

NOT LIKE OTHER CONTRACTS: THE SUPREMACY AND EXCEPTIONALISM OF ARBITRATION

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ABSTRACT

*This Article provides a framework for analyzing, normatively and descriptively, the Supreme Court's remarkable interpretation of the Federal Arbitration Act. Looking back at the Court's treatment of arbitration following the paradigm shift of the 1980s, I introduce two novel concepts that explain a pattern in the precedent: arbitration supremacy and arbitration exceptionalism. The former, arbitration supremacy, is the Court's consistent treatment of the Federal Arbitration Act as expansively preempting state law, including state contract law of general applicability. The supremacy of the arbitration clause, in this sense, has been continuously affirmed and expanded by the Court since its decision in *Southland Corp. v. Keating*, functionally creating in all but name a federal common law of arbitration. Arbitration exceptionalism is the Court's pattern of treating arbitration clauses as exceptional types of contract terms, subject to unique, Court-created doctrines. Arbitration exceptionalism has resulted in the creation of, for example, the separability doctrine, which insulates arbitration clauses even when the primary container contracts are void ab initio. Arbitration supremacy and exceptionalism explain much of the last 50 years of the Court's arbitration jurisprudence and offer a foreboding insight into what lies ahead. Here, I look closely at two rapidly developing legal issues in the arbitration sphere—arbitrability delegation clauses and the enforcement of arbitration agreements by non-signatories—to highlight how the Court is poised to continue to expand the reach of arbitration in the coming years.*

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I. INTRODUCTION

To put it bluntly: Arbitration is everywhere.¹ It is “a phenomenon that pervade[s] virtually every corner of the daily economy.”² The last several decades have seen a paradigm shift in where—and how—workers, consumers, and marketplace entities resolve contractual disputes and remedy statutory violations. The majority of private-sector, non-unionized employees are bound by mandatory arbitration procedures.³ A 2019 study found that 81 of the 100 largest U.S. companies now use arbitration in their dealings with consumers.⁴ Telecom and financial services nearly always include arbitration clauses in their terms of service and user agreements.⁵ A consequence of the ubiquity of arbitration clauses in contemporary American life is that the rules governing arbitration are now the rules governing many of the procedural and substantive rights of workers and consumers. Mandatory arbitration and class waivers are an unavoidable component of a modern economic presence,⁶ and scholars have warned for years that binding arbitration could spell the end of class proceedings altogether.⁷ This Article suggests that the Supreme Court has created a domain of law specific to arbitration that provides arbitration clauses unequal—preferential and

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1. See, e.g., Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019); see also G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517, 517 (1989) (noting an increasing use of arbitration in securities cases); see also Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 n.7 (1985) (citing figures published by the American Arbitration Association reflecting an increase across a variety of arbitration cases).

2. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1429 (2008).

3. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is now Barred for more than 60 Million American Workers*, ECON. POL’Y INST. (Apr. 6, 2018), <https://perma.cc/VP6Y-P8UN>.

4. Szalai, *supra* note 1, at 234.

5. Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (January 30, 2020), <https://perma.cc/B56R-U89M>.

6. See Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 1 (2019) [hereinafter “*Arbitration Nation*”].

7. See, e.g., Judith Resnik et al., *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611 (2020); see also Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (“[T]he waiver works in tandem with standard arbitration provisions to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, nonaggregated arbitral proceeding.”); see also Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 6 (2000) (“Increasingly, potential defendants are drafting arbitration clauses that explicitly bar class actions . . .”).

disproportionally powerful—status. I focus on three key legal developments in the Court’s arbitration jurisprudence. First, I analyze the unprecedented scope of the Court’s interpretation of the Federal Arbitration Act (FAA), specifically its preemption of states’ traditional jurisdiction over contract law and its displacement of even other federal statutes; this is part of what I identify as “arbitration supremacy.” Second, I explain the history of the ‘separability doctrine,’ an arbitration-specific rule that permits arbitration clauses to stand and survive independently of the primary contracts in which they appear. The separability doctrine is at the very heart of the rapidly developing jurisprudence shaping the legal issues of arbitrability and delegation clauses. Third, I look forward to an issue unresolved by the Supreme Court but appearing with increasing frequency in the lower courts: the scope and power of non-signatories to compel arbitration. The legal issues of arbitrability and non-signatory enforcement of arbitration agreements are instances of what I call “arbitration exceptionalism.” Arbitration exceptionalism is the Court’s pattern of treating arbitration clauses differently from any other contract term, insulating it from state regulation in part by developing its own arbitration-specific legal standards. The Court’s tendency to treat arbitration clauses exceptionally while simultaneously stripping states’ ability to regulate the use of arbitration is the foundation of what functionally has become a federal common law of arbitration.⁸ As the Court continues to grant certiorari to an unusually high number of cases interpreting the FAA, this trend of arbitration supremacy and exceptionalism is positioned to expand even further; I conclude the article with some possible responses to these developments.

In the abstract, arbitration is simply an alternative process of dispute resolution, with no inherent moral valence. But in the last few decades, “arbitration has evolved from a norm-driven method of settling disputes to a parallel justice system that is caught in a political tug-of-war.”⁹ Arbitration has not always been considered a tool of corporate power. When the FAA first became law in 1925, it enjoyed nonpartisan support: progressives united with business associations in support of a more flexible, efficient, and fair method of dispute resolution than the courts could provide for the kind of claims typical of the average employee or consumer.¹⁰ However, the “parallel justice system” of arbitration is not necessarily an equal system; it is indisputable that arbitration does not afford the procedural

8. See Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191 (2020).

9. *Arbitration Nation*, *supra* note 6, at 18.

10. See, e.g., Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940, 2973–80 (2015).

protections of civil litigation.¹¹ Arbitration is confidential and nonprecedential.¹² Courts have referred to arbitration as “an inferior system of justice, structured without due process, rules of evidence, accountability of judgment and rules of law.”¹³ Arbitration advocates, of course, focus on precisely these same qualities to highlight its comparative efficiency and expediency. At least in theory, arbitration can provide access to justice where otherwise there would be no other financially viable option. But current data reveals that “arbitration is not currently living up to this potential.”¹⁴ Contradicting the arbitration-optimists’ predictions, it has not been “self represented consumers, employees, or medical patients—[that] have been taking advantage of arbitration’s speed and relative affordability.”¹⁵

The data surrounding modern use of arbitration clauses is complicated: the tracking and reporting of private arbitration proceedings is inconsistent and the outcomes from arbitral proceedings are not transparent.¹⁶ It is taken as common wisdom that arbitration has become a tool of monopolies and corporations to avoid liability and foreclose the possibility of consumer and employment litigation.¹⁷ Significantly, this includes increasing the number and complexity of the obstacles to pursuing class proceedings which, in the U.S., have historically served a quasi-

11. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015). Julius Henry Cohen, an author of the FAA, noted that arbitration was “not the proper method for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.” Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926).

12. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409 (2016).

13. *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986).

14. *Arbitration Nation*, *supra* note 6, at 9.

15. *Id.*

16. In *Arbitration Nation*, the most comprehensive empirical look at arbitration data to date, Andrea Cann Chandrasekher and David Horton rely upon information released pursuant to Section 1281.96 of the California Code of Civil Procedure, which requires “conflict resolution service” entities to release information about every “consumer” arbitration (where the statutory definition of consumer includes employment and medical malpractice cases) every five years. See *Arbitration Nation*, *supra* note 6, at 18. The authors remark that “every paper to date (including ours) has focused on a single arbitration provider (almost always the AAA). As a result, these studies shed no light on the thousands of cases in other institutions. Also, because the AAA refuses to handle certain matters, such as medical malpractice, we know almost nothing about entire sectors within arbitration’s sprawling domain.” *Id.* at 9 (internal citations omitted).

17. This fact has also long been noted in the scholarly literature. See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Jean R. Sternlight, *Panacea or Corporate Tool? Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

regulatory role¹⁸ and often are the only practical avenue of redress for individuals.¹⁹ In 2020, workers only won 1.6% of the cases brought against employers that were resolved in arbitration.²⁰ That is significantly lower than employee win rates reported in employment litigation in court.²¹ The National Employment Law Project estimates that mandatory arbitration in 2019 alone resulted in employers pocketing \$9.2 billion in wages from workers in jobs that pay under \$13 per hour.²² Since *AT&T Mobility LLC v. Concepcion*,²³ consumers and employees alike have struggled to find legal representation, as class action waivers in arbitration agreements have made the pursuit of individual claims financially inviable.²⁴ Arbitration of disputes between equally sophisticated and powerful parties may be unproblematic. The outcomes of arbitration between large corporations and

18. Zimmerman writes that:

Large private settlements attempt to provide more accountability in the legal system by enabling the resolution of claims that otherwise would not be brought in individual litigation. Class certification is thought to enable litigation when damages are too small for individuals to justify the high costs of retaining counsel. In cases involving large damages, the class action device may also provide more access to redress by granting plaintiffs the same economies of scale enjoyed by well-financed defendants. In both cases, large settlements hold defendants accountable for wide and diffuse harms that are too costly to be prosecuted through individual litigation. Class action settlements, at least theoretically, also serve an important democratic function by allowing groups of individuals to collectively redress widespread harm.

Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 509–10 (2011) (internal citations omitted). See also J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022).

19. See Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704–05 (2012) (“In many contexts, if plaintiffs cannot join together in a class action, lack of knowledge, lack of resources, or fear of retaliation will prevent them from bringing any claims at all.”). See also Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011).

20. Abha Bhattarai, *As Closed-Door Arbitration Soared Last Year, Workers Won Cases Against Employers Just 1.6% of the Time*, THE WASH. POST (Oct. 27, 2021) <https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/>.

21. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

22. Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket \$9.2 billion in 2019 From Workers in Low-Paid Jobs*, NAT’L EMP. L. PROJECT (June 07, 2021) <https://www.nelp.org/publication/forced-arbitration-cost-workers-in-low-paid-jobs-9-2-billion-in-stolen-wages-in-2019/>.

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

24. See, e.g., Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

individuals, however, with procedures unencumbered with judicial oversight or the possibility of appeal and couched in the realities of modern consumer and employment contracting, make this out-of-court mechanism for resolving legal claims a significant obstacle to obtaining legal remedies for the average individual. Consequently, in practice, arbitration is not a neutral procedure of dispute resolution. Repeat-players have outsized success.²⁵ Indeed, there is ample evidence that corporations prefer judicial fora when resolving disputes amongst themselves.²⁶

Here, I argue that the precedent concerning arbitration and the FAA as developed in the Supreme Court in recent decades is not simply a ‘policy favoring arbitration’ but a judicially-constructed doctrine of arbitration supremacy and exceptionalism, whereby the FAA preempts state contract law, even laws of general applicability, judicial review of arbitral proceedings is nearly non-existent, and arbitrators are granted extraordinary deference—a degree of deference granted almost nowhere else under the law. This is not a completely radical position.²⁷ In 1995, Justice O’Connor described the FAA as “an edifice of [the Court’s] own creation.”²⁸ While Congress intended the FAA to put “arbitration agreements on an

25. See *Arbitration Nation*, *supra* note 6, at 58.

26. See Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876 (2008) (“The absence of arbitration provisions in the great majority of negotiated business contracts suggests that companies value, even prefer, litigation as the means for resolving disputes with peers. The systematic eschewing of arbitration clauses in business-to-business contracts also casts doubt on the corporations’ asserted beliefs in the superior fairness and efficiency of arbitration clauses.”).

27. The uniqueness of the Court’s treatment of arbitration clauses is a developing topic of scholarly interest. See, e.g., Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531 (2014); Jeffery W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, U. KAN. L. REV. 795, 795–96 (2012). Stempel writes that:

Collectively, the U.S. Supreme Court, even if not ‘in love’ with arbitration, appears to at least have a serious attachment to arbitration, subject to revision only in the service of other questionable preferences, such as support for the comparatively richer and more powerful litigant. In that sense, the Court’s pronounced, but intellectually inconsistent, preferences for arbitration reflect a reckless, impure, or tainted love rather than the type of mature, realistic affection society generally sets forth as exemplary. The Court has an unrealistically sanguine view of the wonders of arbitration—so sanguine that it is willing in most cases to impose arbitration in situations far exceeding those envisioned by the drafters of the Federal Arbitration Act and despite significant issues of states’ rights, the quality of contract consent, the fairness of the arbitration tribunal, and the overall operation of the dispute resolution system.

Id. See also Sarah E. Belton & F. Paul Bland, Jr., *How the Arbitration-at-all-Costs Regime Ignores and Distorts Settled Law*, 35 BERKELY. J. EMP. & LAB. L. 135 (2014) [hereinafter “Arbitration-at-all-Costs”].

28. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

equal footing with other contracts,”²⁹ the Supreme Court has interpreted Section 2 of the FAA as a “congressional declaration of a liberal federal policy *favoring* arbitration agreements.”³⁰ For nearly fifty years, the Court has cited this “liberal federal policy favoring arbitration agreements” as it has expanded the reach of the FAA, leaving workers, consumers, and businesses subject to an arbitration leviathan that controls the rights, remedies, and relationships of individuals and corporations.³¹

Beginning in the 1980s, initiating a drastic change from its previous treatment of the FAA, the Supreme Court held that the statute preempts state law,³² that arbitration clauses can be enforced even in otherwise unenforceable contracts,³³ that courts must surrender jurisdiction to arbitrators even when claims are “wholly groundless,”³⁴ and that federal statutory claims can be relegated to arbitral fora, even if it precludes plaintiffs’ access to a judicial forum, review, or remedy.³⁵ Moreover, the Court has thoroughly insulated class arbitration waivers from

29. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

30. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (emphasis added). Section 2 of the FAA does not explicitly articulate a Congressional policy preferring arbitration. It reads in full:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C. § 2.

31. On the prevalence of arbitration clauses, see Eisenberg et al., *supra* note 26, at 880–83; see also Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 143–50 (2010).

32. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding that a California state law that would have rendered an arbitration agreement unenforceable violated the Supremacy clause and was thus preempted by the FAA and that the Court “cannot believe Congress intended to limit the Arbitration Act to disputes subject only to *federal* court jurisdiction”) (emphasis added).

33. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (holding that an arbitration provision required an arbitrator to determine whether the contract containing the arbitration agreement was void for illegality).

34. Henry Schein, Inc. v. Archer and White Sales, Inc., 586 U.S. ___, 139 S. Ct. 524 (2019).

35. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that an Age Discrimination in Employment Act claim was subject to mandatory arbitration pursuant to an arbitration agreement in the securities registration application).

challenge.³⁶ Though the Supreme Court has recently stated that “a court may not devise novel rules to favor arbitration over litigation,”³⁷ its own precedent belies the proposition; most notably with the court-created doctrine of separability: a doctrine of preemptive federal contract law that allows an arbitration clause to survive and control when no other contract clause would, when even the contract itself may not or does not survive.³⁸ The preferential treatment of arbitration is especially apparent in controversies where parties ask the courts to treat arbitration clauses as an exceptional kind of contract term: one that transforms the contract into an agreement that the courts have no jurisdiction to review. The trend of stripping courts of their jurisdiction to determine even the basic legality of a contract that contains an arbitration agreement has not gone unnoticed nor unresisted by the lower courts and the states. In 2003, the Second Circuit wrote that “[w]hile the FAA expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA ‘was to make arbitration agreements as enforceable as other contracts, *but not more so.*’”³⁹ The First Circuit has noted that “[a] federal court’s review of an arbitrator’s decision . . . is extremely narrow and exceedingly deferential. Indeed, it is among the narrowest known in the law.”⁴⁰ The Supreme Court has shown no sign of slowing down its uptake of cases concerning arbitration. In the 2021–2022 term alone, the Court decided four cases interpreting

36. *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

37. *Morgan v. Sundance*, 142 S. Ct. 1708, 1713 (2022) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–21 (1985)).

38. The separability doctrine—that “arbitration clauses, as a matter of federal law, are ‘separable’ from the contracts in which they are embedded” and that “a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud”—was established by the Court in *Prima Paint Co. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967). The doctrine was affirmed and extrapolated upon in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (holding that an arbitration provision required an arbitrator to determine whether the contract containing the arbitration agreement was void for illegality) and *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63 (2010) (holding that it is up to an arbitrator to decide the enforceability of an agreement where there is a delegation provision; courts can only resolve challenges specifically contesting the validity of arbitration provisions themselves).

39. *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 364 (2d Cir. 2003) (emphasis in original) (internal quotations omitted) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). For similar conclusions in other circuits, see *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (concluding that “as arbitration depends on a valid contract an argument that the contract does not exist can’t logically be resolved by the arbitrator”); *Chastain v. Robinson–Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (stating that “*Prima Paint* has never been extended to require arbitrators to adjudicate a party’s contention, supported by substantial evidence, that a contract *never existed at all*”).

40. *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 123 (1st Cir. 2008) (citations omitted) (internal quotation marks omitted).

the FAA⁴¹ and a fifth case restricting discovery under 28 U.S.C. section 1782 in part as a result of the tension it creates with the FAA.⁴²

This article argues that the Supreme Court's arbitration jurisprudence has led to extraordinary treatment of arbitration agreements by creating a separate legal domain for the interpretation and enforcement of arbitration clauses, governed by what is essentially a federal common law of arbitration. I explore how the reach of the FAA may continue to expand in Court's coming terms, sustaining the concerning trend of arbitration supremacy and exceptionalism. In the following section, "Federal Arbitration Act v. California, et al.," I review how the Court's interpretation of the FAA has inhibited states' traditional authority to regulate contract law within their borders. Importantly, I explain how the Court's establishment of expansive and unparalleled preemption by the FAA has carved out a unique legal domain for arbitration clauses at the expense of state law and authority. California, for example, has attempted to pass legislation to protect employees and consumers from, among other things, unconscionable contract terms, only to see those laws preempted by the Supreme Court's muscular interpretation and application of the FAA.⁴³ This forceful reading of the FAA, leading to the preemption of state law and even the displacement of other federal statutes, is what I call arbitration supremacy.⁴⁴

I then turn to what I call arbitration exceptionalism.⁴⁵ Arbitration exceptionalism is the Court's willingness to devise legal standards specific to arbitration clauses that insulate and elevate arbitration agreements, functionally establishing a federal common law of arbitration. In the section titled "Arbitrating Arbitrability," I analyze the Supreme Court decisions establishing the separability doctrine and standards touching on arbitrability, including the recent holding in *Henry Schein, Inc. v. Archer and White Sales, Inc.*⁴⁶ This analysis leads to an examination of the questions that the Court has left unanswered but intimated it will decide in the near future.⁴⁷

41. *Badgerow v. Walters*, 142 S. Ct. 1310 (2022); *Morgan v. Sundance*, 142 S. Ct. 1708 (2022); *Southwest Airlines v. Saxon*, 142 S. Ct. 1783 (2022), *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (2022).

42. *ZF Auto. U.S., Inc. v. Luxshare, Ltd.*, 596 U.S. ___, 142 S. Ct. 2078 (2022).

43. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (reasoning that even *general* contract defenses under state law may be preempted by the FAA if the Court determines those defenses uniquely disadvantage arbitration clauses).

44. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that where the NLRA and FAA both touch the same subject, it is the FAA that controls).

45. Thanks to Bill Eskridge for pushing me to sharpen and clarify the distinction between arbitration supremacy and arbitration exceptionalism.

46. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019).

47. The Court granted certiorari a second time in *Henry Schein* in June 2020 to address the question it left open in 2019, i.e., the question of when a delegation clause is "clear and unmistakable" and whether the agreement in this case met that standard. *Henry Schein, Inc.*, 139 S. Ct. 524 (2019), *cert.*

Questions of arbitrability are just one vehicle through which the Court may continue to develop its expansive interpretation of the FAA, and examination of its recent decisions suggest that this is precisely what it will do. In the section titled, “Non-Signatory Enforcement,” I consider the ability of non-signatories to compel arbitration, in particular under the state contract law doctrine of equitable estoppel. In 2020, the Court held in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC* that non-signatories to contracts containing arbitration agreements bound by the New York Convention could compel arbitration under those clauses via the domestic doctrine of equitable estoppel.⁴⁸ I suggest that, as with the precedents developed following the decision in *Mitsubishi Motors*,⁴⁹ the Court may eventually graft principles developed in the context of arbitration between parties of comparable sophistication and resources onto cases involving domestic employment and consumer arbitration to the detriment of workers and consumers in the United States. Looking to cases moving through the lower courts, it is clear that disputes involving non-signatories, including in contracts of adhesion, are headed toward the Supreme Court, and there are reasons to believe the doctrine of equitable estoppel is the next frontier of court-constructed arbitration exceptionalism.⁵⁰ The fifth and final section of this Article reiterates the primary components of what I call arbitration supremacy and exceptionalism, and reviews various responses to the state of arbitration jurisprudence, such as legislative reform of the FAA, reconsidering the precedent established in *Southland*, the articulation of clear standards of a federal common law of arbitration, and creative litigation tactics such as those seen in *Abernathy v. DoorDash, Inc.*⁵¹

II. FEDERAL ARBITRATION ACT V. CALIFORNIA, ET AL.

A fixture of the Supreme Court’s contemporary FAA jurisprudence is the extent to which it flouts respect for state contract law: “[I]n a variety of settings the U.S. Supreme Court has enunciated a strong presumption against federal preemption of state law. In cases decided under the FAA, however, the Supreme

granted, S. Ct. 107 (2020). However, the Court dismissed the second iteration of the case as improvidently granted after oral argument in January 2021. *Henry Schein Inc. v. Archer and White Sales, Inc.*, 141 S. Ct. 656 (2021) (mem.) (per curiam).

48. *GE Energy Power Conversion Fr. SAS v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020).

49. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that claims brought under the Sherman Act, arising from an international commercial transaction, can be subject to arbitration); see *infra* Section IV.B, The *Mitsubishi* Model.

50. See discussion *infra* notes 197 to 201 and accompanying text. Circuit courts have addressed issues of first impression implicating non-signatories in, for example, *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021). The Supreme Court was set to resolve a case of non-signatory enforcement in the October 2020 term but dismissed the case as improvidently granted after oral argument. *Henry Schein, Inc.*, 141 S. Ct. 656.

51. *Abernathy v. DoorDash Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2020); see *infra* notes 262 to 266 and accompanying text; see also Glover, *supra* note 18.

Court has never mentioned or acknowledged the presumption against preemption, even when its FAA decisions have preempted laws in areas traditionally governed by the States, such as the law of contracts.⁵² Of course, when state law and federal law conflict, it is the federal law that prevails.⁵³ Arbitration supremacy as I detail it here, however, is more than an invocation of the Supremacy Clause. The expansive judicial interpretation of the FAA is not merely a function of the balance between federal and state powers. Instead, though lacking a clear basis in the statute's text and in tension with its legislative history,⁵⁴ arbitration supremacy follows from the Supreme Court's reading of the FAA applied with such muscle that it insulates arbitration agreements from state law and elevates the FAA when in conflict with other federal statutes. While the Court has stated that "[i]nvolving some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law,"⁵⁵ its own interpretation of the FAA, with its broad displacement of state law, controverts that contention.

While various states' laws and regulations have found themselves operating as vessels for the Court's expansion of the FAA, no state has been in the crosshairs as frequently as California, nor has any state found itself the central object of so many pivotal cases in federal arbitration jurisprudence.⁵⁶ In this section, I consider the Court's intrusion into the law of contracts, traditionally the domain of the

52. *Arbitration-at-all-Costs*, *supra* note 27, at 136.

53. U.S. CONST. art. IV, cl. 2.

54. One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts. In 1925 Congress emphatically believed arbitration to be a matter of "procedure." At hearings on the Act congressional subcommittees were told: "The theory on which you do this is that you have the right to tell the Federal courts how to proceed." The House Report on the FAA stated: "Whether an agreement for arbitration shall be enforced or not is a question of procedure" On the floor of the House Congressman Graham assured his fellow members that the FAA "does not involve any new principle of law except to provide a simple method . . . in order to give enforcement It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." *Southland Corp. v. Keating*, 465 U.S. 1, 25–26 (1984) (O'Connor, J., dissenting) (internal citations omitted).

55. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019).

56. See Lyra Haas, Note, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 BOS. UNIV. L. REV. 1419, 1427–28 (2014) ("Other federal circuit and state courts have come into conflict with the Supreme Court on these issues too, of course, but none so often, nor with such persistence."). Two of the most pivotal cases in the FAA's recent history, *Southland* and *Concepcion*, arose from conflict between California state contract law and the Supreme Court's application of the FAA. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). The arguably antagonistic role California law has played in shaping FAA jurisprudence has continued into the most recent Supreme Court terms. See *Viking River Cruises Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (holding that the FAA preempted nearly all of California's Private Attorneys General Act).

states. I begin with two watershed cases that arose out of controversies under California law: *Southland Corp. v. Keating*, establishing FAA preemption of state law, and *AT&T Mobility LLC v. Concepcion*, reasoning that the FAA sometimes preempts even generally applicable contract defenses.⁵⁷

A. California: *Southland* and *Concepcion*

One of the first and most consequential decisions in the Supreme Court's precedential pivot concerning the FAA in the 1980s, which radically transformed the role and reach of the statute, was the holding in *Southland*. Justice Burger, writing for the majority, held that the FAA was not merely a procedural law applicable in federal courts but was instead a "substantive rule applicable in state as well as federal courts."⁵⁸ In *Southland*, the Court held that the California Franchise Investment Law⁵⁹ was preempted by the FAA,⁶⁰ establishing for the first time that provisions of state law that conflict with or frustrate the purpose of the FAA (as the Court interprets it) violate the Supremacy clause.⁶¹ In so holding, the Court "effectively nullified any wisdom that state legislatures or courts might bring to bear on the increasing prevalence of arbitration clauses in contracts."⁶² Justice O'Connor, joined by Justice Rehnquist, dissented vigorously in *Southland*, arguing that the majority ignored the "unambiguous" legislative history of the FAA: "That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts."⁶³ Justice O'Connor's dissent in *Southland* laid out the statute's legislative history and persuasively argued that Congress never intended the FAA to govern state court proceedings; instead, the purpose of the FAA was to require courts to uphold arbitration awards except "upon such grounds as exist at law or in equity for the

57. *Southland*, 465 U.S. at 1; *Concepcion*, 563 U.S. at 333.

58. *Southland*, 465 U.S. at 16.

59. CAL. CORP. CODE § 31000 (2022).

60. The California Supreme Court, interpreting the California Franchise Investment Law, had reasoned that the legislature had passed the law to provide protections for franchisees from franchisors, in part by requiring specific preinvestment disclosure statements. The California Franchise Investment Law stated that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." See *Keating v. Superior Ct.*, 645 P.2d 1192, 1198 (Cal. 1982) (quoting CAL. CORP. CODE § 31512 (2022)). The California law did not facially discriminate against arbitration. As Justice Stevens wrote: "Like the majority of the California Supreme Court, I am not persuaded that Congress intended the pre-emptive effect of this statute to be so unyielding as to require enforcement of an agreement to arbitrate a dispute over the application of a regulatory statute which a state legislature, in conformity with analogous federal policy, has decided should be left to judicial enforcement." *Southland*, 465 U.S. at 21 (Stevens, J., concurring in part and dissenting in part).

61. *Southland*, 465 U.S. at 15–16.

62. Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1186 (2020).

63. *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting).

revocation of any contract.”⁶⁴ In support of this reading of the FAA, the dissent quoted a draftsman of the bill itself, who emphasized that it cannot be said “that the Congress of the United States, *directing its own courts* . . . , would infringe upon the provinces or prerogatives of the States [T]he question of the enforcement relates to the law of remedies and not to substantive law. . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.”⁶⁵ Justice O’Connor reiterated her position on FAA preemption in *Perry v. Thomas*: “I continue to believe that [*Southland*’s] holding was unfaithful to congressional intent, unnecessary, and in light of the [Act’s] antecedents and the intervening contraction of federal power, inexplicable.”⁶⁶

Nowhere in the text of the FAA does the statute indicate that it is meant to supersede state policy or preempt state law, statutory or judicial, regulating arbitration. Principles of federalism require clear Congressional intent to effect preemption.⁶⁷ The Supreme Court, however, has interpreted the FAA without any such mandate from Congress: state policy judgments and laws on the appropriateness of arbitration for certain claims are irrelevant, according to the Court, as the FAA overrides “any state rule discriminating on its face against arbitration. . . .”⁶⁸ Justice Thomas, a lone dissenting voice in recent years, has continuously reasserted that the FAA does not apply to state court proceedings, and thus the FAA does not require state courts to enforce an arbitration agreement

64. *Id.*

65. *Id.* at 26–27.

66. *Perry v. Thomas*, 482 U.S. 483, 494 (1987) (O’Connor, J., dissenting) (internal citations and quotations omitted).

67. Justice Stevens’ concurrence in part and dissent in part in *Southland* stated this principle clearly:

The exercise of State authority in a field traditionally occupied by State law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress. Moreover, even where a federal statute does displace State authority, it rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose.

Southland, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) (internal quotations and citations omitted).

68. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *see also* *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012).

that violates or conflicts with a state law.⁶⁹ While the majority of the Court now treats the *Southland* decision as fully settled, Justice Thomas remains unpersuaded that Congress intended the FAA to preempt state law and regulation:

Even if the interstate commerce requirement raises uncertainty about the original meaning of the statute, we should resolve the uncertainty in light of core principles of federalism. While “Congress may legislate in areas traditionally regulated by the States” as long as it “is acting within the powers granted it under the Constitution,” we assume that “Congress does not exercise [this power] lightly.” To the extent that federal statutes are ambiguous, we do not read them to displace state law. Rather, we must be “absolutely certain” that Congress intended such displacement before we give preemptive effect to a federal statute. In 1925, the enactment of a “substantive” arbitration statute along the lines envisioned by *Southland* would have displaced an enormous body of state law: Outside of a few States, predispute arbitration agreements either were wholly unenforceable or at least were not subject to specific performance. Far from being “absolutely certain” that Congress swept aside these state rules, I am quite sure that it did not.⁷⁰

The implications of *Southland* are apparent,⁷¹ and scholars have repeatedly noted the extraordinary treatment of the law of arbitration by the Supreme Court. “States have traditionally governed the law of contracts, which includes, among other things, contract formation. . . . The FAA says nothing about when a contract is or is not formed. . . . Nonetheless, the Supreme Court has superimposed on state law contract formation its invented substantive rules of federal arbitration law.”⁷² Pointing to Justice Scalia’s dissent in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, in which he wrote that FAA preemption “entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes,”⁷³ one scholar has gone so far as to assert that “[t]he Federal Arbitration Act is unconstitutional as applied to the states.”⁷⁴ Kristin Blankley has coined the term ‘impact preemption’ to refer to the Court’s expansion of “arbitration

69. Justice Thomas’s position was reaffirmed most recently in *Viking River Cruises Inc. v. Moriana*: “Accordingly, the FAA does not require California’s courts to enforce an arbitration agreement that forbids an employee to invoke the State’s Private Attorneys General Act.” *Viking River Cruises Inc. v. Moriana*, 142 S. Ct. 1906, 1926 (2022) (Thomas, J., dissenting).

70. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 292–93 (1995) (Thomas, J., dissenting) (internal citations omitted).

71. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 41 (1988) (Scalia, J., dissenting) (“Nor can or should courts ignore that issues of contract validity are traditionally matters governed by state law.”).

72. *Arbitration-at-all-Costs*, *supra* note 27, at 148–49.

73. *Allied-Bruce Terminix Cos., Inc.*, 513 U.S. at 285 (Scalia, J., dissenting).

74. David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541, 541 (2004).

preemption jurisprudence to unprecedented and unexplained bounds. . . . Impact preemption shifts the balance of regulatory power in the dual federal-state arbitration system toward the federal courts and away from state regulatory authorities.”⁷⁵

What is exceptionally important about the holding in *Southland* is that its intrusion on state law is arbitration-specific: it is arguably the beginning of the Court’s jurisprudence to assert not arbitration parity or equality, but arbitration supremacy. *Southland* laid the groundwork for the Court to continuously expand the reach of the FAA at the expense of state authority over contract law:

For many years, state law doctrines of unconscionability, duress, and public policy have provided floors of protection for workers and individuals against over-reaching and unfair contract terms. Given the modern reality that an employer may simply say “an employee may not work here unless she signs an acknowledgement agreeing to a large number of fine print legalese terms that the employee will predictably not read,” there is a strong argument that there needs to be some protection against abuses of this great power. As the Court’s [arbitration] jurisprudence repeatedly chips away at the state laws that protect against over-reaching, contract law threatens to be less of a body of true law—with rules and limits—and more into a device for the powerful drafters of contracts to demand and receive whatever they want.⁷⁶

In the decades following *Southland*, including through its most recent term, the Supreme Court has continued to carve out rules and exceptions for arbitration agreements that do not apply to any other contract clause.⁷⁷ While I will discuss two such arbitration-specific exceptions and their continued expansion by the Court in the proceeding sections of this article, for the rest of this section, I focus on some notable cases where laws regulating contracts, established by state courts and state legislatures, were gutted by the Supreme Court under the guise of FAA preemption.

75. Kristin M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 711 (2015) (“Impact preemption raises serious federalism issues because it does not require a conflict between federal and state law. Taken to its logical conclusion, the Court’s impact preemption analysis may prohibit states from regulating any aspect of arbitration that potentially ‘impacts’ the arbitration process.”).

76. *Arbitration-at-all-Costs*, *supra* note 27, at 150 (footnotes omitted).

77. These arbitration-specific rules and exceptions include, among other things, the separability doctrine and rules of arbitrability. *See, e.g.*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Allied-Bruce Terminix Cos.*, 513 U.S. at 269; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018); *Lamps Plus, Inc. v. Varela*, 587 U.S. ___, 139 S. Ct. 1407 (2019).

Following *Southland*, another watershed case arising from a conflict with California law transformed the universe of contracts, preemption, and arbitration.⁷⁸ In *Concepcion*, the Supreme Court held that provisions of the California Code of Civil Procedure outlining certain contract terms that render a clause unconscionable cannot be applied to arbitration agreements, though the provision was generally applicable to all contracts.⁷⁹ The state law rule at issue in *Concepcion* was established by the California Supreme Court in *Discover Bank v. Superior Court*, and concerns the generally applicable contract defense of unconscionability under California law.⁸⁰ California courts may refuse to enforce any contract found “to have been unconscionable at the time it was made” or may “limit the application of any unconscionable clause.”⁸¹ Unconscionability under California law requires both a substantive (overly harsh or one-sided results) and a procedural (oppression or surprise due to unequal bargaining power) component.⁸² In *Discover Bank*, the California Supreme Court interpreted these state laws to mean that in some cases, waivers of class proceedings are unconscionable and thus unenforceable; more specifically, such waivers are subject to the generally applicable defense of unconscionability in consumer contracts of adhesion where the party with superior bargaining power has schemed to deliberately cheat many consumers individually of small sums of money (the “*Discover Bank* rule”).⁸³ The Concepcions, customers of AT&T in California, sued the company in federal district court, alleging that the company had engaged in false advertising and fraud by charging them sales tax on “free” phones.⁸⁴ When AT&T moved to compel arbitration based on the terms of the consumer contract, which included an arbitration provision that prohibited class-wide proceedings, the Concepcions argued that the arbitration agreement was unconscionable and unenforceable under the *Discover Bank* rule.⁸⁵ The district court denied AT&T’s motion to compel arbitration, and the Ninth Circuit affirmed, agreeing that California’s *Discover Bank* rule made the arbitration agreement unconscionable and further reasoning that the rule was not preempted by the FAA

78. *Concepcion*, 563 U.S. 333.

79. *Id.* at 341–44.

80. *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (“[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.”) (citation omitted).

81. CAL. CIV. CODE § 1670.5(a) (2022).

82. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

83. *See Discover Bank*, 113 P.3d at 1100.

84. *Concepcion*, 563 U.S. at 337.

85. *Id.* at 337–38.

because it was merely “a refinement of the unconscionability analysis *applicable to contracts generally* in California.”⁸⁶ The Supreme Court disagreed.

Justice Scalia, writing for the majority in *Concepcion*, reasoned that even when a “doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration,”⁸⁷ if the Court determines that the state law rule is “an obstacle to the accomplishment of the FAA’s objectives,” it is preempted by the Act.⁸⁸ The Court went on to find that class wide proceedings are inconsistent with the FAA, and thus preempted, when not explicitly consented to because they impose a formality and procedural complexity that undermine the efficient and streamlined nature of arbitration.⁸⁹ That procedural informality and efficiency are, the Court found, “fundamental attributes” of arbitration, and so interfering with them runs afoul of the FAA.⁹⁰

The majority’s reasoning in *Concepcion* is a clear illustration of the extraordinary treatment arbitration and the FAA receive, in particular vis-à-vis state-law rules of contract. The *Discover Bank* rule, as Justice Breyer’s dissent points out, “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.”⁹¹ Therefore, according to the dissent, the *Discover Bank* rule does not run afoul of either the language or the objective of the FAA because it does not prohibit arbitration, create an arbitration-specific rule or obstacle, nor disfavor arbitration as compared to any other procedure of dispute resolution. Taking aim at the majority’s extensive negative discussion of class proceedings to justify its conclusion that the *Discover Bank* rule frustrates the objectives of the FAA, the dissent argues:

Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?⁹²

86. *Id.* at 338 (emphasis added) (quoting *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (2009)).

87. *Id.* at 341.

88. *Id.* at 343.

89. *Id.* at 348.

90. *Concepcion*, 563 U.S. at 344.

91. *Id.* at 359 (Breyer, J., dissenting). Breyer noted that the *Discover Bank* rule is an application of a more general unconscionability principle. *Id.* at 358.

92. *Id.* at 365 (Breyer, J., dissenting).

While *Concepcion* received much scholarly coverage concerning its impacts on the availability of class proceedings,⁹³ it had an equally troubling, but less explored, result that undermined the heart of state authority over contract law: the reasoning authorized the Court to dictate—here, curtail—the scope of unconscionability under state contract law as interpreted by state courts.⁹⁴ A consequence of *Concepcion* is that the Supreme Court, not state courts or legislatures, determine the legal standards of contract law that apply to arbitration. Essentially acknowledging this point, Justice Scalia wrote in *Concepcion* that by this time the Court had suggested “that the FAA’s pre-emptive effect might extend even to grounds traditionally thought to exist ‘at law or in equity for the revocation of any contract.’”⁹⁵ This, of course, appears to facially conflict with the FAA’s own language that arbitration agreements be enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”⁹⁶ and the Court’s own assertion that arbitration agreements belong on “an equal footing with other contracts.”⁹⁷ As has become increasingly obvious, however, the Court’s interpretation of the FAA “places arbitration clauses not on equal footing, but on a pedestal.”⁹⁸

B. Canary in the Coal Mine: *McGill v. Citibank*

93. See, e.g., Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016); Aaron Blumenthal, Comment, *Circumventing Concepcion: Conceptualizing Innovative Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver*, 103 CALIF. L. REV. 699 (2015); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015); Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CALIF. L. REV. 103 (2015); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217 (2013); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012); David L. Noll, *Rethinking Anti-Aggregation Doctrine*, 88 NOTRE DAME L. REV. 649 (2012); Resnik, *supra* note 19.

94. In another major arbitration case before the Supreme Court, an employee who filed an employment discrimination claim defended against a motion to compel arbitration by the employer, arguing that the employment contract itself was unconscionable under Nevada state law. *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63 (2010). While the employee did not dispute that the arbitration agreement assigned the question of arbitrability to the arbitrator, he argued that because the arbitration clause was unconscionable, he could not meaningfully assent to it. Therefore, the employee argued, and the Ninth Circuit agreed, the threshold question of conscionability was an issue for the court, not an arbitrator. As is discussed in more detail in the following section, the Supreme Court did not agree with the Ninth Circuit and held that where an arbitration agreement delegates authority to an arbitrator to determine the agreement’s validity, the court must compel arbitration. *Id.* at 68–70.

95. *Concepcion*, 563 U.S. at 341.

96. 9 U.S.C. § 2.

97. *Concepcion*, 563 U.S. at 339 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

98. Frankel, *supra* note 27, at 532.

No state's authority over contract law is exempt from the intrusive reach of the FAA. *Southland*, of course, was the divisive initial case where the Supreme Court stripped California, and all other states, of the ability to enforce statutory requirements that conflicted with its expansive interpretation of the FAA or its interpretation of the policy choices of Congress in enacting the FAA.⁹⁹ The Supreme Court has repeatedly overruled and occasionally abrogated the California Supreme Court's interpretation and application of California state laws.¹⁰⁰ It is thus predictable that the California Supreme Court appears at times hostile to the Supreme Court's interference with their interpretation of their own state's laws; modern federal arbitration jurisprudence regularly interferes with California's ability to legislate its own business, consumer, and commercial infrastructures by hamstringing California contract law.

Before moving on to explore how the Court's expansive interpretation of the FAA has similarly impacted contract law issues and truncated traditional state authority in states other than California, a 2017 case is a 'canary in the coal mine' for how dramatically the Court might extend its already expansive interpretation of the FAA, further fomenting arbitration supremacy. The case, heard before the California Supreme Court, arose between an individual and Citibank, her credit card issuer. The dispute concerned the "validity of a provision in a predispute arbitration agreement that waives the right to seek the statutory remedy [for violations of the Consumers Legal Remedies Act]¹⁰¹ in any forum."¹⁰²

Arguments advanced in *McGill v. Citibank*¹⁰³ are an eye-opening illustration of how the Supreme Court's treatment of arbitration has empowered parties to make incredible claims about the scope of the FAA's preemption. In *McGill*, the California Supreme Court found that the FAA did *not* preempt a California rule that makes invalid provisions in a predispute arbitration agreement waiving the right to seek a statutory remedy *in any forum*.¹⁰⁴ Justice Chin, writing for the court, held that allowing predispute arbitration agreements to contain provisions that waive the signatories' right to seek a statutory remedy for a violation of the Consumers Legal Remedies Act, among other state consumer protection laws, was contrary to California public policy and thus unenforceable under California law.¹⁰⁵ Citibank argued that the above principles apply only when enforcement of an arbitration agreement would lead to forfeiture of a *federal* statutory right. This is so, Citibank

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

100. See *Southland*, 465 U.S. at 1; *Concepcion*, 563 U.S. at 333; *Viking River Cruises Inc. v. Moriana*, 142 S. Ct. 1906 (2022).

101. CAL. CIV. CODE §§ 1750–84 (2022).

102. *McGill v. Citibank, N.A.*, 393 P.3d 85, 87 (Cal. 2017).

103. *Id.*

104. *Id.*

105. *Id.*

asserted, because only *federal* statutes “stand on equal footing with and therefore *modify* the FAA, whereas a state law that is in conflict with federal law is *preempted* by the FAA.”¹⁰⁶

As the California Supreme Court noted, Citibank’s arbitration agreement with McGill did not merely require her to arbitrate her claims on an individual basis but precluded her from seeking public injunctive relief in arbitration, in court, or in any forum. The substance of the state statutory right at issue—the right to seek public injunctive relief—is thus forum-neutral, but irrelevant to the legal issue of the case: whether McGill could validly waive her right to vindicate the statutory right in any forum. California law holds that such a waiver is not valid and the California Supreme Court has held the law is not preempted by the FAA because it is “a generally applicable contract defense, i.e., it is a ground under California law for revoking any contract.”¹⁰⁷ Thus it falls within the scope of the FAA’s saving clause and Citibank’s argument that, only “when enforcement of an arbitration agreement would lead to forfeiture of federal statutory right” can the state law survive FAA preemption, is without merit.¹⁰⁸ The fact that Citibank made this argument at all should be concerning. While the California Supreme Court rejected it, if some iteration of that position finds its way to the United States Supreme Court, applying its expansive preemptive interpretation of the FAA, the result may be quite different.

C. The FAA: A Graveyard for State Contract Law

California is far from alone in losing its traditional jurisdiction over contract law. Many other key arbitration cases in the Supreme Court, establishing and fortifying the supremacy of arbitration over contrary state law and policy, emerged from what the Court saw as conflicts between state law and the FAA. To conclude this section, I review several cases involving state contract law that made their way from Alabama, Montana, Florida, Nevada, West Virginia, and Kentucky to the Supreme Court. In each case, state law was preempted by the FAA and arbitration’s reach expanded ever further, concretizing a judicially constructed doctrine of arbitration supremacy.

Even after the decision in *Southland*, Alabama long disfavored the enforcement of arbitration clauses.¹⁰⁹ An Alabama statute passed in 1993 made written, predispute arbitration agreements invalid and unenforceable.¹¹⁰ After a termite inspection gone wrong, Terminix and one of its franchises, Allied-Bruce, which operated in Alabama, were sued in state court by homeowners dealing with an infestation.¹¹¹ Allied-Bruce and Terminix immediately moved to stay the proceedings in order for arbitration to proceed on the basis of an arbitration clause

106. *Id.* at 95.

107. *Id.* at 94.

108. 9 U.S.C. § 2; *McGill*, 393 P.3d at 94.

109. See Henry C. Strickland, *Allied-Bruce Terminix, Inc. v. Dobson: Widespread Enforcement of Arbitration Agreements Arrives in Alabama*, 56 ALA. L. 238, 242 (1995).

110. ALA. CODE § 8-1-41(3) (2022).

111. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995).

contained within the “Termite Protection Plan” purchased by the homeowners.¹¹² The Alabama court denied the motion to stay, and that denial was upheld by the Supreme Court of Alabama.¹¹³ The Supreme Court of Alabama held that the FAA neither preempted nor conflicted with the Alabama statute “because the connection between the termite contract and interstate commerce was too slight. In the [Supreme Court of Alabama]’s view, the [FAA] applies to a contract only if ‘at the time [the parties entered into the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity.’”¹¹⁴ This reading of the FAA’s reach was not unique to Alabama: it had also been adopted by courts in North Carolina, Kansas, and Virginia.¹¹⁵ Moreover, when this case reached the Supreme Court, twenty state attorneys general requested the Court overturn its ruling in *Southland* and permit Alabama (and thus all other states) to recover their traditional authority over contract law and specifically the regulation of arbitration within their jurisdiction.¹¹⁶ Justice Breyer, writing for the majority, held that the FAA applied to transactions that in fact involve interstate commerce “even if the parties did not contemplate an interstate commerce connection.”¹¹⁷ The three Justices writing separately—Justices O’Connor, Scalia, and Thomas—concurring, dissenting, and dissenting, respectively, all articulated their position that *Southland* was wrongly decided, and that Congress did not intend the FAA to apply in state courts.¹¹⁸

Just a year after *Dobson*, the Supreme Court took up a case involving a Montana state law establishing an arbitration-specific contract requirement: the law mandated that any contract subject to arbitration indicate as much by “typ[ing] in underlined capital letters on the first page of the contract.”¹¹⁹ The Montana Supreme Court interpreted the Supreme Court’s holding in *Volt Information Sciences*¹²⁰ to direct courts, in doing an FAA preemption analysis, to ask whether the state law at issue undermines the objectives of the FAA.¹²¹ It found that the

112. *Id.* at 268.

113. *Id.* at 269.

114. *Id.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354 (Ala. 1993)).

115. *Id.* at 269–70.

116. *Allied-Bruce Terminix*, 513 U.S. at 268.

117. *Id.* at 281.

118. *Id.* at 282–97 (O’Connor, J., concurring) (Scalia, J., dissenting) (Thomas, J., dissenting).

119. MONT. CODE ANN. § 27-5-114 (West 1997).

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

121. *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995). The court wrote:

Our conclusion that Montana’s notice requirement does not undermine the policies of the FAA is based on the Supreme Court’s conclusion that it was never Congress’s intent when it enacted the FAA to preempt the entire field of arbitration, and its further conclusion that the FAA does not require parties to arbitrate when they have not agreed to do so. That Court held that the purpose of the FAA is simply to enforce arbitration

Montana law requiring notice of an arbitration clause in a contract did not undermine the FAA because its requirement did not discourage arbitration but rather required that arbitration agreements be entered knowingly.¹²² Reversing the Montana Supreme Court in *Doctor's Associates, Inc. v. Casarotto*, Justice Ginsburg, writing for the majority, held that the requisite FAA preemption analysis does not only ask whether the state law undermines the FAA but must also inquire whether it singles out arbitration or treats arbitration provisions with "suspect status:" courts may not "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."¹²³ Thus statutes such as Montana's, establishing a notice requirement specific to contracts containing arbitration clauses, are preempted by the FAA. An identical requirement for some other, non-arbitration contract term would presumably enjoy no such federal life support and would remain within the power of the state to regulate.

The Supreme Court has also held that states may not exempt certain types of claims from arbitration. West Virginia, for example, exempted wrongful death lawsuits from the scope of the FAA: "[A]rbitration clauses in nursing home admission agreements . . . cannot be enforced to compel arbitration of a later negligence action against the nursing home."¹²⁴ This state-law rule was struck down by the Court in *Marmet Health Care Center, Inc. v. Brown*.¹²⁵ More recently, Kentucky attempted to limit the ability of an agent (through power of attorney) to contract away a principal's right to access the courts, that is, to bind the agent to arbitration without express permission to do so.

[A] long-standing rule of law applicable to a wide range of constitutional rights provides that waivers of such rights must be voluntary, knowing, and intelligent. Yet in arbitration cases, courts regularly find waivers of the constitutional right to a jury trial on the basis of fine-print clauses that are buried in adhesion contracts and that consumers and employees rarely read, let alone understand. Indeed, the Supreme Court has instructed that if there is any doubt as to whether an arbitration clause waives a party's right to a jury with respect to a

agreements into which parties had entered, and acknowledged that the interpretation of contracts is ordinarily a question of state law. . . . Montana's notice requirement does not preclude parties from knowingly entering into arbitration agreements, nor do our courts decline to enforce arbitration agreements which are entered into knowingly.

Id. at 597–98 (quoting *Casarotto v. Lombardi*, 886 P.2d 931, 938–39 (Mont. 1994) (citing *Volt*, 489 U.S. at 474)).

122. *Id.* at 598.

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

124. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 293 (W. Va. 2011).

125. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012). Likewise, California exempted wage disputes from arbitration, only for the law to be preempted by the FAA in *Perry v. Thomas*. *Perry v. Thomas*, 482 U.S. 483, 491–92 (1987) (holding that the FAA preempted a provision of California law that stated that wage collection actions may be maintained without regard to existence of any private agreement to arbitrate).

particular claim, courts should indulge in a presumption that construes contracts in favor of requiring arbitration if possible.¹²⁶

The Kentucky Supreme Court wrote that “the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document in order for that authority to be vested in the attorney-in-fact.”¹²⁷ Two years later, the Supreme Court eliminated this Kentucky rule in *Kindred Nursing Centers. Ltd. Partnership v. Clark*.¹²⁸

The FAA’s extraordinary intrusion into states’ ability to regulate contract law on behalf of arbitration is particularly astonishing in *Buckeye Check Cashing, Inc. v. Cardegna*.¹²⁹ Before being overturned by the Supreme Court of the United States, the Supreme Court of Florida held that a claim that a contract is void ab initio under Florida law must be resolved before a term from that contract—e.g., an arbitration clause—can be compelled.¹³⁰ The Supreme Court of Florida held: “Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract. Florida’s law has long held that contracts which are determined to be against public policy and void should not be enforced.”¹³¹ Florida’s determination that, for contracts subject to Florida law, a court may determine whether a contract is void before enforcing its terms seems facially reasonable. To enforce the terms of a contract that may be void seems much less sensible. Justice Scalia, writing for the Court in *Buckeye Check Cashing*, briefly acknowledges this tension: “[T]he *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void.”¹³² The legal mechanism, specific to arbitration clauses, that facilitates the unintuitive outcome in *Buckeye Check Cashing* is what I turn to in the following section: the doctrine of separability, and its operation as a gateway into the world of arbitrability, i.e., arbitrating the scope and enforceability of an arbitration clause.

III. ARBITRATING ARBITRABILITY

A. The Separability Doctrine

The legal issue of arbitrability begins with the doctrine of separability. The doctrine of separability, a court-constructed doctrine exclusively applied to

126. *Arbitration-at-all-Costs*, *supra* note 27, at 136.

127. *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328 (Ky. 2015).

128. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1425 (2017) (holding that Kentucky’s clear-statement rule, requiring an explicit statement in a power of attorney that the attorney-in-fact has authority to waive the principal’s state constitutional rights to access the courts and to a jury trial is preempted by the FAA).

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

130. *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 861 (Fla. 2005).

131. *Id.* at 864.

132. *Buckeye Check Cashing*, 546 U.S. at 448.

arbitration clauses, is what saves an arbitration agreement when the contract in which it is contained may otherwise be unenforceable. The separability of an arbitration clause from the rest of a contract was first established by the Supreme Court in *Prima Paint*¹³³ in 1967. The rationale behind the doctrine is relatively straightforward:

In some cases, one of the parties to a contract with an arbitration clause will contend that the entire contract is unenforceable. The FAA provides that arbitration agreements should be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.” Arguably, if the entire contract is void, then there is no agreement to arbitrate, and the party resisting arbitration should not be forced into an arbitral forum. On the other hand, if the challenge to the entire contract turns out to be without merit, then the party seeking arbitration should not have been forced to litigate that issue. The federal courts escape this conundrum by applying the doctrine of severability of the arbitration provision.

The doctrine of severability of the arbitration provision springs from the language of section 4 of the FAA. Section 4 authorizes federal courts to compel arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.”¹³⁴

Section 4 of the FAA assigns to judges the task of resolving disputes about whether parties in fact agreed to arbitration, stating that if any disputes arise concerning “the making of the arbitration agreement . . . the court shall proceed summarily to the trial thereof.”¹³⁵ In 1986, the Supreme Court held that arbitrability is “undeniably an issue for judicial determination . . . [u]nless the parties clearly and unmistakably provide otherwise”¹³⁶ However, arbitrators have been tasked with determining arbitrability with some regularity, at least in the domain of labor

133. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); Belton & Bland write:

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the Court held that the FAA requires that arbitration clauses be treated as though they are separable from the rest of the contract. In other words, even if a contract containing an arbitration clause is unenforceable for some reason (perhaps for fraudulent inducement), courts are to treat the arbitration clause as separate from the remainder of the contract and thus presumptively enforceable notwithstanding the broader contract's problems.

Arbitration-at-all-Costs, *supra* note 27, at 1449.

134. Thomas J. Lilly Jr., *Arbitrability and Severability in Statutory Rights Arbitration Agreements: How to Decide Who Should Decide*, 42 OK. CITY UNI. L. REV. 1, 14 (2017).

135. 9 U.S.C. § 4.

136. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).

arbitration, since the mid-1900s.¹³⁷ The arbitration of arbitrability disputes is not unprecedented; in England, France, and Switzerland, for example, the principle of *kompetenz-kompetenz* holds that arbitrators and other tribunals have the competence and jurisdiction to determine their jurisdiction.¹³⁸ However, before the Supreme Court's jurisprudential pivot in the 1980s that dramatically transformed the interpretation and scope of the FAA, the Court had suggested that arbitrating arbitrability was an exceptional procedural move.¹³⁹ Traditionally, and in accordance with Section 4 of the FAA, trial courts served as an important check on the procedural fairness of arbitration proceedings: overseeing mandates of confidentiality to prevent their abuse; ensuring that statutes of limitations were not unreasonably shortened; ensuring unbiased arbitrators were selected; and preventing the imposition of unreasonable costs or fees, among other things.¹⁴⁰

However, now, to execute a contract with an arbitration clause is to open that contract up to an entirely unique body of law designed by the Court exclusively for arbitration agreements. As Justice Toal of the Supreme Court of South Carolina has put it, courts are “effectively plac[ing] arbitration agreements in a position of vast superiority to all other contracts. In essence, arbitration agreements now become ‘super contracts,’ in which the parties’ intentions in outlining the scope of their agreement are irrelevant, and courts must now indiscriminately send parties to arbitration regardless of their intentions.”¹⁴¹ This extraordinary treatment of arbitration clauses—the Court's tendency to develop doctrines like separability to save arbitration agreements or expand their enforceability—is what I refer to as arbitration exceptionalism.

B. Arbitration *Matryoshka*

The Court first considered the issue of arbitrating arbitrability under the auspices of the FAA in *First Options of Chicago, Inc. v. Kaplan*, granting certiorari to clarify the standard courts should implement when reviewing an arbitrator's decision that a dispute is or is not subject to arbitration or interpreting an ambiguous delegation clause concerning disputes over arbitrability.¹⁴² Importantly, *First Options* involved sophisticated parties—i.e., businesses and banks, rather than individuals without sophisticated knowledge of or experience in the legal system, or individuals bound by contracts of adhesion. Justice Breyer wrote for the Court

137. David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 382–83 (2018).

138. See, e.g., William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 AM. REV. INT'L ARB. 133 (1997); Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 LA. L. REV. 1045 (1986).

139. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960).

140. Horton, *supra* note 137, at 369–70.

141. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 791 S.E.2d 128, 137–38 (S.C. 2016) (Toal, J., dissenting).

142. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

that if the parties agreed to submit the arbitrability question to the arbitrator, then the arbitrator's decision should be given the exceptional deference generally accorded to arbitration decisions.¹⁴³ "an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits."¹⁴⁴ However, if the parties did not agree to submit the question of arbitrability to arbitration, then the court should resolve it as it would any other issue not delegated to arbitration.¹⁴⁵ It was in *First Options* that the "clear and unmistakable evidence" standard was formulated with respect to parties' intent to arbitrate arbitrability.¹⁴⁶ As scholars have noted, the "legacy" of *First Options* was "not its analysis of the facts" but instead "its strong suggestion that the FAA did not bar contractual partners from unambiguously agreeing to submit the arbitrability question itself to arbitration."¹⁴⁷

Despite an initial judicial hesitancy to apply the principles articulated in *First Options* concerning the arbitration of arbitrability to consumer and employment contexts, the Court eventually held that the fairness of an arbitration agreement can be exclusively delegated to the arbitrator.¹⁴⁸ In *Rent-A-Center, West, Inc. v. Jackson*, the Court held that an arbitration agreement that delegated to the arbitrator exclusive authority to resolve any dispute relating to the agreement's enforceability was valid under the FAA.¹⁴⁹ Jackson, an employee of Rent-A-Center who sued the company for racial discrimination and retaliation, argued that the arbitration agreement included in his employment contract was unconscionable under Nevada law because it forced him to pay a portion of the arbitrator's fees and provided for a much more circumscribed discovery than would be contemplated in a judicial forum.¹⁵⁰ The Ninth Circuit held that it had jurisdiction over Jackson's claim because if the arbitration agreement were unconscionable, then it could not pass the "clear and unmistakable evidence" test and thus Jackson could not have agreed to delegate the question of arbitrability, which would

143. *Id.* at 943.

144. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (quoting *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62 (2000)).

145. *Kaplan*, 514 U.S. at 940–43.

146. *Id.* at 944.

147. Horton, *supra* note 137, at 391–92. See also Natasha Wyss, *First Options of Chi., Inc. v. Kaplan: A Perilous Approach to Kompetenz-Kompetenz*, 72 TUL. L. REV. 351, 357–58 (1997).

148. Horton states that:

Courts had few qualms about agreements to arbitrate arbitrability in business-to-business transactions or contracts involving savvy individuals like Manuel Kaplan. But judges were more skeptical when these clauses appeared in adhesion contracts. [E]ven as late as the dawn of the new millennium, courts refused to allow arbitrators to resolve matters of substantive arbitrability in the consumer and employment setting.

Horton, *supra* note 137, at 393–94.

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

150. *Id.* at 65–66, 74.

exclude the question from the jurisdiction of the arbitrator.¹⁵¹ The Supreme Court, predictably, disagreed. Justice Scalia, writing for the majority, held that the “clear and unmistakable evidence” rule applied to a “*manifestation of intent*” rather than the parties’ actual assent to delegate arbitrability to the arbitrator.¹⁵² The Court also set aside Jackson’s unconscionability argument, reasoning that an arbitration agreement is separable from the ‘container contract’ in which it exists,¹⁵³ and that a delegation clause is likewise separable from the arbitration agreement such that a party must prove the delegation clause invalid before asking a court to review the fairness or conscionability of the arbitration agreement.¹⁵⁴ *Rent-A-Center* thus established a second separability doctrine within the separability doctrine: while arbitration agreements are separable from their container contracts, so are delegation clauses separable from their arbitration agreements.¹⁵⁵

The spirited dissent in *Prima Paint* articulates precisely what is so concerning about the doctrine of separability and the permissibility of arbitrators determining the arbitrability of disputes and claims:

The Court here holds that the United States Arbitration Act, as a matter of federal substantive law, compels a party to a contract containing a written arbitration provision to carry out his ‘arbitration agreement’ even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—void because of fraud in the inducement. The Court holds, what is to me fantastic, that the legal issue of a contract’s voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified

151. *Jackson v. Rent-A-Center W., Inc.*, 581 F.3d 912, 914, 917 & n.1 (9th Cir. 2009), *rev’d*, 561 U.S. 63 (2010).

152. *Rent-A-Center*, 561 U.S. at 69 n.1.

153. *Id.* at 64; *see also* *Prima Paint Corp. v. Food & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

154. *Rent-A-Center*, 561 U.S. at 70–72.

155. Horton writes that:

Prima Paint decreed that a challenge to the validity of the container contract (but not the arbitration clause) is a matter for the arbitrator to hear. The Court in *Rent-A-Center* took this principle one step further and held that if an arbitration clause includes a delegation clause, a challenge to the validity of the arbitration clause (but not the delegation clause) is also for the arbitrator to evaluate.

to decide legal issues, and even if qualified to apply the law, not bound to do so.¹⁵⁶

At the time of *Prima Paint*, the Court arguably treated the arbitration clause as simply a contract-within-a-contract that could be considered separately from its “container contract.” The dispute in *Buckeye Check Cashing v. Cardegna*,¹⁵⁷ however, is precisely what Justice Black cautioned against in his *Prima Paint* dissent: an arbitration agreement that could at least temporarily sustain a void ab initio contract, even in the face of explicitly contrary state law and policy, simply as a matter of arbitrability. Even more unsettling, by the time the Court decided *Rent-A-Center*, its FAA jurisprudence had developed so expansively as to treat arbitration clauses as a kind of “super term” subject to a Court-made federal law of arbitration, which it developed piecemeal at the expense of traditional state authority. Arbitration agreements had been transformed by the Court into exceptional contracts-within-contracts that could survive not only the invalidity or voidness of a container contract but even state contract laws of general applicability as applied to the term itself.¹⁵⁸

Unsurprisingly, the Supreme Court continued to develop the exceptional treatment of arbitration agreements and delegation clauses following *Rent-A-Center*. Its jurisprudence toward delegation clauses and arbitrability determinations have not reclaimed any jurisdictional territory for the courts. As a matter of course, some businesses now include a “secondary” arbitration clause within their arbitration agreements that mandates the arbitration of any questions of arbitrability, thereby removing any judicial oversight of the arbitration proceedings whatsoever.¹⁵⁹

Justice Kavanaugh, in his first opinion for the Court, affirmed the standard established in *First Options in Henry Schein, Inc. v. Archer and White Sales, Inc.*¹⁶⁰ The Court reiterated that courts retain jurisdiction to decide the question of whether an issue is arbitrable unless there is “clear and unmistakable evidence” that the parties agreed to arbitrate questions of arbitrability.¹⁶¹ Arbitrability is a “gateway” question: it is a preliminary procedural question that must be resolved to move forward with consideration of the merits of a case.¹⁶² In the unanimous *Henry Schein* decision, the Court remarked: “Under the [FAA], arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms.

156. *Prima Paint*, 388 U.S. at 407 (Black, J., dissenting) (citation omitted).

157. *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 447–48 (2005).

158. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). To be clear, this trend is not the Court reshaping state contract laws of general applicability broadly, as applied to any contract; instead, it is the Court carving out arbitration-specific exceptions to state contract law.

159. See, e.g., *Tiri v. Lucky Chances, Inc.*, 171 Cal. Rptr. 3d 621, 636 (Cal. 2014) (holding that the court has no authority to review the enforceability of an arbitration agreement as a result of the delegation clause within the arbitration agreement).

160. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 526 (2019).

161. *Henry Schein, Inc.*, 139 S. Ct. at 531.

162. See *id.* at 529.

... [A]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce.”¹⁶³

However, on the novel legal question before it, the Court found that even “wholly groundless” claims of arbitrability must go to the arbitrator.¹⁶⁴ In *Henry Schein*, a dental equipment distributor sued competitors that distributed and manufactured dental equipment under the Sherman Act and Texas state law seeking “both money damages and injunctive relief.”¹⁶⁵ The contract between the parties provided that any dispute arising under or related to the agreement, excepting actions seeking injunctive relief, would be resolved through arbitration.¹⁶⁶ The defendants attempted to compel arbitration, but their motion was denied because the plaintiff had sought injunctive relief, and claims for injunctive relief had been carved out of the arbitration agreement between the parties.¹⁶⁷ The Fifth Circuit affirmed the district court’s denial of the motion to compel arbitration,¹⁶⁸ and the defendants appealed to the Supreme Court, arguing that an arbitrator, not the court, should determine whether the arbitration agreement applied to the action.¹⁶⁹ Before the Supreme Court, the plaintiff countered that the argument for arbitration was “wholly groundless,” and thus the district court retained jurisdiction to resolve the threshold arbitrability question.¹⁷⁰

Although the Court determined that even “wholly groundless” claims of arbitrability must be determined by the arbitrator where the parties have agreed to delegate arbitrability disputes,¹⁷¹ it left open the question of when a delegation

163. *Id.*

164. *Id.* at 529–31.

165. *Id.* at 528.

166. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) (citing the contract term excepting actions seeking injunctive relief from binding arbitration).

167. *Id.*

168. *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 490–91 (5th Cir. 2017).

169. *Henry Schein, Inc.*, 139 S. Ct. at 528.

170. *See id.*

171. For a compelling discussion of the “wholly groundless” rule, see Horton, *supra* note 137, at 424–29. Horton writes that:

The “wholly groundless” rule is supposed to give courts a safety valve for far-fetched assertions that an arbitration agreement applies to a particular claim. Suppose *A* and *B* enter into a contract for the sale of widgets that includes an arbitration clause allowing the arbitrator to resolve any dispute about its scope. Years later, *A* crashes her car into *B*, who sues *A* for personal injuries. If the delegation clause in the widget sales contract is taken at face value, the arbitrator would need to decide whether *B* needs to arbitrate her unrelated tort claim against *A*. Because entering the arbitral forum only to be inevitably bounced out seems like a colossal waste of time and resources, the First, Fifth, Sixth, and

clause is “clear and unmistakable,” and whether the clause in the *Henry Schein* case had met that standard.¹⁷² The Court subsequently granted certiorari on this question in June 2020 but dismissed it as improvidently granted after oral argument in January 2021.¹⁷³ When the Court inevitably returns to this legal issue, it will have several specific questions to contemplate. The first is whether an agreement that incorporates by reference the rules of the American Arbitration Association (AAA)—which include a “competence-competence” provision that empowers arbitrators to adjudicate arbitrability issues¹⁷⁴—satisfies the “clear and unmistakable evidence” standard in manifesting the parties’ intent to delegate arbitrability questions to the arbitrator. If boilerplate incorporation by reference to institutional arbitration rules like those promulgated by the AAA is sufficient to delegate arbitrability questions to the arbitrator, the Court may still find that such delegation is not sufficient to confer *exclusive* jurisdiction on the arbitrator to determine the arbitrability rule. Given the Court’s recent holdings, this outcome is unlikely, but the possibility is important for several reasons. If boilerplate incorporation is enough to delegate authority to the arbitrator to determine issues of arbitrability but does not remove jurisdiction from the courts to decide the same issue, courts can retain an important supervisory position in a vast number of arbitration agreements in force in the United States today. However, such a decision will almost certainly result in the immediate and ubiquitous additions of express delegation clauses in arbitration agreements, providing for exclusive jurisdiction by the arbitrator for issues of arbitrability. But if boilerplate incorporation of the AAA’s rules is enough to provide exclusive jurisdiction to an arbitrator to decide arbitrability, untold numbers of arbitration agreements will instantaneously fall outside the reach of the courts and disappear into arbitral forums.

Setting aside the question of arbitrators’ competence to decide issues of arbitrability and the fairness of mandatory arbitration-of-arbitrability in contracts of adhesion, *Henry Schein* raised another interesting issue that the Court did not reach: what effect the injunctive relief carve-out from the arbitration clause had on the overall arbitration agreement? The question of whether or not the action, or only part of the action, is arbitrable may be subject to an arbitrator’s determination; if the arbitrator’s jurisdiction over the arbitrability determination is exclusive, then the injunctive carve-out, its scope, and its impact must be resolved by the arbitrator

Federal Circuits, among other courts, have observed that judges can ignore delegation clauses when the merits are not “at least arguably covered by the agreement.”

Id. at 425 (citations omitted). Horton’s article was published prior to the Court’s decision in *Henry Schein, Inc.*.

172. *Henry Schein, Inc.*, 139 S. Ct. at 531.

173. *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 107 (2020) (No. 19-963, 2019 Term) (mem.); see Transcript of Oral Argument, *Henry Schein, Inc. v. Archer and White Sales, Inc.* (U.S.) (2020) (No. 19-963), 2020 WL 7229731/7246514 (duplicate filings). *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 141 S. Ct. 656 (2021) (mem.) (per curiam).

174. The provision reads in relevant part: “[T]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.” Rule 7(a) of the Commercial Arbitration Rules of the AAA.

before the court can exercise its jurisdiction over either the entire action or the injunctive components as carved out in the arbitral proceedings. If it seems strange that a court would allow a privately organized and operated institution like the American Arbitration Association—not Congress, and not another court, such as a state court acting with valid parity—to dictate the scope of the court’s jurisdiction over the action, that is because it is. *Henry Schein* raised this precise issue before its remand and subsequent dismissal: Does an express carve-out like the one applicable to injunctive relief in *Henry Schein* preempt a delegation clause within the same arbitration agreement?¹⁷⁵ If the Supreme Court continues to treat arbitrability as a gateway issue, i.e., an issue antecedent to the merits of the case, then it follows that any such carve-outs must be enforced prior to addressing the rest of the agreement, including other issues of arbitrability. But if express carve-outs like one in *Henry Schein* do not preempt delegation clauses, then the question remains: who can, and should, interpret the scope and impact of the carve-out on the agreement.

The unique and ubiquitous role of arbitration agreements in contemporary life make these otherwise esoteric questions of procedural infrastructure incredibly important. Procedure may not always determine the merits of a case, but it often prevents the merits from ever being considered by a court. This is especially true as FAA jurisprudence surrounding arbitrability looks more and more like a Matryoshka doll, at each step moving individuals bound by mandatory arbitration further and further away from the courts. In a time when there is no realistic possibility of individual consumers and employees negotiating changes to contracts and arbitration clauses with the businesses they interface with in daily life, the courts stand as a last bastion of oversight ensuring that parties have access to fora for dispute resolution that are fair and serve their intended legislative purpose. There are some distinctive considerations, often invisible in the reasoning of the Supreme Court, that problematize the use of arbitration and the deference the Court has been willing to show arbitration agreements and now delegation clauses. Many of those distinctive considerations are rooted in the dramatic differential in power that impacts the bargaining positions of the parties involved in the vast majority of consumer and employment arbitration agreements.¹⁷⁶ Not only are corporations repeat players that pay the arbitrators,¹⁷⁷ but there is essentially no avenue of appeal either within or outside the arbitral infrastructure. These disparities in power and sophistication are at the heart of why the Court’s treatment of the FAA as supreme and the arbitration clause as exceptional is so harmful not just to the law and its active development in the marketplace, but also to the workers and consumers who are subject to it. As discussed in the next section of this article, the harm arbitration exceptionalism has wrought will only escalate if the Court’s approach to the FAA and consent in the realm of alternative dispute resolution does not change.

175. *Henry Schein, Inc.*, 141 S. Ct. 107; see *Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019).

176. See *Arbitration-at-all-Costs*, *supra* note 27 and accompanying text.

177. See *Arbitration Nation*, *supra* note 6.

There is one other unusual aspect in the *Henry Schein* case: the petitioner was not a signatory to the contract containing the arbitration clause that was the basis of the motion to compel.¹⁷⁸ This may go some way to explain why the Supreme Court dismissed as improvidently granted certiorari in the second *Henry Schein* case; but there are reasons to believe that the Court may soon establish a wide-reaching right of non-signatories to compel arbitration based on contracts they are not a party to.¹⁷⁹ This, I argue, is yet another opportunity for the Court to entrench its pattern of arbitration exceptionalism: commandeering the state law doctrine of equitable estoppel, the Court may further develop its federal common law of arbitration by establishing a federal doctrine of equitable estoppel specific to arbitration. It is unclear whether such an expansion would provide grounds for non-signatories to compel arbitration based on a delegation doctrine independent of the primary, substantive arbitration clause. As is discussed in the next section, the Court has already held that international arbitration procedures and regulations do not prevent enforcement of arbitration agreements by non-signatories under domestic equitable estoppel doctrine.¹⁸⁰ If this precedent continues in the vein of modern arbitration jurisprudence, it will not be long before workers and consumers are subject to the same: compelled into arbitration and out of the courtroom by non-signatories to the operative contract. As I turn to in the next section, this issue is already appearing in federal courts around the country.

IV. NON-SIGNATORY ENFORCEMENT

Courts have already begun to devise arbitration-specific rules in the invocation of equitable estoppel by non-signatories that make it “much easier to apply equitable estoppel with respect to arbitration clauses than with respect to other contractual provisions.”¹⁸¹ While the Supreme Court recently decided one case presenting this issue in the context of international arbitration,¹⁸² more

178. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 528 (2019).

179. Rosenhouse states that:

The federal courts have initiated and many state courts have recognized and adopted a unique body of ‘equitable estoppel’ law that is peculiarly applicable to cases in which a nonsignatory to an arbitration agreement either seeks to compel arbitration of a claim against itself brought by a signatory party to the arbitration agreement, or asserts a claim against such a signatory, who then seeks to compel the nonsignatory to arbitrate that claim. ... The doctrine differs from traditional equitable estoppel in that it contains no requirement of justifiable reliance.

Michael A. Rosenhouse, Annotation, *Application of Equitable Estoppel to Compel Arbitration by or Against Nonsignatory—State Cases*, 22 A.L.R.6th 387 (2007).

180. See discussion *infra* Section III, notes 184 to 187 and accompanying text.

181. Frankel, *supra* note 27, at 582.

182. *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637 (2020).

concerning domestic iterations of the question are already proliferating in the district and circuit courts. After outlining the jurisprudential frontier of non-signatory arbitration enforcement,¹⁸³ I argue that the extraordinary doctrine surrounding arbitration clauses and the FAA has managed to develop, bit-by-bit, from disputes between parties that are comparably resourced and sophisticated to disputes between parties that have entered contracts with enormously unequal bargaining power. I identify one instance of this pattern of precedential development following the decision in *Mitsubishi Motors*, and I conclude this section by describing how that pattern might repeat with respect to non-signatories compelling arbitration, in particular through the doctrine of equitable estoppel developing into yet another legal instrument of arbitration exceptionalism.

A. GE Energy and *Cooper v. Ruane*

In 2020's *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, the Supreme Court held that a non-signatory to an international contract containing an arbitration agreement could compel arbitration.¹⁸⁴ Justice Thomas, writing for the Court in *Outokumpu*, noted that "[t]he 'traditional principles of state law' that apply under Chapter 1 [of the FAA] include doctrines that authorize the enforcement of a contract by a nonsignatory."¹⁸⁵ While *Outokumpu* was highly circumscribed—finding that a non-signatory to an international arbitration agreement bound by the New York Convention¹⁸⁶ could compel arbitration under the domestic doctrine of equitable estoppel—Justice Sotomayor's concurrence confirms that more concerning applications may be on the horizon.¹⁸⁷ As I discuss below, questions of non-signatory arbitration

183. For an overview of equitable estoppel as invoked to compel arbitration by non-signatories, see Frankel, *supra* note 27, at 580–87. Frankel's article, published in 2014, discusses non-signatory enforcement of arbitration via equitable estoppel, but I disagree with at least one of his conclusions: that "courts have conferred, through equitable estoppel, virtually the same rights to non-signatories as they have to signatories." *Id.* at 585. While this may be the case in the future, it overstates the current status quo; see, for example, *infra* notes 188 to 205 and accompanying text. It is, however, simply a fact that courts are devising arbitration-specific rules for equitable estoppel analysis, and they are generally more forgiving to the moving non-signatories than under general contract law doctrine.

184. *Outokumpu*, 140 S. Ct. at 1646.

185. *Id.* at 1643 (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009)).

186. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517 (entered into force Dec. 29, 1970) [hereinafter New York Convention].

187. "While the FAA's consent principle itself is crystalline, it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small part because some domestic nonsignatory doctrines vary from jurisdiction to jurisdiction." *Outokumpu*, 140 S. Ct. at 1649. Citing one of GE Energy's theories of equitable estoppel as presented to the Court in this case, Justice Sotomayor remarks that one "allegedly 'allows a non-party to force arbitration even of claims wholly unconnected to the agreement.'" *Id.*

enforcement in the context of domestic contracts of adhesion are already working their way through the courts.

Can the investment manager of an employee's profit-sharing fund compel arbitration on the basis of that employee's arbitration agreement with his employer, a contract to which the investment manager is not a party? That is precisely the question presented before the Second Circuit in *Cooper v. Ruane Cunniff & Goldfarb Inc.*¹⁸⁸ In *Cooper v. Ruane*, an employee, Cooper, sued an investment manager claiming breach of fiduciary duty with respect to the management of a profit-sharing fund he was required to participate in by his employer, DST Systems, Inc. The third-party investment advisor and manager, Ruane, hired by DST Systems, sought to compel arbitration in response to Cooper's complaint. The District Court for the Southern District of New York ordered Cooper to arbitrate his claims against Ruane, though Ruane was not a signatory to Cooper's employment contract. The employment contract contained a term mandating arbitration of "all legal claims arising out of or relating to employment." Cooper appealed the district court's order granting the motion to compel arbitration, arguing that his dispute with Ruane was not a legal claim arising out of or relating to his employment.¹⁸⁹ The Second Circuit panel reversed and remanded with one judge dissenting.¹⁹⁰

The outcome in *Cooper v. Ruane* turned on the Court's analysis of whether the claims Cooper brought against Ruane "relate to" his employment under the terms of the arbitration agreement with DST Systems.¹⁹¹ The Second Circuit decided that arbitration clauses containing "relating to employment" language cannot be construed to encompass everything that touches employment in any way, thus aligning itself with similar reasoning evidenced in cases decided in the Ninth,¹⁹² Fifth,¹⁹³ and Eleventh Circuits.¹⁹⁴ The dissent in *Cooper v. Ruane*, providing a potential harbinger of what may come should this issue reach the Supreme Court, argued that because Cooper's arbitration agreement with DST Systems did not "clearly and unambiguously" exclude his breach of fiduciary duty claims against Ruane from arbitration, the district court's decision should be affirmed and arbitration compelled.¹⁹⁵ In effect, the dissent would establish a rule that any ambiguity in an arbitration agreement's scope would always resolve in favor of arbitration of any issue that in any way touches employment, i.e., any incident that would not have occurred *but for* the employment, even if the event itself is outside the scope of employment.¹⁹⁶ The only way to escape the mandate of arbitration

188. *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021).

189. *Id.* at 175.

190. *Id.* at 185.

191. *Id.* at 184.

192. *United States ex rel. Welch v. My Left Foot Child.'s Therapy, LLC*, 871 F.3d 791, 799 (9th Cir. 2017).

193. *Jones v. Halliburton Co.*, 583 F.3d 228, 230 (5th Cir. 2009).

194. *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1208, 1218–20 (11th Cir. 2011).

195. *Cooper*, 990 F.3d at 185–86 (Sullivan, J., dissenting).

196. *See id.* at 188–89. The panel wrote that:

under such a rule would be to “clearly and unambiguously” exclude certain kinds of claims from arbitration in the terms of the agreement.

Cooper v. Ruane is just one case of many in the federal courts exploring the boundaries of non-signatories’ ability to compel arbitration defensively on the basis of contracts to which they are not a party. Such cases include: a credit card issuer unsuccessfully attempting to compel arbitration via equitable estoppel with cardholders based on contracts containing arbitration agreements that were not signed by the credit card issuer;¹⁹⁷ a case permitting non-signatory insurance management consultants to compel arbitration of claims brought against them based on purportedly negligent tax advice;¹⁹⁸ a case allowing Apple, a non-signatory, to rely on the arbitration clause found in the service agreement between customers and AT&T;¹⁹⁹ and a case permitting Best Buy to enforce an arbitration clause contained in cardholder agreement between a consumer and Citibank.²⁰⁰

A recent case in the Ninth Circuit is exactly the kind of dispute that may soon end up before the Supreme Court, offering an avenue for the Court to develop its doctrine of arbitration exceptionalism even further by empowering non-signatories—in particular, non-signatory corporate defendants—to enforce arbitration agreements by establishing a federal common law doctrine of equitable estoppel exclusive to arbitration. In *Ngo v. BMW of North America, LLC*, the buyer of a BMW sued BMW for various breaches of warranty and violations of California consumer protection laws, alleging various defects with the car.²⁰¹ BMW moved to “invok[e] the arbitration clause in the purchase agreement between Ngo and the dealership,” arguing that it was a third party beneficiary of the contract, or, in the alternative, was entitled to compel arbitration under the doctrine of equitable estoppel.²⁰² The Ninth Circuit rejected both of these arguments.²⁰³ The panel rejected the equitable estoppel argument on the basis of California law, which limits non-signatories’ ability to compel arbitration to instances:

The district court concluded, and Ruane urges on appeal, that Cooper’s fiduciary claims ‘relate to’ Cooper’s employment at DST primarily for two reasons: first, in a ‘but for’ causation approach, because he would not have those claims but for his employment at DST; second, because Cooper’s stake in the Plan is part of his overall compensation from DST, and compensation is, of course, a feature of his employment.

Id. at 180. The dissent “would . . . affirm the district court’s conclusion that Cooper’s claims ‘relate to his employment’ within the meaning of the Arbitration Agreement” and “would also affirm the district court’s equitable estoppel holding.” *Id.* at 186 (Sullivan, J., dissenting).

197. *Ross v. Am. Express Co.*, 547 F.3d 137, 148 (2d Cir. 2008).

198. *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1057–58 (9th Cir. 2020).

199. *In re Apple & AT & TM Antitrust Litig.*, 826 F. Supp. 2d 1168, 1176–79 (N.D. Cal. 2011).

200. *Stinson v. Best Buy Co.*, 18-CV-00295, 2018 WL 3850739 (D. Minn. June 26, 2018).

201. *Ngo v. BMW of N. Am., LLC*, 23 F.4th 942, 945 (9th Cir. 2022).

202. *Id.*

203. *Id.* at 948.

- (1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract, and
- (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement.²⁰⁴

While in this case the Ninth Circuit rejected the non-signatory's attempt to compel arbitration, finding that BMW was neither a third-party beneficiary nor could it compel arbitration under the doctrine of equitable estoppel,²⁰⁵ the approach the Supreme Court may take when faced with a similar controversy is less certain: California, like many jurisdictions, provides arbitration-specific rules regarding the doctrine of equitable estoppel.²⁰⁶ Just as the Supreme Court rejected California courts' application of California state law concerning unconscionability in *Concepcion*, so too may it reject California state law concerning equitable estoppel as applied to arbitration; plausibly, it may interpret California's doctrine of equitable estoppel to be more accommodating of arbitration enforceability than California or the Ninth Circuit does, adding yet more ink to the federal common law of arbitration. Such a holding would be entirely consistent with the Court's trend of arbitration exceptionalism.

B. The Mitsubishi Model

While the chasm between *Outokumpu* and cases like *Cooper v. Ruane* and *Ngo v. BMW* remains significant, it is important to take seriously the possibility that the Supreme Court's application of the doctrine of equitable estoppel to domestic cases arising under the FAA may one day command the opposite outcome for disputes like *Cooper's* or *Ngo's*. Even if the Court slows its expansion of the FAA and curtails its exceptional treatment of arbitration clauses, this non-signatory empowerment may come to be on the basis of the law as it currently exists. Indeed, the dissent in *Cooper v. Ruane* argued at length that *Cooper's* breach of fiduciary duty claims against *Ruane*, a non-signatory to the contract containing the arbitration clause, fell within the broad language of the arbitration agreement.²⁰⁷ That is to say, a circuit

204. *Id.* at 948–49.

205. *Id.* at 948. BMW argued that it could invoke equitable estoppel to compel arbitration under the first basis outlined in California law, asserting that *Ngo's* claims were “intimately founded in and intertwined with the underlying contract” because “if *Ngo* had not signed the purchase agreement with the dealership, she would not have been able to purchase her car; if she had not purchased her car, BMW would have issued no warranties; and if BMW had issued no warranties, *Ngo* could not bring statutory claims.” *Id.* at 949.

206. See *Rosenhouse*, *supra* note 179.

207. *Cooper v. Ruane*, 990 F.3d 173, 185–86 (2d Cir. 2021) (Sullivan, J., dissenting).

judge has already found a legal basis for the determination that a third party managing a profit-sharing fund that is hired by one's employer but otherwise has no relationship to the employee is engaging in activities that are sufficiently "relating to employment" such that any disputes arising from those activities are subject to the arbitration agreement.²⁰⁸ The dissent writes:

"Under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate a dispute where" (1) the non-signatory is seeking to arbitrate issues "intertwined with the agreement that the estopped party has signed" and (2) there is "a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement."²⁰⁹

To explain why this should concern those who are troubled by the transformation of the FAA by the Supreme Court since the 1980s, I will draw a comparison to the precedential pattern that emerged after *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*²¹⁰ *Mitsubishi* was a dispute between two sophisticated parties—one a manufacturer and the other a dealer—in the international automobile market.²¹¹ The claims involved were brought under the Sherman Act, but the important takeaway—and what caused *Mitsubishi* to shake up the universe of arbitration—was that the Court held that statutory rights can be arbitrated, i.e., that arbitration can 'effectively vindicate' statutory rights.²¹² Soler Chrysler argued before the Court that an arbitration agreement like the one it had with Mitsubishi could not cover claims arising out of the Sherman Act, a statute that contemplated a protected class, unless the contracting parties had consented and explicitly named the statute in the arbitration clause.²¹³ However, the Court held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."²¹⁴ While reasoning in the context of *Mitsubishi*, the Court was referring to claims under the Sherman Act.²¹⁵ In the

208. *See id.*

209. *Id.* at 189 (Sullivan, J., dissenting) (citing *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126–27 (2d Cir. 2010)).

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

211. *Id.*

212. *Id.*; Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 125 (2016) ("[T]he Supreme Court announced the effective vindication doctrine in *Mitsubishi* . . .").

213. *Mitsubishi*, 473 U.S. at 624.

214. *Id.* at 628.

215. *Id.* at 616.

coming years, the principle of “effective vindication” would support the Court’s reasoning in permitting the arbitration of Racketeer Influenced and Corrupt Organizations Act (RICO) claims,²¹⁶ Securities Exchange Act (SEA) claims,²¹⁷ and statutory claims under, for example, Title VII and the Age Discrimination Employment Act (ADEA).²¹⁸

The Court in *Mitsubishi* justified its holding to permit arbitration of statutory claims by comparing arbitration clauses to forum-selection clauses in international transactions, dismissing any worries that antitrust disputes are too complex for arbitration, and generally reasoning that arbitral fora are fair and competent, in a striking reversal from the Court’s musings on arbitration’s shortcomings in *Alexander v. Gardner-Denver Co.*²¹⁹ Whatever the merits of the Court’s analysis as applied to the specific controversy before it in *Mitsubishi*, the doctrinal shift that followed was a result of the Court opening the floodgates for statutory rights to be ‘adjudicated’ in arbitration. That is precisely what happened. Applying the reasoning implemented to permit arbitration of Sherman Act claims in a dispute between sophisticated corporate parties, the Court cited itself in *Mitsubishi* to subsequently hold that RICO and SEA claims could be subject to arbitration: “[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals’ should inhibit enforcement of the Act”²²⁰ Just six years after *Mitsubishi*, the Court essentially overturned *Alexander v. Gardner-Denver* in *Gilmer v. Interstate/Johnson Lane*, again quoting itself in *Mitsubishi* to assert that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function”²²¹ and that “[i]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”²²²

A trend of bleeding together precedents from disparate areas of dispute through the enthusiastic application and expansion of the FAA and exceptional treatment of arbitration clauses has been noted before. For example, in expanding its interpretation of the FAA, the Court repeatedly likened the law to Section 301 of the Labor Management Relations Act, despite important substantive and subject-matter differences between the two statutes.²²³ And in *14 Penn Plaza v. Pyett*,²²⁴ the Court began the jurisprudential grafting of principles from the domain of labor arbitration to the historically and substantively distinct realm of commercial

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

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

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

219. *Mitsubishi*, 473 U.S. at 632–33; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

220. *McMahon*, 482 U.S. at 226 (citing *Mitsubishi*, 473 U.S. at 626–27).

221. *Gilmer*, 500 U.S. at 28 (citing *Mitsubishi*, 473 U.S. at 637).

222. *Id.* at 29 (citing *Mitsubishi*, 473 U.S. at 628).

223. Allison Anderson, *Labor and Commercial Arbitration: The Court’s Misguided Merger*, 54 B.C. L. REV. 1237, 1238 (2013).

224. *14 Penn Plaza v. Pyett*, 566 U.S. 247 (2009).

arbitration, and vice versa.²²⁵ This problematic pattern has not gone unnoticed; the Sixth Circuit has noted that “[a]lthough labor arbitrations and commercial arbitrations share certain legal concepts, these areas of law are not interchangeable.”²²⁶ Moreover, as discussed in the previous section, the application of the arbitrability holding from the controversy between the sophisticated parties in *First Options* to individuals bound by contracts of adhesion, as in *Rent-A-Center*, inspired in the Court only temporary hesitation.²²⁷

There is nothing at all novel about the observation that the Supreme Court revisits and even overturns precedents, and it is even more prosaic to note that the Supreme Court cites itself. What I am attempting to illustrate here is that in the context of *arbitration* jurisprudence, the Supreme Court has exhibited a pattern, since the 1980s, of expanding the reach of the FAA and broadening the principles of deference to arbitral arenas in contexts that are not particularly controversial only to then graft those same principles—rules developed in controversies between sophisticated, resourced parties as in *Mitsubishi*—to disputes that arise in substantially different circumstances, such as those resulting from contracts of adhesion.²²⁸ In fact, Justice Stevens spoke just to this point in the conclusion of his dissent in *Gilmer v. Interstate/Johnson Lane*:

When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court “has effectively rewritten the statute,” and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration. Although I remain persuaded that it erred in

225. Anderson notes that:

Eventually, the FAA expanded so far that it governed the outcome of *14 Penn Plaza LLC v. Pyett*, a labor arbitration dispute. The *Pyett* decision suggests that the FAA and section 301 have merged. The consequences of this merger are now unfolding. The *AT&T Mobility LLC v. Concepcion* case illustrates that the Court’s commitment to arbitration is unwavering. Although this dispute concerned commercial arbitration, the holding also affects labor arbitration because, as *Pyett* shows, the FAA’s reach extends to the labor context as well.

Anderson, *supra* note 223, at 1274.

226. *Samaan v. Gen. Dynamics Land Sys., Inc.*, 835 F.3d 593, 599 (6th Cir. 2016).

227. See *Horton*, *supra* note 137, at 391–92.

228. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi* to hold that “statutory claims may be the subject of a[] [binding] arbitration agreement, enforceable pursuant to the FAA”). *Gilmer* overturned in spirit if not in word the established precedent that statutory rights are entitled to adjudication in a judicial forum. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55 (1974).

doing so, the Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other.²²⁹

As mentioned just above, in *Mitsubishi*, the Court held that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”²³⁰ The submission of statutory claims to arbitration was one step in the Court’s journey to establishing arbitration exceptionalism in its jurisprudence. It is the following proposition, from Justice Thomas in *Outokumpu*, that I warn could be the lit fuse for yet another step down that path: “[T]he ‘traditional principles of state law’ that apply under Chapter 1 [of the FAA] include doctrines that authorize the enforcement of a contract by a nonsignatory.”²³¹

A primary concern arising from the holding in *Outokumpu*, for the purposes of this article, is the application of the doctrine of equitable estoppel. While the specific application of equitable estoppel varies among states, in general “[i]n the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of [another’s] signature on a written contract precludes enforcement of the contract’s arbitration clause”²³² The Supreme Court held in *Arthur Andersen* that “traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through ‘assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.’”²³³ Thus, state law governs the application of estoppel to permit a non-signatory to compel a signatory to arbitrate.²³⁴ Of course, as discussed at length earlier in this article, the FAA preempts state law and the Court has shown little hesitancy in interpreting, applying, or displacing state law in furtherance of its policy of arbitration favoritism. Moreover, “the hallmark element of traditional equitable estoppel—detrimental reliance—is not a relevant consideration in the arbitration context;”²³⁵ that is, detrimental reliance is not relevant in the court-constructed, arbitration-specific equitable estoppel doctrines taking form across various jurisdictions. Here we see the potential union of arbitration supremacy as established in *Southland* and *Concepcion* with arbitration exceptionalism, as established piecemeal in the proceeding years through various Court-constructed doctrines unique to arbitration clauses and their

229. *Gilmer*, 500 U.S. at 42–43 (Stevens, J., dissenting) (internal citations omitted).

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

231. *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1643 (2020) (citing *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009)).

232. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App’x 704, 708 (10th Cir. 2011) (citing *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 417–18 (4th Cir. 2000)).

233. *Arthur Andersen LLP*, 556 U.S. at 631 (internal quotations omitted).

234. See *Medtronic*, 449 F. App’x at 708.

235. Frankel, *supra* note 27, at 582.

enforceability.²³⁶ With the Supreme Court's explicit pro-arbitration position, even at the expense of generally applicable state contract law, the application of the doctrine of equitable estoppel to disputes involving non-signatories to arbitration agreements spells trouble. Even setting the background pro-arbitration precedent aside, enforcement of an arbitration agreement by a non-signatory to the agreement raises serious concerns of legitimacy: allowing a non-signatory defendant to compel the signatory to arbitrate "not only disregards the most fundamental principle of arbitration—that a party may only be compelled to arbitrate when he previously agreed to arbitration—but it also discourages careful drafting of contracts Furthermore, it improperly gives a nonsignatory the power to compel arbitration according to the contract when he has no contractual relationship to the signatory."²³⁷

This implicates, and jeopardizes, the 'basic precept' that "arbitration is a matter of consent."²³⁸ Even more specifically, the Court has found that "it is [] clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes"²³⁹ and "nothing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement."²⁴⁰ While this dicta arises in cases concerning an arbitrator's decision to permit class arbitration and the ability of the Equal Employment Opportunity Commission to pursue victim-specific enforcement and relief in light of an arbitration agreement, respectively, it bears clear relevance for the ability of non-signatories to enforce arbitration clauses. If arbitration is truly a matter of consent, and a legal agreement of a 'contractual nature,' then any equitable estoppel analysis ought to be applied the same as it would to any other contractual term, defense, or argument. But as the Court has made clear, an arbitration clause is *not* like any other contractual term.

If one takes the Court's position on the supremacy and exceptionalism of arbitration seriously—as this article contends one should—then the importance of non-signatory arbitration enforcement and its precedential development cannot be ignored. The injudicious amalgamation of pro-arbitration precedent in conjunction with the Court's expansive preemptive interpretation of the FAA has led us to a legal regime where arbitration operates as an extrajudicial monolith, unbound from due process, appeal, or meaningful oversight, but ubiquitous in the economic and legal existence of the average individual.

236. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019).

237. Alexandra A. Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711, 714 (2007).

238. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (internal quotations omitted) (citing *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

239. *Id.* at 683.

240. *Equal. Emp. Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (emphasis added).

V. CONCLUSION

In this article, I explored three specific issues at various stages of jurisprudential development: preemption of state law by the FAA, which is well-established and far-reaching; arbitrability, which has its foundation in the separability doctrine recognized in 1967 but is continuing to raise novel legal issues concerning its scope and application; and finally, the ability of non-signatories to enforce arbitration agreements, a question that is emerging with increasing frequency in the lower courts and has wide-reaching implications for the countless arbitration clauses contained in the contracts that are pervasive in contemporary economic life. Before turning to possible responses to the supremacy and exceptionalism of arbitration, I will reiterate the components of the jurisprudence that provide for such singular treatment of arbitration clauses by the Court.

One of the most remarkable aspects of the Supreme Court's treatment of arbitration is the forcefulness with which the Supreme Court has taken the FAA to preempt state law, beginning with its decision in *Southland* that the FAA applies in state courts and later extended by, among others, the holding in *Concepcion* that held even some laws of general applicability can be preempted by the FAA. Moreover, the Court's unparalleled deference to arbitration and arbitral decisions marks the alternative dispute procedure as unique: "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable."²⁴¹ An arbitral decision "even arguably construing or applying the contract" must be upheld, regardless of the court's view of its correctness or merits.²⁴² The only question before a court reviewing an arbitrator's award is whether they interpreted the parties' contract, *not whether the arbitrator construed the contract correctly*.²⁴³ "A federal court's review of an arbitrator's decision . . . is extremely narrow and exceedingly deferential. Indeed, it is among the narrowest known in the law."²⁴⁴ The Court, since the 1980s, has exhibited an assertive willingness to treat arbitration preferentially, to favor arbitration as policy yet insist that arbitration be on 'equal footing with other contracts.'²⁴⁵ In that vein, the Supreme Court has consistently permitted pro-arbitration policies but struck down policies or laws with even the possibility of interference with arbitration, despite general applicability—for example, in *Concepcion*, where the Court allowed the California state law to stand as it regulates litigation but found it was preempted with respect to arbitration.²⁴⁶ This, of course, is not 'equal footing:' it is arbitration supremacy and exceptionalism.

241. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (per curiam).

242. *E. Associated Coal Corp. v. United Mine Workers of America*, Dist. 17, 531 U.S. 57, 62 (2000).

243. *See Oxford Health Plans L.L.C. v. Sutter*, 569 U.S. 564, 569 (2013).

244. *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 123 (1st Cir. 2008) (citations omitted) (internal quotation marks omitted).

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

246. *Id.* at 343.

A recent Supreme Court case functions as an exception that proves the rule. In *Morgan v. Sundance*,²⁴⁷ the Court held that courts may not create arbitration-specific rules; in this case, conditioning the waiver of a right to arbitrate on a showing of prejudice, which is not a requirement in non-arbitration contract disputes.²⁴⁸ Citing *Prima Paint*, Justice Kagan wrote that “the FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules The policy is to make arbitration agreements as enforceable as other contracts, but not more so.”²⁴⁹ The question the Court should be asking after *Sundance* is why *nine* circuits developed “an arbitration-specific waiver rule demanding a showing of prejudice,” when “[o]utside the arbitration context, a federal court assessing waiver does not generally ask about prejudice.”²⁵⁰ The answer is perhaps not so inscrutable as the opinion in *Sundance* might suggest: Circuit courts, following the lead of the Supreme Court, have adopted or accepted the exceptional treatment of arbitration, and arbitration-specific rules *are* generally acceptable, so long as they are pro-arbitration.²⁵¹

Numerous possibilities for reform of the FAA and the Court’s arbitration jurisprudence more generally have been suggested over the years. First, scholars and lawmakers have proposed legislative reform for years.²⁵² Such reform could exempt certain claims from arbitration to protect substantive rights; it could reform, repeal, replace, or clarify the FAA; or it could prescribe minimal procedural protections for the vindication of claims in arbitral proceedings conducted pursuant to the FAA. While Congress unsuccessfully attempted to pass the Arbitration Fairness Act in 2017,²⁵³ in March 2022 the House of Representatives passed the Forced Arbitration Injustice Repeal (FAIR) Act.²⁵⁴ The FAIR Act would have made unenforceable many arbitration provisions in consumer contracts (such as terms of use contracts) and employment contracts.²⁵⁵ At least one aspect of the FAIR Act could be judicially implemented by the Court: a reversal of the holding in *Circuit City*

247. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022).

248. *Id.* at 1709.

249. *Id.* at 1713 (internal quotations and citations omitted).

250. *Id.* at 1712, 1713.

251. *See, e.g.*, *Joca-Roca Real Estate, LLC v. Brennan*, 772 F.3d 945, 948 (1st Cir. 2014) (suggesting that the ‘federal policy favoring arbitration’ permitted the court to construct an arbitration-specific waiver rule).

252. *See, e.g.*, Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); JEAN R. STERNLIGHT ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006); FAIR Act, H.R. 963, 117th Cong. (2022).

253. The Arbitration Fairness Act, H.R. 1374, 115th Cong. (2017). The Arbitration Fairness Act would have made unenforceable any pre-dispute arbitration agreement that mandates arbitration of an employment, consumer, civil rights, or antitrust dispute.

254. FAIR Act, H.R. 963, 117th Cong. (2022).

255. *Id.*

Stores v. Adams,²⁵⁶ interpreting section 1 of the FAA to exclude all contracts of employment, instead of excluding exclusively the employment contracts of transportation workers.²⁵⁷ This is the interpretation of the FAA that Justice Stevens argued for in his dissent in *Circuit City*: “[N]either the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment.”²⁵⁸ Similarly, the Court could reconsider its decision in *Southland*, adopting the position advocated for in the dissent by Justice O’Connor²⁵⁹ and continuously restated in the dissent by Justice Thomas in more recent cases.²⁶⁰ Reversing the holding in *Southland* would allow states to regulate the use of arbitration agreements within their borders, empowering them to protect workers, consumers, and other parties to contracts of adhesion, in particular.

However, legislative and jurisprudential reform has not succeeded in the past. Innovative practitioners have employed novel tactics to take advantage of the current arbitration monolith. In *Abernathy v. DoorDash, Inc.*,²⁶¹ lawyers ‘called the bluff’ of the corporation and proceeded to arbitrate hundreds of individual claims.²⁶² A similar tactic was employed against Intuit, the company that owns

256. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (holding that only employees engaged in interstate transportation are excluded by § 1 of the FAA).

257. *Circuit City* held that only workers engaged in interstate transportation are excluded by section 1 of the FAA. 532 U.S. 105 (2001). However, the scope of who qualifies as an interstate transportation worker is being hashed out in ongoing litigation. See, e.g., *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020); *Carmona v. Domino’s Pizza, LLC*, 21 F.4th 627 (9th Cir. 2021); *Bissonnette v. LePage Bakeries Park St., LLC*, 33F.4th 650 (2d. Cir. 2022). In 2019, the Supreme Court held that independent contractors can be exempted from the FAA under section 1. *New Prime Inc. v. Oliveira*, 586 U.S. ___, 139 S. Ct. 532 (2019). In 2022, the Court held that ramp agents and cargo loaders for airlines also fall under the section 1 exemption. *Southwest Airlines Co. v. Saxon*, 596 U.S. ___, 142 S. Ct. 1783 (2022). To fully exclude employment contracts from the scope of the FAA without legislative action, the Court would be required to overturn its ruling in *Circuit City*.

258. *Circuit City*, 532 U.S. at 126 (Stevens, J., dissenting).

259. *Southland Corp. v. Keating*, 465 U.S. 1, 21–36. (O’Connor, J., dissenting).

260. See, e.g., *Viking River Cruises Inc. v. Moriana*, 142 S. Ct. 1906, 1926 (2022) (Thomas, J., dissenting).

261. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064–65 (N.D. Cal. 2020).

262. The court wrote that:

For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of

TurboTax.²⁶³ This strategy has only recently been explored in the scholarly literature,²⁶⁴ and there are already signs that companies are adapting their employment and consumer contracts to avoid these types of claims.²⁶⁵ Some scholars have suggested that state legislatures could pass incentives for lawyers to arbitrate, proposing that “jurisdictions ... create a statutory ‘arbitration multiplier’: an extra bounty for winning a case in arbitration. This approach addresses the root of the arbitration drought, which appears to be a lack of incentives for lawyers to take these cases, rather than a lack of access to arbitration.”²⁶⁶ Some arbitration-friendly scholarship suggests that reform could come about by establishing or codifying federal standards that apply to arbitration:

If state contract law cannot be used to invalidate arbitration agreements on grounds that are *unique* to state law, we are effectively left with convergent general standards that operate at the federal level. Instead of couching its analysis in the language of “proper applications” of state contract law to arbitration agreements, the Supreme Court should acknowledge the existence of federal standards. If nothing else, this approach has the benefit of being more analytically clear and intellectually honest.²⁶⁷

The extraordinary treatment of the arbitration clause in the recent history of the Court has several components. One of the most significant aspects of the Court’s interpretation of the FAA is the *Southland* holding that Congress intended the FAA to be more than a procedural law binding federal courts, but is instead a substantive federal common law of arbitration agreements in all but name. The expansion and precedential revisionism of the types of claims that are subject to

the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.

Id. at 1067–68.

263. *In re Intuit Free File Litig.*, No. 19-CV-02546-CRB, 2019 WL 7286933 (N.D. Cal. Dec. 6, 2019).

264. See J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022).

265. See, e.g., Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (Sept. 28, 2021), <http://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html>.

266. *Arbitration Nation*, *supra* note 6, at 10. “[U]nlike the legions of failed state efforts to restrict arbitration, our proposal actually encourages private dispute resolution and thus exists in harmony with the FAA.” *Id.*

267. E. Jin Lee, *Whose Law Is It Anyway? The Contract Interpretation Problem in U.S. Arbitration Jurisprudence*, 27 AM. REV. OF INT’L ARB. 495, 513–14 (2016). See also Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184 (2021).

arbitration,²⁶⁸ and whether or not the arbitration of those claims can replace or preclude a judicial avenue of redress,²⁶⁹ are a worrying feature of modern arbitration jurisprudence. The development of these aspects of arbitration supremacy and exceptionalism began in the 1980s and arbitration's reach into the vindication of statutory rights has been so expansive that there is little else it could grow to encompass.²⁷⁰ The frontier of arbitration jurisprudence shows no sign of slowing down. Legal issues that are still developing in the courts include questions of arbitrability, of how the system can and should determine what constitutes a gateway issue (defining the scope of the court's jurisdiction to review an agreement), and to what extent other common law principles, like equitable estoppel, should apply to arbitration agreements. As the Supreme Court continues to expand its interpretation of the FAA and treat arbitration clauses as an exceptional type of contract term, free from regulation by the states, and consistently evading judicial oversight, lawyers, lawmakers, workers, and consumers alike should take heed: Arbitration agreements are not like other contracts.

268. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (holding that Sherman Act claims, among other statutory claims, can be subject to arbitration); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (overturning *Wilko v. Swan*, 346 U.S. 427, 438 (1953)) ("Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that "statutory claims [here, the Age Discrimination Employment Act] may be the subject of an arbitration agreement, enforceable pursuant to the FAA").

269. These postural shifts are a notable change from the Court's presumptions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), where the Court held that submission of Title VII claims to the court were *not* foreclosed by the prior submission of the same claim to arbitration under a collective bargaining agreement.

270. The relationship between arbitration and constitutional rights is an area of unsettled and unclear law. See, e.g., Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992); PETER RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* (2013); Kimberly J. Mann, *Constitutional Challenges to Court-Ordered Arbitration*, 24 FLA. ST. U. L. REV. 1055 (1997).