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Justice Scalia's Jiggery-Pokery in Federal Arbitration Law

David S. Schwartz[†]

In his final year on the Court, Justice Scalia introduced the phrase "jiggery-pokery" into the United States Reports to criticize his majority colleagues for what he felt was manipulative statutory interpretation.[1] "Jiggery-pokery" is not only a memorable phrase in itself, but is also emblematic of Justice Scalia's style—both his lively writing style, and his penchant for criticizing his colleagues for judicial practices in which he frequently indulged himself.

Though less well-known than his opinions in constitutional or administrative law, Justice Scalia's contribution to federal arbitration law is a prime example of his own jiggery-pokery in statutory interpretation. Federal arbitration law comprises the largely judge-made doctrine under the aegis of interpreting and applying the 1925 Federal Arbitration Act ("FAA"). Justice Scalia's impact in this area boils down to three recent and significant 5–4 majority opinions issued between 2010 and 2013. The purpose and effect of these decisions has been to winkle unconscionability doctrine out of the law of arbitration contracts, and to establish, at least for now, a legal regime in which arbitration clauses can be used by corporate defendants to immunize themselves from class actions. These decisions display some serious "jiggery-pokery" and "pure applesauce"[2]: that is to say, reasoning that casts aside both doctrinal fidelity and logic to reach a desired result.

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1. King v. Burwell, 135 S. Ct. 2480, 2500 (2015) (Scalia, J., dissenting) ("The Court's next bit of interpretive jiggery-pokery . . . .").

2. Another now-famous Scalia-ism from the same case. *See id.* at 2501 (Scalia, J., dissenting).

I. A LATE ENTRANT TO THE FIELD

Over the past 50 years, the Supreme Court has decided an average of one FAA case every year.[3] Yet the field of federal arbitration law remains something of a doctrinal backwater. Frequently characterized by dry procedural complexity and often involving business-to-business litigation that lacks plain consequences for the constitutional politics that most interest the Court and its watchers, FAA cases seem to have made even the Justices' eyes glaze over. Yet FAA cases carry important implications for the enforcement of civil rights and consumer protection laws. To be sure, the Justices have often missed these implications, as can be seen from their repeated failures to identify them and from fragmented voting patterns that cut across the 5–4 conservative/liberal splits that normally characterize cases involving employee and consumer rights. Even Justice Scalia, whose antennae for opportunities to impose a policy agenda were as sensitive as anyone's, demonstrated a lack of interest in this field for his first 20 years on the Court.

A. THE LEGAL CONTEXT

The Federal Arbitration Act was enacted in 1925 for the specific purpose of overruling a federal common law doctrine under which pre-dispute arbitration agreements—contracts or contract provisions to arbitrate future disputes—were revocable at will by either party at any time prior to the arbitration hearing; even arbitrators' decisions were often voidable in court.[4] The FAA, according to its legislative history, was intended to govern procedure in federal courts and to "place[ ] such agreements to arbitrate on the same footing as other contracts."[5] Thus, the FAA makes written arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[6] As the Supreme Court once said, "the purpose of Congress in 1925 was

3. *See infra* note 15.

4. *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 70–75.

5. H.R. REP. NO. 68-96, at 1 (1924).

6. Federal Arbitration Act, 9 U.S.C. § 2 (2016).

to make arbitration agreements as enforceable as other contracts, but not more so."[7]

As I have written elsewhere, "[t]he FAA was designed to enforce arbitration agreements entered into by parties who had substance-neutral and remedy-neutral reasons for preferring non-judicial, but binding, dispute resolution."[8] Had the Supreme Court confined its application of the FAA to this primarily business-to-business context, FAA doctrine would have remained limited in scope and largely obscure. But, as characterized by Justice O'Connor in 1995, "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[9] Since the early 1980s, the Supreme Court has recast what was intended to be a procedural statute governing arbitration *clauses* in federal court into a substantive-law "federal policy in favor of arbitration" that applies in both federal and state court, preempting contrary state laws. Moreover, the Court has mistakenly but consistently enforced pre-dispute arbitration clauses against consumers, employees and others bringing claims under statutes designed to protect them from overreaching by the very party demanding arbitration.[10] Called "mandatory arbitration" by most commentators, I have argued that it is more appropriately called "claim-suppressing arbitration"[11] because arbitration clauses drafted by regulated corporate defendants are designed and intended to suppress claims.[12]

Two intertwined doctrinal strands in this area have had real political salience, and have produced the only liberal-conservative 5–4 splits during Justice Scalia's time on the Court. These, not coincidentally, are the cases that appear to have held the greatest interest for Justice Scalia. The first

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

8. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L. J. 239, 243 (2012); *see also* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 994–95 (1999) (describing the history in detail).

9. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., dissenting).

10. *See, e.g.*, Schwartz, *supra* note 4, at 89–110.

11. *See* Schwartz, *supra* note 8, at 239–42.

12. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1264–83 (2009).

concerns the extent to which the FAA preempts state law contract defenses, most notably unconscionability doctrine and state consumer protection policies. The second concerns the extent to which the FAA permits enforcement of adhesive arbitration clauses that restrict class actions and diminish the effectiveness of laws designed to regulate the parties drafting those clauses. These two strands have come together in a long series of Supreme Court decisions that authorize claim-suppressing arbitration.[13] The Court has thereby transformed the FAA into a statutory authorization for what Professor Jean Sternlight has called "do it yourself-tort reform."[14]

B. JUSTICE SCALIA'S RECORD IN FAA CASES

Justice Scalia's tenure on the Court overlapped with most of the FAA's doctrinal developments. Since Justice Scalia's investiture on September 29, 1986, the Court has, by my count, issued 33 majority opinions in FAA cases.[15] Justice Scalia wrote eight of these majority opinions—nearly a quarter, and more than twice what might be considered his "fair share." Yet, in his first 19 years on the Court, to the end of the 2005 term, Justice Scalia wrote just two of the Court's 19 majority FAA opinions. Notably, he only dissented twice in the 33 arbitration cases over 29 years—a striking statistic, though one largely explained by his general agreement with the Court's strongly consistent pro-arbitration, anti-regulatory trend in this area. Perhaps more suggestive is the fact that Justice Scalia wrote only one separate opinion in the 25 cases in which he did not

13. *See generally* Schwartz, *supra* note 8.

14. Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 854 (2002) (arguing that class-action-barring arbitration clauses are used by businesses as "do it yourself tort reform"). I apologize to Professor Sternlight for having previously borrowed her extremely apt phrase without proper attribution.

15. Thus, the count is necessarily approximate because some cases raise a question of judgment whether they involve precedential interpretations of the FAA or not. The Lexis search "Federal Arbitration Act and date(>1966)" yielded 58 cases, ending with *DIRECTV, Inc. v. Imburgia*. 136 S. Ct. 463 (2015). Twelve cases predated 1986, the year of Justice Scalia's investiture. Of the remaining 46 cases from 1986 on, I judged 9 hits to be false positives—a handful not construing or applying the FAA at all, and others merely referring to the FAA very tangentially. Four cases were per curiam opinions. This leaves 33 "majority" opinions. For the sake of simplicity, I have included in this count the sole plurality opinion in the group, *Green Tree Financial Corp. v. Bazzle*, in which Justice Scalia joined. *See* 539 U.S. 444 (2003).

write the majority—his dissent in *Allied-Bruce Terminix Cos. v. Dobson*,[16] about which more will be said later. In other areas of the law, Justice Scalia was strongly inclined to have his own say, frequently in dissent of course, but also very often in concurring opinions or concurrences in the judgment. That he did not write a single concurrence in any arbitration case signaled his lack of interest in the field.

2006 marked a pivotal year in Justice Scalia's place in FAA doctrine. Justice Scalia's two majority opinions before the October 2005 term were both unanimous "decisions not to decide" the cert question, decisions written in that muddy fashion the Court uses when there is no clear agreement on legal policy and the Justices agree to issue an opinion with no precedential value.[17] However, starting with *Buckeye Check Cashing, Inc. v. Cardegna*[18] in spring 2006, Justice Scalia wrote six majority opinions out of 14 total FAA decisions by the Court. Five of the Scalia majority opinions issued pro-business rulings against consumer or antitrust interests, including all three of the anti-consumer 5–4 decisions involving a conservative versus liberal split. In that time frame, only two anti-consumer majority opinions were written by Justices other than Scalia.[19]

In sum, it seems that Justice Scalia lacked any particular interested in the development of FAA doctrine in his first 19 years on the Court, save for an abortive federalism interest expressed in his sole dissenting opinion in this area in *Allied-Bruce* in 1995.[20] Starting in 2006, however, he began to see the opportunity to develop a powerful anti-consumer direction in FAA cases, and took a much more active interest in the field, authoring a disproportionate number of majority holdings against consumer litigants.

16. 513 U.S. 265, 284 (1995) (Scalia, J., dissenting).

17. *See* PacifiCare Health Sys. v. Book, 538 U.S. 401 (2003); Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).

18. 546 U.S. 440 (2006).

19. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009) (Thomas); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (Breyer). Two other anti-consumer decisions were issued per curiam in this time frame. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam) (holding that a state law precluding pre-dispute arbitration of nursing home contracts was preempted); Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (applying *Prima Paint* to rule a contract void under a state law against non-competes).

20. *Allied-Bruce*, 513 U.S. at 284 (Scalia, J., dissenting).

II. JUSTICE SCALIA'S LEGACY IN FAA DOCTRINE

Justice Scalia's legacy for FAA doctrine can be discerned by examining the three anti-consumer majority opinions in 5–4 cases, all delivered between 2010 and 2013. But first, it is important to view his only dissent, in 1995, which offers a principled counterpoint to his three pragmatic and result-driven majority decisions.

A. FEDERALISM AND FAA PREEMPTION

Since most consumer protection law has arisen in the post-*Erie* legal environment, it tends to be state rather than federal law. And because most claim-suppressing arbitration cases arise in the consumer context, a recurring question is whether the FAA preempts state consumer protection laws. In *Southland Corp. v. Keating*,[21] the Supreme Court held for the first time that the FAA created substantive federal law that bound state as well as federal courts under the Supremacy Clause, and therefore preempted state law. The case involved a purely state-law suit in California state court by several 7-Eleven convenience store franchisees against the parent corporation. The California Supreme Court denied the defendant's motion to compel arbitration on the basis of a state statute that voided any term in a franchise contract requiring the franchisee to waive procedural or substantive rights. The U.S. Supreme Court reversed. Writing for a six-Justice majority, Chief Justice Burger asserted: "In enacting §2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[22]

Three Justices vigorously dissented. Justice Stevens agreed that the FAA undoubtedly bound state courts and preempted state laws purporting to adhere to the old common law rule that arbitration agreements were revocable at will. However, he argued, it was not properly construed to preempt state contract laws and policies designed to regulate unequal bargaining power and protect parties from overreaching, that tangentially affected the enforcement of arbitration clauses. Justice O'Connor, joined by then-Associate Justice Rehnquist,

21. 465 U.S. 1 (1984)

22. *Id.* at 10.

went further. The FAA was procedural, not substantive law, and did not bind state courts at all.[23]

Justice O'Connor was right. The FAA is a procedural, not a substantive statute: as the Supreme Court itself has repeatedly acknowledged, arbitration agreements are "in effect, a specialized kind of forum selection clause,"[24] in which a party compelled to arbitrate "does not forgo . . . substantive rights," but "only submits to their resolution in an arbitral, rather than a judicial, forum."[25] The FAA was never intended by the enacting Congress to apply in state court.[26] The strange "substantive law" interpretation *Southland* places on the FAA makes that statute a unique and anomalous instance of a federal substantive law that creates no federal question jurisdiction.[27] Moreover, the *Southland* Court ignored the serious constitutional objections to gratuitously interpreting the FAA to restructure the operations of state courts—that is to divert classes of cases from state courts into a private contractual dispute resolution system.[28]

Justice Scalia was a member of the Court by the next time it took up this issue in 1995. In *Allied-Bruce Terminix Cos. v. Dobson*,[29] the Court was asked to overrule *Southland* in a brief submitted on behalf of 20 states. Instead, a 7–2 majority reaffirmed *Southland* and held that the FAA preempted an Alabama statute making pre-dispute arbitration agreements unenforceable. A reluctant Justice O'Connor joined the majority, citing statutory stare decisis concerns while

23. *Id.* at 25.

24. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989).

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

26. *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 18 (2004).

27. The Supreme Court has always held that FAA "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise." *Southland*, 465 U.S. at 15 n.9; *accord* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 420 (1967) (Black, J., dissenting). That much is a correct interpretation of the FAA, which provides that arbitration agreements can only be enforced in federal court when, "save for such agreement, [the federal court] would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter . . . ." 9 U.S.C. § 4.

28. *See* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 541–42 (2005) (arguing that the FAA as construed by *Southland* is unconstitutional).

29. 513 U.S. 265 (1995).

continuing to assert that *Southland* was wrong. In a dissenting opinion joined by Justice Scalia, Justice Thomas reprised and developed the historical arguments from Justice O'Connor's *Southland* dissent, concluding flatly that "the Federal Arbitration Act (FAA) does not apply in state courts."[30] He brushed aside stare decisis concerns, arguing that reliance interests did not weigh against overruling *Southland*.[31]

Justice Scalia filed his own brief dissent—his only separate opinion in an FAA case—stating that "*Southland* clearly misconstrued the Federal Arbitration Act."[32] He argued that stare decisis did not prevent "correction of the mistake" of *Southland*, because the reliance interests on *Southland* could not have been strong and because *Southland* was so egregiously wrong: "Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes."[33] He concluded:

> I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence, and the accumulated private reliance will not likely increase beyond the level it has already achieved (few contracts not terminable at will have more than a 5-year term).[34]

Had Justice Scalia been a truly influential voice on federalism principles, he might have been able to build a majority to overrule *Southland* in the *Allied-Bruce* case itself. None of the six majority Justices from *Southland* were still on the Court in 1995, but the three *Southland* dissenters—Rehnquist, Stevens and O'Connor—were. When *Allied Bruce* was decided in January 1995, federalism concerns were no doubt salient in all the Justices' minds. *Allied-Bruce* was argued in October 1994; one month later, the Court heard argument in *United States v. Lopez*,[35] the case that would usher in the purported "federalism revival/revolution" of the Rehnquist Court. This might well have made Justices Kennedy, Rehnquist and O'Connor susceptible to a strong federalism-

30. *Id.* at 285 (Thomas, J., dissenting).
31. *Id.* at 286.
32. *Id.* at 284 (Scalia, J., dissenting).
33. *Id.*
34. *Id.* at 284–85.
35. 514 U.S. 149 (1995).

based argument to overrule *Southland*. Whatever Scalia's behind-the-scenes persuasive powers, they were not enough to overcome Kennedy's general liking of arbitration and Rehnquist's administrative concerns as Chief Justice for getting cases off the federal docket. And, to be frank, Justice Scalia was hardly an exemplar of principled decision-making who could shame his colleagues into adhering to an abstract principle at the expense of a desired result.

True to his word, if not to federalism, Justice Scalia never again dissented from a case relying on *Southland*. In marked contrast, Justice Thomas has dissented in all four cases since *Allied-Bruce* in which the Court has applied the FAA in state court litigation.[36] Meanwhile, Justice Scalia himself went on to become the Court's leading spokesman for the "eviction of state-court power to adjudicate a potentially large class of disputes"[37]—consumer protection cases.

B. UNCONSCIONABILITY AND ARBITRATORS' AUTHORITY

A recurring problem in arbitration doctrine centers around the scope and limits of the arbitrator's authority. There is an unavoidable gray area when it comes to distinguishing threshold "validity" questions to be decided by the court from "arbitrability" questions in which the arbitrator determines what substantive issues the parties contractually intended to arbitrate. Even so, the Supreme Court has turned this distinction into a confused mess.[38] Justice Scalia exploited this confusion in a 2010 decision in *Rent-A-Center v. Jackson*,[39] which allows arbitrators to decide important questions of validity that affect their own financial interests.

In *Rent-A-Center*, the plaintiff-employee, Jackson, sued his employer Rent-A-Center for race discrimination under 42 U.S.C. § 1981. When Rent-A-Center moved to compel arbitration, Jackson argued that the arbitration clause was unconscionable under Nevada law. But the arbitration clause included a "delegation" provision stating that "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement

36. *See* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Preston v. Ferrer, 552 U.S. 346 (2008); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996).

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

38. *See* Schwartz, *supra* note 8, at 254–59.

39. 561 U.S. 63 (2010).

including, but not limited to any claim that all or any part of this Agreement is void or voidable."[40] This raised the question of whether the unconscionability issue could be given to the arbitrator rather than to a reviewing court. If so, arbitration would be compelled despite an unresolved claim that the arbitration clause was unenforceable.[41]

In a logic-defying 5–4 majority opinion authored by Justice Scalia, the Court reversed, holding that the decision on the unconscionability of the arbitration clause was for the arbitrator.[42] There is a problem in this position, both of logic and fundamental fairness. If an arbitration agreement is unconscionable, then the victim of the unconscionable contract never really agreed to arbitration at all—and there is no legal basis to authorize an arbitrator to decide anything affecting that party's rights. To get around this problem, Justice Scalia had to apply the rule of *Prima Paint Corp. v. Flood & Conklin Manufacturing. Co.*[43] There, the Court held that arbitration clauses were "severable" from the rest of the contract containing them; and therefore, a claim that a contract was procured by fraud had to be submitted to arbitration, unless there was a contention that the arbitration agreement was voided due to fraud "directed to the arbitration agreement itself."[44] Here, in *Rent-A-Center*, Justice Scalia extended this logic-straining doctrine to apply to an unconscionability argument—and gave it a wrenching twist. Jackson's arbitration agreement with Rent-A-Center, he asserted, is a contract complete in itself: the "delegation provision," delegating the decision of unconscionability vel non to the arbitrator, is an independent provision within that arbitration contract. Under *Prima Paint*, he asserted, the delegation clause is severable and enforceable when what is being challenged is the unconscionability of the arbitration "contract" as a whole.[45] Therefore, the delegation clause stands, and the question of unconscionability must go to the arbitrator.[46]

40. *Id.* at 66.
41. *Id.* at 70.
42. *Id.* at 72.
43. *See id.* at 64; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
44. *Prima Paint*, 388 U.S. at 402.
45. *Rent-A-Center*, 561 U.S. at 72.
46. *Id.*

This jiggery-pokery cannot seriously be called "reasoning." To begin with, it makes no sense to view a pre-dispute arbitration clause, promising to arbitrate disputes arising out of a contract, as a self-contained, stand-alone contract (so as to invoke the *Prima Paint* rule).[47] Here, Justice Scalia acknowledged that the arbitration agreement was signed "as a condition of [plaintiff's] employment"[48]—a direct concession that the arbitration agreement is part of the employment contract. Moreover, the delegation clause is not logically independent and severable from the arbitration clause, in the way that an arbitration clause is logically independent from the substantive deal around which the overall contract is built. Thus, there will never be occasion to challenge a clause delegating validity issues to the arbitrator without also challenging the overall validity of the arbitration clause; it is more or less a logical impossibility. And nothing in the holding, or underlying logic, of *Prima Paint* supports chopping up an arbitration clause into severable pieces in order to take validity questions going to the arbitration clause itself away from courts and reassigning them to arbitrators.

Prima Paint was itself "a 'fantastic' and likely erroneous decision," allowing a party that procures a contract by fraud to get the benefit of (the arbitration clause) part of its bargain.[49] Yet *Prima Paint* is far less indefensible than *Rent-A-Center*. Fraudulent inducement claims are fact-intensive inquiries going to the heart of the contract; these are not only the kinds of matters arbitrators have traditionally handled, but the Supreme Court was no doubt concerned that assigning such cases to the court would create a gaping exception to enforcement of pre-dispute arbitration clauses. Whatever might be said in defense of *Prima Paint* in its original context of fraud-in-the-inducement claims, the same does not apply to claims, such as illegality and unconscionability, asserting that the contract is voidable on grounds that are largely apparent on the face of the contract.

Moreover, Justice Scalia's *Rent-A-Center* opinion glosses over a glaring due process problem. The contract drafter wants

47. The only exception would be the rather fanciful situation in which two parties with no other contractual relationship simply agree to arbitrate all future disputes between them.

48. *Rent-A-Center*, 561 U.S. at 65.

49. *Id.* at 76 (Stevens, J., dissenting) (quoting *Prima Paint*, 388 U.S. at 407 (Black, J., dissenting)).

the arbitrator to decide everything, and the arbitrator makes money by deciding he has the power to decide the validity of the delegation clause, which in turn permits him to uphold the validity of the arbitration clause and thereby make more money by conducting the arbitration on the merits. This appalling violation of basic due process norms—requiring the adhering party to submit a question to an adjudicator with a direct financial stake in deciding the question favorably to the contract drafter—has elsewhere been held to be a classic example of unconscionability.[50]

Rent-A-Center also has ominous implications for state consumer protection law as applied to arbitration clauses. A delegation clause tailored to *Rent-A-Center* strips the court of power to review any threshold issues concerning validity. Courts will have no choice but to compel arbitration in every case, leaving it up to the arbitrators to determine how to respond to unconscionable and overreaching arbitration agreements. All the sorts of remedy-stripping arbitration clauses that have been struck down as unconscionable by courts will no longer be judicially reviewable in the first instance, and subject only to the very limited judicial review allowable for arbitration awards.[51]

C. Class Actions and Public Policy

Justice Scalia's most significant contribution (if that is the word) to claim-suppressing arbitration law has been in two opinions empowering adhesion contract drafters to immunize themselves from class actions.

1. *AT&T Mobility v. Concepcion*

A longstanding question in arbitration law has been whether an arbitration clause could be used to impose a contractual advance waiver of class action claims; or in other words, would a class action ban in an arbitration clause be deemed enforceable or not, or would its presence render the entire arbitration clause unconscionable?[52] After years of

50. *Cf.* Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1981) (holding unconscionable a provision to name an arbitrator with financial ties to the contract-drafter).

51. *See* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003).

52. Professor Sternlight was the first scholar to offer a close examination

avoidance, and one dithering opinion, the Court finally confronted the question of the enforceability of a class action waiver in 2011 in *AT&T Mobility v. Concepcion*.[53] The plaintiffs, California residents who claimed that they had been illegally charged thirty dollars in sales tax on cell phones that had been offered to them as "free," filed a class action complaint in federal court in California, and the defendant AT&T Mobility (ATTM) moved to compel arbitration.[54] The arbitration agreement banned class claims against ATTM and expressly stated that the arbitrators had no power to conduct class arbitration.[55] Applying California law as required in a diversity case, the lower courts denied the motion to compel arbitration on the ground that the arbitration agreement's class action ban made the arbitration agreement invalid under California unconscionability doctrine.[56] The Supreme Court reversed in a 5–4 decision authored by Justice Scalia, upholding the class action waiver, and holding that state law doctrines refusing to enforce arbitral class action bans as unconscionable are preempted by the FAA.

The plaintiffs' argument, which had convinced the lower courts, relied on the reasoning of *Discover Bank v. Superior Court*.[57] There, the California Supreme Court had sensibly held that a class action ban (whether placed in an arbitration agreement or elsewhere) tends to work as an exculpatory clause, effectively immunizing the defendant from liability for widespread low-dollar-value consumer frauds whose stakes are insufficient to sustain claims by litigants individually; accordingly, class action bans were unconscionable under California contract law, whether or not in an arbitration agreement.[58] This common-sense principle, that a class action may be the only way to meaningfully vindicate rights where the

of this question sixteen years ago, in her prophetically-titled article. *See* Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive*?, 42 WM. & MARY L. REV. 1 (2000).

53. 563 U.S. 333 (2011). The Court was faced with that question and failed to resolve it. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

54. Brief for Petitioner at 9, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893).

55. Brief for Respondents at 3; Brief for Petitioner at 4–5, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893).

56. *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 857–58 (9th Cir. 2009). The *Concepcion* case was consolidated with the *Laster* case at this stage. *See id.* at 853.

57. 113 P.3d 1100 (Cal. 2005).

58. *Id.* at 1110.

available damages are too low relative to the cost of litigating, had been long recognized by courts and commentators, including the U.S. Supreme Court.[59]

Justice Scalia's disingenuous majority opinion seemed crafted to avoid addressing this logic. Rather than considering whether a company's self-immunization from class actions was an improper use of arbitration clauses, the entire analysis was structured around a different question: whether "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration" and is thus preempted by the FAA under the doctrine of obstacle preemption.[60] To frame the question as one involving the desirability of class *arbitration*, the opinion studiously ignored the fact that *neither party to the litigation desired or sought classwide arbitration*. The parties had assumed that the alternative to enforcing the class action ban and ordering individual arbitration was to strike the arbitration clause and allow the case to proceed in court as a (putative) class action. Thus, ATTM's contract included a "blow up" clause providing that, if the class action ban were found unenforceable, the arbitration agreement as a whole would be "null and void."[61] ATTM thereby contractually guaranteed itself the right to defend any class action in court. The plaintiffs, for their part, filed their case in court as a class action, and reasonably assumed that under either California unconscionability doctrine or the "blow up" clause, the alternative to case-by-case compelled arbitration would be a judicial class action. In short, neither of the parties sought or desired class arbitration.

Yet Justice Scalia failed even to consider the possibility that the case might proceed in court as a class action. The majority implied that an unconscionability rule against class action bans will be read as a rule "allow[ing] any party to a consumer contract to demand [class-wide *arbitration*] ex post."[62] The Court simply does not acknowledge the existence of a rule that allows the consumer to demand class-wide *litigation* when there is an arbitration clause present. The majority took for granted that, despite the alleged unconscionability of using the

59. *See, e.g.*, Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997); Sternlight, *supra* note 51, at 28–33.

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

61. Brief for Respondents at 3; Brief for Petitioner at 4–5, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893).

62. *Concepcion*, 563 U.S. at 348.

arbitration agreement as a class action ban, the arbitration clause would be enforced in some fashion. The only question was what that arbitration would look like, not whether the claims would go forward in court due to unenforceability of the arbitration agreement.

In short, Justice Scalia framed the question as whether a party with an arbitration agreement, which would be deemed per se enforceable, could be forced to defend itself in class action arbitration. Justice Scalia proceeded to justify the Court's negative answer by attacking the adequacy of arbitration as a procedure for handling class action cases. Arbitration procedures and arbitrators are not to be "entrusted with ensuring that third parties' due process rights are satisfied."[63] Arbitration's "absence of multilayered [judicial] review makes it more likely that errors will go uncorrected."[64] And "[a]rbitration is poorly suited to the higher stakes of class litigation."[65] Ironically, these are the very arguments long advanced by pro-consumer arbitration critics against claim-suppressing arbitration in general.

"Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations," Justice Scalia wrote without irony.[66] Yet, here the parties plainly expected that if a class action ban were held unconscionable, the parties would litigate a putative class action in court. The Supreme Court had never upheld a class action ban in an arbitration agreement, and longstanding public policy made contractual class action waivers unenforceable. Thus, ATTM had no reasonable ex ante expectation that its class action ban would stand up in court. To be sure, the defendant *hoped* it would—but nothing in the FAA previously required courts to honor *defendants' hopes*. Justice Scalia suggested that the FAA does exactly that, revealingly noting that class arbitration was beyond the pale because it "greatly increases risks to defendants."[67]

2. *American Express Co. v. Italian Colors Restaurant*

Justice Scalia's last decision in the field of arbitration law came in 2013, in *American Express Co. v. Italian Colors*

63. *Id.* at 350.
64. *Id.*
65. *Id.*
66. *Id.* at 351.
67. *Id.* at 350.

Restaurant,[68] where he took aim at both class actions and at plaintiffs' right to a forum to effectively vindicate their statutory rights. Various small businesses representing a putative plaintiff class of merchants who accepted American Express credit cards filed an antitrust suit in federal court, claiming that American Express exploited its monopoly position to extract excessive merchant fees. American Express moved to compel arbitration under an arbitration clause stating that: "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."[69] The plaintiffs argued that the class action ban was unenforceable on the ground that it would render their statutory antitrust rights nugatory. The plaintiffs presented an expert affidavit asserting that "the cost of an expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed $1 million,' while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled."[70] The district court granted the motion to compel arbitration, but the Second Circuit reversed and ordered the case to proceed as a putative class action in Court. The Supreme Court reversed.[71]

Justice Scalia's majority opinion held that class action bans in arbitration clauses are enforceable, even where the cost of litigating an individual arbitration exceeds the potential recovery. Looking at antitrust claims in particular, Justice Scalia reasoned that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[72] In enacting the treble damages remedy built into the Sherman Act,

> Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational. "[N]o legislation pursues its purposes at all costs."[73]

68. 133 S. Ct. 2304 (2013).
69. *Id.* at 2308.
70. *Id.*
71. The Supreme Court had twice ordered the Second Circuit to reconsider its judgment in light of new Court decisions in other cases, and the Second Circuit reaffirmed its judgment both times. *Id.* at 2308.
72. *Id.* at 2309.
73. *Id.* (citation omitted).

This argument proves far too much, because it could just as easily support a construction of the Sherman Act precluding all class actions—not just those where an arbitration agreement is involved.

Moreover, the assumption that the antitrust statutes intended certain "normal limits" from which class actions are a departure lacks any legal basis. What exactly are these "normal limits"—one plaintiff, one defendant and untrebled compensatory damages? In fact, treble damages are just as "normal" as punitive damages, which have long been permitted at common law and authorized in numerous statutes. And class actions are just as "normal" as cases involving multiple named plaintiffs or defendants under well-established joinder rules. What makes party joinder under Rules 19 and 20 more "normal" than class actions under Rule 23?[74]

Justice Scalia's effort to explain this point is unconvincing. Because the Sherman and Clayton Acts were enacted before Rule 23, he argued, it cannot be said that Congress viewed class actions as in any way essential to vindication of rights under the antitrust laws. This argument is simply fatuous. By enacting Rule 23, Congress recognized that in circumstances such as those present in the *Italian Colors* case, class actions are essential to vindication of *any* rights cognizable in federal court. As the Supreme Court itself has recognized, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[75] It would have been pointless and unnecessary for Congress to amend every federal statute to provide specially for class actions when it did so in one fell swoop in Rule 23. Putting it another way, by enacting the Federal Rules of Civil Procedure in 1938, Congress redefined what is "normal" for litigation under all federal statutes. Where it intended that class actions would somehow represent undue "enforcement at all costs," it could write a class action ban into a statute. Justice Scalia's shifting what is "normal" litigation enforcement of a statute from the procedures in the Federal Rules to some undefined pre-1938 Hohfeldian ideal of a single plaintiff and

74. *See* FED. R. CIV. P. 19, 20, 23.

75. Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)).

single defendant is legally unwarranted and utterly unconvincing.

Justice Scalia next argued that a litigant has no "entitlement" to class action enforcement of statutory rights because Rule 23 "imposes stringent requirements" that are often not met, even where the costs of individual claims exceed the potential recovery.[76] This is merely a non-sequitur. The fact that a *judge* might deny a class action has nothing to do with whether a putative class defendant can deny a class action by writing an adhesion contract. Justice Scalia implicitly recognizes this problem in his argument when acknowledging that the plaintiffs are asserting "a [contractually] nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23."[77] Rather than addressing this argument, he simply finesses it by asserting, "But we have already rejected that proposition in *AT&T Mobility* [*v. Concepcion*]."[78] In fact, the Court did not address the question there, as shown above. Indeed, the question that the Court has never answered is this: is a contract term simply prohibiting class actions enforceable? It is widely assumed that such a term would not be enforceable. And if not, why does it become enforceable by nesting it in an arbitration clause?

Longstanding Supreme Court precedent had promised pre-dispute arbitration agreements would be enforced against claims under private attorney general statutes, such as the antitrust, securities and antidiscrimination laws, only so long as the party compelled to arbitrate "does not [thereby] forgo the substantive rights afforded by the statute" and "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[79] Justice Scalia brushed these precedents aside, mischaracterizing the repeatedly acknowledged limit on enforcement of arbitration clauses as

76. *Italian Colors*, 133 S. Ct. at 2310.

77. *Id.*

78. *Id.*

79. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 637 (1985); *accord id.* at 637 n.19 (noting that should an arbitration or other forum-selection clause "operate[ ] . . . as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *see also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273–74 (2009) (antidiscrimination laws); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (same); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 229–30 (1987) (securities laws).

dicta.[80] Justice Scalia's answer to Justice Kagan's stinging dissent, calling out the majority's inconsistency with these precedents,[81] was to circle back to his previous point: "The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938."[82] I was previously unaware that Justice Scalia's elaborate methodology of statutory interpretation pegs the effectiveness of a statutory right to the state of the law before the adoption of the Federal Rules in 1938.

CONCLUSION

Taken together, Justice Scalia's major federal arbitration law opinions render unconscionability and public policy defenses to arbitration clauses virtually non-existent, while allowing corporate defendants to immunize themselves from class actions by the expedient of nesting a class action waiver in an arbitration clause. To achieve these results, Justice Scalia had to engage in a fair amount of jiggery-pokery on behalf of the long-lived five-Justice conservative bloc. One looking for principled conservative jurisprudence in Justice Scalia's body of work should probably look elsewhere than his arbitration decisions. Justice Scalia abandoned his much-touted federalism principles early on, and eventually found in FAA cases an opportunity to transform arbitration agreements into "do-it-yourself tort reform."[83] While the phrase "jiggery-pokery" may well be long remembered, one can hope that Justice Scalia's doctrinal jiggery-pokery in federal arbitration law will soon be overruled, gone and forgotten.

80. *Italian Colors*, 133 S. Ct. at 2310.
81. *See id.* at 2314 (Kagan, J., dissenting).
82. *Id.* at 2312.
83. Sternlight, *supra* note 14, at 854.