

## ARTICLES

# THE UNCONSCIONABILITY GAME: STRATEGIC JUDGING AND THE EVOLUTION OF FEDERAL ARBITRATION LAW

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*This Article uses recent developments in the enforcement of arbitration agreements to illustrate one way in which strategic dynamics can drive doctrinal change. In a fairly short period of time, arbitration has grown from a method of resolving disputes between sophisticated business entities into a phenomenon that pervades the contemporary economy. The United States Supreme Court has encouraged this transformation through expansive interpretations of the Federal Arbitration Act. But not all courts have embraced arbitration so fervently, and therefore case law in this area is marked by tension and conflict. The thesis of this Article is that we can better understand developments in arbitration doctrine by viewing the case law as the product of an ongoing strategic interaction between courts with differing preferences regarding the spread of arbitration. As the Supreme Court has shut off most other means of resisting arbitration, the state law doctrine of unconscionability has in the last several years become a surprisingly attractive and successful tool for striking down arbitration agreements. The nature of unconscionability analysis is that it is flexible, which provides opportunities for courts skeptical of arbitration to use the doctrine to evade the Supreme Court's pro-arbitration directives while simultaneously insulating their rulings from Supreme Court review. Sophisticated resistance to arbitration is just one side of the story, however. The approach employed in this Article examines the judicial system as a whole, including the ways pro-arbitration courts respond, sometimes indirectly, to what they perceive as manipulation of unconscionability. The suspicion that some courts are disfavoring arbitration drives pro-arbitration courts to change their strategies, such as by establishing new doctrine that facilitates monitoring and shifts decisionmaking authority. This strategic framework can help us make sense of otherwise puzzling trends in arbitration doctrine and can help us predict what moves will be next. Although the specific subject matter is arbitration, this analysis is also aimed at those interested in more general problems of judicial federalism.*

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## INTRODUCTION

Some observers have conceived of the relationship between the federal courts and the state courts as a dialogue, an interchange of ideas between two systems with distinct sets of values, competencies, and needs.<sup>1</sup> But we can also profitably think of the relationship not as a conversation but as a game. This Article presents a case study in the game of judicial federalism: the “unconscionability game.” The state and federal courts are the players. Their field is the Federal Arbitration Act (FAA), the federal statute that makes agreements to arbitrate future disputes generally enforceable.<sup>2</sup> This game provides insights into ongoing developments in FAA jurisprudence and, more broadly, into the problem of how and why certain doctrine changes.

The unconscionability game is a game in the sense that it involves the interaction of various institutional players, each with its own policy preferences. The United States Supreme Court strongly favors

<sup>1</sup> E.g., Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1046–52 (1977).

<sup>2</sup> 9 U.S.C. §§ 1–16 (2006). The key provisions of the FAA are discussed in Part I.A, *infra*.

arbitration as a method of dispute resolution. It has interpreted the FAA expansively, nullifying most of the state laws and public policies that formerly excluded many types of transactions, such as consumer and employment transactions, from arbitration. With the Court's encouragement, arbitration is changing from a method of resolving disputes between commercial parties into a phenomenon that permeates the contemporary economy. Some lower courts (mostly certain state courts, but also a few federal courts) view arbitration with more skepticism, especially in cases involving consumers or employees who have signed nonnegotiated arbitration agreements embedded in standard-form contracts. As in any situation where the preferences of the reviewing court and the lower courts diverge, there is the potential for strategic behavior. Each player seeks to advance its own aims through the tools at its disposal, keeping in mind the other's anticipated responses.

Because the Supreme Court has embraced arbitration much more firmly than have some other parts of the judicial system, there is a sort of hydraulic pressure in the system that will seek release through whatever channel still exists for invalidating, or at least limiting, arbitration agreements. The main channel that remains open to courts skeptical of the increasingly pervasive use of arbitration is a provision of the FAA that allows a court to invalidate an arbitration agreement under generally applicable state contract principles, such as unconscionability, that would render any contract unenforceable.<sup>3</sup> That is, federal law allows a court to hold an arbitration agreement unconscionable as a matter of state contract law, but only if the court is employing, evenhandedly, the same unconscionability analysis it applies to other contracts.<sup>4</sup> Yet it is extremely difficult for a reviewing court to tell if a decision invalidating an arbitration agreement on unconscionability grounds obeys that rule. This difficulty creates opportunities for lower courts to misapply, or perhaps even manipulate, state contract doctrines so as to nullify arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse.

Although this Article takes the FAA as its specific subject matter, it implicates broader themes of federal courts law. It has become commonplace to observe that the law of federal courts contains two fundamental but inconsistent rhetorical and doctrinal traditions: a nationalist view that privileges federal authority and the federal judi-

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<sup>3</sup> *Id.* § 2 (making arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

<sup>4</sup> *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); see *infra* notes 66–83 and accompanying text (discussing role of state contract defenses).

ciary on the one hand versus a federalist (i.e., pro-state) view that gives primacy to state powers and state courts on the other.<sup>5</sup> Those two strands of thought are associated with competing positions on the question of parity—the shorthand for the long-running debate over whether the state courts are just as good as the federal courts in enforcing federal rights and duties.<sup>6</sup> Traditionally, the clash over parity has been most conspicuous in politically charged fields like habeas corpus and civil rights litigation.<sup>7</sup> Certainly, questions of parity retain vitality there, but today the real front line may instead be civil litigation that pits consumers, tort claimants, employees, and other individuals against business interests. Echoing the complaints of civil rights litigants and criminal defendants a generation ago, corporate defendants now take the lead in arguing that the state courts are deficient. This dissatisfaction with state courts has manifested itself through, among other things, federal legislation such as the Class Action Fairness Act,<sup>8</sup> judicial endorsements of broad readings of federal jurisdiction,<sup>9</sup> Supreme Court review of state courts' punitive damages awards,<sup>10</sup> and, as we explore here, tensions over the scope of the FAA.

Indeed, the FAA provides a particularly fertile ground for the study of judicial federalism because the FAA provision at issue here—which imposes a federal duty of evenhandedness on state law rul-

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<sup>5</sup> E.g., Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606–07 (1981); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1142–45 (1988).

<sup>6</sup> The parity debate has generated a large literature. A small sampling includes MICHAEL E. SOLIMINE & JAMES L. WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* (1999), BATOR, *supra* note 5, and Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

<sup>7</sup> See, e.g., *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) (citing parity as justification for restricting availability of habeas relief); Neuborne, *supra* note 6 (discussing parity in context of federal constitutional claims).

<sup>8</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C. (2006)) (expanding federal jurisdiction over interstate class actions); see also 15 U.S.C. §§ 77p(c), 78bb(f)(2) (2006) (providing for removal of certain securities fraud cases).

<sup>9</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (announcing broad interpretation of supplemental jurisdiction statute); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (holding state claims against HMO completely preempted by ERISA and thus subject to removal to federal court). For recent commentary on the general trend toward more expansive federal court jurisdiction, see Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1398–1414 (2006), and Stephen I. Vladeck, *The Increasingly “Unflagging Obligation”: Federal Jurisdiction after Saudi Basic and Anna Nicole*, 42 TULSA L. REV. 553 (2007).

<sup>10</sup> See Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2074–84 (2008) (describing recent Supreme Court activity in this area as reflection of distrust of state courts).

ings—implicates a thorny problem in state-federal judicial relations: We treat state courts as supreme and unreviewable on matters of state law, and yet we also understand that a misapplication (or distortion) of state law can in some cases defeat federal rights. This tension provides the animating force behind storied cases like *Fairfax's Devisee v. Hunter's Lessee*, the “inadequate state ground” decisions of the civil rights era, and, most recently, the controversial *Bush v. Gore* concurrence.<sup>11</sup> In each case, the federal courts were faced with rulings that arguably manipulated state law and that called for the extraordinary response of questioning the bona fides of the state ruling. The FAA creates a similar dynamic by requiring the federal courts to police the honesty of state law rulings in what has become a highly contentious area of the law. A vexing but usually rare problem in federal courts law thus finds itself uncomfortably spotlighted at center stage in the liability reform debate.

This Article is meant to be primarily positive and explanatory rather than normative. The purpose is not to criticize how lower courts are applying current FAA doctrine nor to pass judgment upon the Supreme Court decisions that have created that doctrine. Nor does it aim to add to the heated policy debate over whether the expansion of arbitration is a positive development.<sup>12</sup> The point is instead to develop an analytical framework, building on certain insights from positive political theory, that can advance our understanding of where arbitration doctrine is and where it might be going. A key virtue of this approach is that it allows us to examine, with some perspective, the judicial system as a whole, including how pro-arbitration courts have begun reacting to burgeoning applications of unconscionability and related doctrines. We thus can see that the recent rise in the use of unconscionability to strike down arbitration agreements, recognized in the existing scholarly literature,<sup>13</sup> represents only one part of the story—one of the latest moves but certainly not the last. The system is not static but reactive.

The strategic perspective also helps us make sense of some otherwise puzzling recent developments. It may explain, for example, why the Supreme Court—never shy about enforcing its pro-arbitration preferences—has been surprisingly hesitant to police certain areas of FAA compliance directly. It may also explain why the Supreme Court and some lower federal courts have taken the bizarre step of federalizing various issues that would otherwise obviously be questions of

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<sup>11</sup> See *infra* notes 127–30 and accompanying text (discussing these cases).

<sup>12</sup> Cf. sources cited *infra* notes 37, 59 (citing commentary on whether current FAA jurisprudence is correct as interpretive matter and desirable as policy matter).

<sup>13</sup> See *infra* note 88 (citing scholarly commentary).

state law. In both cases my proposed explanation is that the Supreme Court finds itself in the difficult position of having provoked an explosion of decisions that it disfavors but that are difficult to review head on—and thus it needs to fashion a new, less pliable doctrine in order to improve monitoring and reduce the opportunity for evasion. Perceived manipulation of current doctrine demands new doctrine.

The Article proceeds as follows. Part I sets the stage for the later analysis by briefly explaining the Supreme Court's transformation of the FAA and describing the tensions the Court's strongly pro-arbitration directives have created. Part II then introduces a conceptual framework that builds on recent strategic instruments models of judicial behavior, under which lower courts can manipulate the choice of decision instruments so as to insulate their rulings from reversal by ideologically adverse reviewing courts.<sup>14</sup> The framework contributes to the existing strategic instruments literature by considering expressive costs of review as well as technical costs of review. Part III then examines the responsive strategies at the disposal of pro-arbitration courts. In particular, it scrutinizes the development of new rules about the allocation of judicial authority—rules that shift decision-making power between state and federal courts and between courts and arbitrators. These emerging doctrinal changes reflect not just legal considerations, nor just the Supreme Court's preferences, but rather respond to the ongoing problem of monitoring lower courts.

## I

### THE CONDITIONS THAT GENERATE THE UNCONSCIONABILITY GAME

The unconscionability game results from the tension between strongly pro-arbitration courts, especially the United States Supreme Court, and courts that are more leery of arbitration, mostly some state courts. The Supreme Court has heightened these tensions by rapidly expanding the scope and force of the Federal Arbitration Act to bring it into conflict with important state policies. As the Court has shut off various means of resisting arbitration, unconscionability has become an increasingly attractive tool for striking down arbitration agreements.

This Part is intended to provide a context for understanding the conditions that generate strategic maneuvering between courts with divergent views about arbitration. This will necessarily require

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<sup>14</sup> *E.g.*, Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2007); *see also infra* Part II.A (describing this approach).

making some generalizations about which courts hold particular views—and indeed some generalizations are warranted—but it would be incorrect to think that all state courts have resisted the spread of arbitration or that all federal courts share the Supreme Court’s fervor. There is diversity within each group as well as between them. Further, positions on arbitration are not fixed, even over the fairly short term: Perhaps the courts in a certain state used to be skeptical of arbitration, but after a change in personnel brought by an election, they might take a different view. With those caveats in mind, let us proceed by first examining the Supreme Court’s role in setting the game in motion.

### A. *The Supreme Court’s Transformation of the FAA*

The FAA was enacted in 1925 to bolster the enforceability of agreements to arbitrate future disputes.<sup>15</sup> Its key provision, section 2, states:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>16</sup>

In other words, an arbitration agreement involving commerce—whether a freestanding agreement or a clause within a larger contract—stands on equal footing with other agreements. Like all contracts, it is susceptible to familiar defenses such as fraud, duress, or lack of consideration (i.e., “grounds as exist at law or in equity for the revocation of any contract”), but it cannot be invalidated merely because it is an agreement to settle a dispute outside the judicial system.

The short passage quoted above holds within it the seeds of several major interpretive debates. Is the FAA merely a procedural rule operative only in federal courts or instead a substantive national policy that state courts must apply to the exclusion of their own law?

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<sup>15</sup> There has developed a standard lore that, before the enactment of the FAA, courts were hostile to arbitration. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (referring to “the longstanding judicial hostility to arbitration agreements that had existed at English common law and [that was] adopted by American courts”). In fact, the history may be more complicated. Most courts refused to enforce predispute arbitration agreements through specific performance, for example, but courts were quite hospitable to private dispute resolution in other ways. For discussions of the pre-FAA history, see IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 15–24 (1992), and Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 259–77 (2003).

<sup>16</sup> 9 U.S.C. § 2 (2006).

To which types of contracts does it extend (or, in other words, what is a “contract evidencing a transaction involving commerce”)? And what types of causes of action can be sent to arbitration—only common law actions or statutory claims as well?

These and related questions have spawned a large and still-growing literature.<sup>17</sup> For our purposes, the interesting issue is not what constitutes the “correct” interpretation of the statute. Rather, the important point is that each of the interpretive questions was initially answered in a way that gave the statute a narrow scope and cabined its potential to generate conflict, but these same questions are now answered in ways that seem inevitably to lead to friction and, perhaps, to evasion.

To begin, for many years the FAA was generally thought not to apply in state courts.<sup>18</sup> Indeed, as late as 1967 the Supreme Court had not even definitively established that the FAA applied in *federal* courts in diversity cases to override state policies.<sup>19</sup> To be sure, during the course of the twentieth century most states adopted their own statutes or judicial policies recognizing or bolstering the enforceability of arbitration agreements, but these state policies were often less favorable to arbitration than was the FAA.<sup>20</sup>

Moreover, even in a court in which it applied, the FAA was initially limited in scope to a fairly confined set of transactions. As we have seen, the FAA requires enforcement of arbitration provisions in a “contract evidencing a transaction involving commerce.”<sup>21</sup> The section defining “commerce” states that it means interstate or international commerce.<sup>22</sup> To a modern reader, this definition may evoke the

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<sup>17</sup> See generally MACNEIL, *supra* note 15, at 92–155 (discussing scope of FAA and court interpretations of it); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (same); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5 (same). Other sources are cited in the course of the discussion below.

<sup>18</sup> See MACNEIL, *supra* note 15, at 127–30 (discussing near absence of state cases concerning FAA in first thirty-four years after enactment).

<sup>19</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–05 (1967) (concluding that FAA is exercise of congressional commerce power and governs in diversity suits). It should be noted that part of the difficulty in fixing the proper application of the FAA stems from the fact that it was enacted in 1925, well before *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), meaning that the statute comes from a period of very different expectations regarding the division between state and federal law.

<sup>20</sup> See MACNEIL, *supra* note 15, at 15–80 (discussing state arbitration laws); see also, e.g., *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204–05 (1956) (applying Vermont arbitration law, which permitted party to revoke agreement to arbitrate at any time prior to announcement of award).

<sup>21</sup> 9 U.S.C. § 2.

<sup>22</sup> *Id.* § 1.

vast sweep of current Commerce Clause power, which reaches almost all economic activity. But at the time of the FAA's enactment, in 1925, the scope of federal regulatory power was, of course, much narrower.<sup>23</sup> And although federal authority substantially expanded through the course of the New Deal and then World War II,<sup>24</sup> the Supreme Court did not expand the scope of the FAA to match the full reach of that expanded constitutional power.<sup>25</sup> Moreover, the FAA's definition of "commerce" expressly excluded (at least certain types of) employment contracts that would otherwise fall within the statute, which further tended to restrict the statute's reach.<sup>26</sup>

Finally, the FAA was limited in the types of causes of action to which it applied. The Supreme Court held in 1953 in *Wilko v. Swan* that actions under the Securities Act of 1933 were not arbitrable, concluding that arbitration was contrary to the language and intent of the statute.<sup>27</sup> Later decisions applied that holding to various other statutory schemes.<sup>28</sup>

As a result of all the above limitations—of forums in which the statute applied, of the types of transactions subject to regulation, and of the kinds of claims that were arbitrable—the FAA's reach was for decades quite restrained. Arbitration under the FAA was during this time largely a tool for resolving commercial disputes between busi-

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<sup>23</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (holding that Commerce Clause did not authorize federal statute prohibiting interstate transportation of goods made by child labor). In the mid-1930s, the Supreme Court struck down several early New Deal initiatives as exceeding the scope of the commerce power. E.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 297–310 (1936) (Coal Conservation Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–51 (1935) (Live Poultry Code promulgated under National Industrial Recovery Act); *R.R. Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 344, 370–74 (1935) (Railroad Retirement Act).

<sup>24</sup> See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (permitting Congress to regulate farming for local consumption because of aggregate impact on national prices); *United States v. Darby*, 312 U.S. 100, 116–17 (1941) (repudiating *Hammer*, 247 U.S. 251). For discussions of the growth of national regulatory power in this period, see generally Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from Swift to Jones & Laughlin*, 61 *FORDHAM L. REV.* 105 (1992), and Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 *HARV. L. REV.* 645 (1946).

<sup>25</sup> In the 1956 case of *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, for instance, the Court quickly and easily dismissed the idea that an employment contract between a Vermont citizen and a New York corporation was a contract "evidencing a transaction involving commerce" for purposes of the FAA. *Id.* at 199–201.

<sup>26</sup> 9 U.S.C. § 1; see Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section I of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 *J. DISP. RESOL.* 259 (discussing employment exception).

<sup>27</sup> 346 U.S. 427, 437–38 (1953).

<sup>28</sup> E.g., *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826–28 (2d Cir. 1968) (Sherman Act); *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 271 (E.D. Pa. 1977) (ERISA).

nesspeople, not a phenomenon that pervaded virtually every corner of the daily economy.<sup>29</sup>

That constrained, somewhat timid FAA is no more. With the Supreme Court's encouragement, it has grown into the broadly sweeping, muscular statute we know today. The metamorphosis was not instantaneous, but it is fair to say that the major stages of growth occurred in the 1980s.<sup>30</sup> The causes for this change are uncertain. Likely playing a role was the Court's view that litigation had become excessive and needed to be curtailed. In 1976, Chief Justice Burger promoted and spoke at the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the chief message of which was that the "litigation explosion would have to be controlled."<sup>31</sup> The Pound Conference took place against a background of the business community's growing dissatisfaction with the legal system.<sup>32</sup> Yet enthusiasm for arbitration can hardly be attributed only to conservative Justices who let pro-business views overcome their professed solicitude for federalism; early rulings strengthening the FAA found support from left-leaning nationalist Justices as well.<sup>33</sup>

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<sup>29</sup> Carrington & Haagen, *supra* note 17, at 339–45. Arbitration was of course also a common feature of union-management relations; arbitration in the collective bargaining context is not a product of the FAA but instead of federal labor law. 1 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 11.3 (1994 & Supp. 1999).

<sup>30</sup> Signs of the coming transformation were apparent in the 1960s and 1970s. See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 773–75 (2004) (discussing gradual growth of FAA in this period); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 653–60 (1996) (same). Some lower courts in the late 1950s and 1960s began to believe that the FAA applied in state courts, thus anticipating the Supreme Court's conclusion. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286 (1995) (Thomas, J., dissenting) (citing earlier lower-court decisions); MACNEIL, *supra* note 15, at 137–38 (same).

<sup>31</sup> Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1158 (1993); see also Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 310–16 (1996) (discussing Burger's role in Pound Conference). The lectures presented at the conference are collected in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (A. Leo Levin & Russell R. Wheeler eds., 1979).

<sup>32</sup> See Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Account-ability*, 81 TEX. L. REV. 285, 291–99 (2002) (describing rise of pro-business "too much law" critique in 1970s).

<sup>33</sup> See, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (Brennan, J.) (announcing "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"). As Andrew Siegel argues, the Rehnquist Court was characterized by hostility to litigation, a sentiment that manifested itself (among other ways) through a pro-arbitration jurisprudence embraced to varying degrees by most members of the Court. Andrew M. Siegel, *The Court*

Chief Justice Burger would soon become the author of the important 1984 decision in *Southland Corp. v. Keating*, in which the Court held that the FAA is preemptive federal substantive law that applies in both state and federal courts to the exclusion of any conflicting state law.<sup>34</sup> The Court therefore invalidated the California Franchise Investment Law, which the California Supreme Court had interpreted as barring arbitration of franchise disputes.<sup>35</sup> Several Justices dissented,<sup>36</sup> and the decision has remained the object of sustained criticism.<sup>37</sup> Nonetheless, it has since been reaffirmed and extended several times.<sup>38</sup>

Also overrun was the restrictive reading of “contract[s] evidencing a transaction involving commerce” to mean only commerce that was foreign or interstate in a narrow sense (as opposed to the broad sense of those terms represented by modern constitutional doctrine). Under the old regime, states with arbitration-restricting policies could decline to apply the FAA to local transactions. Alabama was one such state, and its courts routinely applied a state statute invalidating predispute arbitration clauses, reasoning that the FAA applied only to transactions in which the parties actively contemplated substantial interstate activity.<sup>39</sup> In the mid-1990s, the Supreme Court granted certiorari in a case involving a pest-control contract between an Alabama homeowner and a local Terminix franchisee.<sup>40</sup> Rejecting the state court’s narrow reading of the FAA, the Supreme Court held

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*Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1139–43 (2006).

<sup>34</sup> 465 U.S. 1, 10–17 (1984). The Court relied in part on its dictum in *Moses H. Cone Memorial Hospital* that the FAA was “federal substantive” law applicable in all courts. 460 U.S. at 25 n.32. Yet while the FAA is substantive law, it is unusual in that it does not create federal jurisdiction. *Id.*; see 9 U.S.C. §§ 3–4 (2006) (giving district courts authority to issue stays of litigation and orders compelling arbitration in cases within district courts’ preexisting jurisdiction). If an arbitration clause were an automatic ticket to federal court, that would of course eliminate much of the opportunity for state court noncompliance discussed in this Article. See *infra* Part III.C.3 (discussing potential developments in this area).

<sup>35</sup> *Southland Corp.*, 465 U.S. at 10–17.

<sup>36</sup> *Id.* at 17 (Stevens, J., concurring in part and dissenting in part); *id.* at 21 (O’Connor, J., joined by Rehnquist, J., dissenting).

<sup>37</sup> E.g., MACNEIL, *supra* note 15, at 103–21, 139–47; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Act Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 125–31 (2006). Needless to say, I do not purport to resolve the debate here.

<sup>38</sup> E.g., *Preston v. Ferrer*, 128 S. Ct. 978, 983 n.2 (2008) (refusing invitation to overrule *Southland*); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (same).

<sup>39</sup> E.g., *Allied-Bruce Terminix Cos. v. Dobson*, 628 So.2d 354, 355 (Ala. 1993); see also *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 603–04 (Minn. 1982) (holding that FAA did not reach edge of Commerce Clause and therefore applying state arbitration law).

<sup>40</sup> *Allied-Bruce Terminix Cos.*, 513 U.S. at 268.

that the FAA applied to the full reach of the modern Commerce Clause power.<sup>41</sup> And that is, of course, a broad reach indeed; it easily encompassed the pest-control contract because some of the treatment and repair materials moved in interstate commerce and because Terminix (though not its local franchise) is a multistate business.<sup>42</sup> When the Alabama Supreme Court later fashioned another narrow reading of the FAA's scope, the Supreme Court summarily reversed the state court and reiterated that the FAA applies broadly to economic activity that affects interstate commerce in the aggregate, whether or not the *particular* contract at issue itself substantially affects interstate commerce.<sup>43</sup>

There at least remained the fact that section 1 of the FAA excluded from the statute's reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>44</sup> Just as the Supreme Court had now begun to read section 2's reference to contracts "involving commerce" broadly to reach the edge of the Commerce Clause, presumably the exclusion in section 1 for workers "engaged in foreign or interstate commerce" could be read with parallel breadth to exempt almost all employment disputes from the FAA's grasp. The Ninth Circuit thought so, but the Supreme Court interred that reading in 2001.<sup>45</sup> The Court held that the phrase "any other class of workers engaged in foreign or interstate commerce" had to be read in light of the same provision's earlier reference to seamen and railroad workers, such that the entire exemption applied only to "transportation workers."<sup>46</sup> In other words, despite reference to "commerce" in both sections, the scope of the FAA sweeps broadly in section 2, but the employment exception in section 1 is narrow.

Finally, the modern FAA has also been held to apply to statutory causes of action. The Court began by distinguishing *Wilko* and ruling that the duty to arbitrate reached claims under the 1934 Securities Exchange Act and the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>47</sup> Soon, the Court expressly overruled *Wilko*'s

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<sup>41</sup> *Id.* at 268–70.

<sup>42</sup> *Id.* at 282.

<sup>43</sup> *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 55–57 (2003) (per curiam) (citing, *inter alia*, *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).

<sup>44</sup> 9 U.S.C. § 1 (2006).

<sup>45</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001), *rev'g* 194 F.3d 1070 (9th Cir. 1999).

<sup>46</sup> *Id.* at 119.

<sup>47</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227–42 (1987) (citing *Wilko v. Swan*, 346 U.S. 427 (1953)); *see supra* note 27 and accompanying text (discussing *Wilko*). Previously, the Court had begun to chip away at *Wilko* by permitting arbitration of statu-

holding that claims under the 1933 Securities Act were not arbitrable.<sup>48</sup> Perhaps most importantly of all, the Court held in 1991 that statutory age discrimination claims could be arbitrated, a dramatic expansion of arbitration into the workplace.<sup>49</sup> Following that decision, all circuits now hold that employment discrimination claims under Title VII—among the most frequently invoked federal statutory protections—can be subject to arbitration.<sup>50</sup>

### B. Continuing “Hostility” Toward Arbitration

The massive expansion of the FAA described above happened fairly quickly and without any legislative amendment of the relevant provisions of the FAA itself. But while the pro-FAA turn might have been congenial to a majority of the Court and some segments of elite opinion,<sup>51</sup> it was not embraced everywhere.

Certain state courts have been among the most vocal critics of arbitration’s expansion beyond commercial contexts (though state courts are certainly not alone in this<sup>52</sup>). Many of the major recent decisions implementing the newly powerful FAA have been reversals of state courts.<sup>53</sup> In the Montana litigation that led to the Supreme Court’s decision in *Doctor’s Associates, Inc. v. Casarotto*, one of the Montana justices wrote a concurring opinion to “explain a few things” to “those federal judges who consider forced arbitration as the pan-

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tory claims that arose in the context of international commercial transactions. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628–40 (1985) (finding Sherman Act claim arising out of international transaction arbitrable); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511–20 (1974) (finding Securities Exchange Act claim arising out of international transaction arbitrable).

<sup>48</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479–85 (1989).

<sup>49</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

<sup>50</sup> See *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 748–49 (9th Cir. 2003) (en banc) (citing decisions from other circuits and overruling Ninth Circuit’s prior contrary precedent).

<sup>51</sup> See *supra* notes 31–33 and accompanying text (discussing pro-arbitration sentiments of Supreme Court Justices and certain interest groups).

<sup>52</sup> Consider the pungent commentary of one federal bankruptcy judge:

The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic.

. . . .

. . . Arbitration was innocuous when limited to negotiated commercial contracts, but it developed sinister characteristics when it became ubiquitous. *In re Knepp*, 229 B.R. 821, 827–28 (Bankr. N.D. Ala. 1999).

<sup>53</sup> *E.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Florida); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Montana); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (Alabama); *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (California); *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984) (California).

acea for their ‘heavy case loads’ and who consider the reluctance of state courts to buy into the arbitration program as a sign of intellectual inadequacy.”<sup>54</sup>

What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, [Montana’s] laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.

. . . .

Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as “therapy for their crowded dockets.” . . .

It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens.<sup>55</sup>

When the case returned to the Montana high court after the U.S. Supreme Court’s reversal, two of the state justices took the unusual step of refusing to sign the order remanding the case to the trial court, stating that “[w]e cannot in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental and philosophically misguided as the United States Supreme Court’s decision in this and other cases which interpret and apply the Federal Arbitration Act.”<sup>56</sup> In another case, the Chief Justice of Alabama wrote that the U.S. Supreme Court had unconstitutionally expanded the boundaries of the FAA; he defiantly concluded that the FAA still did not apply in state courts notwithstanding the Supreme Court’s views.<sup>57</sup> This is the sort of open judicial insubordination usually seen only in cases

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<sup>54</sup> Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994) (Trieweiler, J., concurring), vacated sub nom. Doctor’s Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995).

<sup>55</sup> *Id.* at 940–41.

<sup>56</sup> Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16, 16 (quoting Montana Justices Trieweiler and Hunt).

<sup>57</sup> Selma Med. Ctr., Inc. v. Fontenot, 824 So. 2d 668, 677–78 (Ala. 2001) (Moore, C.J., dissenting); see also *infra* notes 136–37 (citing comments from various courts and judges about possibility of state-judge defiance).

involving hot-button issues such as racial integration and religion in public schools, and even then only with extraordinary rarity.<sup>58</sup>

Why have some courts resisted the Supreme Court's campaign? There are several potential explanations. In part it may just be a matter of probabilities. The Supreme Court has staked out a position close to the pro-arbitration end of the spectrum. Among the various state judiciaries and the hundreds of federal judges across the country, it would be surprising not to find a substantial number of judges who have different preferences. These judicial doubters of arbitration's virtues might well say that they are not hostile to consensual alternative dispute resolution but are instead simply well informed about arbitration's shortcomings in certain contexts.<sup>59</sup> In some instances, this wariness of arbitration may dovetail with a more general skepticism toward the liability reform movement.<sup>60</sup> It is inevitable that some subset of these judicial skeptics of arbitration will hold their views firmly enough that they will not automatically toe the Supreme Court's line. After all, to many people these are questions about basic justice and the judicial role.

Further, there may also be more systematic influences that could explain resistance to arbitration, at least to the extent it appears concentrated in state courts.<sup>61</sup> State courts that resist the Supreme Court's federal policy favoring arbitration are in many cases trying to

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<sup>58</sup> Cf., e.g., *Jaffree v. Bd. of Sch. Comm'rs*, 554 F. Supp. 1104, 1126–28 (S.D. Ala. 1983) (refusing to follow Supreme Court precedent in school prayer case), *rev'd in relevant part sub nom.* *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984).

<sup>59</sup> For prominent critiques of binding predispute arbitration, especially in the consumer and employment contexts, see, for example, Richard M. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001), Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995), Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005), and Sternlight, *supra* note 30. For contrary views, see, for example, Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549 (2008), and Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–64 (2006).

<sup>60</sup> See Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656–61 (1999) (discussing linkage between Alabama judges' views on arbitration and larger tort reform battles).

<sup>61</sup> The considerations mentioned in this paragraph, which tend toward the institutional, are not meant to be exclusive. There could be other explanations for the differing attitudes of federal versus state judges as well, such as those emphasizing sociological factors. See, e.g., Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 94 n.20 (1998) ("Perhaps state judges' heightened sympathy toward the unfairness claimed by consumers or small businesses can be attributed to the fact that state judges may come from less wealthy or elite backgrounds than do federal judges . . ."); cf. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639,

effectuate not their own preferences but fundamental state legislative policies that restrict arbitration or apply heightened procedural safeguards. Thus, the leading Supreme Court cases slapping down “rogue” state courts and establishing the preeminence of the FAA often involve state courts that were enforcing state *statutes* that conflicted with the Supreme Court’s understanding of the FAA: *Perry* and *Southland* from California and *Casarotto* from Montana all fit this pattern, for example, and famously hostile Alabama likewise has a state statute limiting the reach of arbitration.<sup>62</sup> A decade ago, a score of state attorneys general advocated overruling *Southland*’s preemption holding,<sup>63</sup> and by the time of the recent *Buckeye Check Cashing* decision, the number had swelled to a staggering *forty* (plus the District of Columbia and Puerto Rico).<sup>64</sup> Further, many state judges are elected and therefore are accountable to the consumers and the employees that businesses (often out-of-state businesses) attempt to bind to arbitration agreements. Indeed, arbitration has become an important issue in some judicial campaigns, and pro-business interests do not always prevail.<sup>65</sup>

Thus, while resistance to the growth of arbitration continues, the Supreme Court’s dialectic of combating hostility to arbitration is today largely anachronistic in that it has come unmoored from the conditions that produced it. Old-fashioned judicial resistance to arbitration may well have stemmed from judicial arrogance or unsophisti-

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665–67 (1981) (arguing that state and federal judges, while both collections of elites, have different backgrounds and represent different social orders).

<sup>62</sup> ALA. CODE § 8-1-41 (LexisNexis 2002) (providing that an agreement to arbitrate cannot be specifically enforced); see *supra* notes 53–56 and accompanying text (discussing *Casarotto* and citing *Perry* and *Southland*).

<sup>63</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (referring to states’ amicus brief).

<sup>64</sup> Brief of Florida et al. as Amici Curiae in Support of Respondents, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (No. 04-1264), 2005 WL 2477361.

<sup>65</sup> Stephen Ware has written on the electoral dynamics of arbitration law in Alabama. Stephen J. Ware, *The Alabama Story: The State’s Experience with Arbitration Shows the Connection of Law to Politics and Culture*, DISP. RESOL. MAG., Summer 2001, at 24; Ware, *supra* note 60, at 664–86. Roadside signs posted in anticipation of the November 2000 judicial elections stated “Arbitration: A License to Steal. Vote Democrat.” *Id.* Ware’s study led him to conclude that “[t]he entire body of arbitration law seems to be shaped by the campaign finance battle between plaintiffs’ lawyers and business” and that “arbitration law in Alabama seems to have no doctrinal integrity that survives the vicissitudes of the interest group battle.” Ware, *supra* note 60, at 662, 685. Arbitration has also been an important campaign issue in Mississippi, where the famously plaintiff-friendly judiciary has been mostly converted to the tort reform cause, in part due to the efforts of insurance companies. See Cecil Pearce, *High Stakes for Mississippi Tort Reform*, INS. J. SOUTHEAST REGION, June 21, 2004, available at <http://www.insurancejournal.com/magazines/southeast/2004/06/21/partingshots/43442.htm> (discussing business and insurance community impact on Mississippi Supreme Court elections).

cation. Congress and state legislatures enacted statutes rejecting (to varying degrees) those judicial prejudices and demanding enforcement of arbitration agreements, in certain contexts, on more or less the same terms as other contracts. Today, the Court still uses the same hostility rhetoric even though the concerns animating the debate have in large part shifted to considerations of federalism and local control.

But whether one calls it “hostility” or not, the fact is that the Supreme Court’s extremely favorable view of a sweeping, federalized arbitration law is not shared by the people and officials everywhere. The Supreme Court cannot change those preferences overnight, and so resistance to arbitration continues to seek an outlet. And it has found one.

### C. *Unconscionability as an Outlet*

The Supreme Court’s fairly rapid embrace of arbitration was a shock to the legal system, or at least portions of it. All courts and jurisdictions were now required to enforce mandatory predispute arbitration clauses in almost every kind of contract, notwithstanding any state common law or statutory law to the contrary. With all direct means of resistance to arbitration shut down, the principal remaining channel through which skepticism toward arbitration could flow became the proviso in section 2 of the FAA stating that arbitration agreements must be enforced except “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>66</sup>

For a court wishing to strike back against arbitration, however, it is not enough simply to invoke the word “unconscionability.” First, under the separability doctrine, a court cannot invalidate an arbitration agreement contained in a larger contract based upon a defense regarding the contract as a whole.<sup>67</sup> Thus, a charge that an entire contract is unconscionable (or the product of duress, etc.) must be sent to the arbitrator to decide, even though the arbitration clause is part of the contract that is allegedly invalid in toto. A court can rule only upon defenses that go to the arbitration clause. (The separability doctrine may seem strange as a matter of contract law, but, as we will see, it makes much sense as a tool for monitoring compliance with the FAA.<sup>68</sup>) Second, even when dealing with a challenge that targets the arbitration provision, a court does not have *carte blanche* to use

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<sup>66</sup> 9 U.S.C. § 2 (2006).

<sup>67</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967). The separability doctrine and *Prima Paint* are discussed more fully in Part III.C *infra*.

<sup>68</sup> See *infra* notes 217–18 and accompanying text (discussing how separability doctrine facilitates federal monitoring of enforcement of arbitration agreements).

unconscionability however it likes. As the Supreme Court explained in a key footnote in *Perry v. Thomas*:

An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, “save upon such grounds as exist at law or in equity for the revocation of *any* contract.” Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.<sup>69</sup>

Thus, a court may invalidate an arbitration clause based on general contract principles like duress or unconscionability, but the court may not apply those doctrines differently in the context of arbitration, singling out arbitration clauses for special scrutiny. As some commentators have put it, section 2 is a sort of “equal protection clause” for arbitration agreements.<sup>70</sup> (That federal law imposes this hard-to-monitor duty of evenhandedness on state law contract rulings is, of course, the source of many of the problems of judicial federalism discussed later in this Article.)

Because a court cannot hold that arbitration agreements are in themselves *per se* unconscionable—after all, the FAA makes arbitration favored as a matter of federal policy—courts’ analyses instead typically focus on particular aspects of arbitration clauses that allegedly render them unconscionable or otherwise impermissibly frustrate the plaintiff’s substantive rights.<sup>71</sup> These aspects include:

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<sup>69</sup> 482 U.S. 483, 492 n.9 (1987) (citations omitted).

<sup>70</sup> *E.g.*, Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1955 (2003); David Ling, Case Comment, *Preserving Fairness in Arbitration Agreements: States’ Options After Casarotto*, 2 HARV. NEGOT. L. REV. 193, 193 (1997).

<sup>71</sup> Instead of (or in addition to) using the language of unconscionability, cases involving statutory causes of action often speak in terms of whether arbitration would effectively deprive the litigant of the substantive rights conferred by the legislature. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1479–83 (D.C. Cir. 1997). The two inquiries are very similar in practice, though unconscionability focuses more on state law. *Kristian v. Comcast Corp.*, 446 F.3d 25, 60, 63–64 (1st Cir. 2006); *see also Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868, 877–78 (11th Cir. 2005) (using substantive rights and unconscionability doctrines interchangeably). Where appropriate, this Article cites cases from both doctrinal lines.

- limitations on the types or amount of relief that the arbitrator can award, such as bans on punitive damages;<sup>72</sup>
- provisions that forbid class-wide or other collective arbitration;<sup>73</sup>
- “nonmutual” arbitration clauses that require the customer or employee to arbitrate all claims but that permit the drafting party the option of proceeding in court;<sup>74</sup>
- clauses that select an allegedly biased arbitrator;<sup>75</sup>
- limitations on the extent of discovery available in the arbitral proceedings;<sup>76</sup>
- clauses relating to the allocation of the costs of the arbitration proceedings;<sup>77</sup>
- provisions stating that the arbitration proceedings, including the result thereof, must be kept confidential;<sup>78</sup>

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<sup>72</sup> *E.g.*, *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1178–79 (9th Cir. 2003); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 670–71 (S.C. 2007); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 277–80 (W. Va. 2002); *see also* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49 (2003) (reviewing cases); Christopher A. Taravella et al., *An Annotated Arbitration Clause*, 56 CONSUMER FIN. L.Q. REP. 263, 279–80 (2002) (same).

<sup>73</sup> *E.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1106–10 (Cal. 2005); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 267–75 (Ill. 2006); *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 98–102 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002). *See generally* William M. Howard, Annotation, *Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R.6TH 145 (2006) (reviewing cases); Jack Wilson, “*No-Class-Action Arbitration Clauses*,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIAC L. REV. 737, 759–73 (2004) (same); Bryon Allyn Rice, Comment, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 225–45 (2008) (same).

<sup>74</sup> *E.g.*, *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 169 (5th Cir. 2004); *Armendariz v. Found. Health Psychcare Servs.*, 6 P.3d 669, 691–94 (Cal. 2000); *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 172–76 (Wis. 2006). *See generally* Christopher R. Drahozal, *Nonmutual Agreements To Arbitrate*, 27 J. CORP. L. 537 (2002) (reviewing issue of nonmutual arbitration clauses).

<sup>75</sup> *E.g.*, *Burch v. Second Judicial Dist. Court*, 49 P.3d 647, 650–51 (Nev. 2002); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 173–77 (Cal. 1981).

<sup>76</sup> *E.g.*, *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786–87 (9th Cir. 2002); *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 88, 96–100 (Ct. App. 2004).

<sup>77</sup> *E.g.*, *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1177–78 (9th Cir. 2003); *McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273–74 (Pa. Super. Ct.), *review denied*, 853 A.2d 362 (Pa. 2004); *see also* Kelly Thompson Cochran & Eric J. Mogilnicki, *Current Issues in Consumer Arbitration*, 60 BUS. LAW. 785, 788–90 (2005) (citing cases). *See generally* Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004) (detailing costs arbitration can impose on consumers and proposing regulatory and legislative solutions).

<sup>78</sup> *E.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078–79 (9th Cir. 2007); *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003); *Eagle v. Fred Martin Motor Co.*, 809

- provisions specifying that the arbitration will take place in a distant forum;<sup>79</sup> and
- provisions that allow the drafting party to change the terms of the agreement.<sup>80</sup>

Additionally, because many courts require elements of procedural unconscionability or other faults in contract formation as well as substantive unfairness before they will invalidate a contract,<sup>81</sup> agreements to arbitrate are often attacked as procedurally unconscionable or adhesive.<sup>82</sup> Along similar lines, some courts, most notably in Montana, have invalidated arbitration agreements using the contract doctrine of reasonable expectations, under which an inconspicuous term in a form contract is not binding if it would defeat the reasonable expectations of the nondrafting party.<sup>83</sup>

The anecdotal impression that unconscionability arguments have become increasingly prevalent and prominent can be bolstered with numerical data:<sup>84</sup>

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N.E.2d 1161, 1180–83 (Ohio Ct. App. 2004); *see also* Cochran & Mogilnicki, *supra* note 77, at 787–88 (citing cases).

<sup>79</sup> *E.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1287–92 (9th Cir. 2006) (en banc); *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1243–46 (Mont. 1998); *see also* Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1026–28 (1996) (reviewing cases).

<sup>80</sup> *E.g.*, *Morrison v. Amway Corp.*, 517 F.3d 248, 253–58 (5th Cir. 2008); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002).

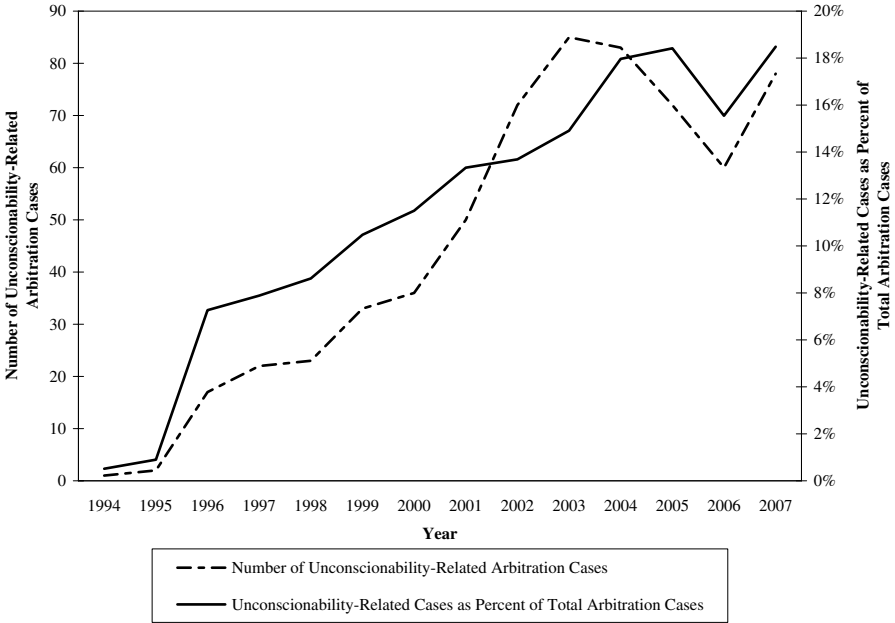
<sup>81</sup> *See generally* 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18:10 (4th ed. 1998) (discussing procedural and substantive unconscionability).

<sup>82</sup> *E.g.*, *Nagrampa*, 469 F.3d at 1281–84; *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 742–45 (Wis. Ct. App.), *review denied*, 737 N.W.2d 432 (Wis. 2007); *see also* Ware, *supra* note 79, at 1028–34 (reviewing issue of procedural unconscionability).

<sup>83</sup> *See infra* Part II.C (discussing recent Montana cases).

<sup>84</sup> One should keep in mind that I am not attempting to use this data on the prevalence of unconscionability arguments in court decisions to derive conclusions about the impact of unconscionability doctrine on real world behavior. Few interactions lead to disputes, few disputes to lawsuits, few lawsuits to searchable decisions. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 1–2 (1984) (discussing these problems of inference and bias).

FIGURE 1



The dashed line in the graph shows the number of cases addressing arbitration-related unconscionability arguments each year.<sup>85</sup> Lest one think that this apparent increase in the prevalence of unconscionability challenges is an artifact of an overall increase in litigation (or in the coverage of the Westlaw databases) or that it simply reflects the fact that all types of arbitration cases have become increasingly common over this period, we can also measure those unconscionability cases as a percentage of all cases involving arbitra-

<sup>85</sup> These figures reflect the results, as of July 1, 2008, of running the following search in the Westlaw ALLCASES database (which includes published and all available unpublished federal and state court decisions) for each of the included years: di(arbitrat! /s unconscionab!) & (“9 U.S.C.” or “Federal Arbitration Act” or “United States Arbitration Act”) & da([year]). In plain English, the search returns cases that (1) have a sentence in the Westlaw-supplied digest field containing both the words “arbitration” and “unconscionability” (and their variants) and also (2) contain other terms that indicate that the case concerns the FAA. Limiting part of the search to the digest field helps to exclude cases in which the words “arbitration” and “unconscionability” appear together in the same sentence and yet which do not actually involve any substantial treatment of the concepts. I hasten to add that this is an imperfect measure that is in different ways both overinclusive and underinclusive. Nevertheless, we can draw comfort from the fact that a study that involved a more individualized examination of cases from 2002–2003 identified 161 unconscionability-related arbitration cases, a figure almost identical to the 157 returned for those years by this cruder measure. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004). Further, while the exact numbers presented are subject to debate, the imprecision of the search should not call the upward trend into question.

tion (the solid line in the graph).<sup>86</sup> Where unconscionability challenges once appeared in less than 1% of all arbitration-related cases, more recently they have appeared in 15–20% of all cases involving arbitration. (The reader might wonder about the dip in both measures right before 2007. I will have more to say about this later.<sup>87</sup>) Other observers agree that we are witnessing something of a renaissance for unconscionability arguments.<sup>88</sup>

I want to be clear that the increase in the prominence of unconscionability arguments does not show that courts are employing the doctrine inappropriately. As the Supreme Court closes off more promising lines of attack, parties resisting arbitration have more reason to raise unconscionability arguments, whether meritorious or not. It could be, for example, that many arbitration provisions could properly have been challenged as unconscionable in earlier years, but it was unnecessary for litigants and courts to rely on that ground because other doctrines achieved the same result more clearly. For instance, until several years ago some courts held that the FAA did not reach employment relationships.<sup>89</sup> Given that clear legal rule, there was little need to decide a more fact-specific unconscionability challenge or even to raise it.<sup>90</sup> Further, the chart above does not tell us about the success rate of unconscionability challenges, and while there is indeed some evidence of increasing success rates,<sup>91</sup> it remains true that even a surge in the success rate of unconscionability challenges would not necessarily suggest anything untoward. For example, it might be that the Supreme Court's pro-arbitration rulings, together with continued tort reform sentiment, emboldened some par-

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<sup>86</sup> These figures reflect the number of unconscionability-related arbitration cases as determined above divided by the total number of arbitration cases, a figure retrieved by running the following search in the Westlaw ALLCASES database for various years: di(arbitrat!) & ("9 U.S.C." or "Federal Arbitration Act" or "United States Arbitration Act") & da([year]).

<sup>87</sup> See *infra* Conclusion.

<sup>88</sup> For scholars who have noted a rise in unconscionability cases, see, for example, Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements To Arbitrate*, 2006 J. DISP. RESOL. 469, 470–71, Sandra F. Gavin, *Unconscionability Found: A Look at Pre-dispute Mandatory Arbitration Agreements 10 Years After Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249 (2006), Randall, *supra* note 85, at 194–98, and Stempel, *supra* note 30, at 761–62.

<sup>89</sup> *E.g.*, *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999); *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117, 120–23 (N.D. Miss. 1995).

<sup>90</sup> The *Circuit City Stores, Inc. v. Adams* litigation illustrates the point. After the Supreme Court reversed the Ninth Circuit's rule excluding employment contracts from the FAA, see *supra* text accompanying notes 44–46, the Ninth Circuit on remand then addressed (and agreed with) an unconscionability challenge to the agreement. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892, 896 (9th Cir. 2002).

<sup>91</sup> See *infra* Part II.B (discussing empirical evidence).

ties to draft increasingly one-sided or burdensome arbitration provisions, so that the number of truly unconscionable agreements was actually increasing over some period.

Nonetheless, the upswing in the prominence of unconscionability doctrine is peculiar because, for a few reasons, it would not seem like a very promising line of attack. While every contracts casebook includes a famous unconscionability case such as *Williams v. Walker-Thomas Furniture Co.*,<sup>92</sup> it is well known that unconscionability is generally a loser of an argument.<sup>93</sup> Further, unconscionability does not completely address the problem: Many of the features of arbitration clauses that are often challenged as unconscionable really do not strike one as a gross imposition on the particular person at issue but rather strike at more broadly based considerations of public policy.<sup>94</sup> (For example, a ban on punitive damages is hard to deem so grossly oppressive to the individual as to be unconscionable, especially if full compensation and attorneys' fees are available.) The newfound attraction to unconscionability is especially striking because the doctrine has been mostly in intellectual retreat for various reasons, including the strength of the law and economics movement and continuing emphasis on judicial "restraint."<sup>95</sup>

Despite all of these defects, unconscionability at least has the notable advantage of remaining available. The new popularity of unconscionability and allied doctrines has, accordingly, been aptly described by scholars as an attempt, using one of the few tools remaining, to put the brakes on the pro-arbitration trend and restore

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<sup>92</sup> 350 F.2d 445 (D.C. Cir. 1965).

<sup>93</sup> E.g., 7 JOSE M. PERILLO, CORBIN ON CONTRACTS § 29.4 (rev. ed. 2002) ("Most claims of unconscionability fail.")

<sup>94</sup> Cf. Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1901 (2006) (noting that true issue in some class-waiver unconscionability cases is whether waiver distorts underlying substantive law).

<sup>95</sup> See Stempel, *supra* note 30, at 812–32 (describing confluence of trends that have made unconscionability unfashionable as method for policing contracts). This is not to say that law and economics speaks with a single voice on the subject, for it does not. See Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441 (2004) (presenting competing law-and-economics accounts); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995) (providing qualified support for unconscionability arguments); cf. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294–95, 302, 315 (1975) (defending some forms of procedural unconscionability doctrine on economic grounds but criticizing substantive unconscionability doctrine). Criticisms of unconscionability are not necessarily linked to the law and economics movement; consider, for example, the canonical academic attack on unconscionability represented by Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

some sort of balance.<sup>96</sup> There is much truth in that view, but it is incomplete in important ways. First, any balance or equilibrium may be only temporary, for pro-arbitration courts will try to respond to the new tools being used to limit arbitration. That is, arbitration jurisprudence is not at rest but is still evolving. And second, unconscionability's allure is not limited to the fact that it remains available: Another of its virtues is that it provides at least the opportunity for furtive manipulation and evasion of review, making it a move that is hard to counter directly. In the hope of providing a more comprehensive and dynamic account of the role of unconscionability, the rest of this Article will examine the actions and reactions that are currently shaping arbitration law.

## II

### CIRCUMVENTION OF THE FAA

Even judges who are remarkably dim bulbs know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences.

— *Garnes v. Fleming Landfill, Inc.*<sup>97</sup>

This Part examines one half of the unconscionability game, namely, the moves available to courts skeptical of arbitration. The approach used here builds on the strategic instruments framework, a type of positive political theory model developed by Emerson Tiller and others.<sup>98</sup> The basic insight of this approach, elaborated upon

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<sup>96</sup> Jeffrey Stempel describes the matter:

Just as nature abhors a vacuum, water seeks to be level, and ecosystems work to retain environmental stability, the legal system has witnessed an incremental effort by lower courts to soften the rough edges of the Supreme Court's pro-arbitration jurisprudence through rediscovery of what might be called the 'unconscionability norm' . . . .

Stempel, *supra* note 30, at 765–66; *cf.* Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 253, 260–61 (explaining that courts “use the tools available to reach their desired outcomes” when they believe enforcing arbitration agreements would be too inequitable).

<sup>97</sup> 413 S.E.2d 897, 907 (W. Va. 1991) (Neely, J.).

<sup>98</sup> *See generally* Joseph L. Smith & Emerson H. Tiller, *The Strategy of Judging: Evidence from Administrative Law*, 31 J. LEGAL STUD. 61 (2002) (providing evidence from environmental cases showing that courts of appeals selected grounds for their decisions based on strategic considerations); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349 (1999) (developing theoretical model according to which agencies and courts choose decision instruments in order to manipulate costs of review); Pablo T. Spiller & Matthew L. Spitzer, *Judicial Choice of Legal Doctrines*, 8 J.L. ECON. & ORG. 8 (1992) (employing similar framework to study Supreme Court's choice between statutory and constitutional grounds for decision).

below, is that lower courts can choose the grounds for their decisions in ways that reach a desired result and simultaneously make it difficult for higher courts to review their decisions. The discussion below will give the greatest attention to Supreme Court review of state courts, as that is where the divergence of views is greatest and the federalism stakes the highest, but much of the discussion applies to hierarchical review more generally. Indeed, some of the analysis also applies to what we might call nonhierarchical review: The lower federal courts do not directly “review” state decisions in the appellate sense, but they often need to apply state case law (such as, here, the state law of contract formation and defenses); when they do, they must ensure that state decisions are compliant with federal law. It would be unnecessarily tedious to multiply the analysis below so as to discuss all of the various permutations—Supreme Court review of state courts, Supreme Court review of lower federal courts, lower federal court review of state courts, and so on—at each point, but some notable differences will be identified where useful.

### A. *Theoretical Framework*

It is appropriate to begin with a few words about the underpinnings of the general approach to judicial decisionmaking employed here. To greatly simplify a complicated debate, one view is that judges decide cases according to the dictates of the relevant laws, precedents, and other authoritative legal materials as they honestly understand them, while an opposing view holds that judges rule according to their policy preferences.<sup>99</sup> The latter view can itself be divided into various forms. In one variation, judges directly vote their preferences.<sup>100</sup> Also popular today, however, is the idea that judges are strategic or sophisticated in some sense—that is, judges realize that the best way to advance their goals might be through indirect means that reduce the likelihood of overrides by higher courts or other political institutions such as legislatures.<sup>101</sup> Overlaying these debates are controver-

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<sup>99</sup> For an overview of the debate and discussion of the contending positions, see generally LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997), and JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44–114 (2002).

<sup>100</sup> This view is most closely associated with Segal and Spaeth’s work on the attitudinal approach to Supreme Court decisionmaking. See SEGAL & SPAETH, *supra* note 99, at 114 (stating that Supreme Court justices can “virtually always . . . engage in rationally sincere behavior on the merits”). They argue that lower court judges are similarly motivated by policy preferences but recognize that those judges usually face more constraints on their behavior. *Id.* at 111 & n.80.

<sup>101</sup> See Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING*

sies over topics such as how much the fear of reversal acts as a constraint on judicial behavior.<sup>102</sup>

As most commentators recognize, it is unlikely that the whole truth resides in any of the contending theories of judicial behavior in their purest forms.<sup>103</sup> Individual judges likely act on a mixture of motives, and the judiciary as a whole, which is composed of many distinct individuals, certainly does. Judges often follow precedents with which they strongly disagree, even when the risk of being reversed is low.<sup>104</sup> For purposes of this Article, we need not embrace the view that all (or even most) judges act strategically or otherwise deviate from the traditional legal paradigm. We need accept only the relatively modest propositions that, whether or not they are fully self-conscious regarding their own conduct,<sup>105</sup> (1) at least some judges

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43, 43–48 (Cornell W. Clayton & Howard Gillman eds., 1999) (contrasting strategic approach with attitudinal approach).

<sup>102</sup> This topic has itself generated a substantial literature. *E.g.*, Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369 (2005); David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 L. & SOC'Y REV. 579 (2003); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principle-Agent Model of Supreme Court–Circuit Court Interactions*, 38 AM. J. POL. SCI. 673 (1994).

<sup>103</sup> *See, e.g.*, Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 394–95 (2007) (concluding that empirical work “strongly suggests that both politics and law matter”); *see also* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2158–59 (1998) (stating that various explanations for compliance with legal doctrine “may operate at different times and under different circumstances”).

<sup>104</sup> Kim, *supra* note 103, at 394–404.

<sup>105</sup> Those who advocate attitudinal models of judicial behavior often claim to be agnostic about judges' subjective cognitive experience. *See, e.g.*, SEGAL & SPAETH, *supra* note 99, at 433 (stating that whether judges are aware of ideological influences on their behavior “doesn't matter”). The topic of the cognitive foundations of various approaches to judicial behavior is currently attracting increased interest. *E.g.*, THE PSYCHOLOGY OF JUDICIAL DECISION MAKING (David Klein & Gregory Mitchell eds., forthcoming Oct. 2009); Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision-Making*, 68 J. POL. 308 (2006); Dan M. Kahan, ‘Ideology in’ vs. ‘Cultural Cognition of’ Law: What Difference Does it Make? (Mar. 20, 2008) (unpublished manuscript), available at [http://www.ssrn.com/abstract\\_id=1111865](http://www.ssrn.com/abstract_id=1111865).

One reason to favor explanations that involve some type of subconscious element is that they permit one to accept political scientists' evidence of attitudinal behavior while also crediting what judges usually report about their own subjective experience: that they sincerely try to follow the law. It may be that strategic models, as compared to more directly attitudinal models, are harder to explain in terms of subconscious influences, given that the former impute more sophistication and information to judges. For my part, I do not find it so difficult to believe that people of good faith can be subtly influenced by the risk of being caught, nor do I find it implausible that many judges have the sophistication—and some have the intent—to engage in strategic behavior in order to avoid being caught. In any event, whatever the cognitive processes, there is in fact some empirical support for the strategic model in various contexts. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998) (providing theoretical structure and tentative empirical

pursue their ideological/policy aims in some cases, and (2) their pursuit of those aims is impacted to some degree by the expected responses of other judicial actors. More concretely, some judges disagree with the Supreme Court's strongly pro-arbitration course, are willing to oppose it, and will take the survivability of their doctrinal choices into account when fashioning their arbitration rulings.<sup>106</sup>

The analysis here relies on the fact that lower courts can influence the risk of reversal, and not just by changing the outcome they reach. In any given case, there may be multiple legal grounds that could support a particular outcome—a case might be subject to resolution based on constitutional, statutory, evidentiary, procedural, jurisdictional, or other grounds, and even within each of those categories there may be multiple alternative routes to the same outcome. The chosen basis for the decision can affect the likelihood of reversal by a higher court, even when holding the decision's bottom line constant. Lower court judges realize this, and so they can manipulate their grounds of decision both to advance their preferred outcomes and to make review of their decisions more costly. This is the essence of the strategic instruments approach.

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support for strategic approach); Lee Epstein & Jack Knight, *Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. RES. Q. 625, 638–41 (2000) (citing articles providing empirical evidence for strategic approach); Kirk A. Randazzo, Strategic Anticipation and the Hierarchy of Justice in the U.S. District Courts (Feb. 1, 2008) (unpublished manuscript), available at <http://www.ssrn.com/abstract=1114207> (testing strategic model of district court decisionmaking and finding that district courts are constrained by anticipated responses of appellate courts); see also *infra* note 133 (citing empirical support for strategic instruments approach in particular). *But cf.* VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 86 (2006) (finding lack of evidence that strategic considerations influence decision to dissent on intermediate appellate courts). A general account of the cognitive basis of the strategic approach is beyond the scope of this Article.

<sup>106</sup> To the extent that Supreme Court review is at issue (as opposed to other forms of hierarchical or even nonhierarchical review), the tiny percentage of cases that the Court reviews might lead one to question whether fear of reversal could play an appreciable role for a rational court. *Cf.* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-first Century*, 35 IND. L. REV. 335, 350–53 (2002) (noting shrinking Supreme Court docket, especially dwindling number of state cases reviewed). Yet while the overall rate is small, particular types of rulings can receive very close scrutiny and exhibit high grant rates. See Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 108–12 (2000) (showing extremely high grant rates for liberal search-and-seizure cases during part of Burger Court era); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 745–63 (2001) (documenting differential grant rates associated with various factors); Songer et al., *supra* note 102, at 692–94 (explaining that Supreme Court can achieve fairly effective control despite rarity of reversals, in part because litigants act as monitors). In light of the Supreme Court's pro-arbitration campaign and the mobilization of business interest groups, see *infra* notes 180–86 and accompanying text, I suggest that anti-arbitration rulings fall into one of those rare categories of cases that do face an appreciable risk.

## 1. *Competing Decision Instruments*

In the FAA/unconscionability context, we can posit two types of competing decision instruments for invalidating arbitration agreements. The first type of instrument, which is really a collection of slightly different possible rationales, would be a decision of a broad or categorical nature: Arbitration agreements abridge the state constitutional right to jury trial, are per se (or presumptively) unconscionable in certain contexts (such as employment), are inapplicable to certain types of statutory actions (such as consumer protection claims), and so on.<sup>107</sup> The second instrument would be a more contextual ruling to the effect that the particular arbitration agreement at hand is unconscionable (or adhesive, or contravened the nondrafting party's reasonable expectations, etc.) and so need not be enforced as a matter of generally applicable state contract law.<sup>108</sup>

The two decision instruments differ along several dimensions. Three relevant attributes of the different decision instruments are as follows:

*Policy impact of decision* refers to the likely legal impact of the decision (primarily in the rendering jurisdiction, but potentially in others as well).

*Technical ease of review* refers to the relative technical ease or difficulty of determining whether a decision complies with the FAA, due to, for example, the degree of transparency of the decision.

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<sup>107</sup> See, e.g., *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003) (“[U]nder California law, a contract to arbitrate between an employer and an employee, such as the one we evaluate in this case, raises a rebuttable presumption of substantive unconscionability.”); *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1161–65 (Cal. 2003) (holding that state statutory claims for public interest injunctions are not subject to arbitration); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 11–15 (Mont. 2002) (Nelson, J., concurring) (contending that waiver of state constitutional rights of jury trial and access to courts are judged by knowing-and-intelligent standard rather than by ordinary contractual consent rules); *Casarotto v. Lombardi*, 886 P.2d 931, 936–39 (Mont. 1994) (holding arbitration clauses ineffective unless they comply with state statute requiring prominent notice), *vacated sub nom. Doctor’s Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995).

<sup>108</sup> The distinction drawn here between the two types of decision instruments is not exactly the same as the familiar one between rules and standards, though there are certainly some parallels. The literature on the rules-versus-standards debate is large. For examples of work that emphasizes the relative advantages and disadvantages of rules and standards in terms of controlling potentially disobedient lower courts, see Heytens, *supra* note 10, at 11 & n.47, and Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 39 (2000) (observing that, as opposed to misapplication of standards, “errors in rule application will tend to be more obvious and, therefore, more susceptible to correction on appeal”).

*Expressive ease of review* refers to the expressive impact of reversing or otherwise not following the decision.<sup>109</sup> For example, is reversal compatible with showing respect for the lower court or does it call into question the lower court's integrity and honesty?

These attributes have important consequences for appellate review. In explaining those consequences, the discussion will focus on review by the Supreme Court, though much of the analysis is generally applicable.<sup>110</sup> Further, while I usually refer to Supreme Court review of state court decisions, similar comments would apply to the Court's review of a federal decision that applies state law unconscionability doctrine. The chart below illustrates how the decision attributes map onto the two different decision instruments and how that affects appellate review.

TABLE 1  
IMPACT OF DIFFERING DECISION INSTRUMENTS ON  
APPELLATE REVIEW

	Policy impact of decision	Technical ease of review	Expressive ease of review	Resulting risk of reversal
Broad, categorical ruling (i.e., per se rule, public policy, etc.)	High	High	High	High
Contextualized ruling (i.e., unconscionability)	Low	Low	Low	Low

One might initially suspect that a court that was resistant to arbitration might seek to maximize the effect of its decision by choosing the first decision instrument: a decision to the effect that arbitration agreements are against public policy, are per se unconscionable, do

<sup>109</sup> The inclusion of an expressive component of the cost of review represents an innovation in this Article, compared to other strategic instrument accounts.

<sup>110</sup> One distinctive feature of Supreme Court review is that the Supreme Court's docket is almost wholly discretionary, so it is often important to distinguish between decision-making at the certiorari stage and the merits stage. However, some of the same factors that reduce the likelihood of a grant of certiorari are also useful more generally in preventing reversal of a decision. For example, a decision that is based on factual findings is both difficult to reverse in any appellate review context *and* highly unlikely to be reviewed at all by the Supreme Court. See FED. R. CIV. P. 52(a)(6) ("Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 223-24 (1991) (providing evidence of rarity of Supreme Court engaging in fact-oriented review).

not apply in certain contexts or to certain causes of action, or offend another across-the-board rule. A decision that holds an arbitration clause unconscionable based on a particularized, fact-intensive examination of the contract and circumstances of formation will have somewhat less direct impact than would a categorical rule,<sup>111</sup> and to that extent it would appear less attractive to such a court. Such reasoning, however, would be shortsighted, because these different types of decisions differ in terms of how likely they are to survive and garner adherence. As the following discussion will more fully explain, reviewing and reversing an unconscionability ruling is very difficult both technically and expressively.

## 2. *Technical Difficulty of Review*

A decision based on grounds such as unconscionability is opaque to the reviewing court in several respects. Scrutinizing the decision may require an immersion in the factual record (how small was the print, how (un)sophisticated was the customer, what representations did the salesperson make?).<sup>112</sup> Certainly it will require grappling with the details of state law, a matter on which the Supreme Court is not expert.<sup>113</sup> An unconscionability ruling thus takes advantage of the lower court's asymmetric information about both the record and the content of state law.

Moreover, even for a person knowledgeable about the record and state law, it will often be nearly impossible to tell if a court is applying state unconscionability doctrine evenhandedly in the way the FAA requires. This is so for two basic reasons. First, some contractual issues arise exclusively or nearly exclusively in the arbitration context, which means that there is no ready and obvious nonarbitration base-

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<sup>111</sup> See, e.g., *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006) (distinguishing California Supreme Court unconscionability case because it applied only in "limited circumstances" and because "there is no blanket policy in California against class action waivers in the consumer context").

<sup>112</sup> Calling the decision below fact-bound is a common tactic in opposing certiorari, here as in other contexts. See, e.g., Respondents' Brief in Opposition at 18, *Ryan's Family Steak Houses, Inc. v. Walker*, 546 U.S. 1030 (2005) (No. 04-1672), 2005 WL 2844933 (describing unconscionability ruling below as "fact-specific" and "fact-bound"); Respondent's Brief in Opposition at 14, *Edward D. Jones & Co. v. Kloss*, 538 U.S. 956 (2003) (No. 02-1112), 2003 WL 21698586 (describing unconscionability decision below as involving "particular" and "peculiar" circumstances). The Supreme Court denied certiorari in both cases. *Ryan's Family Steak Houses, Inc. v. Walker*, 546 U.S. 1030 (2005); *Edward D. Jones & Co. v. Kloss*, 538 U.S. 956 (2003).

<sup>113</sup> See, e.g., *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (referring to Supreme Court Justices as "outsiders" without special competence in law of various states); cf. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (stating that "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States" than Supreme Court).

line to use as a point of comparison. For instance, one recurring topic is whether an arbitration clause is unconscionable if it provides that any arbitration proceedings, and the outcome thereof, will be kept confidential.<sup>114</sup> The closest nonarbitration cognate would seem to be a contract provision stating that any future lawsuit that results from the parties' contract, together with its outcome, would be confidential. But, of course, one generally does not see such clauses because the nature of our legal system is that court files and proceedings are (with certain exceptions for trade secrets, national security, etc.) open to the public, regardless of what the particular parties may prefer. Also inapposite are confidentiality terms in settlement agreements: These come into being when the parties agree to settle a dispute, not when they begin their contractual relationship in the first place.<sup>115</sup> So if a court says that a confidentiality provision in an arbitration agreement is unconscionable under state law, there is no solid nonarbitration analogue against which to check that conclusion.

A similar difficulty in making apples-to-apples comparisons arises with regard to one of the most often litigated issues in consumer arbitration agreements: whether bans on class or other collective arbitrations are unconscionable.<sup>116</sup> One might think that there is a ready nonarbitration analogue, namely, a contractual clause that does not require arbitration but forbids bringing a class action *lawsuit* in court. But on further reflection, one sees that such a clause might not yield a good baseline for comparison after all, even assuming the law were clear on how waivers of class actions in ordinary litigation should be treated.<sup>117</sup> In the ordinary litigation context, the alternative to a class action suit would be proceeding in court on an individual basis. In order to judge how that alternative compares with the burden of proceeding in arbitration on an individual basis, one would have to con-

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<sup>114</sup> See *supra* note 78 and accompanying text. Consumers and other parties resisting arbitration have criticized confidentiality because, among other things, secrecy advantages repeat players, who already know how things have gone in previous arbitrations. See *Ting v. AT&T*, 319 F.3d 1126, 1151–52 (9th Cir. 2003) (deeming confidentiality provisions in arbitration agreement unconscionable).

<sup>115</sup> Cf. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 176 (5th Cir. 2004) (drawing parallels between confidentiality in arbitration and confidential settlements, but acknowledging that they “are not completely analogous”).

<sup>116</sup> For samples of the large and growing case law in this area, see sources cited *supra* note 73.

<sup>117</sup> There is relatively little law on class waivers in the ordinary litigation context. *But compare* *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1022 (Wash. 2007) (invalidating nonarbitration forum selection clause because, inter alia, out-of-state forum would not allow suit to proceed as class action), *and* *America Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 708–12 (Ct. App. 2001) (same), *with* *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1011–13 (D.C. 2002) (rejecting similar argument).

sider a number of factors, including the predicted size (and variability) of the awards in the two fora, the availability of attorneys' fees (as a matter of law and of contract), whether the plaintiff could proceed in small claims court despite an arbitration clause, and how the costs of the arbitration would be paid. Although one might be tempted to say that the (usually) lower costs of arbitration make an individual proceeding less burdensome than an ordinary lawsuit would be, the need to consider various factors, which are case-specific, makes it hard to say that a fair-minded court would *have to* rule the same way when it comes to both waivers of class action lawsuits and waivers of class arbitration proceedings. So once again there is no clear cognate to use to check the arbitration case law against general principles of state law.

The second reason it is extremely difficult to tell if a court is applying unconscionability evenhandedly is that, even when cognates are available in principle, in some situations the law is just too indeterminate to tell whether a decision is discriminatory.<sup>118</sup> Oftentimes, past cases alone will not definitively dictate the outcome of future cases. Take, for instance, the issue of clauses that specify that any proceedings shall take place in a specified location only. Challenges to such clauses can arise both with regard to arbitration agreements and to forum-selection clauses more generally. Suppose that the California state courts have held *in nonarbitration situations* that a forum-selection clause specifying the courts of faraway Florida is unconscionable but that a clause requiring a person who lives in San Francisco to litigate in not-so-distant Sacramento is permissible. The cases do not purport to establish a bright-line rule regarding how far is too far. Suppose that there next arises a case involving a San Francisco consumer challenging *an arbitration clause* that specifies arbitration in Los Angeles. Unconscionable or not? A federal court asking that question as a matter of first impression might think of Los Angeles as more like Sacramento than Florida, but if the California state courts have said this clause is unconscionable, can the federal court really say that the state courts have decided the case differently than they would have if the case had involved a nonarbitration forum-selection clause? Probably not, at least not until the Los Angeles case arises under a nonarbitration scenario and the state courts give a different answer. Unless the state court has misstated the governing

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<sup>118</sup> Some other commentators have perceived this risk as well. See Alan Scott Rau, *Does State Arbitration Law Matter at All? Part II: A Continuing Role for State Law*, in *ADR & THE LAW* 208, 214 (Am. Arb. Ass'n et al. eds., 15th ed. 1998) (observing that vague doctrines such as unconscionability "provide[] abundant opportunity for covert manipulation").

legal standards or has made anti-arbitration comments, the federal court will just have to take its word that state law would invalidate a similar provision in a nonarbitration context. This, of course, creates an opportunity for noncompliance.

### 3. *Expressive Difficulty of Review*

Now, to be sure, the federal courts take the state courts' word for things all the time. That is, indeed, the norm. The official dogma in our federal system is that the state courts are fully competent to apply federal law (and, *a fortiori*, state law) and certainly can be trusted to be honest in their decisions.<sup>119</sup> This leads us to another way in which the costs of reviewing an unconscionability ruling are high, especially when it is a federal court scrutinizing a state court decision. Not only is review technically taxing, but it can also be expressively difficult given prevailing norms. Some reversals are more normatively freighted than others. We are accustomed to seeing federal courts conclude that a state court has erred on some matter of federal law, but here we are confronted with something quite different. If the state court quotes the proper federal standard and purports to generate an evenhanded application of unconscionability law,<sup>120</sup> rejecting the state court's holding is tantamount to impugning the state court's honesty.

Admittedly, such an attack on a state court's integrity would not be completely unprecedented in the world of judicial federalism. One parallel situation is the "adequate and independent state ground" doctrine, under which the Supreme Court will ordinarily refuse to review a federal issue in a case if the state court's judgment rejecting a federal claim can independently stand on a state law basis, including the federal claimant's failure to comply with state procedural rules for

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<sup>119</sup> As the Supreme Court wrote in limiting federal habeas review of state rulings on Fourth Amendment issues: "State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. . . . [T]here is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent or conscientious . . . than his neighbor in the state courthouse.'" *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)); see also Lonny S. Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law, and the "Reliance Principle,"* 81 TUL. L. REV. 283, 286 (2006) (discussing Rehnquist Court's general reliance on state judges to adjudicate federal rights fairly).

<sup>120</sup> See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112–13 (Cal. 2005) (stating that FAA allows unconscionability defenses but "forbids the use of such defenses to discriminate against arbitration clauses," while noting that "[t]here is no such discrimination here" (citations omitted)).

presenting his federal claim.<sup>121</sup> Despite the doctrine's general deference toward state court interpretations of state law, the question whether a state ground is truly "adequate" to support the judgment is *itself* a federal question.<sup>122</sup> Thus, a state procedural rule is not adequate to bar review of the underlying federal question unless the rule is "firmly established and regularly followed."<sup>123</sup> The Supreme Court can, if necessary, examine prior state decisions to see if there really *is* such a procedural rule regularly applied in like cases.<sup>124</sup> This facet of the adequate state grounds doctrine is necessary, among other reasons, because otherwise state courts could opportunistically disregard federal law *sub silentio*.<sup>125</sup>

A second useful parallel comes from situations in which federal law protects an interest created by state law, such as property or contract rights. The federal protection could be nullified if, as a matter of unreviewable state law determinations, the underlying property interest were deemed never to have existed. Thus, as in cases under the adequate and independent state ground doctrine, the federal courts may scrutinize a state court's treatment of state property or contract interests to prevent circumvention of the federal guaranty.<sup>126</sup>

Needless to say, the scenarios just mentioned inhabit a narrow doctrinal cranny characterized by tension and suspicion. Their assumptions clash with the usual pieties regarding comity and trust. Indeed, it is illuminating that most of the key precedents deeming

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<sup>121</sup> See generally 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4019–4033 (2d ed. 1996) (describing doctrine). The doctrine applies both in the context of Supreme Court direct review of state court decisions and in the context of review of habeas petitions at all levels of the federal court system. *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991).

<sup>122</sup> *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

<sup>123</sup> *James v. Kentucky*, 466 U.S. 341, 348 (1984); see also *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims.").

<sup>124</sup> See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455–58 (1958) (concluding that procedural bar imposed by state court below was not supported by prior state decisions).

<sup>125</sup> See Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 86–87 (2002) ("[T]he Court's practice of state grounds reversals appears to rest, at bottom, on the intuition that . . . there simply must be some federal judicial mechanism for catching state courts that disingenuously manipulate antecedent state law to thwart federal interests . . .").

<sup>126</sup> For example, in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), a Contracts Clause case, the Court stated that "in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." *Id.* at 100. The Court then proceeded to scrutinize prior state decisions and concluded that the decision under review was inconsistent with state contract law. *Id.* at 100–09.

state procedural rules “inadequate” because not consistently followed—that is, holding them not to be real rules but one-off “cheats”—tended to arise in the politically charged historical context of the civil rights era, in which there really was a strong reason to disbelieve certain state courts.<sup>127</sup> Similarly, one of the most famous cases in which the Supreme Court found a state court to have manipulated state property law to defeat federal protections, *Fairfax’s Devisee v. Hunter’s Lessee*, also arose in a contentious period of state court resistance and recalcitrance.<sup>128</sup> This is not to say that state grounds have never been deemed spurious in other eras, but the doctrine does inescapably carry this baggage of distrust. Thus, when Chief Justice Rehnquist cited some of these extraordinary cases in his *Bush v. Gore* concurrence—in which he concluded that the Florida Supreme Court’s interpretation of its state election laws “distorted them beyond what a fair reading required”<sup>129</sup>—Justice Ginsburg pointed out the expressive stakes involved:

THE CHIEF JUSTICE’s casual citation of these cases might lead one to believe they are part of a larger collection of cases in which we said that the Constitution impelled us to train a skeptical eye on a state court’s portrayal of state law. . . . [T]his case involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. The Florida Supreme Court . . . surely should not be bracketed with state high courts of the Jim Crow South.<sup>130</sup>

Given the historical connotations, one can see that a Supreme Court decision rejecting a state unconscionability holding as a discriminatory manipulation of state law would find itself in a rather remarkable category. We all know that the Supreme Court is strongly pro-arbitration, but such a ruling would really be pulling out the big guns, in terms of federal-state judicial relations. Issuing such a ruling would

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<sup>127</sup> See Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 885–900 (1994) (describing how doctrine evolved in 1950s and 1960s in response to perceived manipulation of procedural rules by some southern state courts).

<sup>128</sup> 11 U.S. (7 Cranch) 603 (1812); see KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 71–75 (15th ed. 2004) (discussing background of case); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3–12 (1913) (same).

<sup>129</sup> *Bush v. Gore*, 531 U.S. 98, 114–15 (2000) (Rehnquist, C.J., concurring).

<sup>130</sup> *Id.* at 140–41 (Ginsburg, J., dissenting); see also Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1739 (2001) (“Without expressly saying so, the conservative Justices implied that the Florida Supreme Court’s statutory interpretations in *Bush* were entitled to no greater deference in federal court than those of renegade White supremacist nullifiers during the civil rights era.”).

arguably reveal something about the Court's values,<sup>131</sup> namely, that it thinks state discrimination against arbitration merits the same extraordinary response, in terms of judicial federalism, as discrimination in the Jim Crow South. While some commentators have noted parallels between state court resistance to civil rights in the 1950s and 1960s and the current hostility to arbitration,<sup>132</sup> it would be quite remarkable if the Court itself were to validate their similarity in this way.

### B. Support for the Strategic Model

We have now introduced a theoretical framework for understanding the attractiveness of unconscionability rulings in the arbitration context. To be sure, some applications of unconscionability are completely compliant with the FAA. But is there reason to believe that, in some cases, arbitration-resistant courts are using unconscionability to target arbitration agreements for special scrutiny? I believe there is such evidence, and the next several pages will describe some of it.<sup>133</sup> It is important to recognize, however, that producing empirical proof of discrimination would be (at best) extremely difficult and in one sense is almost beside the point. Pro-arbitration courts will evolve doctrine in response to what they believe they are seeing, so

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<sup>131</sup> Cf. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 167 (1984) (Stevens, J., dissenting) (“[T]his case has illuminated the character of an institution.”).

<sup>132</sup> Stephen Ware compares Alabama's responses to civil rights and to arbitration:

In both cases, an underlying issue was whether those with power in Alabama courts would continue to inflict “home-cooked justice” on those without power in Alabama courts. In both cases, it ultimately took direct action by the United States Supreme Court to force Alabama into line with the country as a whole.

Of course, there are differences, too. Injustices committed by pro-plaintiff courts pale in comparison with injustices committed by those who resisted civil rights. Nevertheless, I keep hearing echoes of that earlier “massive resistance” when Alabama lawyers express opposition to federal arbitration law.

Ware, *supra* note 65, at 27 (footnote omitted). In a similar vein, one observer of the *Casarotto* remand proceedings in the Montana Supreme Court has pointed out that the refusal of two of the Montana justices to sign the remand order is reminiscent of the practice of some defiant southern judges during the civil rights movement. Reuben, *supra* note 56, at 16.

<sup>133</sup> I note that there is some evidentiary support for the strategic instruments approach in other areas. See Schanzenbach & Tiller, *supra* note 14, at 25–26 (showing that district court's choice between fact-oriented sentence adjustments and law-oriented departures from Sentencing Guidelines depends on ideological alignment between district and appellate court); Smith & Tiller, *supra* note 98, at 71–72, 77–78 (finding relationship between ideological direction of decision and appellate panels' choice between statutory grounds (e.g., *Chevron* analysis) and process grounds (e.g., review for “substantial evidence,” “hard look” review) in environmental law cases).

the suspicion of manipulation is enough. And there are certainly reasonable grounds for suspicion.

To begin with what we might call circumstantial evidence, there is motive. As discussed above, some courts are not nearly as enthralled with arbitration as is the Supreme Court.<sup>134</sup> Whether because they seek to honor state statutes, to follow the electorate's wishes, or simply because they believe arbitration is bad policy, these courts have cause to oppose it. True, it is one thing to dislike arbitration and quite another to bend the law to get around it. Yet the temptation to act on the dislike may grow (whether consciously or not) given the opportunity to do so without significant cost. And here there is certainly the chance to manipulate the law with relatively little risk of detection, for we have already seen that Supreme Court review is technically and expressively difficult in this area—technically difficult because it is hard to tell whether state law is in fact being applied disingenuously, expressively difficult because it violates norms of judicial federalism to say so.<sup>135</sup>

Further, at least some judges realize that they have an opportunity for evasion. As one said during a conference on arbitration for state appellate judges:

I don't see how [the FAA] could preempt anything we would do in state substantive contract or other law. We would write our way around it. We have had case after case where we have written our way around the federal United States Supreme Court law. And they have denied certiorari. There are hundreds of techniques to do [sic].<sup>136</sup>

Likewise, some judges have in published opinions taken the unusual step of accusing their colleagues of evading—not just misunderstanding—the controlling Supreme Court precedents.<sup>137</sup>

Motive, opportunity, and anecdote may not add up to a conviction. Fortunately, there is also some more systematic evidence that is,

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<sup>134</sup> See *supra* Part I.B.

<sup>135</sup> See *supra* Part II.A.2–3.

<sup>136</sup> POUND CIVIL JUSTICE INST., *THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS: REPORT OF THE 2003 FORUM FOR STATE APPELLATE COURT JUDGES* 117 (2006); see also *id.* at 119, 123 (reporting panel moderators' summary, stating that "[t]he sense was from the state court justices that they simply aren't going to kowtow to what the U.S. Supreme Court thinks state law should be, and they are going to apply state law, and they are going to write their way around the FAA if they have to deal with that preemption").

<sup>137</sup> See *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., concurring and dissenting) (accusing majority of "chip[ping] away at United States Supreme Court [arbitration] precedents broadly construing the scope of the FAA by indirection, despite the high court's admonition against doing so" (first alteration in original) (internal quotation marks omitted)).

while limited in several ways, suggestive. A study by Susan Randall, for instance, examined the outcomes of unconscionability challenges in two time periods—1982–1983 and 2002–2003. She found that in the earlier period, unconscionability challenges to arbitration agreements were not especially prevalent (she found only eight, out of fifty-four total unconscionability cases) and not notably successful (only one of the eight succeeded).<sup>138</sup> By 2002–2003, however, after the Supreme Court had blocked off most other ways to challenge arbitration agreements, unconscionability challenges to arbitration agreements came to represent about two-thirds of all unconscionability challenges (161 out of 235) and—more importantly—succeeded at twice the rate of unconscionability arguments directed against other types of contracts.<sup>139</sup> Similarly, a study by Stephen Broome examined over a decade of California appellate decisions on unconscionability—over 150 cases in all. He found that unconscionability challenges to arbitration agreements, which accounted for about two-thirds of all unconscionability challenges, succeeded at a rate several times higher than the rate for other types of contracts.<sup>140</sup>

The aggregate data regarding rates of success are interesting, but they are insufficient to show that arbitration agreements are victims of discrimination. There are, to begin with, difficulties in drawing conclusions from such data, because the disputes that are litigated and result in searchable court decisions may be unrepresentative. Beyond that general point, the arbitration cases may simply differ from the nonarbitration cases in relevant ways. The fact that arbitration agreements were more often held unconscionable may simply reflect the fact that during the relevant period they really *were*, on average, more unfair than other types of challenged agreements, wholly apart from the requirement of arbitration itself. That would occur, for instance, if drafters of arbitration clauses felt emboldened by their string of suc-

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<sup>138</sup> Randall, *supra* note 85, at 196. The small number of cases means, of course, that the success rate is sensitive to small changes.

<sup>139</sup> *Id.* at 194. Although Randall did not perform statistical tests (and, for reasons mentioned in the text, there are difficulties in drawing inferences because the arbitration and nonarbitration cases may differ), the difference in the success rate for unconscionability challenges in the arbitration context as compared to nonarbitration contexts in 2002–2003 is statistically significant (using a chi-square test,  $p < 0.001$ ).

<sup>140</sup> Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–48 (2006). With the caveat mentioned in the previous footnote, it is worth pointing out that the difference in outcomes reported by Broome is also statistically significant (using a chi-square test,  $p < 0.001$ ).

cesses in the Supreme Court and thus began to push the envelope by imposing increasingly burdensome and unexpected terms.<sup>141</sup>

What would be useful, then, is a more nuanced examination of whether courts are employing different rules in arbitration versus nonarbitration contexts. For example, if courts rule that a particular limitation on damages is unconscionable in the arbitration context, do they also hold a like limitation unconscionable in a nonarbitration context? Both of the studies mentioned above go on to attempt to provide this type of more contextualized analysis.<sup>142</sup> Now, as explained earlier, some issues that initially appear to provide good test cases—the treatment of class-proceedings waivers in arbitration and nonarbitration contexts, for one—actually turn out not to; holdings in one context would not necessarily have to carry over to the other.<sup>143</sup> That is, the same considerations that make it hard for a reviewing court to tell whether a lower court is behaving evenhandedly also make it hard for us to conclude that a lower court is *not* behaving evenhandedly. Nonetheless, some topics do provide reasonably good tests, at least in principle. Randall has concluded, for example, that some courts more harshly scrutinize out-of-state forum selection clauses regarding arbitral fora than similar clauses regarding litigation in regular courts,<sup>144</sup> and Broome believes that the observed high suc-

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<sup>141</sup> See Leroy & Feuille, *supra* note 15, at 325 (suggesting, based on review of nearly 400 decisions, that some employers' arbitration agreements are "testing the limits of self-advantage"); see also *Ting v. AT&T*, 182 F. Supp. 2d 902, 939 (N.D. Cal. 2002) (describing an arbitration agreement that severely limited company's liability and may have been designed so that customers would not know that they had agreed to arbitration), *aff'd in part and rev'd in part*, 319 F.3d 1126 (9th Cir. 2003). It may be that, given the recent successes of unconscionability challenges, the most aggressive arbitration clauses are now being scaled back. Some business advocates provide such an account, admitting that some early arbitration provisions were unduly burdensome but contending that the clauses have now improved to become more attractive to consumers. See Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party, *T-Mobile USA, Inc. v. Laster*, 128 S. Ct. 2500 (2008) (No. 07-976), 2008 WL 534808 ("[C]onsumer arbitration provisions have been evolving. At first, many provisions plainly favored the business that drafted them. Invoking state unconscionability principles, several courts struck down these clauses . . .").

<sup>142</sup> See Broome, *supra* note 140, at 48 (stating that differences in aggregate outcomes are result of different rules being applied); Randall, *supra* note 85, at 198 (arguing that "judges are avoiding arbitration through arbitration-specific expansions of the doctrine of unconscionability").

<sup>143</sup> See *supra* text accompanying notes 114–17.

<sup>144</sup> Randall, *supra* note 85, at 214–16. The Randall article also finds discrimination in other areas, such as objections to arbitral costs and confidentiality rules, *id.* at 198–209, 218–20, but those topics do not, in my view, have close enough nonarbitration analogues to make for a convincing test.

cess rate of unconscionability challenges in California results from the courts applying different rules to arbitration agreements.<sup>145</sup>

It may be that the above studies still do not provide definitive evidence of manipulation of unconscionability doctrine. This is not a situation in which we can take a large mass of cases, code a few clearly defined variables, and then employ the tools of statistical inference. Instead, when we are careful about ensuring apples-to-apples comparisons, we are left with few cases; the nature of unconscionability is that it is contextual and tries to account for the totality of the factual circumstances. Recognizing that proof may not be attainable—and is not necessary in order to trigger a reaction from pro-arbitration courts—we can, nonetheless, marshal some additional evidence in the form of a case study that further bolsters and helpfully illustrates the theory adduced above.

### C. A Case Study

For an example of how a court can write its way around the Supreme Court's rulings and frustrate review through its selection of decision instruments, one can consider a recent series of cases in Montana. Recall *Doctor's Associates, Inc. v. Casarotto*,<sup>146</sup> which was discussed briefly in Part I.B, above. *Casarotto* involved a Montana statute that provided that no arbitration clause was valid unless the contract containing the clause had a notice printed in underlined capital letters on the first page of the contract alerting the signing party to the clause's presence.<sup>147</sup> The Montana Supreme Court held that this state statute was not preempted by the FAA and refused to send a dispute to arbitration.<sup>148</sup> Making matters more interesting, the author of the majority opinion, Justice Trieweiler, added his own separate concurrence that seemed to set forth the "real" reasons for his vote.<sup>149</sup> The concurrence referred to arbitration's "total lack of procedural safeguards," the financial burdens it places on consumers, the naïveté of those who consider arbitration clauses voluntary, and the way arbitration allows corporations to operate "above the law."<sup>150</sup> Adhesionary arbitration clauses, he stated, "subvert our system of justice as we

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<sup>145</sup> Broome, *supra* note 140, at 64–65.

<sup>146</sup> 517 U.S. 681 (1996).

<sup>147</sup> *Id.* at 683.

<sup>148</sup> *Casarotto v. Lombardi*, 886 P.2d 931, 939 (Mont. 1994), *vacated sub nom. Doctor's Assocs., Inc. v. Casarotto*, 515 U.S. 1129 (1995).

<sup>149</sup> *Id.* at 939 (Trieweiler, J., concurring) ("The majority opinion sets forth principles of law agreeable to the majority of this Court in language appropriate for judicial precedent. I offer this special concurring opinion as my personal observation regarding many of the federal decisions which have been cited to us as authority.").

<sup>150</sup> *Id.* at 940–41.

have come to know it. If any foreign government tried to do the same, we would surely consider it a serious act of aggression.”<sup>151</sup> These anti-arbitration statements amounted to the judge writing his own petition for certiorari asking to be reversed.

The U.S. Supreme Court did in fact grant certiorari, but only to summarily vacate and remand for reconsideration in light of an intervening decision.<sup>152</sup> On remand, Justice Trieweiler wrote the court’s revised opinion and found no reason to alter the court’s previous decision.<sup>153</sup> A dissent noted that the court had reaffirmed its prior opinion without permitting new briefing and concluded that the court was “simply unwilling to consider any analysis that would require a change in the result it remains determined to reach.”<sup>154</sup> The Supreme Court again granted certiorari and this time reversed 8 to 1.<sup>155</sup> While conceding that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2,” the Supreme Court held that the Montana statute was preempted by the FAA because it “conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.”<sup>156</sup> The Court found this an easy case.<sup>157</sup>

The Montana court’s direct approach—relying on a clear legal rule limiting arbitration and (worse) making anti-arbitration policy arguments—was not too successful. Could the Montana Supreme Court have achieved the same objective if it had been sly? Perhaps so. The *Casarotto* plaintiffs argued to the U.S. Supreme Court that the Montana statute could be upheld as nondiscriminatory because the statutory notice requirement was just “one illustration of a cross-the-board [state law] rule: Unexpected provisions in adhesion contracts must be conspicuous.”<sup>158</sup> Justice Ginsburg’s opinion for the Court declined to address that argument because the Montana Supreme Court had not cited any such general common law doctrine.<sup>159</sup>

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<sup>151</sup> *Id.* at 941.

<sup>152</sup> *Doctor’s Assocs.*, 515 U.S. 1129 (1995) (vacating and remanding for further consideration in light of *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)).

<sup>153</sup> *Casarotto v. Lombardi*, 901 P.2d 596, 599 (Mont. 1995) (Trieweiler, J.).

<sup>154</sup> *Id.* at 600 (Gray, J., dissenting).

<sup>155</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996).

<sup>156</sup> *Id.* at 687.

<sup>157</sup> The opinion was short, with only Justice Thomas dissenting (and only because he continues to believe that the FAA does not apply in state courts at all). *Id.* at 689 (Thomas, J., dissenting).

<sup>158</sup> *Id.* at 687 n.3 (majority opinion); see also Brief for Respondents at 15–25, *Doctor’s Assocs.*, 517 U.S. 681 (No. 95-559), 1996 WL 115790 (advancing this argument).

<sup>159</sup> *Doctor’s Assocs.*, 517 U.S. at 687 n.3.

Before long, the Montana Supreme Court began using common law contract doctrines to get around the *Casarotto* ruling. In a case decided a few years after *Casarotto*, the Montana Supreme Court declared an arbitration agreement unconscionable as a matter of state law because it required only the customer, but not the drafting party, to arbitrate.<sup>160</sup> The Montana court—perhaps showing that it had learned from *Casarotto* that one should mouth the appropriate pieties—was careful to cite the federal policy in favor of arbitration and to state that it was not “craft[ing] special rules which apply only to arbitration provisions” but was instead applying “general principles that exist at law or in equity for the revocation of any contract.”<sup>161</sup>

But the real assault on *Casarotto*, albeit necessarily an indirect one, came next in *Kloss v. Edward D. Jones & Co.*<sup>162</sup> Again, the court emphasized that it was now applying “generally applicable contract law defenses” and “prior decisions which apply to any contract.”<sup>163</sup> In an opinion by Justice Trieweler, the court deemed a boilerplate arbitration clause in a consumer’s standard-form contract unenforceable—not because of any unusually oppressive content but because the consumer was unaware of the term and it was outside of her “reasonable expectations.”<sup>164</sup> Although the *Kloss* court was not explicit about what the broker could have done to create a valid arbitration agreement, one might guess that the way to make the arbitration clause enforceable would be to make sure it *does* come within the consumer’s expectations, such as by explaining the provision to the consumer . . . or perhaps by putting it in large print in a prominent location.<sup>165</sup> Of course, requiring special notices that highlight arbitra-

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<sup>160</sup> *Iwen v. U.S. W. Direct*, 977 P.2d 989, 994–96 (Mont. 1999).

<sup>161</sup> *Id.* at 994, 996.

<sup>162</sup> 54 P.3d 1 (Mont. 2002).

<sup>163</sup> *Id.* at 8–9.

<sup>164</sup> *Id.* at 6–9. The doctrine of reasonable expectations, a cousin of unconscionability, is also sometimes used in other contractual contexts, such as to invalidate terms in adhesive insurance contracts. *E.g.*, *Transamerica Ins. Co. v. Royle*, 656 P.2d 820, 824 (Mont. 1983); JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* § 4.09 (2d ed. 2004). *But cf.* *Counterpoint Inc. v. Essex Ins. Co.*, 967 P.2d 393, 396 (Mont. 1998) (denying plaintiff’s request to apply reasonable expectation doctrine in interpreting unambiguous insurance policy).

<sup>165</sup> As Professor Burnham puts it in his insightful and colorful summary of the Montana courts’ response to arbitration:

If the evil of the provision is that it is not reasonably expected, the cure is to make it reasonable [sic] expected. How? By giving notice of it! . . . The drafter accomplishes this goal by putting those provisions in bold print, in a contrasting color, or, the wise guy reader is no doubt thinking, in underlined capital letters on the first page of the contract.

Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 194 (2005).

tion clauses is what the U.S. Supreme Court said the Montana legislature could not do. Instead, now the same result is clothed in the judicial rationale of the principle of reasonable expectations.

The story continues, as later Montana decisions have built on and extended *Kloss*, suggesting that even a conspicuously displayed arbitration clause might still be outside of a party's reasonable expectations.<sup>166</sup> The Montana court's rather aggressive use of the reasonable expectations doctrine is all the more surprising given a twenty-year-old Montana decision that rejected a reasonable expectations challenge to an arbitration clause in an adhesion contract, even though the clause was not explained or brought to the signing party's attention, observing along the way that, even back then, "arbitration clauses are common, and may be universal, in brokerage agreements."<sup>167</sup>

It is not completely clear whether *Kloss* and its progeny ultimately would withstand scrutiny under the FAA. Why, after all, would an arbitration clause be outside of a person's reasonable expectations, especially given the ubiquity of arbitration clauses, while other contract terms are not? And while a general doctrine of reasonable expectations certainly exists, it is often said that a term is "unexpected"—and therefore subject to invalidation—only if there is also something substantively bizarre or oppressive about it or if it defeats the purpose of the contract's bargained-over terms.<sup>168</sup> It may be that the FAA would prevent a court from regarding an arbitration clause as unexpected or bizarre in this way.

But correctness is beside the point for our purposes. For a strategic court, a decision does not have to be correct under prevailing law; if the decision is too hard to reverse, that suffices. In that sense, *Kloss* was a success: The U.S. Supreme Court denied certiorari,<sup>169</sup> despite arguments by petitioner and the amicus U.S. Chamber of Commerce that the state court had simply dressed up the previous

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<sup>166</sup> In *Zigrang v. U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237 (Mont. 2005), the court held that an arbitration clause could be outside a party's reasonable expectations even though notice of it was printed in bolded all-caps font above the signature line. *Id.* at 240–42; see Brief of Appellants at 2–4, *Zigrang*, 123 P.3d 237 (No. 04-455), 2004 WL 2319412 (describing arbitration clause); see also *Larsen v. Western States Ins. Agency, Inc.*, 170 P.3d 956, 959 (Mont. 2007) (stating that prominently displayed arbitration clause was "insufficient to establish the weaker party's reasonable expectation," but upholding arbitration agreement based on other evidence). *Zigrang* is also notable because *Kloss* arguably rested in part on the fact that the broker owed the consumer a fiduciary duty to explain the arbitration agreement. See *Kloss*, 54 P.3d at 9–10. *Zigrang* made clear that a fiduciary duty is not necessary to trigger the reasonable expectations analysis. See 123 P.3d at 240–43 (engaging in reasonable expectations analysis absent fiduciary relationship).

<sup>167</sup> *Passage v. Prudential-Bache Sec., Inc.*, 727 P.2d 1298, 1302 (Mont. 1986).

<sup>168</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (1981).

<sup>169</sup> *Edward D. Jones & Co. v. Kloss*, 538 U.S. 956 (2003).

state statutory policy in common law garb in order to evade the Supreme Court's ruling.<sup>170</sup> Indeed, it may be that the Court denied certiorari precisely *because* those advocating review made it so clear that the Montana court's honesty was at issue.<sup>171</sup> The respondent aptly characterized the petition as a request that the Supreme Court "look behind" the Montana court's opinion in a search for animus, and then its response ducked into the weeds of the Montana law of reasonable expectations and fiduciary duties.<sup>172</sup> Technically difficult to review, expressively difficult to review, certiorari denied. The Supreme Court has continued to deny review in similar Montana cases in recent years.<sup>173</sup>

In sum, it appears that the ultimate outcomes of Montana cases have not much changed in response to the Supreme Court's continuing endorsement of arbitration, except perhaps to move in the opposite direction. The doctrinal basis has shifted, however, to squishy state law doctrines like unconscionability and reasonable expectations.<sup>174</sup> The Montana court claims to be honoring its federal law duty to apply those doctrines fairly, and so far the Supreme Court has not disturbed those decisions.

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<sup>170</sup> See Reply Brief for Petitioners at 2–5, *Edward D. Jones & Co.*, 538 U.S. 956 (No. 02-1112), 2003 WL 21698588; Motion for Leave to File Brief and Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioners at 8, *Edward D. Jones & Co.*, 538 U.S. 956 (No. 02-1112), 2003 WL 21698587 [hereinafter Amicus Brief] (“[T]he Montana Supreme Court has used the cloak of the common law to do precisely what this Court ruled that the Montana legislature may not do by statute . . .”).

<sup>171</sup> See Amicus Brief, *supra* note 170, at 2 (accusing Montana court of using “state-law rules that are described under the rubric of general contract law, but in fact have been fashioned solely to deal with arbitration agreements”); *id.* at 3 (“The Montana Supreme Court’s decision is a classic example of judicial hostility to arbitration, expressed through the discriminatory application of state common law. The court purported to apply the state-law principles that govern *all* contracts. In fact, however, its refusal to order Kloss to abide by the arbitration agreement that she signed reflected the court’s distaste for arbitration . . .”).

<sup>172</sup> Respondent’s Brief in Opposition at 4–5, 9–10, *Edward D. Jones & Co.*, 538 U.S. 956 (No. 02-1112), 2003 WL 21698586.

<sup>173</sup> *E.g.*, Piper Jaffray & Co. v. Paffhausen, 547 U.S. 1163 (2006); Piper Jaffray & Co. v. Tomazich, 547 U.S. 1111 (2006).

<sup>174</sup> The result of this Montana case study thus parallels the result found in another strategic instruments study, which found that after the *Chevron* decision, courts reviewing EPA determinations switched to process reversals rather than statutory interpretation reversals, but the overall rate of reversal did not drop. Smith & Tiller, *supra* note 98, at 78–81; see also *supra* note 132.

## III

## STRATEGIES FOR RESPONDING TO CIRCUMVENTION

So far, we have seen only half the story. Pro-arbitration courts (as well as other actors, like the drafters of arbitration clauses<sup>175</sup>) can be expected to respond. We now turn, therefore, to judicial strategies for reacting to evasion (or, at least, what pro-arbitration courts perceive as evasion). Although it should be emphasized that this is not a confrontation between state courts unified in opposition to arbitration and a monolithic federal judiciary that supports it, we focus on the federal courts' responses, as those are the most fraught in terms of judicial federalism.

From the point of view of the federal courts—both the Supreme Court and the lower courts—the current state of play described in Part II is unsatisfactory in a few ways. Because resistance to arbitration now expresses itself through unconscionability rulings, compliance with federal law is hard to monitor. This opacity is unattractive from a neutral, rule-of-law perspective. Also, and again quite apart from one's take on arbitration, deviation from the commands of federal law is problematic from the point of view of the Supremacy Clause and the nationalist values expressed in venerable cases such as *Martin v. Hunter's Lessee*.<sup>176</sup> And, not least, for strongly pro-arbitration courts like the U.S. Supreme Court, the current situation is unattractive in terms of policy outcomes as well. Difficulty in monitoring compliance may be acceptable to reviewing courts when they are satisfied that lower courts share their policy preferences, but not when the lower courts have opposing preferences. Indeed, this is exactly the type of situation in which a reviewing court would want a highly transparent and determinate doctrine precisely in order to control the lower courts.<sup>177</sup> That is to say, the current doctrinal regime is

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<sup>175</sup> Businesses that rely on arbitration agreements have not stood still in the face of the increasing popularity of unconscionability arguments. For example, financial services companies encouraged Utah to enact legislation expressly validating contractual waivers of class proceedings; combined with Utah choice-of-law clauses, this legislation can counteract unconscionability rulings in other states. See Peter Geier, *Utah Passes Key Class Action Waiver*, NAT'L L.J., Apr. 3, 2006, at 4 (describing passage of law validating class action waivers in consumer contracts); see also *Homa v. Am. Express Co.*, 496 F. Supp. 2d 440, 447–51 (D.N.J. 2007) (enforcing Utah choice-of-law clause and concluding that class waiver was not unconscionable under Utah law).

<sup>176</sup> 14 U.S. (1 Wheat.) 304 (1816) (affirming that Supreme Court can review decisions of state high courts to ensure compliance with federal law).

<sup>177</sup> Cf. Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, J.L. ECON. & ORG. 326, 339 (2007) (explaining that rational reviewing court would choose between determinate rules and flexible standards depending on degree of alignment between its policy preferences and those of lower courts). The more general point being made here is that doctrine reflects not just legal considerations, and not just the principal's

a bad fit, from the principal's point of view, given the clashing preferences of the principal and its agents.

What can the federal courts do in response to arguably noncompliant state unconscionability rulings? For the U.S. Supreme Court, the immediate question is what to do with all the petitions for certiorari that challenge questionable unconscionability rulings. The problem confronts the lower federal courts too, because they also have to review state unconscionability decisions, though somewhat less directly. Agreements to arbitrate do not by themselves trigger the jurisdiction of the federal district courts, but arbitration-related issues arise in cases that for independent reasons (diversity of citizenship, for example) do come within the district courts' jurisdiction.<sup>178</sup> When a party resisting arbitration argues that the arbitration agreement is unconscionable, that party will sometimes be able to cite an on-point state decision invalidating an arbitration agreement based on what purports to be a generally applicable principle of state law. Federal courts follow state decisions on state law, but here there is the complication that the state unconscionability ruling is valid under the FAA *only* if it treats arbitration clauses evenhandedly.<sup>179</sup> Unlike the Supreme Court, the lower federal courts cannot simply deny certiorari and avoid ruling on these difficult questions.

Federal courts have several ways to respond to the questionable state law unconscionability decisions they confront. These include swallowing the questionable decision despite the court's misgivings, rejecting the state decision despite its facial bona fides, and—most interesting—rewriting the rules to shift authority away from state courts and make monitoring easier. This Part canvasses the alternatives, examining the pros and cons of each and noting as well what the federal courts actually appear to be doing.

### A. *Looking the Other Way*

There is no lack of voices calling for the Supreme Court to do something about the perceived epidemic of unconscionability rulings.

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preferences, but responds to principal-agent problems and the need to control lower courts.

<sup>178</sup> See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) (recognizing that FAA "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction"); see also 9 U.S.C. §§ 3–4 (2006) (authorizing stays of litigation and orders compelling arbitration in cases within district courts' preexisting jurisdiction). Whether federal subject matter jurisdiction in cases involving arbitration may be expanding is addressed in Part III.C.3, *infra*.

<sup>179</sup> See *supra* notes 69–70 and accompanying text.

One finds this call in numerous articles<sup>180</sup> and, not surprisingly, in the court filings of influential business groups and pro-business foundations.<sup>181</sup> They are joined by a number of prominent judges who have also expressed their support for, or at least expectation of, Supreme Court review of the issue.<sup>182</sup> Unconscionability is, quite simply, one of the most important issues out there when it comes to the enforcement of arbitration agreements.

Certainly the Court has had ample opportunity to heed the call to action. The last several years have yielded a bumper crop of petitions for certiorari seeking to enforce arbitration agreements invalidated by lower courts on the basis of unconscionability (and related state law defenses). Since 2000, there have been dozens of petitions for certiorari raising the issue,<sup>183</sup> many filed by prominent Supreme Court litigators. These petitions include a number of petitions that enjoyed support from influential interest groups, such as the Chamber of Commerce, which would be expected to increase the odds of a grant.<sup>184</sup> Yet the Court let them pass by, despite its strongly pro-arbitration leanings.

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<sup>180</sup> E.g., Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 62, 92; Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761, 783 n.117 (2003); cf. STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 67 (2d ed. 2007) (“[T]he United States Supreme Court surely would review state courts’ unconscionability rulings to the extent necessary to prevent the unconscionability doctrine from effectively nullifying the FAA with respect to a huge class of contracts.”).

<sup>181</sup> See, e.g., Amicus Brief, *supra* note 170, at 11–16 (noting increasing use of common law doctrines like unconscionability to invalidate arbitration clauses).

<sup>182</sup> See, e.g., *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1313 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) (“I would not be the least surprised to see the Supreme Court of the United States soon take a close look at whether the unconscionability doctrine, as developed by some state courts, undermines the important policies of the Arbitration Act.”); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 999 (Cal. 2003) (Brown, J., dissenting) (“I therefore urge the [U.S. Supreme Court] to clarify once and for all whether our approach to arbitration law comports with its precedents.”).

<sup>183</sup> List on file with the *New York University Law Review*.

<sup>184</sup> From May 2004 to August 2007, the grant rate in cases in which the Chamber of Commerce filed an amicus brief at the certiorari stage was twenty-six percent; for the Pacific Legal Foundation, which has also made filings at the certiorari stage in support of some of these petitions, the grant rate is twenty-eight percent. SCOTUSblog, *Top Sixteen Cert.-Stage Amicus Brief Filers from May 19, 2004 to August 15, 2007*, <http://www.scotusblog.com/movabletype/archives/Top%2016%20Amici.pdf> (last visited Sept. 10, 2008). See generally Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1124 (1988) (concluding that presence of amicus briefs at petition stage is associated with substantial and statistically significant increases in grant rate); Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 753–54 (2001) (same).

Why the hesitation? The analysis presented in this Article suggests an answer. The pro-arbitration Supreme Court finds itself in the position of having picked most of the low-hanging anti-arbitration fruit. The important state statutes that directly target and disadvantage arbitration have been invalidated in cases such as *Southland*<sup>185</sup> and *Casarotto*.<sup>186</sup> Whether or not those cases were correctly decided, they were simple in that they involved relatively clean questions of federal law. To the extent that state courts have now retreated to more opaque rulings such as unconscionability, noncompliant decisions are much more difficult to detect and correct.

The lower federal courts of course lack the luxury of simply denying certiorari when they are presented with the question of whether to follow what looks like a questionable state unconscionability ruling. Some have tried to steer a middle path between violating the etiquette of judicial federalism and wholesale abdication of monitoring. A 2004 Fifth Circuit case, involving a procedural unconscionability challenge, exemplifies this approach.<sup>187</sup> A recent on-point Mississippi Supreme Court case, *Taylor*, had supported the unconscionability attack.<sup>188</sup> The Fifth Circuit followed the Mississippi case, but it was not content to let the state courts off too easily, so it dropped a footnote in which it warned:

It is important to note here that if the Mississippi courts were to limit the applicability of the procedural unconscionability approach outlined in *Taylor* to arbitration agreements only, or were repeatedly to apply a different approach to other contractual provisions, the issue of discrimination against arbitration under the FAA may come into play.<sup>189</sup>

Thus the federal court was willing to give the state court the benefit of the doubt this time, but it seems to be putting the state court “on notice” and signaling that next time may be different.

### *B. Calling Them on It*

At some point, one imagines that the pressure of looking the other way becomes hard to bear. Another obvious response to manipulation is to “call them on it.” If a certain court is using uncon-

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<sup>185</sup> See *supra* notes 34–38 and accompanying text.

<sup>186</sup> See *supra* notes 146–56 and accompanying text.

<sup>187</sup> *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426 (5th Cir. 2004).

<sup>188</sup> *Id.* at 428 (citing *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 717 (Miss. 2002)).

<sup>189</sup> *Banc One*, 367 F.3d at 432 n.3; see also *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004) (stating that court “must exercise care in enforcing state doctrines of unconscionability to invalidate arbitration clauses” and that subsequent events might show that purportedly evenhanded state decisions are in fact discriminatory).

scionability against arbitration clauses in ways it is not used in other contexts, reviewing courts could say so.

This strategy too has drawbacks. Federal courts generally regard state courts as trustworthy partners in enforcing federal law. Or, at least, etiquette demands that they so affirm, even if they harbor suspicions. To actually bring the suspicions into the light would be an extraordinary move, the stuff of federal-state tensions over civil rights fifty years ago. After all, as the Supreme Court tells us, today “[w]e are unwilling to assume the States will refuse to . . . obey the binding laws of the United States.”<sup>190</sup>

To be sure, reviewing courts can reject a suspicious decision without calling it so. They will label it a “mistake” or a “misunderstanding,” even where something more willful is afoot, in order to lower the stakes.<sup>191</sup>

The important point here, however, is that the target courts themselves to a significant degree control whether the reviewing court can assume the pose of the polite corrector of good-faith error. If a state court says that it understands the law and that some contractual feature “would be unconscionable whether applied in a lawsuit or in arbitration,”<sup>192</sup> how can a federal court respond? A sophisticated state court—one that states the governing law correctly, expresses the appropriate pro-arbitration sentiments,<sup>193</sup> and the like—can raise the stakes substantially and make review extremely difficult for the federal courts. As Professor Monaghan wrote in the related context of the adequate and independent state ground doctrine, “few indeed will be the occasions in which the Court will be prepared explicitly to charge the state-court judges with violating their oaths to support the Constitution,” including the Supremacy Clause that requires them to follow federal law.<sup>194</sup>

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<sup>190</sup> *Alden v. Maine*, 527 U.S. 706, 755 (1999).

<sup>191</sup> A good illustration, from a different context, is the Supreme Court’s recent *second* reversal of the Texas Court of Criminal Appeals in the *Smith v. Texas* death penalty case. 127 S. Ct. 1686 (2007). Justice Kennedy’s opinion for the Court repeatedly referred to the court below’s “misunderstanding” or “confusion,” *id.* at 1690, 1698, when an equally plausible assessment would be that the Texas court tried to frustrate the Supreme Court’s prior mandate through the opportunistic manipulation of state procedural rules.

<sup>192</sup> *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 91 (N.J. 2006) (invalidating class-arbitration waiver), *cert. denied*, 127 S. Ct. 2032 (2007).

<sup>193</sup> *See, e.g., Iberia*, 379 F.3d at 169 (following Louisiana unconscionability ruling and observing that “[t]he [state] court recognized that arbitration is favored in the law and cited Louisiana’s cognate to 9 U.S.C. § 2”); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110, 1113 (Cal. 2005) (criticizing state lower court for harboring “the very mistrust of arbitration that has been repudiated by the United States Supreme Court” but nonetheless striking down class-action waiver (internal quotation omitted)).

<sup>194</sup> Monaghan, *supra* note 70, at 1958.

Given the difficulties involved, we should expect that the Supreme Court will look for any remaining straightforward anti-arbitration decisions that arise. Indeed, the Court recently reviewed a case concerning the validity of a California statute that diverts some entertainment industry disputes to an administrative board even where the parties have an arbitration agreement.<sup>195</sup> This case did not appear to be very important in terms of having a broad impact and was in that sense a poor candidate for certiorari. But it presented a readily manageable question of preemption, and in that way it was attractive.

To gaze into the crystal certiorari ball, one could predict that another likely future target would be California's rule that some types of state statutory claims for injunctive relief are not arbitrable because the injunctive relief is meant to protect the general public from wrongdoing.<sup>196</sup> This is the type of categorical legal ruling that is transparent to a reviewing court. Assuming that the Supreme Court believes California's rule is wrong, which seems likely,<sup>197</sup> it is a strong candidate for reversal.

If the Supreme Court were to take an unconscionability case, one would expect it to be one that misstates the governing federal law, openly expresses hostility to arbitration, obviously deviates from the unconscionability rules applied in other contexts, or the like. Perhaps the Court would be able to sidestep the unconscionability issue by adopting a broader theory of implied federal preemption. Taking a case that comes from the federal courts rather than from the state courts, even though the applicable law is the same (e.g., a Ninth Circuit case applying California unconscionability law), would also lower the federalism stakes.

The Court may well at some point resolve an unconscionability case head-on despite the difficulties involved. (It can't keep turning down the Chamber of Commerce forever, can it?<sup>198</sup>) If it does take

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<sup>195</sup> *Preston v. Ferrer*, 128 S. Ct. 978 (2008) (holding portions of California Talent Agencies Act preempted by FAA).

<sup>196</sup> See *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1161–65 (Cal. 2003) (holding that claims for injunctive relief under state unfair competition and false advertising statutes are not preempted by FAA); *Broughton v. Cigna Healthplans*, 988 P.2d 67, 75–79 (Cal. 1999) (holding that claims for injunctive relief under Consumer Legal Remedies Act are not preempted by FAA). See generally Thomas A. Manakides, Note, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433 (2003) (discussing issue and reviewing cases).

<sup>197</sup> For a defense of the California decisions, see David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129, 148–51 (2004).

<sup>198</sup> See *supra* note 184 (discussing certiorari grant rates for cases in which Chamber of Commerce filed amicus brief).

such a case, and if it reverses, that likely will not be the sum of its response to the rise of unconscionability, however. For one thing, the court below might have made obvious mistakes, and so cleverer unconscionability rulings might still be possible. But even apart from that, the fact-specific nature of the doctrine means that cases will continue to arise and that the Supreme Court's decision could plausibly be distinguished. Pro-arbitration courts need more systematic, if indirect, tools as well. And in fact they are already using such tools.

### C. *Changing the Rules: Federalization and Allocation*

The Supreme Court (and, to a lesser extent, the lower federal judiciary) has an advantage in the unconscionability game in that it is not just a player but also an umpire and even a rulemaker, at least unless Congress acts. Some recent developments show that perhaps the most promising federal response to noncompliance will not be direct confrontation but instead the indirect response of changing the doctrinal regime. In particular, federal courts are increasingly suggesting that more and more challenges to arbitration agreements—including unconscionability arguments—are for the arbitrator to decide; this allocational principle is regarded as a matter of federal law. Federalization of the allocation question is the ultimate trump card in the unconscionability game: There is no need to question hard-to-scrutinize state law rulings if one takes away, as a matter of federal law, the authority to issue them in the first place.<sup>199</sup>

To understand the new federalized allocation rule that may be emerging, one first needs to appreciate the Supreme Court's decades-old decision in *Prima Paint*, which also established an allocation rule.<sup>200</sup> The Court there confronted a claim that a contract had been formed through fraudulent inducement and that therefore the contract, including its arbitration clause, was unenforceable; the arbitration clause itself had not been the subject of any alleged

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<sup>199</sup> The strategic substitution of an allocation rule for a less easily monitored substantive rule would not be unprecedented; the Supreme Court apparently used the tactic in administrative law, shifting authority to administrative agencies and away from ideologically adverse lower courts. See Linda R. Cohen & Matthew L. Spitzer, *Solving the "Chevron" Puzzle*, LAW & CONTEMP. PROBS., Spring 1994, at 65, 68, 71–81 (explaining changes in administrative law doctrines in terms of allocations of authority to decisionmaking body that is politically closest to Supreme Court); cf. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1117 (1987) (explaining how allocation rules can help ensure uniformity across country despite limited opportunities for Supreme Court review).

<sup>200</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

misrepresentations.<sup>201</sup> On the one hand, one can see how it would be strange to send such a case to arbitration, given that if the arbitrator concludes that the contract as a whole was fraudulently induced, that would seem to undercut the arbitrator's very authority to decide anything. On the other hand, if the court were to review the claim of fraudulent inducement and deem the contract valid, then a valid agreement to arbitrate disputes would have been effectively nullified. Neither solution is completely satisfactory, but the Court resolved the dilemma in favor of arbitration: The arbitrator should resolve the claim that the entire agreement, as opposed to the arbitration clause in particular, was fraudulently induced.<sup>202</sup> This has come to be known as the separability doctrine, because an arbitration clause is regarded as separate from the contract as a whole.<sup>203</sup> As long as a court can identify a theoretically distinct agreement to arbitrate something, defects in the container contract will not invalidate that separate agreement.<sup>204</sup>

At least as far as *Prima Paint's* separability rule goes, challenges to an arbitration clause itself are for the courts. The claim that the parties' agreement to arbitrate disputes was itself invalid would need to be resolved by a court, for arbitral authority to resolve disputes comes only from (valid) consent.<sup>205</sup> Otherwise, a party would be subjected to the adjudicative power of a person clothed with no authority. Thus, a claim that an arbitration clause was unconscionable or illegal because arbitration is itself violative of public policy would have to be a matter for a court to decide—though of course it would be a very easy decision, because public policy favors arbitration in almost all contexts. As noted earlier, however, the frequent unconscionability challenges we are now witnessing typically attack not the policy favoring arbitration *per se* but instead focus on particular aspects of arbitration clauses that allegedly render them unconscionable or oth-

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<sup>201</sup> *Id.* at 397–98.

<sup>202</sup> *Id.* at 403–04.

<sup>203</sup> Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 NEV. L.J. 107, 121 (2007).

<sup>204</sup> Alan Scott Rau, *Everything You Really Need To Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 14–28 (2003). Because *Prima Paint* relies on the existence of consent to arbitrate, certain types of arguments should be resolved by the court even though they apply to the entire contract. For example, if one party claims that his signature on the container agreement has been forged and so he has not agreed to anything at all, that should be decided by the court. See *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992). Admittedly, the distinction between cases like *Chastain* and those like *Prima Paint* is sometimes elusive.

<sup>205</sup> See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

erwise impermissibly frustrate the plaintiff's substantive rights—limitations on damages, bans on collective arbitrations, high costs, and the like.<sup>206</sup>

Who—court or arbitrator—should rule upon the currently popular challenges to these aspects of an arbitration clause? It is an important question, and not an easy one. On the one hand, it can be argued that the logic of *Prima Paint* dictates that the arbitrator decide.<sup>207</sup> The various problematic restrictions and burdens may be located in the arbitration provision of the contract, but they are logically separable from the underlying agreement to arbitrate disputes. On this view, it is a mistake to view these challenges as impugning the fundamental agreement to arbitrate itself.<sup>208</sup> On the other hand, there are also reasonable arguments for assigning decisional authority to the court.<sup>209</sup> These types of challenges do strike more closely at the duty to arbitrate itself than is true of a defense that goes to the contract as a whole, like the defense of fraudulent inducement involved in *Prima Paint*. We might worry that the arbitrator's self-interest would distort the decision. And assigning these decisions to the court would not destroy the benefits of arbitration by deciding the merits of the underlying dispute, as would often happen if the challenge involved the contract as a whole.

For our purposes, we are not concerned with which view is actually correct in some abstract sense but are rather interested in where the law appears to be going and why. To be sure, there has been and still is much disagreement and confusion in the courts, which makes it difficult to state definitively what the law is or was, much less to identify a clear change in doctrine. Nonetheless, it is fair to say that, rightly or wrongly, many courts have for a long time ruled on unconscionability challenges to various aspects of arbitration agreements (and many courts still do)—occasionally expressly stating that the matter was for the court, other times simply so assuming without a

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<sup>206</sup> See *supra* notes 71–80 and accompanying text.

<sup>207</sup> See Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of 'Consent,'* 24 *ARB. INT'L* 199, 259–64 (2008) (contending that separability doctrine gives arbitrator authority to rule on validity of remedial limitations); Rau, *supra* note 204, at 58–66 (same).

<sup>208</sup> Even according to this view, there may be certain types of offensive provisions that are so wrapped up with the basic agreement to arbitrate that there is no way to separate them out. These might include challenges to the site of arbitration or the impartiality of the arbitrator, for example. Rau, *supra* note 204, at 67–70. That is, even if we were to permit the arbitrator to rule upon whether a limitation on the damages he can award is valid, it is hard to see how we could sensibly send to the arbitrator the claim that the arbitrator is biased.

<sup>209</sup> See David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles,* 38 *U.S.F. L. REV.* 49, 79–82 (2003) (contending that most issues regarding remedial limitations are for court to decide).

second thought.<sup>210</sup> Even fairly recently, defendants did not even argue that such matters were for the arbitrator.<sup>211</sup> But this may be starting to change. In the last several years, one can discern the outlines of a nascent trend toward a federal rule shifting more authority over such challenges to the arbitrator, so that the arbitrator would decide whether (for example) a bar on punitive damages or collective proceedings or discovery in arbitration is valid.<sup>212</sup> Perhaps it is just

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<sup>210</sup> See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 47, 52–55 (1st Cir. 2006) (addressing claim that limitations on damages, recovery of attorneys' fees, and class proceedings were unenforceable because they prevented vindication of statutory rights); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir. 2005) (addressing claim that class action waiver was substantively unconscionable); *Ting v. AT&T*, 319 F.3d 1126, 1150–52 (9th Cir. 2003) (addressing claim that terms regarding class actions, arbitrator fees, and confidentiality were substantively unconscionable); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (addressing claim that fee-splitting provisions were unenforceable because they prevented vindication of statutory rights); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1015–17 (Ariz. 1992) (addressing claim that arbitration agreement was adhesive and unduly favored drafting party); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 146–52 (Ct. App. 1997) (addressing claim that unilateral duty to arbitrate and limitations on remedies were unconscionable); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 271, 278–82 (W. Va. 2002) (addressing claim that various provisions, including class action waiver, damages limitation, and cost provisions were substantively unconscionable); see also June Lehrman, *On the Threshold of Arbitration*, L.A. LAWYER, Dec. 2003, at 25 (“Extensive case law has developed across the country from challenges to arbitrability based on the defense of unconscionability. Such challenges have been routinely decided by courts, not arbitrators.”); *Wilson*, *supra* note 73, at 781 (noting that courts have decided challenges regarding class arbitration waivers “without even considering that the issue might be one that the arbitrator should decide”). As noted in the text, the case law on this point has never been uniform, and thus one can certainly find older cases that view certain challenges as matters for the arbitrator. E.g., *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir. 1997) (sending challenges to availability of attorneys fees and punitive damages to arbitrator, though ruling on objection to limitations on discovery).

<sup>211</sup> Lehrman, *supra* note 210, at 25 n.61; see, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 165 n.6 (5th Cir. 2004) (noting that parties agreed that unconscionability claims were for court).

<sup>212</sup> It should be noted here that we can distinguish between two different senses in which a challenge to some aspect of an arbitration clause could be shifted to the arbitrator:

(1) The arbitrator is given the authority to decide the challenge because that issue is considered one of the matters the parties have agreed to arbitrate, such that the arbitrator's decision on that matter, just like his decision on the merits, can be reversed only in extraordinary circumstances.

(2) The arbitrator is given the initial authority to consider an unconscionability challenge, but that decision is subject to plenary review later by a court (i.e., without the extreme deference normally accorded arbitral determinations).

As against the traditional baseline of judicial authority to resolve unconscionability both initially and conclusively, the first option above changes the ultimate division of authority between courts and arbitrators, while the second option is primarily a change of timing.

As option 2 recognizes, the order of the decisionmaking need not necessarily dictate the scope of later judicial review. Some European systems, under the doctrine of competence-competence, let the arbitrator make initial decisions about his own authority,

that courts are finally, at long last, getting it right. But if the law in fact says that these challenges are for the arbitrator, why has it taken most people so long to start catching on? The framework employed in this Article suggests one answer: because there was no pressure to shift the locus of decisionmaking—until some courts started using unconscionability opportunistically. The following pages will describe these straws in the wind and what they might augur.

### *I. Recent Supreme Court Allocation Decisions*

Although the Supreme Court has not directly addressed the allocation problem in the context of unconscionability, several of its recent decisions are portentous.

The first decision of note is *Buckeye Check Cashing, Inc. v. Cardegna*,<sup>213</sup> which involved a dispute arising from a payday loan agreement that was allegedly void and indeed criminally usurious under state law. The Florida high court refused to enforce the arbitration clause in the parties' contract, concluding that the entire contract was a nullity, but the U.S. Supreme Court reversed and sent the dispute to arbitration. The Court began by emphasizing that *Prima*

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subject to subsequent plenary court review. See John J. Barceló III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT'L L. 1115, 1122–31 (2003) (describing different versions of competence-competence); Rau, *supra* note 204, at 93–94 (describing competence-competence as primarily “timing mechanism”). In American law, however, the two often go together: If the parties agreed in their contract to let the arbitrator decide a certain question of arbitrability, then the arbitrator decides first *and* will get deference. Cf. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court’s standard for reviewing the arbitrator’s decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.” (internal citations omitted)); Barceló, *supra*, at 1133–34 (noting that in certain respects arbitral decisions on arbitrability may receive more deference under American law than they would under French version of competence-competence, which would call for *de novo* review). The courts that are creating the nascent trend toward greater arbitral authority rarely tell us whether, in sending the unconscionability challenge to the arbitrator, they mean option 1 or option 2 above; one suspects they often overlook the distinction. *But cf.* *Anders v. Hometown Mortgage Servs.*, 346 F.3d 1024, 1033 n.8 (11th Cir. 2003) (noting and reserving question of judicial review of arbitrator’s ruling on validity of remedial limitation that court was sending to arbitration). For our purposes, the difference between option 1 and option 2 is not critical; the point is that *both* of them represent a substantial departure from the practice of vesting authority in the court to decide the matter conclusively before arbitration. For many litigants seeking to avoid arbitration, the difference between option 1 and option 2 is irrelevant because they do not intend to go through with an arbitration; a deferred court decision is equivalent to none at all. Cf. Barceló, *supra*, at 1123 (discussing importance of timing of judicial review).

<sup>213</sup> 546 U.S. 440 (2006).

*Paint*'s doctrine of separability is a rule of substantive federal law that applies in state courts as well as in federal courts.<sup>214</sup> The Court then concluded that it was of no moment that the contract was deemed, as a matter of state law, void ab initio (as opposed to merely voidable).<sup>215</sup> The Florida courts, like some other courts, had thought this state law distinction the key to whether *Prima Paint* applied.<sup>216</sup> The Supreme Court's decision to send the matter to arbitration is quite strange to many people, inasmuch as it finds a valid agreement to arbitrate in a null and criminal contract.<sup>217</sup> But regardless of what one thinks of the outcome, the important point for our purposes is that the *Buckeye* rule makes these types of cases easy for a federal court to decide in the sense that they only require the application of the federal rule of separability. No foray into state law distinctions between voidness, voidability, and other categories is required, for such distinctions are henceforth irrelevant. This is an allocation rule that greatly facilitates federal monitoring of the enforcement of arbitration agreements.<sup>218</sup>

Keeping with the theme of allocation rules and moving closer to unconscionability issues, the Court's decision in *Green Tree Financial Corp. v. Bazzle*<sup>219</sup> provides a good illustration of the odd turns that the jurisprudence is taking. *Bazzle* implicated potentially far-reaching questions regarding whether the FAA prohibits a court from ordering class arbitration. Bars on class proceedings in arbitration are, of course, frequent sources of unconscionability challenges.<sup>220</sup> The Supreme Court of South Carolina had held, applying state contract law, that a particular arbitration agreement was silent regarding

<sup>214</sup> *Id.* at 445–46.

<sup>215</sup> *Id.* at 446.

<sup>216</sup> See *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860, 863–64 (Fla. 2005) (distinguishing *Prima Paint* on ground that contract was void), *rev'd*, 546 U.S. 440 (2006); *accord* Ala. *Catalog Sales v. Harris*, 794 So. 2d 312, 314–17 (Ala. 2000) (same); *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 353–54 (Minn. 2003) (same).

<sup>217</sup> See, e.g., Richard L. Barnes, *Prima Paint Pushed Compulsory Arbitration under the Erie Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1, 1–4 (2007) (arguing that *Buckeye* makes no sense according to normal common law contract doctrines).

<sup>218</sup> As counsel for *Buckeye* put it at oral argument:

[W]hether something is void or voidable under State law, which may vary from State to State, kind of misses the whole point which is the genius of a Federal separability rule is we don't care about those State law issues. You don't have to get into that bog to decide the arbitrability question . . . [;] you cannot avoid arbitration by simply coming up with all those grounds.

Transcript of Oral Argument at 21, *Buckeye Check Cashing*, 546 U.S. 440 (No. 04-1264), 2005 U.S. TRANS LEXIS 69.

<sup>219</sup> 539 U.S. 444 (2003).

<sup>220</sup> See cases cited *supra* note 73.

whether class arbitration was permitted and that, in such a circumstance, class arbitration was allowed.<sup>221</sup>

In such a scenario, there are several ways the U.S. Supreme Court might reverse the state court, including (1) ruling that the state court was simply wrong in interpreting the contract under state contract law to permit class arbitration in this case; (2) holding that the interpretation of the contract's stance toward class arbitration is a matter of federal law and that, as a matter of this federal contract law, the contract did not allow class arbitration; or (3) holding, as a matter of federal law, that the interpretive question regarding the availability of arbitration is a matter for the arbitrator rather than a court to decide.

Option 1 should not be much of a contender, because it is usually not the Supreme Court's business to review state court rulings on state contract law. Option 2 at least would be a proper ground for decision, but it would be a very problematic ruling. After all, while the FAA does create some federal substantive law, the Court had previously stated that arbitration agreements are generally construed according to ordinary state law contract rules.<sup>222</sup> It would be quite stunning to hold that all arbitration agreements are to be interpreted according to a general federal common law instead of state law. Yet Chief Justice Rehnquist's dissenting opinion in *Bazzle*, echoing his *Bush v. Gore* concurrence, came very close to such a rule in stating that the South Carolina Supreme Court's ruling allowing class arbitration was so wrong as a matter of contract interpretation that it was implicitly preempted by federal law.<sup>223</sup>

Thus Option 3—shifting the decision to the arbitrator—begins to look attractive. Or at least it would if the parties had argued it: In *Bazzle*, petitioner Green Tree did not contend that the question was

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<sup>221</sup> *Bazzle*, 539 U.S. at 447–50 (plurality opinion).

<sup>222</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (“When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989) (stating that federal courts “apply[ ] general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA]”). To be clear, the cases also recognize that certain federal interpretative presumptions apply, such as a presumption that the scope of an arbitration agreement should be broadly construed in favor of arbitration. *First Options*, 514 U.S. at 944–45; *Volt*, 489 U.S. at 475–76.

<sup>223</sup> 539 U.S. at 458–60 (Rehnquist, C.J., joined by O'Connor and Kennedy, JJ., dissenting). As Stephen Huber aptly observes: “The position taken by the Chief Justice is puzzling. His approach, if adopted, would amount to nothing less than a federal common law of arbitration contract interpretation.” Stephen K. Huber, *Confusion About Class Arbitration*, 7 J. TEX. CONSUMER L. 2, 6 (2003).

for the arbitrator but instead argued that the state court had violated the FAA by failing to enforce the contract as written (i.e., in Green Tree's view, as forbidding class arbitration).<sup>224</sup> Nonetheless, the *Bazzle* plurality took this third approach.<sup>225</sup>

Even apart from the procedural oddity of disposing of the case on grounds not requested by the parties, the *Bazzle* decision is most curious. The plurality opinion expressly states that the question whether class proceedings are permitted under the contract is a question of *state law contract interpretation*, and thus it declines to reverse the state court's interpretation on the merits.<sup>226</sup> Yet in the next breath the plurality proceeds to interpret the contract as regards its provisions for *who decides* whether class proceedings are allowed, concluding that the South Carolina court had erred in ruling upon that question.<sup>227</sup> The Court observed that the parties' arbitration clause was broad, conferring authority on the arbitrator to decide "*all disputes . . . relating to this contract,*" and that this was not the sort of dispute the parties would assume a court would decide.<sup>228</sup> Thus, the decision is for the arbitrator. This allocation ruling, though a matter of contract interpretation, is presented as what looks like a federal law ruling: The Court cited federal cases,<sup>229</sup> and, after all, it had just stated that it would be improper to review the state law contract interpretation issue of whether class arbitration is actually allowed. In sum, the question whether class arbitration is permitted is one of state law because it is a matter of contract interpretation, but the question of who decides whether class arbitration is permitted is, somehow, apparently one of federal law, even though it is *also* a matter of contract interpretation.<sup>230</sup>

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<sup>224</sup> See *Bazzle*, 539 U.S. at 455 (Stevens, J., concurring in the judgment and dissenting in part) (noting that Green Tree "has merely challenged the merits of [the state court] decision without claiming that it was made by the wrong decisionmaker"); Brief for the Petitioner at 15, *Bazzle*, 539 U.S. 444 (No. 02-634), 2003 WL 721716.

<sup>225</sup> See *Bazzle*, 539 U.S. at 451-54 (plurality opinion) ("[T]he question—whether the agreement forbids class arbitration—is for the arbitrator to decide.").

<sup>226</sup> *Id.* at 447 (stating that whether "the contracts [are] in fact silent, or [whether] they forbid class arbitration . . . is a matter of state law"); *id.* at 450 (explaining that Chief Justice's dissent would "ignore the fact that state law, not federal law, normally governs" contract interpretation).

<sup>227</sup> *Id.* at 451-53.

<sup>228</sup> *Id.* at 451.

<sup>229</sup> This result was foreshadowed in *Howsam v. Dean Witter Reynolds, Inc.*, which discussed the "who decides" question while citing only federal cases and not state cases. 537 U.S. 79, 82-85 (2002). On the other side is *First Options of Chicago, Inc. v. Kaplan*, which stated that "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . apply ordinary state-law principles." 514 U.S. 938, 944 (1995).

<sup>230</sup> As Prof. Monaghan describes the puzzle:

The Court produced a similar result in another case decided shortly before *Bazzle*. That case, *PacifiCare Health Systems, Inc. v. Book*,<sup>231</sup> raised potentially sweeping questions such as the enforceability of an arbitration clause that bars the arbitrator from awarding damages otherwise available under a federal statute. The federal statute at issue, RICO, allows awards of treble damages, but the arbitration clauses at issue barred awards of “punitive” damages.<sup>232</sup> The courts below found the arbitration clause unenforceable with regard to the RICO claims due to the limitation on damages.<sup>233</sup> The Supreme Court did not decide whether such a limitation made the arbitration agreement unenforceable or even whether the question of the validity of the limitations was for the court or the arbitrator in the first instance, deeming those inquiries “premature.”<sup>234</sup> They were premature because, according to the Supreme Court, the courts below had wrongly assumed that a bar on punitive damages equated to a bar on RICO treble damages, which are not exactly punitive (though not exactly compensatory either).<sup>235</sup> That is, there was initially a question of contract interpretation regarding what the contracts purported to bar. And that question should first be answered by the arbitrator, the Court said, so the motion to compel arbitration should have been granted.<sup>236</sup> This decision that the initial interpretation of the limitation was for the arbitrator was itself evidently understood as a question of federal law—no state contract principles were mentioned.

It is true that the cases above do not directly address unconscionability and who—court or arbitrator—would decide a claim that an arbitration clause was unconscionable because of a remedial limitation or some other feature. Both *Bazzle* and *PacifiCare* did, however, address issues—class proceedings and punitive damages—that frequently arise in unconscionability cases. Both shifted difficult questions to the arbitrator rather than confront them head on, and they did so as a matter of federal law. I do not claim to be able to prove that the Supreme Court rendered these decisions *because* it believed that

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Whether the state court correctly determined an allocation issue (i.e., who decides, court or arbitrator) is an issue of state contract law only, and one that is not antecedent to any federal claim, and thus, standard application of the adequate nonfederal ground doctrine should have barred review. Or is the Court implicitly “federalizing” arbitration law, at least in terms of allocation of roles between courts and arbitrators?

Monaghan, *supra* note 70, at 1956. The answer to his query, surprisingly, seems to be yes.

<sup>231</sup> 538 U.S. 401 (2003).

<sup>232</sup> *Id.* at 403.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 403–04.

<sup>235</sup> *Id.* at 405–06.

<sup>236</sup> *Id.* at 407.

channeling decisional authority to the arbitrator was the way to hold back a growing torrent of anti-arbitration rulings—though business groups certainly made the Court aware of the unconscionability “epidemic” in their amicus filings.<sup>237</sup> It does seem, however, that while the rulings are strange in certain ways, they are consistent with the type of approach that a court might take if it were acting strategically.

The lower federal courts, which lack discretionary control over their dockets, have had to address the unconscionability problem more directly and more frequently, and so we can look to them for more development of this trend.

## 2. *Developments in the Lower Federal Courts*

While there is uncertainty and divergence of opinion on various issues, a review of lower federal court decisions reveals the outlines of a move toward courts putting greater emphasis on questions of allocation and toward federalizing this allocation question so that state courts’ views on the unconscionability question become irrelevant.

A good illustration is the Eleventh Circuit’s decision in *Anders v. Hometown Mortgage Services, Inc.*<sup>238</sup> By way of background, the Alabama Supreme Court had recently decided cases in which it held that a contractual bar on an arbitrator awarding punitive damages was unconscionable and unenforceable. However, since the unconscionable limitation was severable from the rest of the agreement as a matter of state contract doctrine, the Alabama court ordered arbitration minus the bar on punitive damages.<sup>239</sup> The Eleventh Circuit in *Anders* likewise faced the question of whether such a remedial limitation was permissible under Alabama law. Yet the court did not rule on the question. It instead held that, since the restriction would be severable if invalid, the arbitrator should rule on its validity:

Whether the agreement is valid as written or suffers [from] invalid provisions that must be removed under the forgiving eye of the severance clause, there is a valid agreement to arbitrate in place. Since

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<sup>237</sup> See, e.g., Brief for Am. Bankers Ass’n et al. as Amici Curiae in Support of Petition for a Writ of Certiorari at 15, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634), 2002 WL 32101083 (“The court below suggested that it might reject an arbitration agreement containing [a bar on class proceedings] as unconscionable. Some other courts have already done so. Their hostility to arbitration could hardly be more clear.” (internal citation omitted)); Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner at 5 n.2, *Bazzle*, 539 U.S. 444 (No. 02-634), 2003 WL 721691 (“Recently, the Ninth Circuit concluded that class action bans in standard form arbitration agreements are ‘manifestly one-sided’ by their very nature and hence are inherently unconscionable. The present case is an appropriate vehicle for dispatching that shibboleth.” (internal citation omitted)).

<sup>238</sup> 346 F.3d 1024 (11th Cir. 2003).

<sup>239</sup> E.g., *Ex parte Thicklin*, 824 So. 2d 723, 730–34 (Ala. 2002).

the case is going to arbitration, an arbitrator and not a court should decide the validity of the remedial restriction provisions . . . .<sup>240</sup>

This holding was in some tension with an older Eleventh Circuit case, which—like most older cases—had ruled upon the validity of an arbitration clause containing a damages restriction.<sup>241</sup> *Anders* gave the earlier case a very narrow reading, deeming the case irrelevant because it had not discussed whether the contract contained a severability clause.<sup>242</sup> *Anders* also had to address an apparent conflict with the Alabama state cases:

We realize that the Supreme Court of Alabama [in its recent cases] did decide the validity of the challenged remedial restrictions in those cases before sending the disputes to arbitration. If it were a matter of general contract law, we would follow [that] approach here, because Alabama law applies to the general contract questions in this case. However, unlike severability, whether a court or arbitrator is to decide particular issues is not a question of contract law, but is instead governed by the FAA; it is a federal law issue . . . . State and federal courts are free to decide federal law issues for themselves (unless and until the United States Supreme Court settles the matter). We have done so, concluding that the arbitrator should decide whether the remedial provisions of the arbitration agreement are invalid, if the arbitrator decides that *Anders*' claims have merit.<sup>243</sup>

In sum, the Alabama Supreme Court's unconscionability holding may have been right, but the state court should not have asked the question in the first place. Parties should instead go to arbitration and present this challenge there. Some other recent cases have likewise held that various unconscionability challenges should also be decided by an arbitrator.<sup>244</sup> Again, the point is not that these decisions are wrong. The point is that they depart significantly from what most courts thought was the law,<sup>245</sup> and this change in the law may reflect a

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<sup>240</sup> *Anders*, 346 F.3d at 1032.

<sup>241</sup> *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998).

<sup>242</sup> *Anders*, 346 F.3d at 1031. Perhaps the contract did not have one, but the *Paladino* court's failure to mention it one way or the other just as plausibly suggests that the earlier panel did not think it relevant.

<sup>243</sup> *Id.* at 1033.

<sup>244</sup> *See, e.g.*, *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) (holding that validity of remedial limitations and ban on class arbitration should be decided by arbitrator); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp.*, 334 F.3d 721, 726–27 (8th Cir. 2003) (holding that alleged unconscionability of attorneys' fees provisions was question for arbitrator); *see also In re Am. Express Merchants Litig.*, No. 03-CV-09592, 2006 WL 662341, at \*6 (S.D.N.Y. Mar. 16, 2006) (holding that "enforceability of the collective action waivers is a claim for the arbitrator to resolve" when waivers were alleged to violate antitrust laws).

<sup>245</sup> *See supra* notes 210–12 and accompanying text (discussing case law on this point).

perceived need to take decisionmaking power away from the state courts (and some federal courts).

We can close this Section with one more instance of innovation in federalization and allocation rules. The difference is that this one seems sufficiently wrong that it is difficult not to suspect that the motive was to cut anti-arbitration state courts out of the loop. This case, perhaps surprisingly, comes from the Ninth Circuit, which is in many ways the circuit most hospitable to state unconscionability rulings. California, like many states, typically requires that an agreement display some degree of both procedural and substantive unconscionability before it will be invalidated.<sup>246</sup> Arguments regarding the substantive unconscionability of an arbitration clause will generally target certain aspects of the clause, such as its provisions concerning remedies, expenses, or forum. Arguments concerning procedural unconscionability, though proffered for the purpose of invalidating the substantively burdensome arbitration clause, will generally include matters such as adhesionary formation and unequal bargaining power that apply to the formation of the contract as a whole. In other words, one has to make some arguments that apply to the circumstances of the formation of the contract as a whole, even though the target is just the arbitration clause. This type of inquiry was not thought to conflict with *Prima Paint's* admonition that the court can consider only challenges that implicate the validity of the arbitration clause. Indeed, since an unconscionability analysis will almost always include some matters that involve the contract as a whole—namely its adhesionary formation—such a reading of *Prima Paint* would mean that practically all of the many courts to have ruled on unconscionability had overstepped their jurisdiction. That could not possibly be correct.

Or could it? In *Nagrampa v. MailCoups, Inc.*, a Ninth Circuit panel came to the startling latter-day conclusion that it and other courts had been ignoring *Prima Paint* all along without even knowing it.<sup>247</sup> The franchisee plaintiff sought to invalidate an arbitration clause in a franchise agreement she had signed, claiming that it was unconscionable—both procedurally and substantively, as California law requires.<sup>248</sup> As often happens, her procedural unconscionability argument included both allegations that applied to the arbitration clause in particular (namely, that she lacked notice and the clause was incon-

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<sup>246</sup> *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689–90 (Cal. 2000). They need not be present in equal degree; the presence of more of one type means that less of the other type is required. *Id.* See generally WILLISTON & LORD, *supra* note 81, § 18:10 (discussing substantive and procedural unconscionability).

<sup>247</sup> 401 F.3d 1024, 1027–28 (9th Cir. 2005), *rev'd en banc*, 469 F.3d 1257 (9th Cir. 2006).

<sup>248</sup> *Id.* at 1027.

spicuous) and a general charge that the entire contract was adhesi-  
onary.<sup>249</sup> The panel, which could reasonably be regarded as pro-  
business, found the clause-specific charges insufficient to constitute  
procedural unconscionability and then refused to consider the more  
general adhesion arguments, holding that *Prima Paint* prohibited the  
inquiry.<sup>250</sup> It therefore did not even reach the substantive attack on  
the arbitration clause—that it provided for expensive arbitration on  
the other side of the country—because the plaintiff had not been able  
to establish procedural unconscionability.<sup>251</sup> The panel was  
untroubled by the apparent conflict with prior Ninth Circuit decisions,  
explaining that those decisions had not discussed *Prima Paint*.<sup>252</sup> The  
prior cases' failure to discuss *Prima Paint* would be unsurprising, of  
course, if *Prima Paint* is not implicated.

Although the *Nagrampa* panel decision was later repudiated by  
an en banc panel of the Ninth Circuit,<sup>253</sup> the episode nonetheless rep-  
resents a striking approach to blocking an unconscionability challenge.  
California substantive law is regarded as hostile to arbitration, and its  
courts are often more than willing to declare arbitration agreements  
unconscionable. Rather than directly challenge the state law as dis-  
criminatory, the *Nagrampa* panel instead wholly circumvented the  
state unconscionability inquiry by cutting courts out of the picture.  
The panel's allocation ruling that the unconscionability inquiry is for  
the arbitrator would have been a rule of substantive federal law appli-  
cable in state courts as well as federal courts,<sup>254</sup> and thus sought to  
take away the California courts' favorite tool for invalidating arbitra-  
tion clauses.

There is good reason to think that the court's views on the "who  
decides" question were driven not so much by a disagreement over  
*Prima Paint* but rather reflected deeper views about arbitration and

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<sup>249</sup> *Id.* at 1027–30.

<sup>250</sup> *Id.* at 1027–28. The opinion was authored by Circuit Judge O'Scannlain (appointed by President Reagan), joined by Circuit Judge Bea (appointed by President G.W. Bush) and Senior Circuit Judge Cowan (of the Third Circuit, sitting by designation, appointed by President Reagan). Judges' biographical information is available at the Federal Judicial Center's website, <http://www.fjc.gov/public/home.nsf/hisj>.

<sup>251</sup> *Nagrampa*, 401 F.3d at 1030.

<sup>252</sup> *Id.* at 1028 (citing *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001), as prior case that had not considered *Prima Paint* problem).

<sup>253</sup> *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 (9th Cir. 2006) (en banc), *rev'g* 401 F.3d 1024 (explaining that court must consider challenge to arbitration agreement even when "substantive state law requires the court to consider, in the course of analyzing the validity of the arbitration provision, the circumstances surrounding the making of the entire agreement").

<sup>254</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447–48 (2006) (holding that separability doctrine governs in state courts).

unconscionability. Of the thirteen circuit judges who examined the case, all but one took a consistent view, either pro-arbitration or anti-arbitration, *both* on the “who decides” question *and* on the merits of the unconscionability challenge. That is, the judges believed either that (1) the question was for the court *and* the clause was unconscionable, or (2) the question was for the arbitrator *and*, in any event, the clause was not unconscionable.<sup>255</sup>

### 3. *Expanding Federal Jurisdiction?*

When the state courts produce outcomes that are regarded as deficient, one response is to create federal law that will displace or counteract a disfavored aspect of state law. As we have seen, arbitration doctrine continues to become more federal in character. Our modern judicial system, however, is predicated on the idea that the identity of the forum holds its own independent significance.<sup>256</sup> Thus, while state courts routinely apply federal law, either plaintiff or defendant may instead choose the federal forum for their federal dispute.<sup>257</sup> In diversity cases, federal courts today apply state substantive law, and so diversity jurisdiction is now defended (to the extent it is defended) in part because the difference in forum might lead to a difference in result despite application of the same substantive rules.<sup>258</sup>

Given the perception that some state courts are insufficiently attentive to the national policy favoring arbitration, it should not be surprising to see pressure developing on the jurisdictional front. To the extent that anti-arbitration rulings are most common in state courts, an expansion of federal adjudicative jurisdiction would represent an attractive pro-arbitration response, even if both court systems are supposed to apply the same mix of federal and state law.<sup>259</sup>

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<sup>255</sup> Only Judge Clifton reached a split decision, finding that the question was for the court but that the clause was valid. *Nagrampa*, 469 F.3d at 1294 (Clifton, J., concurring in part and dissenting in part). Three judges were on the original panel and eleven were on the en banc panel, with one overlap between the two (Judge O’Scannlain), thus totaling thirteen circuit judges.

<sup>256</sup> See, e.g., Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1218 (2004) (“Commentators and courts understand that often [a state or federal interest] is at stake in the adjudication of a case, [which] calls out for litigation in one court system or another.”).

<sup>257</sup> See 28 U.S.C. § 1331 (2006) (conferring federal jurisdiction over cases arising under federal law); *id.* § 1441 (conferring removal jurisdiction).

<sup>258</sup> See generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1498–1500 (5th ed. 2003) (discussing post-*Erie* justifications for diversity jurisdiction).

<sup>259</sup> A somewhat similar dynamic was at work when Congress enacted the Class Action Fairness Act (CAFA). Congress believed that expanding federal jurisdiction would reduce

To begin by clarifying the existing jurisdictional landscape: Although the FAA creates substantive federal law requiring enforcement of arbitration agreements, “it does not create any independent federal-question jurisdiction.”<sup>260</sup> Thus, the fact that one contracting party is flouting its (federal) duty to arbitrate does not all by itself permit an aggrieved party to file a federal action seeking to compel arbitration. There must be an independent basis for federal jurisdiction beyond just the arbitration agreement.<sup>261</sup> That much is clear and seems unlikely to change anytime soon.

Around the edges of the jurisdictional rules, however, there is room for pro-arbitration federal courts to shift more cases away from the state courts. To pick one example, suppose that two parties are engaged in a dispute: One contends that the matter must be arbitrated, but the other refuses. If the parties are diverse and the requisite amount of money is at stake, the district court will have diversity jurisdiction to entertain a petition by one party seeking to compel the other to arbitrate.<sup>262</sup> But what if, in the absence of diversity, the party seeking to compel arbitration tries instead to invoke *federal question* jurisdiction—not based solely on the FAA, but based on the fact that the underlying dispute, which the other party refuses to arbitrate, arises under federal law (say, under federal securities law)? Would the federal character of the underlying dispute support federal question jurisdiction?

The older view tended to be that the federal nature of the underlying dispute did not suffice to confer federal jurisdiction over an action to compel arbitration.<sup>263</sup> At one point this position seemed on

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“abusive” choice-of-law decisions, even though federal courts follow state choice-of-law rules. Patrick Woolley, *Erie and Choice of Law After the Class Action Fairness Act*, 80 TUL. L. REV. 1723, 1723–26 (2006); accord S. Rep. No. 108-123, at 61 (2003) (“A premise of the Class Action Fairness Act is that [the problem of abusive choice-of-law decisions] can be corrected by expanding federal jurisdiction over interstate class actions, the theory being that federal courts will not engage in ‘false federalism’ games.”). Of course, another motive for CAFA was to change the governing procedural law by substituting Federal Rule of Civil Procedure 23 and its associated jurisprudence for state class-certification law, which was in some places more favorable to certification. Nagareda, *supra* note 94, at 1912–13.

<sup>260</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

<sup>261</sup> *Id.*; see also 9 U.S.C. §§ 3–4 (2006) (providing for stays of litigation and orders compelling arbitration in cases within district courts’ preexisting jurisdiction).

<sup>262</sup> 13B CHARLES ALAN WRIGHT ET AL., *supra* note 121, § 3569 (2d ed. 1984).

<sup>263</sup> *E.g.*, *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 94 (6th Cir. 1997); *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263, 266–68 (2d Cir. 1996); *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992); *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957, 963 (S.D.N.Y. 1988) (Leval, J.).

its way to becoming settled doctrine.<sup>264</sup> Then, in 1999, the Eleventh Circuit disagreed in a footnote that did not cite any of the prior cases to the contrary.<sup>265</sup> In 2001, the Fifth Circuit, in apparent *sub silentio* conflict with one of its earlier decisions, likewise applied the look-through-to-the-underlying-dispute approach.<sup>266</sup> In 2005, the Fourth Circuit also embraced the broad view of federal jurisdiction in a careful opinion by Judge Wilkinson. The opinion relied primarily on textual arguments, but the court also pointed out that the broader view would promote the federal policy in favor of enforcement of arbitration agreements.<sup>267</sup> A pro-arbitration shift seemed to be underway.

The Supreme Court might soon rule upon whether the underlying federal character of a dispute can confer jurisdiction.<sup>268</sup> As with the debate over the allocation rule dividing authority between courts and arbitrators, our concern is not to attempt to discern the correct answer but instead to examine the strategic dynamics at work. The broader view of federal jurisdiction is clearly the more pro-arbitration view. Imagine an employer engaged in a dispute with an employee implicating federal antidiscrimination law. If the parties are in a state

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<sup>264</sup> See *Minor v. Prudential Sec., Inc.*, 94 F.3d 1103, 1106 (7th Cir. 1996) (noting “strong body of caselaw” in support of this view).

<sup>265</sup> *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999).

<sup>266</sup> *Compare Rio Grande Underwriters, Inc. v. Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001) (“A party may obtain relief in federal court under the FAA only when the underlying civil action would otherwise be subject to the court’s federal question or diversity jurisdiction.”), with *Prudential-Bache*, 966 F.2d at 989 (“Federal jurisdiction did not vest over this action based on the federal character of the underlying claims . . .”).

<sup>267</sup> *Discover Bank v. Vaden*, 396 F.3d 366, 372 (4th Cir. 2005). Although it adopted the broad view of jurisdiction, the court remanded to the district court to determine whether the underlying dispute really did arise under federal law. *Id.* at 373.

Academic commentary tends to favor the broad view of federal jurisdiction. For scholarship reviewing the issue and supporting the broad view, see generally MACNEIL ET AL., *supra* note 29, § 9.2.3, Richard A. Bales & Jamie Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, 80 COLO. L. REV. (forthcoming Jan. 2009), available at <http://www.ssrn.com/abstract=1112304>, and Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319 (2007).

<sup>268</sup> The Supreme Court granted certiorari in a subsequent appeal in the *Vaden* litigation. *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), *cert. granted*, 128 S. Ct. 1651 (2008). The case presents the jurisdictional question in a rather awkward situation. *Discover Bank* initiated litigation in state court. When its customer countersued with class action claims purportedly based on state law, *Discover Bank* filed an independent federal court action seeking to compel arbitration of the counterclaims, which it contended were completely preempted by federal banking law. *Id.* at 597–98. It is certainly possible that the Supreme Court could hold that it is proper to look through to the underlying dispute in some cases but not in this peculiar type of case, in which *Discover Bank* arguably tried to circumvent the rule that federal counterclaims do not support removal. See *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830–32 (2002) (holding that counterclaim does not satisfy “arising under” jurisdictional test).

whose courts are relatively unsympathetic to arbitration of employment disputes, it is easy to see why the employer would like access to federal court, even though the federal court should in theory apply the same state unconscionability doctrine as would the state court. Indeed, supporters of the broad view of federal jurisdiction write that one consideration in support of their view is that it allows parties seeking arbitration, especially of federal statutory claims, to escape from state courts that are perceived as less friendly toward arbitration.<sup>269</sup> Adopting the broad view of district court jurisdiction would relieve to some degree the Supreme Court's current burden of reviewing state court arbitration rulings, setting up the lower federal courts in its place.<sup>270</sup>

The important point here is that this or other questions about the jurisdictional reach of the FAA are not solely technical debates over how to read a statute but are also disputes that have a distinctly political, and potentially strategic, valence.

#### D. Congress: Coming off the Sidelines?

Congress has long left the FAA in the courts' hands to develop in a common law fashion, but Congress is always free to amend the statute. Indeed, in some ways the issue screams out for a legislative solution, as the current state of the law leaves almost nobody happy: Pro-arbitration forces decry the rise of unconscionability analysis, while consumer activists and employee advocates find unconscionability an unsatisfactory defense against the spread of arbitration. And regardless of one's position on those policy questions, the current doctrine is problematic from the point of view of rule-of-law values like stability and hierarchical compliance. Let us therefore close by considering Congress's part in the unconscionability game.

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<sup>269</sup> Szalai, *supra* note 267, at 323 & n.15.

<sup>270</sup> Cf. Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 253–54 (1988) (explaining that mid-twentieth-century habeas decisions deployed federal district courts as Supreme Court's surrogates in reviewing state convictions). *But cf.* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 613 (1996) (Ginsburg, J., dissenting) (“[T]he Court will work at this business [of monitoring punitive damages] alone. It will not be aided by the federal district courts and courts of appeals. It will be the *only* federal court policing the area.”). To be clear, adopting the broader view of FAA jurisdiction would make a difference in only certain categories of cases. If the party resisting arbitration actually filed suit in state court asserting the federal claim, that suit would ordinarily be removable under 28 U.S.C. § 1441 (2006). If the party resisting arbitration filed suit in federal court asserting the federal claim, the court would not need any additional jurisdictional basis to entertain the defendant's request to compel arbitration. *Prudential-Bache*, 966 F.2d at 989. The broader view of federal jurisdiction really does increase access to the federal courts in certain scenarios, however, such as when no suit has yet been filed or when the supposedly arbitrable federal claim arises as a state court counterclaim.

Congress has not yet played an active role, either to restrict the reach of arbitration or to further limit defenses to arbitration. Not for lack of proposals: Scores of bills and proposals have been advanced in recent years,<sup>271</sup> and yet no major legislation affecting the topics at issue here has passed.<sup>272</sup> The November 2006 election, which brought the Democrats to power in both houses of Congress, has given new prominence to proposals to remove mandatory predispute arbitration agreements from the consumer economy and workplace. Potentially the most significant development is the introduction of the Arbitration Fairness Act, which would exempt consumer, employment, franchise, and civil rights disputes from the FAA's purview, as well as specifying that courts, rather than arbitrators, should rule on challenges to the validity of arbitration agreements.<sup>273</sup> The bill faces stiff resistance from powerful interest groups and has not yet emerged from committee.<sup>274</sup>

Nonetheless, even if Congress takes no action, its mere presence could affect how other players behave. Just as inferior courts shape their behavior with an eye toward the anticipated responses of superior courts, the Supreme Court might shape its behavior with an eye toward the anticipated responses of the actor able to override its arbi-

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<sup>271</sup> See, e.g., S. Pierre Paret, Report from Washington: Looking Back: ADR Legislation in the 109th Congress, Jan. 4, 2007, <http://www.adr.org/sp.asp?id=29591> (reporting that over sixty ADR-related bills were introduced in 2005–2006).

<sup>272</sup> There have been a few narrowly focused enactments, such as a 2002 statute that makes predispute arbitration agreements in certain automobile franchise arrangements voidable, 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028(a)(2), 116 Stat. 1758, 1836 (2002) (codified at 15 U.S.C. § 1226(a)(2) (2006)), a 2006 statute exempting members of the military and their dependents from arbitrating consumer credit disputes, John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, sec. 670(a), § 987(f)(4), 120 Stat. 2083, 2267–68 (2006) (codified at 10 U.S.C. § 987(f)(4) (2006)), and a 2008 enactment that restricts the use of arbitration clauses in livestock and poultry production contracts, Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, sec. 11005, § 210, 122 Stat. 923, 1357–58 (to be codified at 7 U.S.C. § 197c).

<sup>273</sup> S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007). A recent law review symposium was devoted to the topic of amending the FAA. Symposium, *Rethinking the Federal Arbitration Act: An Examination of Whether and How the Statute Should Be Amended*, 8 NEV. L.J. 1 (2007).

<sup>274</sup> See Letter from Am. Bankers Ass'n et al. to Senators Patrick Leahy and Arlen Specter, Senate Comm. on the Judiciary (Feb. 7, 2008), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1082> (urging opposition to Arbitration Fairness Act); Letter from R. Bruce Josten, Executive Vice President of Gov't Affairs, Chamber of Commerce, to Representatives Linda T. Sanchez and Chris Cannon, House Subcomm. on Commercial and Admin. Law (Oct. 24, 2007), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1077> (same). Information on the status of the bills is available through the Thomas website operated by the Library of Congress, <http://thomas.loc.gov/>.

tration decisions, Congress.<sup>275</sup> The Supreme Court has been less aggressive in combating unconscionability rulings than one might expect, given its strongly pro-arbitration preferences. As suggested above, the difficulty of review is likely a good part of the explanation for why the Court, despite its aggressive moves on other fronts, has been hesitant. But sophisticated Justices might also refrain from attacking unconscionability rulings if they believed that doing so would provoke Congress to amend the FAA in a way that would harm the Court's long-term pro-arbitration preferences.

Unconscionability might operate as a sort of safety valve that makes arbitration politically sustainable. It permits courts, on a case-by-case basis, to respond to the most compelling inequities. At the same time, the mere risk of an unconscionability challenge may prevent drafters of arbitration clauses from overreaching. In this way, unconscionability is an outlet to relieve pressure on the system and avert the truly intolerable outcomes that might provoke legislative action. To the extent that the recent Democratic majorities in Congress make legislative action to restrict arbitration more likely (which is not necessarily to say likely in absolute terms), a sophisticated Supreme Court would tend to be careful about closing off this safety valve.

### CONCLUSION

This Article has attempted to explain recent and ongoing developments in FAA case law as the result of a strategic interaction between various courts with divergent preferences regarding arbitration. As the Supreme Court has shut off various means of resisting arbitration, unconscionability has become one of the few tools still available to skeptical courts. The flexibility of unconscionability doctrine, however, creates the potential for the conflicting judicial preferences to express themselves through manipulation of state law. This noncompliance then drives further responses by pro-arbitration courts

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<sup>275</sup> There is a significant and growing literature, both theoretical and empirical, on whether the Supreme Court decides its statutory interpretation cases with an eye toward the possibility of congressional override. *E.g.*, SEGAL & SPAETH, *supra* note 99, at 103–10, 326–55; Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 591–95 (2001); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263 (1990); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1652–56 (1995). Needless to say, my brief remarks are not intended to settle that debate but instead simply address how Congress might play a role in the unconscionability game and how that might influence a strategic Supreme Court.

like the Supreme Court, including development of new doctrines and allocation rules that ease monitoring.

One might wish, by way of conclusion, to declare who is “winning” or to predict who will “win” the unconscionability game, but this is difficult. Recall the chart in Part I.C, above, which shows that the sharp upward trend in unconscionability challenges to arbitration agreements might have started to level off. It is risky to draw conclusions from those data, but one could propose a few potential explanations. One possibility is that many of the issues regarding unconscionability have now been resolved one way or the other, so that there is less need for litigation. That is, the doctrine has simply become more mature. Another possibility is that unconscionability challenges have leveled off because the most aggressive arbitration clauses have been eliminated.<sup>276</sup> The cases have told companies how far they can go, and the companies have redrafted their clauses to push right up to the edge. That would be a victory of sorts for courts resistant to arbitration, though a victory only at the margins of the continuing triumph of mandatory arbitration. Still another possibility is that the nascent allocation rule pushed by pro-arbitration courts and described in Part III.C is beginning to work: Courts are starting to have fewer opportunities to rule on unconscionability arguments, because the authority has been shifted to the arbitrator. Time will tell, and the game will continue to evolve, with each side countering the other side’s latest innovation. And just possibly, Congress will radically restructure the game. Legislation exempting consumer and employment disputes from arbitration would do much to eliminate the tensions that generate the unconscionability game, as there is little opposition today to arbitration between sophisticated commercial parties.

Turning to broader themes, the FAA has much to teach federal courts scholars because it is a curious amalgam of federal and state law—a federal duty of fidelity to general state law—that seems to invite trouble. It also shows us that topics such as civil rights and criminal defendants’ rights are not the only areas in which we should be attuned to the possibility of evasion of federal mandates.

But my aims in this Article go beyond the FAA in particular. Part of the attraction of the political scientists’ strategic approaches to judicial behavior is that they can accommodate sophisticated understandings of doctrine. Even if judges are partly motivated by ideology, that does not render doctrine unimportant; indeed, doctrine can operate as an important tool. I have hoped to provide an illustra-

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<sup>276</sup> See *supra* note 141 (describing this possibility).

tion and contextualized elaboration of such a model of judicial behavior, in which emerging doctrinal changes reflect not just legal considerations, nor just preferences, but rather respond to the ongoing problem of monitoring lower courts. I believe there are many further insights that future work at this intersection of law and political science can generate.