Introduction to U.S. Law
and
Legal Practice

Section 2: Professor Mary Holland

Just or Unjust? Private Arbitration
and the American Consumer
Table of Contents
List of Statute Cases

8. AT&T Mobility v. Concepcion, 563 U.S. 321 (2011)
TITLE 9—ARBITRATION

This title was enacted by act July 30, 1947, ch. 392, § 1, 61 Stat. 669

Chap.  General provisions .............................. 1
2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards ........................................ 201
3. Inter-American Convention on International Commercial Arbitration ........................................ 301

AMENDMENTS

§ 1. “Maritime transactions” and “commerce” defined; exceptions to operation of title

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION
§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been held in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, ch. 392, 61 Stat. 670.)

DERIVATION

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.


DERIVATION

REFERENCES IN TEXT
Federal Rules of Civil Procedure, referred to in text, are set out in Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

(July 30, 1947, ch. 392, 61 Stat. 671.)

DERIVATION
§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.


DERIVATION

AMENDMENTS
1951—Act Oct. 31, 1951, substituted “United States district court for” for “United States court in and for”, and “by law for” for “on February 12, 1925, for”.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.


DERIVATION

AMENDMENTS
2002—Subsec. (a)(1) to (4). Pub. L. 107–169, §1(1)–(3), substituted “where” for “Where” and realigned margins in pars. (1) to (4), and substituted a semicolon for
§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(Derivation)

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the motion may be served upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action. The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

(Derivation)

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

(Derivation)

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

(Added Pub. L. 100–669, § 1, Nov. 16, 1988, 102 Stat. 3969.)

CODIFICATION

Another section 15 of this title was renumbered section 16 of this title.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.


AMENDMENTS

1990—Pub. L. 101–650 renumbered the second section 15 of this title as this section.

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§ 201. Enforcement of Convention.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.


EFFECTIVE DATE


§ 202. Agreement or award falling under the Convention.

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.


§ 203. Jurisdiction; amount in controversy.

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.


§ 204. Venue.

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.


§ 205. Removal of cases from State courts.

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.


§ 206. Order to compel arbitration; appointment of arbitrators.

A court having jurisdiction under this chapter may direct that arbitration be held in accord-
WILKO v. SWAN et al.
No. 39.

Argued Oct. 21, 1953.
Decided Dec. 7, 1953.

Buyer’s suit to recover, under Securities Act, for misrepresentation. The United States District Court for the Southern District of New York, 107 F. Supp. 75, denied the defendant-brokers’ motion for stay of proceeding until an arbitration could be had in accordance with agreement between parties, and the defendants appealed. The United States Court of Appeals for the Second Circuit, 201 F.2d 439, reversed, and the plaintiff brought certiorari. The United States Supreme Court, Mr. Justice Reed, held that right to select judicial forum is kind of “provision” which cannot validly be waived, and that an agreement to arbitrate future controversies between securities brokers and buyer constitutes a “stipulation” binding buyer to waive compliance with such Securities Act provision, and held that such an agreement is therefore invalidated by the act’s express prohibitions against waiver.

Reversed.

Mr. Justice Frankfurter and Mr. Justice Minton, dissented.

1. Courts ☞383(1)

Federal Supreme Court would grant certiorari to review important and novel federal question, affecting both Securities Act and United States Arbitration Act, presented by purchaser’s action, against brokers, involving issue as to whether an agreement to arbitrate future controversy was the sort of “condition, stipulation, or provision” for waiver of compliance with any “provision” of the Securities Act which said act itself declares “void.” Securities Act of 1933, § 14, 15 U.S.C.A. § 77n; 9 U.S.C.A. § 2.

2. Licenses ☞181½(39)

The Securities Act of 1933 was passed in response to a presidential message urging that there be added to the ancient rule of caveat emptor the further doctrine of “let the seller also beware,” and such act was designed to protect investors. Securities Act of 1933, §§ 1 et seq., 12(2). 15 U.S.C.A. §§ 77a et seq., 77l(2).

3. Courts ☞289

Licenses ☞39.33

Removal of Cases ☞3

The special right given by Securities Act, to recover for misrepresentation, is enforceable in any court of competent jurisdiction, federal or state, and removal from state court is prohibited, but if suit is brought in federal court purchaser has wide choice of venue and privilege of nation-wide service of process, and jurisdictional $3,000 requirement of diversity cases is inapplicable. Securities Act of 1933, §§ 4, 12(2), 16, and § 22(a), as amended, 15 U.S.C.A. §§ 77d, 77l(2), 77p, 77v(a); 9 U.S.C.A. § 10.

4. Arbitration and Award ☞48

Where arbitration agreement between buyer and brokers was made subject to provisions of Securities Act, provisions of Securities Act would control, in so far as award in arbitration might be affected by legal requirements, statutes or common law, even if proposed agreement had no requirement that arbitrators follow the law. 9 U.S.C.A. §§ 1 et seq., 3.

5. Arbitration and Award ☞73

In unrestricted submissions, interpretations of law by arbitrators, in contrast to manifest disregard thereof, are not subject, in federal courts, to judicial review for error in interpretation. 9 U.S.C.A. § 10.

6. Arbitration and Award ☞2

By Federal Arbitration Act, Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration, if parties are willing to accept less certainty of legally correct adjustment. 9 U.S.C.A. § 1 et seq.
7. Contracts \(\Leftrightarrow 284(1)\)
Licenses \(\Leftrightarrow 39.27\)
Right to select judicial forum is kind of "provision" which cannot, by express terms of Securities Act, validly be waived; and an agreement to arbitrate future controversy between securities brokers and buyer constitutes a "stipulation" binding buyer to waive compliance with such Securities Act provision. 9 U.S.C.A. § 10.

Mr. Richard H. Wels, New York City, for petitioner.

Mr. Horace G. Hitchcock, New York City, for respondents.

Mr. William H. Timbers, New York City, for S.E.C., amicus curiae, by special leave of Court.

Mr. Justice REED delivered the opinion of the Court.

This action by petitioner, a customer, against respondents, partners in a securities brokerage firm, was brought in the United States District Court for the Southern District of New York, to recover damages under § 12(2) of the Securities Act of 1933. The complaint alleged that on or about January 17, 1951, through the instrumentality of interstate commerce, petitioner was induced by Hayden, Stone and Company to purchase 429,160 shares of the common stock of Air Associates, Incorporated, by false representations that pursuant to a merger contract with the Borg Warner Corporation, Air Associates' stock would be valued at $6.00 per share over the then current market price, and that financial interests were buying up the stock for the speculative profit. It was alleged that he was not told that Haven B. Page (also named as a defendant but not involved in this review), a director of, and counsel for, Air Associates was then selling his own Air Associates' stock, including some or all that petitioner purchased. Two weeks after the purchase, petitioner disposed of the stock at a loss. Claiming that the loss was due to the firm's misrepresentations and omission of information concerning Mr. Page, he sought damages.

Without answering the complaint, the respondent moved to stay the trial of the action pursuant to § 3 of the United States Arbitration Act until an arbitration
tration in accordance with the terms of identical margin agreements was had. An affidavit accompanied the motion stating that the parties’ relationship was controlled by the terms of the agreements and that while the firm was willing to arbitrate petitioner had failed to seek or proceed with any arbitration of the controversy.

Finding that the margin agreements provide that arbitration should be the method of settling all future 430 controversies, the District Court held that the agreement to arbitrate deprived petitioner of the advantageous court remedy afforded by the Securities Act, and denied the stay. A divided Court of Appeals concluded that the Act did not prohibit the agreement to refer future controversies to arbitration, and reversed.5

431


431

[2, 3] In response to a Presidential message urging that there be added to the ancient rule of caveat emptor the further doctrine of “let the seller also beware,” Congress passed the Securities Act of 1933. Designed to protect investors, the Act requires issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale.9 To effectuate this policy, § 12(2) created a special right to recover for misrepresentation which differs substantially from the common-law action in that the seller is made to assume the burden of proving lack of scienter. The Act’s special right is enforceable in any court of competent jurisdiction—federal or state—and removal from a pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.”

5. Wilko v. Swan, 2 Cir., 201 F.2d 430.

“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.”

10. See note 1, supra. “Unless responsibility is to involve merely paper liability it is necessary to throw the burden of disproving responsibility for reprehensible acts of omission or commission on those
state court is prohibited. If suit be brought in a federal court, the purchaser has a wide choice of venue, the privilege of nation-wide service of process and the jurisdictional $3,000 requirement of diversity cases is inapplicable.\textsuperscript{11}

The United States Arbitration Act establishes by statute the desirability of arbitration as an alternative to the complications of litigation. The reports of both Houses on that Act stress the need for avoiding the delay and expense of litigation,\textsuperscript{12} and practice under its terms raises hope for its usefulness both in controversies based on statutes\textsuperscript{13} or on standards otherwise created.\textsuperscript{14} This hospitable attitude of legislatures and courts toward arbitration, however, does not solve our question as to the validity of petitioner's stipulation by the margin agreements, set out below, to submit to arbitration controversies that might arise from the transactions.\textsuperscript{15}

Petitioner argues that § 14, note 6, supra, shows that the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act. He contends that arbitration lacks the certainty of a suit at law under the Act to enforce his rights. He reasons that the arbitration paragraph of the margin agreement is a stipulation that waives "compliance with" the provision of the Securities Act, set out in the margin, conferring jurisdiction of suits and special powers.\textsuperscript{16}

who purport to issue statements for the public's reliance. • • • To impose a lesser responsibility would nullify the purposes of this legislation.' H.R.Rep. No.85, 73d Cong., 1st Sess. 9–10.


15. "Any controversy arising between us under this contract shall be determined by arbitration pursuant to the Arbitration Law of the State of New York, and under the rules of either the Arbitration Committee of the Chamber of Commerce of the State of New York, or of the American Arbitration Association, or of the Arbitration Committee of the New York Stock Exchange or such other Exchange as may have jurisdiction over the matter in dispute, as I may elect. Any arbitration hereunder shall be before at least three arbitrators."


"The district courts of the United States • • • shall have jurisdiction • • • concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the
Respondent asserts that arbitration is merely a form of trial to be used in lieu of a trial at law, and therefore no conflict exists between the Securities Act and the United States Arbitration Act either in their language or in the congressional purposes in their enactment. Each may function within its own scope, the former to protect investors and the latter to simplify recovery for actionable violations of law by issuers or dealers in securities.

[4] Respondent is in agreement with the Court of Appeals that the margin agreement arbitration paragraph, note 15, supra, does not relieve the seller from either liability or burden of proof, note 1, supra, imposed by the Securities Act. We agree that in so far as the award in arbitration may be affected by legal requirements, statutes or common law, rather than by considerations of fairness, the provisions of the Securities Act control. This is true even though defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1292-93 and 1254 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. See note 11, supra.


18. "Paragraph 3 of the margin agreement provides that all transactions 'shall be subject to the provisions of the Securities Exchange Act of 1934 and present and future acts amendatory thereto (15 U.S. C.A. § 78a, et seq.)." It contains no express mention of the Securities Act of 1933. If reference to the 1934 Act were construed as excluding the 1933 Act, it might be argued that the agreement did not provide for arbitration of a controversy as to the liability of Hayden, Stone & Co. under section 12(2) of the 1933 Act. But we do not think the principle of expressed inclusio est exclusio alterius is here applicable. It may well be that the phrase 'present * * * acts * * * supplemental' to the 1934 Act should be construed to include the 1933 Act. In any event the sale transaction would necessarily be subject to that Act. Therefore the amicus does not regard it as material whether or not the agreement purports to make that statute applicable. We agree, and shall proceed to a consideration of the question decided below, namely, whether the 1933 Act evidences a public policy which forbids referring the controversy to arbitration." 201 F.2d at page 443.

The paragraph of the agreement referred to by the Court of Appeals as "3" reads as follows:

"All transactions made by you or your agents for me are to be subject to the constitutions, rules, customs and practices of the exchanges or markets where executed and of their respective clearing houses and shall be subject to the provisions of the Securities Exchange Act of 1934 and present and future acts amendatory thereof or supplemental thereto, and to the rules and regulations of the Federal Securities and Exchange Commission and of the Federal Reserve Board insofar as they may be applicable * * * * * * ."

arm's length on equal terms, it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor. Issuers of and dealers in securities have better opportunities to investigate and appraise the prospective earnings and business plans affecting securities than buyers. It is therefore reasonable for Congress to put buyers of securities covered by that Act on a different basis from other purchasers.

When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary.

Even though the provisions of the Securities Act, advantageous to the buyer, apply, their effectiveness in application is lessened in arbitration as compared to judicial proceedings. Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved.

This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact," see, note 1, supra, cannot be examined. Power to vacate an award is limited.

While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failures would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in


"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a re-hearing by the arbitrators."

interpretation. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law. As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14, note 6, supra, to apply to waiver of judicial trial and review.

This accords with Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55. We there held invalid a stipulation restricting an employee's choice of venue in an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. Section 6 of that Act permitted suit in any one of several localities and § 5 forbade a common carrier's exempting itself from any liability under the Act. Section 5 had been adopted to avoid contracts waiving employers' liability. It is to be noted that in words it forbade exemption only from "liability." We said the right to select the "forum" even after the creation of a liability is a "substantial right" and that the agreement, restricting that choice, would thwart the express purpose of the statute. We need not and do not go so far in this present case. By the terms of the agreement to arbitrate, petitioner is restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require petitioner to sue, a waiver in advance of a controversy stands upon a different footing.

Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the rights of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an


28. § 5 of the Federal Employers' Liability Act, 35 Stat. 66, 45 U.S.C. § 55, 45 U.S.C.A. § 55, provides: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * * ."


agreement for arbitration of issues arising under the Act.

Reversed.

Mr. Justice JACKSON, concurring.

I agree with the Court's opinion insofar as it construes the Securities Act to prohibit waiver of a judicial remedy in favor of arbitration by agreement made before any controversy arose. I think thereafter the parties could agree upon arbitration. However, I find it unnecessary


in this case, where there has not been and could not be any arbitration, to decide that the Arbitration Act precludes any judicial remedy for the arbitrators' error of interpretation of a relevant statute.

Mr. Justice FRANKFURTER, whom Mr. Justice MINTON joins, dissenting.

If arbitration inherently precluded full protection of the rights § 12(2) of the Securities Act affords to a purchaser of securities, or if there were no effective means of ensuring judicial review of the legal basis of the arbitration, then, of course, an agreement to settle the controversy by arbitration would be barred by § 14, the anti-waiver provision, of that Act.

There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system as practiced in the City of New York, and as enforceable under the supervisory authority of the District Court for the Southern District of New York, would not afford the plaintiff the rights to which he is entitled.*

The impelling considerations that led to the enactment of the Federal Arbitration Act are the advantages of providing a speedier, more economical and more effective

enforcement of rights by way of arbitration than can be had by the tortuous course of litigation, especially in the City of New York. These advantages should not be assumed to be denied in controversies like that before us arising under the Securities Act, in the absence of any showing that settlement by arbitration would jeopardize the rights of the plaintiff.

Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12(2)." On this we are all agreed. It is suggested, however, that there is no effective way of assuring obedience by the arbitrators to the governing law. But since their failure to observe this law "would * * * constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," 201 F.2d 439, 445, appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.

We have not before us a case in which the record shows that the plaintiff in opening an account had no choice but to accept the arbitration stipulation, thereby making the stipulation an unconscionable and unenforceable provision in a business transaction. The Securities and Exchange Commission, as amicus curiae, does not contend that the stipula-

* Under the rules of the American Arbitration Association, available to the plaintiff under his contract, the procedure for selection of arbitrators is as follows:
The Association submits a list of potential arbitrators qualified by experience to adjudicate the particular controversy. In the City of New York, the list would be drawn from a panel of 4,400 persons, 1,275 of whom are lawyers. Each party may strike off the names of any unac-
tion which the Court of Appeals respect-
ed, under the appropriate safeguards de-
finied by it, was a coercive practice by
financial houses against customers in-
capable of self-protection. It is one thing
to make out a case of overreaching as
between parties bargaining not at arm's
length. It is quite a different thing to
find in the anti-waiver provision of the
Securities Act a general limitation on
the Federal Arbitration Act.

On the state of the record before us, I
would affirm the decision of the Court of
Appeals.

Mr. Justice Jackson, Mr. Justice
Frankfurter, Mr. Justice Minton, Mr.
Justice Clark, Mr. Chief Justice Warren,
Mr. Justice Reed, and Mr. Justice Bur-
ton, dissented in part.

1. Constitutional Law <=16(1)

United States Supreme Court will
construe a statute in a manner that re-
quires decision of serious constitutional
questions only if the statutory language
leaves no reasonable alternative.

2. Gaming <=61

Indictment and Information <=144

Judgments dismissing indictments
which charged defendants with engaging
in business of dealing in gambling de-
vices without registering with Attorney
General and reporting sales and deliv-
eries, and dismissing libel to forfeit
gambling machines seized by Federal Bu-
reau of Investigation agents from a
country club in Tennessee, would be af-
irmed. 15 U.S.C.A. §§ 1171–1177, 1172,
1173, 1176, 1177.

3. Gaming <=62

Statute requiring all manufacturers
of and dealers in gambling devices to
register with Attorney General and to
report all sales and deliveries of such
devices, is directed to all such manufac-
turers and dealers, and to all such sales
and deliveries, irrespective of their re-
lation to interstate commerce. 15 U.S.
C.A. § 1173.

Mr. Robert L. Stern, Acting Sol. Gen.,
Washington, D. C., for appellant.

Mr. Shelby Myrick, Savannah, Ga., for
appellees Denmark and Braun.

No appearance for appellee in No. 14.

Mr. Justice JACKSON announced the
judgment of the Court and an opinion in
which Mr. Justice FRANKFURTER and
Mr. Justice MINTON join.

These cases present unsuccessful at-
ttempts, by two different procedures, to
enforce the view of the Department of
40 and an unlawful motive is not the sole inference to be drawn from the conduct. Nor is the employer's conduct here, like the super-seniority plan in Erie Resistor, supra, such that an unlawful motive can be found by “an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.” Radio Officers, Union of Comm. Telegraphers Union, AFL v. National Labor Relations Board, 347 U.S. 17, 45, 74 S.Ct. 323, 338, 98 L.Ed. 455. The differences between the facts of this case and those of Erie Resistor, supra, are, as the parties recognize, so significant as to preclude analogy. Unlike the granting of super-seniority, the vacation pay policy here had no potential long-term impact on the bargaining situation. The vacation policy was not employed as a weapon against the strike as was the super-seniority plan. Notice of the date of required presence for vacation pay eligibility was not given until after the date had passed. The record shows clearly that Great Dane had no need to employ any such policy to combat the strike, since it had successfully replaced almost all of the striking employees. The Trial Examiner rejected all union claims that particular actions by Great Dane demonstrated antionion animus. In these circumstances, the Court of Appeals correctly found no substantial evidence of a violation of § 8(a) (3).

Plainly the Court is concerned lest the strikers in this case be denied their “rights” under the collective bargaining agreement that expired at the commencement of the strike. Equally plainly, a suit under § 301 is the proper manner by which to secure these “rights,” if they indeed exist. I think it inappropriate to becloud sound prior interpretations of § 8(a) (3) simply to reach what seems a sympathetic result.

4. By July 1, 1963, almost 75% of the striking employees had been replaced. By August 1, 1963, when the dispute over va-

See publication Words and Phrases for other judicial constructions and definitions.

2. Contracts ⇔284(1)

Transactions in "commerce", within United States Arbitration Act, are not limited to contracts between merchants for interstate shipment of goods. 9 U.S.C.A. §§ 1, 2.

3. Contracts ⇔292½

In passing on application for stay pending arbitration, federal court may consider only issues relating to making and performance of agreement to arbitrate. 9 U.S.C.A. § 3.

4. Courts ⇔365(1)

Federal courts are bound in diversity cases to follow state rules of decision in matters which are "substantive" rather than "procedural" or where matter is "outcome determinative."

5. Constitutional Law ⇔55

Congress may prescribe how federal courts are to conduct themselves with respect to subject matter of which Congress plainly has power to legislate.

6. Admiralty ⇔1

Commerce ⇔80

United States Arbitration Act is constitutional as based upon and confined to federal foundations of control over interstate commerce and over admiralty. 9 U.S.C.A. §§ 1–14.

7. Constitutional Law ⇔67

Federal courts are bound to apply rules enacted by Congress with respect to matters over which it has legislative power.

8. Contracts ⇔285(2)

Under United States Arbitration Act, claim of fraud in inducement of entire contract was for arbitrators under arbitration clause providing for reference of any controversy or claim arising out of or relating to agreement or breach thereof, in absence of evidence that contracting parties intended to withhold that issue from arbitration. 9 U.S.C.A. §§ 1–14.

Robert P. Herzog, New York City, for petitioner.

Martin A. Coleman, New York City, for respondent.

Gerald Aksen, New York City, for the American Arbitration Assn., as amicus curiae.

Mr. Justice FORTAS delivered the opinion of the Court.

This case presents the question whether the federal court or an arbitrator is to resolve a claim of "fraud in the inducement," under a contract governed by the United States Arbitration Act of 1925, where there is no evidence that the contracting parties intended to withhold that issue from arbitration.

The question arises from the following set of facts. On October 7, 1964, respondent, Flood & Conklin Manufacturing Company, a New Jersey corporation, entered into what was styled a "Consulting Agreement," with petitioner, Prima Paint Corporation, a Maryland corporation. This agreement followed by less than three weeks the execution of a contract pursuant to which Prima Paint purchased F & C's paint business. The consulting agreement provided that for a six-year period F & C was to furnish advice and consultation "in connection with the formulae, manufacturing operations, sales and servicing of Prima Trade Sales accounts." These services were to be performed personally by F & C's chairman, Jerome K. Jelin, "except in the event of his death or disability." F & C bound itself for the duration of the contractual period to make no "Trade Sales" of paint or paint products in its existing sales territory or to current customers. To the
consulting agreement were appended lists of F & C customers, whose patronage was to be taken over by Prima Paint. In return for these lists, the covenant not to compete, and the services of Mr. Jelin, Prima Paint agreed to pay F & C certain percentages of its receipts from the listed customers and from all others, such payments not to exceed $225,000 over the life of the agreement. The agreement took into account the possibility that Prima Paint might encounter financial difficulties, including bankruptcy, but no corresponding reference was made to possible financial problems which might be encountered by F & C. The agreement stated that it “embodies the entire understanding of the parties on the subject matter.” Finally, the parties agreed to a broad arbitration clause, which read in part:

“Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association.”

The first payment by Prima Paint to F & C under the consulting agreement was due on September 1, 1965. None was made on that date. Seventeen days later, Prima Paint did pay the appropriate amount, but into escrow. It notified attorneys for F & C that in various enumerated respects their client had broken both the consulting agreement and the earlier purchase agreement. Prima Paint’s principal contention, so far as presently relevant, was that F & C had fraudulently represented that it was solvent and able to perform its contractual obligations, where as it was in fact insolvent and intended to file a petition under Chapter XI of the Bankruptcy Act, 52 Stat. 905, 11 U.S.C. § 701 et seq., shortly after execution of the consulting agreement. Prima Paint noted that such a petition was filed by F & C on October 14, 1964, one week after the contract had been signed. F & C’s response, on October 25, was to serve a “notice of intention to arbitrate.” On November 12, three days before expiration of its time to answer this “notice,” Prima Paint filed suit in the United States District Court for the Southern District of New York, seeking rescission of the consulting agreement on the basis of the alleged fraudulent inducement. The complaint asserted that the federal court had diversity jurisdiction.

Contemporaneously with the filing of its complaint, Prima Paint petitioned the District Court for an order enjoining F & C from proceeding with the arbitration. F & C cross-moved to stay the court action pending arbitration. F & C contended that the issue presented—whether there was fraud in the inducement of the consulting agreement—was a question for the arbitrators and not for the District Court. Cross-affidavits were filed on the merits. On behalf of Prima Paint, the charges in the complaint were reiterated. Affiants for F & C attacked the sufficiency of Prima Paint’s allegations of fraud, denied that misrepresentations had been made during negotiations, and asserted that Prima Paint had relied exclusively upon delivery of the lists, the promise not to compete, and the availability of Mr. Jelin. They contended that Prima Paint had availed itself of these considerations for nearly a year without claiming “fraud,” noting that Prima Paint was in no position to claim ignorance of the bankruptcy proceeding since it had participated therein in February of 1965. They added that F & C was revested with its assets in March of 1965.

The District Court, 262 F.Supp. 605, granted F & C’s motion to stay the action. Although the letter to F & C’s attorneys had alleged breaches of both consulting and purchasing agreements, and the fraudulent inducement of both, the complaint did not refer to the earlier purchase agreement, alleging only that Prima Paint had been “fraudulently induced to accelerate the execution and closing date of the [consulting] agreement herein, from October 24, 1964 to October 7, 1964.”
pending arbitration, holding that a charge of fraud in the inducement of a contract containing an arbitration clause as broad as this one was a question for the arbitrators and not for the court. For this proposition it relied on Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (C.A.2d Cir. 1959), cert. granted, 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 618, dismissed under Rule 60, 364 U.S. 801 (1960). The Court of Appeals for the Second Circuit dismissed Prima Paint’s appeal, 2 Cir., 360 F.2d 315. It held that the contract in question evidenced a transaction involving interstate commerce; that under the controlling decision a claim of fraud in the inducement of the contract generally—as opposed to the arbitration clause itself—is for the arbitrators and not for the courts; and that this rule—one of “national substantive law”—governs even in the face of a contrary state rule. We agree, albeit for somewhat different reasons, and we affirm the decision below.

The key statutory provisions are §§ 2, 3, and 4 of the United States Arbitration Act of 1925. Section 2 provides that a written provision for arbitration “in any maritime transaction or a contract evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Section 3 requires a federal court in which suit has been brought “upon any issue referable to arbitration under an agreement in writing for such arbitration” to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement. Section 4 provides a federal remedy for a party “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration,” and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored.

In Bernhardt v. Polygraphic Co., 350 U.S. 198, 76 S.Ct. 275, 100 L.Ed. 199 (1956), this Court held that the stay provisions of § 3, invoked here by respondent F & C, apply only to the two kinds of contracts specified in §§ 1 and 2 of the Act, namely those in admiralty or evidencing transactions in “commerce.” Our first question, then, is whether the consulting agreement between F & C and Prima Paint is such a contract. We agree with the Court of Appeals that it is. Prima Paint acquired a New Jersey paint business serving at least 175 wholesale clients in a number of States, and secured F & C’s assistance in arranging the transfer of manufacturing and selling operations from New Jersey to Maryland. The consulting agree-


4. The meaning of “maritime transaction” and “commerce” is set forth in § 1 of the Act.

5. See, infra, at 1806.

6. This conclusion is amply supported by an affidavit submitted to the District Court by Prima Paint’s own president, which read in part: “The agreement entered into between the parties on October 7, 1964, contemplated and intended an orderly transfer of the assets of the defendant to the plaintiff, and further contemplated and intended that the defendant would consult, advise, assist and help the plaintiff so as
ment was inextricably tied to this inter-
state transfer and to the continuing op-
erations of an interstate manufacturing
and wholesaling business. There could
not be a clearer case of a contract evid-
cencing a transaction in interstate com-
merce.\(^7\)

Having determined that the contract
in question is within the coverage of the
Arbitration Act, we turn to the central
issue in this case: whether a claim of
fraud in the inducement of the entire
contract is to be resolved by the federal
court, or whether the matter is to be re-
ferred to the arbitrators. The courts
of appeals have differed in their ap-
proach to this question. The view of the
Court of Appeals for the Second Circuit,
as expressed in this case and in others,\(^8\)
to insure a smooth transition of manufac-
turing operations to Maryland from New
Jersey, together with the sales and serv-
icings of customer accounts and the reten-
tion of the said customers."
The affidavit’s references to a “transfer
of the assets” cannot fairly be read to
mean only “expertise and know-how
* * * and a covenant not to compete,”
as argued by counsel for petitioner.

7. It is suggested in dissent that, despite
the absence of any language in the stat-
te so indicating, we should construe it
to apply only to “contracts between mer-
chants” for the interstate shipment of
goods.” Not only have we neither the
desire nor the warrant so to amend the
statute, but we find persuasive and au-
thoritative evidence of a contrary legis-
lative intent. See, e. g., the House Re-
port on this legislation which proclaims
that “[t]he control over interstate com-
merce [one of the bases for the legisla-
tion] reaches not only the actual physical
interstate shipment of goods but also con-
tracts relating to interstate commerce.”
1 (1924). We note, too, that were the
dissent’s curious narrowing of the statute
correct, there would have been no neces-
sity for Congress to have amended the
statute to exclude certain kinds of em-
ployment contracts. See § 1. In any
event, the anomaly urged upon us in
dissent is manifested by the present case.
It would be remarkable to say that a
contract for the purchase of a single
can of paint may evidence a transaction
in interstate commerce, but that an agree-
ment relating to the facilitation of the
purchase of an entire interstate paint
business and its re-establishment and op-
eration in another State is not.

8. In addition to Robert Lawrence Co., su-
pra, see In re Kinosita & Co., 287 F.2d
951 (C.A.2d Cir. 1961). With respect
to claims other than fraud in the induce-
ment, the court has followed a similar
process of analysis. See, e. g., Metro
Industrial Painting Corp. v. Terminal
Constr. Co., 287 F.2d 382 (C.A.2d Cir.
1961) (dispute over performance); El
Hoss Engineer. & Transport Co. v. Amer-
ican Ind. Oil Co., 289 F.2d 346 (C.A.2d
Cir. 1961) (where, however, the court
found an intent not to submit the issue
in question to arbitration).

9. The Court of Appeals has been careful
to honor evidence that the parties intend-
ed to withhold such issues from the arbi-
trators and to reserve them for judicial
resolution. See El Hoss Engineer. &
Transport Co. v. American Ind. Oil Co.,
supra. We note that categories of con-
tracts otherwise within the Arbitration
Act but in which one of the parties
characteristically has little bargaining
power are expressly excluded from the
reach of the Act. See § 1.

10. These cases and others are discussed
in a recent Note, Commercial Arbitra-
tion in Federal Courts, 20 Vand.L.Rev. 607,
622-625 (1967).
[3] With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in “commerce,” we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that “the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.” 11 Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which

goes to the “making” of the agreement to arbitrate—the federal court may proceed to adjudicate it. 12 But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally. Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court. We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

[4–6] There remains the question whether such a rule is constitutionally permissible. The point is made that, whatever the nature of the contract involved here, this case is in federal court solely by reason of diversity of citizenship, and that since the decision in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts are bound in diversity cases to follow state rules of decision in matters which are “substantive” rather than “procedural,”

or where the matter is “outcome determinative.” Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. See Bernhardt v. Polygraphic Co., supra, 350 U.S. at 202, and concurring opinion, at 208, 76 S.Ct. at 275 and at 279. Rather, the question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration stat-

---

11. Section 4 reads in part: “The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * * If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.”

12. This position is consistent both with the decision in Moseley v. Electronic & Missile Facilities, 374 U.S. 167, 171, 172, 83 S.Ct. 1815, 1817, 1818, 10 L.Ed.2d 818 (1963), and with the statutory scheme. As the “saving clause” in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the “saving clause.”

[7, 8]

406

In the present case no claim has been advanced by Prima Paint that F & C fraudulently induced it to enter into the agreement to arbitrate "[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof." This contractual language is easily broad enough to encompass Prima Paint's claim that both execution and acceleration of the consulting agreement itself were procured by fraud. Indeed, no claim is made that Prima Paint ever intended that "legal" issues relating to the contract be excluded from arbitration, or that it was not entirely free so to contract. Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power. The question which Prima Paint requested the District Court to adjudicate preliminarily to allowing arbitration to proceed is one not intended by Congress to delay the granting of a § 3 stay. Accordingly, the decision below dismissing Prima Paint's appeal is affirmed.

Affirmed.

Mr. Justice HARLAN:

In joining the Court's opinion I desire to note that I would also affirm the judgment below on the basis of Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (C.A.2d Cir. 1959), cert. granted, 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 612.

13. It is true that the Arbitration Act was passed 13 years before this Court's decision in Erie R. Co. v. Tompkins, supra, brought to an end the regime of Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865 (1842), and that at the time of enactment Congress had reason to believe that it still had power to create federal rules to govern questions of "general law" arising in simple diversity cases—at least, absent any state statute to the contrary. If Congress relied at all on this "oft-challenged" power, see Erie R. Co., 304 U.S., at 68, 58 S.Ct., at 818, it was only supplementary to the admiralty and commerce powers, which formed the principal bases of the legislation. Indeed, Congressman Graham, the bill's sponsor in the House, told his colleagues that it "only affects contracts relating to interstate subjects and contracts in admiralty." 65 Cong. Rec. 1921 (1924). The Senate Report on this legislation similarly indicated that the bill "[relates] to maritime transactions and to contracts in interstate and foreign commerce." S.Rep.No.536, 68th Cong., 1st Sess., 3 (1924).

Non-congressional sponsors of the legislation agreed. As Mr. Charles L. Bernheimer, chairman of the Arbitration Committee of the New York Chamber of Commerce, told the Senate subcommittee, the proposed legislation "follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce." Hearing on S. 4213 and S. 4214, before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923). In the joint House and Senate hearings, Mr. Bernheimer answered "Yes; entirely," to the statement of the chairman, Senator Sterling, that "What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce." Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 7 (1924). Mr. Julius Henry Cohen, draftsman for the American Bar Association of the proposed bill, said the sponsor's goals were: "[F]irst * * * to get a State statute, and then to get a Federal law to cover interstate and foreign commerce and admiralty, and, third, to get a treaty with Foreign countries." Joint Hearings, supra, at 16 (emphasis added). See also Joint Hearings, supra, at 27–28 (statement of Mr. Alexander Rose). Mr. Cohen did submit a brief to the Subcommittee urging a jurisdictional base broader than the commerce and admiralty powers, Joint Hearings, supra, at 37–38, but there is no indication in the statute or in the legislative history that this invitation to go beyond those powers was accepted, and his own testimony took a much narrower tack.
The agreement involved here is a consulting agreement in which Flood & Conklin agreed to perform certain services for and not to compete with Prima Paint. The agreement contained an arbitration clause providing that "[a]ny controversy or claim arising out of or relating to this Agreement * * * shall be settled by arbitration in the City of New York." F & C, contending that Prima had failed to make a payment under the contract, sent Prima a "Notice of Intention to Arbitrate" pursuant to the New York Arbitration Act.\textsuperscript{1} Invoking diversity jurisdiction, Prima brought this action in federal district court to rescind the entire consulting agreement on the ground of fraud. The fraud allegedly consisted of F & C's misrepresentation at the time the contract was made, that it was solvent and able to perform the agreement, while in fact it was completely insolvent. Prima alleged that it would not have made any contract at all with F & C but for this misrepresentation. Prima simply contended that there was never a meeting of minds between the parties. F & C moved to stay Prima's lawsuit for rescission pending arbitration of the fraud issue raised by Prima. The lower courts, relying on the

\textsuperscript{1} N.Y. Civ. Prac. § 7503 (1963) provides that once a party is served with a notice of intention to arbitrate, "unless the party served applies to stay the arbitration * * *"
ported by the language or history of the
Arbitration Act. First, the Court holds
that because the consulting agreement
was intended to supplement a separate
contract for the interstate transfer of
assets, it is itself a "contract evidencing
a transaction involving commerce," the
language used by Congress to describe
contracts the Act was designed to cover.
But in light of the legislative history
which indicates that the Act was to
have a limited application to contracts
between merchants for the interstate
shipment of goods, and in light of the
express failure of Congress to use lan-
guage

making the Act applicable to all
contracts which "affect commerce," the
statutory language Congress normally
uses when it wishes to exercise its full
powers over commerce, I am not at all
certain that the Act was intended to
apply to this consulting agreement. Sec-
2. The principal support for the Act came
from trade associations dealing in gro-
cerries and other perishables and from
commercial and mercantile groups in the
major trading centers. 50 A.B.A. Rep.
337 (1925). Practically all who testified
in support of the bill before the Senate
subcommittee in 1923 explained that the
bill was designed to cover contracts be-
tween people in different States who
produced, shipped, bought, or sold com-
ommodities. Hearing on S. 4213 and S.
4214 before the Subcommittee of the Sen-
ate Committee on the Judiciary, 67th
Cong., 4th Sess., 3, 7, 9, 10 (1923). The
same views were expressed in the 1924
hearings. When Senator Sterling sug-
gested, "What you have in mind is that
this proposed legislation relates to con-
tracts arising in interstate commerce,"
Mr. Bernheimer, a chief exponent of the
bill, replied: "Yes; entirely. The farmer
who will sell his carload of potatoes, from
Wyoming, to a dealer in the State of New
Jersey, for instance." Joint Hearings on
S. 1005 and H.R. 646 before the Sub-
committees of the Committees on the Ju-
diciary, 68th Cong., 1st Sess., 7. See
also id., at 27.

3. In some Acts Congress uses broad lan-
guage and defines commerce to include
even that which "affects" commerce. Federal
Employment Liability Act, 36 Stat.
65, § 1, as amended, 45 U.S.C. § 51; Na-
tional Labor Relations Act, 49 Stat. 450,

§ 2, as amended, 29 U.S.C. § 132(7). In
other instances Congress has chosen more
restrictive language. Fair Labor Stan-
dards Act of 1938, 52 Stat. 1062, § 6, as
amended, 29 U.S.C. § 206. Prior to this
case, this Court has always made careful
inquiry to assure itself that it is apply-
ing a statute with the coverage that
Congress intended, so that the meaning
in that statute of "commerce" will be
neither expanded nor contracted. The
Arbitration Act is an example of care-
fully limited language. It covers only
those contracts "involving commerce," and
nowhere is there a suggestion that it
is meant to extend to contracts "affect-
ing commerce." The Act not only uses
narrow language, but also is completely
without any declaration of some national
interest to be served or some nationwide
comprehensive scheme of regulation to
be created; and this absence suggests that
Congress did not intend to exert its full
power over commerce.

4. Although F & C requested arbitration
pursuant to New York law, n. 1, supra,
it is not entirely clear that New York
law would apply in absence of the fed-
eral Act. And, as the Court points out,
it is not entirely clear whether New York
courts would consider Prima's promise
to arbitrate inseparable from the rest of
the contract. But, since Robert A. Law-
rence held and the lower courts here as-
sumed that application of New York law

1809

PRIMA PAINT CORP. v. FLOOD & CONKLIN MFG. CO.

Cite as 87 S.Ct. 1801 (1967)

388 U.S. 411

87 S.Ct.—114
Court necessarily holds that federal law determines whether certain allegations put the making of the arbitration agreement in issue. And the Court approves the Second Circuit’s fashioning of a federal separability rule which overrides state law to the contrary. The Court thus holds that the Arbitration Act, designed to provide merely a procedural remedy which would not interfere with state substantive law, authorizes federal courts to fashion a federal rule to make arbitration clauses “separable” and valid. And the Court approves a rule which is not only contrary to state law, but contrary to the intention of the parties and to accepted principles of contract law—a rule which indeed elevates arbitration provisions above all other contractual provisions. As the Court recognizes, that result was clearly not intended by Congress. Finally, the Court summarily disposes of the problem raised by Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, recognized as a serious constitutional problem in Bernhardt v. Polygraphic Co., 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199, by insufficiently supported assertions that it is “clear beyond dispute” that Congress based the Arbitration Act on its power to regulate commerce and that “[i]f Congress relied at all on” its power to create federal law for diversity cases, such reliance “was only supplementary.”

412

II.

Let us look briefly at the language of the Arbitration Act itself as Congress passed it. Section 2, the key provision of the Act, provides that “[a] written provision in * * * a contract * * * involving commerce to settle by arbitra-

tion 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 con-
tact.” (Emphasis added.) Section 3 provides that “[i]f any suit * * * be brought * * * upon any issue re-
ferable to arbitration under an agreement in writing for such arbitration, the court * * * upon being satisfied that the issue involved in such suit * * * is referable to arbitration under such an agreement, shall * * * stay the trial of the action until such arbitration has been had * * *.” (Emphasis added.) The language of these sections could not, I think, raise doubts about their meaning except to someone anxious to find doubts. They simply mean this: an arbitration agreement is to be enforced by a federal court unless the court, not the arbitrator, finds grounds “at law or in equity for the revocation of any con-
tact.” Fraud, of course, is one of the most common grounds for revoking a contract. If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolu-
tely no contract, nothing to be arbi-
trated. Sections 2 and 3 of the Act as-
sume the existence of a valid contract. They merely provide for enforcement where such a valid contract

413

exists.

These provisions were plainly designed to protect a person against whom arbi-
tration is sought to be enforced from having to submit his legal issues as to validity of the contract to the arbitrator. The legislative history of the Act makes this clear. Senator Walsh of Montana, in hearings on the bill in 1923, observed, “The court has got to hear and deter-

where a defendant in a case already pend-
ing in federal court moves for a stay of the lawsuit. In finding an “explicit an-
swer” in a provision “not expressly” ap-
plicable, the Court almost completely ig-
nores the language of § 3 and the proviso to § 2, a section which Bernhardt held to “define the field in which Congress was legislatign.” 350 U.S., at 201, 76 S.Ct. at 275.
mine whether there is an agreement of arbitration, undoubtedly, and it is open
to all defenses, equitable and legal, that
would have existed at law.* * * *" 6

Mr. Platt, who represented the American
Bar Association which drafted and sup-
ported the Act, was even more explicit:
"I think this will operate something like
an injunction process, except where he
would attack it on the ground of fraud." 7

And then Senator Walsh replied: "If
he should attack it on the ground of
fraud, to rescind the whole thing.
* * * I presume that it merely [is]
a question of whether he did make the
arbitration agreement or not, * * * and
then he would possibly set up that he
was misled about the contract and en-
tered into it by mistake * * *." 8 It
is evident that Senator Walsh was refer-
ing to situations in which the validity of
the entire contract is called into ques-
tion. And Mr. Bernheimer, who repre-
sented one of the chambers of commerce
in favor of the bill, assured the Senate
subcommittee that "[t]he constitutional
right to jury trial is adequately safegu-
ded" by the Act. 9 Mr. Cohen, the
American Bar Association's draftsman of
the bill, assured the members of Congress
that the Act would not impair the right to
a jury trial, because it deprives a person
of that right only when he has voluntar-
ily and validly waived it by agreeing
to submit certain

* * * disputes to arbitration. 10 The court and a jury are to
determine both the legal existence and
scope of such an agreement. The mem-
bers of Congress revealed an acute

6. Senate Hearing, supra, at 5.
7. Ibid.
8. Ibid.
10. "The one constitutional provision we
have got is that you have a right of trial
by jury. But you can waive that. And
you can do that in advance. Ah, but the
question whether you waive it or not de-
pends on whether that is your signature
to the paper, or whether you authorized

awareness of this problem. On several
occasions they expressed opposition to a
law which would enforce even a valid
arbitration provision contained in a con-
tract between parties of unequal bargain-
ing power. Senator Walsh cited insur-
ance, employment, construction, and ship-
ning contracts as routinely containing
arbitration clauses and being offered on
a take-it-or-leave-it basis to captive cus-
tomers or employees. 11 He noted that
such contracts "are really not voluntarily
[sic] things at all" because "there is
nothing for the man to do except to sign
it; and then he surrenders his right to
have his case tried by the court
* * * *." 12 He was emphatically as-
sumed by the supporters of the bill that
it was not their intention to cover such
cases. The significant thing is that Sen-
ator Walsh was not thinking in terms of
the arbitration provisions being "separ-
able" parts of such contracts, parts
which should be enforced without regard
to why the entire contracts in which
they were contained were agreed to. The
issue for him was not whether an arbit-
ration provision in a contract was made,
but why, in the context of the entire con-
tract and the circumstances

415 of the par-
ties, the entire contract was made. That
is precisely the issue that a general alle-
gation of fraud in the inducement
raises: Prima contended that it would
not have executed any contract, includ-
ing the arbitration clause, if it were not
for the fraudulent representations of
F & C. Prima's agreement to an arbitra-
tion clause in a contract obtained by
fraud was no more "voluntary" than an

11. Senate Hearing, supra, at 9–11. See
also Joint Hearings, supra, at 15.
insured’s or employee’s agreement to an arbitration clause in a contract obtained by superior bargaining power.

Finally, it is clear to me from the bill’s sponsors’ understanding of the function of arbitration that they never intended that the issue of fraud in the inducement be resolved by arbitration. They recognized two special values of arbitration: (1) the expertise of an arbitrator to decide factual questions in regard to the day-to-day performance of contractual obligations, and (2) the speed with which arbitration, as contrasted to litigation, could resolve disputes over performance of contracts and thus mitigate the damages and allow the parties to continue performance under the contracts. Arbitration serves neither of these functions where a contract is sought to be rescinded on the ground of fraud. On the one hand, courts have far more expertise in resolving legal issues which go to the validity of a contract than do arbitrators. On the other hand, where a party seeks to rescind a contract and his allegation of fraud in the inducement is true, an arbitrator’s speedy remedy of this wrong should never result in resumption of performance under the contract. And if the contract were not procured by fraud, the court, under the summary trial procedures provided by the Act, may determine with little delay that arbitration must proceed. The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation. Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.

III.

With such statutory language and legislative history, one can well wonder what is the basis for the Court’s surprising departure from the Act’s clear statement which expressly excepts from arbitration “such grounds as exist at law or in equity for the revocation of any contract.” Credit for the creation of a rationalization to justify this statutory mutilation apparently must go to the Second Circuit’s opinion in Robert Lawrence Co. v. Devonshire Fabrics, Inc., supra. In that decision Judge Medina undertook to resolve the serious constitutional problem which this Court had avoided in Bernhardt by holding the Act inapplicable to a diversity case involving an intrastate contract. That problem was whether the Arbitration Act, passed 13 years prior to Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, could be constitutionally applied in a diversity case even though its application would require the federal court to enforce an agreement to arbitrate which the state court across the street would not enforce. Bernhardt’s holding that arbitration is “outcome determinative,” 350

13. “Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complement-

14. See, e.g., Senate Hearing, supra, at 3.

15. “It [arbitration] is not a proper remedy for * * * questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law.” Cohen & Dayton, supra at 281.
U.S., at 203, 76 S.Ct., at 276, and its recognition that there would be unconstitutional discrimination if an arbitration agreement were enforceable in federal court but not in the state court, id., at 204, 76 S.Ct., at 276, posed a choice of two alternatives for Judge Medina. If he held that the Arbitration Act rested solely on Congress' power, widely recognized in 1925 but negated in Erie, to prescribe general federal law applicable in diversity cases, he would be compelled to hold the Act unconstitutional as applied to diversity cases under Erie and Bernhardt. 16 If he held that the Act rested on Congress' power to enact substantive law governing interstate commerce, then the Erie-Bernhardt problem would be avoided and the application of the Act to diversity cases involving commerce could be saved.

The difficulty in choosing between these two alternatives was that neither, quite contrary to the Court's position, was "clear beyond dispute" upon reference to the Act's legislative history. 17 As to the first, it is clear that Congress intended the Act to be applicable in diversity cases involving interstate commerce and maritime contracts, 18 and to hold the Act inapplicable in diversity cases would be severely to limit its impact. As to the second alternative, it is clear that Congress in passing the Act relied primarily on its power to create general federal rules to govern federal courts. Over and over again the drafters of the Act assured Congress: "The statute establishes a procedure in the Federal courts * * *.

force such agreements whenever under the Judicial Code they would have had jurisdiction * * *.

Where the basis of jurisdiction is diversity of citizenship, the dispute must involve $5000 as in suits at law." Cohen & Dayton, supra, at 207. See, e.g., Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A.B.A.J. 153, 156; Note, 29 Ill. L.Rev. 111 (1925). The bill, as originally drafted by the American Bar Association, 49 A.B.A.Rep. 51-52 (1924), and introduced in the House, H.R. No. 646, 68th Cong., 1st Sess. (1924), 65 Cong. Rec. 11051-11082 (1924), expressly provided in § 8 "[t]hat if the basis of jurisdiction be diversity of citizenship * * * the district court * * * shall have jurisdiction * * * hereunder notwithstanding the amount in controversy is unascertained * * *." Though that provision was deleted by the Senate, the omission was not intended substantially to alter the law. 66 Cong.Rec. 3004 (1924).

16. Mr. Justice Frankfurter chose this alternative in his concurring opinion in Bernhardt, 350 U.S., at 208, 76 S.Ct., at 279, and even the Court there suggested that its pre-Erie decision in Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp., 295 U.S. 449, 55 S. Ct. 313, 79 L.Ed. 583, which applied the Act to an interstate contract in a diversity case, might be decided differently under the Bernhardt holding that arbitration is outcome-determinative, 350 U.S., at 202, 76 S.Ct., at 275.

17. For an analysis of these alternatives, see generally, Symposium, Arbitration and the Courts, 58 Nw.U.L.Rev. 409 (1963); Note, 69 Yale L.J. 847 (1960).

18. The House Report accompanying the Act expressly stated: "The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce * * * or which may be the subject of litigation in the Federal courts." H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasis added). Mr. Cohen, and a colleague, commenting on the Act after its passage, explained: "The Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would have had jurisdiction * * *.

duties of the Federal courts.” 20 One cannot read the legislative history without concluding that this power, and not Congress’ power to legislate in the area of commerce, was the “principal basis” of the Act. 21 Also opposed to the view that Congress intended to create substantive law to govern commerce and maritime transactions are the frequent statements in the legislative history that the Act was not intended to be “the source of * * * substantive law.” 22 As Congressman Graham explained the Act to the House:

“It does not involve any new principle of law except to provide a simple method * * * in order to give enforcement * * * It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.” 65 Cong.Rec. 1931 (1924). (Emphasis added.)

Finally, there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts 23 or to provide an independent federal-question basis for jurisdiction in federal courts apart from diversity jurisdiction. 24 The absence of both of these effects—which normally follow from legislation of federal substantive law—seems to militate against the view that Congress was creating a body of federal substantive law.

Suffice it to say that Judge Medina chose the alternative of construing the Act to create federal substantive law in order to avoid its emasculation under Erie and Bernhardt. But Judge Medina was not content to stop there with a


21. Although Mr. Cohen, in a brief filed with Congress, suggested that Congress might rely on its power over commerce, he added that there were “questions which apparently can be raised in this connection,” id., at 38, and expressly denied that “the proposed law depends for its validity upon the exercise of the interstate-commerce and admiralty powers of Congress,” id., at 37. And when he testified, he made the point clearer:

“So what we have done * * * [in New York] is that we have * * * made it a part of our judicial machinery. That is what we have done. But it can not be done under our constitutional form of government and cover the great fields of commerce until you gentlemen do it, in the exercise of your power to confer jurisdiction on the Federal courts. The theory on which you do this is that you have the right to tell the Federal courts how to proceed.” Id., at 17.

The legislative history which the Court recites to support its assertion that Congress relied principally on its power over commerce consists mainly of statements that the Act was designed to cover only contracts in commerce, and that is certainly true. But merely because the Act was designed to enforce arbitration agreements only in contracts in commerce, does not mean that Congress was primarily relying on its power over commerce in supplying that remedy of enforceability.


23. See, e.g., Cohen & Dayton, supra, at 277; Committee on Commerce, Trade & Commercial Law, supra, at 155, 156. Mr. Rose, representing the Arbitration Society of America, suggested that the Act might have the beneficial effect of encouraging States to enact similar laws. Joint Hearings, supra, at 28, but Mr. Cohen assured Congress:

“Nor can it be said that the Congress of the United States, directing its own courts * * *, would infringe upon the provinces or prerogatives of the States. * * [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced * * *. There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.” Id., at 39–40.

24. This seems implicit in § 3’s provision for a stay by a “court in which such suit is pending” and § 4’s provision that enforcement may be ordered by “any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties.”
holding that the Act makes arbitration agreements in a contract involving commerce enforceable in federal court even though the basis of jurisdiction is diversity and state law does not enforce such agreements. The problem in Robert Lawrence, as here, was not whether an arbitration agreement is enforceable, for the New York Arbitration Act, upon which the federal Act was based, enforces an arbitration clause in the same terms as the federal Act. The problem in Robert Lawrence, and here, was rather whether the arbitration clause in a contract induced by fraud is "separable." Under New York law, it was not: general allegations of fraud in the inducement would, as a matter of state law, put in issue the making of the arbitration clause. So to avoid this application of state law, Judge Medina went further than holding that the federal Act makes agreements to arbitrate enforceable: he held that the Act creates a "body of law" that "encompasses questions of interpretation and construction as well as questions of validity, revocability and enforceability of arbitration agreements affecting interstate commerce or maritime affairs." 271 F.2d at 409.

Thus, 35 years after the passage of the Arbitration Act, the Second Circuit completely rewrote it. Under its new formulation, § 2 now makes arbitration agreements enforceable "save upon such grounds as exist at federal law for the revocation of any contract." And under § 4, before enforcing an arbitration agreement, the district court must be satisfied that "the making of the agreement for arbitration, as a matter of federal law, is not in issue." And then when Judge Medina turned to the task of "the formulation of the principles of federal substan-

tive law necessary for this purpose," 271 F.2d, at 409, he formulated the separability rule which the Court today adopts— not because § 4 provided this rule as an "explicit answer," not because he looked to the intention of the parties, but because of his notion that the separability rule would further a "liberal policy of promoting arbitration." 271 F.2d, at 410. 25

25. It should be noted that the New York courts apparently do not find any inconsistency between application of a non-separability rule and that State's policy of enforcing arbitration agreements, a policy embodied in a statute from which the federal Act was copied.

Today, without expressly saying so, the Court does precisely what Judge Medina did in Robert Lawrence. It is not content to hold that the Act does all it was intended to do: make arbitration agreements enforceable in federal courts if they are valid and legally existent under state law. The Court holds that the Act gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means. Even if Congress intended to create substantive rights by passage of the Act, I am wholly convinced that it did not intend to create such a sweeping body of federal substantive law completely to take away from the States their power to interpret contracts made by their own citizens in their own territory.

First. The legislative history is clear that Congress intended no such thing. Congress assumed that arbitration agreements were recognized as valid by state and federal law. 26 Courts would give damages for their breach, but would simply refuse to specifically enforce them. Congress thus had one limited purpose in mind: to provide a party to such an agreement "a remedy formerly denied him." 27 "Arbitration under the Federal * * * [statute] is simply a new procedural remedy." 28 The Act "creates no new legislation, grants no new rights, except a remedy to enforce * * *." 29

28. Id., at 279.
29. 65 Cong.Rec. 1931 (1924).
The drafters of the Act were very explicit:

“A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made.” Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A.B.A.J. 153, 154. (Emphasis added.)

“Neither is it true that such a statute, declaring arbitration agreements to be valid, is the source of their existence as a matter of substantive law. * * *

“So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual States.” Cohen & Dayton, The New Federal Arbitration Law, 12 Va.L. Rev. 265, 276–277.

All this indicates that the § 4 inquiry of whether the making of the arbitration agreement is in issue is to be determined by reference to state law, not federal law formulated by judges for the purpose of promoting arbitration.

Second. The avowed purpose of the Act was to place arbitration agreements “upon the same footing as other contracts.” 30 The separability rule which the Court applies to an arbitration clause does not result in equality between it and other clauses in the contract. I had always thought that a person who attacks a contract on the ground of fraud and seeks to rescind it has to seek rescission of the whole, not tidbits, and is not given the option of denying the existence of some clauses and affirming the existence of others. Here F & C agreed both to perform consulting services for Prima and not to compete with Prima. Would any court hold that those two agreements were separable, even though Prima in agreeing to pay F & C not to compete did not directly rely on F & C’s representations of being solvent? The simple fact is that Prima would not have agreed to the covenant not to compete or to the arbitration clause but for F & C’s fraudulent promise that it would be financially able to perform consulting services. As this Court held in United States v. Bethlehem Steel Corp., 315 U.S. 289, 298, 62 S.Ct. 581, 587, 86 L.Ed. 855:

“Whether a number of promises constitute one contract [and are non-separable] or more than one is to be determined by inquiring whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.”

Under this test, all of Prima’s promises were part of one, inseparable contract.

Third. It is clear that had this identical contract dispute been litigated in New York courts under its arbitration act, Prima would not be required to present its claims of fraud to the arbitrator if the state rule of nonseparability applies. The Court does not hold today, as did Judge Medina, 31 that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect—which the Court seems to leave up in the air—would flout the intention of the framers of the Act. 32 Yet under this Court’s opinion today—that the Act supplies not only the remedy of enforcement but a body of federal doctrines to determine the valid-

31. “This is a declaration of national law equally applicable in state or federal courts.” 271 F.2d, at 407.
ity of an arbitration agreement—failure to make the Act

applicable in state courts would give rise to “forum shopping” and an unconstitutional discrimination that both Erie and Bernhardt were designed to eliminate. These problems are greatly reduced if the Act is limited, as it should be, to its proper scope: the mere enforcement in federal courts of valid arbitration agreements.

IV.

The Court’s summary treatment of these issues has made it necessary for me to express my views at length. The plain purpose of the Act as written by Congress was this and no more: Congress wanted federal courts to enforce contracts to arbitrate and plainly said so in the Act. But Congress also plainly said that whether a contract containing an arbitration clause can be rescinded on the ground of fraud is to be decided by the courts and not by the arbitrators. Prima here challenged in the courts the validity of its alleged contract with F & C as a whole, not in fragments. If there has never been any valid contract, then there is not now and never has been anything to arbitrate. If Prima’s allegations are true, the sum total of what the Court does here is to force Prima to arbitrate a contract which is void and unenforceable before arbitrators who are given the power to make final legal determinations of their own jurisdiction, not even subject to effective review by the highest court in the land. That is not what Congress said Prima must do. It seems to be what the Court thinks would promote the policy of arbitration. I am completely unable to agree to this new version of the Arbitration Act, a version which its own creator in Robert Lawrence practically admitted was judicial legislation. Congress might possibly have enacted such a version into law had it been able to foresee subsequent legal events, but I do not think this Court should do so.

I would reverse this case.

1. Marriage ⇔ 2

Marriage is social relation subject to state’s police power.

2. Marriage ⇔ 2


3. Constitutional Law ⇔ 215

Mere equal application of statute containing racial classifications is not sufficient to remove classifications from Fourteenth Amendment’s proscription of all invidious racial discriminations. U.S. C.A.Const. Amend. 14.

4. Constitutional Law ⇔ 215

Fact of equal application of statutes containing racial classifications does not immunize statutes from heavy burden of
however, did not reach the point of exercising discretion because it never was notified about the results of the informal examination of juror Payton. Accordingly, the case should be remanded to the District Court for a hearing and decision consistent with the principles outlined above.

465 U.S. 1, 79 L.Ed.2d 1

SOUTHLAND CORPORATION, et al., Appellants
v.
Richard D. KEATING et al.

No. 82-500.


Individual actions and class action by convenience store franchisees were brought against franchisor alleging, among other things, fraud, breach of contract and violation of disclosure requirements of the California Franchise Investment Law. The Superior Court, Alameda County, Robert H. Kroninger, J., ordered arbitration of all claims except those based on the statute. The California Court of Appeal, 109 Cal. App.3d 784, 167 Cal.Rptr. 481, reversed as regards the statutory claim. The California Supreme Court, 31 Cal.3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192, held that statutory claims were not arbitrable, and appeal was taken. The Supreme Court, Chief Justice Burger, held that: (1) the court had jurisdiction to decide whether federal arbitration act preempted state law voiding arbitration clause; (2) since it did not affirmatively appear that request for class certification was drawn in question on federal grounds the court lacked appellate jurisdiction to resolve that question as a matter of federal law; and (3) provision of state law requiring judicial consideration of claims brought under that law directly conflicts with the Federal Arbitration Act and violates the supremacy clause.

Appeal dismissed in part and judgment reversed in part.

Justice Stevens, filed an opinion concurring in part and dissenting in part.

Justice O'Connor filed a dissenting opinion, in which Justice Rehnquist joined.

1. Federal Courts ？=451

Judgment of California Supreme Court that claims asserted under state Franchise Investment Law were not arbitrable and that the state law did not contravene Federal Arbitration Act was immediately appealable and the court would determine whether the federal act preempted the state law. 9 U.S.C.A. §§ 1 et seq., 2; U.S. C.A. Const. Art. 6, cl. 2; West's Ann.Cal. Corp.Code §§ 31000 et seq., 31512; 28 U.S.C.A. § 1257(2).

2. Arbitration ？=7.9

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. 9 U.S.C.A. § 2.

3. Federal Courts ？=451

Where it was not contended in California courts and those courts did not decide whether state law imposition of class actions procedures for arbitration under franchise agreement was preempted by Federal Arbitration Act, the class action arbitration issue was not directly appealable to the United States Supreme Court under statute providing for appeal from state court when validity of challenged state statute is sustained as not in conflict with federal law, notwithstanding appealability of ruling that provision of state franchise act precluding arbitration did not violate the federal act. West's Ann.Cal.Corp.Code §§ 31000 et seq., 31512; 9 U.S.C.A. § 2; 28 U.S.C.A. § 1257(2).

4. Commerce ？=80.5

Provision of California Franchise Investment Law requiring judicial consideration of claims brought under the statute

5. Arbitration ⇐ 1
   Commerce ⇐ 80.5

   In enacting provision of federal arbitration act that an arbitration provision is valid and irrevocable the Congress declared a national policy favoring arbitration and withdrew power of the states to require a judicial forum for resolution of claims which the contracting parties agreed to resolve by arbitration. 9 U.S.C.A. § 2.

6. Commerce ⇐ 80.5


7. Commerce ⇐ 80.5

   The "involving commerce" requirement of Federal Arbitration Act is not an inexplicable limitation on the power of federal courts but is a necessary qualification on a statute intended to apply in state and federal courts. 9 U.S.C.A. § 2.

   See publication Words and Phrases for other judicial constructions and definitions.

8. Arbitration ⇐ 31

   Although Federal Arbitration Act preempts state law that withdraws power to enforce arbitration agreements that are enforceable under the Federal Act, provision of Federal Act that the federal rules apply in proceedings to arbitration is not applicable in state court proceedings. 9 U.S.C.A. §§ 2, 4.

9. Arbitration ⇐ 23

   A party may assert general contract defenses such as fraud to avoid enforce-

*Syllabus*

Appellant Southland Corp. (hereafter appellant) is the owner and franchisor of 7-Eleven convenience stores. Appellees are 7-Eleven franchisees. Each franchise agreement between appellant and appellees contains a clause requiring arbitration of any controversy or claim arising out of or relating to the agreement or breach thereof. Several of the appellees filed individual actions against appellant in California Superior Court, alleging fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law. These actions were consolidated with a subsequent class action filed by another appellee making substantially the same claims. Appellant moved to compel arbitration of the claims pursuant to the contract. The Superior Court granted the motion as to all claims except those based on the Franchise Investment Law, and did not pass on appellees' request for class certification. The California Court of Appeal reversed the trial court's refusal to compel arbitration of the claims under the Franchise Investment Law, construing the arbitration clause to require arbitration of such claims and holding that the Franchise Investment Law did not invalidate arbitration agreements and that if it rendered such agreements involving commerce unenforceable, it would conflict with § 2 of the United States Arbitration Act, which provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy ... arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The court also directed the trial court to conduct class-certification proceedings. The California Supreme Court reversed the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
ruling that claims asserted under the Franchise Investment Law are arbitrable, interpreting § 31512 of that Law—which renders void any provision purporting to bind a franchisee to waive compliance with any provision of that Law—to require judicial consideration of claims brought under that statute and holding that the statute did not contravene the federal Act. The court remanded the case to the trial court for consideration of appellees' request for class certification.  

Held:  

1. This Court has jurisdiction under 28 U.S.C. § 1257(2) to decide whether the United States Arbitration Act pre-empts § 31512 of the California statute. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). To delay review of a state judicial decision denying enforcement of an arbitration contract until the state litigation has run its course would defeat the core purpose of the contract. On the other hand, since it does not affirmatively appear that the request for class certification was “drawn in question” on federal grounds, this Court is without jurisdiction to resolve this question as a matter of federal law under § 1257(2). Pp. 856–858.  


(a) In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration. That Act, resting on Congress' authority under the Commerce Clause, creates a body of federal substantive law that is applicable in both state and federal courts. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). To confine the Act's scope to arbitrations sought to be enforced in federal courts would frustrate what Congress intended to be a broad enactment. Pp. 858–860.  

(b) If Congress, in enacting the Arbitration Act, had intended to create a procedural rule applicable only in federal courts it would not have limited the Act to contracts “involving commerce.” Section 2’s “involving commerce” requirement is not to be viewed as an inexplicable limitation on the power of the federal courts but as a necessary qualification on a statute intended to apply in state as well as federal courts. P. 860.  

(c) The California Supreme Court’s interpretation of § 31512 would encourage and reward forum shopping. This Court will not attribute to Congress the intent to create a right to enforce an arbitration contract and yet make that right dependent on the particular forum in which it is asserted. Since the overwhelming proportion of civil litigation in this country is in the state courts, Congress could not have intended to limit the Arbitration Act to disputes subject only to federal-court jurisdiction. In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. Pp. 860–861.  

Appeal dismissed in part; 31 Cal.3d 584, 183 Cal.Rptr. 360, 645 P.2d 1192, reversed in part and remanded.  

Mark J. Spooner, Washington, D.C., for appellants.  
John F. Wells, Oakland, Cal., for appellees.  

Chief Justice BURGER delivered the opinion of the Court.  

This case presents the questions (a) whether the California Franchise Investment Law, which invalidates certain arbitration agreements covered by the Federal Arbitration Act, violates the Supremacy Clause and (b) whether arbitration under the federal Act is impaired when a class-ac-
tion structure is imposed on the process by the state courts.

I

Appellant Southland Corp. is the owner and franchisor of 7-Eleven convenience stores. Southland’s standard franchise agreement provides each franchisee with a license to use certain registered trademarks, a lease or sublease of a convenience store owned or leased by Southland, inventory financing, and assistance in advertising and merchandising. The franchisees operate the stores, supply bookkeeping data, and pay Southland a fixed percentage of gross profits. The franchise agreement also contains the following provision requiring arbitration:

“Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association ... and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction hereof.”

Appellees are 7-Eleven franchisees. Between September 1975 and January 1977, several appellees filed individual actions against Southland in California Superior Court alleging, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law, Cal.Corp. Code Ann. § 31000 et seq. (West 1977). Southland’s answer, in all but one of the individual actions, included the affirmative defense of failure to arbitrate.

In May 1977, appellee Keating filed a class action against Southland on behalf of a class that assertedly includes approximately 800 California franchisees. Keating’s principal claims were substantially the same as those asserted by the other franchisees. After the various actions were consolidated, Southland petitioned to compel arbitration of the claims in all cases, and appellees moved for class certification.

The Superior Court granted Southland’s motion to compel arbitration of all claims except those claims based on the Franchise Investment Law. The court did not pass on appellees’ request for class certification. Southland appealed from the order insofar as it excluded from arbitration the claims based on the California statute. Appellees filed a petition for a writ of mandamus or prohibition in the California Court of Appeal arguing that the arbitration should proceed as a class action.

The California Court of Appeal reversed the trial court’s refusal to compel arbitration of appellees’ claims under the Franchise Investment Law. Keating v. Superior Court, Alameda County, 109 Cal. App.3d 784, 167 Cal.Rptr. 481 (1980). That court interpreted the arbitration clause to require arbitration of all claims asserted under the Franchise Investment Law, and construed the Franchise Investment Law not to invalidate such agreements to arbitrate.1 Alternatively, the court concluded that if the Franchise Investment Law rendered arbitration agreements involving commerce unenforceable, it would conflict with § 2 of the Federal Arbitration Act, 9 U.S.C. § 2, and therefore be invalid under the Supremacy Clause. 167 Cal.Rptr., at 493–494. The Court of Appeal also determined that there was no “insurmountable obstacle” to conducting an arbitration on a classwide basis, and issued a writ of mandate directing the trial court to conduct class-certification proceedings. Id., at 492.

The California Supreme Court, by a vote of 4–2, reversed the ruling that claims asserted under the Franchise Investment Law are arbitrable. Keating v. Superior Court of Alameda County, 31 Cal.3d 584, 183 Cal.Rptr. 360, 645 P.2d 1192 (1982). The California Supreme Court interpreted the Franchise Investment Law to require judicial consideration of claims brought un-

1. California Corp.Code Ann. § 31512 (West 1977) provides: “Any condition, stipulation or provision purporting to bind any person ac-

quiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.”
der that statute and concluded that the California statute did not contravene the federal Act. *Id.*, at 604, 183 Cal.Rptr., at 371–372, 645 P.2d, at 1203–1204. The court also remanded the case to the trial court for consideration of appellees’ request for classwide arbitration.

We postponed consideration of the question of jurisdiction pending argument on the merits. 459 U.S. 1101, 102 S.Ct. 721, 74 L.Ed.2d 948 (1983). We reverse in part and dismiss in part.

II

A

Jurisdiction of this Court is asserted under 28 U.S.C. § 1257(2), which provides for an appeal from a final judgment of the highest court of a state when the validity of a challenged state statute is sustained as not in conflict with federal law. Here Southland challenged the California Franchise Investment Law as it was applied to invalidate a contract for arbitration made pursuant to the Federal Arbitration Act. Appellees argue that the action of the California Supreme Court with respect to this claim is not a “final judgment or decree” within the meaning of § 1257(2).

Under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482–483, 95 S.Ct. 1029, 1039–1040, 41 L.Ed.2d 328 (1975), judgments of state courts that finally decide a federal issue are immediately appealable when “the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . .” In these circumstances, we have resolved the federal issue “if a refusal immediately to review the state-court decision might seriously erode federal policy.” *Id.*, at 483, 95 S.Ct., at 1040.

[1,2] The judgment of the California Supreme Court with respect to this claim is reviewable under *Cox Broadcasting, su-
monetary terms, with the consequences of the forum clause figuring prominently in their calculations." Id., at 14, 92 S.Ct., at 1915 (footnote omitted).

For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate. We hold that the Court has jurisdiction to decide whether the Federal Arbitration Act pre-empts § 31512 of the California Franchise Investment Law.

B

3. That part of the appeal relating to the propriety of superimposing class-action procedures on a contract arbitration raises other questions. Southland did not contend in the California courts that, and the state courts did not decide whether, state law imposing of class-action procedures was preempted by federal law. When the California Court of Appeal directed Southland to address the question whether state or federal law controlled the class-action issue, Southland responded that state law did not permit arbitrations to proceed as class actions, that the Federal Rules of Civil Procedure were inapplicable, and that requiring arbitrations to proceed as class actions "could well violate the [federal] constitutional guaranty of procedural due process." 2 Southland did not claim in the Court of Appeal that if state law required class-action procedures, it would conflict with the federal Act and thus violate the Supremacy Clause.

In the California Supreme Court, Southland argued that California law applied but that neither the contract to arbitrate nor state law authorized class-action procedures to govern arbitrations. Southland also contended that the Federal Rules were inapplicable in state proceedings. Southland pointed out that although California law provided a basis for class-action procedures, the Judicial Council of California acknowledged "the incompatibility of class actions and arbitration." Petition for Hearing 23. It does not appear that Southland opposed class procedures on federal grounds in the California Supreme Court. 3 Nor does the record show that the California Supreme Court passed upon the question whether superimposing class-action procedures on a contract arbitration was contrary to the federal Act. 4


3. The question presented to the State Supreme Court was [whether a court may enter an order compelling a private commercial arbitration governed by the Federal Arbitration Act ... to proceed as a class action even though the terms of the parties' arbitration agreement do not provide for such a procedure." Petition for Hearing in Civ. No. 45162 (Cal.1980). Southland argued that (1) the decision of the Court of Appeal is in conflict with the decisions of other Courts of Appeal in this State," id., at 3; (2) class actions would delay and complicate arbitration, increase its cost, and require judicial supervision, "considerations [which] strongly militate against the creation of class action arbitration procedures," id., at 22; and (3) there was no basis in law for class actions. According to appellants, the Federal Rules of Civil Procedure did not apply in California courts. Id., at 23. Southland thus relied, not on federal law, but on California law in opposing class-action procedures.

4. The California Supreme Court cited [a]nalagous authority" supporting consolidation of arbitration proceedings by federal courts. 31 Cal.3d, at 611–612, 183 Cal.Rptr., at 376, 645 P.2d, at 1208. E.g., Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966, 975 (CA2 1975), cert. denied, 426 U.S. 935, 96 S.Ct. 2550, 49 L.Ed.2d 387 (1976); In re Czarnikow-Rianda Co., 512 F.Supp. 1308, 1309 (SDNY 1981). This, along with support by other state courts and the California Legislature for consolidation of arbitration proceedings, permitted the court to conclude that class-action proceedings were authorized: "It is unlikely that the state Legislature in adopting the amendment to the Arbitration Act authorizing consolidation of arbitration proceedings, intended to preclude a court from ordering classwide arbitration in an appropriate case. We conclude that a court is not without authority to do so." 31 Cal.3d, at 613, 183 Cal.Rptr., at 377, 645 P.2d, at 1209. The California Supreme Court thus ruled that imposing a class-action structure on the arbitration process was permissible as a matter of state law.
Since it does not affirmatively appear that the validity of the state statute was "drawn in question" on federal grounds by Southland, this Court is without jurisdiction to resolve this question as a matter of federal law under 28 U.S.C. § 1257(2). See Bailey v. Anderson, 328 U.S. 203, 207, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945).

As previously noted, the California Franchise Investment Law provides:

"Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." Cal.Corp.Code Ann. § 31512 (West 1977).

The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the state statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.

In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. The Federal Arbitration Act provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Congress has thus mandated the enforcement of arbitration agreements.

We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce" and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.

The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause. In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the Court examined the legislative history of the Act and concluded that the statute "is based upon ... the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" Id., at 405, 87 S.Ct., at 1806 (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The contract in Prima Paint, as here, contained an arbitration clause. One party in that case alleged that the other had committed fraud in the inducement of the contract, although not of the arbitration clause in particular, and sought to have the claim of fraud adjudicated in federal court. The Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract "is for the arbitrators and not for the courts," 388 U.S., at 400, 87 S.Ct., at 1804. The Court relied for this holding on Congress' broad power to fashion substantive rules under the Commerce Clause.

5. We note that in defining "commerce" Congress declared that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

6. The procedures to be used in an arbitration are not prescribed by the federal Act. We note, however, that Prima Paint, considered the question of what issues are for the courts and what issues are for the arbitrator.
At least since 1824 Congress’ authority under the Commerce Clause has been held plenary. *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1, 196, 6 L.Ed. 23 (1824). In the words of Chief Justice *Marshall*, the authority of Congress is “the power to regulate; that is, to prescribe the rule by which commerce is to be governed.” *Ibid.* The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. As Justice Black observed in his dissent, when Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts. *Prima Paint*, supra, 388 U.S., at 420, 87 S.Ct., at 1814.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S., at 1, 25, and n. 32, 103 S.Ct., at 942, and n. 32, we reaffirmed our view that the Arbitration Act “creates a body of federal substantive law” and expressly stated what was implicit in *Prima Paint*, i.e., the substantive law the Act created was applicable in state and federal courts. *Moses H. Cone* began with a petition for an order to compel arbitration. The District Court stayed the action pending resolution of a concurrent state-court suit. In holding that the District Court had abused its discretion, we found no showing of exceptional circumstances justifying the stay and recognized “the presence of federal-law issues” under the federal Act as “a major consideration weighing against surrender [of federal jurisdiction].” 460 U.S., at 76, 103 S.Ct., at 942. We thus read the underlying issue of arbitrability to be a question of substantive federal law: “Federal law in the terms of the Arbitration Act governs that issue in either state or federal court.” *Id.*, at 24, 103 S.Ct., at 941.

Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts. The House Report plainly suggests the more comprehensive objectives:

“The purpose of this bill is to make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or [sic] admiralty, or which may be the subject of litigation in the Federal courts.” H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasis added).

This broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce. The Arbitration Act sought to “overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement.” Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 6 (1923) (Senate Hearing) (remarks of Sen. Walsh). The House Report accompanying the bill stated:

“The need for the law arises from . . . the jealousy of the English courts for their own jurisdiction . . . . This jealousy survived for so long[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . . .” H.R. Rep. No. 96, supra, at 1–2.

Surely this makes clear that the House Report contemplated a broad reach of the Act, unencumbered by state-law constraints. As was stated in *Metropolitan Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382, 387 (CA2 1961) (Lumbard, C.J., concurring), “the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures.” Congress also showed its awareness of the widespread unwillingness of
state courts to enforce arbitration agreements, e.g., Senate Hearing, at 8, and that
such courts were bound by state laws inadequately providing for

"technical arbitration by which, if you agree to arbitrate under the method provided
by the statute, you have an arbitration by statute[,] but [the statutes] ha[d] nothing to do with validating the contract
The problems Congress faced were therefore twofold: the old common-law hostility
toward arbitration, and the failure of state arbitration statutes to mandate enforce-
ment of arbitration agreements. To con-
fine the scope of the Act to arbitrations
sought to be enforced in federal courts
would frustrate what we believe Congress intended to be a broad enactment appropri-
ate in scope to meet the large problems
Congress was addressing.

[7] Justice O'CONNOR argues that
Congress viewed the Arbitration Act "as a
procedural statute, applicable only in fed-
eral courts." *Post,* at 865. If it is correct
that Congress sought only to create a pro-
cedural remedy in the federal courts, there
can be no explanation for the express limi-
tation in the Arbitration Act to contracts
"involving commerce." 9 U.S.C. § 2. For
example, when Congress has authorized
this Court to prescribe the rules of pro-
dure in the federal courts of appeals, dis-
trict courts, and bankruptcy courts, it has
not limited the power of the Court to pre-
scribe rules applicable only to causes of
action involving commerce. See, e.g., 28
U.S.C. §§ 2072, 2075, 2076 (1976 ed. and
Supp. V). We would expect that if Con-
gress, in enacting the Arbitration Act, was
creating what it thought to be a procedural
rule applicable only in federal courts, it
would not so limit the Act to transactions
involving commerce. On the other hand,
Congress would need to call on the Com-
merce Clause if it intended the Act to apply
in state courts. Yet at the same time, its
reach would be limited to transactions in-
volving interstate commerce. We there-
fore view the "involving commerce" re-
quirement in § 2, not as an inexplicable
limitation on the power of the federal
courts, but as a necessary qualification
on a statute intended to apply in state and
federal courts.

Under the interpretation of the Arbitra-
tion Act urged by Justice O'CONNOR,
claims brought under the California Fran-
chise Investment Law are not arbitrable
when they are raised in state court. Yet it
is clear beyond question that if this suit
had been brought as a diversity action in a
federal district court, the arbitration clause
would have been enforceable. *Prima
Paint,* supra. The interpretation given to
the Arbitration Act by the California Su-
preme Court would therefore encourage
and reward forum shopping. We are un-
willing to attribute to Congress the intent,
in drawing on the comprehensive powers of
the Commerce Clause, to create a right to
enforce an arbitration contract and yet
make the right dependent for its enforce-
ment on the particular forum in which it is
asserted. And since the overwhelming pro-
portion of all civil litigation in this country
is in the state courts, we cannot believe
Congress intended to limit the Arbitration
Act to disputes subject only to federal-

---

7. Appellees contend that the arbitration clause, which provides for the arbitration of "any controversy or claim arising out of or relating to
this Agreement or the breach hereof," does not cover their claims under the California Franchise Investment Law. We find the language
quoted above broad enough to cover such
claims. Cf. *Prima Paint,* 388 U.S., at 403–404,
406, 87 S.Ct., at 1805–1806, 1807 (finding nearly
identical language to cover a claim that a con-
tract was induced by fraud).

8. It is estimated that 2% of all civil litigation in
this country is in the federal courts. Annual
Report of the Director of the Administrative
Office of the U.S. Courts 3 (1982) (206,000 fil-
ings in federal district courts in 12 months end-
ing June 30, 1982, excluding bankruptcy filings);
Flango & Elsner, Advance Report, The Latest
State Court Caseload Data, 7 State Court J., 18
(Winter 1983) (approximately 13,600,000 civil
filings during comparable period, excluding
traffic filings).
court jurisdiction. Such an interpretation would frustrate congressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs." H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

[8,9] In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.11 We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.

IV

The judgment of the California Supreme Court denying enforcement of the arbitration agreement is reversed; as to the ques-

9. While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise. Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1, 25, n. 32, 103 S.Ct. 927, 942, n. 32, 74 L.Ed.2d 765 (1983). This seems implicit in the provisions in § 3 for a stay by a "court in which such suit is pending" and in § 4 that enforcement may be ordered by "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Ibid.; Prima Pianti, supra, 388 U.S., at 420, and n. 24, 87 S.Ct., at 1814, and n. 24 (Black, J., dissenting); Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc., 62 F.2d 1004, 1006 (CA2 1933) (L. Hand, J.).

10. The contention is made that the Court's interpretation of § 2 of the Act renders §§ 3 and 4 "largely superfluous." Post, at 869, n. 20. This misreads our holding and the Act. In holding that the Arbitration Act pre-empts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.

11. The California Supreme Court justified its holding by reference to our conclusion in Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), that arbitration agreements are nonbind-

ing as to claims arising under the federal Securities Act of 1933. 31 Cal.3d, at 602, 183 Cal. Rptr., at 370, 645 P.2d, at 1202-1203. The analogy is unpersuasive. The question in Wilko was not whether a state legislature could create an exception to § 2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.

Justice STEVENS dissents in part on the ground that § 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such grounds as exist at law or in equity for the revocation of any contract." Post, at 862. We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of any contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under this dissenting view, "a state policy of providing special protection for franchisees . . . can be recognized without impairing the basic purposes of the federal statute." Post, at 864. If we accepted this analysis, states could wholly eviscerate congressional intent to place arbitration agreements "upon the same footing as other contracts," H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.
the statute viewed the statute as essentially procedural in nature, I am persuaded that the intervening developments in the law compel the conclusion that the Court has reached. I am nevertheless troubled by one aspect of the case that seems to trouble none of my colleagues.

For me it is not "clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable." Ante, at 860. The general rule prescribed by § 2 of the Federal Arbitration Act is that arbitration clauses in contracts involving interstate transactions are enforceable as a matter of federal law. That general rule, however, is subject to an exception based on "such grounds as exist at law or in equity for the revocation of any contract." I believe that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses.

The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978); see generally The Federalist No. 32, p. 200 (Van Doren ed. 1945) (A. Hamilton). Moreover, even where a federal statute does displace state authority, it "rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states.... Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 470-471 (2d ed. 1973).

The limited objective of the Federal Arbitration Act was to abrogate the general common-law rule against specific enforce-ment of arbitration agreements, S.Rep. No. 536, 88th Cong., 1st Sess., 2-3 (1924), and a state statute which merely codified the general common-law rule—either directly by employing the prior doctrine of revocability or indirectly by declaring all such agreements void—would be pre-empted by the Act. However, beyond this conclusion, which seems compelled by the language of § 2 and case law concerning the Act, it is by no means clear that Congress intended entirely to displace state authority in this field. Indeed, while it is an understatement to say that "the legislative history of the ... Act ... reveals little awareness on the part of Congress that state law might be affected," it must surely be true that given the lack of a "clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach on the powers which Congress had, if not the Constitution, would reserve to the states." Metro Industrial Painting Corp. v. Terminal Construction Co., 287 F.2d 382, 386 (CA2 1961) (Lumbard, C.J., concurring).

The textual basis in the Act for avoiding such encroachment is the clause of § 2 which provides that arbitration agreements are subject to revocation on such grounds as exist at law or in equity for the revocation of any contract. The Act, however, does not define what grounds for revocation may be permissible, and hence it would appear that the judiciary must fashion the limitations as a matter of federal common law. Cf. Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). In doing so, we must first recognize that as the "saving clause" in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 1806, n. 12, 18 L.Ed.2d 1270 (1967); see also, H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). The existence of a federal statute enunciating a substantive
federal policy does not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens. Cf. Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 69, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 389 (1966); see generally Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671–672, 99 S.Ct. 2529, 2539–2540, 61 L.Ed.2d 153 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979); Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 888 (1943). Indeed, the lower courts generally look to state law regarding questions of formation of the arbitration agreement under § 2, see, e.g., Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp., 521 F.2d 1210 (CA7 1975), which is entirely appropriate so long as the state rule does not conflict with the policy of § 2.

A contract which is deemed void is surely revocable at law or in equity, and the California Legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Investment Law, including but not limited to arbitration provisions, void as a matter of public policy. Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purposes of the California Act, I believe this declaration of state policy is entitled to respect.

Congress itself struck a similar balance in § 14 of the Securities Act of 1933, 15 U.S.C. § 77n, and did not find it necessary to amend the Federal Arbitration Act. Rather, this Court held that the Securities Act provision invalidating arbitration agreements in certain contexts could be reconciled with the general policy favoring enforcement of arbitration agreements. Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). Repeals by implication are of course not favored, and we did not suggest that Congress had intended to repeal or modify the substantive scope of the Arbitration Act in passing the Securities Act. Instead, we exercised judgment, scrutinizing the policies of the Arbitration Act and their applicability in the special context of the remedial legislation at issue, and found the Arbitration Act inapplicable. We have exercised such judgment in other cases concerning the scope of the Arbitration Act, and have focused not on sterile generalization, but rather on the substance of the transaction at issue, the nature of the relationship between the parties to the agreement, and the purpose of the regulatory scheme. See, e.g., Scherk v. Alberto–Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), rev’g 484 F.2d 611 (CA7 1973); see also, id., at 615–620 (Stevens, Circuit Judge, dissenting). Surely the general language of the Arbitration Act that arbitration agreements are valid does not mean that all such agreements are valid irrespective of their purpose or effect. See generally Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930) (holding arbitration agreement void as a restraint of trade).

We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the Act, can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government. I find no evidence that Congress intended such a double standard to apply, and I would not lightly impugn such an intent to the 1925 Congress which enacted the Arbitration Act.

A state policy excluding wage claims from arbitration, cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973), or a state policy of providing special protection for franchisees, such as that expressed in California’s Franchise Investment Law,
can be recognized without impairing the basic purposes of the federal statute. Like the majority of the California Supreme Court, I am not persuaded that Congress intended the pre-emptive effect of this statute to be "so unyielding as to require enforcement of an agreement to arbitrate a dispute over the application of a regulatory statute which a state legislature, in conformity with analogous federal policy, has decided should be left to judicial enforcement." App. to Juris. Statement 18a.

Thus, although I agree with most of the Court's reasoning and specifically with its jurisdictional holdings, I respectfully dissent from its conclusion concerning the enforceability of the arbitration agreement. On that issue, I would affirm the judgment of the California Supreme Court.

Justice O'CONNOR, with whom Justice REHNQUIST joins, dissenting.

Section 2 of the Federal Arbitration Act (FAA) (also known as the United States Arbitration Act), provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 1 Section 2 does not, on its face, identify which judicial forums are bound by its requirements or what procedures govern its enforcement. The FAA deals with these matters in §§ 3 and 4. Section 3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration ... the court ... shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...." 2

Section 4 specifies that a party aggrieved by another's refusal to arbitrate

2. 9 U.S.C. § 3 (emphasis added).
3. 9 U.S.C. § 4 (emphasis added). Section 9, which addresses the enforcement of arbitration awards, is also relevant. "If no court is speci-

"may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter ... for an order directing that such arbitration proceed in the manner provided for in such agreement...."

3

Today, the Court takes the facial silence of § 2 as a license to declare that state as well as federal courts must apply § 2. In addition, though this is not spelled out in the opinion, the Court holds that in enforcing this newly discovered federal right state courts must follow procedures specified in § 8. The Court's decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.

I

The FAA was enacted in 1925. As demonstrated, infra, at 865–867, Congress thought it was exercising its power to dictate either procedure or "general federal law" in federal courts. The issue presented here is the result of three subsequent decisions of this Court.

In 1938 this Court decided Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Erie denied the Federal Government the power to create substantive law solely by virtue of the Art. III power to control federal-court jurisdiction. Eighteen years later the Court decided Bernhardt v. Polygraphic Co., 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956). Bernhardt held that the duty to arbitrate a contract dispute is outcome-determinative—i.e. "substantive"—and therefore a matter normally governed by state law in federal diversity cases.

fied in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made...." 9 U.S.C. § 9 (emphasis added).
Bernhardt gave rise to concern that the FAA could thereafter constitutionally be applied only in federal-court cases arising under federal law, not in diversity cases.\(^4\) In Prima Paint Corp. v. Flood \& Conklin Mfg. Co., 388 U.S. 395, 404–405, 87 S.Ct. 1801, 1806–1807, 18 L.Ed.2d 1270 (1967), we addressed that concern, and held that the FAA may constitutionally be applied to proceedings in a federal diversity court.\(^5\) The FAA covers only contracts involving interstate commerce or maritime affairs, and Congress “plainly has power to legislate” in that area. \(^6\) Id., at 405, 87 S.Ct., at 1807.

Nevertheless, the Prima Paint decision “carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies that were to be applied to all contracts within its scope, whether sued on in state or federal courts.” P. Bator, P. Mishkin, D. Shapiro, \& H. Wechsler, Hart and Wechsler’s The Federal Courts and the Federal System 781–782 (2d ed. 1973).\(^7\) Today’s case is the first in which this Court has had occasion to determine whether the FAA applies to state-court proceedings. One statement on the subject did appear in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 108 S.Ct. 927, 74 L.Ed.2d 765 (1988), but that case involved a federal, not a state, court proceeding; its dictum concerning the law applicable in state courts was wholly unnecessary to its holding.

\(^4\) Justice Frankfurter made precisely this suggestion in Bernhardt. 350 U.S., at 208, 76 S.Ct., at 279 (concurring opinion).


\(^6\) In Robert Lawrence, supra, the Second Circuit had flatly announced—in dictum, of course—that the FAA was “a declaration of national law equally applicable in state or federal courts.” 271 F.2d, at 407. One Justice in Prima Paint was prepared to adopt wholesale the Second Circuit’s more broadly written opinion. 388 U.S., at 407, 87 S.Ct., at 1807 (Harlan, J., concur-

II

The majority opinion decides three issues. First, it holds that § 2 creates federal substantive rights that must be enforced by the state courts. Second, though the issue is not raised in this case, the Court states, ante, at 861, n. 9, that § 2 substantive rights may not be the basis for invoking federal-court jurisdiction under 28 U.S.C. § 1331. Third, the Court reads § 2 to require state courts to enforce § 2 rights using procedures that mimic those specified for federal courts by FAA §§ 3 and 4. The first of these conclusions is unquestionably wrong as a matter of statutory construction; the second appears to be an attempt to limit the damage done by the first; the third is unnecessary and unwise.

A

One rarely finds a legislative history as unambiguous as the FAA’s. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.

In 1925 Congress emphatically believed arbitration to be a matter of “procedure.” At hearings on the Act congressional Subcommittees were told: “The theory on which you do this is that you have the right to tell the Federal courts how to proceed.” 7

The House Report on the FAA stated: "Whether an agreement for arbitration shall be enforced or not is a question of procedure...." 8 On the floor of the House Congressman Graham assured his fellow Members that the FAA does not involve any new principle of law except to provide a simple method... in order to give enforcement.... It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts." 9

A month after the Act was signed into law the American Bar Association Committee that had drafted and pressed for passage of the federal legislation wrote:

"The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements.... A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts.... [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts." 10

Since Bernhardt, a right to arbitration has been characterized as "substantive," and that holding is not challenged here.

8. H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). To similar effect, the Senate Report noted that the New York statute, after which the FAA was patterned, had been upheld against constitutional attack the previous year in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924). S.Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). In Red Cross Justice Brandeis based the Court's approval of the New York statute on the fact that the statute effected no change in the substantive law.


12. Joint Hearings 39-40 (emphasis added). "The primary purpose of the statute is to make enforcible [sic] in the Federal courts such agreements for arbitration...." Id., at 38 (statement of Mr. Cohen). See also Senate Hearing 2 ("This bill follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal Jurisdiction").
ognized and enforced by the courts of the United States." 13

Yet another indication that Congress did not intend the FAA to govern state-court proceedings is found in the powers Congress relied on in passing the Act. The FAA might have been grounded on Congress' powers to regulate interstate and maritime affairs, since the Act extends only to contracts in those areas. There are, indeed, references in the legislative history to the corresponding federal powers. More numerous, however, are the references to Congress' pre-Erie power to prescribe "general law" applicable in all federal courts. 14 At the congressional hearings, for example: "Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts." 15 And in the House Report:

"The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the

13. H.R.Rep. No. 96, supra, at 1. Commentators writing immediately after passage of the Act uniformly reached the same conclusion. The A.B.A. Committee that drafted the legislation wrote: "So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual states." Committee on Commerce, Trade and Commercial Law, supra, at 155. See also Cohen & Dayton, supra, at 276–277; Baum & Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N.Y.U. L.Q.Rev. 428, 459 (1931). Williston wrote: "Inasmuch as arbitration acts are deemed proce-
dural, the United States Act applies only to the federal courts . . . ." 6 S. Williston & G. Thoms-


14. For my present purpose it is enough to recognize that Congress relied at least in part on its Art. III power over the jurisdiction of the federal courts. See Prima Paint, 388 U.S., at 405, and n. 13, 87 S.Ct., at 1807, n. 13 (majority opinion); id., at 416–420, 87 S.Ct., at 1812–1814 (Black, J., dissenting).

15. Joint Hearings 38. See also id., at 17, 37–38.

16. H.R.Rep. No. 96, supra n. 8, at 1. Immediately after the FAA's enactment the A.B.A. drafters of the Act wrote:

"[The FAA] rests upon the constitutional provi-
sion by which Congress is authorized to estab-
lish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congres-
sional power." Committee on Commerce, Trade and Commercial Law, supra n. 10, at 156.

Numerous other commentators writing shortly after the FAA's passage, as well as more recent-
ly, have made similar statements. See, e.g., Cohen & Dayton, supra n. 10, at 275; Baum & Pressman, supra, at 430–431; Note, 73 Harv.L. Rev., at 1383; Note, 58 Nw.U.L.Rev., at 481.
under Title 28 of the United States Code. As originally enacted, § 3 referred, in the same terms as § 4, to “courts [or court] of the United States.” There has since been a minor amendment in § 4’s phrasing, but no substantive change in either section’s limitation to federal courts.\footnote{18}

None of this Court’s prior decisions has authoritatively construed the Act otherwise. It bears repeating that both \textit{Prima Paint} and \textit{Moses H. Cone} involved \textit{federal-court} litigation. The applicability of the FAA to state-court proceedings was simply not before the Court in either case. Justice Black would surely be surprised to find either the majority opinion or his dissent in \textit{Prima Paint} cited by the Court today, as both are, \textit{ante}, at 858, 859. His dissent took pains to point out:

“The Court here does not hold . . . that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect—which the Court seems to leave up in the air—would flout the intention of the framers of the Act.” 388 U.S., at 424, 87 S.Ct., at 1816 (footnotes omitted).

17. The use of identical language in both sections was natural. § 3 applies when the party resisting arbitration initiates the federal-court action; § 4 applies to actions initiated by the party seeking to enforce an arbitration provision. Phrasing the two sections differently would have made no sense.


19. The Court suggests, \textit{ante}, at 859, that it is unlikely that Congress would have created a federal substantive right that the state courts were not required to enforce. But it is equally rare to find a federal substantive right that cannot be enforced in federal court under the jurisdictional grant of 28 U.S.C. § 1331. Yet the Court states, \textit{ante}, at 861, n. 9, that the FAA must be so construed. The simple answer to this puzzle is that in 1925 Congress did not believe it was creating a substantive right at all.

20. If my understanding of the Court’s opinion is correct, the Court has made § 3 of the FAA binding on the state courts. But as we have noted, \textit{supra}, at 868, § 3 by its own terms governs only federal-court proceedings. Moreover, if § 2, standing alone, creates a federal right to specific enforcement of arbitration agreements
It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure. "[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Brown v. Western R. Co. of Alabama, 388 U.S. 294, 299, 70 S.Ct. 105, 108, 94 L.Ed. 100 (1949). But absent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights. Before we undertake to read a set of complex and mandatory procedures into § 2's brief and general language, we should at a minimum allow state courts and legislatures a chance to develop their own methods for enforcing the new federal rights. Some might choose to award compensatory or punitive damages for the violation of an arbitration agreement; some might award litigation costs to the party who remained willing to arbitrate; some might affirm the "validity and enforceability" of arbitration agreements in other ways. Any of these approaches could vindicate § 2 rights in a manner fully consonant with the language and background of that provision.  

The unelaborated terms of § 2 certainly invite flexible enforcement. At common law many jurisdictions were hostile to arbitration agreements. Kulukundis Shipping Co. v. Antorgy Trading Corp., 126 F.2d 978, 982–984 (CA2 1942). That hostility was reflected in two different doctrines: "revocability," which allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made, and "invalidity" or "unenforceability," equivalent rules 22 that flatly denied any remedy for the failure to honor an arbitration agreement. In contrast, common-law jurisdictions that enforced arbitration agreements did so in at least three different ways—through actions for damages, actions for specific enforcement imposed by the enforce sanctions imposed by trade and commercial associations on members who violated arbitration agreements. 23 In 1925 a forum allowing any one of these remedies would have been thought to recognize the "validity" and "enforceability" of arbitration clauses.  

This Court has previously rejected the view that state courts can adequately protect federal rights only if "such courts in enforcing the Federal right are to be treated as Federal courts and subjected pro hac vice to [federal] limitations...." Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 221, 36 S.Ct. 595, 598, 60 L.Ed. 961 (1916). As explained by Professor Hart:

21. The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered. If the differences become so conspicuous as to affect advance calculations of outcome, and so to induce an undesirable shopping between forums, the remedy does not lie in the sacrifice of the independence of either government. It lies rather in provision by the federal government, confident of the justice of its own procedure,  

22. See J. Cohen, Commercial Arbitration and the Law 53–252 (1918); Sturges, supra, §§ 15–17 (discussing "revocability"); id., § 22 (treating as equivalent different courts' declarations that arbitration agreements were "contrary to public policy," "invalid," "not binding upon the parties," "unenforceable," or "void"). See also Note, 73 Harv.L.Rev., at 1384.  

of a federal forum equally accessible to both litigants.”

In summary, even were I to accept the majority’s reading of § 2, I would disagree with the Court’s disposition of this case. After articulating the nature and scope of the federal right it discerns in § 2, the Court should remand to the state court, which has acted, heretofore, under a misapprehension of federal law. The state court should determine, at least in the first instance, what procedures it will follow to vindicate the newly articulated federal rights. Cf. Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5, 71 S.Ct. 1, 3, 95 L.Ed. 3 (1950).

IV

The Court, ante, at 860–861, rejects the idea of requiring the FAA to be applied only in federal courts partly out of concern with the problem of forum shopping. The concern is unfounded. Because the FAA makes the federal courts equally accessible to both parties to a dispute, no forum shopping would be possible even if we gave the FAA a construction faithful to the congressional intent. In controversies involving incomplete diversity of citizenship there is simply no access to federal court and therefore no possibility of forum shopping. In controversies with complete diversity of citizenship the FAA grants federal-court access equally to both parties; no party can gain any advantage by forum shopping. Even when the party resisting arbitration initiates an action in state court, the opposing party can invoke FAA § 4 and promptly secure a federal-court order to compel arbitration. See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Ironically, the FAA was passed specifically to rectify forum-shopping problems created by this Court’s decision in Swift v. Tyson, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842). By 1925 several major commercial States had passed state arbitration laws, but the federal courts refused to enforce those laws in diversity cases. The drafters of the FAA might have anticipated Bernhardt by legislation and required federal diversity courts to adopt the arbitration law of the State in which they sat. But they deliberately chose a different approach. As was pointed out at congressional hearings, an additional goal of the Act was to make arbitration agreements enforceable even in federal courts located in States that had no arbitration law. The drafters’ plan for maintaining reasonable harmony between state and federal practices was not to bludgeon States into compliance, but rather to adopt a uniform federal law, patterned after New York’s path-breaking state statute, and simultaneously to press for passage of coordinated state legislation. The key language of the Uniform Act for Commercial Arbitration was, accordingly, identical to that in § 2 of the FAA.


25. See Joint Hearings 16 (statement of Mr. Cohen, A.B.A.); Senate Hearing 2. See also Cohen & Dayton, supra n. 10, at 275–276; Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act, 17 Law & Contemp.Prob. 580, 590 (1952).

26. See, e.g., Atlantic Fruit Co. v. Red Cross Line, 276 F. 319 (SDNY 1921), aff’d, 3 P.2d 218 (CA2 1924); Lappe v. Wilcox, 14 F.2d 861 (NDNY 1926).

27. Joint Hearings 35.


In summary, forum-shopping concerns in connection with the FAA are a distraction that does not withstand scrutiny. The Court ignores the drafters' carefully devised plan for dealing with those problems.

V

Today's decision adds yet another chapter to the FAA's already colorful history. In 1842 this Court's ruling in *Swift v. Tyson*, *supra*, set up a major obstacle to the enforcement of state arbitration laws in federal diversity courts. In 1925 Congress sought to rectify the problem by enacting the FAA; the intent was to create uniform law binding only in the federal courts. In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 88 S.Ct. 817, 82 L.Ed. 1188 (1958), and then in *Bernhardt Polygraphic Co.* v. *Tompkins*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956), this Court significantly curtailed federal power. In 1967 our decision in *Prima Paint* upheld the application of the FAA in a federal-court proceeding as a valid exercise of Congress' Commerce Clause and admiralty powers. Today the Court discovers a federal right in FAA § 2 that the state courts must enforce. Apparently confident that state courts are not competent to devise their own procedures for protecting the newly discovered federal right, the Court summarily prescribes a specific procedure, found nowhere in § 2 or its common-law origins, that the state courts are to follow.

Today's decision is unfaithful to congressional intent, unnecessary, and, in light of the FAA's antecedents and the intervening contraction of federal power, inexplicable. Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far. I respectfully dissent.

State prisoner under sentence of death sought habeas corpus. The United States District Court for the Southern District of California, William B. Enright, J., denied relief. The Court of Appeals for the Ninth Circuit, 692 F.2d 1189, reversed. On certiorari, the Supreme Court, Justice White, held that: (1) there was no basis for returning case to state court to consider statutory challenges to lack of proportionality review in California death sentence scheme; (2) Eighth Amendment does not require proportionality review by appellate court in every case in which it is requested by the defendant; and (3) California scheme for imposition of the death penalty is not rendered unconstitutional by absence of provision for proportionality review.

Reversed and remanded.

Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Justice Brennan dissented and filed an opinion in which Justice Marshall joined.

1. *Habeas Corpus* ⇒ 45.2(4)

Federal court may not issue writ of habeas corpus on the basis of a perceived error of state law.

2. *Habeas Corpus* ⇒ 45.2(4)

In view of fact that state Supreme Court had twice rejected defendant's claim without suggesting that it was in any way departing from precedent, denial of the claim was not an error of state law so egregious as to deny the defendant due process or equal protection and thus to permit it to be raised in federal habeas
Warth v. Seldin, 422 U.S. 490, 507, 95 S.Ct. 2197, 2209, 45 L.Ed.2d 343 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 618–619, 93 S.Ct. 1146, 1149–1150, 35 L.Ed.2d 536 (1973). Because § 8(c)(1)(D)(ii) does not give appellees any legal basis for claiming that they have been harmed by anything EPA did or threatened to do, a decision that FIFOA’s arbitration provisions violate Article III could not support an injunction against the Administrator’s use of appellees’ data. Accordingly, appellees do not have standing to challenge the constitutionality of § 8(c)(1)(D)(ii) in this action. For this reason, I agree that the judgment of the District Court must be reversed.

473 U.S. 614, 87 L.Ed.2d 444

MITSUBISHI MOTORS CORPORATION, Petitioner
v.
SOLER CHRYSLER–PLYMOUTH, INC.

SOLER CHRYSLER–PLYMOUTH, INC., Petitioner
v.
MITSUBISHI MOTORS CORPORATION.
Argued March 18, 1985.
Decided July 2, 1985

Automobile manufacturer brought action against automobile dealer for nonpay-

3. The District Court held that appellees had standing to challenge FIFOA’s arbitration provisions because “plaintiffs’ injuries here would be the direct product of the statutory plan.” Union Carbide Agricultural Products Co. v. Ruckelshaus, 571 F.Supp. 117, 123, n. 2 (SDNY 1983). This analysis is incomplete: “The injury must be ‘fairly’ traceable to the challenged action, and relief from the injury must be ‘likely’ to follow from a favorable decision.” Allen v. Wright, 468 U.S., at 751, 104 S.Ct., at 3324 (emphasis added); accord, Valley Forge Christian College v. Ameri-

2. Arbitration

1. Arbitration

There is no warrant in the Arbitration Act [9 U.S.C.A. § 1 et seq.] for implying in every contract within its ken a presumption against arbitration of statutory claims.

Federal Courts

First task of a court asked to compel arbitration of a dispute is to determine whether parties agreed to arbitrate dis-

2. Arbitration

Ibid.
MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH

473 U.S. 614
Cite as 105 S.Ct. 3346 (1985)

pute, and court is to make that determination by applying federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Arbitration Act [9 U.S.C.A. § 1 et seq.].

3. Arbitration ⇔7. 7.1

As with any other contract, parties’ intentions control regarding arbitrability of a claim, but those intentions are generously construed as to issues of arbitrability.

4. Arbitration ⇔7.5

Nothing prevents a party from excluding statutory claims from scope of agreement to arbitrate.

5. Arbitration ⇔23.14

In determining arbitrability of an issue, the Court of Appeals correctly conducted two-step inquiry by first determining whether parties’ agreement to arbitrate reached statutory issues and then, upon finding it did, considering whether legal constraints external to parties’ agreement foreclosed arbitration of claims.

6. Arbitration ⇔7.5

Concerns of international comity, respect for capacities of foreign and transnational tribunals and sensitivity to need of international commercial system for predictability in resolution of disputes all required enforcement of arbitration clause in automobile distributorship agreement with respect to antitrust claims even if contrary result would be forthcoming in a domestic context. 9 U.S.C.A. § 1 et seq.

7. Arbitration ⇔6

Mere appearance of antitrust dispute does not alone warrant invalidation of selected forum on undemonstrated assumption that arbitration clause in agreement is tainted. 9 U.S.C.A. § 1 et seq.

8. Arbitration ⇔7.5

Potential complexity of antitrust matters does not suffice to ward off arbitration nor does arbitration panel pose too great a danger of innate hostility to constraints on

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

business conduct that antitrust law imposes. 9 U.S.C.A. § 1 et seq.

9. Arbitration ⇔7.5

Importance of private damages remedy in antitrust dispute does not compel conclusion that resolution may not be sought outside an American court by means of arbitration.

Syllabus *

Petitioner-cross-respondent (hereafter petitioner), a Japanese corporation that manufactures automobiles, is the product of a joint venture between Chrysler International, S.A. (CISA), a Swiss corporation, and another Japanese corporation, aimed at distributing through Chrysler dealers outside the continental United States automobiles manufactured by petitioner. Respondent-cross-petitioner (hereafter respondent), a Puerto Rico corporation, entered into distribution and sales agreements with CISA. The sales agreement (to which petitioner was also a party) contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof. Thereafter, when attempts to work out disputes arising from a slackening of the sale of new automobiles failed, petitioner withheld shipment of automobiles to respondent, which disclaimed responsibility for them. Petitioner then brought an action in Federal District Court under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, seeking an order to compel arbitration of the disputes in accordance with the arbitration clause. Respondent filed an answer and counterclaims, asserting, inter alia, causes of action under the Sherman Act and other statutes. The District Court ordered arbitration of most of the issues raised in the complaint and counterclaims, including the federal antitrust issues. Despite the doctrine of

an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. So too, the potential complexity of antitrust matters does not suffice to ward off arbitration; nor does an arbitration panel pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. And the importance of the private damages remedy in enforcing the regime of antitrust laws does not compel the conclusion that such remedy may not be sought outside an American court. Pp. 3855–3861.

728 F.2d 155 (CA1 1983), affirmed in part, reversed in part, and remanded.

Wayne Alan Cross, New York City, for Mitsubishi Motors Corp.

Benjamin Rodriguez-Ramon, Hato Rey, P.R., for Soler Chrysler-Plymouth, Inc.

Jerold Joseph Ganzfried, Washington, D.C., for the United States as amicus curiae supporting Soler Chrysler, by special leave of Court.

Justice BLACKMUN delivered the opinion of the Court.


I

Petitioner-cross-respondent Mitsubishi Motors Corporation (Mitsubishi) is a Japanese corporation which manufactures automobiles and has its principal place of business in Tokyo, Japan. Mitsubishi is the product of a joint venture between, on the one hand, Chrysler International, S.A. (CISA), a Swiss corporation registered in
Geneva and wholly owned by Chrysler Corporation, and, on the other, Mitsubishi Heavy Industries, Inc., a Japanese corporation. The joint aim of the joint venture was the distribution through Chrysler dealers outside the continental United States of vehicles manufactured by Mitsubishi and bearing Chrysler and Mitsubishi trademarks. Respondent-cross-petitioner Soler Chrysler-Plymouth, Inc. (Soler), is a Puerto Rico corporation with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico.

On October 31, 1979, Soler entered into a Distributor Agreement with CISA which provided for the sale by Soler of Mitsubishi-manufactured vehicles within a designated area, including metropolitan San Juan. App. 18. On the same date, CISA, Soler, and Mitsubishi entered into a Sales Procedure Agreement (Sales Agreement) which, referring to the Distributor Agreement, provided for the direct sale of Mitsubishi products to Soler and governed the terms and conditions of such sales. Id., at 42. Paragraph VI of the Sales Agreement, labeled “Arbitration of Certain Matters,” provides:

“All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I–B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association.” Id., at 52–53.

Initially, Soler did a brisk business in Mitsubishi-manufactured vehicles. As a result of its strong performance, its minimum sales volume, specified by Mitsubishi and CISA, and agreed to by Soler, for the 1981 model year was substantially increased. Id., at 179. In early 1981, however, the new-car market slackened. Soler ran into serious difficulties in meeting the expected sales volume, and by the spring of 1981 it felt itself compelled to request that Mitsubishi delay or cancel shipment of several orders. 1 Record 181, 183. About the same time, Soler attempted to arrange for the transshipment of a quantity of its vehicles for sale in the continental United States and Latin America. Mitsubishi and CISA, however, refused permission for any such diversion, citing a variety of reasons,1 and no vehicles were transshipped. Attempts to work out these difficulties failed. Mitsubishi eventually withheld shipment of 966 vehicles, apparently representing orders placed for May, June, and July 1981 production, responsibility for which Soler disclaimed in February 1982. App. 131.

The following month, Mitsubishi brought an action against Soler in the United States District Court for the District of Puerto Rico under the Federal Arbitration Act and the Convention.2 Mitsubishi sought an order, pursuant to 9 U.S.C. §§ 4 and 201,3 to tend to reimburse Mitsubishi for storage costs and interest charges incurred because of Soler’s failure to take shipment of ordered vehicles; that Soler’s failure to fulfill warranty obligations threatened Mitsubishi’s reputation and goodwill; that Soler had failed to obtain required financing; and that the Distributor and Sales Agreements had expired by their terms or, alternatively, that Soler had surrendered its rights under the Sales Agreement. Id., at 11–14.

3. Section 4 provides in pertinent part:

“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the contro-
compel arbitration in accord with 13 U.S. VI of the Sales Agreement. App. 15. 4 Shortly after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association. Id., at 70.


In the counterclaim premised on the Sherman Act, Soler alleged that Mitsubishi and CISA had conspired to divide markets in restraint of trade. To effectuate the plan, according to Soler, Mitsubishi had refused to permit Soler to resell to buyers in North, Central, or South America vehicles it had obligated itself to purchase from Mitsubishi; had refused to ship ordered vehicles or the parts, such as heaters and defoggers, that would be necessary to permit Soler to make its vehicles suitable for resale outside Puerto Rico; and had coercively attempted to replace Soler and its other Puerto Rico distributors with a wholly owned subsidiary which would serve as the exclusive Mitsubishi distributor in Puerto Rico. App. 91–96.

After a hearing, the District Court ordered Mitsubishi and Soler to arbitrate each of the issues raised in the complaint and in all the counterclaims save two and a portion of a third. 7 With regard to the

5. The alleged breaches included wrongful refusal to ship ordered vehicles and necessary parts, failure to make payment for warranty work and authorized rebates, and bad faith in establishing minimum-sales volumes. Id., at 97–101.

6. The fourth counterclaim alleged that Mitsubishi had made statements that defamed Soler's good name and business reputation to a company with which Soler was then negotiating the sale of its plant and distributorship. Id., at 96. The sixth counterclaim alleged that Mitsubishi had made a willfully false and malicious statement in an affidavit submitted in support of its application for a temporary restraining order, and that Mitsubishi had wrongfully advised Soler's customers and the public in its market area that they should no longer do business with Soler. Id., at 98–99.

7. The District Court found that the arbitration clause did not cover the fourth and sixth counterclaims, which sought damages for defamation, see n. 6, supra, or the allegations in the seventh counterclaim concerning discriminatory treatment and the establishment of minimum-sales volumes. App. to Pet. for Cert. in No. 83–1509, pp. B10–B11. Accordingly, it retained jurisdiction over those portions of the litigation. In addition, because no arbitration agreement between Soler and CISA existed, the court retained jurisdiction, insofar as they sought relief from CISA, over the first, second, third, and ninth counterclaims, which raised claims under the Puerto Rico Dealers' Contracts Act, the federal Automobile Dealers' Day in Court Act, the Sherman Act, and the Puerto
federal antitrust issues, it recognized that the Courts of Appeals, following American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (CA2 1968), uniformly had held that the rights conferred by the antitrust laws were "of a character inappropriate for enforcement by arbitration." App. to Pet. for Cert. in No. 89-1569, p. B9, quoting Wilko v. Swan, 346 U.S. 44 (CA2 1953), rev'd, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). The District Court held, however, that the international character of the Mitsubishi-Soler undertaking required enforcement of the agreement to arbitrate even as to the antitrust claims. It relied on Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-520, 94 S.Ct. 2449, 2455-2458, 41 L.Ed.2d 270 (1974), in which this Court ordered arbitration, pursuant to a provision embodied in an international agreement, of a claim arising under the Securities Exchange Act of 1934 notwithstanding its assumption, arguendo, that Wilko, supra, held nonarbitrable claims arising under the Securities Act of 1933, also would bar arbitration of a 1934 Act claim arising in a domestic context.

The United States Court of Appeals for the First Circuit affirmed in part and reversed in part. 723 F.2d 155 (1983). It first rejected Soler's argument that Puerto Rico law precluded enforcement of an agreement obligating a local dealer to arbitrate controversies outside Puerto Rico. It also rejected Soler's suggestion that it could not have intended to arbitrate statutory claims not mentioned in the arbitration agreement. Assessing arbitrability "on an allegation-by-allegation basis," id., at 159, the court then read the arbitration clause to encompass virtually all the claims arising under the various statutes, including all those arising under the Sherman Act.


9. As the Court of Appeals saw it, "[t]he question ... is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims—and Mitsubishi's bona fide defenses to those counterclaims—are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." 723 F.2d, at 159. Because Soler's counterclaim under the Puerto Rico Dealers' Contracts Act focused on Mitsubishi's alleged failure to comply with the provisions of the Sales Agreement governing delivery of automobiles, and those provisions were found in that portion of Article I of the Agreement subject to arbitration, the Court of Appeals placed this first counterclaim within the arbitration clause. Id., at 159-160.

The court read the Sherman Act counterclaim to raise issues of wrongful termination of Soler's distributorship, wrongful failure to ship ordered parts and vehicles, and wrongful refusal to permit transshipment of stock to the United States and Latin America. Because the existence of just cause for termination turned on Mitsubishi's allegations that Soler had breached the Sales Agreement by, for example, failing to pay for ordered vehicles, the wrongful termination claim implicated at least three provisions within the arbitration clause: Article I-D(1), which rendered a dealer's orders "firm"; Article I-E, which provided for "distress unit penalties" where the dealer prevented timely shipment; and Article I-F, specifying payment obligations and procedures. The court therefore held the arbitration clause to cover this dispute. Because the nonshipment claim implicated Soler's obligation under Article I-F to proffer acceptable credit, the court found this dispute covered as well. And because the transshipment claim prompted Mitsubishi defenses concerning the suitability of vehicles manufactured to Soler's specifications for use in different locales and Soler's inability to provide warranty service to transshipped products, it implicated Soler's obligation under Article IV, another covered provision, to make use of Mitsubishi's trademarks in a manner that would not dilute Mitsubishi's reputation and goodwill or damage its name.
Finally, after endorsing the doctrine of *American Safety*, precluding arbitration of antitrust claims, the Court of Appeals concluded that neither this Court's decision in *Scherk* nor the Convention required abandonment of that doctrine in the face of an international transaction. 723 F.2d, at 164–168. Accordingly, it reversed the judgment of the District Court insofar as it had ordered submission of "Soler's antitrust claims" to arbitration.10 Affirming the remainder of the judgment,11 the court directed the District Court to consider in the first instance how the parallel judicial and arbitral proceedings should go forward.12

We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction. 469 U.S. 916, 105 S.Ct. 291, 83 L.Ed.2d 227 (1984).

II

At the outset, we address the contention raised in Soler's cross-petition that the arbitration clause at issue may not be read to encompass the statutory counterclaims stated in its answer to the complaint. In making this argument, Soler does not question the Court of Appeals' application of ¶ Vi of the Sales Agreement to the disputes involved here as a matter of standard contract interpretation.13 Instead, it argues states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

11. In this Court, Soler suggests for the first time that Congress intended that claims under the federal Automobile Dealers' Day in Court Act be nonarbitrable. Brief for Respondent and Cross-Petitioner 21, n. 12. Because Soler did not raise this question in the Court of Appeals or present it in its cross-petition, we do not address it here.

12. Following entry of the District Court's judgment, both it and the Court of Appeals denied motions by Soler for a stay pending appeal. The parties accordingly commenced preparation for the arbitration in Japan. Upon remand from the Court of Appeals, however, Soler withdrew the antitrust claims from the arbitration tribunal and sought a stay of arbitration pending the completion of the judicial proceedings on the ground that the antitrust claims permeated the claims that remained before that tribunal. The District Court denied the motion, instead staying its own proceedings pending the arbitration in Japan. The arbitration recommenced, but apparently came to a halt once again in September 1984 upon the filing by Soler of a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq.

13. We therefore have no reason to review the Court of Appeals' construction of the scope of the arbitration clause in the light of the allegations of Soler's counterclaims. See n. 9, supra; *Southland Corp. v. Keating*, 465 U.S., at 110, 104 S.Ct., at 858, where we held that the Federal Arbitration Act "withdraw the power of the
MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH

473 U.S. 626
Cite as 105 S.Ct. 3346 (1985)

gues that as a matter of law a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs "unless [that party] has expressly agreed" to arbitrate those claims, see Pet. for Cert. in No. 83-7338, pp. 8, i, by which Soler presumably means that the arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate. See 728 F.2d, at 159. Soler reasons that, because it falls within the class for whose benefit the federal and local antitrust laws and dealers' Acts were passed, but the arbitration clause at issue does not mention these statutes or statutes in general, the clause cannot be read to contemplate arbitration of these statutory claims.

1 We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "liberal federal policy favoring arbitration agreements," Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangement.

Soler ignores the inclusion within those "certain matters" of "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to [the specified provisions] or for the breach thereof." Contrary to Soler's suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals

ments: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." Id., at 25, n. 32, 103 S.Ct., at 942, n. 32. As this Court recently observed, "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." Landmark Associates v. United Nuclear Corp., 461 U.S. 411, 424, 103 S.Ct. 1814, 1821, 76 L.Ed.2d 63 (1983). Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Memorial Hospital, 460 U.S., at 24, 103 S.Ct., at 941. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400-404, 87 S.Ct. 1801, 1804-1806, 18 L.Ed.2d 1270 (1967); Southland Corp. v. Keating, 465 U.S. 1, 12, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984). And that body of law counsels

"that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language it-

properly resolved any doubts in favor of arbitrability. See 723 F.2d, at 159.

14. The Court previously has explained that the Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law. See Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 219-221, and n. 6, 105 S.Ct. 1241-1243, and n. 6, 84 L.Ed.2d 158 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510, and n. 4, 94 S.Ct. 2449, 2452, and n. 4, 41 L.Ed.2d 270 (1974).
self or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital*, 460 U.S., at 24–25, 103 S.Ct., at 941–942.

See, e.g., *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–583, 80 S.Ct. 1347, 1352–1353, 4 L.Ed.2d 1409 (1960). Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed "hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created," *Wilko v. Swan*, 346 U.S. 427, 432, 74 S.Ct. 182, 185, 98 L.Ed.168 (1953) (footnote omitted); see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 135, n. 15, 94 S.Ct. 383, 393, n. 15, 38 L.Ed.2d 348 (1973), and we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. Just last Term in *Southland Corp.*, *supra*, where we held that § 2 of the Act declared a national policy applicable equally in state as well as federal courts, we construed an arbitration clause to encompass the disputes at issue without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration. 465 U.S., at 15, and n. 7, 104 S.Ct., at 860, and n. 7. Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract." 9 U.S.C. § 2; see *Southland Corp.*, 465 U.S., at 16, n. 11, 104 S.Ct., at 861, n. 11; *The Bremen v. Zapata Off.*

15. The claims whose arbitrability was at issue in *Southland Corp.* arose under the disclosure requirements of the California Franchise Investment Law, Cal.Corp.Code Ann. § 31000 et seq. (West 1977). While the dissent in *Southland Corp.* disputed the applicability of the Act to proceedings in the state courts, it did not object to the Court's reading of the arbitration clause under examination.

[4] That is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. See *Wilko v. Swan*, 346 U.S., at 434–435, 74 S.Ct., at 186–187; *Southland Corp.*, 465 U.S., at 16, n. 11, 104 S.Ct., at 861, n.11; *Dean Witter Reynolds Inc.*, 470 U.S., at 224–225, 105 S.Ct., at 1244–1245 (concurring opinion). For that reason, Soler's concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. See *Wilko v. Swan*, *supra*. Having made the bargain to arbitrate, the party should be held to it unless Congress
itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. See Prima Paint Corp., 388 U.S., at 406, 87 S.Ct., at 1807.

[5] In sum, the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. We endorse its rejection of Soler's proposed rule of arbitration-clause construction.

III

[6] We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (1968). Notwithstanding the absence of any explicit support for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." Id., at 827–828. We find it unnecessary to assess the legitimacy of the American Safety doctrine as applied to agreements to arbitrate arising from domestic transactions. As in Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Even before Scherk, this Court had recognized the utility of forum-selection clauses in international transactions. In The Bremen, supra, an American oil company, seeking to evade a contractual choice of an English forum and, by implication, English law, filed a suit in admiralty in a United States District Court against the German corporation which had contracted to tow its rig to a location in the Adriatic Sea. Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court gave effect to the choice-of-forum clause. It observed:

"The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." 407 U.S., at 9, 92 S.Ct., at 1912.

[6] Recognizing that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting," id., at 13–14, 92 S.Ct., at 1914–1916 the decision in The Bremen clearly eschewed a provincial solicitude for the jurisdiction of domestic forums.

Identical considerations governed the Court's decision in Scherk, which categorized "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 417 U.S., at 519, 94 S.Ct., at 2457. In Scherk, the American company Alberto-Culver purchased several interrelated business enterprises, organized under the laws of Germany and Liechtenstein, as well as the rights held by those enterprises in certain trademarks, from a German citizen who at the time of trial resided in Switzer-
land. Although the contract of sale contained a clause providing for arbitration before the International Chamber of Commerce in Paris of "any controversy or claim [arising] out of this agreement or the breach thereof," Alberto-Culver subsequently brought suit against Scherk in a Federal District Court in Illinois, alleging that Scherk had violated § 10(b) of the Securities Exchange Act of 1934 by fraudulently misrepresenting the status of the trademarks as unencumbered. The District Court denied a motion to stay the proceedings before it and enjoined the parties from going forward before the arbitral tribunal in Paris. The Court of Appeals for the Seventh Circuit affirmed, relying on this Court's holding in Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), that agreements to arbitrate disputes arising under the Securities Act of 1933 are nonarbitrable. This Court reversed, enforcing the arbitration agreement even while assuming for purposes of the decision that the controversy would be nonarbitrable under the holding of Wilko had it arisen out of a domestic transaction. Again, the Court emphasized:

"A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is ... an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction....

"A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.... [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U.S., at 516-517, 94 S.Ct., at 2455-2456.

Accordingly, the Court held Alberto-Culver to its bargain, sending it to the international arbitral tribunal before which it had agreed to seek its remedies.

The Bremen and Scherk establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in Scherk, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, 16 that federal policy applies with special force in the field of international commerce. Thus, we must weigh the concerns of American Safety against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses.

At the outset, we confess to some skepticism of certain aspects of the American Safety doctrine. As distilled by the First Circuit, 723 F.2d, at 162, the doctrine comprises four ingredients. First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages. Second, "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract." Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process, i.e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, ... decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community—particularly those

from a foreign community that has had no experience with or exposure to our law and values.” See American Safety, 391 F.2d, at 826–827.

[7] Initially, we find the second concern unjustified. The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the underdemonstrated assumption that the arbitration clause is tainted. A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Moreover, the party may attempt to make a showing that would warrant setting aside the forum-selection clause—that the agreement was “[a]ffected by fraud, undue influence, or overweening bargaining power”; that “enforcement would be unreasonable and unjust”; or that proceedings “in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court.” The Bremen, 407 U.S., at 179–181, 15, 18, 92 S.Ct., at 1914, 1916, 1917. But absent such a showing—and none was attempted here—there is no basis for assuming the forum inadequate or its selection unfair.

[8] Next, potential complexity should not suffice to ward off arbitration. We might well have some doubt that even the courts following American Safety subscribe fully to the view that antitrust matters are inherently insusceptible to resolution by arbitration, as these same courts have agreed that an undertaking to arbitrate antitrust claims entered into after the dispute arises is acceptable. See, e.g., Coven v. R.W. Pressprich & Co., 453 F.2d 1209, 1215 (CA2), cert. denied, 406 U.S. 949, 92 S.Ct. 2045, 32 L.Ed.2d 337 (1972); Cobb v. Lewis, 488 F.2d 41, 45 (CA5 1974). See also, in the present cases, 723 F.2d, at 168, n. 12 (leaving question open). And the vertical restraints which most frequently give birth to antitrust claims covered by an arbitration agreement will not often occasion the monstrous proceedings that have given antitrust litigation an image of intractability. In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal.

Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies. In sum, the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.

For similar reasons, we also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly.


18. See Craig, Park, & Paulsson, supra, § 12.03, p. 28; Sanders, Commentary on UNCITRAL Arbitration Rules § 15.1, in 2 Yearbook Commercial Arbitration, supra, at 203.
decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

We are left, then, with the core of the American Safety doctrine—the fundamental importance to American democratic capitalism of the regime of the antitrust laws. See, e.g., United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972); Northern Pacific R. Co. v. United States, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). Without doubt, the private cause of action plays a central role in enforcing this regime. See, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972). As the Court of Appeals pointed out:

"'A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.'" 723 F.2d, at 168, quoting American Safety, 391 F.2d, at 826.


[9] The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court. Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act, 15 U.S.C. § 15, and pursued by Soler here by way of its third counterclaim, seeks primarily to enable an injured competitor to gain compensation for that injury.

"Section 4 . . . is in essence a remedial provision. It provides treble damages to '[a]ny person . . . who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . .' Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed . . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a less multiple of the injury actually proved, is designed primarily as a remedy." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-486, 97 S.Ct. 690, 695-696, 50 L.Ed.2d 701 (1977).

After examining the respective legislative histories, the Court in Brunswick recognized that when first enacted in 1890 as § 7 of the Sherman Act, 26 Stat. 210, the treble-damages provision "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,'" 429 U.S., at 486, n. 10, 97 S.Ct., at 696, n. 10, quoting 21 Cong.Rec. 1767-1768 (1890) (remarks of Sen. George); when reenacted in 1914 as § 4 of the Clayton Act, 38 Stat. 731, it was still "conceived primarily as judicial or arbitral tribunal required to determine foreign law. See, e.g., Fed. Rule Civ.Proc. 44.1. Moreover, while our attachment to the antitrust laws may be stronger than most, many other countries, including Japan, have similar bodies of competition law. See, e.g., 1 Law of Transnational Business Transactions, ch. 9 (Banks, Antitrust Aspects of International Business Operations), § 9.03[7] (V. Nanda ed. 1984); H. Iyori & A. Ucuxi, The Antimonopoly Laws of Japan (1983).
it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. Wilko v. Swan, 346 U.S., at 433-434, 74 S.Ct., at 185-186.19 And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. that basis. Tr. of Oral Arg. 18. The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission. See District Court Order of May 25, 1984, pp. 2-3.

We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstitute suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. See, e.g., Redel's Inc. v. General Electric Co., 498 F.2d 95, 98-99 (CA5 1974); Gaines v. Carrollton Tobacco Board of Trade, Inc., 386 F.2d 757, 759 (CA6 1967); Fox Midwest Theatres v. Means, 221 F.2d 173, 180 (CA8 1955). Cf. Lawlor v. National Screen Service Corp., 349 U.S. 322, 329-375 S.Ct. 865, 869, 99 L.Ed. 1122 (1955). See generally 15 S. Williston, Contracts § 1750A (3d ed. 1972).
V(2)(b), 21 U.S.T., at 2520; see Scherk, 417 U.S., at 519, n. 14, 94 S.Ct., at 2457, n. 14. While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.20

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," Kulukundis Shipping Co. v. Amtoy Trading Corp., 126 F.2d 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrariness to the international policy favoring commercial arbitration. See Scherk, supra.21

Accordingly, we "require this representative of the American business community to honor its bargain," Alberto-Culver Co. v. Scherk, 484 F.2d 611, 620 (CA7 1973) (Stevens, J., dissenting), by holding this agreement to arbitrate "enforce[able] . . . in accord with the explicit provisions of the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope. See Act of July 31, 1970, Pub.L. 91-368, 84 Stat. 692, codified at 9 U.S.C. §§ 201-208. In Scherk, this Court recited Art. II(1), including the language relied upon by the Court of Appeals, but paid heed to the Convention delegates' "frequent[ly voiced] concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." 417 U.S., at 520, n. 15, 94 S.Ct., at 2457, n. 15, citing G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24-28 (1958). There, moreover, the Court dealt, arguendo, with an exception to arbitrariness grounded in express congressional language; here, in contrast, we face a judicially implied exception. The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own. Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.
MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH

473 U.S. 642
Cite as 105 S.Ct. 3346 (1985)

Arbitration Act.” Scherk, 417 U.S., at 520, 94 S.Ct., at 2457

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice POWELL took no part in the decision of these cases.

Justice STEVENS, with whom Justice BRENNAN joins, and with whom Justice MARSHALL joins except as to Part II, dissenting.

One element of this rather complex litigation is a claim asserted by an American dealer in Plymouth automobiles that two major automobile companies are parties to an international cartel that has repressed competition in the American market. Pursuant to an agreement that is alleged to have violated § 1 of the Sherman Act, 15 U.S.C. § 1, those companies allegedly prevented the dealer from transshipping some 966 surplus vehicles from Puerto Rico to other dealers in the American market. App. 92.

Petitioner denies the truth of the dealer's allegations and takes the position that the validity of the antitrust claim must be resolved by an arbitration tribunal in Tokyo, Japan. Largely because the auto manufacturer's defense to the antitrust allegation is based on provisions in the dealer's franchise agreement, the Court of Appeals concluded that the arbitration clause in that agreement encompassed the antitrust claim. 723 F.2d 155, 159 (CA1 1983). It held, however, as a matter of law, that arbitration of such a claim may not be compelled under either the Federal Arbitration Act 1 or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 2 Id., at 161-168.

This Court agrees with the Court of Appeals' interpretation of the scope of the arbitration clause, but disagrees with its conclusion that the clause is unenforceable insofar as it purports to cover an antitrust claim against a Japanese company. This Court's holding rests almost exclusively on the federal policy favoring arbitration of commercial disputes and vague notions of international comity arising from the fact that the automobiles involved here were manufactured in Japan. Because I am convinced that the Court of Appeals' construction of the arbitration clause is erroneous, and because I strongly disagree with this Court's interpretation of the relevant federal statutes, I respectfully dissent. In my opinion, (1) a fair construction of the language in the arbitration clause in the parties' contract does not encompass a claim that auto manufacturers entered into a conspiracy in violation of the antitrust laws; (2) an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify; (3) Congress did not intend § 2 of the Federal Arbitration Act to apply to antitrust claims; and (4) Congress did not intend the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to apply to disputes that are not covered by the Federal Arbitration Act.

I

On October 31, 1979, respondent, Soler Chrysler-Plymouth, Inc. (Soler), entered into a "distributor agreement" to govern the sale of Plymouth passenger cars to be manufactured by petitioner, Mitsubishi Motors Corporation 3 of Tokyo, Japan (Mitsubishi). 3 Mitsubishi, however, was not a

---

3 The distributor agreement provides, in part: "This Agreement is made by and between CHRYSLER INTERNATIONAL S.A., a corporation organized and existing under the laws of the Swiss Confederation with its principal office in Geneva, Switzerland (hereinafter sometimes called CHRYSLER), and SOLER CHRYSLER-PLYMOUTH INC., ... (hereinafter sometimes called DISTRIBUTOR), and will govern the sale by CHRYSLER to DISTRIBUTOR of PLYMOUTH PASSENGER CARS AND CAR DERIVATIVES MANUFACTURED BY MITSUBISHI MOTORS CORPORATION OF TOKYO, JAPAN and automotive replacement parts and accessories

---
party to that agreement. Rather the "purchase rights" were granted to Soler by a wholly owned subsidiary of Chrysler Corporation that is referred to as "Chrysler" in the agreement. The distributor agreement does not contain an arbitration clause. Nor does the record contain any other agreement providing for the arbitration of disputes between Soler and Chrysler.

Paragraph 26 of the distributor agreement authorizes Chrysler to have Soler's orders filled by any company affiliated with Chrysler, that company thereby becoming the "supplier" of the products covered by the agreement with Chrysler. Relying on paragraph 26 of their distributor agreement, Soler, Chrysler, and Mitsubishi entered into a separate Sales Procedure Agreement designating Mitsubishi as the supplier of the products covered by the distributor agreement. The arbitration clause the Court construes today is found in that agreement. As a matter of ordinary contract interpretation, there are at least two reasons why that clause does not apply to Soler's antitrust claim against Chrysler and Mitsubishi.

First, the clause only applies to two-party disputes between Soler and Mitsubishi. The antitrust violation alleged in Soler's counterclaim is a three-party dispute. Soler has joined both Chrysler and its associated company, Mitsubishi, as counterdefendants. The pleading expressly alleges that both of those companies are "engaged in an unlawful combination and conspiracy to restrain and divide markets in interstate and foreign commerce, in violation of the Sherman Antitrust Act and the Clayton Act." App. 91. It is further alleged that Chrysler authorized and participated in several overt acts directed at Soler. At this stage of the case we must, of course, assume the truth of those allegations. Only by stretching the language of the arbitration clause far beyond its ordinary meaning such sales will not constitute the basis forming a distributor relationship between SUPPLIER and DISTRIBUTOR. Further, DISTRIBUTOR acknowledges and agrees that any claim or controversy resulting from such direct sales by SUPPLIER will be handled by CHRYSLER as though such sale had been made by CHRYSLER. "Id., at 39-40.

4. "PURCHASE RIGHTS"
"Subject to the provisions of this Agreement, CHRYSLER grants to DISTRIBUTOR the non-exclusive right to purchase Products from CHRYSLER, and DISTRIBUTOR agrees to buy Products from CHRYSLER, for resale within the following described territory (hereinafter called Sales Area): METROPOLITAN SAN JUAN, PUERTO RICO..." Ibid.
This is the same company that is referred to as "CISA" in the sales purchase agreement and in the Court's opinion.

5. Paragraph 26 of the distributor agreement provides:
"DIRECT SALES"
"CHRYSLER and DISTRIBUTOR agree that CHRYSLER may, at its option, forward orders received from DISTRIBUTOR pursuant to this Agreement to its parent company, Chrysler Corporation, or to any subsidiary, associated or affiliated company (hereinafter called 'SUPPLIER') which will then sell the Products covered by such order directly to DISTRIBUTOR, CHRYSLER and DISTRIBUTOR hereby acknowledge and agree that, unless otherwise agreed in writing, any such direct sales between SUPPLIER and DISTRIBUTOR will be governed by the terms and conditions contained on the order form and in this Agreement and that any

6. "WHEREAS, pursuant to Article 26 of the Distributor Agreement, CISA may forward orders received from BUYER to an associated company; "WHEREAS, MMC and CISA have agreed that MMC, which is an associated company of CISA, may sell such MMC Products directly to BUYER pursuant to Article 26 of the Distributor Agreement." Id., at 43.

7. Mitsubishi is jointly owned by Chrysler and by Mitsubishi Heavy Industries, Ltd., a Japanese corporation. Id., at 200-201.

8. That clause reads as follows:
"ARBITRATION OF CERTAIN MATTERS"
"All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." Id., at 52-53.
could one possibly conclude that it encompasses this three-party dispute.

Second, the clause only applies to disputes "which may arise between MMC and BUYER out of or in relation to Articles I–B through V of this Agreement or for the breach thereof...." Id., at 52. Thus, disputes relating to only 5 out of a total of 15 Articles in the Sales Procedure Agreement are arbitrable. Those five Articles cover: (1) the terms and conditions of direct sales (matters such as the scheduling of orders, deliveries, and payment); (2) technical and engineering changes; (3) compliance by Mitsubishi with customs laws and regulations, and Soler's obligation to inform Mitsubishi of relevant local laws; (4) trademarks and patent rights; and (5) Mitsubishi's right to cease production of any products. It is immediately obvious that Soler's antitrust claim did not arise out of Articles I–B through V and it is not a claim "for the breach thereof." The question is whether it is a dispute "in relation to" those Articles.

Because Mitsubishi relies on those Articles of the contract to explain some of the activities that Soler challenges in its antitrust claim, the Court of Appeals concluded that the relationship between the dispute and those Articles brought the arbitration clause into play. I find that construction of the clause wholly unpersuasive. The words "in relation to" appear between the references to claims that arise under the contract and claims for breach of the contract; I believe all three of the species of arbitrable claims must be predicated on contractual rights defined in Articles I–B through V.

9. Even if Mitsubishi can prove that it did not violate any provision of the contract, such proof would not necessarily constitute a defense to the antitrust claim. In contrast, in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), Prima Paint's claim of fraud in the inducement was asserted to rescind the contract, not as an independent basis of recovery.

10. Section 2 provides:

---

The federal policy favoring arbitration cannot sustain the weight that the Court assigns to it. A clause requiring arbitration of all claims "relating to" a contract surely could not encompass a claim that the arbitration clause was itself part of a contract in restraint of trade. Cf. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145 (1930); see also United States v. Paramount Pictures, Inc., 334 U.S. 131, 176, 68 S.Ct. 915, 938, 92 L.Ed. 1260 (1948). Nor in my judgment should it be read to encompass a claim that relies, not on a failure to perform the contract, but on an independent violation of federal law. The matters asserted by way of defense do not control the character, or the source, of the claim that Soler has asserted. Accordingly, simply as a matter of ordinary contract interpretation, I would hold that Soler's antitrust claim is not arbitrable.

II

Section 2 of the Federal Arbitration Act describes three kinds of arbitrable agreements. Two—those including maritime transactions and those covering the submission of an existing dispute to arbitration—are not involved in this case. The language of § 2 relating to the Soler-Mitsubishi arbitration clause reads as follows:

"A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... or the refusal to perform the whole or any part thereof, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law.

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
or in equity for the revocation of any contract."
The plain language of this statute encompasses Soler's claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law, or indeed one that arises under its distributor agreement with Chrysler. Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.\footnote{11}

Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims. In one, the party claiming a breach of contractual warranties also claimed that the breach amounted to fraud actionable under § 10(b) of the Securities Exchange Act of 1934. Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).\footnote{12} But this is the first time the Court has considered the question whether a standard arbitration clause referring to claims arising out of or relating to a contract should be construed to cover statutory claims that have only an indirect relationship to the contract.\footnote{13} In my opinion, neither the Congress that enacted the Arbitration Act in 1925, nor the many parties who have agreed to such standard clauses, could have anticipated the Court's answer to that question.

On several occasions we have drawn a distinction between statutory rights and contractual rights and refused to hold that an arbitration barred the assertion of a statutory right. Thus, in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 89 L.Ed.2d 147 (1974), we held that the arbitration of a claim of employment discrimination would not bar an employee's statutory right to damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17, notwithstanding the strong federal policy favoring the arbitration of labor disputes. In that case the Court explained at some length why it would be unreasonable to assume that Congress intended to give arbitrators the final authority to implement the federal statutory policy:

"[We] have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.' U.S. Bulk Carriers v. Arquelles, 400 U.S. 566, 571, 91 S.Ct. 1552, 1557, 29 L.Ed.2d 701 (1971)."

11. In his dissent in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S., at 415, 87 S.Ct., at 1811 Justice Black quoted the following commentary written shortly after the statute was passed:

"Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are comcomitant to the questions of fact which we have just mentioned." Cohen & Dayton, The New Federal Arbitration Law, 12 Va.L.Rev. 265, 281 (1926).

In the Prima Paint case the Court held that the Act applied to a claim of fraud in the inducement of the contract, but did not intimate that it might also cover federal statutory claims. See n. 9, supra.

12. "The dispute between these parties over the alleged shortage in defendant's inventory of European trademarks, a matter covered by contract warranties and subject to pre-closing verification, is the kind of commercial dispute for which arbitration is entirely appropriate. In my opinion, the fact that the 'fraud' language of Rule 10(b)(5) has been included in the complaint is far less significant than the desirability of having the Court of Arbitration of the International Chamber of Commerce in Paris, France, decide the various questions of foreign law which should determine the rights of these parties." Alberto-Culver Co. v. Scherk, 484 F.2d 611, 619–620 (CA7 1973) (Stevens, J., dissenting), rev'd, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

13. It is interesting to note that in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the Court referred to the standard clause describing claims "arising out of, or relating to, this Contract or the breach thereof" as a provision "for resolving disputes arising out of the contract or its breach." Id., at 4–5, 103 S.Ct., at 931–932.
Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. But other factors may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581–588, [80 S.Ct. 1347, 1352–1358, 4 L.Ed.2d 1409] (1960). Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.” 415 U.S., at 56–57, 94 S.Ct., at 1023–1024 (footnote omitted).

In addition, the Court noted that the informal procedures which make arbitration so desirable in the context of contractual disputes are inadequate to develop a record for appellate review of statutory questions. Such review is essential on matters of statutory interpretation in order to assure consistent application of important public rights.

In Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 101 S.Ct. 1427, 67 L.Ed.2d 641 (1981), we reached a similar conclusion with respect to the arbitrariness of an employee’s claim based on the Fair Labor Standards Act, 29 U.S.C. §§ 201–219. We again noted that an arbitrator, unlike a federal judge, has no institutional obligation to enforce federal legislative policy:

“Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.

“Finally, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, see Gardner-Denver, supra [415 U.S.], at 57–58 [94 S.Ct., at 1024–1025], but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney’s fees, and costs. 29 U.S.C. § 216(b). An arbitrator, by contrast, can award only that to the court to give their reasons for an award.’ United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, [80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424]. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.” 415 U.S., at 57–58, 94 S.Ct., at 1024–1025 (footnote omitted).
compensation authorized by the wage provision of the collective-bargaining agreement. . . . It is most unlikely that he will be authorized to award liquidated damages, costs, or attorney's fees.” 450 U.S., at 744-745, 101 S.Ct., at 1446-1447 (footnote omitted).


The Court's opinions in Alexander, Barrentine, McDonald, and Wilko all explain why it makes good sense to draw a distinction between statutory claims and contract claims. In view of the Court's repeated recognition of the distinction between federal statutory rights and contractual rights, together with the undisputed historical fact that arbitration has functioned almost entirely in either the area of labor disputes or in “ordinary disputes between merchants as to questions of fact,” see n. 11, supra, it is reasonable to assume that most lawyers and executives would not expect the language in the standard arbitration clause to cover federal statutory claims. Thus, in my opinion, both a fair respect for the importance of the interests that Congress has identified as worthy of federal statutory protection, and a fair appraisal of the most likely understanding of the parties who sign agreements containing standard arbitration clauses, support a presumption that such clauses do not apply to federal statutory claims.

III

The Court has repeatedly held that a decision by Congress to create a special statutory remedy renders a private agreement to arbitrate a federal statutory claim unenforceable. Thus, as I have already noted, the express statutory remedy provided in the Ku Klux Act of 1871, the express statutory remedy in the Securities Act of 1933, the express statutory remedy in the Fair Labor Standards Act, and the express statutory remedy in Title VII of the Civil Rights Act of 1964, each provided the Court with convincing evidence that Congress did not intend the protections afforded by the statute to be administered by a private arbitrator. The reasons that motivated those decisions apply with special force to the federal policy that is protected by the antitrust laws.

To make this point it is appropriate to recall some of our past appraisals of the importance of this federal policy and then to identify some of the specific remedies Congress has designed to implement it. It was Chief Justice Hughes who characterized the Sherman Antitrust Act as “a charter of freedom” that may fairly be compared to a constitutional provision. See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360, 53 S.Ct. 471, 473-474, 77 L.Ed. 825 (1933). In United States v. Philadelphia National Bank, 374 U.S. 321, 371, 83 S.Ct. 1715, 1745, 10 L.Ed.2d 915 (1963), the Court referred to the extraordinary “magnitude” of the value choices made by Congress in enacting the Sherman Act. More recently, the Court described the weighty public interests underlying the basic philosophy of the statute:

“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protec-
tion of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."


The Sherman and Clayton Acts reflect Congress' appraisal of the value of economic freedom; they guarantee the vitality of the entrepreneurial spirit. Questions arising under these Acts are among the most important in public law.

The unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress. Since its enactment in 1890, the Sherman Act has provided for public enforcement through criminal as well as civil sanctions. The preeminent federal interest in effective enforcement once justified a provision for special three


20. "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. 210. The current version of the private remedy is codified at 15 U.S.C. § 15(a).

21. "We have often indicated the inappropriate- ness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in Kiefer-Stewart Co. v. Saxgam & Sons, 340 U.S. 211, [71 S.Ct. 259, 95 L.Ed. 219] (1951), that a plaintiff in an antitrust suit could not be judge district courts to hear antitrust claims on an expedited basis, as well as for direct appeal to this Court bypassing the courts of appeals. See, e.g., United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975).

The special interest in encouraging private enforcement of the Sherman Act has been reflected in the statutory scheme ever since 1890. Section 7 of the original Act, used the broadest possible language to describe the class of litigants who may invoke its protection. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328, (1948); see also Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 529, 103 S.Ct. 897, 904, 74 L.Ed.2d 723 (1983).

The provision for mandatory treble damages—unique in federal law when the statute was enacted—provides a special incentive to the private enforcement of the statute, as well as an especially powerful deterrent to violators. What we have debarred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in Simpson v. Union Oil Co., 377 U.S. 13, [84 S.Ct. 1051, 12 L.Ed.2d 98] (1964), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both Simpson and Kiefer-Stewart were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously under-mining the usefulness of the private action as a bulwark of antitrust enforcement. And permit-
scribed as "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," *Lafler v. National Screen Service Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 869, 99 L.Ed. 1122 (1955), is buttressed by the statutory mandate that the injured party also recover costs, "including a reasonable attorney's fee." 15 U.S.C. § 15(a). The interest in wide and effective enforcement has thus, for almost a century, been vindicated by enlisting the assistance of "private Attorneys General," we have always attached special importance to their role because "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972).

There are, in addition, several unusual features of the antitrust enforcement scheme that unequivocally require rejection of any thought that Congress would tolerate private arbitration of antitrust claims in lieu of the statutory remedies that it fashioned. As we explained in *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440, 40 S.Ct. 385, 386, 64 L.Ed. 649 (1920), an antitrust treble-damages case "can only be brought in a District Court of the United States."

The determination that these cases are "too important to be decided otherwise than by competent tribunals" surely cannot allow private arbitrators to assume a jurisdiction that is denied to courts of the sovereign States.

The extraordinary importance of the private antitrust remedy has been emphasized in other statutes enacted by Congress. Thus, in 1913, Congress passed a special Act guaranteeing public access to depositions in Government civil proceedings to enforce the Sherman Act. 37 Stat. 731, 15 U.S.C. § 30. The purpose of that Act plainly was to enable victims of antitrust violations to make evidentiary use of information developed in a public enforcement proceeding. This purpose was further implemented in the following year by the enactment of § 5 of the Clayton Act providing that a final judgment or decree in a Government case may constitute prima facie proof of a violation in a subsequent treble-damages case. 38 Stat. 731, 15 U.S.C. § 16(a). These special remedial provisions attest to the importance that Congress has attached to the private remedy.

In view of the history of antitrust enforcement in the United States, it is not surprising that all of the federal courts that have considered the question have un-
formly and unhesitatingly concluded that agreements to arbitrate federal antitrust issues are not enforceable. In a landmark opinion for the Court of Appeals for the Second Circuit, Judge Feinberg wrote:

"A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public’s interest. ... Antitrust violations can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage. ... We do not believe that Congress intended such claims to be resolved elsewhere than in the courts. We do not suggest that all antitrust litigations attain these swollen proportions; the courts, no less than the public, are thankful that they do not. But in fashioning a rule to govern the arbitrability of antitrust claims, we must consider the rule’s potential effect. For the same reason, it is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations." American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826-827 (1968) (footnote omitted).

This view has been followed in later cases from that Circuit 25 and by the First, 26 Fifth, 27 Seventh, 28 Eighth, 29 and Ninth Circuits. 30 It is clearly a correct statement of the law.

This Court would be well advised to endorse the collective wisdom of the distinguished judges of the Courts of Appeals who have unanimously concluded that the statutory remedies fashioned by Congress for the enforcement of the antitrust laws render an agreement to arbitrate antitrust disputes unenforceable. Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207, and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator’s decision is virtually unreviewable. 31 Despotic decisionmaking of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets. 32 In

31. The arbitration procedure in this case does not provide any right to evidentiary discovery or a written decision, and requires that all proceedings be closed to the public. App. 220-221. Moreover, Japanese arbitrators do not have the power of compulsory process to secure witnesses and documents, nor do witnesses who are available testify under oath. Id., at 218-219. Cf. 9 U.S.C. § 7 (arbitrators may summon witnesses to attend proceedings and seek enforcement in a district court).
32. The greatest risk, of course, is that the arbitrator will condemn business practices under the antitrust laws that are efficient in a free
stead of "muffling a grievance in the cloakroom of arbitration," the public interest in free competitive markets would be better served by having the issues resolved "in the light of impartial public court adjudication." See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 136, 94 S.Ct. 383, 394, 35 L.Ed.2d 348 (1974).33

IseqIV

The Court assumes for the purposes of its decision that the antitrust issues would not be arbitrable if this were a purely domestic dispute, ante, at 3355, but holds that the international character of the controversy makes it arbitrable. The holding rests on vague concerns for the international implications of its decision and a misguided application of Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

International Obligations of the United States

Before relying on its own notions of what international comity requires, it is surprising that the Court does not determine the specific commitments that the United States has made to enforce private agreements to arbitrate disputes arising under public law. As the Court acknowledges, the only treaty relevant here is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997. The Convention was adopted in 1958 at a multilateral conference sponsored by the United Nations. This Nation did not sign the proposed convention at that time; displaying its characteristic caution before entering into international compacts, the United States did not accede to it until 12 years later.

As the Court acknowledged in Scherk v. Alberto-Culver Co., 417 U.S., at 520, n. 15, 94 S.Ct., at 2457, n. 15, the principal purpose of the Convention "was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." However, the United States, as amicus curiae, advises the Court that the Convention "clearly contemplates" that signatory nations will enforce domestic laws prohibiting the arbitration of certain subject matters. Brief for United States as Amicus Curiae 28. This interpretation of the Convention was adopted by the Court of Appeals, 723 F.2d, at 162-166, and the Court declines to reject it, ante, at 3360, n. 21. The construction is beyond doubt.

Article II(3) of the Convention provides that the court of a Contracting State, "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration." This obligation does not arise, however, (i) if the agreement "is null and void, inoperative or incapable of being performed," Art. II(3), or (ii) if the dispute does not concern "a subject matter capable of settlement by arbitration," Art. II(1). The former qualification principally applies to matters of fraud, mistake, and duress in the inducement, or problems of procedural fairness and feasibility. 723 F.2d, at 164. The latter clause plainly suggests the possibility

33. The Court notes that some courts which have held that agreements to arbitrate antitrust claims generally are unenforceable have nevertheless enforced arbitration agreements to settle an existing antitrust claim. Ante, at 3357. These settlement agreements, made after the parties have had every opportunity to evaluate the strength of their position, are obviously less destructive of the private treble-damages remedy that Congress provided. Thus, it may well be that arbitration as a means of settling existing disputes is permissible.
that some subject matters are not capable of arbitration under the domestic laws of the signatory nations, and that agreements to arbitrate such disputes need not be enforced.

This construction is confirmed by the provisions of the Convention which provide for the enforcement of international arbitration awards. Article III provides that each "Contracting State shall recognize arbitral awards as binding and enforce them." However, if an arbitration award is "contrary to the public policy of [a] country" called upon to enforce it, or if it concerns a subject matter which is "not capable of settlement by arbitration under the law of that country," the Convention does not require that it be enforced. Arts. V(2)(a) and (b). Thus, reading Articles II and V together, the Convention provides that agreements to arbitrate disputes which are nonarbitrable under domestic law need not be honored, nor awards rendered under them enforced. 34

This construction is also supported by the legislative history of the Senate's advice and consent to the Convention. In presenting the Convention for the Senate's consideration the President offered the following interpretation of Article II(1):

"The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In

34. Indeed, it has been argued that a state may refuse to enforce an agreement to arbitrate a subject matter which is nonarbitrable in domestic law under Article II(3) as well as under Article III(1). Since awards rendered under such agreements need not be enforced under Article V(2) the agreement is "incapable of being performed." Art. II(3). S.Exec.Doc. E, 90th Cong., 2d Sess., 19 (1968) (hereinafter S.Exec. Doc. E); G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 27-28 (1958).

35. For example, the Cour de Cassation in Belgium has held that disputes arising under a Belgian statute limiting the unilateral termination of exclusive distributorships are not arbitrable under the Convention in that country, Audi some States of the United States, for example, disputes affecting the title to real property are not arbitrable." S.Exec.Doc. E, at 19.

The Senate's consent to the Convention presumably was made in light of this interpretation, and thus it is to be afforded considerable weight. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-185, 102 S.Ct. 2374, 2379-2380, 72 L.Ed.2d 765 (1982).

International Comity

It is clear then that the international obligations of the United States permit us to honor Congress' commitment to the exclusive resolution of antitrust disputes in the federal courts. The Court today refuses to do so, offering only vague concerns for comity among nations. The courts of other nations, on the other hand, have applied the exception provided in the Convention, and refused to enforce agreements to arbitrate specific subject matters of concern to them. 35

36. It may be that the subject-matter exception to the Convention ought to be reserved—as a matter of domestic law—for matters of the greatest public interest which involve concerns that are shared by other nations. The Sherman Act's commitment to free competitive markets is among our most important civil policies. Supra, at 3366-3370. This commitment, shared by other nations which are signatory to the Convention, is hardly the sort of parochial

concern that we should decline to enforce in the interest of international comity. Indeed, the branch of Government entrusted with the conduct of political relations with foreign governments has informed us that the "United States' determination that federal antitrust claims are nonarbitrable under the Convention . . . is not likely to result in either surprise or recrimination on the part of other signatories to the Convention." Brief for United States as Amicus Curiae 30.

Lacking any support for the proposition that the enforcement of our domestic laws in this context will result in international recriminations, the Court seeks refuge in an obtuse application of its own precedent, Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), in order to defend the contrary result. The Scherk case was an action for damages brought by an American purchaser of three European businesses in which it was claimed that the seller's fraudulent representations concerning the status of certain European trademarks constituted a violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). The Court held that the parties' agreement to arbitrate any dispute arising out of the purchase agreement was enforceable under the Federal Arbitration Act. The legal issue was whether the Court's earlier holding in Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed.2d 168 (1953)—"that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933," see 417 U.S., at 510, 94 S.Ct., at 2453—was "controlling authority." Ibid.

The Court carefully identified two important differences between the Wilko case and the Scherk case. First, the statute involved in Wilko contained an express private remedy that had "no statutory counterpart" in the statute involved in Scherk, see 417 U.S., at 513, 94 S.Ct., at 2454. Although the Court noted that this difference provided a "colorable argument" for reaching a different result, the Court did not rely on it. Id., at 513-514, 94 S.Ct., at 2454-2455.

Instead, it based its decision on the second distinction—that the outcome in Wilko was governed entirely by American law whereas in Scherk foreign rules of law would control and, if the arbitration clause were not enforced, a host of international conflict of laws problems would arise. The Court explained:

"Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.

"Such a contract involves considerations and policies significantly different from those found controlling in Wilko. In Wilko, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by con-
MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH 3373

473 U.S. 665
Cite as 105 S.Ct. 3346 (1985)

trust, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.” 417 U.S., at 515–516, 94 S.Ct., at 2455–2456 (footnote omitted).

Thus, in its opinion in Scherk, the Court distinguished Wilko because in that case “no credible claim could have been entertained that any international conflict-of-laws problems would arise.” 417 U.S., at 516, 94 S.Ct., at 2455. That distinction fits this case precisely, since I consider it perfectly clear that the rules of American antitrust law must govern the claim of an American automobile dealer that he has been injured by an international conspiracy to restrain trade in the American automobile market.37

The critical importance of the foreign-law issues in Scherk was apparent to me even before the case reached this Court. See n. 12, supra. For that reason, it is especially distressing to find that the Court is unable to perceive why the reasoning in Scherk is wholly inapplicable to Soler’s antitrust claims against Chrysler and Mitsubishi. The merits of those claims are controlled entirely by American law. It is true that the automobiles are manufactured in Japan and that Mitsubishi is a Japanese corporation, but the same antitrust questions would be presented if Mitsubishi were owned by two American companies instead of by one American and one Japanese partner. When Mitsubishi enters the American market and plans to engage in business in that market over a period of years, it must recognize its obligation to comply with American law and to be subject to the remedial provisions of American statutes.38

The federal claim that was asserted in Scherk, unlike Soler’s antitrust claim, had not been expressly authorized by Congress. Indeed, until this Court’s recent decision in Landreth Timber Co. v. Landreth, 471 U.S. 681, 105 S.Ct. 2297, 85 L.Ed.2d 692 (1985), the federal cause of action asserted by Scherk would not have been entertained in a number of Federal Circuits because it did not involve the kind of securities transaction that Congress intended to regulate when it enacted the Securities Exchange Act of 1934.39 The fraud claimed in Scherk was virtually identical to the breach of warranty claim; arbitration of such claims arising out of an agreement between parties of equal bargaining strength does not conflict with any significant federal policy.

In contrast, Soler’s claim not only implicates our fundamental antitrust policies, supra, at 3366–3370, but also should be evaluated in the light of an explicit congressional finding concerning the disparity in bargaining power between automobile manufacturers and their franchised dealers. In 1956, when Congress enacted special legislation to protect dealers from bad-faith franchise terminations, it recited its intent “to balance the power now heavily weighted in favor of automobile manufacturers.” 70 Stat. 1125. The special federal interest in protecting automobile dealers from overreaching by car manufacturers, as well as the policies underlying the Sherman Act, underscores the folly of the Court’s decision today.


39. The Court’s opinion in Landreth Timber, 471 U.S., at 694–695, n. 7, 105 S.Ct., at 2306, n. 7, does not take issue with my assertion, in dissent, that Congress never “intended to cover negotiated transactions involving the sale of control of a business whose securities have never been offered or sold in any public market.” Id., at 699, 105 S.Ct., at 2313.

V

The Court's repeated incantation of the high ideals of "international arbitration" creates the impression that this case involves the fate of an institution designed to implement a formula for world peace. But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so is it equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute. Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well—the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for matters involving the political passions and the fundamental interests of nations, even the multilateral convention adopted under the auspices of the United Nations recognizes that private international arbitration is incapable of achieving satisfactory results.

In my opinion, the elected representatives of the American people would not have us dispatch an American citizen to a foreign land in search of an uncertain remedy for the violation of a public right that is protected by the Sherman Act. This is especially so when there has been no genuine bargaining over the terms of the submission, and the arbitration remedy provided has not even the most elementary guarantees of fair process. Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator.

Unlike the Congress that enacted the Sherman Act in 1890, the Court today does not seem to appreciate the value of economic freedom. I respectfully dissent.

Review Granted
Previously published at: 105 Cal.App.4th 326
(Cal.Const. art. 6, s 12; Cal. Rules of Court, Rules 8.500, 8.1105 and 8.1110, 8.1115, 8.1120 and 8.1125)
Court of Appeal, Second District, Division 1, California.

DISCOVER BANK, Petitioner,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Christopher Boehr, Real Party in Interest.


Credit card holder filed putative class action against credit card issuer, alleging breach of contract and violation of Delaware Consumer Fraud Act. The Superior Court, Los Angeles County, No. BC 256167, Carolyn B. Kuhl, J., initially granted issuer's motion to compel arbitration and dismissed the class action pursuant to the arbitration agreement's class action waiver, but later granted holder's motion for reconsideration and invalidated the class action waiver. Issuer petitioned for writ of mandate. The Court of Appeal, Ortega, J., held that the Federal Arbitration Act (FAA), which mandates enforcement of arbitration agreements that fall within the scope of the act and preempts a state court's ability to invalidate on state substantive law grounds the express terms of a validly formed arbitration agreement, preempts any otherwise applicable California judicial law finding class action waivers to be substantively unconscionable and invalid.

Petition granted.

West Codenotes
Preempted

Attorneys and Law Firms

*394 Kirkland & Ellis, Jeffrey S. Davidson, Rich Richmond, C. Robert Boldt, Los Angeles, and Amy M. Wilkins for Petitioner.

No appearance for Respondent.

Strange & Carpenter, Brian R. Strange and Gretchen Carpenter; Law Offices of Barry L. Kramer and Barry L. Kramer, Los Angeles, for Real Party in Interest.

Opinion

*395 ORTEGA, J.

According to Blue Cross of California v. Superior Court (1998) 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779 (Blue Cross ), where an arbitration agreement governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) is silent with regard to classwide arbitration, section 4 of the FAA does not bar state courts from ordering classwide arbitration where permitted by California law. (Blue Cross, supra, 67 Cal.App.4th at pp. 62–63, 78 Cal.Rptr.2d 779.) Blue Cross also found that permitting the plaintiff to proceed with class certification efforts in such instances would not violate section 2 of the FAA: “In the absence of an express agreement not to proceed to arbitration on a classwide basis, ordering the parties to arbitrate class claims as authorized by state law does not conflict with their contractual arrangement.” (Id. at p. 64, 78 Cal.Rptr.2d 779.)

The present case concerns a Discover Bank cardholder agreement that also contains an arbitration clause governed by the FAA. Unlike the arbitration agreement in Blue Cross, however, the agreement herein expressly prohibits arbitration on a classwide basis (the prohibition will sometimes be referred to herein as a “class action waiver”). Although section 2 of the FAA mandates the enforcement of arbitration agreements that fall within the scope of the act and preempts a state court's ability to invalidate on state substantive law grounds the express terms of a validly formed arbitration agreement, the lower court struck the class action waiver as substantively unconscionable and invalid under California law. (See Szetela v. Discover Bank (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (Szetela ), in which the identical class action waiver in the same Discover Bank cardholder agreement was declared unconscionable and invalid under California law.) Having invalidated the class action waiver, the lower court granted Discover Bank's motion to compel arbitration, but permitted the plaintiff to attempt to certify a class for arbitration. (See Keating v. Superior Court (1982) 31 Cal.3d 584, 183 Cal.Rptr. 360, 645 P.2d 1192 (Keating ), disapproved on other grounds sub nom. Southland Corp.
In this proceeding, Discover Bank, seeking relief from the order striking the class action waiver, has petitioned for extraordinary writ relief on the ground that the FAA precludes states from forcing parties to arbitrate in a manner contrary to their agreement. (9 U.S.C. § 2.) Apart from the question of whether the FAA preempts a state court's ability to strike a class action waiver on substantive state law grounds, the validity of the arbitration agreement as a whole is not otherwise at issue in this proceeding. We hold that where a valid arbitration agreement governed by the FAA prohibits classwide arbitration, section 2 of the FAA preempts a state court from applying state substantive law to strike the class action waiver from the agreement. Accordingly, we disagree with the Szetela decision and grant Discover Bank's petition.

BACKGROUND

Plaintiff Christopher Boehr obtained a credit card from defendant Discover Bank in April 1986. The Discover Bank cardholder agreement (“agreement”) governing plaintiff's credit card account contained a choice of law clause providing for the application of Delaware and federal law.

A. Addition of the Arbitration Clause to the Agreement

When plaintiff's credit card was issued, the agreement did not contain an arbitration clause. Discover Bank subsequently added the arbitration clause in July 1999, pursuant to a change of terms provision in the agreement. Relying on the change of terms provision, Discover Bank added the arbitration clause by sending to its existing cardmembers (including plaintiff) a notice that stated in relevant part: “NOTICE OF AMENDMENT ... WE ARE ADDING A NEW ARBITRATION SECTION WHICH PROVIDES THAT IN THE EVENT YOU OR WE ELECT TO RESOLVE ANY CLAIM OR DISPUTE BETWEEN U.S. BY ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. THIS ARBITRATION SECTION WILL NOT APPLY TO LAWSUITS FILED BEFORE THE EFFECTIVE DATE.”

B. Plaintiff's Putative Class Action Complaint

On August 15, 2001, plaintiff filed a putative class action complaint in superior court against Discover Bank alleging breach of contract and violation of the Delaware Consumer Fraud Act (6 Del.Code, § 2511 et seq.). The complaint alleged that both causes of action arose under Delaware law.

Allegedly, Discover Bank breached its cardholder agreement by imposing a late fee of approximately $29 on payments that were received on the payment due date, but after Discover Bank's undisclosed 1 p.m. “cut-off time.” Discover Bank also allegedly imposed a periodic finance charge (thereby disallowing a grace period) on new purchases when payments were received on the payment due date, but after 1 p.m.

C. Discover Bank's Motion to Compel Arbitration

*397 In addition, the arbitration clause precluded both sides from participating in classwide arbitration, consolidating claims, or arbitrating claims as a representative or in a private attorney general capacity: “... NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.”

The arbitration agreement also stated that the FAA would govern the agreement: “Your Account involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act (FAA).” “The arbitrator shall follow applicable substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized at law.”

Existing cardholders were notified that if they did not wish to accept the new arbitration clause, they must notify Discover Bank of their objection and cease using their account. Their continued use of the account would be deemed to constitute acceptance of the new terms. Plaintiff did not notify Discover Bank of his objection to the arbitration clause or cease using his account before the stated deadline.


Discover Bank moved to compel arbitration of plaintiff’s claim on an individual basis and to dismiss the class action pursuant to the agreement’s class action waiver.

Plaintiff opposed the motion, contending the unilateral addition of the arbitration clause was unconscionable under California law (Badie v. Bank of America (1998) 67 Cal.App.4th 779, 79 Cal.Rptr.2d 273) (Bank of America). In addition, plaintiff contended the class action waiver was unconscionable and unenforceable under California law.

Discover Bank, on the other hand, argued that Delaware law permits the unilateral addition of arbitration clauses to cardholder agreements (5 Del.Code § 952), and the FAA requires the enforcement of the express provisions of an arbitration clause, including class action waivers. Discover Bank contended that under section 2 of the FAA, arbitration agreements should not be singled out for suspect status under state laws applicable only to arbitration provisions.

Plaintiff’s counsel conceded below that if the trial court applied Delaware law to the agreement, the unilateral addition of the arbitration clause would be valid under Delaware law. (5 Del.Code § 952, subd. (a).) After the parties presented additional briefing on the applicability of Delaware law (particularly whether the Delaware statute allowing the unilateral addition of the arbitration clause was retroactively applicable to the agreement in this case), the trial court concluded that Delaware law governed the agreement.

The trial court initially granted Discover Bank’s motion in its entirety under Delaware law. The trial court found no fundamental California public policy requiring it to reject the parties' selection of Delaware law, under which the unilateral addition of the arbitration clause was conceded to be valid. The trial court stated in part: “Moreover, I don’t find in [Bank of America] an articulation of a public policy against using a clause allowing a unilateral right to amend as a way of adding an arbitration clause. [¶] California law and Delaware law may differ in their analysis of contract formation principles regarding unilateral amendment of contracts, but that does not mean that Delaware's contract formation principles offend fundamental California policy.”

The trial court also found no California public policy reason to invalidate the class action waiver, which was alleged to be a valid waiver under Delaware law. (See Johnson v. West Suburban Bank (3d Cir.2000) 225 F.3d 366 (Johnson), which Discover Bank cites in support of its position that Delaware law permits class action waivers.) The lower court noted the availability of small claims court actions to resolve disputes involving minor sums, and also the availability of the California Unfair Practice Act (Bus. & Prof.Code, § 17200) for injunctive relief. The trial court found no fundamental policy in California to supplant federal and Delaware law permitting contractual waivers of class actions.

D. Plaintiff’s Motion for Reconsideration

After Discover Bank’s motion to compel arbitration was granted, the Fourth District Court of Appeal decided Szetela, supra, 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862, on April 22, 2002. Plaintiff, citing Szetela, moved for reconsideration of that portion of the order enforcing the class action waiver. Plaintiff contended Szetela had articulated California public policy reasons to reject (purported) Delaware law permitting class action waivers.

The lower court found Szetela constituted new and controlling authority for the proposition that under California law, an arbitration class action waiver is unconscionable and, thus, unenforceable. The lower court stated in part, “We now know after Szetela, which is binding on this Court, that the result under California law is different from the result under Delaware law. That is, that California law finds unconscionable and unenforceable a contract provision by which a consumer waives the right to bring a class action.”

The trial court conducted a choice of law analysis and concluded that enforcing the class action waiver under Delaware law would violate a fundamental public policy under California law as articulated in Szetela. Upon determining it would be proper to sever the class action waiver clause from the rest of the arbitration agreement, the trial court struck the class action waiver clause from the agreement, ordered plaintiff to arbitrate his claims individually, and left open the possibility that plaintiff may succeed in certifying an arbitration class under California law.

The written order granting plaintiff’s motion for reconsideration states in part: “Upon reconsideration, this Court’s March 7, 2002[,] order compelling plaintiff
Christopher Boehr to arbitrate his claims is hereby vacated insofar as it precludes arbitration on behalf of a potential class. [¶] ... Based on the law set forth in the Szetela case, and based on Civil Code section 1670.5(a), the portion of Discover's arbitration clause which purports to preclude classwide relief is hereby stricken as unconscionable and against public policy. [¶] ... Notwithstanding the foregoing, this Court's March 7, 2002[,] order compelling plaintiff to arbitrate his claims is not vacated. Plaintiff's individual claims must be arbitrated and plaintiff may seek to certify an arbitration class.”

E. This Writ Proceeding
After the lower court granted plaintiff's motion for reconsideration, Discover Bank filed the present writ petition. Discover Bank seeks reinstatement of the lower court's original order enforcing the arbitration clause in its entirety by compelling plaintiff to arbitrate on an individual basis and precluding him from participating in class litigation or class arbitration. We issued an order to show cause and set the matter for hearing.

DISCUSSION 10

A. The Federal Arbitration Act
[1] [2] [3] [4] The FAA “was enacted in 1925 (43 Stat. 883) and codified in 1947. (61 Stat. *401 669.) It provides in section 2 that a written arbitration provision in a contract ‘evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’ (9 U.S.C.A. § 2, italics added.) ... [¶] The purpose of the act ‘was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.’ [Citations.]” (Blue Cross, supra, 67 Cal.App.4th at p. 48, 78 Cal.Rptr.2d 779.)

[5] [6] “There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.” (Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University (1989) 489 U.S. 468, 476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (Volt ).) The FAA’s “primary purpose [is to] ensur[e] that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate ..., so too may they specify by contract the rules under which that arbitration will be conducted.” (Id. at p. 479, 109 S.Ct. 1248.)

[7] “[S]ection 2 of the act places arbitration agreements on an equal footing with contracts generally. [Citations.] In view of that purpose, the Supreme Court has held: ‘Thus, generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. [Citations.]’ (Doctor's Associates, Inc. v. Casarotto [ (1996) ] 517 U.S. [681,] 687, [116 S.Ct. 1652, 134 L.Ed.2d 902].) However, a state law that invalidates the express terms of an arbitration agreement is preempted by the act.” (Blue Cross, supra, 67 Cal.App.4th at p. 51, 78 Cal.Rptr.2d 779.)

B. A Valid Arbitration Agreement Was Formed
[8] The cardholder agreement in effect when plaintiff opened his credit card account did not contain an arbitration clause. Discover Bank subsequently added the arbitration clause by unilateral amendment, as permitted by the agreement's change of terms clause and Delaware law. Under Delaware law, Discover Bank's unilateral addition of the arbitration clause resulted in the formation of a valid arbitration agreement: “Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to ... arbitration or other alternative dispute resolution mechanisms....” (5 Del.Code § 952, subd. (a).)

[9] [10] In its motion to compel arbitration, Discover Bank urged the trial court *402 to apply Delaware law, as designated in the agreement's choice of law clause, 11 to uphold the formation of a valid arbitration agreement. Plaintiff, on the other hand, contended that upholding the
formation of an arbitration agreement under Delaware law would conflict with California's fundamental public policy as expressed in Bank of America, supra, 67 Cal.App.4th 779, 79 Cal.Rptr.2d 273.

Finding no California fundamental public policy to preclude the application of Delaware law, the trial court concluded a valid arbitration agreement had been formed. In the present proceeding, Discover Bank contends the issue of whether a valid arbitration agreement was formed is not before us. Discover Bank has petitioned for review of the order granting plaintiff's motion for reconsideration of the class action waiver issue. Whether a valid arbitration agreement had been formed was not at issue in plaintiff's motion for reconsideration. By limiting the motion for reconsideration to the class action waiver issue, Discover Bank contends plaintiff is precluded from “reviv [ing] the issue of whether the arbitration clause was validly added to the Cardmember Agreement.”

In his opposition to the writ petition, plaintiff has denied that a valid arbitration agreement was formed, stating that he “admits that Discover purported to add an arbitration clause to the Cardmember Agreement, but denies that such amendment was valid and enforceable.”

According to rule 28(e)(2) of the California Rules of Court, “[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court.” Given that plaintiff in his answer has denied that a valid arbitration agreement was formed, technically the issue is before us. In the discussion portion of plaintiff's brief, however, he failed to supply any arguments or authority to support his claim that no arbitration agreement was formed. Instead, plaintiff's brief focused exclusively on the question of whether the class action waiver was properly stricken from the agreement under Delaware law. The two issues are not the same: whether a valid arbitration agreement was formed under Delaware law requires a choice of law analysis, whereas deciding whether the class action waiver was properly stricken from the agreement requires a federal preemption analysis.

*403 "As stated in People v. Ham (1970) 7 Cal.App.3d 768, 783, [86 Cal.Rptr. 906]: 'Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion.' " (People v. Dougherty (1982) 138 Cal.App.3d 278, 282–283, 188 Cal.Rptr. 123.) Given plaintiff's failure to provide argument or authority to support the position that no arbitration agreement was formed, we need not discuss the issue. We therefore assume that a valid arbitration agreement was formed.

C. Federal Preemption of California Law
Finding Szetela had articulated fundamental public policy reasons not to enforce the parties' choice of law clause, the trial court refused to enforce the class action waiver under Delaware law, finding Delaware law to be contrary to this state's fundamental public policy of prohibiting class action waivers as expressed in Szetela. As we shall explain, however, where there is a valid arbitration agreement governed by the FAA, California's public policy regarding class action waivers has been preempted by section 2 of the FAA.

1. California Policy on Class Action Waivers
In America Online, Inc. v. Superior Court (2001) 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (AOL), the plaintiff filed a putative consumer class action lawsuit under the California Consumer Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.) against America Online, Inc. (AOL), in California. The CLRA specifically provides for the prosecution of class actions. (Civ.Code, §§ 1752, 1781.) The CLRA also voids any purported waiver of rights under the CLRA as being contrary to California public policy. (Civ.Code, § 1751.)

AOL moved to stay or dismiss the class action suit, seeking to enforce the forum selection and choice of law clauses in its agreements with the putative class members. The contracts provided for litigation in Virginia and for Virginia law to govern any dispute arising out of the contractual relationship.

Virginia, however, apparently does not allow consumer lawsuits to be brought as class actions. (AOL, supra, 90 Cal.App.4th at p. 5, 108 Cal.Rptr.2d 699.) The AOL court refused to enforce the Virginia forum selection and choice of law clauses, stating that to do so would violate California public policy by necessitating waivers of the CLRA's statutory remedies, right to bring a class action, and antiwaiver provision. (Id. at p. 15, 108 Cal.Rptr.2d 699.) The court also noted that “Virginia's law provides significantly less consumer protection to its citizens than California law provides for our own.” (Ibid.)
Regarding the absence of any provision in the Virginia Consumer Protection Act of 1977 (Va.Code Ann., § 59.1–196) for class action relief, the AOL court stated that California has an important interest in making class action relief available to consumers: “In contrast to Virginia consumer law’s ostensible hostility to class actions, the right to seek class action relief in consumer cases has been extolled by California courts.... [¶] That this view has endured over the last 30 years is of little surprise given the importance class action consumer litigation has come to play in this state. In light of that history, we cannot accept AOL's assertion that the elimination of class actions for consumer remedies if the forum selection clause is enforced is a matter of insubstantial moment. The unavailability of class action relief in this context is sufficient in and by *404 itself to preclude enforcement of the TOS [terms of service] forum selection clause.” (AOL, supra, 90 Cal.App.4th at pp. 17–18, 108 Cal.Rptr.2d 699, fns. omitted.)

Although choice of law and forum selection clauses may be invalidated under California law as shown in AOL, there is no blanket prohibition against class action waiver clauses. In Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (Washington Mutual Bank ), the California Supreme Court rejected the “suggestion that California businesses dealing with mass groups of consumers should not be permitted to rely on choice-of-law clauses as a means of avoiding involvement in a nationwide class action. The point is not well taken. ‘Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.’ (City of San Jose v. Superior Court [1974] 12 Cal.3d [447] 462, [115 Cal.Rptr. 797, 525 P.2d 701], fn. omitted....) Consequently, an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a multistate or nationwide class action or result in the exclusion of nonresident consumers from a California-based class action. [¶] Of course, choice-of-law agreements have no effect in a class action if the trial court determines that they are unenforceable or that class claims fall outside their scope. Nonetheless, if the class action opponent continues to invoke the application of foreign law to the claims of out-of-state class members, the trial court remains obligated to analyze the governmental interests of the various jurisdictions involved to determine whose law is more properly applied.” (Id. at pp. 918–919, 103 Cal.Rptr.2d 320, 15 P.3d 1071.)

2. Federal Preemption of State Policy

Neither AOL nor Washington Mutual Bank involved an arbitration agreement or the FAA. Where, as here, an arbitration agreement is governed by the FAA, we must engage in federal preemption analysis to determine whether state policy must bow to the federal act.

In Doctor's Associates, Inc. v. Casarotto (1996) 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902, a franchise holder (Casarotto) filed suit in Montana state court against the national franchisor of Subway sandwich shops. The franchise agreement contained an arbitration clause governed by the FAA, which the franchisor sought to enforce. The Montana Supreme Court held the arbitration clause was unenforceable, due to a violation of a Montana statute requiring that notice of arbitration clauses be typed in underlined capital letters on the first page of the contract. The United States Supreme Court reversed, holding that the Montana statute was preempted by section 2 of the FAA.

Casarotto discussed Volt, supra, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488, which upheld an arbitration agreement governed by the FAA. The agreement in Volt incorporated a state procedural rule permitting the stay of arbitration pending the resolution of a related judicial proceeding. Volt held that enforcing the agreement's adoption of the state procedural rule would not conflict with the FAA, because the purpose of the FAA was to ensure that private arbitration agreements are enforced according to their terms. (Id. at p. 688, 109 S.Ct. 1248.)

Casarotto distinguished Volt and concluded that applying Montana's arbitration notice statute would conflict with the purpose of the FAA because the Montana statute would invalidate, rather than enforce, the parties' arbitration agreement. *405 Under section 2 of the FAA, arbitration agreements may not be invalidated for reasons other than those applicable to all contracts: “The ‘goals and policies’ of the FAA, this Court's precedent indicates, are antithetical to threshold limitations placed specifically and solely on arbitration provisions. Section 2 ‘mandate[s] the enforcement of arbitration agreements,’ Southland, 465 U.S. at 10, [104 S.Ct. 852], ‘save upon such grounds as exist at law or in equity
for the revocation of any contract,’ 9 U.S.C. § 2. Section 27–5–114(4) of Montana’s law places arbitration agreements in a class apart from ‘any contract,’ and singularly limits their validity. The State’s prescription is thus inconsistent with, and is therefore preempted by, the federal law.” (Casarotto, supra, 517 U.S. at p. 688, 116 S.Ct. 1652.)

In Southland, supra, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1, the Supreme Court held that California’s Franchise Investment Law (Corp.Code, § 31000 et seq.) (FIL), which provides for the judicial resolution of disputes, was not a defense to enforcement of an arbitration clause governed by the FAA. The FIL, like the CLRA, contains a nonwaiver provision that invalidates any contractual agreement to waive the statute’s protections. Southland held that arbitration agreements may not be invalidated on the ground that state law provides for a nonwaivable judicial forum to resolve disputes: “We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity ‘for the revocation of any contract’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.” (Southland, supra, 465 U.S. at p. 16, 104 S.Ct. 852, fn. 11.)

3. Szetela Failed to Discuss Federal Preemption

Szetela, as previously noted, involved the identical Discover Bank arbitration clause at issue in this case. In Szetela, the plaintiff cardholder filed a class action against Discover Bank for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent or negligent misrepresentation, and deceptive business practices. The plaintiff in Szetela alleged Discover Bank had improperly charged cardholders fees for exceeding their credit limits (overlimit fees of $29) and other penalties. (Szetela, supra, 97 Cal.App.4th p. 1097, 118 Cal.Rptr.2d 862.)

As in this case, Discover Bank moved to compel arbitration in Szetela and the plaintiff was ordered to arbitrate his claim on an individual basis. After Szetela prevailed at arbitration, recovering $29, Szetela appealed from the order compelling arbitration. Treating the appeal as a petition for writ of mandate, the appellate court reached the merits and vacated the order compelling arbitration. The appellate court struck the class action waiver from the arbitration clause, finding it to be unconscionable under California law. (Szetela, supra, 97 Cal.App.4th at pp. 1099–1102, 118 Cal.Rptr.2d 862.)

In striking the class action waiver, Szetela applied California law and rejected the contract’s selection of Delaware and federal law without conducting any choice of law analysis, stating that Discover Bank had failed to brief the choice of law issue. (Szetela, supra, 97 Cal.App.4th at p. 1099, fn. 3, 118 Cal.Rptr.2d 862.) Szetela struck the class action waiver as unconscionable under California law (citing Civ.Code, § 1670.5, subd. (a), which permits the revocation of a contract on the ground of unconscionability) and section 2 of the FAA (citing Casarotto, supra, 517 U.S. at pp. 686–687, 116 S.Ct. 1652). (Szetela, supra, 97 Cal.App.4th at p. 1099, 118 Cal.Rptr.2d 862.)

Although Szetela cited the Casarotto decision, Szetela failed to discuss Casarotto in any detail. Szetela also failed to discuss the preemptive effect of the FAA. Instead, Szetela engaged in a public policy discussion similar to that found in cases such as AOL, supra, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, which do not involve arbitration agreements governed by the FAA.

In finding the class action waiver unconscionable, Szetela first discussed procedural unconscionability. In that context, Szetela found unconscionable the unilateral manner in which the arbitration clause was added to the agreement. Given that the validity of “the arbitration clause as a whole” was not at issue in Szetela (97 Cal.App.4th at p. 1099, fn. 2, 118 Cal.Rptr.2d 862), however, Szetela erred in focusing on procedural unconscionability rather than on federal preemption.

Szetela found the Discover Bank class action waiver to be substantively unconscionable under California law, citing the California Unfair Practices Act (Bus. & Prof.Code, § 17200 et seq.) as one basis for its finding. (Szetela, supra, 97 Cal.App.4th at pp. 1101–1102, 118 Cal.Rptr.2d 862.) As the Southland and Casarotto decisions have shown, however, the FAA has preempted a state’s ability to refuse to enforce an arbitration agreement on the basis of state substantive law. If a state statute requiring a nonwaivable judicial forum for resolution of consumer disputes must give way to section 2 of the FAA, it necessarily must follow that a state judicial policy...
In its petition, Discover Bank states: “Permitting a state court to invalidate as ‘unconscionable’ discrete portions of an arbitration agreement that do not go to the issue of whether an arbitration agreement was formed is tantamount to a license to disregard the FAA altogether. Such a result is untenable given the United States Supreme Court's command that the FAA binds both state and federal courts.” We agree with Discover Bank's position on this point. As explained in Southland, the FAA supersedes state law, and the FAA's substantive law is applicable in both state and federal court. (Southland, supra, 465 U.S. at pp. 10–12, 104 S.Ct. 852.)

The California Supreme Court has recognized that California law, like the FAA, favors the enforcement of valid arbitration agreements: “California law, like federal law, favors enforcement of valid arbitration agreements. (Broughton [v. Cigna Healthplans (1999) ] 21 Cal.4th [1066.] 1074, [90 Cal.Rptr.2d 334, 988 P.2d 67].) As we have observed: ‘Two years after the FAA was enacted, this state adopted its first modern arbitration statute (Stats.1927, ch. 225), declaring arbitration agreements to be irrevocable and enforceable in terms identical to those used in section 2 of the federal act, and since that time California courts and its Legislature have “consistently reflected a friendly policy toward the arbitration process.”' [Citation.] That policy was expanded and clarified in the current arbitration statute which was adopted in 1961 (Stats.1961, ch. 461, § 2 et seq.), and it continues to be the policy of this state.’ (Keating v. Superior Court (1982) 31 Cal.3d 584, 601–602, [183 Cal.Rptr. 360, 645 P.2d 1192], disapproved on other grounds sub nom. Southland Corp. v. Keating (1984) 465 U.S. 1, [104 S.Ct. 852, 79 L.Ed.2d 1].) Thus, under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2; see also, Code Civ. Proc., § 1281.) In other words, under California law, as under federal law, an arbitration agreement may only be invalidated for the same reasons as other contracts.” (Armendariz, supra, 24 Cal.4th at pp. 97–98, 99 Cal.Rptr.2d 745, 6 P.3d 669.)

Accordingly, once an arbitration agreement is found to have been validly formed, California law, like federal law, favors its enforcement. In this case, as previously discussed, due to plaintiff's failure to present any argument or authority to support his assertion that the arbitration agreement was not validly formed, we need not discuss the contract formation issue and have assumed the existence of a valid arbitration agreement.

[11] With that assumption in mind, we conclude section 2 of the FAA, which mandates enforcement of arbitration agreements, preempts any otherwise applicable California judicial law finding class action waivers to be substantively unconscionable and invalid. In reaching this conclusion, we look to Perry v. Thomas, supra, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (Perry), in which the issue was “whether § 2 of the [FAA], which mandates enforcement of arbitration agreements, pre-empts § 229 of the California Labor Code, which provides that actions for the collection of wages may be maintained ‘without regard to the existence of any private agreement to arbitrate.’” Cal. Lab.Code Ann. § 229 (West 1971).” (Id. at p. 484, 107 S.Ct. 2520.)

In upholding the arbitration agreement, Perry discussed the preemptive effect of the FAA as follows: “[T]he present appeal addresses the pre-emptive effect of the [FAA], a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause. Its general applicability reflects that ‘[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered...’” [Dean Witter Reynolds Inc. v. Byrd [1985] 470 U.S. 213, 221, [105 S.Ct. 1238, 84 L.Ed.2d 158]. We have accordingly held that these agreements must be ‘rigorously enforce[d].’ Ibid; see Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 226, [107 S.Ct. 2332, 96 L.Ed.2d 185] (1987); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 625–626, [105 S.Ct. 3346, 87 L.Ed.2d 444] (1987). This clear federal policy places § 2 of the Act in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.” (Perry, supra, 482 U.S. at pp. 490–491, 107 S.Ct. 2520.)

In Perry, the lower courts had not addressed the plaintiff's claim that the arbitration agreement was an unconscionable and unenforceable contract of adhesion. In noting that the issue may be considered on remand, the United States

Supreme Court addressed the choice of law issues that arise when unconscionability defenses are asserted, stating: "We note, however, the choice-of-law issue that arises when defenses such as Thomas' so-called 'standing' and unconscionability arguments are asserted. In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, see Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, [103 S.Ct. 927, 74 L.Ed.2d 765] (1983), 'save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2 (emphasis added). 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. See Prima Paint [Corp. v. Flood & Conklin Mfg. Co.] 388 U.S. [395,404. [87 S.Ct. 1801, 18 L.Ed.2d 1270] [1967]; Southland Corp. v. Keating, 465 U.S., at 16–17, [104 S.Ct. 852], n. 11. 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." (Perry, supra, 482 U.S. at p. 492–493, 107 S.Ct. 2520, fn. 9.)

While a state may prohibit the contractual waiver of statutory consumer remedies, including the right to seek relief in a class action, such protections fall by the wayside when the waiver is contained in a validly formed arbitration agreement governed by the FAA. The anti-waiver provisions in statutes such as section 229 of the California Labor Code and section 31512 of the California Corporations Code are preempted by section 2 of the FAA. (Perry, supra, 482 U.S. at p. 492, 107 S.Ct. 2520; Southland, supra, 465 U.S. at p. 16, 104 S.Ct. 852, fn. 11.) Similarly, we conclude the anti-waiver language found in judicial decisions such as AOL and Szetela also has been preempted by section 2 of the FAA.

Accordingly, we find the lower court erred in granting the motion for reconsideration *409 and striking the class action waiver from the arbitration agreement.

4. The Issues Are Substantive, Not Procedural

Plaintiff contends preemption is not an issue in this case because in state court, the FAA does not preempt matters of procedure, such as class action procedural rules, which are to be governed by state law. In support of this position, plaintiff cites Blue Cross, supra, 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779, which held that because section 4 of the FAA does not apply in state court (section 4 requires federal district courts to apply Federal Rules of Civil Procedure in determining motions to compel arbitration), in the absence of an express agreement to the contrary, state courts may order classwide arbitration where permitted by California law. (Id. at pp. 62–63, 78 Cal.Rptr.2d 779.) The critical distinction between this case and Blue Cross, however, is that here, the agreement contains a class action waiver clause.

Even if we were to view the issues before us as procedural, that would not justify applying state law to this proceeding. Federal rules of procedure are not binding on state courts except where the applicable state rules would defeat the purpose of the FAA. (See Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 409, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) In this case, it would defeat the purpose of the FAA, which was enacted primarily to ensure that arbitration agreements are enforced according to their terms (Volt, supra, 489 U.S. at p. 479, 109 S.Ct. 1248), to strike the class action waiver from the agreement. The FAA’s “primary purpose [is to] ensure[e] that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate ..., so too may they specify by contract the rules under which that arbitration will be conducted." (Ibid.)

In any event, the issues before us are substantive, not procedural. Blue Cross dealt primarily with preemption issues under section 4 of the FAA, and left it to the trial court to determine, in the first instance, whether to impose classwide arbitration in the absence of any contractual provision on the subject. Blue Cross mentioned, but did not decide, the defendant’s contention that because the agreement had
adopted the rules of the American Arbitration Association (AAA), which do not provide for classwide arbitration, it would interfere with the parties' intention to impose classwide arbitration under California's "hybrid" system requiring judicial intervention. *(Blue Cross, supra, 67 Cal.App.4th at p. 64, 78 Cal.Rptr.2d 779.)* Blue Cross did not decide this issue, finding it to be premature given the absence of a trial court decision on the certification issue. *(Ibid.)*

Although Blue Cross did not decide the issue, the issue demonstrates that arguments of unconscionability and unfairness run in both directions where classwide arbitration is concerned. While California courts have, for policy reasons, declared class action waivers to be unconscionable from the consumer's point of view, a competing policy exists to enforce valid arbitration agreements. *(9 U.S.C. § 2.)* Although California courts have recognized the consumer protection value of classwide arbitration, that is not the sole consideration. Courts should also consider the “California rule which prevents reweighing the merits of an arbitrator's decision.” *(Siegel v. Prudential Ins. Co. (1998) 67 Cal.App.4th 1270, 1290, 79 Cal.Rptr.2d 726; Code Civ. Proc., § 1286.2.)* The FAA does not preempt this rule. *(Siegel, at p. 1290, 79 Cal.Rptr.2d 726.)* As judicial review of the merits of an arbitrator's decision may not be had under California law, a multi-million dollar class arbitration award entered on nothing more than mere whim cannot be corrected under California law. Just as consumers may be harmed by the enforcement of an unconscionable class action waiver, defendant companies may be able to prove they will be prejudiced if classwide arbitration is imposed where, even though the arbitration agreement is silent on the subject, the agreement has adopted arbitration rules, such as those of the AAA, that do not provide for classwide arbitration.

In this case, the prejudice to Discover Bank that would be caused by altering the parties' agreement is clear. As classwide arbitration in California vastly increases the scope of potential liability and damages that a defendant will face without the ability to seek judicial review of the merits of the arbitrator's decision, we conclude the decision to strike a classwide arbitration ban from a valid agreement alters substantive, and not just procedural, rights of both parties.

**DISPOSITION**

The petition for writ of mandate is granted. We direct the lower court to vacate its July 11, 2002, order granting plaintiff's motion for reconsideration and to issue a new and different order denying same. The lower court's original order granting the motion to compel arbitration shall be reinstated in full, requiring plaintiff to arbitrate on an individual basis and submit to the class action waiver. Discover Bank is entitled to its costs on this writ proceeding.

We concur: SPENCER, P.J., and MIRIAM A. VOGEL, J.

**Parallel Citations**


Footnotes

1 Section 4 of the FAA requires in part that federal district courts apply federal procedural rules in deciding motions to compel arbitration and, where warranted, to "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

2 Section 2 of the FAA provides in part that arbitration agreements in contracts "evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."


4 In *Keating*, the California Supreme Court considered whether class action arbitration is permissible under California law, assuming a class is maintainable. The court noted that consolidation of arbitration is authorized in certain cases in California. *(Code Civ. Proc., § 1281.3.)* Given the analogous authority to consolidate arbitration proceedings, the court found that class action arbitration should be permitted when the interests of justice so require. *(Keating, supra,* 31 Cal.3d at pp. 611–613, 183 Cal.Rptr. 360, 645 P.2d 1192.)* The Court held that whether classwide arbitration is justified should be left to the trial court's discretion. *(Id. at p. 613, 183 Cal.Rptr. 360, 645 P.2d 1192.)* Factors to be considered include (1) the factors normally relevant to class certification; (2) special circumstances
There apparently are no published Delaware state appellate court decisions on the validity of class action waivers under Delaware law. The change of terms clause in effect when plaintiff's credit card was issued stated that Discover Bank could "change any term or part of this Agreement, including any Finance Charge rate, fee or method of computing any balance upon which the Finance Charge rate is assessed, by sending you a written notice at least 30 days before the change is to become effective. Your express written agreement to any such change or the use of your Account or the card on or after the effective date of the change means that you accept and agree to them. We may apply any such change to the outstanding balance of your Account on the date of the change of terms and to new charges made after that date."

In March 1999, the change of terms clause was amended to permit the unilateral "addition" of new terms or parts to the agreement. Discover Bank informed its existing cardholders (including plaintiff) of this change as follows: "Change of Terms. We are changing this section to permit us to change any term or part of the Agreement or to add any new term or part to the Agreement by sending you a written notice at least 15 days, instead of 30 days, before the change is to become effective. In addition, we are changing this section to require you to notify us in writing within 15 days, instead of 30 days, after the mailing of the notice of change that you do not agree to the change." (Italics added.)

In Bank of America, Division Three of the First District Court of Appeal applied California contract formation law to invalidate an alternate dispute resolution (ADR) clause added to Bank of America's cardholder agreement. Like Discover Bank's cardholder agreement, the Bank of America agreement contained a change of terms clause that permitted the bank's unilateral amendment of the agreement. As in this case, Bank of America notified its existing cardholders of the new ADR clause by means of a "bill stuffer" (an insert sent with the cardholder's monthly billing statement). (Bank of America, supra, 67 Cal.App.4th at pp. 783, 785–786, 791, 79 Cal.Rptr.2d 273.) In Bank of America, the plaintiff cardholders contended the change of terms clause did not entitle the bank to add new terms, such as the ADR, to the agreement. The change of terms clause, the cardholders contended, permitted only the modification of existing terms that were mentioned in the original agreement. The original agreement was silent about the method and forum of dispute resolution. (Id. at p. 800, 79 Cal.Rptr.2d 273.)

Given that the ambiguous change of terms clause was "reasonably susceptible to the interpretations offered by both sides," the Bank of America court interpreted the change of terms clause according to standard rules of contract interpretation. (Bank of America, supra, 67 Cal.App.4th at p. 800, 79 Cal.Rptr.2d 273.) Applying those rules, the Bank of America court concluded the change of terms clause did not authorize the bank unilaterally to add an ADR clause and force a jury waiver by means of "bill stuffers": "Thus, after analyzing the credit account agreements in light of the standard canons of contract interpretation, we conclude that when the account agreements were entered into, the parties did not intend that the change of terms provision should allow the Bank to add completely new terms such as an ADR clause simply by sending out a notice. Further, to the extent that application of these canons of construction has not removed all uncertainty concerning the meaning of the provision, we resort to the rule that ambiguous contract language must be interpreted most strongly against the party who prepared it (Civ.Code, § 1654), a rule that applies with particular force to the interpretation of contracts of adhesion, like the account agreements here. [Citations.] [Application of this rule strengthens our conviction that the parties did not intend that the change of terms provision should permit the Bank to add new contract terms that differ in kind from the terms and conditions included in the original agreements.]." (Id. at p. 803, 79 Cal.Rptr.2d 273, fn. omitted.) Accordingly, the appellate court in Bank of America granted declaratory relief to the individual plaintiffs and refused to enforce the ADR clause against them. (Id. at pp. 806–807, [79 Cal.Rptr.2d 273].)

Discover Bank's counsel informed the trial court that should the prohibition against class action arbitration be invalidated as unconscionable, Discover Bank would elect to proceed with a judicial class action.

There apparently are no published Delaware state appellate court decisions on the validity of class action waivers under Delaware law. Although Delaware state trial court decisions were cited below, we do not rely upon them. The closest authority on the subject is Johnson, supra, 225 F.3d 366, a federal case arising out of a Delaware loan transaction. In Johnson, the Third Circuit upheld an arbitration clause governed by the FAA, even though to do so would deprive the plaintiff of the right to bring a judicial class action in federal court. Johnson follows the line of federal appellate decisions which, under section 4 of the FAA, bar classwide arbitration or consolidated arbitration in federal district courts absent an express agreement to arbitrate class or consolidated claims. (See Champ v. Siegel Trading Co., Inc. (7th Cir.1995) 55 F.3d 269, 271; Government of United Kingdom v. Boeing Co. (2d Cir.1993) 998 F.2d 68, 74; American Centennial Ins. Co. v. National Cas. Co. (6th Cir.1991) 951 F.2d 107, 108; Baesler v. Continental Grain Co. (8th Cir.1990) 900 F.2d 1193, 1195; Protective Life Ins. Corp. v. Lincoln Nat. Life Ins. Corp. (11th Cir.1989) 873 F.2d 281, 282; Del E. Webb Const. v. Richardson Hosp. Authority (5th Cir.1987) 823 F.2d 225.)
We reject as unfounded plaintiff's contention that the writ petition, filed 61 days after the motion for reconsideration was granted, is barred by the doctrine of laches. There is no showing of unreasonable delay and prejudice. (Discover Bank v. Superior Court, 105 Cal.App.4th at pp. 62–63, [78 Cal.Rptr.2d 779]). Johnson does not definitively establish the validity of class action waivers under Delaware law.

The plaintiff borrower in Johnson filed a class action suit against the defendant lender (Delaware Bank), alleging the bank's loan agreement failed to disclose interest rate information required under the Truth in Lending Act (TILA) and Electronic Fund Transfer Act (EFTA). The bank sought to stay the class action and moved to compel arbitration. The Third Circuit enforced the arbitration clause in Johnson, despite the plaintiff's loss of a potential class action remedy under the TILA. Johnson noted the Supreme Court had similarly upheld an arbitration clause in Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, [111 S.Ct. 1647, 114 L.Ed.2d 26], a case brought under the Age Discrimination in Employment Act (ADEA), even though the plaintiff lost the statutory right to bring a class action under the ADEA. (Johnson, supra, 225 F.3d at pp. 374, 377.) Johnson also quoted from the Supreme Court's decision in another TILA case: “ ‘[T]hough pursuing individual claims in arbitration may well be less attractive than pursuing a class action in the courts, we do not agree that compelling arbitration of the claim of a prospective class action plaintiff irreconcilably conflicts with TILA's goal of encouraging private actions to deter violations of the Act. Whatever the benefits of class actions, the FAA 'requires piecemeal resolution when necessary to give effect to an arbitration agreement.’ Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 20, [103 S.Ct. 927, 74 L.Ed.2d 765] (1983) (emphasis in the original).’” (Id. at pp. 374–375.)

As for the class claims, the trial court noted another cardholder not bound by the arbitration clause might be found to represent a putative class of cardholders who had rejected the arbitration clause.

We reject as unfounded plaintiff's contention that the writ petition, filed 61 days after the motion for reconsideration was granted, is barred by the doctrine of laches. (H.D. Arnaiz, Ltd. v. County of San Joaquin (2002) 96 Cal.App.4th 1357, 1368, 118 Cal.Rptr.2d 71.)

We also reject plaintiff's contention that the writ proceeding is premature given that no class has been certified as yet. This proceeding is in a procedural posture similar to that in Blue Cross, supra, 67 Cal.App.4th at p. 48, [78 Cal.Rptr.2d 779], where the appellate court concluded the matter was ripe for writ review even though no class had yet been certified. The court stated: “To allow discovery to proceed as to the existence of a class if classwide arbitration is not allowed would waste judicial resources and burden the parties with unnecessary expense of time and money. In addition, to defer a decision on this issue would result in ‘lingering uncertainty in the law.’ (Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 170, [188 Cal.Rptr. 104, 655 P.2d 306],)’ (Id. at p. 48, [78 Cal.Rptr.2d 779]).

Finally, we reject plaintiff's contention that the order granting the motion for reconsideration was the equivalent of a denial of Discover Bank's motion to compel arbitration and, as such, was an appealable order. (Code Civ. Proc., § 1294, subd. (a).) According to the record, the motion to compel arbitration was granted, not denied, despite the trial court's ultimate refusal to enforce the class action waiver clause.


“[T]he proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties' or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue...'. (Rest., § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.” (Nedlloyd, supra, 3 Cal.4th at p. 466, [11 Cal.Rptr.2d 330, 834 P.2d 1148], fns. omitted.)
Due to our disagreement with the **Szetela** decision, we place no reliance upon cases cited by plaintiff that have adopted **Szetela's** reasoning. (See **Luna v. Household Finance Corp. III** (W.D.Wa.2002) 236 F.Supp.2d 1166; **ACORN v. Household International, Inc.** (N.D.Cal.2002) 211 F.Supp.2d 1160, 1170–1171.)

In the recent decision of **Mandel v. Household Bank (Nevada) Nat. Assn.** (2003) 105 Cal.App.4th 75, 129 Cal.Rptr.2d 380, 2003 WL 57282 Division Three of the Fourth Appellate District (the same division that decided the **Szetela** case) severed and invalidated as unconscionable a class action waiver clause contained in a credit card arbitration agreement that was otherwise upheld under Nevada law. **Mandel** rejected the bank's contention that the FAA had preempted a state's ability to refuse to enforce a class action waiver clause as substantively unconscionable under state law. **Mandel** discussed the FAA preemption issue as follows: “Defendant asserts that to some undefined extent, a state's public policy is preempted by the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), and the parties' agreement as to the manner of arbitration, including a prohibition on class treatment, must be enforced. Certainly, if a state's law disfavors arbitration and creates unreasonable hurdles to the enforcement of arbitration agreements governed by the FAA, it is preempted. (See **Doctor's Associates, Inc. v. Casarotto** (1996) 517 U.S. 681, 687, [116 S.Ct. 1652, 134 L.Ed.2d 902].) But Nevada law favors arbitration of disputes (**Phillips v. Parker** (1990) [106 Nev. 415], 794 P.2d 716, 718), and therefore federal preemption is inapplicable.” (**Mandel, supra**, 105 Cal.App.4th at p. 83, 129 Cal.Rptr.2d 380.)

It appears **Mandel** rejected the FAA preemption argument without recognizing that its refusal to uphold the class action waiver was contrary both to the terms of the arbitration agreement and Nevada's policy of favoring arbitration agreements. Given that the FAA's substantive law is applicable in both state and federal court (**Southland, supra**, 465 U.S. at pp. 10–12, [104 S.Ct. 852]), we do not find **Mandel** to be persuasive authority on the preemption issue and decline to follow it.
executive and quasi-judicial acts of the Commission brought before a court had finally determined, in an action for injunctive or declaratory relief, that the performance of such acts was unconstitutional. For that reason, as the majority explains, we need not decide whether the Commission's former structure did render it subservient to the Legislature. (Maj. opn., ante, 30 Cal.Rptr.3d at p. 67, 113 P.3d at p. 1093.)

I write separately to stress why the de facto officer doctrine (or a closely related rule) applies here. While plaintiffs' separation-of-powers challenge is not, strictly speaking, an attack on the qualifications or appointment of any particular officer, it does, as the majority observes, rest on aspects of the Commission members' appointment and tenure; consequently, if successful, it would, like a collateral attack on an officer's qualifications or appointment to office, undermine the validity of all the Commission's executive or quasi-judicial acts. (Maj. opn., ante, 30 Cal.Rptr.3d at p. 69, 113 P.3d at p. 1095.) Because of the reasonable public reliance on an agency's prima facie legitimacy, to require that this type of challenge be brought first in an action for prospective relief rather than in a direct attack on past agency actions is appropriate and fair.

The majority, as I understand it, does not embrace any broader doctrine precluding a party from raising fundamental flaws in an agency action directly in challenges to those actions. As a general rule, individuals aggrieved by government actions affecting them or their property may present fundamental legal challenges in a timely complaint or petition directly attacking the government action. (See Travis v. County of Santa Cruz (2004) 33 Cal.4th 757, 767–769, 16 Cal. Rptr.3d 404, 94 P.3d 538 [challenge to permit conditions imposed under allegedly unconstitutional and preempted ordinance]; Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal.4th 809, 819–822, 107 Cal. Rptr.2d 369, 23 P.3d 601 [challenge to continued collection of tax under ordinance allegedly adopted in violation of state law].) The court's opinion today should not be read as suggesting, instead, that a separate action for declaratory or injunctive relief must generally be successfully pursued before an agency's actions can be challenged as unconstitutional.

With this understanding, I have signed the majority opinion.

I CONCUR: BROWN, J.
ed by the Federal Arbitration Act (FAA).
Reversed and remanded.
Concurring and dissenting opinion by Baxter, J., with Chin and Brown, JJ., concurring.
Opinion 129 Cal.Rptr.2d. 393, superseded.

1. Contracts ⇔1

The doctrine of unconscionability of a contract has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results.

2. Contracts ⇔1

The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.

3. Contracts ⇔1

Substantively unconscionable contract terms may take various forms, but may generally be described as unfairly one-sided.

4. Arbitration ⇔6.2

Waiver of class arbitration in a consumer contract of adhesion is unconscionable under California law and should not be enforced, when it occurs in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. West's Ann.Cal.Civ. Code § 1668.

5. Arbitration ⇔2.2
States ⇔18.15

California public policy prohibiting the enforcement of class action waivers applies to waivers contained in arbitration agreements, including those governed by the Federal Arbitration Act, and is not preempted by the FAA. 9 U.S.C.A. § 2.


6. Arbitration ⇔1.2, 6.2

California law, like federal law, favors enforcement of valid arbitration agreements, and under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2; West's Ann. Cal.C.C.P. § 1281.

7. Arbitration ⇔2.2
States ⇔18.15

The principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, such as would be preempted by the Federal Arbitration Act (FAA), but to contracts generally; it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements. 9 U.S.C.A. § 2; West's Ann.Cal.C.C.P. § 1281.

8. Arbitration ⇔2.2, 6.2
States ⇔18.15

State courts are not obliged to enforce contractual terms even if those terms are found to be unconscionable or contrary to public policy under general contract law principles just because contract contains arbitration provision coming under the Federal Arbitration Act (FAA); agreements to arbitrate may not be used to harbor terms, conditions and practices that undermine state public policy. 9 U.S.C.A. § 2; West's Ann.Cal. C.C.P. § 1281.

9. Arbitration ⇔2.2

Provision of Federal Arbitration Act (FAA) that federal district courts petitioned to compel arbitration will do so in accordance with the terms of the agreement precludes
class action arbitration when the agreement
does not provide for it, does not apply to

10. Arbitration \(\Rightarrow 23.13\)
Under California law, the question
whether grounds exist for the revocation of
an arbitration agreement based on grounds
as exist for the revocation of any contract, is
for the courts to decide, not an arbitrator;
this includes the determination of whether
arbitration agreements or portions thereof
are deemed to be unconscionable or contrary
to public policy. West's Ann.Cal.C.C.P.
§ 1281.2.

11. Contracts \(\Rightarrow 129(1)\)
Under California's choice-of-law provi-
sions, if the trial court finds that the claims
at issue fall within the scope of a choice-of-
law clause, it must next evaluate the clause's
enforceability pursuant to the analytical ap-
proach reflected in Restatement Second of
Conflict of Laws (Restatement) § 187 (2).
Restatement (Second) Conflict of Laws
§ 187(2).

12. Contracts \(\Rightarrow 129(1)\)
If the trial court finds that claims at
issue fall within the scope of a choice-of-law
clause, and if California has a materially
greater interest than the chosen state, a
choice of law that is contrary to California's
fundamental policy will not be enforced.

Kirkland & Ellis, Jeffrey S. Davidson, Rick
Richmond, C. Robert Boldt, Amy M. Wilkins,
Timothy B. Jafek, Los Angeles; Stroock &
Strook & Lavan and Julia B. Strickland,
Los Angeles, for Petitioner.

Morrison & Foerster and Maren E. Nelson
for California Bankers Association as Amicus
Curiae on behalf of Petitioner.

M. Jane Brady, Attorney General (Del-
aware); Severson & Werson and William L.
Stern, San Francisco, for Robert A. Glen,
Delaware State Bank Commissioner as Ami-
cus Curiae on behalf of Petitioner.

Rintala, Smoot, Jaenicke & Rees, G. How-
den Fraser, Los Angeles; Wilmer, Cutler &
Pickering and Christopher R. Lipssett for
American Bankers Association, American Fi-
nancial Services Association and Consumer
Bankers Association as Amici Curiae on be-
half of Petitioner.

Gibson, Dunn & Crutcher, Mark E. Weber,
Gabriel J. Pasette, Los Angeles; Stokes
Lawrence, Kelly T. Noonan and Bradford
Axel for AT & T Wireless Services, Inc., as
Amicus Curiae on behalf of Petitioner.

Littler Mendelson, Henry D. Lederman,
Marissa M. Tirona and James Y. Wu for
Ralphs Grocery Company as Amicus Curiae
on behalf of Petitioner.

No appearance for Respondent.

Trial Lawyers for Public Justice, F. Paul
Bland, Jr., Michael J. Quirk, Arthur H.
Bryant, Leslie A. Bailey, Kate Gordon;
Strange & Carpenter, Brian R. Strange,
Gretchen Carpenter, Los Angeles; Law Of-
fices of Barry Kramer and Barry L. Kramer
for Real Party in Interest.

Bramson, Plutzik, Mahler & Birkhaeuser
and Robert M. Bramson, Walnut Creek, for
National Association of Consumer Advocates
as Amicus Curiae on behalf of Real Party in
Interest.

Deborah M. Zuckerman, Michael R. Schus-
ter; Kemnitzer, Anderson, Barron & Ogilvie
and Mark F. Anderson, San Francisco, for
AARP as Amicus Curiae on behalf of Real
Party in Interest.

The Sturdevant Law Firm, James C. Stur-
devant, San Francisco; Ian Herzog, Santa
Monica; Michael Adler; Sharon J. Arkin,
Newport Beach; Stuart B. Esner, Los Ange-
les.; Brian S. Kabateck, Los Angeles; David
A. Rosen, Los Angeles; Daniel U. Smith,
Kentfield; Christine D. Spagnoli; Lea–Ann
Tratten; Steven B. Stevens, Los Angeles,
and Scott H.Z. Sumner, Walnut Creek, for
Consumer Attorneys of California as Amicus
Curiae on behalf of Real Party in Interest.

Ghalchi & Associates, Kamran Ghalchi,
Los Angeles; Adhoot & Wolfson, Tina Wolf-
son, Los Angeles, and Robert Adhoot for
Rebecca Shakib and Karen Bernard as Amici
Curiae on behalf of Real Party in Interest.
MORENO, J.

This case concerns the validity of a provision in an arbitration agreement between Discover Bank and a credit cardholder forbidding classwide arbitration. The credit cardholder, a California resident, alleges that Discover Bank had a practice of representing to cardholders that late payment fees would not be assessed if payment was received by a certain date, whereas in actuality they were assessed if payment was received after 1:00 p.m. on that date, thereby leading to damages that were small as to individual consumers but large in the aggregate. Plaintiff filed a complaint claiming damages for this alleged deceptive practice, and Discover Bank successfully moved to compel arbitration pursuant to its arbitration agreement with plaintiff.

Plaintiff now seeks to pursue a classwide arbitration, which is well accepted under California law. (See Keating v. Superior Court (1982) 31 Cal.3d 584, 613–614, 183 Cal.Rptr. 360, 645 P.2d 1192 (Keating), overruled on other grounds in Southland Corp. v. Keating (1984) 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (Southland).) But plaintiff’s arbitration agreement with Discover Bank has a clause forbidding classwide arbitration. Moreover, the agreement has a Delaware choice-of-law provision. Discover Bank argues that Delaware law allows contracting parties to waive class action remedies. The trial court ruled that the class arbitration waiver was unconscionable and enforced the arbitration agreement with the proviso that plaintiff could seek classwide arbitration. The Court of Appeal, without disputing that such class arbitration waivers may be unconscionable under California law and without addressing the choice-of-law issue, nonetheless held that the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) preempts the state law rule that class arbitration waivers are unconscionable.

As explained below, we conclude that, at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration. We further conclude that the Court of Appeal is incorrect that the FAA preempts California law in this respect. Finally, we will remand to the Court of Appeal to decide the choice-of-law issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following undisputed facts are largely drawn from the Court of Appeal opinion. Plaintiff Christopher Boehr obtained a credit card from defendant Discover Bank in April 1986. The Discover Bank cardholder agreement (agreement) governing plaintiff’s credit card account contained a choice-of-law clause providing for the application of Delaware and federal law.

When plaintiff’s credit card was issued, the agreement did not contain an arbitration clause. Discover Bank subsequently added the arbitration clause in July 1999, pursuant to a change-of-terms provision in the agreement. Relying on the change-of-terms provision, Discover Bank added the arbitration clause by sending to its existing cardholders (including plaintiff) a notice that stated in relevant part: “NOTICE OF AMENDMENT ... WE ARE ADDING A NEW ARBITRATION SECTION WHICH PROVIDES THAT IN THE EVENT YOU OR WE ELECT TO RESOLVE ANY CLAIM OR DISPUTE BETWEEN U.S. BY ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. THIS ARBITRATION SECTION WILL NOT APPLY TO LAWSUITS FILED BEFORE THE EFFECTIVE DATE.”

In addition, the arbitration clause precluded both sides from participating in classwide arbitration, consolidating claims, or arbitrating claims as a representative or in a private attorney general capacity: “... NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY.”
The arbitration agreement also stated that the FAA would govern the agreement: “Your Account involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act (FAA).” “The arbitrator shall follow applicable substantive law to the extent consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized at law.” Existing cardholders were notified that if they did not wish to accept the new arbitration clause, they must notify Discover Bank of their objections and cease using their accounts. Their continued use of an account would be deemed to constitute acceptance of the new terms. Plaintiff did not notify Discover Bank of any objection to the arbitration clause or cease using his account before the stated deadline.

On August 15, 2001, Boehr filed a putative class action complaint in superior court against Discover Bank. Plaintiff alleged two causes of action—breach of contract and violation of the Delaware Consumer Fraud Act (Del.Code Ann., tit. 6, §§ 2511–2527). The latter act in part prohibits misrepresentations “of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale, lease or advertisement of any merchandise.” (Id., § 2513.) He alleged that Discover Bank breached its cardholder agreement by imposing a late fee of approximately $29 on payments that were received on the payment due date, but after Discover Bank’s undisclosed 1:00 p.m. “cut-off time.” Discover Bank also allegedly imposed a periodic finance charge (thereby disallowing a grace period) on new purchases when payments were received on the payment due date, but after 1:00 p.m. The complaint acknowledged that the contract with Discover Bank provided that the contract was “governed by federal law and the law of Delaware.” Plaintiff alleged, however, that “this choice of law provision applies only to plaintiff’s substantive claims and not to other issues related to the contract, which plaintiff contends are governed by California or other applicable law.”

Discover Bank moved to compel arbitration of plaintiff’s claim on an individual basis and to dismiss the class action pursuant to the arbitration agreement’s class action waiver.

Plaintiff opposed the motion,contending among other things that the class action waiver was unconscionable and unenforceable under California law. Discover Bank, on the other hand, argued that the FAA requires the enforcement of the express provisions of an arbitration clause, including class action waivers. Discover Bank contended that under section 2 of the FAA, arbitration agreements should not be singled out for suspect status under state laws applicable only to arbitration provisions.

The trial court initially granted Discover Bank’s motion in its entirety under Delaware law. After Discover Bank’s motion to compel arbitration was granted, the Fourth District Court of Appeal decided Szetela v. Discover Bank (2002) 97 Cal.App.4th 1094, 118 Cal.Rptr.2d 862 (Szetela), which held, for reasons explained below, that a virtually identical class action waiver was unconscionable. Plaintiff, citing Szetela, moved for reconsideration of that portion of the order enforcing the class action waiver.

The lower court found Szetela constituted new and controlling authority for the proposition that, under California law, an arbitration class action waiver is unconscionable and, thus, unenforceable. The trial court further conducted a choice-of-law analysis and concluded that enforcing the class action waiver under Delaware law would violate a fundamental public policy under California law as articulated in Szetela. Upon determining it would be proper to sever the class action waiver clause from the rest of the arbitration agreement, the trial court struck the class action waiver clause from the agree-

1. Plaintiff also contended below that the unilateral addition of the arbitration clause was unconscionable under California law. (See Badie v. Bank of America (1998) 67 Cal.App.4th 779, 79 Cal.Rptr.2d 273.) That contention was rejected by the trial court and the Court of Appeal, and the issue was not raised in the petition for review. Accordingly, we do not address the issue and omit most of the discussion of the proceedings pertaining to the issue in the courts below from our statement of facts.
ment, ordered plaintiff to arbitrate his claims individually, and left open the possibility that plaintiff may succeed in certifying an arbitration class under California law.

After the lower court granted plaintiff's motion for reconsideration, Discover Bank filed a writ petition seeking reinstatement of the lower court's original order enforcing the arbitration clause in its entirety by compelling plaintiff to arbitrate on an individual basis and precluding him from participating in class litigation or class arbitration. The Court of Appeal issued an order to show cause.

The Court of Appeal granted Discover Bank's writ. It did not take issue with the premise that class action waivers are unenforceable, at least under some circumstances, under California law and that this rule could override the Delaware choice-of-law provision. But the Court of Appeal held, for reasons elaborated below, that any California rule prohibiting class action waivers was preempted by the FAA, and that Szetela had failed to adequately analyze the federal preemption issue. It therefore upheld the Discover Bank class action waiver. We granted review.

II. DISCUSSION

A. Class Action Law Suits and Class Action Arbitration

Before addressing the questions at issue in this case, we first consider the justifications for class action lawsuits. These justifications were set forth in Justice Mosk's oft-quoted majority opinion in Vasquez v. Superior Court (1971) 4 Cal.3d 800, 808, 94 Cal.Rptr. 796, 484 P.2d 964 (Vasquez): "Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent prac-

This same concerns were acknowledged by the United States Supreme Court: "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action
solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” (Amchem Products, Inc. v. Windsor (1997) 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689.)

It is this important role of class action remedies in California law that led this court to devise the hybrid procedure of classwide arbitration in Keating, supra, 31 Cal.3d 584, 183 Cal.Rptr. 360, 645 P.2d 1192. In that case, plaintiff 7–Eleven franchisors sought to invalidate an arbitration agreement between them and Southland Corporation and proceed with class action litigation to redress Southland’s alleged systemic misconduct. This court held that the arbitration agreement was enforceable for most of the claims. In considering the impact that enforcement of the arbitration agreement would have on class action claims, the Keating court stated: “This court has repeatedly emphasized the importance of the class action device for vindicating rights asserted by large groups of persons. We have observed that the class suit ‘both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. [Citation.]’ ” [Citation.] Denial of a class action in cases where it is appropriate may have the effect of allowing an unscrupulous wrongdoer to ‘retain[ the benefits of its wrongful conduct.’ [Citation.] [Moreover,] ‘[c]ontroversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party.’ ” (Keating, supra, 31 Cal.3d at p. 609, 183 Cal.Rptr. 360, 645 P.2d 1192, fn. omitted.)

The Keating court recognized that “[w]ithout doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration, ideally ‘a complete proceeding, without resort to court facilities.’ ” [Citation.] The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement. A good deal of care, and ingenuity, would be required to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay. [Citation.] [¶]

An adhesion contract is not a normal arbitration setting, however, and what is at stake is not some abstract institutional interest but the interests of the affected parties.” (Keating, supra, 31 Cal.3d at p. 613, 183 Cal.Rptr. 360, 645 P.2d 1192.) Keating’s endorsement of classwide arbitration has been echoed by subsequent Court of Appeal decisions. (See, e.g., Sanders v. Kinko’s, Inc. (2002) 99 Cal.App.4th 1106, 121 Cal.Rptr.2d 766; Blue Cross of California v. Superior Court (1998) 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779.)

B. The Enforceability of Class Action Waivers

Keating judicially authorized classwide arbitration in a case in which the arbitration agreement at issue was silent on the matter. It did not answer directly the question whether a class action waiver may be unenforceable as contrary to public policy or unconscionable. Recent cases have addressed that question. First, the Court of Appeal discussed the validity of a contractual class action waiver outside the arbitration context in America Online, Inc. v. Superior Court (2001) 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (AOL). Several former AOL subscribers alleged that AOL had continued to debit their credit cards for monthly service fees after their subscriptions had been canceled. (Id. at p. 5, 108 Cal.Rptr.2d 699.) The plaintiffs filed a class action lawsuit alleging violation of the Consumers Legal Remedies Act (CLRA) (Civ.Code, § 1750 et seq.), the Unfair Business Practices Act and several common law causes of action. The subscription contracts contained Virginia forum selection and choice-of-law provisions. Because Virginia law did not permit consumer class action lawsuits, those provisions were the "function-
al equivalent” of a waiver of class action lawsuits. (Ibid.)

The AOL court held the forum selection and choice-of-law provisions to be unenforceable. As to the latter, the court stated: “While “California does not have any public policy against a choice of law provision, where it is otherwise appropriate” [citation] and “choice of law provisions are usually respected by California courts . . .” [citation] “an agreement designating [a foreign] law will not be given effect if it would violate a strong California public policy . . . [or] ‘result in an evasion of . . . a statute of the forum protecting its citizens.’” [Citation.]” (AOL, supra, 90 Cal.App.4th at p. 13, 108 Cal. Rptr.2d 699, quoting Hall v. Superior Court (1983) 150 Cal.App.3d 411, 416–417, 197 Cal. Rptr. 757; see also Nedlloyd Lines B.V. v. Superior Court (1982) 3 Cal.4th 459, 466, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (Nedlloyd) [an arm’s length choice-of-law provision between commercial entities will not be enforced if it violates a fundamental California public policy and California has materially greater interests than the chosen state].)

The AOL court found in the CLRA a statute that overrode the choice-of-law provision. The court noted that the statute contained an antiwaiver provision, Civil Code section 1751, which states: “Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.” The court reasoned that following Virginia law would result in a waiver of the CLRA in light of the fact that the equivalent Virginia consumer protection statute, the Virginia Consumer Protection Act of 1977 (Va.Code Ann. § 59.1-196), was significantly weaker. (AOL, supra, 90 Cal. App.4th at pp. 15–16, 108 Cal.Rptr.2d 699.) Among the most important differences between the two statutes was the lack of a provision permitting class action relief in the Virginia statute. (Id. at p. 17, 108 Cal. Rptr.2d 699.)

The court held that the class arbitration waiver was unenforceable. It first recognized that unconscionability was one reason to refuse to enforce an arbitration waiver. (Szetela, supra, 97 Cal.App.4th at pp. 1097, 118 Cal.Rptr.2d 862.) It found procedural unconscionability in the adhesive nature of the contract. (Id. at p. 1100, 118 Cal.Rptr.2d 862.) The court also found substantive unconscionability in the imposition of a one-sided and oppressive class action waiver provision. “This provision is clearly meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the $29 sought by Szetela. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while
suffering no similar detriment to its own rights. [*] . . . The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place. By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness. [*] . . . This is not only substantively unconscionable, it violates public policy by granting Discover a ‘get out of jail free’ card while compromising important consumer rights.” (Szetela, supra, 97 Cal. App.4th at p. 1101, 118 Cal.Rptr.2d 862; see also Ting v. AT & T (9th Cir.2003) 319 F.3d 1126, 1151 [concluding class action waivers in CLRA claim violated California law, relying in part on Szetela]; Ingle v. Circuit City Stores, Inc. (9th Cir.2003) 328 F.3d 1165, 1176 [same].)

Turning to the present case, we note that plaintiff does not plead a CLRA cause of action and so does not invoke its antiwaiver provision 2; nor does he seek recovery under any other California statute as to which a class action remedy is essential. (See Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 100–101, 99 Cal.Rptr.2d 745, 6 P.3d 669 (Armendariz).) Rather, plaintiff contends that class action or arbitration waivers in consumer contracts, and in this particular contract, should be invalidated as unconscionable under California law.

1–3] “To briefly recapitulate the principles of unconscionability, the doctrine has ‘both a ‘procedural’ and a ‘substantive’ element,” the former focusing on “‘oppression’” or “‘surprise’” due to unequal bargaining power, the latter on “‘overly harsh’” or “‘one-sided’” results.’ [Citation.] The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, ‘‘which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’’ . . . [*] Substantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided.” (Little v. Auto Stiegler, Inc. (2003) 29 Cal.4th 1064, 1071, 130 Cal.Rptr.2d 892, 63 P.3d 979 (Little), cert. den. sub nom. Auto Stiegler, Inc. v. Little (2003) 540 U.S. 818, 124 S.Ct. 83, 157 L.Ed.2d 35.)

We agree that at least some class action waivers in consumer contracts are unconscionable under California law. First, when, a consumer is given an amendment to its cardholder agreement in the form of a “bill stuffer” that he would be deemed to accept if he did not close his account, an element of procedural unconscionability is present. (Szetela, supra, 97 Cal.App.4th at p. 1100, 118 Cal.Rptr.2d 862.) Moreover, although adhesive contracts are generally enforced (Graham v. Scissor–Tail, Inc. (1981) 28 Cal.3d 807, 817–818, 171 Cal.Rptr. 604, 623 P.2d 165), class action waivers found in such contracts may also be substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy. As stated in Civil Code section 1668: “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” (Italics added.)

Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because “[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit” (Linder, supra, 23
DISCOVER BANK v. SUPERIOR COURT  
Cite as 113 P.3d 1100 (Cal. 2005)  

Cal. 4th at p. 446, 97 Cal.Rptr.2d 179, 2 P.3d 27), “the class action is often the only effective way to halt and redress such exploitation.” (Ibid.) Moreover, such class action or arbitration waivers are indisputably one-sided. “Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class-action lawsuits.” (Setzela, supra, 97 Cal.App.4th at p. 1101, 118 Cal.Rptr.2d 862.) Such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.

We acknowledge that other courts disagree. Some courts have viewed class actions or arbitrations as a merely procedural right, the waiver of which is not unconscionable. (See, e.g., Strand v. U.S. Bank National Association ND (N.D.2005) 693 N.W.2d 918, 926 (Strand); Blaz v. Belfer (5th Cir. 2004) 368 F.3d 501, 504–505; Johnson v. West Suburban Bank (3d Cir.2000) 225 F.3d 366, 369; Champ v. Siegel Trading Co., Inc. (1995) 55 F.3d 269, 277; but see Leonard v. Terminix Intern. Co. L.P. (Ala.2002) 854 So.2d 529, 538 [class action waiver together with limitation of damages clause in adhesive consumer arbitration agreement deprives plaintiffs of a “meaningful remedy” and is therefore unconscionable]; State v. Berger (2002) 211 W.Va. 549, 567 S.E.2d 265, 278 [holding contract provision limiting class action rights unconscionable]; Powertel v. Blexley (Fla.Dist.Ct.App.1999) 743 So.2d 570, 576 [same].) But as the above cited cases of this court have continually affirmed, class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights. Affixing the “procedural” label on such devices understates their importance and is not helpful in resolving the unconscionability issue.

Nor are we persuaded by the rationale stated by some courts that the potential availability of attorney fees to the prevailing disregarded merely because it may hinder the prosecution of a multistate or nationwide class action or result in the exclusion of nonresident consumers from a California-based class action.” (Ibid.)

Our conclusion that the defendant was not precluded from varying the state law that would control its agreements “merely because it may hinder the prosecution of a multistate or nationwide class action” is a long way from categorically approving class action waivers. It is one thing to hold that class action waivers are unenforceable under certain circumstances, and quite another to require companies to structure their agreements so as to optimize the chance that those who litigate against them will be able to obtain nationwide class certification. Moreover, the Washington Mutual Bank court did not foreclose the possibility of class certification in the case before it. Nor did it express any views on the choice-of-law provision before it, affirming the conclusion of Restatement Second of Conflict of Laws, section 187, comment b, that in the case of contracts of adhesion “the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent.” (Washington Mutual Bank, supra, at p. 918, fn. 6, 103 Cal.Rptr.2d 320, 15 P.3d 1071.) Nothing in Washington Mutual Bank can be interpreted to suggest a view, one way or the other, on the enforceability of class action waivers in contracts of adhesion.
party in arbitration or litigation ameliorates
the problem posed by such class action waivers. (Strand, supra, 693 N.W.2d at p. 926; Snowden v. Checkpoint Check Cashing (4th Cir.2002) 290 F.3d 631, 638.) There is no indication other than these courts' unsupported assertions that, in the case of small individual recovery, attorney fees are an adequate substitute for the class action or arbitration mechanism. Nor do we agree with the concurring and dissenting opinion that small claims litigation, government prosecution, or informal resolution are adequate substitutes.

[4] We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.” (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

C. FAA Preemption of California Rules Against Class Action Waivers

1. The Court of Appeal Opinion

[5] The Court of Appeal did not dispute the conclusions of AOL and Szetela that, at least under some circumstances, a class action waiver would be unconscionable or contrary to public policy. The court concluded, however, that when class action waivers are contained in arbitration agreements, California law prohibiting such waivers is preempted by section 2 of the FAA (9 U.S.C. § 2). We conclude the Court of Appeal erred.

[6] We begin by reviewing some basic principles pertaining to the enforcement of arbitration agreements. “California law, like federal law, favors enforcement of valid arbitration agreements. [Citation.] . . . Thus, under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (Armendariz, supra, 24 Cal.4th at pp. 97–98, 99 Cal.Rptr.2d 745, 6 P.3d 669, fn. omitted; see also 9 U.S.C. § 2; Code Civ. Proc., § 1281.) In other words, although under federal and California law, arbitration agreements are enforced “in accordance with their terms” (Volt Info. Sciences v. Leland Stanford Jr. U. (1989) 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (Volt)), such enforcement is limited by certain general contract principles “at law or in equity for the revocation of any contract.”

At the outset of our discussion, we note that the FAA is silent on the matter of class actions and class action arbitration. Indeed, not only is classwide arbitration a relatively recent development, but class action litigation for damages was for the most part unknown in federal jurisdictions at the time the FAA was enacted in 1925. (Act of Feb. 12, 1925, ch. 213, 43 Stat. 883.) The Congress that enacted the FAA therefore cannot be said to have contemplated the issues before us. Accordingly, our conclusions with respect to FAA preemption must come from the United States Supreme Court’s articulation of general principles regarding such preemption.

In support of its conclusion, the Court of Appeal cited Perry v. Thomas (1987) 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 1966 revision of Rule 23.” (Ortiz v. Fibreboard Corp. (1999) 527 U.S. 815, 833, 119 S.Ct. 2295, 144 L.Ed.2d 715.) This revision gave class actions their “current shape,” in part by authorizing “class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded.” (Amchem Products, Inc. v. Windsor, supra, 521 U.S. at pp. 613–614, 117 S.Ct. 2231.)
that a contract to arbitrate is at issue does not comport with this requirement of § 2. [Citations.] 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.” (Perry, supra, 482 U.S. at pp. 492–493, fn. 9, 107 S.Ct. 2520 italics added.) The Court of Appeal quoted the above language and also noted similar reasoning in the seminal case of Southland, supra, 465 U.S. at page 16, 104 S.Ct. 852 in which the Supreme Court held that a California statute prohibiting arbitration of certain claims under the Franchise Investment Law was preempted by the FAA.5

Based on the above, the Court of Appeal concluded: “While a state may prohibit the contractual waiver of statutory consumer remedies, including the right to seek relief in a class action, such protections fall by the wayside when the waiver is contained in a validly formed arbitration agreement governed by the FAA. The antiwaiver provisions in statutes such as section 229 of the Labor Code . . . are preempted by section 2 of the FAA. Similarly, we conclude the antiwaiver language found in judicial decisions such as AOL and Szetela also has been preempted by section 2 of the FAA.”

[7] The Court of Appeal’s conclusion is puzzling, because it ignores the critical distinction made by the Perry court between a “state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue,” which is preempted by section 2 of the FAA, and a state law that “govern[s] issues concerning the validity, revocability, and enforceability of contracts generally,” which is not. (Perry, supra, 482 U.S. at p. 493, fn. 9, 107 S.Ct. 2520.) “[U]nder section 2 of the FAA, a state court may

---

5. We note that although the Southland court overruled the portion of our Keating decision holding that the statute was not preempted by the FAA, it expressly declined to rule on the
refuse to enforce an arbitration agreement based on ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (Little, supra, 29 Cal.4th at p. 1079, 130 Cal.Rptr.2d 892, 63 P.3d 979, quoting Doctor’s Associates, Inc. v. Casarotto (1996) 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902.) In the present case, the principle that class action waivers are, under certain circumstances, unconscionable as un-lawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements. (See AOL, supra, 90 Cal. App.4th at pp. 17–18, 108 Cal.Rptr.2d 699.)

In that important respect it differs from the provision under consideration in Perry, which singled out certain arbitration agreements as unenforceable.

The Court of Appeal also relied on statements found in Volt, supra, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488. In Volt, the parties agreed to arbitrate under California law, which permitted a stay of arbitration proceedings while litigation was pending. (See Code Civ. Proc., § 1281.2, subd. (c).) Such a stay would not have been allowed under the relevant parts of the FAA. (9 U.S.C. §§ 3, 4; Volt, supra, 489 U.S. at pp. 471–472 & fn. 2, 109 S.Ct. 1248.) The Volt court rejected the federal preemption argument and affirmed the parties’ right to structure its arbitration agreement according to California rules. It stated, in a passage quoted by the Court of Appeal below, that the FAA’s “primary purpose [is to] ensur[e] that private agreements to arbitrate are enforced according to their terms.” (Volt, supra, 489 U.S. at p. 479, 109 S.Ct. 1248.)

[8] The Court of Appeal in the present case concluded that, unlike in Volt, the imposition of class action arbitration despite a class action waiver in the arbitration agreement would defeat the purpose of the FAA because it would not be enforcing the arbitration agreement according to its terms. We disagree. Volt’s dictum that the primary purpose of the FAA is to “ensur[e] that private agreements to arbitrate are enforced according to their terms” (Volt, supra, 489 U.S. at p. 479, 109 S.Ct. 1248) was intended to explain why the procedural rules provided in arbitration agreements should be enforced, rather than imposing the rules contained in the FAA. (Id. at pp. 478–479, 109 S.Ct. 1248.) Nothing in Volt, nor any other Supreme Court case, however, suggests that state courts are obliged to enforce contractual terms even if those terms are found to be unconscionable or contrary to public policy under general contract law principles. As discussed, section 2 of the FAA and cases interpreting it make clear that state courts have no such obligation. Agreements to arbitrate may not be used to “harbor terms, conditions and practices” that undermine public policy. (Little, supra, 29 Cal.4th at p. 1079, 130 Cal.Rptr.2d 892, 63 P.3d 979.)

[9] Discover Bank cites various cases holding that the requirement of section 4 of the FAA that federal district courts petitioned to compel arbitration will do so “in accordance with the terms of the agreement” precludes class action arbitration when the agreement does not provide for it. (See, e.g., Champ v. Siegel Trading Co., Inc., supra, 55 F.3d 269, 277.) But as we have recognized, section 4 does not apply to state court proceedings. (Cronus Investments, Inc. v. Concierge Services, LLC (2005) 35 Cal.4th 376, 388–389, 25 Cal.Rptr.3d 540, 107 P.3d 217; see Blue Cross of California v. Superior Court, supra, 67 Cal.App.4th 42, 62–64, 78 Cal.Rptr.2d 779 [concluding that neither § 4 nor any other part of the FAA precludes classwide arbitration].) Aside from that, there is no suggestion that the quoted language in section 4 overrides the principle embodied in section 2 that state courts can refuse to enforce arbitration agreements or portions thereof based on general contract principles. As discussed, the FAA does not
federalize the law of unconscionability or related contract defenses except to the extent that it forbids the use of such defenses to discriminate against arbitration clauses. (See Perry, supra, 482 U.S. at p. 493, fn. 9, 107 S.Ct. 2520.) There is no such discrimination here with respect to California's rule against class action waivers.

The Court of Appeal opinion below also relied on the supposed shortcomings of arbitration to bolster its conclusion that a class action waiver is enforceable under the FAA. As the court stated: "Although California courts have recognized the consumer protection value of classwide arbitration, that is not the sole consideration. Courts should also consider the 'California rule which prevents reweighing the merits of an arbitrator's decision.' [Citation.] The FAA does not preempt this rule. [Citation.] As judicial review of the merits of an arbitrator's decision may not be had under California law, a multi-million dollar class arbitration award entered on nothing more than mere whim cannot be corrected under California law."

Far from holding that the invalidation of a class action waiver discriminates against arbitration, the Court of Appeal below reasoned in effect that arbitration is an inferior forum and therefore cannot be entrusted with classwide claims. The court's conclusion regarding the unsuitability of arbitration to class actions reflects, as we stated in the context of another proposed limitation on arbitration, "the very mistrust of arbitration that has been repudiated by the United States Supreme Court." (Armendariz, supra, 24 Cal.4th at p. 120, 99 Cal.Rptr.2d 745, 6 P.3d 669.) Moreover, as explained below, there is nothing to indicate that class action and arbitration are inherently incompatible.

2. *Gilmer v. Interstate/Johnson Lane Corp.*

Discover Bank and its amici curiae also argue that their position on FAA preemption is supported by language in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26. In that case, the court considered whether the Age Discrimination in Employment Act (ADEA; 29 U.S.C. § 621 et seq.) precluded arbitration of claims brought under that act. The court made clear that the inquiry was into congressional intent to preclude arbitration, discoverable through the language, legislative history, or through "an inherent conflict between arbitration and the ADEA's underlying purposes." (Gilmer, supra, 500 U.S. at p. 26, 111 S.Ct. 1647.) The *Gilmer* court rejected the argument that there was such an inherent conflict because of the supposed lack of collective action mechanisms in the New York Stock Exchange arbitration rules under which plaintiff's arbitration was being conducted. As the court stated: "The NYSE rules ... provide for collective proceedings. [Citation.] But 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" (Gilmer, supra, 500 U.S. at p. 32, 111 S.Ct. 1647.) The above passage does not support Discover Bank's position. At most, the *Gilmer* court can be understood to mean that a party can still vindicate his or her rights under the ADEA even if no class action remedy is available. The ADEA is an employment discrimination statute in which large individual awards are commonplace. (See Carnahan, *Removing the Scarlet A* (Aug. 12, 2002) Forbes, at p. 78 [reporting that the median award in employee age discrimination suits is $269,000].) Under California law, classwide arbitration is only justified when "gross unfairness would result from the denial of opportunity to proceed on a classwide basis." (Keating, supra, 31 Cal.3d at p. 613, 183 Cal.Rptr. 360, 645 P.2d 1192.)

Moreover, in *Gilmer* the plaintiff sought to use the supposed lack of a class action remedy as a reason for invalidating the entire arbitration agreement. In the present case, the enforceability of the arbitration agreement itself is not in question, only enforcement of the class action waiver. *Gilmer*’s determination that the lack of class action remedies does not give rise to an inherent conflict between the ADEA and the FAA does not lend support to the proposition that
the FAA categorically precludes states from enforcing arbitration-neutral rules that prohibit consumer class action waivers in some circumstances.  


Discover Bank’s argues that Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S.Ct. 2402, 156 L.Ed.2d 414 (Bazzle), issued after the filing of the Court of Appeal opinion, supports the position that a state law rule against class arbitration waivers is preempted by the FAA. We disagree.

In Bazzle, several customers sued Green Tree Financial Corp. (Green Tree), alleging that the company failed to provide them with a form informing them of their right to name their own lawyer and insurance agent, contrary to South Carolina law. They sought class certification, and Green Tree sought to compel arbitration pursuant to arbitration agreements with the plaintiffs. The trial court both certified a class action and entered an order compelling arbitration. Two class arbitration proceedings were conducted, and in both instances, the arbitrators awarded the class several million dollars in statutory damages. The trial court confirmed the awards. (Bazzle, supra, 539 U.S. at pp. 448–449, 123 S.Ct. 2402.) Green Tree challenged on appeal, among other things, the legality of the class arbitration. The South Carolina Supreme Court held that the arbitration agreements were silent with respect to classwide arbitration and that, under South Carolina law, silence would be construed to permit such arbitration. (Id. at p. 450, 123 S.Ct. 2402.)

The Bazzle court addressed a narrow question: Green Tree disputed whether the arbitration clause was silent on classwide arbitration, arguing that the contract language in fact prohibited such arbitrations. As the court’s plurality framed the issue: “[W]e must deal with that argument at the outset, for if it is right, then the South Carolina court’s holding is flawed on its own terms; that court neither said nor implied that it would have authorized class arbitration had the parties’ arbitration agreement forbidden it.” (Bazzle, supra, 539 U.S. at p. 450, 123 S.Ct. 2402 (plur. opn. of Breyer, J.).)

Even on this narrow issue, Bazzle produced no majority opinion. A plurality of four justices held that the question whether the contract was in fact silent on arbitration was for the arbitrator to decide, and remanded for an arbitral determination. As the plurality stated: “In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of ‘clea[re] and unmistakabl[ely] evidence to the contrary).” (Citation.) These limited instances typically involve matters of a kind that ‘contracting parties would likely have expected a court’ to decide. (Citation.) They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. (Citations.) [¶] The question here whether—the contracts forbid class arbitration—does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties.” (Bazzle, supra, 539 U.S. at p. 452, 123 S.Ct. 2402.)

6. Several federal cases, relying in part on Gilmer, have held that enforcement of arbitration clauses prohibiting class actions did not inherently conflict with the federal Truth in Lending Act (TILA; 15 U.S.C. § 1601 et seq.) (See Snowden v. Checkpoint Check Cashing, supra, 290 F.3d at pp. 638–639; Randolph v. Green Tree Fin. Corp. (11th Cir.2001) 244 F.3d 814, 818 (Randolph); Johnson v. West Suburban Bank, supra, 225 F.3d at p. 369.) These courts reasoned, inter alia, that even without class actions, “the statute contains other incentives—statutory damages and attorneys fees—for bringing TILA claims.” (Randolph, supra, at p. 818; see 15 U.S.C. § 1640(a)(2)(A) [providing $100 minimum statutory damages for TILA violations].) These decisions, which address whether a federal statute impliedly limits arbitration, are obviously not binding on this court when it decides whether class arbitration waivers are unconscionable under state law principles. Moreover, as discussed, there is no reason to believe that attorney fee and minimal statutory damages remedies, in cases in which the amount of individual damages are slight, are adequate substitutes for class actions in vindicating consumer rights and deterring misconduct.
Justice Stevens filed a concurring opinion that stated in part: “The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement, and that the agreement between these parties is silent on the issue. [Citation.] There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina. See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., [supra], 489 U.S. 468, 475–476, 109 S.Ct. 1248, 103 L.Ed.2d 488.

“Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court. [Citation.] Because the decision to conduct a class-action arbitration was correct as a matter of law, and because petitioner has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker, there is no need to remand the case to correct that possible error. [¶] Accordingly, I would simply affirm the judgment of the Supreme Court of South Carolina. Were I to adhere to my preferred disposition of the case, however, there would be no controlling judgment of the Court. In order to avoid that outcome, and because JUSTICE BREYER's opinion expresses a view of the case close to my own, I concur in the judgment.” (Bazzle, supra, 539 U.S. at pp. 455–456, 123 S.Ct. 2402 (conc. & dis. opn. of Stevens, J.).

Chief Justice Rehnquist, writing also for Justices Kennedy and O'Connor, would have held that the question whether the agreement is silent on classwide arbitration is for the court, rather than the arbitrator, to decide. (Bazzle, supra, 539 U.S. at pp. 457–458, 123 S.Ct. 2402.) The dissent viewed the choice of class arbitration as relating to the choice of arbitrator (Bazzle, supra, 539 U.S. at p. 456, 123 S.Ct. 2402) and concluded that this choice “is as important a component of the agreement to arbitrate as is the choice of what is to be submitted [for arbitration].” (Id. at pp. 456–457, 123 S.Ct. 2402.) On the merits, the Chief Justice would have decided the contract interpretation in Green Tree's favor, i.e., that the contract forbade class action arbitration and that such waiver is fully enforceable. (Id. at pp. 458–459, 123 S.Ct. 2402.)

Justice Thomas adhered to his previous view that the FAA does not apply to state court proceedings. (Bazzle, supra, 539 U.S. at p. 460, 123 S.Ct. 2402 (dis. opn. of Thomas, J.).)

Reading the plurality opinion together with Justice Stevens's opinion, the most that might be derived from Bazzle is a narrow holding: that when the question of whether a class action arbitration is available depends on whether or not the arbitration agreement is silent on the matter or expressly forbids class action arbitration, then it is up to the arbitrator, not the court, to determine whether the arbitration agreement is in fact silent.

More significant than Bazzle's holding, for purposes of the present case, is what it did not decide. The court did not address whether a state court can, consistent with the FAA, hold a class action waiver appearing in a contract of adhesion for arbitration unconscionable or contrary to public policy, as part of an arbitration-neutral law that finds all such waivers unenforceable. As noted, the plurality in framing the issue stated “that the [South Carolina Supreme Court] neither said nor implied that it would have authorized class arbitration had the parties' arbitration agreement forbidden it.” (Bazzle, supra, 539 U.S. at p. 450, 123 S.Ct. 2402 (plur. opn. of Breyer, J.).) Under California law, as discussed, class arbitration may be authorized, even when a contract of adhesion forbids it, because a class arbitration waiver may be unconscionable. Bazzle does not call into question the principle that state courts may enforce general contract rules regarding unconscionability and public policy that preclude class action waivers.

[10] Nor did the court address the question whether that determination of unconscionability should be made by a court or an arbitrator. The court was in general agreement that courts should be left to decide certain “gateway matters” (Bazzle, supra, 539 U.S. at p. 452, 123 S.Ct. 2402 (plur. opn. of Breyer, J.)) or “fundamental” matters such as the validity and scope of the arbitra-
tion agreement (id. at pp. 456–457, 123 S.Ct. 2402 (dis. opn. of Rehnquist, C. J.)). Under California law, the question whether “grounds exist for the revocation of the [arbitration] agreement” based on “grounds as exist for the revocation of any contract” is for the courts to decide, not an arbitrator. (Code Civ. Proc., § 1281.2; see Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal.4th 951, 973, 64 Cal.Rptr.2d 843, 938 P.2d 903.) This includes the determination of whether arbitration agreements or portions thereof are deemed to be unconscionable or contrary to public policy. (See, e.g., Little, supra, 29 Cal.4th at p. 1076, 130 Cal.Rptr.2d 892, 63 P.3d 979; Balandran v. Labor Ready, Inc. (2004) 124 Cal.App.4th 1522, 1530, 22 Cal.Rptr.3d 441 [question of unconscionability of arbitration agreement a gateway issue to be resolved by the court]; see also, e.g., Miller v. Drezel Burnham Lambert, Inc. (11th Cir.1986) 791 F.2d 850, 854; American General Finance, Inc. v. Branch (Ala.2000) 793 So.2d 738, 743; In re Arbitration Between Teleserve Systems, Inc. & MCI Telecommunications Corp. (N.Y.App.Div. 1997) 230 A.D.2d 585, 594, 659 N.Y.S.2d 659.) Nothing in Bazzle is to the contrary.

Amicus curiae United States Chamber of Commerce argues that the imposition of classwide arbitration undermines the purpose of the FAA by drastically altering the rules by which the parties agreed to arbitrate, transforming arbitration into a less efficient and less desirable mechanism of dispute resolution. Bazzle lends no support to that position. On the contrary, although Bazzle could have been disposed of easily if a majority had decided that arbitrations and class actions were inherently incompatible, and that class action arbitration therefore could not be instituted without an express agreement, the court did not take that route. The fact that a majority of the court looked to state law rules to determine whether class arbitration is authorized indicates its view that there is no such incompatibility. The only justice to comment directly on this issue, Justice Stevens, concluded that nothing in the FAA prohibits state courts from authorizing classwide arbitration in agreements silent on the matter. (Bazzle, supra, 539 U.S. at pp. 454–455, 123 S.Ct. 2402 (conc. opn. of Stevens, J.).)


We reiterate what this court said over 20 years ago in Keating: “Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives.” (Keating, 31 Cal.3d at p. 613, 183 Cal.Rptr. 360, 645 P.2d 1192.) We continue to believe that the alternatives—either not enforcing arbitration agreements and requiring class action litigation, or allowing arbitration agreements to be used as a means of completely inoculating parties against class liability—are unacceptable. Nothing in the FAA nor in Bazzle requires us to reconsider that assessment.7

7. Amicus curiae Ralphs Grocery Co. argues that section 5 of the FAA forbids the enforcement of classwide arbitrations not consented to by the parties. Section 5 provides, in pertinent part: “If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.” (9 U.S.C. § 5.) Amicus curiae con-
It may be the case that arbitration becomes a less desirable forum from Discover Bank’s viewpoint if the arbitration must be conducted in a classwide manner. But the fact that a court’s refusal to enforce an unconscionable term of an arbitration agreement makes that agreement less desirable to the party imposing the term does not argue in favor of its enforcement.8

D. Choice–of–Law Issue

Our holding that the FAA does not prohibit a California court from refusing to enforce a class action waiver that is unconscionable does not bring a resolution to this case. The agreement between Discover Bank and plaintiff has a Delaware choice-of-law agreement and Discover Bank argues that under Delaware law, a class arbitration waiver is enforceable. Because the Court of Appeal concluded that any California rule against class arbitrations waivers was preempted by the FAA, it did not address the question whether the Delaware choice-of-law provision requires the enforcement of the class arbitration waiver. It must do so on remand. For the Court of Appeal’s guidance on remand, we offer these comments.

[11, 12] We have summarized California’s choice-of-law provisions9 as follows: “If the trial court finds that the . . . claims [at issue] fall within the scope of a choice-of-law clause, it must next evaluate the clause’s enforceability pursuant to the analytical approach reflected in section 187, subdivision (2) of the Restatement Second of Conflict of Laws (Restatement). Under that approach, the court tends that the imposition of a class action is inconsistent with their right to choose a method of selecting arbitrators under section 5.

We reject Ralphs Grocery Co.’s argument. First, it is unclear whether section 5 applies to state courts. (See Volt, supra, 489 U.S. at p. 477, fn. 6, 109 S.Ct. 1248; Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394, 407, fn. 6, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) We need not resolve the issue here, however. As noted, section 2 of the FAA requires that arbitration agreements be enforced according to their terms. (Volt, supra, at p. 478, 109 S.Ct. 1248.) Section 5 merely provides a specific application of that general rule for arbitrator selection procedures. As such, reading section 2 and section 5 together, a party’s contract providing arbitrator-selection rules will be followed unless those rules are otherwise unenforceable under general rules of contract. As discussed above, a prohibition against class action waivers under some circumstances is one such general rule of contract.

8. We note both parties agree that, in the event a classwide arbitration is compelled, Discover Bank may waive the arbitration agreement and have the matter brought in court.

9. Because the Delaware choice-of-law provision appears to apply to itself, we would normally start by reviewing Delaware choice-of-law principles. (See Nedlloyd, supra, 3 Cal.4th at p. 469, fn. 7, 11 Cal.Rptr.2d 330, 834 P.2d 1148.) In the present case, the parties do not discuss Delaware choice-of-law rules nor argue they differ from California rules. The question therefore becomes one of California law. (Ibid.)
waiver of plaintiff's right to bring a class action lawsuit under the CLRA would not be enforced against a California resident, concluding that the CLRA class action remedy furthered a “strong public policy of the state.” (AOL, supra, 90 Cal.App.4th at p. 15, 108 Cal.Rptr.2d 699.) The present case differs from AOL in that plaintiff is not invoking the anti-waiver provision of the CLRA, nor is he seeking to enforce an obligation imposed by the CLRA or any other California statute. Instead, he has brought this action under the Delaware Consumer Fraud Act and Delaware contract law, but seeks to enforce those Delaware laws in a California court with a California unconscionability rule against class action waivers that arguably is not found under Delaware law. Whether he may do so remains to be determined on remand. Also to be addressed is plaintiffs’ argument that class arbitration rules are procedural rules that California courts are to apply even when the substantive law dictated by contract is from another state (see Rest.2d Conf. of Laws, supra, § 122), as well as any other choice-of-law arguments appropriately raised.

III.Disposition

The judgment of the Court of Appeal is reversed, and the cause is remanded for proceedings consistent with this opinion.

WE CONCUR: GEORGE, C.J., KENNARD and WERDEGAR, JJ.

Concurring and Dissenting Opinion by BAXTER, J.

I concur in part and dissent in part. I agree with the majority that federal law does not compel enforcement of contractual class action waivers simply because they are contained in arbitration agreements. But I lament the majority’s determination to use this case as a vehicle to resolve the issue of California’s policy on class action waivers. For two reasons, we need not, and should not, confront that question here.

First, because the Court of Appeal upheld the instant waiver solely by finding federal preemption of any California antiwaiver policy, that court did not decide whether such a policy exists. Ordinarily, we do not address, on review, issues that were not decided by the Court of Appeal.

Second, the majority’s questionable decision to deem the class action waiver in this contract unconscionable by California standards—a determination at odds with the vast weight of authority elsewhere (see discussion, post)—is simply moot under the particular circumstances. The parties reasonably agreed that Delaware law would govern all aspects of their contractual relationship, and plaintiff has asserted only Delaware causes of action. Thus, regardless of California’s position on class waivers, California has a manifest obligation to evaluate the waiver under Delaware law alone. Because Delaware, like most other jurisdictions, would uphold the waiver, California—the fortuitous venue for this “nationwide” class action—must honor it.

If the majority insists on reaching beyond the issues addressed by the Court of Appeal, it should at least identify and resolve the dispositive one. Instead, the majority, so bold on the waiver issue, avoids deciding the choice-of-law issue. Despite some mild cautionary admonitions, the majority leaves the Court of Appeal free on remand to dishonor the class waiver under California law despite the contrary Delaware rule.

In that event, the parties’ reasonable contractual expectations, as well as the strong interest of Delaware itself in the application of its own law to this issue, would be frustrated. Moreover, if California courts must, or may, dishonor class action waivers that are perfectly valid under the governing law selected by the parties themselves, California—which now takes a minority position on this issue—might well become the magnet for countless nationwide consumer class lawsuits that could not be maintained elsewhere. I cannot accept such a result.

I briefly review what I deem the pertinent aspects of this controversy. The cardholder agreement at issue in this case, as modified by Discover Bank in 1999, specifies that either party may choose arbitration, rather than litigation, of a dispute under the contract, and that neither party may obtain class treatment. As plaintiff concedes, the agree-
DISCOVER BANK v. SUPERIOR COURT

Cite as 113 P.3d 1100 (Cal. 2005)

The choice of Delaware law is hardly startling in view of Discover Bank's Delaware domicile. Indeed, Delaware requires that "[a] revolving credit plan between a [Delaware-chartered] bank and an individual borrower shall be governed by the laws of [Delaware]." (Del.Code Ann., tit. 5, § 966, italics added.)

Thus, unwilling to take the bitter with the sweet, plaintiff would now rather apply California law to a single issue governed by the contract. After agreeing to one-on-one arbitration in a contract choosing Delaware law, he now seeks to proceed as a nationwide class representative by persuading California courts, through the application of California law, to dishonor his contractual waiver of class treatment. As the majority itself cogently states the matter, he and his counsel have selected a California forum so that, in an action representing Discover Bank cardholders from all 50 states, he can "enforce . . . Delaware laws . . . [but] with a California unconscionability rule against class arbitration waivers." (Maj. opn., ante, 30 Cal. Rptr.3d at p. 96, 113 P.3d at p. 117.)

He should not be allowed to do so. The solution to this case lies in a straightforward application of the choice-of-law test set forth in Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (Nedlloyd) and Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (Washington Mutual). Under that test, California will apply the law of contracting parties. The law of California applies in this case.

tual choice if (1) the chosen state has a substantial relationship to the parties or their transaction or (2) there is any other reasonable basis for the parties' choice of law, unless the chosen state's law offends a "fundamental" California policy. Even where there is a "fundamental" conflict, the chosen state's law will apply unless California has a materially greater interest than the chosen state in resolving the particular issue. (Washington Mutual, supra, at pp. 916–917, 103 Cal.Rptr.2d 320, 15 P.3d 1071; Nedloyd, supra, at pp. 464–466, 11 Cal.Rptr.2d 330, 834 P.2d 1148.) By these standards, plaintiff's effort to apply California class waiver law, to the extent it differs from Delaware's, clearly fails.

The first two considerations favoring application of the chosen state's law are easily satisfied here. Delaware, where Discover Bank is domiciled, has a substantial relationship to the parties and the transaction. Moreover, the choice of Delaware's law as uniformly applicable to Discover Bank's nationwide credit card business is entirely reasonable. The relationship to Delaware becomes even more substantial, and the choice of its law even more reasonable, by virtue of Delaware's express statutory requirement that its law shall govern.

Furthermore, in the circumstances of this case, the contractual waiver is not so contrary to "fundamental" California policy that California should invalidate it despite contrary Delaware law. The majority suggests the waiver is unconscionable. But unconscionability is simply a matter of contract law—it constitutes a "generally applicable contract defense[ ]" (Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669 (Armendariz), quoting Doctor's Associates, Inc. v. Casarotto (1996) 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902) based on a claim that a particular agreement, or a term thereof, is unfairly oppressive to one party under the particular circumstances. (See Civ.Code, § 1668.) In the majority's view, such waivers may have an exculpatory effect because, given the usually modest amount of each cardholder's personal claim against Discover Bank, litigation or arbitration on an individual basis is impractical and uneconomic. The majority posits that because cardholders and their attorneys have no incentive to pursue such claims except by aggregating them with other similar complaints, Discover Bank will escape liability or punishment for its improper practices.

I find this analysis unpersuasive for several reasons. At the outset, I cannot accept the facile premise that lack of a class remedy is equivalent to exculpation of an alleged wrongdoer. Class treatment, in whatever forum, is a relatively recent invention, designed to encourage and facilitate the resolution of certain kinds of disputes. It may provide valuable procedural leverage to one side. But as we noted in Washington Mutu-
al, supra, 24 Cal.4th 906, 103 Cal.Rptr.2d 320, 15 P.3d 1071, “‘[c]lass actions are pro-
vided only as a means to enforce substantive law.’” (Id., at p. 918, 103 Cal.Rptr.2d 320,
15 P.3d 1071, quoting City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 462, 115
Cal.Rptr. 797, 525 P.2d 701, fn. omitted, italics added.) They must not be confused with
the substantive law to be enforced. (Ibid.)
Even if the unavailability of class relief
makes a plaintiff’s pursuit of a particular
claim “less convenient” (Moses H. Cone Hos-
U.S. 1, 19, 103 S.Ct. 927, 74 L.Ed.2d 765; see
also Gibber v. Interstate/Johnson Lane Corp.
(1991) 500 U.S. 20, 32, 111 S.Ct. 1647, 114
L.Ed.2d 26), such claims may nonetheless be
pursued on an individual basis.

Moreover, the majority exaggerates the
difficulty of pursuing modest claims where
class treatment is unavailable and overlooks
the many other means by which Discover
Bank could be called to account for the mis-
harges plaintiff alleges. For example:

(1) The cardholder may contact the bank
and attempt to resolve the matter informally.
Discover Bank’s cardholder agreement spec-
ifically provides a 60-day period in which to
contact the company with billing questions
and disputes. Plaintiff’s complaint does not
state that he pursued this avenue. (Indeed,
though the complaint asserts widespread im-
proper billing practices by Discover Bank, it
does not allege that the bank has ever mis-
charged plaintiff himself. Plaintiff admitted
in his deposition that he does not know
whether Discover Bank has ever done so.)

2. The agreement does not eliminate the theoreti-
cal possibility that Discover Bank might seek to
remove a small claims action to another court,
then elect to arbitrate. However, a small claim-
ant can suffer removal to another forum only if
the defendant files a counterclaim exceeding the
$5,000 small claims jurisdictional limit—an un-
likely development in cases like plaintiff’s.
(Code Civ. Proc., § 116.390.)

3. Though the cardholder agreement contains no
forum selection clause, and thus does not bar
suits in California courts, a question may arise
whether, pursuant to the choice-of-law provi-
sion, the small claims court would be obliged to apply
Delaware law to any dispute before it.

(2) Pursuant to the agreement, the card-
holder may pursue one-on-one arbitration of
Delaware state law claims, including those
under the Delaware Consumer Fraud Act
(Del.Code Ann., tit. 6, § 2511 et seq.). The
agreement includes several provisions de-
designed to make the individual arbitration process
fair and accessible. Under the agree-
ment’s terms, Discover Bank will arbitrate in
the federal judicial district where the card-
holder resides. Further, the cardholder may
obtain an advance of all forum costs and will
never pay forum costs exceeding those he or
she would have had to pay in court litigation.

(3) For claims under $5,000, the cardhold-
er may proceed in small claims court. (See
Code Civ. Proc., § 116.210 et seq.) In the
cardholder agreement, Discover Bank prom-
ises that it “will not invoke [its] right to
arbitrate an individual claim,” involving less
than $5,000, which is pending only in a small
claims court.2 The only mandatory expense
of a small claims action is a modest filing fee
plus the actual cost of any mail service by the
court clerk. (Id., §§ 116.230, subds. (a), (c),
116.910.) The claim is pled by filling out a
standard form. (Id., §§ 116.310, subd. (a),
116.320.) No formal discovery is permitted
(id., § 116.310, subd. (b)), and neither party
may be represented by a lawyer (id.,
§ 116.530, subd. (a)), though free advisory
assistance is available to the claimant (id.,
§ 116.260).3

(4) The cardholder may arbitrate, pursu-
ant to the terms of the cardholder agree-
ment, his rights under such federal statutes
as TILA. (15 U.S.C. § 1601 et seq.).4 This
statute imposes mandatory disclosure re-
quirements for consumer credit transactions,
including those arising on credit card accounts. As to the latter, the statute provides for detailed disclosure of the terms on which credit is being extended, including annual percentage rates, methods of computing outstanding balances, finance charges, grace periods, and late fees. (Id., § 1637.) The cardholder, if he or she prevails, may recover actual damages, twice the finance charge imposed in connection with each violative transaction, and attorney fees and costs. (Id., § 1640(a)(1), (2)(A), (3)).

(5) If Discover Bank's conduct violates California's unfair competition statutes (Bus. & Prof.Code, § 17200 et seq.), which broadly prohibit “any unlawful, unfair or fraudulent business act or practice” (id., § 17200), the Attorney General and designated local law enforcement officials (who are not bound by the cardholder agreement) may sue on the People's behalf for injunctive relief and for mandatory civil penalties of up to $2,500 for each violation (id., §§ 17203, 17204, 17206). The amount of a civil penalty shall be calculated in accordance with “any one or more of the relevant circumstances . . . including, but not limited to . . . the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.” (Id., § 17206, subd. (b)).

(6) Finally, in the highly regulated banking and credit industry, other means of sanctioning and remediating illegal conduct are available at the behest of both federal and Delaware law. (See, e.g., 12 U.S.C. § 1818(b) [Federal Deposit Insurance Corporation may issue cease-and-desist orders and order corrective measures including restitution]; Del.Code Ann., tit. 5, § 121 et seq. [investigative and enforcement powers of Delaware State Banking Commissioner]; Del. Code Ann., tit. 29, § 2504 [investigative and enforcement powers of Delaware Attorney General].)

Under these circumstances, it cannot be said that, by upholding cardholders' contractual waiver of a class remedy under Delaware law, we would effectively absolve Discover Bank of its objectionable conduct. Thus, there is no basis to conclude that enforcement of the class waiver pursuant to the parties' choice of Delaware law would contravene a fundamental California statutory policy against exculpatory agreements.

Finally, even if the application of Delaware law permitting class waivers would violate fundamental California public policy, I conclude that California has no materially greater interest in applying its own policy to this controversy than does Delaware. California is, to be sure, the home of this individual plaintiff, with his modest personal monetary claim, and of some of the other similarly situated Discover Bank cardholders, with similarly modest individual claims, he seeks to represent. But to the extent plaintiff proposes to vindicate the rights of a nationwide class under Delaware consumer protection laws, California has no greater interest than any other jurisdiction, including Delaware, in protecting the interests of its resident class members.

Indeed, California, its courts, and its judicial resources will be negatively impacted if, by invoking its own liberal antiwaiver rule in derogation of contrary law chosen by the parties, this state attracts nationwide consumer class litigation of the sort plaintiff seeks to maintain. Such an adverse affect on California detracts further from this state's interest in applying its own law under such circumstances.

Moreover, any factors in California's favor are outweighed by Delaware's far greater concern with the primacy of its own law, both contractual and regulatory, in relations between Discover Bank and its nationwide cardholders. Delaware is Discover Bank's domicile, as well as the source of the substantive law plaintiff expressly seeks to apply. Robert A. Glen, the Delaware State Bank Commissioner, explains in his amicus curiae brief that Delaware has a paramount interest in the economic and business regulation of financial and banking institutions domiciled in that state.

As Discover Bank's domicile, Delaware has a specific regulatory interest in applying its own laws and policies, uniformly and exclusively, to Discover Bank's operations. Dela-
ware thereby seeks to minimize Discover Bank's exposure to the varying and possibly conflicting laws, regulations, and procedures of 49 sister jurisdictions. In particular, Delaware has ample grounds for concern that the terms of the standardized credit agreements entered by its locally chartered banks, including those terms governing resolution of customer disputes, will have the same meaning no matter where the banks' customers reside.

As Commissioner Glen observes, Delaware also strives, for the benefit of the banks' customers, including their nationwide credit card customers, to promote financial stability, safety, and soundness in such institutions. These interests are substantially affected by the banks' costs of consumer litigation, including their exposure to consumer class actions. In Commissioner Glen's words, "[a]rbitration helps keep the costs of dispute resolution down because it is more efficient, expeditious and economical than litigation. If a bank has to spend substantial sums in connection with litigation and, in particular, class action litigation, that threatens the bank's safety and soundness and forces the bank to increase the costs of operations, all of which redounds to the detriment of the bank and its customers, including customers located in states outside of Delaware."

Delaware has evidenced its concerns, as noted above, by specifically providing that credit card agreements issued by Delaware-chartered banks must be governed by Delaware law. (Del.Code Ann., tit. 5, § 956.) Commissioner Glen explains that "[t]he purpose of this requirement is to ensure the safe and sound operation of Delaware banks by effectuating the uniform construction of credit card agreements issued by [such] banks in accordance with Delaware law, no matter where disputes concerning those agreements might arise."

Because Delaware has a substantial relationship to this controversy, the parties' choice of Delaware law was reasonable, and Delaware's interest in applying its own law—including its acceptance of class waivers—exceeds California's, California must uphold that choice of law. Under Delaware law, the parties' waiver of class treatment of disputes between them is valid, and California courts must enforce it.

Plaintiff suggests that the choice-of-law principles set forth in Washington Mutual, supra, 24 Cal.4th 906, 103 Cal.Rptr.2d 320, 15 P.3d 1071, and Nedlloyd, supra, 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148—as derived from section 187 of the Restatement Second of Conflicts of Law (Restatement)—apply to matters of "substantive" law but not of "procedure." The forum state, plaintiff asserts, always has a paramount interest in applying its own procedures.

Assuming without deciding that we confront an issue of "procedure," plaintiff's argument nonetheless lacks merit. As primary support for his position, plaintiff cites Restatement sections 122 and 125. The former section states that the forum "usually applies its own" litigation rules even when the law of another jurisdiction is applied for other purposes. The latter section declares that the forum's law determines "who may and who must be parties unless the substantial rights and duties of the parties would [thereby] be affected . . . ." 5

But Restatement sections 122 and 125, like most of the Restatement, set forth principles for determining which jurisdiction's law to apply "[i]n the absence of an effective choice of law by the parties." (Rest., § 188(2).) Nothing in those sections, or in the comments thereto, indicates a purpose to supersede Restatement section 187 where the parties have contractually chosen the applicable law, or to impose a forum rule for dispute resolution despite the express contrary provisions of an agreement which specifies the law of a jurisdiction in which that choice is valid.

Indeed, the comments to both these Restatement sections demonstrate their inappl-

---

5 Section 122 provides: "A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." Section 125 provides: "The local law of the forum determines who may and who must be parties to a proceeding unless the substantial rights and duties of the parties would be affected by the determination of this issue."
cability here. For example, the comments to section 122 point out that “in matters of judicial administration, it would often be disruptive or difficult for the forum to apply the local law rules of another state [without any repayment] by a furtherance of the values that the application of another state’s local law is designed to promote.” (Rest., § 122, com.a, p. 350.)

Moreover, it is explained, “[p]arties do not usually give thought to matters of judicial administration before they enter into legal transactions. They do not usually place reliance on the applicability of the rules of a particular state to issues that would arise only if litigation should become necessary. Accordingly, the parties have no expectations as to such eventualities, and there is no danger of unfairly disappointing their hopes by applying the forum’s rules in such matters.” (Rest. § 122, com.a, p. 351.)

Here, the parties gave extensive and detailed contractual consideration to the “issues that would arise ... if litigation [became] necessary.” They specifically agreed that disputes would be resolved, upon either party’s election, by mandatory arbitration, and that class treatment of the dispute would not be permitted. Further, they expressly provided that their agreement would be governed by the law of Delaware—a jurisdiction which, for policy reasons of its own, allows contractual provisions requiring nonclass arbitration and further demands that credit card agreements issued by Delaware-chartered banks be applied according to that state’s law. The reasonable expectations of both Discover Bank and the State of Delaware would thus be “unfairly disappointed” if a California rule banning class waivers were applied despite the parties’ agreement.

Moreover, by honoring the parties’ agreement in this respect, California courts risk no disruption or confusion in matters of judicial administration. There is no need to delve deeply into the procedural rules of another jurisdiction. All that is required is to compel arbitration, and to deny class certification, as the parties agreed.

Similarly, the comments to section 125, like the text of that section itself, make clear that the forum’s rules on the identity of parties will not be applied “when [such] application would substantially affect the rights and duties of the parties.” (Rest. § 125, com.a, p. 356.) Here, Discover Bank’s rights would be substantially affected were it forced into a class proceeding contrary to a specific term of its contract with plaintiff.

Finally, as the majority must concede, neither Szetela v. Discover Bank (2002) 97 Cal. App.4th 1094, 118 Cal.Rptr.2d 862, nor America Online, Inc. v. Superior Court (2001) 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (AOL) undermines the dispositive effect in this case of Delaware law. In Szetela, the Court of Appeal concluded that because choice-of-law issues had not been briefed, they were waived. (Szetela, supra, at p. 1099, fn. 3, 118 Cal.Rptr.2d 862.) AOL involved a suit brought under a law of this state, the Consumers Legal Remedies Act, which specifically grants the right to bring a class action and makes the rights granted by the statute unwaivable by contract. (Civ. Code, §§ 1751, 1781, subd. (a).) As noted above, plaintiff in this case bases his claims solely on Delaware substantive law.

If, as the majority hints, California would refuse to enforce the parties’ agreement for individual arbitration as Delaware law demands, the legitimate purpose of that agreement—uniform, inexpensive, efficient dispute resolution—will be entirely frustrated. No matter how many other courts, state and federal, would enforce the agreement according to its terms, if California declines to do so, this state will simply become a forum of choice for putative nationwide class suits like this one. It will only be necessary to find a single California cardholder to act as a representative plaintiff, and to sue in a California court. I cannot join the majority’s willingness to countenance such a result.

I would hold the parties to their agreement, expressly governed by Delaware law, which calls for individual arbitration of disputes arising between Discover Bank and its cardholders. Accordingly, I would affirm the judgment of the Court of Appeal, which directed the issuance of a petition for mandate requiring the trial court to (1) compel arbi-
Concurring opinion by Werdegar, J., with Kennard, J., concurring.
Concurring and dissenting opinion by Kennard, J.

1. Criminal Law 627.6(6)

Under statute providing for discovery of certain relevant information in peace officer personnel records on a showing of good cause, discovery is a two-step process: (1) defendant must file a motion supported by declarations showing good cause for discovery and materiality to the pending case, which embodies a relatively low threshold for discovery and the supporting declaration may include allegations based on information and belief, and (2) once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. West's Ann.Cal.Evid.Code §§ 1043, 1045(b).

2. Jury 131(8, 13)

The trial court properly conducted voir dire in a death penalty case by asking the appropriate death qualifying questions, lengthy juror questionnaires were completed, and both sides had the opportunity to question each prospective juror.

3. Jury 108

The proper standard to excuse a juror for cause based on his or her views on capital punishment is whether the prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

4. Jury 108

Prospective juror in death penalty case was properly excused for cause based on his death penalty views, where in his juror questionnaire he provided a series of contradictory answers to questions regarding his views on the death penalty and his ability to follow the law.

5. Homicide 1008

Evidence showing defendant's lavish lifestyle after the murder of her husband was
agency order); Creppel v. United States, 41 F.3d 627, 633 (C.A.Fed.1994) (“[T]he Court of Federal Claims may stay a takings action pending completion of a related action in a district court.”).

Why is this Court not positioned to direct the CFC to disregard requests for relief simultaneously sought in a district-court action, or at least to recognize that an amended CFC complaint could save the case? I see no impediment to either course, in § 1500 or any other law or rule.

AT&T MOBILITY LLC, Petitioner,
v.
Vincent CONCEPCION et ux.
No. 09–893.
Argued Nov. 9, 2010.
Decided April 27, 2011.
Background: Customers brought putative class action against telephone company, alleging that company’s offer of a free phone to anyone who signed up for its cellphone service was fraudulent to the extent that the company charged the customer sales tax on the retail value of the free phone. The United States District Court for the Southern District of California, Dana M. Sabraw, J., 2008 WL 5216255, denied company’s motion to compel arbitration. Company appealed. The United States Court of Appeals for the Ninth Circuit, Carlos T. Bea, Circuit Judge, 584 F.3d 849, affirmed. Certiorari was granted.

Holding: The Supreme Court, Justice Scalia, held that the Federal Arbitration Act preempts California’s judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts, abrogating Discover Bank v. Superior Court, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100.

Reversed and remanded.
Justice Thomas filed a concurring opinion.

1. Alternative Dispute Resolution ⇨114

The provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, reflects both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. 9 U.S.C.A. § 2.

2. Alternative Dispute Resolution ⇨114

In light of the liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract, which are reflected in the provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms. 9 U.S.C.A. § 2.

3. Alternative Dispute Resolution ⇨117
States ⇨18.15

The Federal Arbitration Act (FAA) preempts California’s judicial rule stating that a class arbitration waiver is uncon-
scionable under California law if it is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and if it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, because that rule stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the FAA, which include ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings; abrogating Discover Bank v. Superior Court, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100.  9 U.S.C.A. § 2; West’s Ann.Cal.Civ.Code §§ 1668, 1670.5(a).

4. Alternative Dispute Resolution ⇐134(1, 3, 6)

Under the saving clause in the provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. 9 U.S.C.A. § 2.

5. Contracts ⇐1

Under California law, a finding that a contract is unconscionable requires a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. West’s Ann.Cal.Civ.Code §§ 1668, 1670.5(a).

6. Alternative Dispute Resolution ⇐117

States ⇐18.15

When state law prohibits outright the arbitration of a particular type of claim, the conflicting state rule is displaced by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

7. Alternative Dispute Resolution ⇐117

States ⇐18.15

In light of the preemptive effect of the Federal Arbitration Act (FAA), a court may not 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 the state legislature cannot. 9 U.S.C.A. § 2.

8. Alternative Dispute Resolution ⇐114

While the saving clause, in the provision of the Federal Arbitration Act (FAA) stating that arbitration agreements in maritime transactions or contracts evidencing transactions involving commerce are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives. 9 U.S.C.A. § 2.

9. States ⇐18.11

A federal statute’s preemption saving clause cannot in reason be construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act; in other words, the act cannot be held to destroy itself.

10. Alternative Dispute Resolution ⇐114

The principal purpose of the Federal Arbitration Act (FAA) is to ensure that
private arbitration agreements are enforced according to their terms. 9 U.S.C.A. §§ 2–4.

11. Alternative Dispute Resolution

In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.

12. Judgment

For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.

13. Alternative Dispute Resolution

Arbitration is a matter of contract, and the Federal Arbitration Act (FAA) requires courts to honor parties' expectations. 9 U.S.C.A. § 1 et seq.

Syllabus *

The cellular telephone contract between respondents (Concepcions) and petitioner (AT & T) provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepcions were charged sales tax on the retail value of phones provided free under their service contract, they sued AT & T in a California Federal District Court. Their suit was consolidated with a class action alleging, inter alia, that AT & T had engaged in false advertising and fraud by charging sales tax on “free” phones. The District Court denied AT & T's motion to compel arbitration under the Concepcions' contract. Relying on the California Supreme Court's Discover Bank decision, it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, did not preempt its ruling.

Held: Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581, California’s Discover Bank rule is pre-empted by the FAA. Pp. 1745 – 1753.


* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

(b) In *Discover Bank*, the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. Pp. 1745–1747.

(c) The Concepcions claim that the *Discover Bank* rule is a ground that “exist[s] at law or in equity for the revocation of any contract” under FAA § 2. When state law prohibits outright the arbitration of a particular type of claim, the FAA displaces the conflicting rule. But the inquiry is more complex when a generally applicable doctrine is alleged to have been applied in a fashion that disfavors or interferes with arbitration. Although § 2’s saving clause preserves generally applicable contract defenses, it does not suggest an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives. Cf. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 120 S.Ct. 1913, 146 L.Ed.2d 914. The FAA’s overarching purpose is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings. Parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444, to arbitrate according to specific rules, *Volt*, supra, at 479, 109 S.Ct. 1248, and to limit with whom they will arbitrate, *Stolt-Nielsen*, supra, at ——. Pp. 1746–1750.

(d) Class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, interferes with fundamental attributes of arbitration. The switch from bilateral to class arbitration sacrifices arbitration’s informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. And class arbitration greatly increases risks to defendants. The absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptably when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes. In litigation, a defendant may appeal a certification decision and a final judgment, but 9 U.S.C. § 10 limits the grounds on which courts can vacate arbitral awards. Pp. 1750–1753.

584 F.3d 849, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

Andrew J. Pincus, Washington, DC, for Petitioner.

Deepak Gupta, for Respondents.


For U.S. Supreme Court Briefs, See:

2010 WL 3017755 (Pet.Brief)
2010 WL 4312794 (Reply.Brief)
Justice SCALIA delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT & T Mobility LLC (AT & T).1 The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” App. to Pet. for Cert. 61a.2 The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT & T’s Web site. AT & T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT & T’s Web site. In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney’s fees, and, in the event that a customer receives an arbitration award greater than AT & T’s last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant’s attorney’s fees.3

The Concepcions purchased AT & T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged $30.22 in sales tax based on the phones’ retail value. In March 2006, the Concepcions filed a complaint against AT & T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT & T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT & T moved to compel arbitration under the terms of its agreement.

1. The Concepcions’ original contract was with Cingular Wireless. AT & T acquired Cingular in 2005 and renamed the company AT & T Mobility in 2007. Laster v. AT & T Mobility LLC, 584 F.3d 849, 852, n. 1 (C.A.9 2009).
2. That provision further states that “the arbitrator may not consolidate more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding.” App. to Pet. for Cert. 61a.
3. The guaranteed minimum recovery was increased in 2009 to $10,000. Brief for Petitioner 7.
tract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT & T’s motion. It described AT & T’s arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was “quick, easy to use” and likely to “promp[t] full or . . . even excess payment to the customer without the need to arbitrate or litigate”; that the $7,500 premium functioned as “a substantial inducement for the consumer to pursue the claim in arbitration” if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. Laster v. T–Mobile USA, Inc., 2008 WL 5216255, *11–*12 (S.D.Cal., Aug.11, 2008). Nevertheless, relying on the California Supreme Court’s decision in Discover Bank v. Superior Court, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT & T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. Laster, 2008 WL 5216255, *14.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in Discover Bank. Laster v. AT & T Mobility LLC, 584 F.3d 849, 855 (2009). It also held that the Discover Bank rule was not preempted by the FAA because that rule was simply “a refinement of the unconscionability analysis applicable to contracts generally in California.” 584 F.3d, at 857. In response to AT & T’s argument that the Concepcions’ interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that “‘class proceedings will reduce the efficiency and expeditiousness of arbitration’” and noted that “‘Discover Bank placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration.’” Id., at 858 (quoting Shroyer v. New Cingular Wireless Services, Inc., 498 F.3d 976, 990 (C.A.9 2007)).

We granted certiorari, 560 U.S. ———, 130 S.Ct. 3322, 176 L.Ed.2d 1218 (2010).

II


“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

We have described this provision as reflecting both a “liberal federal policy favoring arbitration,” Moses H. Cone, supra, at 24, 103 S.Ct. 927, and the “fundamental principle that arbitration is a matter of contract,” Rent–A–Center, West, Inc. v. Jackson, 561 U.S. ———, ———, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010). In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), and enforce them according to their terms, Volt Information Sciences, Inc. v.
The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” This saving clause permits agreements to arbitrate to be invalidated by “generally applicable contract defenses, such as fraud, duress, or unconscionability,” but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); see also *Perry v. Thomas*, 482 U.S. 483, 492–493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). The question in this case is whether § 2 preempts California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

Under California law, courts may refuse to enforce any contract found “to have been unconscionable at the time it was made,” or may “limit the application of any unconscionable clause.” Cal. Civ.Code Ann. § 1670.5(a) (West 1985). A finding of unconscionability requires “a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.” *Armendariz v. Foundation Health Pyschcare Servs., Inc.*, 24 Cal.4th 83, 114, 99 Cal. Rptr.2d 745, 6 P.3d 669, 690 (2000); accord, *Discover Bank*, 36 Cal.4th, at 159–161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108.

In *Discover Bank*, the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

“[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.” *Id.*, at 162, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110 (quoting Cal. Civ.Code Ann. § 1668).

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. 

Preston v. Ferrer, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In Perry v. Thomas, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA’s preemptive effect might extend even to grounds traditionally thought to exist “at law or in equity for the revocation of any contract.” Id., at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted). We said that a court may not “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 ... the state legislature cannot.” Id., at 498, n. 9, 107 S.Ct. 2520.

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in Discover Bank. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. See Discover Bank, supra, at 161, 30 Cal. Rptr.3d 76, 113 P.3d, at 1109 (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to “any” contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed “a panel of twelve lay arbitrators” to help avoid preemption). Such examples are not fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in “a great variety” of “devices and formulas” declaring arbitration against public policy. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (C.A.2 1959). And although these statistics are not definitive, it is worth noting that California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act, 3 Hastings Bus. L.J. 39, 54, 66 (2006); Randall, Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability, 52 Buffalo L.Rev. 185, 186–187 (2004).

The Concepcions suggest that all this is just a parade of horribles, and no genuine worry. “Rules aimed at destroying arbitration” or “demanding procedures incompatible with arbitration,” they concede,
"would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." Brief for Respondents 32. The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" Id., at 33 (quoting Carter v. SSC Odin Operating Co., LLC, 237 Ill.2d 30, 50, 340 Ill.Dec. 196, 927 N.E.2d 1207, 1220 (2010)).


We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are "a far cry from this case." Brief for Respondents 32. The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

[10] The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." Volt, 489 U.S., at 478, 109 S.Ct. 3346, 87 L.Ed.2d 444 (1985), and see also Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. —–, —–, 130 S.Ct. 1758, 1763, 176 L.Ed.2d 605 (2010). This purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the failure . . . to perform the same" is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), Breyer, J.), and that "we should think more than twice before invalidating a state law that . . . puts agreements to arbitrate and agreements to litigate 'upon the same footing'" post, at 4–5.

4. The dissent seeks to fight off even this eminently reasonable concession. It says that to its knowledge "we have not . . . applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings," post, at 10 (opinion of
to arbitrate according to specific rules, Volt, supra, at 479, 109 S.Ct. 1248, and to limit with whom a party will arbitrate its disputes, Stolt-Nielsen, supra, at ———, 130 S.Ct. at 1773.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decision-maker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, ———, 129 S.Ct. 1456, 1460, 173 L.Ed.2d 398 (2009); Mitsubishi Motors Corp., supra, at 628, 105 S.Ct. 3346.

The dissent quotes Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219, 105 S.Ct. 2123, 84 L.Ed.2d 158 (1985), as “reject[ing] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.” Post, at 4 (opinion of BREYER, J.). That is greatly misleading. After saying (accurately enough) that “the overriding goal of the Arbitration Act was [not] to promote the expeditious resolution of claims,” but to “ensure judicial enforcement of privately made agreements to arbitrate,” 470 U.S., at 219, 105 S.Ct. 2123, Dean Witter went on to explain: “This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes. Far from it ….” Id., at 220, 105 S.Ct. 2123. It then quotes a House Report saying that “the costliness and delays of litigation … can be largely eliminated by agreements for arbitration.” Ibid. (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 2 (1924)). The concluding paragraph of this part of its discussion begins as follows:

“We therefore are not persuaded by the argument that the conflict between two goals of the Arbitration Act—enforcement of private agreements and encouragement of efficient and speedy dispute resolution—must be resolved in favor of the latter in order to realize the intent of the drafters.” 470 U.S., at 221, 105 S.Ct. 1238.

In the present case, of course, those “two goals” do not conflict—and it is the dissent’s view that would frustrate both of them.

Contrary to the dissent’s view, our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as “embod[ying] [a] national policy favoring arbitration,” Buckeye Check Cashing, 546 U.S., at 443, 126 S.Ct. 1204, and “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,” Moses H. Cone, 460 U.S., at 24, 103 S.Ct. 927; see also Hall Street Assocs., 552 U.S., at 581, 128 S.Ct. 1396. Thus, in Preston v. Ferrer, holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration, we said: “A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,'” which objective would be “frustrated” by requiring a dispute to be heard by an agency first. 552 U.S., at 357–358, 128 S.Ct. 978. That rule, we said, would “at the least, hinder speedy resolution of the controversy.” Id., at 358, 128 S.Ct. 978.5

5. Relying upon nothing more indicative of congressional understanding than statements of witnesses in committee hearings and a press release of Secretary of Commerce Herbert Hoover, the dissent suggests that Congress “thought that arbitration would be used primarily where merchants sought to resolve disputes of fact … [and] possessed roughly
California’s Discover Bank rule similarly interferes with arbitration. Although the rule does not require classwide arbitration, it allows any party to a consumer contract to demand it ex post. The rule is limited to adhesion contracts, Discover Bank, 36 Cal.4th, at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110, but the times in which consumer contracts were anything other than adhesive are long past.6 Carbajal v. H & R Block Tax Sers., Inc., 372 F.3d 903, 906 (7th Cir.2004); see also Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (C.A.7 1997). The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. Discover Bank, supra, at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. The former requirement, however, is toothless and malleable (the Ninth Circuit has held that damages of $4,000 are sufficiently small, see Oestreicher v. Alienware Corp., 322 Fed.Appx. 489, 492 (2009) (unpublished)), and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under Discover Bank, and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

Although we have had little occasion to examine classwide arbitration, our decision in Stolt–Nielsen is instructive. In that case we held that an arbitration panel exceeded its power under § 10(a)(4) of the FAA by imposing class procedures based on policy judgments rather than the arbitration agreement itself or some background principle of contract law that would affect its interpretation. 559 U.S., at ——, 130 S.Ct. at 1773–1776. We then held that the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the “changes brought about by the shift from bilateral arbitration to class-action arbitration” are “fundamental.” Id., at ——, 130 S.Ct. at 1776. This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that legislative history fails to note that it contains nothing—not even the testimony of a stray witness in committee hearings—that contemplates the existence of class arbitration.

6. Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.
class arbitration, to the extent it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.

[11] First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” 559 U.S., at ––––, 130 S.Ct. at 1775. But before an arbitrator may decide the merits of a claim in class-wide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only. AAA, Analysis of the AAA’s Consumer Arbitration Caseload, online at http://www.adr.org/si.asp?id=5027 (all Internet materials as visited Apr. 25, 2011, and available in Clerk of Court’s case file). As of September 2009, the AAA had opened 283 class arbitrations. Of those, 121 remained active, and 162 had been settled, withdrawn, or dismissed. Not a single one, however, had resulted in a final award on the merits. Brief for AAA as Amicus Curiae in Stolt–Nielsen, O.T.2009, No. 08–1198, pp. 22–24. For those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days. Id., at 24.7

[12] Second, class arbitration requires procedural formality. The AAA’s rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. Compare AAA, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), online at http://www.adr.org/sp.asp?id=21936, with Fed. Rule Civ. Proc. 23. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in Discover Bank, class arbitration is a “relatively recent development.” 36 Cal.4th, at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. And it

7. The dissent claims that class arbitration should be compared to class litigation, not bilateral arbitration. Post, at 6–7. Whether arbitrating a class is more desirable than litigating one, however, is not relevant. A State cannot defend a rule requiring arbitration-by-jury by saying that parties will still prefer it to trial-by-jury.
is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of “in terrorem” settlements that class actions entail, see, e.g., Kohen v. Pacific Inv. Management Co. LLC, 571 F.3d 672, 677–678 (C.A.7 2009), and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed de novo and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award only where the award “was procured by corruption, fraud, or undue means”; “there was evident partiality or corruption in the arbitrators”; “the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced”; or if the “arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made.” The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. Hall Street Assoc., 552 U.S., at 578, 128 S.Ct. 1396. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.8

[13] The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations. Rentz-A-

8. The dissent cites three large arbitration awards (none of which stems from classwide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. Post, at 7–8. Those examples might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the cases prove is that arbitrators can give huge awards—which we have never doubted. The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.
The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See post, at 1760–1761. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT & T will pay claimants a minimum of $7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT & T’s last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be “essentially guaranteed” to be made whole, 584 F.3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were better off under their arbitration agreement with AT & T than they would have been as participants in a class action, which “could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.” Laster, 2008 WL 5216255, at *12.

* * *

Because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941), California’s Discover Bank rule is preempted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

Section 2 of the Federal Arbitration Act (FAA) provides that an arbitration provision “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The question here is whether California’s Discover Bank rule, see Discover Bank v. Superior Ct., 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), is a “ground . . . for the revocation of any contract.”

It would be absurd to suggest that § 2 requires only that a defense apply to “any contract.” If § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to “any contract.” There must be some additional limit on the contract defenses permitted by § 2. Cf. ante, at 17 (opinion of the Court) (state law may not require procedures that are “not arbitration as envisioned by the FAA” and “lack its benefits”); post, at 5 (BREYER, J., dissenting) (state law may require only procedures that are “consistent with the use of arbitration”).

I write separately to explain how I would find that limit in the FAA’s text. As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U.S.C. §§ 2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the Discover Bank rule, which does not relate to defects in the making of an agreement.
This reading of the text, however, has not been fully developed by any party, cf. Brief for Petitioner 41, n. 12, and could benefit from briefing and argument in an appropriate case. Moreover, I think that the Court’s test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. See US Airways, Inc. v. Barnett, 535 U.S. 391, 411, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002) (O’Connor, J., concurring). Therefore, although I adhere to my views on purposes-and-objectives pre-emption, see Wyeth v. Levine, 555 U.S. 555, ––––, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (opinion concurring in judgment), I reluctantly join the Court’s opinion.

I

The FAA generally requires courts to enforce arbitration agreements as written. Section 2 provides that “[a] written provision in . . . a contract . . . 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.” Significantly, the statute does not parallel the words “valid, irrevocable, and enforceable” by referencing the grounds as exist for the “invalidation, revocation, or nonenforce-ment” of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforce-ability. The use of only “revocation” and the conspicuous omission of “invalidation” and “nonenforce-ment” suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses. See Duncan v. Walker, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (“It is our duty to give effect, if possible, to every clause and word of a statute” (internal quotation marks omitted)).

Concededly, the difference between revocability, on the one hand, and validity and enforceability, on the other, is not obvious. The statute does not define the terms, and their ordinary meanings arguably overlap. Indeed, this Court and others have referred to the concepts of revocability, validity, and enforceability interchangeably. But this ambiguity alone cannot justify ignoring Congress’ clear decision in § 2 to repeat only one of the three concepts.

To clarify the meaning of § 2, it would be natural to look to other portions of the FAA. Statutory interpretation focuses on “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988).

Examining the broader statutory scheme, § 4 can be read to clarify the scope of § 2’s exception to the enforcement of arbitration agreements. When a party seeks to enforce an arbitration agreement in federal court, § 4 requires that “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,” the court must order arbitration “in accordance with the terms of the agreement.”

Reading §§ 2 and 4 harmoniously, the “grounds . . . for the revocation” preserved in § 2 would mean grounds related to the
making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (interpreting § 4 to permit federal courts to adjudicate claims of “fraud in the inducement of the arbitration clause itself” because such claims “go to the ‘making’ of the agreement to arbitrate”). Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.*

* The interpretation I suggest would be consistent with our precedent. Contract formation is based on the consent of the parties, and we have emphasized that “[a]rbitration under the Act is a matter of consent.” Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

The statement in Perry v. Thomas, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), suggesting that § 2 preserves all state-law defenses that “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,” id., at 493, n. 9, 107 S.Ct. 2520, is dicta. This statement is found in a footnote concerning a claim that the Court “decline[d] to address.” Id., at 493, n. 9, 107 S.Ct. 2520. Similarly, to the extent that statements in Rent–A–Center, West, Inc. v. Jackson, 561 U.S. ——, —— n. 1, 130 S.Ct. 2772, 2778 n. 1 (2010), can be read to suggest anything about the scope of state-law defenses under § 2, those statements are dicta, as well. This Court has never addressed the question whether the state-law “grounds” referred to in § 2 are narrower than those applicable to any contract.

In Discover Bank, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, the California Supreme Court held that “class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory.” Id., at 65, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112; see also id., at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108 (“[C]lass action waivers [may be] substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy”). The court concluded that where a class-action waiver is found in an arbitration agreement in certain consumer contracts of adhesion, such waivers “should not be enforced.” Id., at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110. In practice, the court explained, such agreements “operate to insulate a party from liability that otherwise would be imposed under California law.” Id., at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108, 1109.

Moreover, every specific contract defense that the Court has acknowledged is applicable under § 2 relates to contract formation. In Doctor’s Associates, Inc. v. Casarotto, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), this Court said that fraud, duress, and unconscionability “may be applied to invalidate arbitration agreements without contravening § 2.” All three defenses historically concern the making of an agreement. See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 547, 128 S.Ct. 2733, 171 L.Ed.2d 607 (2008) (describing fraud and duress as “traditional grounds for the abrogation of [a] contract” that speak to “unfair dealing at the contract formation stage”); Hume v. United States, 132 U.S. 406, 411, 414, 10 S.Ct. 134, 33 L.Ed. 393 (1889) (describing an unconscionable contract as one “such as no man in his senses and not under delusion would make” and suggesting that there may be “contracts so extortionate and unconscionable on their face as to raise the presumption of fraud in their inception” (internal quotation marks omitted)).
nder the influence of fraud, duress, or delusion.

The court’s analysis and conclusion that the arbitration agreement was exculpatory reveals that the Discover Bank rule does not concern the making of the arbitration agreement. Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy. 15 G. Giesel, Corbin on Contracts §§ 85.1, 85.17, 85.18 (rev. ed.2003). Indeed, the court explained that it would not enforce the agreements because they are “against the policy of the law.” 36 Cal.4th, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1108 (quoting Cal. Civ.Code Ann. § 1668); see also 36 Cal.4th, at 166, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112 (“Agreements to arbitrate may not be used to harbor terms, conditions and practices that undermine public policy” (internal quotation marks omitted)). Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

Accordingly, the Discover Bank rule is not a “ground[d] . . . for the revocation of any contract” as I would read § 2 of the FAA in light of § 4. Under this reading, the FAA dictates that the arbitration agreement here be enforced and the Discover Bank rule is pre-empted.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

I

The California law in question consists of an authoritative state-court interpretation of two provisions of the California Civil Code. The first provision makes unlawful all contracts “which have for their object, directly or in-directly, to exempt anyone from responsibility for his own . . . violation of law.” Cal. Civ.Code Ann. § 1668 (West 1985). The second provision authorizes courts to “limit the application of any unconscionable clause” in a contract so “as to avoid any unconscionable result.” § 1670.5(a).

The specific rule of state law in question consists of the California Supreme Court’s application of these principles to hold that “some” (but not “all”) “class action waivers” in consumer contracts are exculpatory and unconscionable under California “law.” Discover Bank v. Superior Ct., 36 Cal.4th 148, 160, 162, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1108, 1110 (2005). In particular, in Discover Bank the California Supreme Court stated that, when a class-action waiver

“is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury
to the person or property of another.”

Id., at 162–163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110.

In such a circumstance, the “waivers are unconscionable under California law and should not be enforced.” Id., at 163, 30 Cal.Rptr.3d 76, 113 P.3d, at 1110.


II

A

The Discover Bank rule is consistent with the federal Act’s language. It “applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.” 36 Cal.4th, at 165–166, 30 Cal.Rptr.3d 76, 113 P.3d, at 1112. Linguistically speaking, it falls directly within the scope of the Act’s exception permitting courts to refuse to enforce arbitration agreements on grounds that exist “for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). The majority agrees. Ante, at 9.

B

The Discover Bank rule is also consistent with the basic “purpose behind” the Act. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). We have described that purpose as one of “ensur[ing] judicial enforcement” of arbitration agreements. Ibid.; see also Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 274, n. 2, 52 S.Ct. 166, 76 L.Ed. 282 (1932) (“The purpose of this bill is to make valid and enforceable agreements for arbitration” (quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924);  emphasis added)); 65 Cong. Rec. 1931 (1924) (“It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts”). As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example by refusing to order specific performance of agreements to arbitrate. See S.Rep. No. 536, 68th Cong., 1st Sess., 2 (1924). The Act sought to eliminate that hostility by placing agreements to arbitrate “upon the same footing as other contracts.” Scherk v. Alberto–Culver Co., 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) (quoting H.R.Rep. No. 96, at 2; emphasis added).

Congress was fully aware that arbitration could provide procedural and cost advantages. The House Report emphasized the “appropriate[ness]” of making arbitra-
tion agreements enforceable “at this time when there is so much agitation against the costliness and delays of litigation.” Id., at 2. And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes. See Preston v. Ferrer, 552 U.S. 346, 357, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (discussing “prime objective of an agreement to arbitrate”). See also Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

But we have also cautioned against thinking that Congress’ primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the “enforcement” of agreements to arbitrate. Dean Witter, 470 U.S., at 221, 105 S.Ct. 1238. See also id., at 219, 105 S.Ct. 1238 (we “reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims”); id., at 219, 217–218, 105 S.Ct. 1238 (“[T]he intent of Congress” requires us to apply the terms of the Act without regard to whether the result would be “possibly inefficient”); cf. id., at 220, 105 S.Ct. 1238 (acknowledging that “expedited resolution of disputes” might lead parties to prefer arbitration). The relevant Senate Report points to the Act’s basic purpose when it says that “[t]he purpose of the [Act] is clearly set forth in section 2,” S.Rep. No. 536, at 2 (emphasis added), namely, the section that says that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” 9 U.S.C. § 2.

Thus, insofar as we seek to implement Congress’ intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate “upon the same footing.”

III

The majority’s contrary view (that Discover Bank stands as an “obstacle” to the accomplishment of the federal law’s objective, ante, at 9–18) rests primarily upon its claims that the Discover Bank rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.

For one thing, a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require “ultimate disposition by a jury” or “judicially monitored discovery” or use of “the Federal Rules of Evidence.” Ante, at 8, 9. Unlike the majority’s examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere. See, e.g., Keating v. Superior Ct., 109 Cal.App.3d 784, 167 Cal.Rptr. 481, 492 (1980) (officially depublished); American Arbitration Association (AAA), Supplementary Rules for Class Arbitrations (2003), http://www.adr.org/sp.asp?id=21936 (as visited Apr. 25, 2011, and available in Clerk of Court’s case file); JAMS, The Resolution Experts, Class Action Procedures (2009). Indeed, the AAA has told us that it has found class arbitration to be “a fair, balanced, and efficient means of resolving class disputes.” Brief for AAA as Amicus Curiae in Stolt–Nielsen S.A. v. Animal–Feeds Int’l Corp., O.T.2009, No. 08–1198, p. 25 (hereinafter AAA Amicus Brief). And unlike the majority’s examples, the Discover Bank rule imposes equivalent limitations on litigation; hence it cannot
fairly be characterized as a targeted attack on arbitration.

Where does the majority get its contrary idea—that individual, rather than class, arbitration is a "fundamental attribute" of arbitration? Ante, at 9. The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. See Mitsubishi Motors, supra, at 646, 105 S.Ct. 3346 (Stevens, J., dissenting); Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 15 (1924); Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9–10 (1923); Dept. of Commerce, Secretary Hoover Favors Arbitration—Press Release (Dec. 28, 1925), Herbert Hoover Papers—Articles, Addresses, and Public Statements File—No. 536, p. 2 (Herbert Hoover Presidential Library); Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L.Rev. 265, 281 (1926); AAA, Year Book on Commercial Arbitration in the United States (1927). This last mentioned feature of the history—roughly equivalent bargaining power—suggests, if anything, that California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

Regardless, if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law preempted?

For another thing, the majority's argument that the Discover Bank rule will discourage arbitration rests critically upon the wrong comparison. The majority compares the complexity of class arbitration with that of bilateral arbitration. See ante, at 14. And it finds the former more complex. See ibid. But, if incentives are at issue, the relevant comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the Discover Bank rule similarly and equally sets aside clauses that forbid class procedures—whether arbitration procedures or ordinary judicial procedures are at issue.

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics "suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take less time than the average class action in court." AAA Amicus Brief 24 (emphasis added). Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought. Compare ante, at 14 (providing statistics for class arbitration), with Judicial Council of California, Administrative Office of the Courts, Class Certification in California: Second Interim Report from the Study of California Class Action Litigation 18 (2010) (providing statistics for class-action litigation in California courts). And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the Discover Bank rule would rein-
force, not obstruct, that objective of the Act.

The majority’s related claim that the *Discover Bank* rule will discourage the use of arbitration because “[a]rbitration is poorly suited to . . . higher stakes” lacks empirical support. *Ante,* at 16. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit high-stake disputes to arbitration. And there are numerous counterexamples.


Further, even though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. ———, ———, 130 S.Ct. 2772, 2775 (2010) (arbitration agreements “may be invalidated by ‘generally applicable contract defenses’”) (quoting *Doctor’s Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996))). A provision in a contract of adhesion (for example, requiring a consumer to decide very quickly whether to pursue a claim) might increase the speed and efficiency of arbitrating a dispute, but the State can forbid it. See, *e.g.*, *Hayes v. Oakridge Home,* 122 Ohio St.3d 63, 67, 2009–Ohio–2054, ¶ 19, 908 N.E.2d 408, 412 (“Unconscionability is a ground for revocation of an arbitration agreement”); *In re Poly–America, L. P.*, 262 S.W.3d 337, 348 (Tex.2008) (“Unconscionable contracts, however—whether relating to arbitration or not—are unenforceable under Texas law”). The *Discover Bank* rule amounts to a variation on this theme. California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration. Cf. *Doctor’s Associates, supra,* at 687. See also *Ante,* at 4, n. (THOMAS, J., concurring) (suggesting that, under certain circumstances, California might remain free to apply its unconscionability doctrine).

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

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. See *Ante,* at 15–16 (referring to the “greatly increase[d] risks to defendants”; the “chance of a devastating loss” pressuring defendants “into settling questionable claims”). But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT & T can avoid the $7,500 payout (the payout that supposedly makes the Concepcions’ arbitration worthwhile) simply by paying the claim’s face value, such that “the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22.” *Laster v. AT & T Mobil-
ity LLC, 584 F.3d 849, 855, 856 (C.A.9 2009).

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? See, e.g., Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (C.A.7 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30”). In California’s perfectly rational view, non-class arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). Discover Bank sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement’s author from liability for its own frauds by “deliberately cheat[ing] large numbers of consumers out of individually small sums of money.” 36 Cal.4th, at 162–163, 30 Cal. Rptr.3d 76, 113 P.3d, at 1110. Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California’s to make?

Finally, the majority can find no meaningful support for its views in this Court’s precedent. The federal Act has been in force for nearly a century. We have decided dozens of cases about its requirements. We have reached results that authorize complex arbitration procedures. E.g., Mitsubishi Motors, 473 U.S., at 629, 105 S.Ct. 3346 (antitrust claims arising in international transaction are arbitrable). We have upheld nondiscriminatory state laws that slow down arbitration proceedings. E.g., Volt Information Sciences, 489 U.S., at 477–479, 109 S.Ct. 1248 (California law staying arbitration proceedings until completion of related litigation is not preempted). But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings. Cf. Preston, 552 U.S., at 355–356, 128 S.Ct. 978 (Act pre-empts state law that vests primary jurisdiction in state administrative board).

At the same time, we have repeatedly referred to the Act’s basic objective as assuring that courts treat arbitration agreements “like all other contracts.” Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). See also, e.g., Vaden v. Discover Bank, 556 U.S. 49, ——, 129 S.Ct. 1262, 1273–1274, 173 L.Ed.2d 206 (2009); Doctor’s Associates, supra, at 687, 116 S.Ct. 1652; Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483–484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); Perry v. Thomas, 482 U.S. 483, 492–493, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987); Mitsubishi Motors, supra, at 627, 105 S.Ct. 3346. And we have recognized that “[t]o immunize an arbitration agreement from judicial challenge” on grounds applicable to all other contracts “would be to elevate it over other forms of contract.” Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967); see also Marchant v. Mead–Morrison Mfg. Co., 252 N.Y. 284, 299, 169 N.E. 386, 391 (1929) (Cardozo, C.J.) (“Courts are not at liberty to shirk the process of [contractual] construction under the empire of a belief that arbitration is beneficial any more than they may shirk it if their belief happens to be the contrary”); Cohen & Dayton, 12 Va. L.Rev., at 276 (the Act “is no infringement upon the right of each State to decide for itself what
contracts shall or shall not exist under its laws’

These cases do not concern the merits and demerits of class actions; they concern equal treatment of arbitration contracts and other contracts. Since it is the latter question that is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision.

IV

By using the words “save upon such grounds as exist at law or in equity for the revocation of any contract,” Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. Through those words Congress reiterated a basic federal idea that has long informed the nature of this Nation’s laws. We have often expressed this idea in opinions that set forth presumptions. See, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (“Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action”). But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State’s action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California’s law, not to strike it down. We do not honor federalist principles in their breach.

With respect, I dissent.

David BOBBY, Warden, Petitioner,

v.

Harry MITTS.

No. 10–1000.

May 2, 2011.

Background: Following affirmance of his convictions for aggravated murder and attempted murder and of his death sentence, 81 Ohio St.3d 223, 690 N.E.2d 522, prisoner sought federal habeas relief. The United States District Court for the Northern District of Ohio, Dan A. Polster, District Judge, 2005 WL 2416929, denied petition, and prisoner appealed. The United States Court of Appeals for the Sixth Circuit, Merritt, Circuit Judge, 620 F.3d 650, granted the petition in part and vacated prisoner’s death sentence.

Holding: Granting certiorari, the Supreme Court held that penalty phase instructions did not improperly influence the jury to impose death sentence. Reversed.

Constitutional Law ☞4745
Sentencing and Punishment ☞1780(3)

Instructions at penalty phase of capital murder trial, stating that if jurors did not find that the aggravating factors outweighed the mitigating factors, and therefore they did not recommend the death penalty, they would choose from two life sentence options, did not improperly influence the jury to impose death sentence, as would have violated due process; there was no risk that jury was forced to choose between finding the defendant guilty of a capital offense and declaring him innocent of any wrongdoing. U.S. CONST. AMEND. 14.
Supreme Court of the United States

American Express Co. et al. v. Italian Colors Restaurant et al.

Certiorari to the United States Court of Appeals for the Second Circuit

No. 12–133. Argued February 27, 2013—Decided June 20, 2013

An agreement between petitioners, American Express and a subsidiary, and respondents, merchants who accept American Express cards, requires all of their disputes to be resolved by arbitration and provides that there “shall be no right or authority for any Claims to be arbitrated on a class action basis.” Respondents nonetheless filed a class action, claiming that petitioners violated §1 of the Sherman Act and seeking treble damages for the class under §4 of the Clayton Act. Petitioners moved to compel individual arbitration under the Federal Arbitration Act (FAA), but respondents countered that the cost of expert analysis necessary to prove the antitrust claims would greatly exceed the maximum recovery for an individual plaintiff. The District Court granted the motion and dismissed the lawsuits. The Second Circuit reversed and remanded, holding that because of the prohibitive costs respondents would face if they had to arbitrate, the class-action waiver was unenforceable and arbitration could not proceed. The Circuit stood by its reversal when this Court remanded in light of Stolt-Nielsen S. A. v. AnimalFeeds International Corp., 559 U. S. 662, which held that a party may not be compelled to submit to class arbitration absent an agreement to do so.

Held: The FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery. Pp. 3–10.

(a) The FAA reflects the overarching principle that arbitration is a matter of contract. See Rent-A-Center, West, Inc. v. Jackson, 561 U. S. ___, ___. Courts must “rigorously enforce” arbitration agreements according to their terms, Dean Witter Reynolds, Inc. v. Byrd,
470 U. S. 213, 221, even for claims alleging a violation of a federal statute, unless the FAA’s mandate has been “overridden by a contrary congressional command,” CompuCredit Corp. v. Greenwood, 565 U. S. ___, ___. Pp. 3–4.

(b) No contrary congressional command requires rejection of the class-arbitration waiver here. The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim, see Rodriguez v. United States, 480 U. S. 522, 525–526, or “evince an intention to preclude a waiver” of class-action procedure, Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc., 473 U. S. 614, 628. Nor does congressional approval of Federal Rule of Civil Procedure 23 establish an entitlement to class proceedings for the vindication of statutory rights. The Rule imposes stringent requirements for certification that exclude most claims, and this Court has rejected the assertion that the class-notice requirement must be dispensed with because the “prohibitively high cost” of compliance would “frustrate [plaintiff’s] attempt to vindicate the policies underlying the antitrust” laws, Eisen v. Carlisle & Jacquelin, 417 U. S. 156, 167–168, 175–176. Pp. 4–5.

(c) The “effective vindication” exception that originated as dictum in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, also does not invalidate the instant arbitration agreement. The exception comes from a desire to prevent “prospective waiver of a party’s right to pursue statutory remedies,” id., at 637, n. 19; but the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. Cf. Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 32; Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528, 530, 534. AT&T Mobility LLC v. Concepcion, 563 U. S. ___, all but resolves this case. There, in finding that a law that conditioned enforcement of arbitration on the availability of class procedure interfered with fundamental arbitration attributes, id., at ___, the Court specifically rejected the argument that class arbitration was necessary to prosecute claims “that might otherwise slip through the legal system,” id., at ___. Pp. 5–9.

667 F. 3d 204, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined. SOTOMAYOR, J., took no part in the consideration or decision of the case.
JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

I

Respondents are merchants who accept American Express cards. Their agreement with petitioners—American Express and a wholly owned subsidiary—contains a clause that requires all disputes between the parties to be resolved by arbitration. The agreement also provides that “[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.” In re American Express Merchants’ Litigation, 667 F. 3d 204, 209 (CA2 2012).

Respondents brought a class action against petitioners for violations of the federal antitrust laws. According to respondents, American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than
the fees for competing credit cards. This tying arrangement, respondents said, violated §1 of the Sherman Act. They sought treble damages for the class under §4 of the Clayton Act.

Petitioners moved to compel individual arbitration under the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq. In resisting the motion, respondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be “at least several hundred thousand dollars, and might exceed $1 million,” while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled. App. 93. The District Court granted the motion and dismissed the lawsuits. The Court of Appeals reversed and remanded for further proceedings. It held that because respondents had established that “they would incur prohibitive costs if compelled to arbitrate under the class action waiver,” the waiver was unenforceable and the arbitration could not proceed. In re American Express Merchants’ Litigation, 554 F. 3d 300, 315–316 (CA2 2009).

We granted certiorari, vacated the judgment, and remanded for further consideration in light of Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp., 559 U. S. 662 (2010), which held that a party may not be compelled to submit to class arbitration absent an agreement to do so. American Express Co. v. Italian Colors Restaurant, 559 U. S. 1103 (2010). The Court of Appeals stood by its reversal, stating that its earlier ruling did not compel class arbitration. In re American Express Merchants’ Litigation, 634 F. 3d 187, 200 (CA2 2011). It then sua sponte reconsidered its ruling in light of AT&T Mobility LLC v. Concepcion, 563

1 A charge card requires its holder to pay the full outstanding balance at the end of a billing cycle; a credit card requires payment of only a portion, with the balance subject to interest.
U. S. ___ (2011), which held that the FAA pre-empted a state law barring enforcement of a class-arbitration waiver. Finding AT&T Mobility inapplicable because it addressed pre-emption, the Court of Appeals reversed for the third time. 667 F. 3d, at 213. It then denied rehearing en banc with five judges dissenting. In re American Express Merchants’ Litigation, 681 F. 3d 139 (CA2 2012). We granted certiorari, 568 U. S. ___ (2012), to consider the question “[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim,” Pet. for Cert. i.

II

Congress enacted the FAA in response to widespread judicial hostility to arbitration. See AT&T Mobility, supra, at ___ (slip op., at 4). As relevant here, the Act provides:

“A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2.

This text reflects the overarching principle that arbitration is a matter of contract. See Rent-A-Center, West, Inc. v. Jackson, 561 U. S. ___, ___ (2010) (slip op., at 3). And consistent with that text, courts must “rigorously enforce” arbitration agreements according to their terms, Dean Witter Reynolds Inc. v. Byrd, 470 U. S. 213, 221 (1985), including terms that “specify with whom [the parties] choose to arbitrate their disputes,” Stolt-Nielsen, supra, at 683, and “the rules under which that arbitration will be conducted,” Volt Information Sciences, Inc. v. Board of

III

No contrary congressional command requires us to reject the waiver of class arbitration here. Respondents argue that requiring them to litigate their claims individually—as they contracted to do—would contravene the policies of the antitrust laws. But the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. Congress has taken some measures to facilitate the litigation of antitrust claims—for example, it enacted a multiplied-damages remedy. See 15 U. S. C. §15 (treble damages). In enacting such measures, Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational. “[N]o legislation pursues its purposes at all costs.” Rodriguez v. United States, 480 U. S. 522, 525–526 (1987) (per curiam).

The antitrust laws do not “evinc[e] an intention to preclude a waiver” of class-action procedure. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 628 (1985). The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” Califano v. Yamasaki,
Opinion of the Court

442 U. S. 682, 700–701 (1979). The parties here agreed to arbitrate pursuant to that “usual rule,” and it would be remarkable for a court to erase that expectation.

Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights. To begin with, it is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an “abridg[ment]” or modification of a “substantive right” forbidden to the Rules, see 28 U. S. C. §2072(b). But there is no evidence of such an entitlement in any event. The Rule imposes stringent requirements for certification that in practice exclude most claims. And we have specifically rejected the assertion that one of those requirements (the class-notice requirement) must be dispensed with because the “prohibitively high cost” of compliance would “frustrate [plaintiff’s] attempt to vindicate the policies underlying the antitrust” laws. Eisen v. Carlisle & Jacquelin, 417 U. S. 156, 166–168, 175–176 (1974). One might respond, perhaps, that federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition in AT&T Mobility, 563 U. S., at ___ (slip op., at 9).

IV

Our finding of no “contrary congressional command” does not end the case. Respondents invoke a judge-made exception to the FAA which, they say, serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the “effective vindication” of a federal statutory right. Enforcing the waiver of class arbitration bars effective vindication, respondents contend, because they have no economic incentive to pursue their antitrust claims individually in arbitration.
The “effective vindication” exception to which respondents allude originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on “public policy” grounds, arbitration agreements that “operat[e] . . . as a prospective waiver of a party’s right to pursue statutory remedies.” 473 U. S., at 637, n. 19 (emphasis added). Dismissing concerns that the arbitral forum was inadequate, we said that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”  *Id.*, at 637. Subsequent cases have similarly asserted the existence of an “effective vindication” exception, see, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U. S. 247, 273–274 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 28 (1991), but have similarly declined to apply it to invalidate the arbitration agreement at issue.2

And we do so again here. As we have described, the exception finds its origin in the desire to prevent “prospective waiver of a party’s right to pursue statutory remedies,” *Mitsubishi Motors*, supra, at 637, n. 19 (emphasis added). That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. See

---

2 Contrary to the dissent’s claim, *post*, at 8–9, and n. 3 (opinion of KAGAN, J.), the Court in *Mitsubishi Motors* did not hold that federal statutory claims are subject to arbitration so long as the claimant may effectively vindicate his rights in the arbitral forum. The Court expressly stated that, “at this stage in the proceedings,” it had “no occasion to speculate” on whether the arbitration agreement’s potential deprivation of a claimant’s right to pursue federal remedies may render that agreement unenforceable. 473 U. S., at 637, n. 19. Even the Court of Appeals in this case recognized the relevant language in *Mitsubishi Motors* as dicta. *In re American Express Merchants’ Litigation*, 667 F. 3d 204, 214 (CA2 2012).
Opinion of the Court

*Green Tree Financial Corp.-Ala. v. Randolph,* 531 U. S. 79, 90 (2000) (“It may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights”). But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. See 681 F. 3d, at 147 (Jacobs, C. J., dissenting from denial of rehearing en banc). The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938, see Fed. Rule Civ. Proc. 23, 28 U. S. C., p. 864 (1938 ed., Supp V); 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1752, p. 18 (3d ed. 2005). Or, to put it differently, the individual suit that was considered adequate to assure “effective vindication” of a federal right before adoption of class-action procedures did not suddenly become “ineffective vindication” upon their adoption.

---

The dissent contends that a class-action waiver may deny a party’s right to pursue statutory remedies in the same way as a clause that bars a party from presenting economic testimony. See post, at 3, 9. That is a false comparison for several reasons: To begin with, it is not a given that such a clause would constitute an impermissible waiver; we have never considered the point. But more importantly, such a clause, assuming it makes vindication of the claim impossible, makes it impossible not just as a class action but even as an individual claim.

Who can disagree with the dissent’s assertion that “the effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute”? Post, at 12. But time does not change the meaning of effectiveness, making ineffective vindication today what was effective vindication in the past. The dissent also says that the agreement bars other forms of cost sharing—existing before the Sherman Act—that could provide effective vindication. See post, at 11–12, and n. 5. Petitioners denied that, and that is not what the Court of Appeals decision under review here held. It held that, because other forms of cost sharing were not economically feasible
A pair of our cases brings home the point. In Gilmer, supra, we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions. We said that statutory permission did “‘not mean that individual attempts at conciliation were intended to be barred.’” Id., at 32. And in Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528 (1995), we held that requiring arbitration in a foreign country was compatible with the federal Carriage of Goods by Sea Act. That legislation prohibited any agreement “‘relieving’ or “‘lessening’” the liability of a carrier for damaged goods, id., at 530, 534 (quoting 46 U. S. C. App. §1303(8) (1988 ed.))—which is close to codification of an “effective vindication” exception. The Court rejected the argument that the “inconvenience and costs of proceeding” abroad “lessen[ed]” the defendants’ liability, stating that “[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier.” 515 U. S., at 532, 536. Such a “tally[ing] [of] the costs and burdens” is precisely what the dissent would impose upon federal courts here.

Truth to tell, our decision in AT&T Mobility all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law “interfered[d] with fundamental

(“the only economically feasible means for . . . enforcing [respondents’] statutory rights is via a class action”), the class-action waiver was unenforceable. 667 F. 3d, at 218 (emphasis added). (The dissent’s assertion to the contrary cites not the opinion on appeal here, but an earlier opinion that was vacated. See In re American Express Merchants’ Litigation, 554 F. 3d 300 (CA2 2009), vacated and remanded, 559 U. S. 1103 (2010).) That is the conclusion we reject.
attributes of arbitration.” 563 U. S., at __ (slip op., at 9).

“[T]he switch from bilateral to class arbitration,” we said, “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” Id., at ___ (slip op., at 14). We specifically rejected the argument that class arbitration was necessary to prosecute claims “that might otherwise slip through the legal system.” Id., at ___ (slip op., at 17).5

* * *

The regime established by the Court of Appeals’ decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

The judgment of the Court of Appeals is reversed.

5 In dismissing AT&T Mobility as a case involving pre-emption and not the effective-vindication exception, the dissent ignores what that case established—that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims. The latter interest, we said, is “unrelated” to the FAA. 563 U. S., at __ (slip op., at 17). Accordingly, the FAA does, contrary to the dissent’s assertion, see post, at 5, favor the absence of litigation when that is the consequence of a class-action waiver, since its “principal purpose” is the enforcement of arbitration agreements according to their terms. 563 U. S., at ___ (slip op., at 9–10) (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 487 (1989)).
It is so ordered.

JUSTICE SOTOMAYOR took no part in the consideration or decision of this case.
THOMAS, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 12–133

AMERICAN EXPRESS COMPANY, ET AL., PETITIONERS
v. ITALIAN COLORS RESTAURANT ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 20, 2013]

JUSTICE THOMAS, concurring.

I join the Court’s opinion in full. I write separately to note that the result here is also required by the plain meaning of the Federal Arbitration Act. In AT&T Mobility LLC v. Concepcion, 563 U. S. ___ (2011), I explained that “the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.” Id., at ___ (concurring opinion) (slip op., at 1–2). In this case, Italian Colors makes two arguments to support its conclusion that the arbitration agreement should not be enforced. First, it contends that enforcing the arbitration agreement “would contravene the policies of the antitrust laws.” Ante, at 4. Second, it contends that a court may “invalidate agreements that prevent the ‘effective vindication’ of a federal statutory right.” Ante, at 6. Neither argument “concern[s] whether the contract was properly made,” Concepcion, supra, at ___ (THOMAS, J., concurring) (slip op., at 5–6). Because Italian Colors has not furnished “grounds . . . for the revocation of any contract,” 9 U. S. C. §2, the arbitration agreement must be enforced. Italian Colors voluntarily entered into a contract containing a bilateral arbitration provision. It cannot now escape its obligations merely because the claim it wishes to bring might be economically infeasible.
Justice Kagan, with whom Justice Ginsburg and Justice Breyer join, dissenting.

Here is the nutshell version of this case, unfortunately obscured in the Court’s decision. The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract’s arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool’s errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.

And here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.

That answer is a betrayal of our precedents, and of federal statutes like the antitrust laws. Our decisions have developed a mechanism—called the effective-vindication rule—to prevent arbitration clauses from choking off a plaintiff’s ability to enforce congressionally
created rights. That doctrine bars applying such a clause when (but only when) it operates to confer immunity from potentially meritorious federal claims. In so doing, the rule reconciles the Federal Arbitration Act (FAA) with all the rest of federal law—and indeed, promotes the most fundamental purposes of the FAA itself. As applied here, the rule would ensure that Amex’s arbitration clause does not foreclose Italian Colors from vindicating its right to redress antitrust harm.

The majority barely tries to explain why it reaches a contrary result. It notes that we have not decided this exact case before—neglecting that the principle we have established fits this case hand in glove. And it concocts a special exemption for class-arbitration waivers—ignoring that this case concerns much more than that. Throughout, the majority disregards our decisions’ central tenet: An arbitration clause may not thwart federal law, irrespective of exactly how it does so. Because the Court today prevents the effective vindication of federal statutory rights, I respectfully dissent.

I

Start with an uncontroversial proposition: We would refuse to enforce an exculpatory clause insulating a company from antitrust liability—say, “Merchants may bring no Sherman Act claims”—even if that clause were contained in an arbitration agreement. See ante, at 6. Congress created the Sherman Act’s private cause of action not solely to compensate individuals, but to promote “the public interest in vigilant enforcement of the antitrust laws.” Lawlor v. National Screen Service Corp., 349 U. S. 322, 329 (1955). Accordingly, courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, whether in an arbitration agreement or any other contract. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 637, and n. 19
KAGAN, J., dissenting


If the rule were limited to baldly exculpatory provisions, however, a monopolist could devise numerous ways around it. Consider several alternatives that a party drafting an arbitration agreement could adopt to avoid antitrust liability, each of which would have the identical effect. On the front end: The agreement might set outlandish filing fees or establish an absurd (e.g., one-day) statute of limitations, thus preventing a claimant from gaining access to the arbitral forum. On the back end: The agreement might remove the arbitrator’s authority to grant meaningful relief, so that a judgment gets the claimant nothing worthwhile. And in the middle: The agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant’s liability—say, by prohibiting any economic testimony (good luck proving an antitrust claim without that!). Or else the agreement might appoint as an arbitrator an obviously biased person—say, the CEO of Amex. The possibilities are endless—all less direct than an express exculpatory clause, but no less fatal. So the rule against prospective waivers of federal rights can work only if it applies not just to a contract clause explicitly barring a claim, but to others that operate to do so.

And sure enough, our cases establish this proposition: An arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result. The rule originated in Mitsubishi,
where we held that claims brought under the Sherman Act and other federal laws are generally subject to arbitration. 473 U. S., at 628. By agreeing to arbitrate such a claim, we explained, “a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” Ibid. But crucial to our decision was a limiting principle, designed to safeguard federal rights: An arbitration clause will be enforced only “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.” Id., at 637. If an arbitration provision “operated . . . as a prospective waiver of a party’s right to pursue statutory remedies,” we emphasized, we would “condemn[]” it. Id., at 637, n. 19. Similarly, we stated that such a clause should be “set[] aside” if “proceedings in the contractual forum will be so gravely difficult” that the claimant “will for all practical purposes be deprived of his day in court.” Id., at 632 (internal quotation marks omitted). And in the decades since Mitsubishi, we have repeated its admonition time and again, instructing courts not to enforce an arbitration agreement that effectively (even if not explicitly) forecloses a plaintiff from remedying the violation of a federal statutory right. See Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 28 (1991); Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528, 540 (1995); 14 Penn Plaza, 556 U. S., at 266, 273–274.

Our decision in Green Tree Financial Corp.-Ala. v. Randolph, 531 U. S. 79 (2000), confirmed that this principle applies when an agreement thwarts federal law by making arbitration prohibitively expensive. The plaintiff there (seeking relief under the Truth in Lending Act) argued that an arbitration agreement was unenforceable because it “create[d] a risk” that she would have to “bear prohibitive arbitration costs” in the form of high filing and administrative fees. Id., at 90 (internal quotation marks
omitted). We rejected that contention, but not because we doubted that such fees could prevent the effective vindication of statutory rights. To the contrary, we invoked our rule from *Mitsubishi*, making clear that it applied to the case before us. See 538 U. S., at 90. Indeed, we added a burden of proof: “[W]here, as here,” we held, a party asserting a federal right “seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” *Id.*, at 92. Randolph, we found, had failed to meet that burden: The evidence she offered was “too speculative.” *Id.*, at 91. But even as we dismissed Randolph’s suit, we reminded courts to protect against arbitration agreements that make federal claims too costly to bring.

Applied as our precedents direct, the effective-vindication rule furthers the purposes not just of laws like the Sherman Act, but of the FAA itself. That statute reflects a federal policy favoring actual arbitration—that is, arbitration as a streamlined “method of resolving disputes,” not as a foolproof way of killing off valid claims. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U. S. 477, 481 (1989). Put otherwise: What the FAA prefers to litigation is arbitration, not *de facto* immunity. The effective-vindication rule furthers the statute’s goals by ensuring that arbitration remains a real, not faux, method of dispute resolution. With the rule, companies have good reason to adopt arbitral procedures that facilitate efficient and accurate handling of complaints. Without it, companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless. So down one road: More arbitration, better enforcement of federal statutes. And down the other: Less arbitration, poorer enforcement of federal statutes. Which would you prefer? Or still more aptly: Which do you think Congress
would?

The answer becomes all the more obvious given the limits we have placed on the rule, which ensure that it does not diminish arbitration’s benefits. The rule comes into play only when an agreement “operate[s] . . . as a prospective waiver”—that is, forecloses (not diminishes) a plaintiff’s opportunity to gain relief for a statutory violation. *Mitsubishi*, 473 U. S., at 637, n. 19. So, for example, *Randolph* assessed whether fees in arbitration would be “prohibitive” (not high, excessive, or extravagant). 531 U. S., at 90. Moreover, the plaintiff must make that showing through concrete proof: “[S]peculative” risks, “unfounded assumptions,” and “unsupported statements” will not suffice. *Id.*, at 90–91, and n. 6. With the inquiry that confined and the evidentiary requirements that high, courts have had no trouble assessing the matters the rule makes relevant. And for almost three decades, courts have followed our edict that arbitration clauses must usually prevail, declining to enforce them in only rare cases. See Brief for United States as *Amicus Curiae* 26–27. The effective-vindication rule has thus operated year in and year out without undermining, much less “destroy[ing],” the prospect of speedy dispute resolution that arbitration secures. *Ante*, at 9.

And this is just the kind of case the rule was meant to address. Italian Colors, as I have noted, alleges that Amex used its market power to impose a tying arrangement in violation of the Sherman Act. The antitrust laws, all parties agree, provide the restaurant with a cause of action and give it the chance to recover treble damages. Here, that would mean Italian Colors could take home up to $38,549. But a problem looms. As this case comes to us, the evidence shows that Italian Colors cannot prevail in arbitration without an economic analysis defining the relevant markets, establishing Amex’s monopoly power, showing anticompetitive effects, and measuring damages.
And that expert report would cost between several hundred thousand and one million dollars.¹ So the expense involved in proving the claim in arbitration is ten times what Italian Colors could hope to gain, even in a best-case scenario. That counts as a “prohibitive” cost, in Randolph’s terminology, if anything does. No rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.

An arbitration agreement could manage such a mismatch in many ways, but Amex’s disdains them all. As the Court makes clear, the contract expressly prohibits class arbitration. But that is only part of the problem.² The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report. And still more: The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails. And beyond all that: Amex refused to enter into any stipulations that would obviate or mitigate the need for

¹The evidence relating to these costs comes from an affidavit submitted by an economist experienced in proving similar antitrust claims. The Second Circuit found that Amex “ha[d] brought no serious challenge” to that factual showing. See, e.g., 667 F. 3d 204, 210 (2012). And in this Court, Amex conceded that Italian Colors would need an expert economic report to prevail in arbitration. See Tr. of Oral Arg. 15. Perhaps that is not really true. A hallmark of arbitration is its use of procedures tailored to the type of dispute and amount in controversy; so arbitrators might properly decline to demand such a rigorous evidentiary showing in small antitrust cases. But that possibility cannot disturb the factual premise on which this case comes to us, and which the majority accepts: that Italian Colors’s tying claim is an ordinary kind of antitrust claim; and that it is worth about a tenth the cost of arbitration.

²The majority contends that the class-action waiver is the only part we should consider. See ante, at 7–8, n. 4. I explain below why that assertion is wrong. See infra, at 11–12.
the economic analysis. In short, the agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.

So contra the majority, the court below got this case right. Italian Colors proved what the plaintiff in Randolph could not—that a standard-form agreement, taken as a whole, renders arbitration of a claim “prohibitively expensive.” 531 U. S., at 92. The restaurant thus established that the contract “operate[s] . . . as a prospective waiver,” and prevents the “effective[] . . . vindicat[ion]” of Sherman Act rights. Mitsubishi, 473 U. S., at 637, and n. 19. I would follow our precedents and decline to compel arbitration.

II

The majority is quite sure that the effective-vindication rule does not apply here, but has precious little to say about why. It starts by disparaging the rule as having “originated as dictum.” Ante, at 6. But it does not rest on that swipe, and for good reason. As I have explained, see supra, at 3–4, the rule began as a core part of Mitsubishi: We held there that federal statutory claims are subject to arbitration “so long as” the claimant “effectively may vindicate its [rights] in the arbitral forum.” 473 U. S., at 637 (emphasis added). The rule thus served as an essential condition of the decision’s holding. And in Randolph,

3The majority is dead wrong when it says that Mitsubishi reserved judgment on “whether the arbitration agreement’s potential deprivation of a claimant’s right to pursue federal remedies may render that agreement unenforceable.” Ante, at 6, n. 2. What the Mitsubishi Court had “no occasion to speculate on” was whether a particular agreement in fact eliminated the claimant’s federal rights. 473 U. S., at 673, n. 19. But we stated expressly that if the agreement did so (as Amex’s does),
we provided a standard for applying the rule when a claimant alleges “prohibitive costs” (“Where, as here,” etc., see supra, at 5), and we then applied that standard to the parties before us. So whatever else the majority might think of the effective-vindication rule, it is not dictum.

The next paragraph of the Court’s decision (the third of Part IV) is the key: It contains almost the whole of the majority’s effort to explain why the effective-vindication rule does not stop Amex from compelling arbitration. The majority’s first move is to describe *Mitsubishi* and *Randolph* as covering only discrete situations: The rule, the majority asserts, applies to arbitration agreements that eliminate the “right to pursue statutory remedies” by “forbidding the assertion” of the right (as addressed in *Mitsubishi*) or imposing filing and administrative fees “so high as to make access to the forum impracticable” (as addressed in *Randolph*). Ante, at 6 (emphasis deleted; internal quotation marks omitted). Those cases are not this case, the majority says: Here, the agreement’s provisions went to the possibility of “proving a statutory remedy.” Ante, at 7.

But the distinction the majority proffers, which excludes problems of proof, is one *Mitsubishi* and *Randolph* (and our decisions reaffirming them) foreclose. Those decisions establish what in some quarters is known as a principle: When an arbitration agreement prevents the effective vindication of federal rights, a party may go to court. That principle, by its nature, operates in diverse circumstances—not just the ones that happened to come before the Court. See supra, at 3–4. It doubtless covers the baldly exculpatory clause and prohibitive fees that the majority acknowledges would preclude an arbitration agreement’s enforcement. But so too it covers the world of other provisions a clever drafter might devise to scuttle even the most

we would invalidate it. Ibid.; see supra, at 4.
meritorious federal claims. Those provisions might deny entry to the forum in the first instance. Or they might deprive the claimant of any remedy. Or they might prevent the claimant from offering the necessary proof to prevail, as in my “no economic testimony” hypothetical—and in the actual circumstances of this case. See supra, at 3. The variations matter not at all. Whatever the precise mechanism, each “operate[s] . . . as a prospective waiver of a party’s [federal] right[s]”—and so confers immunity on a wrongdoer. Mitsubishi, 473 U. S., at 637, n. 19. And that is what counts under our decisions.\footnote{Gilmer and Vimar Seguros, which the majority relies on, see ante, at 8, fail to advance its argument. The plaintiffs there did not claim, as Italian Colors does, that an arbitration clause altogether precluded them from vindicating their federal rights. They averred only that arbitration would be less convenient or effective than a proceeding in court. See Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 31–32 (1991); Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U. S. 528, 533 (1995). As I have explained, that kind of showing does not meet the effective-vindication rule’s high bar. See supra, at 6.} 

Nor can the majority escape the principle we have established by observing, as it does at one point, that Amex’s agreement merely made arbitration “not worth the expense.” Ante, at 7. That suggestion, after all, runs smack into Randolph, which likewise involved an allegation that arbitration, as specified in a contract, “would be prohibitively expensive.” 531 U. S., at 92. Our decision there made clear that a provision raising a plaintiff’s costs could foreclose consideration of federal claims, and so run afoul of the effective-vindication rule. The expense at issue in Randolph came from a filing fee combined with a per-diem payment for the arbitrator. But nothing about those particular costs is distinctive; and indeed, a rule confined to them would be weirdly idiosyncratic. Not surprisingly, then, Randolph gave no hint of distinguishing among the different ways an arbitration agreement can make a claim
too costly to bring. Its rationale applies whenever an agreement makes the vindication of federal claims impossibly expensive—whether by imposing fees or proscribing cost-sharing or adopting some other device.

That leaves the three last sentences in the majority’s core paragraph. Here, the majority conjures a special reason to exclude “class-action waiver[s]” from the effective-vindication rule’s compass. Ante, at 7–8, and n. 4. Rule 23, the majority notes, became law only in 1938—decades after the Sherman Act. The majority’s conclusion: If federal law in the interim decades did not eliminate a plaintiff’s rights under that Act, then neither does this agreement.

But that notion, first of all, rests on a false premise: that this case is only about a class-action waiver. See ante, at 7, n. 4 (confining the case to that issue). It is not, and indeed could not sensibly be. The effective-vindication rule asks whether an arbitration agreement as a whole precludes a claimant from enforcing federal statutory rights. No single provision is properly viewed in isolation, because an agreement can close off one avenue to pursue a claim while leaving others open. In this case, for example, the agreement could have prohibited class arbitration without offending the effective-vindication rule if it had provided an alternative mechanism to share, shift, or reduce the necessary costs. The agreement’s problem is that it bars not just class actions, but also all mechanisms—many existing long before the Sherman Act, if that matters—for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses. See supra, at 7. And contrary to the majority’s assertion, the Second Circuit well understood that point: It considered, for example, whether Italian Colors could shift expert expenses to Amex if its claim prevailed (no) or could join with merchants bringing similar claims to produce a common expert report (no again).
See 554 F. 3d 300, 318 (2009). It is only in this Court that the case has become strangely narrow, as the majority stares at a single provision rather than considering, in the way the effective-vindication rule demands, how the entire contract operates.\(^5\)

In any event, the age of the relevant procedural mechanisms (whether class actions or any other) does not matter, because the effective-vindication rule asks about the world today, not the world as it might have looked when Congress passed a given statute. Whether a particular procedural device preceded or post-dated a particular statute, the question remains the same: Does the arbitration agreement foreclose a party—right now—from effectively vindicating the substantive rights the statute provides? This case exhibits a whole raft of changes since Congress passed the Sherman Act, affecting both parties to the dispute—not just new procedural rules (like Rule 23), but also new evidentiary requirements (like the demand here for an expert report) and new contract provisions affecting arbitration (like this agreement’s confidentiality clause). But what has stayed the same is this: Congress’s intent that antitrust plaintiffs should be able to enforce their rights free of any prior waiver. See supra, at 2–3; Mitsubishi, 473 U. S., at 637, n. 19. The effective-vindication rule carries out that purpose by ensuring that

\(^5\)In defense of this focus, the majority quotes the Second Circuit as concluding that “the only economically feasible means” for Italian Colors to enforce its statutory rights “is via a class action.” Ante, at 7–8, n. 4 (quoting 667 F. 3d, at 218; internal quotation marks omitted; emphasis added by the Court). But the Court of Appeals reached that conclusion only after finding that the agreement prohibited all other forms of cost-sharing and cost-shifting. See 554 F. 3d 300, 318 (2009). That opinion was vacated on other grounds, but its analysis continued to inform—indeed, was essential to—the Second Circuit’s final decision in the case. See 667 F. 3d, at 218.) The Second Circuit therefore did exactly what the majority refuses to do—look to the agreement as a whole to determine whether it permits the vindication of federal rights.
KAGAN, J., dissenting

any arbitration agreement operating as such a waiver is unenforceable. And that requires courts to determine in the here and now—rather than in ye olde glory days—whether an agreement’s provisions foreclose even meritorious antitrust claims.

Still, the majority takes one last stab: “Truth to tell,” it claims, AT&T Mobility LLC v. Concepcion, 563 U. S. ___ (2011), “all but resolves this case.” Ante, at 8. In that decision, the majority recounts, this Court held that the FAA preempted a state “law conditioning enforcement of arbitration on the availability of class procedure.” Ibid.; see 563 U. S., at ___ (slip op., at 9). According to the majority, that decision controls here because “[w]e specifically rejected the argument that class arbitration was necessary.” Ante, at 9.

Where to begin? Well, maybe where I just left off: Italian Colors is not claiming that a class action is necessary—only that it have some means of vindicating a meritorious claim. And as I have shown, non-class options abound. See supra, at 11. The idea that AT&T Mobility controls here depends entirely on the majority’s view that this case is “class action or bust.” Were the majority to drop that pretense, it could make no claim for AT&T Mobility’s relevance.

And just as this case is not about class actions, AT&T Mobility was not—and could not have been—about the effective-vindication rule. Here is a tip-off: AT&T Mobility nowhere cited our effective-vindication precedents. That was so for two reasons. To begin with, the state law in question made class-action waivers unenforceable even when a party could feasibly vindicate her claim in an individual arbitration. The state rule was designed to preserve the broad-scale “deterrent effects of class actions,” not merely to protect a particular plaintiff’s right to assert her own claim. 563 U. S., at ___ (slip op., at 3). Indeed, the Court emphasized that the complaint in that
case was “most unlikely to go unresolved” because AT&T’s agreement contained a host of features ensuring that “aggrieved customers who filed claims would be essentially guaranteed to be made whole.” *Id.*, at ___ (slip op., at 17–18) (internal quotation marks and brackets omitted). So the Court professed that *AT&T Mobility* did not implicate the only thing (a party’s ability to vindicate a meritorious claim) this case involves.

And if that is not enough, *AT&T Mobility* involved a state law, and therefore could not possibly implicate the effective-vindication rule. When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA’s purposes and objectives. If the state rule does so—as the Court found in *AT&T Mobility*—the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another federal law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them. Again, then, *AT&T Mobility* had no occasion to address the issue in this case. The relevant decisions are instead *Mitsubishi* and *Randolph*.

* * *

The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled. So the Court does not consider that Amex’s agreement bars not just class actions, but “other forms of cost-sharing . . . that could provide effective vindication.” *Ante*, at 7, n. 4. In short, the Court does not consider—and does not decide—Italian Colors’s (and similarly situated litigants’) actual
KAGAN, J., dissenting

argument about why the effective-vindication rule precludes this agreement’s enforcement.

As a result, Amex’s contract will succeed in depriving Italian Colors of any effective opportunity to challenge monopolistic conduct allegedly in violation of the Sherman Act. The FAA, the majority says, so requires. Do not be fooled. Only the Court so requires; the FAA was never meant to produce this outcome. The FAA conceived of arbitration as a “method of resolving disputes”—a way of using tailored and streamlined procedures to facilitate redress of injuries. Rodriguez de Quijas, 490 U. S., at 481 (emphasis added). In the hands of today’s majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action. I respectfully dissent.