventh and Eleventh Circuits. In *Hayes v. Delbert Services Corp.*, the trial court compelled arbitration of claims relating to another 139 percent interest rate loan from an entity located on Cheyenne River Indian Reservation.²⁴⁹ The loan had the same arbitration clause as in *Jackson* but also provided with respect to selection of the arbitrator that the borrower could opt for AAA, JAMS, or any other provider mutually agreed on.²⁵⁰ But the loan sharks' agreement also precluded the arbitrator from applying federal or state law and mandated that the case be resolved according to the law of the Cheyenne River Sioux.²⁵¹ The Fourth Circuit held this provision unconscionable, refused to enforce the arbitration agreement, and reversed the trial court.²⁵²

D. Public Interests and Other Statutes

Beyond its impact on traditional rules of contract law, Phase III of the Court's arbitration jurisprudence has been implicated in three additional areas: 1) California's *Broughton-Cruz* rule; 2) California's Private Attorney General Act ("PAGA"); and 3) interpretation of sections 7 and 8(a)(1) of the National Labor Relations Act. To the extent the law in these areas precludes enforcement of the arbitration agreement, it runs smack into the Court's Phase III jurisprudence. Thus far, the Court's emphasis on enforcing arbitration agree-

²⁴⁸ *Id.* at 781 (citations omitted).

²⁴⁹ *Hayes v. Delbert Servs. Corp.*, No. 3:14-cv-258, 2015 WL 269483, at *1 (E.D. Va. Jan. 21, 2015), *rev'd*, 811 F.3d 666 (2016).

²⁵⁰ *Id.* at *3–4.

²⁵¹ *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 670 (4th Cir. 2016).

²⁵² *Id.* at 673–76.

ments in accordance with their terms has played a prominent role in two of the three.

The *Broughton-Cruz* rule was named after two California Supreme Court cases, *Broughton v. Cigna Healthplans of California* and *Cruz v. PacifiCare Health System, Inc.*, whose holdings provided that arbitration could not be required where the injunctive remedy sought under state statutes operated for the public benefit.²⁵³ In *Ferguson v. Corinthian Colleges, Inc.*, the Ninth Circuit reversed a California district court's denial of a motion to compel arbitration for injunctive relief under the *Broughton-Cruz* rule.²⁵⁴ The court noted that *Concepcion* and *Italian Colors* stood for the proposition that there can be no inherent conflict analysis between the FAA and state statutes because any conflicting state law is preempted by the FAA.²⁵⁵ Nor, the court opined, could a defense to a motion to compel arbitration rely on the argument that arbitration interfered with the effective vindication of a state statutory right because the effective vindication requirement applied only to federal statutes.²⁵⁶

The court applied *Concepcion* to preempt any state rule that outright prohibits any particular type of claim (or relief) from arbitration, even if the rule derived from a judicial determination that a state statute allowed for injunctive relief that had a public purpose.²⁵⁷ The *Ferguson* decision analogized injunctive relief to the “social exemplary” feature of punitive damages to address public wrongs.²⁵⁸ Since the U.S. Supreme Court previously held the FAA preempted state rules exempting punitive damages from arbitration even though they may have a public purpose, the *Ferguson* court reasoned this applied to the public purpose of injunctive relief as well.²⁵⁹

Concepcion made clear that the principle purpose of the FAA is to ensure “private arbitration agreements are enforced according to their terms,”²⁶⁰ and thus a party to an agreement might contract to waive punitive damages that would flow directly to her. *Ferguson*, however, extends that analysis to bind to the authority of the arbitrator non-parties to the arbitration agreement, such as the state or the general public benefitting from injunctive relief.

Private Attorney General Act (“PAGA”) claims have fared better thus far. In *Iskanian v. CLS Transportation Los Angeles, LLC*, the California Supreme Court held that “aggrieved employees” act as a proxy for the state labor agency

²⁵³ *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1159 (Cal. 2003); *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 76 (Cal. 1999).

²⁵⁴ *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 930 (9th Cir. 2013).

²⁵⁵ *Id.* at 934–36.

²⁵⁶ *Id.* at 936.

²⁵⁷ *Id.* at 935.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

when bringing a PAGA action²⁶¹ because 75 percent of the remedy for a successful claim goes to the agency.²⁶² Since the FAA promotes enforcing private dispute resolution agreements, the court reasoned, a rule barring enforcement of arbitration of PAGA claims is not inconsistent with the purposes of the FAA and is a proper exercise of a state's police powers.²⁶³ The Ninth Circuit has observed that the *Iskanian* court did not advocate a preference for a judicial forum over an arbitral forum for PAGA claims and that there was no demonstration that arbitration of PAGA claims would prove complex, cumbersome, time-consuming, or expensive in frustration of the purpose of the FAA.²⁶⁴

In *Sakkab v. Luxottica Retail North America, Inc.*, the Ninth Circuit by two-to-one vote held that the FAA does not preempt *Iskanian* even though the contract expressly waived the plaintiffs' right to bring a PAGA action.²⁶⁵ The court did not find the Supreme Court's discovery of a preference for enforcing arbitration agreements according to their terms controlling:

We recognize that Sakkab and Luxottica likely expected the waiver of representative PAGA claims to be enforced, and that the *Iskanian* rule prevents that expectation from being fulfilled. Any generally applicable state law that invalidates a mutually agreed upon term of an arbitration agreement will, by definition, defeat the parties' contractual expectations. However, the FAA's saving clause clearly indicates that Congress did not intend for the parties' expectations to trump any and all other interests. As we have explained, a rule requiring that the parties' expectations be enforced in all circumstances, regardless of whether doing so conflicts with generally applicable state law, would render the saving clause wholly ineffectual.²⁶⁶

The National Labor Relations Board's ("NLRB") analysis that employer-mandated class-action waivers violate section 8(a)(1) of the National Labor Relations Act ("NLRA") by interfering with employees' rights under section 7 to engage in concerted activity for mutual aid and protection has received mixed reviews in the courts of appeals. In *D.R. Horton, Inc. v. NLRB*, a divided Court of Appeals for the Fifth Circuit reversed the NLRB's holding that a class or collective action waiver imposed by an employer as a condition of employment violated section 8(a)(1) of the NLRA.²⁶⁷ The NLRB held that the waiver interfered with, restrained, or coerced employees in the exercise of their right under section 7 of the NLRA to engage in concerted activity for mutual aid and protection.²⁶⁸ The Fifth Circuit majority recognized that the NLRB's holding that section 7 protected the employees' right to sue collectively to improve their

²⁶¹ *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 146–47 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

²⁶² *Id.* at 146.

²⁶³ *See id.* at 148.

²⁶⁴ *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 434–38 (9th Cir. 2015).

²⁶⁵ *Id.* at 427.

²⁶⁶ *Id.* at 437.

²⁶⁷ *D.R. Horton, Inc., v. NLRB*, 737 F.3d 344, 348, 364 (5th Cir. 2013).

²⁶⁸ *See id.* at 349.

working conditions was supported by NLRB and court authority.²⁶⁹ But, relying heavily on *Concepcion* and the Court's determination that the FAA favors enforcing arbitration agreements in accordance with their terms, the majority concluded that section 7 of the NLRA must yield to the conflicting policies of the FAA.²⁷⁰

Judge Graves dissented from the majority's view that the NLRA must yield to conflicting policies of the FAA.²⁷¹ He agreed with the NLRB that the purpose of the FAA was to ensure that arbitration agreements are treated as favorably as other contracts and argued that holding, in effect, that an arbitration agreement is not subject to the NLRA treats the arbitration agreement more favorably than other contracts.²⁷² He also agreed with the NLRB that the class-action waiver amounted to a waiver of a substantive NLRA right to engage in concerted activity through legal action and thus was not subordinate to the FAA.²⁷³ Notably absent from Judge Graves' dissent was any mention of an FAA purpose of enforcing arbitration agreements in accordance with their terms.

In *Lewis v. Epic Systems Corp.*, the Court of Appeals for the Seventh Circuit declined to follow *D.R. Horton* and instead held that a class-action waiver imposed as a condition of employment violates the NLRA.²⁷⁴ The court, with reasoning comparable to Judge Graves' dissent in *D.R. Horton*, observed that the FAA was designed to treat arbitration agreements like all other contracts and not to elevate them over other types of contracts by immunizing them from being declared illegal.²⁷⁵ As with Judge Graves' dissent, at this point nowhere does the Seventh Circuit discuss the federal policy articulated in *Concepcion* and *Italian Colors* that arbitration agreements be enforced according to their terms.

III. THE APPARENT DEMISE OF STATE CONTRACT DOCTRINE AND THE SHATTERING OF THE ACCESSIBLE FORUM VISION

The one-two punch of rigorously enforcing arbitration agreements in accordance with their terms and resolving all ambiguities in favor of arbitration derive from cases, *Volt* and *Moses H. Cone*, which involved commercial transactions between sophisticated parties.²⁷⁶ Most contentious arbitration issues of recent decades, however, have arisen out of contracts of adhesion where

²⁶⁹ *Id.* at 356–57.

²⁷⁰ *Id.* at 359–60.

²⁷¹ *Id.* at 364 (Graves, J., concurring in part and dissenting in part).

²⁷² *Id.* at 364–65 .

²⁷³ *Id.* at 365.

²⁷⁴ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151, 1157–58 (7th Cir. 2016), *petition for cert. filed*, No. 16-285 (U.S. Sept. 2, 2016).

²⁷⁵ *Id.* at 1158–59.

²⁷⁶ *See generally* *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

stronger parties have imposed terms on parties with little bargaining power. It is precisely in such situations that state contract-law doctrines, such as interpreting ambiguous language against the drafter and unconscionability, have arisen to police gross overreaching.

As developed previously, Phase I of the Supreme Court's arbitration jurisprudence emphasized that as long as claimants can effectively vindicate their statutory rights in the arbitral forum, agreements that mandate arbitration are merely a substitution of forum and not a waiver of substantive statutory rights. The effective vindication doctrine inspired a vision that judicially policed arbitration mandates could provide a win-win for all parties to the arbitration agreement. Such mandates would insulate the stronger party—imposing the agreement from the risk of outlier jury awards—while providing the weaker party on whom the agreement was imposed with a speedy, efficient, and less formal forum that would be more accessible than litigation, particularly for low-dollar-value claims.

Phase II of the Court's arbitration jurisprudence substantially weakened the effective vindication doctrine but left intact state contract law doctrines that protect the parties on whom adhesive contract terms are imposed from overreaching by the imposing party. Phase III, however, has nailed the lid on the coffin of the effective vindication doctrine and emasculated state contract law doctrines, such as interpretation against the drafter and unconscionability. By tearing down these firewalls against the abuse of superior bargaining power, Phase III's one-two punch serves to elevate the interests of the stronger party imposing the terms and enshrine them in the Supremacy Clause of the Constitution.

This result is not surprising. If the FAA encompasses a federal policy that arbitration agreements be enforced according to their terms, in the context of consumer, employment, and similar adhesive contracts, it is speaking to the terms imposed by the stronger party. This was not lost on Justice Scalia, writing in *Concepcion*. He made it clear that it was the cell phone company's interests that he viewed the FAA as protecting. The Court catalogued deficiencies in arbitration as a forum for handling class actions in a manner that I have characterized as analogous to the deficiencies of arbitration as a forum for handling statutory claims in *Alexander v. Gardner-Denver Co.*,²⁷⁷ which the Court now views as long discredited.²⁷⁸ The Court concluded, "We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."²⁷⁹

²⁷⁷ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39, 56–57 (1974).

²⁷⁸ Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 309 (2012).

²⁷⁹ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011).

But a class-action waiver can act as a license to steal.²⁸⁰ Consider the following hypothetical: A credit card issuer decides to increase its profits by adding a \$1.00 charge to every card holder's monthly bill. The bill does not expressly show the extra charge. It just gets added to the total due. I suspect that most credit card holders do not check their issuer's addition when they get their monthly statements. The card issuer, of course, is counting on that. Even if some card holders notice and complain, the issuer can simply claim that there was a computer error and refund the \$1.00 while keeping the hundreds of thousands—potentially millions—of other dollars it took in at the expense of less vigilant customers. And if a card holder notices that the same computer error is made every month, the card holder's sole recourse is to bring an individual claim in arbitration for each dollar discrepancy. The only realistic way to attack the theft is with a class action, but after *Concepcion*, that measure is unavailable as a matter of federal law because the Court is certain that the issuer would not bet the company with no effective means of review. Nowhere did the Court even consider, much less express concern with, whether the card holder would have consented to giving the issuer such a license to steal.²⁸¹ That concern, which would lie at the heart of state contract law doctrines that police such adhesive contracts, is now preempted by the FAA, even though the Court in Phase III has never expressly considered whether Congress intended to preclude a state from stopping such a theft. The Court's sole concern was with the perspective of the credit card issuer, cell phone company, and employer—the party with the bargaining power to impose whatever terms it wishes on the weaker party.

Phase I of the Court's arbitration jurisprudence allowed for effective judicial policing of imposed arbitration terms to ensure that arbitration provided a fair and accessible forum for claimants in addition to providing benefits for far more powerful respondents. Phase II made such policing more difficult, but policing remained doable. Phase III, however, has obliterated the effective vindication doctrine and seems well on its way to obliterating state contract doctrines that protect weaker parties in adhesion relationships. To borrow Justice Ginsburg's words, Phase III has developed the law "in a manner most protective of the drafting enterprise."²⁸² It has largely shattered the vision of imposed arbitration procedures, effectively policed, so that they truly provide accessible fora advantageous to all parties. After Phase III, to the extent that this vision

²⁸⁰ See Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 705 (2012) (quoting consumer class action attorney who stated that *Concepcion* "opens the door for companies to pickpocket \$10 at a time from millions of consumers.").

²⁸¹ There is strong empirical evidence that consumers do not understand that they are waiving their rights to litigate and to participate in class actions and do not understand that courts will enforce such waivers. See generally Jeff Sovern et al., "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1 (2015).

²⁸² *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting).

remains, it does so in spite of, rather than assisted by, the evolving legal doctrine of the Supreme Court.

For example, AAA appears to be the dominant provider of arbitration services under employer imposed plans,²⁸³ and it has largely taken the high road, by requiring basic due process and employer payment of all arbitrator fees.²⁸⁴ But even AAA allows employers to impose class-action waivers, and there is strong evidence that avoiding class actions is now the primary reason employers mandate arbitration.²⁸⁵

The cost to an employer, bank, telecommunications company, or other dominant party of not adhering to AAA standards is that the AAA will likely decline to administer the arbitration. Under developing case law, the odds are good that if AAA declines the case, a court will simply appoint a different arbitrator under section 5 of the FAA.²⁸⁶ Even with the demise of NAF, there is not likely to be a shortage of low-road arbitrators to oblige the desires of dominant parties.²⁸⁷

Furthermore, there seems to be little legal disincentive to prevent dominant parties from drafting extremely one-sided arbitration provisions. Much of the law of unconscionability is likely preempted after *Concepcion* and *Italian Colors*, and the Court's grant of certiorari in *Zaborowski* suggested it was poised to hold that the FAA mandates that courts reform unconscionable arbitration provisions rather than deny enforcement of arbitration mandates. Such a holding would invite even more overreaching because an overreaching party would have very little to lose. If the overreaching party lost a court fight, it would still be able to compel arbitration under the terms reformed by the court.

Italian Colors and *Concepcion* were both five-four decisions; both were written by Justice Scalia. Justice Scalia's passing deprives the Court of its most forceful advocate for protecting the already powerful who exploit adhesive arbitration mandates. This leaves a four-four split on the Court with respect to most arbitration issues. The best hope for restoring this shattered vision of arbi-

²⁸³ See Sternlight, *supra* note 5, at 1314 n.31.

²⁸⁴ AM. ARBITRATION ASS'N, EMPLOYMENT: ARBITRATION RULES AND MEDIATION PROCEDURES 9, 33–35 (2016), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased [<https://perma.cc/NBE7-YY62>].

²⁸⁵ See Sternlight *supra* note 5, at 1310; see also ARBITRATION 2012, OUTSIDE IN: HOW THE EXTERNAL ENVIRONMENT IS SHAPING ARBITRATION 252 (Nancy Kauffman & Matthew M. Franckiewicz, eds., 2013) (stating remarks of Paul J. Yechout, in-house counsel for United Health Group, to the National Academy of Arbitrators 2012 Annual Meeting that one of the primary reasons his company mandates arbitration of all employment disputes is to eliminate class actions).

²⁸⁶ See *supra* Part II.C.

²⁸⁷ See Corkery & Silver-Greenberg, *supra* note 4 (reporting that an arbitrator who found a nursing home not responsible for the murder of one of its residents by the resident's roommate had decided 400 other cases involving the same nursing home).

tration as an accessible forum with advantages for both parties to arbitration agreements is for Justice Scalia's successor to tip the balance back to Phase I.²⁸⁸

²⁸⁸ The Court may soon have an opportunity to retreat from the sweeping nature of the policy favoring enforcing arbitration agreements in accordance with their terms exemplified by *Concepcion* and *Italian Colors*. Petitions for certiorari have been filed in four cases concerning the validity of the NLRB's decision in *D.R. Horton*. *Patterson v. Raymours Furniture Co.*, No. 15-2820-ev, 2016 WL 4598542 (2d Cir. Sept. 14, 2016), *petition for cert. filed* No. 16-388 (Sept. 22, 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. Aug. 22, 2016), *petition for cert. filed* No. 16-300 (U.S. Sept. 8, 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed* No. 16-285 (U.S. Sept. 2, 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* No. 16-307 (U.S. Sept. 9, 2016).