# REVISITING THE YELLOW DOG CONTRACT OF MANDATORY ARBITRATION: THE FEDERAL ARBITRATION ACT AND EMPLOYMENT RIGHTS TWENTY-FIVE YEARS AFTER *GILMER*

KATHERINE VAN WEZEL STONE†

TABLE OF CONTENTS



## INTRODUCTION

In 1996, I published an article in this law review entitled *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*.[1] I pointed out an alarming trend had emerged that "threaten[ed] to turn back the clock on workers' rights."[2] That trend was the compulsory arbitration of employee rights. It originated in 1991 with the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[3] where the Court held that an employee of a stock brokerage firm, who alleged he was fired in violation of the Age Discrimination in Employment Act (ADEA),

---

† Arjay and Frances Miller Distinguished Professor of Law, Emerita, UCLA. This essay draws upon several of my published and unpublished writings over the past several years, including *Arbitration—From Sacred Cow to Golden Calf: Three Phases in the History of the Federal Arbitration Act*, PEPP. DISP. RESOL. L. J. (forthcoming 2023); *The Bold Ambition of Justice Scalia's Arbitration Jurisprudence: Keep Workers and Consumers Out of Court*, 21 EMP. RTS & EMP. POL'Y J. 189 (2017); *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, UCLA L. REV. DISCOURSE (2013), https://www.uclalawreview.org/procedure-substance-and-power-collective-litigation-and-arbitration-under-the-labor-law; Symposium, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO STATE J. DISP. RESOL. 467 (2001) (Keynote Lecture, Symposium on *Gilmer v. Interstate/Johnson Lane Corporation*: Ten Years After); *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); *Employment Arbitration Under the Federal Arbitration Act*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE (Adrienne E. Eaton & Jeffrey H. Keefe, eds., 1999).

1. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996) [hereinafter *Yellow Dog Contract*].

2. *Id.* at 1019.

3. 500 U.S. 20 (1991).

had to arbitrate his ADEA claim.[4] When he was hired, the plaintiff was required to sign a standard stock exchange registration form to begin work, and that form contained an arbitration clause.[5] The *Gilmer* Court held that the arbitration agreement was enforceable under the Federal Arbitration Act (FAA),[6] which makes arbitration promises in contracts involving commerce "valid, irrevocable, and enforceable."[7]

The *Gilmer* decision was in line with several other cases the Court had decided in the mid to late 1980s that expanded the scope of the FAA far beyond its reach at the time of its enactment in 1925. At its inception, the FAA's drafters and supporters in Congress assumed that the FAA applied only to commercial disputes involving commerce that were brought in a federal court.[8] However, in the 1980s, the Supreme Court expanded the scope of the statute immeasurably.

In 1984, the Supreme Court held in *Southland Corp. v. Keating*[9] that the FAA applied to actions that were brought in both state and federal courts, so long as the dispute involved interstate commerce.[10] Moreover, the *Southland* majority held that the statute preempted any state law with which the FAA conflicts.[11] Thereafter, any state's effort to regulate arbitration, such as state laws to ensure actual consent to arbitration clauses that were buried in contracts of adhesion or to protect weaker parties from being compelled to submit claims to an unfair tribunal, would be preempted.[12]

In 1985, in *Mitsubishi v. Soler Chrysler-Plymouth*,[13] the Supreme Court further expanded the scope of the FAA by holding that the statute applied not only to contractual disputes but also to statutory claims.[14] The *Mitsubishi* opinion, however, made an exception when it was found that arbitration would not enable a litigant to "vindicate its statutory cause of action in the arbitral forum."[15]

Despite these precedents, the *Gilmer* decision was highly controversial when it was issued because Section 1 of the FAA contains an explicit

---

4. *Id.* at 23–24, 35.
5. *Id.* at 23.
6. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2022).
7. *Gilmer*, 500 U.S. at 24 (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2022) (as enacted at the time *Gilmer* was decided)).
8. *See* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 935 (1999).
9. 465 U.S. 1 (1984).
10. *Id.* at 14–15.
11. *Id.* at 18.
12. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 269–70 (1995) (discussing numerous instances where courts have found state law requiring consent to arbitration preempted); Dr.'s Assocs. v. Casarotto, 517 U.S. 681, 688 (1996) (finding a state law requiring consent and prohibiting unfair arbitration procedures preempted).
13. 473 U.S. 614 (1985).
14. *Id.* at 624–25.
15. *Id.* at 637.

exclusion for arbitration clauses that are contained in "contracts of employment."[16] In the *Gilmer* decision, the Court declined to address that issue because it had not been raised below.[17] Moreover, the *Gilmer* majority added that the arbitration agreement the plaintiff signed was in a contract between himself and the securities exchanges and thus it was not technically a "contract of employment" with his immediate employer.[18]

Subsequent to the *Gilmer* decision, employers began inserting arbitration clauses into their employee handbooks and hiring materials with great frequency.[19] The lower courts split as to whether the "contracts of employment" exclusion in the FAA applied to ordinary, bilateral contracts between an employer and an employee.[20] But in my *Yellow Dog Contract* article, I noted that the majority of lower courts were adopting a narrow interpretation of the exclusion, limiting it to contracts of employees whose work involved transportation across state lines.[21] Such a development, I claimed, threatened to deprive most employees of an effective mechanism to enforce their employment rights.[22]

I specifically warned that if *Gilmer* was applied to typical contracts of employment, workers would suffer on several fronts. First, arbitration lacks the due process guarantees of a court.[23] Arbitration is a privately created tribunal, the rules and procedures of which can vary in every case.[24] The drafter of the arbitration clause, typically the employer, specifies the rules and procedures to be followed by the arbitrator, and those rules rarely provide rights to discovery, compulsory process, or other due process protections common to civil trials.[25] They also can, and sometimes do, limit the number of witnesses a party can call and the types of evidence that a party can submit.[26]

Second, although arbitration is assumed to be consensual, in the employment context workers are usually presented with a nonnegotiable, take-it-or-leave-it arbitration clause that they must accept if they want to have a job.[27] Often the arbitration clause is hidden in an employment handbook or buried in other documents so that a worker is unaware of its existence when they take a job.[28]

---

16. Federal Arbitration Act, 9 U.S.C. § 1 (2022).
17. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991).
18. *Id.*
19. *See* Katherine V. W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE, 27, 28, 32–34 (Adrienne E. Eaton & Jeffrey H. Keefe, eds., 1999).
20. *Id.* at 33–34.
21. *See Yellow Dog Contract*, *supra* note 1, at 1033.
22. *Id.* at 1046.
23. *Id.* at 1036–37, 1044–46.
24. *Id.* at 1046. *See also* Republic Steel Corp. v. Maddox, 379 U.S. 650, 659 (1965) (Black, J., dissenting).
25. *See Yellow Dog Contract*, *supra* note 1, at 1046.
26. *See Maddox*, 379 U.S. at 664.
27. *See Yellow Dog Contract*, *supra* note 1, at 1037.
28. *Id.*

Third, many arbitration clauses are crafted by employers and contain provisions that make it difficult for workers to prevail, such as by including terms that shorten the statute of limitations or raise the employees' burden of proof.[29]

Fourth, in addition to its due process deficits, arbitration does not provide remedies "as effective or as generous as" those in a judicial forum.[30] "For example, most arbitrators believe that they do not have the power to award damages for intangible harms."[31] Some clauses explicitly prevent an award of punitive or consequential damages.[32]

> In addition, arbitrators almost never grant interest on back pay awards, even when they are issued months or years after an unjust dismissal. It is common practice for an arbitrator to award reinstatement but no back pay at all to a worker fired without just cause. In contrast, prevailing parties in unjust dismissal litigation receive jury awards in the mid to high six figures. Furthermore, most arbitrators believe that they do not have the power to order provisional relief.[33]

Thus, many contract violations, such as improper job assignments or safety matters, can neither be prevented nor remedied after the fact.

Fifth, once an arbitration decision has been rendered, it is practically impossible to set it aside.[34] There is no right of appeal, and the grounds for judicial review are exceedingly narrow.[35] Courts will not set aside an arbitration award even if it can be shown to be factually or legally incorrect.[36]

And finally, I warned that compelled arbitration of statutory claims threatens to nullify the gains that workers achieved in employment protective statutes in the late twentieth century.[37] The trend toward compulsory arbitration gives employers an effective weapon to escape burdensome employment regulations.[38] Hence, this trend threatens to deprive workers of their hard-won statutory rights altogether. Indeed, given the lack of meaningful consent to arbitration clauses in the employment context and the fact that they operate to prevent workers from enforcing their rights, I

29. *Id.* at 1040–41.
30. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 629 (1992) [hereinafter *Industrial Pluralism*].
31. *Id.*
32. *Id.* at 629–30.
33. *Id.*
34. *See Yellow Dog Contract*, *supra* note 1, at 1018.
35. *See Industrial Pluralism*, *supra* note 30, at 595.
36. *See Yellow Dog Contract*, *supra* note 1, at 1018.
37. *Id.* at 1020.
38. *Id.* at 1018.

contended, mandatory arbitration agreements were the new "yellow dog contracts" of the 1990s.[39]

In addition, I pointed out that the trend toward private arbitration takes most labor disputes out of the public eye.[40] By removing labor cases to private arbitral tribunals, courts are taking employment concerns out of the public arena, beyond public scrutiny and political accountability.[41] Congress cannot enact effective legislation for worker protection when what is provided by statute can be diluted or compromised away by employer-designated arbitrators.

I concluded the article with a plea that courts honor the contracts of employment exclusion and not apply the FAA to contracts of employment at all.[42] I argued that the courts should not require parties to arbitrate disputes over statutory rights, or if they did, they should provide judicial review for arbitrators' rulings on statutory issues.[43] I also contended that courts should interpret worker protection statutes to be non-waivable, set aside arbitration procedures that were unfair, and police arbitration consent in the employment setting to ensure that arbitration agreements are not made a condition of employment.[44] Without these protections, I averred, the courts' interpretation of the FAA risked "subjecting employment rights to a regime of private justice and cowboy arbitrations" that were eliminating "employment rights for most American workers."[45]

In the twenty-five years since my article was published, there have been major changes in the law of arbitration, but none in the direction that I had proposed. The Supreme Court has decided over two dozen cases involving the FAA, and they have all expanded the scope of the statute and limited access to the courts for workers, consumers, debtors, small businesses, or other weaker parties.[46] Almost all these cases go far beyond the

---

39. *Id.* at 1020. A "yellow dog contract" is a worker's promise not to join a union or engage in collective activities (such as participating in a strike) during the period of employment as a condition of their employment. Joel I. Seidman, *The Yellow Dog Contract*, 46 Q. J. ECON. 348, 348 (1932). The Norris LaGuardia Act made all yellow dog contracts unenforceable. *See* 29 U.S.C. § 104(b) (2022).

40. *Yellow Dog Contract*, *supra* note 1, at 1019.

41. *Id.* at 1020.

42. *Id.* at 1050.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See, e.g.*, Cir. City Stores v. Adams, 532 U.S. 105, 109 (2001) (limiting exemption to transportation workers); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (affirming the legality of arbitration provisions to decide validity of employment contracts); Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 403–04 (1967) (requiring arbitration to determine a fraud in the inducement claim); Rent-A-Ctr. v. Jackson, 561 U.S. 63, 73 (2010) (holding a finding of unconscionability reserved for the arbitrator); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011) (striking down a state law requiring availability of class-wide arbitration); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019) (finding a state contract principle for ambiguity insufficient to compel class-wide arbitration); Kindred Nursing Ctrs. v. Clark, 581 U.S. 246, 255–56 (2017) (holding that the FAA preempts a state law that disfavors arbitration agreements); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 104–05 (2012) (holding that the FAA takes precedence over conflicting federal laws); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (reiterating that Congress intends arbitration

original intent and meaning of the statute in 1925 and have hollowed out the civil justice system as a mechanism for protecting worker rights. Indeed, since my *Yellow Dog Contract* article, I have seen the courts interpret the FAA in ways that restricted employee rights, as well as the rights of consumers, borrowers, franchisees, and other weaker parties, in ways that go beyond those that I predicted or imagined.

The most important doctrinal developments in the past twenty-five years that diminish the ability of workers to enforce their rights are as follows:

1. In 2001, the Supreme Court made it clear that, despite the explicit language of the statute excluding contracts of employment, most employment contracts, except a small subset of transportation workers, are covered by FAA.[47]

2. The Court has required employees to present any contract defenses they might raise, such as lack of consent, fraud, or illegality, to an arbitrator rather than to a court.[48] It has even ruled that a court must compel arbitration even when the underlying contract is void.[49]

3. The Court has made it effectively impossible to challenge an arbitration agreement for unconscionability.[50]

4. The Court has expanded the scope of FAA preemption by holding that not only state laws but also state common law doctrines, state courts' interpretations of their own states' laws, and state constitutional provisions are preempted and thus overridden by FAA.[51]

5. The Court has held that the FAA takes precedence over and supplants other federal laws with which it arguably conflicts.[52]

6. The Court has narrowed and possibly eliminated the "Effective Vindication" doctrine of *Mitsubishi*, which provided that arbitration of a statutory right would not be required when doing so would prevent a party from vindicating its substantive statutory rights.[53]

7. Finally, and most dramatically, the Court has interpreted the FAA to sharply curtail the ability of employees to vindicate their rights by

---

agreements to be enforced as written without clear expression to the contrary); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013) (reiterating that class-wide arbitration runs afoul to the FAA).

47. *Cir. City Stores*, 532 U.S. at 109.

48. *Buckeye*, 546 U.S. at 444–45.

49. *Id.* at 445–46 (citing *Prima Paint*, 388 U.S. at 403–04).

50. *See, e.g.*, *Rent-A-Ctr.*, 561 U.S. at 73.

51. *See Concepcion*, 563 U.S. at 343; *Varela*, 139 S. Ct. at 1415–16; *Clark*, 581 U.S. at 255–56.

52. *See, e.g.*, CompuCredit Corp. v. Greenwood, 565 U.S. 95, 104–05; Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

53. *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 93–94 (2000) (Ginsburg, J., dissenting); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013).

means of collective legal actions either in a class action or class arbitration.[54]

Each of these developments will be discussed in more detail below.

## I. APPLYING THE FAA TO CONTRACTS OF EMPLOYMENT

Section 1 of the FAA states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[55] As discussed, the *Gilmer* majority refused to consider the argument that, pursuant to the exclusion, the plaintiff in that case was not required to arbitrate his ADEA claim.[56] It refused because, the Court stated, the argument had not been raised at the trial court.[57] Furthermore, the Court said that the arbitration agreement at issue was not between the plaintiff and his employer but rather was with a third party, the securities exchanges so the exclusion did not apply.[58]

In the ten years after *Gilmer* was decided, the lower federal courts grappled with the question of how to interpret the contracts of employment exclusion contained in the FAA in cases where the issue was directly raised and the arbitration clause was in a direct bilateral employer–employee contract. Despite considerable disagreement amongst the lower courts, by 2001, every court of appeals except the Ninth Circuit had concluded that the Section 1 exclusion applied only to workers who were directly involved in transporting goods across state lines.[59] Those courts took the position that under the principle of construction known as *ejusdem generis*,[60] the exclusion in Section 1 applied only to employees who were similar to the expressly mentioned seamen and railroad employees—i.e., only those employees who moved goods across state lines.[61]

The Ninth Circuit disagreed. In 1998, in *Craft v. Campbell Soup*,[62] the Ninth Circuit held that the FAA does not apply to any employment contracts.[63] It reasoned that when the FAA was enacted, Congress's Com-

54. *Am. Express*, 570 U.S. at 235–36; *Concepcion*, 563 U.S. at 343.
55. Federal Arbitration Act, 9 U.S.C. § 1 (2022).
56. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30–35 (1991).
57. *Id.* at 25 n.2.
58. *Id.*
59. *See, e.g.*, McWilliams v. Logicon, Inc., 143 F.3d 573, 575–76 (10th Cir. 1998); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 598–602 (6th Cir. 1995); Tenney Eng'g v. United Elec. Radio & Mach. Workers, 207 F.2d 450, 453 (3d Cir. 1953).
60. *Ejusdem Generis*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/ejusdem_generis (last visited Mar. 18, 2023) ("The statutory and constitutional construction principle of 'ejusdem generis' states that where general words or phrases follow a number of specific words or phrases, the general words are specifically construed as limited and apply only to persons or things of the same kind or class as those expressly mentioned. . . . [However,] [t]he rule is used only to help determine whether there is intent; if intent is found, ejusdem generis does not subvert intent.").
61. *See, e.g.*, *McWilliams*, 143 F.3d; *Asplundh*, 71 F.3d; *Tenney*, 207 F.2d.
62. 177 F.3d 1083 (9th Cir. 1998).
63. *Id.* at 1094.

merce Clause power to legislate about employment was limited to employees who actually transported goods in interstate commerce.[64] Under these circumstances, when Congress drafted the statute, it knew the statute could only apply to those employees over which it had power to legislate. Thus, Congress deliberately chose to exempt transportation workers directly engaged in interstate commerce—the very same employees it exempted from the scope of the FAA.[65] In this way, when Congress drafted the FAA in 1925, it displayed an intent to ensure that the statute would not apply to any labor or employment contracts.[66] The Ninth Circuit concluded that the language of the exclusion, the existing scope of Congressional power, and explicit statements during the floor debates on the bill all established that Congress meant to exempt all contracts of employment from the scope of the statute.[67]

In 2001, the Supreme Court resolved the split between the circuits in *Circuit City Stores v. Adams*[68] by reading the exemption practically out of existence and contending that legislative history was irrelevant to the interpretation of the statute.[69] In that case, an employee who sued his employer for sexual harassment, constructive discharge, and discrimination argued that he should not have to arbitrate his claims because the FAA did not apply to employment contracts.[70] The Supreme Court disagreed. Justice Kennedy, writing for the majority, noted that the statute exempts "contracts of employment of seamen, railway employees, or any other class of workers engaged in foreign or interstate commerce."[71] He read the exemption narrowly to only exclude workers who were like seamen and railroad employees—i.e., transportation workers whose work literally took them across state lines.[72]

The Court's four liberal Justices—Stevens, Ginsburg, Breyer, and Souter—dissented.[73] They argued, as had the Ninth Circuit, that the legislative history of the FAA demonstrates that Congress intended to exclude all employees over whom it had power to legislate.[74] The *Circuit City* dissenters maintained that because Congress's commerce power was broadly expanded during the New Deal period, so too should the meaning of the FAA exclusion.[75] Under their view, the statute, by its explicit terms, excludes from its scope all workers engaged in interstate commerce.[76] But

64. *Id.* at 1085.
65. *Id.*
66. *Id.* at 1090.
67. *Id.* at 1093–94. *See also* Arce v. Cotton Club, 883 F. Supp. 117, 123 (N.D. Miss. 1995) (analyzing congressional intent of the FAA's phrase "involving commerce").
68. 532 U.S. 105 (2001).
69. *Id*. at 119.
70. *Id.* at 110–11.
71. *Id.* at 109.
72. *Id.* at 114–15.
73. *Id.* at 124 (Souter, J., dissenting).
74. *Id.* at 125–26.
75. *Id.* at 125–27.
76. *Id.* at 128.

they were in the minority.[77] Thus, after 2001, it was clear that the FAA applied to contracts of employment of most workers, and the exclusion only applied to transportation workers who themselves cross state lines as part of their regular work.[78]

### *A. Eliminating State Law Defenses by Means of the Separability Doctrine*

Arbitration clauses are found in contracts, and as is well known, contracts are governed by state law.[79] If a contract is found to be unconscionable or to have been procured by fraud or duress under the applicable state law, a state court will deny enforcement.[80] The FAA recognizes and affirms the role of state law in contract enforcement, and provides, in Section 2, that a written agreement to arbitrate in a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[81] This provision is known as the "Savings Clause," and it is designed to retain the role of state contract law in determining which arbitration clauses should be enforced.[82]

Despite the FAA's Savings Clause, courts have interpreted the FAA to restrict the ability of parties to challenge an arbitration clause on the grounds that the contract itself is invalid under state law, say for unconscionability, fraud, or lack of consent.[83] Courts do this pursuant to the doctrine of "separability,"[84] a principle in arbitration law that has been particularly restrictive of consumer and workers' rights. The separability doctrine operates to prevent challenges to arbitration decisions based on the claim that a contract containing an arbitration clause is invalid.[85]

The separability doctrine predates *Gilmer*, but it has become more restrictive in the past twenty-five years. It originated in 1959, in the Second Circuit case *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*,[86] where the court ruled that when there is an arbitration clause, the arbitrator

---

77. *Id.* at 128.

78. *Cf.* New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 536, 543–44 (2019) (holding that a driver for an interstate trucking company was excluded from the coverage of the FAA pursuant to the Section 1 exclusion, even though he was designated an "independent contractor" rather than an employee).

79. *See, e.g.*, First Options of Chi. v. Kaplan, 514 U.S. 938, 944 (1995).

80. *See, e.g.*, Garner v. State Farm Mut. Auto. Ins., No. 08-1365, 2009 U.S. Dist. LEXIS 116882, at *24 (N.D. Cal. 2009).

81. Federal Arbitration Act, 9 U.S.C. § 2 (2022).

82. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

83. *Id.* at 343–45.

84. Some courts and commentators refer to the separability doctrine as the severability doctrine. However, the term "severability" also refers to situation in which a court will sever a clause of a contract or a provision of a statute on a variety of grounds that have nothing to do with the FAA. In order to avoid ambiguity and confusion, I refer to the specific FAA doctrine discussed herein as the separability doctrine.

85. Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statue Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 3–4 (2011) (discussing the function of the separability doctrine).

86. 271 F.2d 402 (2d Cir. 1959).

rather than a court should decide all questions of the contract's validity.[87] In that case, one party challenged a contract, claiming that there had been fraud in the inducement.[88] The court ruled that the question should be decided by an arbitrator.[89] It reasoned that an arbitration clause is at least partially separable from the contract in which it is contained, and hence an arbitrator can decide on the validity of an arbitration clause even if the contract containing the arbitration clause is unenforceable.[90] Thus, it held that an arbitration clause is valid and enforceable for the purpose of enabling an arbitrator to decide whether the overall contract, in which the clause is embedded, is valid.[91] That is, even if an entire contract is invalid, the promise to arbitrate is enforceable because it is separable from the rest of the contract.

In 1967, the Supreme Court adopted the Second Circuit's approach in *Prima Paint v. Flood & Conklin*,[92] where it held that a party, who alleged that a contract he had signed was unenforceable because it had been induced by fraud, nonetheless had to submit his claim to arbitration under the arbitration clause in the allegedly unenforceable contract.[93] Justice Fortas, writing for the majority, stated that except where parties otherwise intend, "arbitration clauses as a matter of federal law are 'separable' from the contacts in which they are embedded" unless the claim of "fraud was 'directed to the arbitration clause itself.'"[94]

*Prima Paint* did, however, contain an exception. The Court said that when a party challenged not a contract as a whole but only the arbitration clause, then that issue would be decided by a court and the separability doctrine would not apply.[95]

The separability doctrine was widely criticized by legal scholars and some courts. Some judges took the position that a case should be sent to an arbitrator when the challenge to an arbitration clause was based on allegations that a contract was voidable but not when the challenged contract was alleged to be void.[96] For example, Judge Easterbrook explained, in *Sphere Drake Insurance v. All American Insurance*,[97] that if a contract is

87. *Id.* at 409–10.
88. *Id.* at 404.
89. *Id.* at 410 (relying on the principle that the parties freely contracted into arbitration as a dispute forum).
90. *Id.* at 409–10.
91. *Id.*
92. 388 U.S. 395 (1967).
93. *Id.* at 398, 403–04.
94. *Id.* at 402.
95. *Id.* at 402–03.
96. *See, e.g.*, Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 863 (Fla. 2005) (distinguishing the case at hand from *Prima Paint* because "if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well"), *rev'd*, 546 U.S. 440 (2006); Sphere Drake Ins. v. All Am. Ins., 256 F.3d 587, 591–92 (7th Cir. 2001) (holding that a claim that a signature on a contract was forged must be resolved by a court because if true, no contract ever came into being, and hence there was never consent to the contract, or the arbitration clause contained therein).
97. 256 F.3d 587 (7th Cir. 2001).

entirely void such that no contract ever came into being, forcing a party to arbitrate under its terms "would disregard the principle that arbitration is contractual."[98] He distinguished *Prima Paint* from cases in which it was alleged there was no agreement in the first place. As Judge Easterbrook described:

> Fraud in the inducement [i.e., the allegation in *Prima Paint*] does not negate the fact that the parties actually reached an agreement. . . . But whether there was any agreement is a distinct question. . . . A person whose signature was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked authority to make that commitment. . . . [A]s arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrator.[99]

In 2006, Justice Scalia weighed in on the issue of separability in his first authored Supreme Court majority decision interpreting the FAA. In *Buckeye Check Cashing, Inc. v. Cardegna*,[100] he ruled that the separability doctrine applied to a contract that was altogether void under state law.[101] In *Buckeye*, the plaintiffs had obtained a payday loan from the defendant, and later challenged the loan on the grounds that the terms violated Florida's usury and consumer protection laws.[102] The Florida Supreme Court agreed, ruling that the contract was totally void because it violated a state usury law that was criminal in nature.[103] Accordingly, the state high court refused to enforce the arbitration clause, holding that severability did not apply to contracts that were "illegal and void under Florida law."[104]

On the defendant's appeal to the U.S. Supreme Court, Justice Scalia reversed.[105] Justice Scalia ruled that the separability doctrine of *Prima Paint* applied to all challenges to a contract's validity, even those that allege a contract is illegal or otherwise void.[106] He said, "[W]e cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law.'"[107]

Since *Buckeye*, the Supreme Court has applied its reasoning to require arbitration in disputes involving other contracts that are void or otherwise unenforceable. For example, in 2012 it held that an arbitrator must decide a former employee's challenge to a covenant not to compete, even though such covenants are void under Oklahoma law.[108] In another case

---

98. *Id.* at 590.
99. *Id.* at 590–91.
100. 546 U.S. 440 (2006).
101. *Id.* at 448–49.
102. *Id.* at 442–43.
103. *Id.* at 443.
104. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 864 (Fla. 2005), *rev'd*, 546 U.S. 440 (2006).
105. *Buckeye*, 546 U.S. at 449.
106. *Id.*
107. *Id.* at 446.
108. Nitro-Lift Techs v. Howard, 568 U.S. 17, 21 (2012).

that same year, the Court held that a dispute over alleged negligence by a nursing home that caused the death of a patient must go to arbitration despite a West Virginia law providing that wrongful death actions against nursing homes shall not be decided in arbitration.[109] These rulings expanding the separability doctrine have greatly narrowed the ability of workers to challenge arbitration clauses.

*B. Eliminating Unconscionability Challenges to Arbitration*

One of the most frequent challenges workers raise to an arbitration clause is that it is unconscionable because it contains unfairly onerous terms and was contained in a contract of adhesion. Even after *Buckeye*, it was generally understood that a worker could escape separability, and hence bring a claim to court, if they brought a challenge not to a contract as a whole but instead to the arbitration clause itself.[110] This exception was based on dicta in *Prima Paint* mentioned above.[111] Indeed, in the *Buckeye* opinion, Justice Scalia reiterated that exception, stating that when a party claimed that there was illegality, fraud, or some other recognized contractual defect *in the arbitration clause itself*, the defense would be heard by a court.[112] That is, a party could get a judicial hearing when they alleged that an arbitration clause itself, as distinct from the contract as a whole, was invalid.[113]

After *Buckeye*, this exception enabled consumers and workers to challenge unfair and one-sided arbitration agreements when a particular arbitration clause was alleged to be unconscionable or lacking the necessary consent under the applicable state law. However, in 2010, in *Rent-A-Center, West, Inc. v. Jackson*,[114] Justice Scalia again wrote for the majority on the issue of separability, and there he drastically narrowed the exception.[115] By so doing, he practically eliminated the ability of consumers and workers to challenge unconscionable arbitration procedures.[116]

The facts of *Rent-A-Center* are straightforward. Antonio Jackson worked at Rent-A-Center in Nevada, where he repeatedly sought a promotion and was repeatedly turned down.[117] After one rebuff, he complained to his store manager.[118] He was subsequently promoted but then fired two

109. Marmet Health Care Ctr. v. Brown, 565 U.S. 530, 532–33 (2012).
110. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 403–04.
111. *See supra* text accompanying note 99; *see also Prima Paint*, 388 U.S. 403–04.
112. *Buckeye*, 546 U.S. at 445.
113. *Id.*
114. 561 U.S. 63 (2010).
115. *See id.* at 68.
116. *Id.*
117. Jackson v. Rent-A-Center, Inc., No. 03:07-CV-0050-LRH (RAM), 2007 U.S. Dist. LEXIS 99067, at *2 (D. Nev. June 6, 2007).
118. *Id.*

months later.[119] He sued, alleging he had been denied a promotion because of his race and had been fired in retaliation for complaining about it.[120]

Jackson had signed an arbitration agreement as a condition of obtaining employment, so Rent-A-Center sought to dismiss the lawsuit and compel arbitration of Jackson's discrimination claim.[121] Jackson opposed arbitration on the ground that the arbitration clause was unconscionable under existing state law because it would impose excessive costs on him to have his case heard and it would prevent him from conducting the discovery he would need to prevail on his discrimination claim.[122] The Nevada Supreme Court had previously ruled that these defects would render an arbitration clause unconscionable and unenforceable.[123] Thus, by claiming that the arbitration clause itself was unconscionable, Jackson seemingly came within the exception to the separability doctrine that Justice Scalia had reiterated in *Buckeye*.

The Ninth Circuit agreed with the plaintiff that the issue of the contract's validity should be decided by a court rather than by an arbitrator.[124] The Supreme Court reversed.[125] Writing for the majority, Justice Scalia ruled that under the separability doctrine, Jackson's claim must go to an arbitration.[126] He explained that the arbitration clause had delegated authority to the arbitrator to decide issues of arbitrability.[127] Because Jackson's objection was to the entire arbitration clause and not the specific aspect of the arbitration clause that delegated authority to resolve disputes to the arbitrator, Justice Scalia ruled that his claim of unconscionability did not come under the *Prima Paint* exception and therefore must be decided by an arbitrator.[128] That is, Justice Scalia ruled that the delegation clause of the arbitration agreement was separable from the rest of the contract, including the arbitration clause itself.

The decision drew a strong dissent from Justice Stevens, who claimed that:

> [The separability doctrine] allow[s] a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement.* Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator.[129]

---

119. *Id.*
120. *Id.*
121. *Id.* at *2–4.
122. *Id.* at *7.
123. *Id.*
124. *Rent-A-Ctr.*, 561 U.S. at 66–67.
125. *Id.* at 76.
126. *Id.* at 72.
127. *Id.* at 71.
128. *Id.* at 71–72.
129. *Id.* at 85 (Stevens, J., dissenting).

As a result of *Rent-A-Center*, it has become easy for employers or corporations to avoid unconscionability challenges to arbitration. To make arbitration clauses bulletproof, all employers need to do is include a provision in their arbitration clauses that delegate to the arbitrator the authority to decide all disputes, including disputes over arbitrability. Because employers are the ones who draft the arbitration clause and insert them into contracts of adhesion with their workers and consumers, *Rent-A-Center* means that it is now nearly impossible for a party to challenge a one-sided arbitration clause on unconscionability grounds, no matter how unfair it is. Rather, a party who claims that the arbitration clause in their employment contract is unconscionable under state law must bring *that* claim to arbitration.

*C. Expanding the Preemptive Scope of the FAA*

In 1984, in *Southland*, the Supreme Court held that the FAA preempts any state law with which it conflicts.[130] The following year in *Perry v. Thomas*,[131] the Court further held that any state law that was specific to arbitration or served as an impediment to arbitration was preempted.[132] That principle has been expanded immensely in the ensuing years.

For example, in 2011, in *AT&T Mobility LLC v. Concepcion*,[133] the Supreme Court held that the FAA overrides and therefore nullifies a general principle of state common law.[134] In that case, an AT&T customer brought a class action lawsuit alleging that the company had engaged in fraudulent practices by charging sales taxes to customers—approximately $15 per phone—to whom AT&T promised free cell phones in exchange for a two-year service contract.[135] AT&T's customer agreement included an arbitration clause that also banned class actions and class-wide arbitration.[136] The plaintiffs brought a class action, and AT&T moved to compel arbitration on an individual basis.[137]

The district court and the Ninth Circuit applied a three-pronged test, derived from the 2005 California Supreme Court decision *Discover Bank v. Superior Court*,[138] to determine whether the class action waiver was unconscionable.[139] Pursuant to the *Discover Bank* rule, a court considers three factors to determine whether a class action waiver in a consumer contract is unconscionable: (1) whether the agreement was a contract of adhesion; (2) whether the dispute was likely to involve "small amounts of

130. Southland Corp. v. Keating, 465 U.S. 1, at 10–11 (1984).
131. 482 U.S. 483 (1987).
132. *Id.* at 490–91.
133. 563 U.S. 333 (2011).
134. *Id.* at 352.
135. *Id.* at 337.
136. *Id.* at 336.
137. *Id.* at 337.
138. 113 P.3d 1100 (Cal. 2005).
139. *Id.* at 1110.

damages"; and (3) whether the party with superior bargaining power "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[140] The Ninth Circuit found all three prongs of the test satisfied and thereby denied AT&T's motion to compel arbitration.[141]

Furthermore, the Ninth Circuit found that *Discover Bank* rule is a general rule of California law—one that applies to all waivers of class actions in consumer contracts—and hence should not be preempted by the FAA. As the Ninth Circuit said, "'*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.'"[142] Justice Scalia disagreed, ruling that the *Discover Bank* rule, although couched in general terms, was actually an impediment to arbitration and therefore was preempted by the FAA.[143]

More recently, in *Lamps Plus, Inc. v. Varela*,[144] the Supreme Court found a state court's application of its own general canons of construction was preempted by the FAA.[145] In that case, the plaintiff, Frank Varela, had signed an arbitration agreement when he started work at the company.[146] In 2016, a hacker impersonating a company official tricked a Lamps Plus employee into disclosing the tax information of approximately 1,300 other employees, including Varela's.[147] Soon thereafter, a fraudulent federal income tax return was filed in the name of Frank Varela.[148]

Varela sued Lamps Plus in federal district court in California, "bringing state and federal claims on behalf of [himself and] a putative class of employees whose tax information had been compromised."[149] Lamps Plus moved to dismiss the lawsuit and compel arbitration on an individual rather than on a class-wide basis.[150] The district court granted the motion to compel arbitration but rejected Lamps Plus's request for individual arbitration, instead authorizing arbitration on a class-wide basis.[151] Lamps Plus appealed the order, arguing that the court erred by compelling class arbitration.[152]

A dispositive issue in the case was whether the arbitration clause was ambiguous as to the availability of class-wide arbitration.[153] The Ninth

---

140. *Id.*
141. Laster v. AT&T Mobility LLC, 584 F.3d 849, 855 (9th Cir. 2009).
142. *Concepcion*, 563 U.S. at 338, (quoting *Laster*, 584 F.3d at 858).
143. *Id.* at 352.
144. 139 S. Ct. 1407 (2019).
145. *Id.* at 1417–18.
146. *Id.* at 1413.
147. *Id.* at 1412.
148. *Id.*
149. *Id.* at 1413.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

Circuit found that the arbitration clause was ambiguous on that point, so it applied a California rule of statutory construction that holds that ambiguity in a contract should be construed against the drafter, a doctrine known as *contra proferentem.*[154] As a result of that rule, the court found that the contract permitted class-wide arbitration.[155]

The Supreme Court disagreed. Chief Justice Roberts, writing for the majority, maintained that:

> Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties.
>
> . . . .
>
> . . . The doctrine of *contra proferentem* cannot substitute for the requisite affirmative "contractual basis for concluding that the part[ies] *agreed* to [class arbitration]."[156]

As a result of the *Lamps Plus* decision, the powerful preemptive force of the FAA trumps not only state laws and state common law doctrines but also state canons of construction.

Even more startling, in a nearly unanimous opinion in 2017, the Supreme Court held that the FAA preempted a state supreme court's interpretation of its own constitution.[157] The case, *Kindred Nursing Centers v. Clark*,[158] involved two patients in a nursing home who died under conditions that, their survivors alleged, were the result of substandard care.[159] The surviving kin had, in each case, signed an agreement with the nursing home under a power of attorney given to them by their infirm relative.[160] Both nursing home agreements had a clause that provided that all claims regarding the residents' stay at the facility would be resolved through arbitration.[161] The Kentucky Supreme Court found both powers of attorney to be invalid because, under the Kentucky Constitution, the right to a jury trial is a fundamental right.[162] Accordingly, the state high court held that any power of attorney that would deprive a person of that fundamental right needed to state that deprivation expressly.[163] Because there was no such clear waiver of the fundamental constitutional right to a jury trial in this case, the state high court held that the powers of attorney containing

---

154. *Id.* at 1413, 1417.
155. *Id.* at 1413.
156. *Id.* at 1417, 1419 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l, 559 U.S. 662, 684 (2010) (alteration in original).
157. Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1429 (2017).
158. 137 S. Ct. 1421 (2017).
159. *Id.* at 1425.
160. *Id.*
161. *Id.*
162. *Id.* at 1426.
163. *Id.*

the arbitration clauses were invalid; hence, it refused to order arbitration.[164] The Kentucky Supreme Court further explained that its clear statement rule applies to all waivers of state constitutional rights, so it is not arbitration-specific and thus is not preempted by the FAA.[165]

The Supreme Court, in a seven–one decision, reversed.[166] Justice Kagan, writing for the majority, found that the Kentucky clear statement rule for fundamental constitutional rights was a "covert measure" to disfavor arbitration and hence was preempted.[167] Even though the state supreme court had clearly explained why the rule was not arbitration-specific, Kagan held that the state rule "is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out these contracts for disfavored treatment."[168] Thus, she claimed, it evidenced "the kind of 'hostility to arbitration' that led Congress to enact the FAA" in the first place.[169] Offering no other rationale for her decision, she simply proclaimed that "we once again 'reach a conclusion that . . . falls well within the confines of (and goes no further than) present well-established law.'"[170] However, the decision was far from within the existing law regarding the scope of FAA preemption. Rather, the *Kindred Nursing Centers* decision took FAA preemption to a new level: the FAA preempts not merely a state law or a state common law principle but also a neutral principle embodied in a state's constitution—as interpreted by the state's highest court.

### *D. Displacing Other Federal Statutes Through the FAA*

Preemption pertains to conflicts between federal law and state law.[171] When two federal laws conflict, the courts generally try to adopt an interpretation that will harmonize the two laws, giving each one a fair reading in order to preserve congressional intent.[172] However, this has not been the case with the FAA. Rather, the Court now treats the FAA as a de facto super-statute that supplants other federal laws with which it even potentially conflicts.

The question of what happens when the FAA conflicts with another federal law was squarely presented in 2012 in *CompuCredit Corp. v. Greenwood.*[173] CompuCredit Corporation is a financial service company that, *inter alia*, issues subprime credit cards to individuals who cannot

164. *Id.* at 1425–26.
165. *Id.* at 1426.
166. *Id.* at 1429.
167. *Id.* at 1426, 1428.
168. *Id.* at 1427.
169. *Id.* at 1427–28.
170. *Id.* at 1429 (quoting DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015)).
171. CONG. RSCH. SERV., FEDERAL PREEMPTION: A LEGAL PRIMER 2 (July 23, 2019), https://sgp.fas.org/crs/misc/R45825.pdf.
172. *Id.*
173. 565 U.S. 95 (2012).

qualify for other credit cards.[174] In 2008, the Federal Trade Commission found that CompuCredit had mislead customers by failing to disclose up-front fees, adding on additional fees once customers agreed to purchase its services, and falsely stating that the credit card could be used to rebuild the holder's credit.[175] For the same reasons, some customers brought a class action against CompuCredit, alleging that the company had sold them cards in violation of the federal Credit Repair Organizations Act (CROA).[176] When the customers initially applied for cards, each had been required to fill out a credit card application that included a clause obligating them to submit all account disputes to binding arbitration.[177]

CompuCredit moved to dismiss the class action and compel arbitration of the customers' claims.[178] Both the federal district court and the Ninth Circuit denied the motion because it found that "Congress intended claims under the CROA to be non-arbitrable."[179] It based its conclusion on two provisions in the CROA statute: one that gives consumers a private cause of action for violations thereof, and another that states that any waiver of the rights in the statute are unenforceable and void.[180]

CompuCredit appealed to the Supreme Court, and Justice Scalia reversed.[181] Despite the CROA's explicit statutory language preserving consumers' right to sue, the Supreme Court ordered the case to arbitration.[182] Justice Scalia, writing for the majority, bent the statutory language into a pretzel. He announced that the CROA's language giving consumers a "right to sue a credit repair organization" and its explicit non-waiver clause did not ensure a right to bring an action in court.[183] Rather, he pronounced, the statute could be satisfied by a right to an arbitration. In his reasoning, Justice Scalia departed from his usual literal method of reading statute, instead explaining that:

> The disclosure provision is meant to describe the law to consumers in a manner that is concise and comprehensible to the lay-man—which necessarily means it will be imprecise. . . . [Including] with respect to the statement's description of a "right to sue." This is a colloquial method of communicating to consumers that they have the legal right, enforceable in court, to recover damages from credit repair organiza-

174. *See* Patrick Lunsford, *CompuCredit and its Collection Agency Settle FTC-FDIC Case for $114 million*, INSIDEARM (Dec. 22, 2008), https://www.insidearm.com/news/00016836-compu-credit-and-its-collection-agency-set.

175. Press Release, Fed. Trade Comm'n, FTC Sues Subprime Credit Card Marketing Company and Debt Collector for Deceptive Credit Card Marketing (June 10, 2008), https://www.ftc.gov/news-events/press-releases/2008/06/ftc-sues-subprime-credit-card-marketing-company-debt-collector.

176. *CompuCredit*, 565 U.S. at 97.

177. *Id.* at 96–97.

178. *Id.* at 97.

179. Greenwood v. CompuCredit Corp., 617 F. Supp 2d 980, 988 (2009).

180. 15 U.S.C. §§ 1679(f)–(g) (2022).

181. *CompuCredit*, 565 U.S. at 104.

182. *Id.* at 99, 104.

183. *Id.* at 99.

> tions that violate the CROA. We think most consumers would understand it this way, without regard to whether the suit in court has to be preceded by an arbitration proceeding.[184]

Justice Scalia concluded by saying that "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."[185] Thus, *CompuCredit* put a heavy thumb on the scale in favor of arbitration, even when the FAA is in conflict with the explicit language of another federal statute.[186]

Justice Ginsburg dissented.[187] She began by noting that the CROA was designed to protect consumers who have had difficulty obtaining credit, particularly consumers of limited means.[188] She argued that "Congress enacted the CROA with vulnerable consumers in mind—consumers likely to read the words 'right to sue' to mean the right to litigate in court, not the obligation to submit disputes to binding arbitration."[189]

> The "right to sue" may well be "a colloquial method of communicating to consumers." But it surely is not colloquially *understood* by recipients of the required disclosures as the right, not to adjudicate in court, but only to seek, or defend against, court enforcement of an award rendered by the arbitrator chosen by the credit repair organization. Few, if any, credit repair customers would equate the "right to sue[]" . . . with the extremely limited judicial review given to an arbitrator's award.[190]

The *CompuCredit* opinion has had a wide reach. One example are the cases arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal statute that prohibits employment discrimination against those who serve in the military and then reenter civilian life and establishes reemployment rights on their behalf.[191] The statute sets out an enforcement mechanism by which an aggrieved individual can either file a complaint with the Secretary of Labor or pursue an action in a federal court.[192] USERRA explicitly states that it "supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter . . . ."[193] In the face of this explicit statutory language precluding contractual provisions or agree-

184. *Id.* at 102–03.
185. *Id.* at 104.
186. *See id.* at 98.
187. *Id.* at 110 (Ginsburg, J., dissenting).
188. *Id.*
189. *Id.*
190. *Id.* at 114 (internal citations omitted).
191. *See* 38 U.S.C. § 4301(a) (2022).
192. *Id.* at §§ 4322(a), 4323(a).
193. *Id.* at § 4302(b).

ments that waive, limit, or diminish rights granted by the statute, and despite the statute's enforcement scheme that creates a private individual right of action in a federal court, circuit courts have uniformly relied on *CompuCredit* to hold that claims arising under USERRA must be arbitrated where an employer imposed an arbitration clause on an employee.[194]

A recent Supreme Court case relied on *CompuCredit* to find that the right to engage in collective action protected by the federal labor law statute, the National Labor Relations Act (NLRA), must yield to an arbitration agreement. In *Epic Systems Corp. v. Lewis*,[195] an employee who had been given an arbitration agreement when he was hired subsequently sought to bring a class action lawsuit claiming that he, and others similarly situated, had been misclassified and thereby deprived of overtime pay to which he was entitled under the Fair Labor Standards Act.[196] The employee had been given an arbitration clause when he was hired, and that clause specified that all potential disputes would be decided in arbitration on an individual basis.[197] The employer responded with a motion to dismiss the class action suit and compel individual arbitration of the employee's claim.[198] The employee countered that to require individual arbitration would abrogate his federally protected right, enshrined in the NLRA, to take collective action with his coworkers for their "mutual aid or protection."[199]

The Ninth Circuit ruled for the employee.[200] It "concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the 'concerted activit[y]' . . . of pursuing claims as a class or collective action."[201] Despite the existence of the arbitration clause in this case, the circuit court took the position that the "saving clause" of Section 2 of the FAA removes the obligation to arbitrate when "an arbitration agreement violates some other federal law."[202] And because the protection for concerted activity lies at the heart of the NLRA, the court concluded that an agreement requiring employees to bring disputes to individualized arbitration proceedings violates the NLRA.[203]

---

194. *See, e.g.*, Ziober v. BLB Res., Inc., 839 F.3d 814, 819 (9th Cir. 2016); Landis v. Pinnacle Eye Care, 537 F.3d 559, 562 (6th Cir. 2008); Garrett v. Cir. City Stores, Inc., 449 F.3d 672, 674 (5th Cir. 2006); *see also* Bodine v. Cook's Pest Control Inc., 830 F.3d 1320, 1326–27 (11th Cir. 2016) (holding that a USERRA claim was arbitrable even where the underlying arbitration agreement contained terms that violated the statute because those terms could be severed from the remainder of the agreement).

195. 138 S. Ct. 1612 (2018).

196. *Id.* at 1619–20 (citing Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016)) (*Morris* was consolidated with *Epic* and Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015) on certiorari to the Supreme Court).

197. *Id.*

198. *Id.* at 1620.

199. *Id.* at 1624 (quoting 29 U.S.C. § 157 (2022)).

200. *Id.* at 1620.

201. *Id.* (internal citations omitted).

202. *Id.*

203. *Id.*

The case went to the Supreme Court which, by a five–four majority, reversed the Ninth Circuit.[204] There, the narrow issue was whether the FAA supersedes the rights of employees under the NLRA.[205] Justice Gorsuch, writing for the majority, stated:

> In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. . . . Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration.[206]

Thus, Justice Gorsuch concluded that the FAA overrides the protections for collective action embodied in another federal statute—the NLRA.[207]

A powerful dissent by Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, argued that unlike earlier cases, in this case the essence of the NLRA was to safeguard the right for workers to take collective action, including collective litigation.[208] Hence, to rule that the FAA overrides the NLRA and that employees can be forced to forgo class action litigation in the presence of an arbitration clause was an explicit abrogation of their statutory rights.

*Epic Systems* was a logical extension of *CompuCredit*, in which the Court gave the FAA precedence over other federal statutes. Henceforth, even rights explicitly granted in a federal statute can be relegated to the invisible, unpredictable, and unappealable domain of arbitration.

### *E. Narrowing the Effective Vindication Doctrine*

A key aspect of the Court's decision in *Mitsubishi*, which held that the FAA applies to disputes over individuals' statutory rights as well as their contractual rights, was that arbitration would not be required when doing so would prevent a party from vindicating their substantive statutory rights.[209] The *Mitsubishi* case involved an antitrust dispute in which Justice Blackmun, writing for the majority, justified sending the plaintiff's Sherman Act claim to arbitration, closing the courthouse door on the ground that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute."[210] Justice Blackmun then an-

---

204. *Id.* at 1619, 1632.
205. *Id.* at 1619.
206. *Id.* at 1627 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991)).
207. *Id.* at 1629, 1632.
208. *Id.* at 1633 (Ginsburg, J., dissenting).
209. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–27 (1985).
210. *Id.* at 628. Two years after *Mitsubishi*, the Supreme Court extended the holding in *Mitsubishi* to a dispute alleging violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act and the Securities and Exchange Act of 1934. *See* Shearson/Am. Express v. McMahon,

nounced an important principle of arbitration law: arbitration can be ordered only if the litigant "may vindicate its statutory cause of action in the arbitral forum."[211] This Effective Vindication doctrine has been a guardrail designed to respond to the danger that forcing parties to arbitrate statutory rights could thwart congressional intent and deprive parties of the substantive rights and protections that Congress had embodied in the statute.

The protection accorded to employees and consumers through the Effective Vindication doctrine has been gradually erased over the past two decades. Its unraveling began in 2000 in *Green Tree Financial Corp. v. Randolph*,[212] where the Court ordered arbitration even though the plaintiff did not have the financial means to pay the arbitration fees; hence, the plaintiff was precluded from bringing her case altogether.[213] In *Green Tree*, a mobile home purchaser alleged she had been charged excessive fees to finance her purchase in violation of the federal Truth in Lending Act.[214] The loan agreement contained an arbitration clause and gave the arbitrator discretion to allocate to either party, after the fact, the substantial costs of the arbitral proceeding.[215] The plaintiff claimed she lacked the financial resources to pay the steep fees that an arbitration would likely entail.[216] The Court's majority, in an opinion by Chief Justice Rehnquist, rejected her claim because she had failed to introduce evidence that proved that the arbitration fees would be too expensive for her.[217] Chief Justice Rehnquist proclaimed that the plaintiff bears the burden of establishing that the costs of arbitration would be prohibitive.[218] Because the arbitration clause was silent as to how costs would be allocated after the arbitration was held and the costs were incurred, Chief Justice Rehnquist ruled that the plaintiff had not met that burden.[219]

Although Chief Justice Rehnquist ruled against the plaintiff, in the *Green Tree* opinion he acknowledged the Effective Vindication principle of *Mitsubishi*, stating in dicta that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating [their] federal statutory rights in the arbitral forum."[220] But there was no showing that this was true in the case at hand.[221]

---

482 U.S. 220, 229–30 (1987). That decision was unanimous on the issue that the RICO claim was subject to the FAA. *Id.* at 242, 269. Thus, by the late 1980s, all of the Justices had effectively agreed that federal statutory claims could be subject to arbitration pursuant to the FAA.

211. *Mitsubishi*, 473 U.S. at 637.
212. 531 U.S. 79 (2000).
213. *Id.* at 91.
214. *Id.* at 82–83.
215. *Id.* at 82, 84.
216. *Id.* at 83–84.
217. *Id.* at 90–91.
218. *Id.* at 92.
219. *Id.* at 90–91.
220. *Id.* at 90.
221. *Id.* at 90–91 ("The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.").

The *Green Tree* decision drew a strong dissent from the Court's liberal wing. The dissenting opinion, authored by Justice Ginsburg, argued that the plaintiff, a mobile home purchaser without substantial financial means, should not be forced to arbitrate without knowing in advance who will pay for the forum or what the upfront costs would be.[222] Moreover, Justice Ginsberg contended, the arbitration clause was drafted by Green Tree, and as a large financial institution that is a repeat player in arbitration, it was in a position to know what the costs would entail.[223] Thus, the dissenters averred, the plaintiff should not bear the burden of establishing that the forum is inaccessible and should not be required to submit to arbitration without knowing the cost in advance.[224]

The *Green Tree* majority gave lip service to the Effective Vindication principle, but the Court weakened it in application. In 2013, in *American Express Co. v. Italian Colors Restaurant*,[225] Justice Scalia practically eliminated the doctrine altogether.

There, a group of merchants brought a class action suit against American Express (Amex), claiming that they had been overcharged in violation of federal antitrust law.[226] The merchants' contracts with Amex all contained a clause that prohibited them from bringing any dispute to a forum other than arbitration and required that all disputes be arbitrated on an individual basis.[227] It also prohibited the merchants from sharing resources to produce a common expert report.[228] When Amex moved to compel arbitration on an individual basis, the merchants objected because arbitrating the antitrust claims individually would cost each merchant several hundred thousand dollars, whereas the maximum recovery for an individual plaintiff would be less than $13,000.[229] Hence, the merchants claimed, without the ability to bring a class or collective action, they would lose their substantive rights under the antitrust laws.[230] The plaintiffs prevailed in the Second Circuit, but on appeal to the Supreme Court, they lost.[231]

The Supreme Court upheld the class-action waiver despite unrefuted evidence that the cost of bringing an antitrust case was so high that without the ability to proceed as a class action, the case could not be brought.[232] In his majority opinion, Justice Scalia went out of his way to cast doubt on the viability of the Effective Vindication principle. Justice Scalia called

222. *Id.* at 92–93 (Ginsburg, J., dissenting).
223. *Id.* at 96.
224. *Id.*
225. 570 U.S. 228 (2013).
226. *Id.* at 231.
227. *Id.*
228. *Id.* at 246 (Kagan, J., dissenting).
229. *Id.* at 231 (majority opinion).
230. *See id.* at 232.
231. *Id.* at 232, 239.
232. *See id.* at 231–32, 238.

the doctrine mere "dicta"[233] and interpreted it with mutilating narrowness, stating that the doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."[234] Justice Scalia added that the doctrine "would *perhaps* cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[235] Beyond those circumstances, Justice Scalia stated, "[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[236]

Justice Kagan delivered a powerful dissent in which she gave particular attention to Justice Scalia's dismissive treatment of the Effective Vindication principle.[237] Justice Kagan explained that the effective vindication rule was essential to prevent stronger parties from using these and other kinds of means to eviscerate statutory protections.[238] As she wrote:

> [The FAA] reflects a federal policy favoring actual arbitration—that is, arbitration as a streamlined "method of resolving disputes," not as a foolproof way of killing off valid claims. . . . The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a real, not faux, method of dispute resolution. . . . Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights.[239]

Justice Kagan's warning has come to pass. As shown below, companies now routinely insist that their employees and consumers waive their right to bring class or collective litigation, making it nigh impossible to pursue their claims.[240]

### *F. Limiting the Class Action Rights of Employees*

The most controversial issue in arbitration law today grows out of the interaction between arbitration and class actions. In the late twentieth century, there was a proliferation of state and federal employment rights.[241] To enforce them, employees often banded together in class or collective actions to assert their claims.[242] When such suits were successful, employers were liable for enormous damage recoveries.[243] Indeed, by the early 2000s, employers' counsel opined that their biggest fear was not that their

---

233. *Id.* at 235 n.2 ("Even the Court of Appeals in this case recognized the relevant language in *Mitsubishi Motors* as dicta.").
234. *Id.* at 236.
235. *Id.* (emphasis added).
236. *Id.*
237. *Id.* at 240 (Kagan, J., dissenting).
238. *Id.* at 240, 242.
239. *Id.* at 243–44 (internal citations omitted).
240. *See* discussion *infra* Section I.F.
241. *Yellow Dog Contract*, *supra* note 1, at 1018.
242. *Id.* at 1018–19.
243. *Id.* at 1041.

employees might unionize—unionization rates at that time had fallen dramatically.[244] Rather, their largest concern was employment class actions.[245]

Employers found a solution to their fears in the expanding scope of the FAA and the insistence, as a condition of employment, that employees not only agree to arbitration but also to arbitration on an individual basis. That is, employers insisted that employees waive their rights to assert any potential claims in a collective fashion.

Composite arbitration and class-action waiver clauses have become common in employment contracts as well as in other kinds of contracts of adhesion. [246] These clauses are found in contracts offered by credit card companies, banks, cell phone providers, and providers of other common services.[247] By their terms, composite arbitration and class-action waiver clauses require a party to take any claim or dispute that might arise with their contracting provider to arbitration on an individual basis.[248] These clauses are useful for corporations who want to prevent high-stakes lawsuits against them—i.e., suits in which large numbers of plaintiffs have claims so small that no individual can afford to sue by themselves but which can cost a corporation a lot of money if brought as a class action. In the past decade, it has been found that eighty-one percent of the largest retail banks and credit card companies that require mandatory arbitration also ban class actions.[249] And in my own survey in 2010, I found that *all* of the cell phone companies, cable service providers, credit card companies, and major national banks that required their customers to arbitrate also required them to waive the right to bring a class or collective action.[250]

The combination of class action waivers and arbitration clauses in adhesion contracts has spurred a great deal of litigation. In fact, many of the cases discussed above, which have altered FAA interpretation in ways that make it more difficult for individuals to challenge arbitration, arose in a setting where the employee attempted to bring a class action.[251] Indeed, I suspect that the Court's aversion to the collective assertion of legal

---

244. Lawrence Mishel, Lynn Rhinehart, & Lane Windham, *Explaining the Erosion of Private-Sector Unions*, ECON. POL'Y INST. (Nov. 18, 2020), https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion.

245. *Yellow Dog Contract*, *supra* note 1, at 1019.

246. *See, e.g.*, O'Conner v. Uber Techs., 150 F. Supp. 3d 1095, 1098 (N.D. Cal. 2015); Mohamed v. Uber Techs., 848 F.3d 1201, 1206 (9th Cir. 2015).

247. *See* Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISCOURSE 164, 169 (2013).

248. *Id.*

249. PEW CHARITABLE TRS., BANKING ON ARBITRATION: BIG BANKS, CONSUMERS, AND CHECKING ACCOUNT DISPUTE RESOLUTION 3–4 (2012).

250. *See* Katherine V. Stone, *Signing Away Our Rights*, AM. PROSPECT (Mar. 5, 2011), https://prospect.org/features/signing-away-rights (reporting on survey conducted by author, September–October 2010).

251. *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1413 (2019).

claims, whether in arbitration or a court, has animated many of the decisions that have expanded the scope of the FAA and kept individual plaintiffs out of court.

When a composite class-action waiver and arbitration clause are enforced, plaintiffs are forced to arbitrate claims on an individual basis, even if it is prohibitively expensive for any one of them to do so. These also tend to be cases in which any individual claimant's potential award is so small that it is impossible for them to secure legal representation.

"Consumers and employees have challenged composite arbitration" and class-action waiver clauses on two grounds. Consumers and employees allege: (1) that composite clauses are unconscionable under state law; or (2) that these clauses make it impossible to vindicate statutory rights.[252] As discussed above, the Supreme Court has narrowed the ability to prevail on either of these claims in recent years.[253] In addition, some plaintiffs have attempted to rely on state law doctrines or statutes to ensure their right to proceed in a class or collective manner, but the expanding scope of FAA preemption has precluded them from doing so.

On several occasions, the Supreme Court has specifically addressed the issue of class actions and class arbitration. Starting in 2010, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[254] the Court held that when an arbitration clause is silent on the subject of class arbitration, a party cannot be compelled to submit to class arbitration.[255] Writing for the majority, Justice Alito justified the decision by claiming that that arbitration is intrinsically an individualized process such that class or collective arbitration should not be ordered unless the parties explicitly and unequivocally agreed upon it.[256] He offered no citation or argument as to why that was the case. Justice Scalia echoed and underscored Justice Alito's reasoning in *AT&T Mobility*, where he said:

> Class[-]wide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration . . . is inconsistent with the FAA.[257]

252. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic.

253. *See* discussion *supra* Sections, I.B., I.D.

254. 559 U.S. 662 (2010).

255. *Id.* at 684–85.

256. *Id.* at 684.

257. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

Shortly thereafter, Justice Scalia expanded further on the incompatibility of arbitration and collective litigation in *American Express*.[258] Even more recently, the asserted incompatibility of arbitration and collective litigation was key to the reasoning in *Lamps Plus*,[259] discussed above. There, Justice Roberts, writing for the majority, contended: "Class arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration. The statute therefore requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a class[-]wide basis."[260]

The asserted incompatibility between arbitration and collective proceedings has no historical, logical, or institutional basis. There are examples of class arbitrations going back to the 1980s,[261] and currently the American Arbitration Association, one of the major arbitration service providers, has maintained since 2005 a set of procedures designed for conducting class arbitrations.[262] Nonetheless, the Supreme Court, by making class arbitration a rare and disfavored procedure, has taken away an important mechanism for employees and consumers to assert their rights.

## CONCLUSION

The changes in arbitration law over the past twenty-five years have upended the civil justice system, making it increasingly difficult for ordinary citizens—be they workers, consumers, tenants, cell phone users, borrowers, or others who deal with large corporations—to protect their rights. Moreover, the trend toward upholding class action waivers has made vindication even more difficult. This is a major shift in the balance of power between social groups.

In 1977, legal historian Professor Stephen Yeazell studied the history of class actions and demonstrated the important ways in which social context and structure interact with collective forms of litigation, be they modern class actions or ancient chancellery suits.[263] His message was that procedure matters—specifically, that the procedures that govern the possibil-

---

258. 570 U.S. 228 (2013).

259. 139 S. Ct. 1407 (2019).

260. *Id.* at 1415 (internal citations omitted).

261. There are numerous examples of class arbitration going back decades. It is often used in collective bargaining context to decide issues of contract interpretation. *See generally* John B. Lopez, *Arbitration Agreements with Class and Collective Action Waivers Do Not Violate the NLRA*, AM. BAR ASS'N (Dec. 3 2019), https://www.americanbar.org/groups/business_law/publications/blt/2019/12/arbitration-agreements. Outside of collective bargaining, class arbitration has been used in the context of alleged "fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of disclosure requirements." Southland Corp. v. Keating, 465 U.S. 1, 4 (1984).

262. *See generally* AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (Oct. 8, 2003) https://www.adr.org/sites/default/files/Supplementary_Rules_for_Class_Arbitrations.pdf.

263. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 2–3 (1987); Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977).

ity of group litigation both reflect and shape power relations between social groups.[264] The present era is no exception. Pursuant to an emerging body of law in the field of arbitration, collective litigation is currently under threat. The law of arbitration is not only displacing but also potentially eliminating the ability of consumers and employees to bring collective actions in any tribunal. For decades, consumers and employees have relied on collective actions in the courts to provide social protection and create social rights.[265] Yet now those groups are in danger of disempowerment through the law governing the procedures of group litigation and the Supreme Court's interpretation of the FAA.

264. *See id.* at 878, 892, 894.

265. *See, e.g.*, Thomas I. Elkind, *Some Large Companies Are No Longer Requiring Consumers and Employees to Waive Class Action Claims*, JAMS ADR INSIGHTS (Apr. 7, 2022), https://www.jamsadr.com/blog/2022/some-large-companies-are-no-longer-requiring-consumers-and-employees-to-waive-class-action-claims.